

# Washington University Jurisprudence Review

---

Volume 9 | Issue 2

---

2017

## Justice Antonin Scalia's Flawed Originalist Justification for *Brown v. Board of Education*

Ronald Turner  
*University of Houston Law Center*

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_jurisprudence](https://openscholarship.wustl.edu/law_jurisprudence)



Part of the [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), [Jurisprudence Commons](#), [Legal History Commons](#), [Legal Theory Commons](#), and the [Rule of Law Commons](#)

---

### Recommended Citation

Ronald Turner, *Justice Antonin Scalia's Flawed Originalist Justification for *Brown v. Board of Education**, 9 WASH. U. JUR. REV. 179 (2017).

Available at: [https://openscholarship.wustl.edu/law\\_jurisprudence/vol9/iss2/5](https://openscholarship.wustl.edu/law_jurisprudence/vol9/iss2/5)

This Article is brought to you for free and open access by Washington University Open Scholarship. It has been accepted for inclusion in Washington University Jurisprudence Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

# Washington University Jurisprudence Review

---

---

VOLUME 9

NUMBER 2

2017

---

---

## JUSTICE ANTONIN SCALIA'S FLAWED ORIGINALIST JUSTIFICATION FOR *BROWN V. BOARD OF EDUCATION*

RONALD TURNER\*

### INTRODUCTION

In *Brown v. Board of Education*,<sup>1</sup> the United States Supreme Court addressed the question whether state-mandated racial segregation of public school students violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>2</sup> In the course of answering that question in the affirmative, the Court stated, “we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”<sup>3</sup> Considering “public education in the light of its full development and its present place in American life throughout the Nation,”<sup>4</sup> the Court held “that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>5</sup>

Over the years and decades past, some (not all)<sup>6</sup> scholars and commentators have argued that the result in *Brown* squares with

---

\* A.A. White Professor of Law, University of Houston Law Center. The author acknowledges and is thankful for the research support provided by the University of Houston Law Foundation.

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

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

3. 347 U.S. at 492 (referring to *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 83 (1954)).

4. 347 U.S. at 492–93.

5. *Id.* at 495.

6. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 151 (2d ed. 1997) (the framers of the Fourteenth Amendment did not

originalism.<sup>7</sup> This thesis points to the “widespread belief that the decision was inconsistent with the original understanding of the Fourteenth Amendment.”<sup>8</sup> Robert Bork, an avowed originalist, noted that “*Brown* has become the high ground of constitutional theory. Theorists of all persuasions seek to capture it, because any theory that seeks acceptance must, as a matter of psychological fact, if not logical necessity, account for the result in *Brown*.”<sup>9</sup> Another prominent originalist, Michael McConnell, has observed that the “supposed inconsistency between *Brown* and the original meaning of the Fourteenth Amendment has assumed enormous importance in modern debate over constitutional theory. Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited.”<sup>10</sup>

---

intend to prohibit racially segregated public schools; “no one then imagined that the equal protection clause might affect school segregation”); Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 229 (1996) (the framers did not intend to outlaw racial segregation in public schools).

7. As understood and used herein, the term originalism refers to:

[A] family of constitutional theories, united by two core ideas, fixation and constraint. The Fixation Thesis claims the original meaning (“communicative content”) of the constitutional text is fixed at the time each provision is framed and ratified. The Constraint Principle claims that constitutional actors (e.g., judges, officials, and citizens) ought to be constrained by the original meaning when they engage in constitutional practice (paradigmatically, deciding constitutional cases).

Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–7 (2015); see also Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U.L. REV. 517, 521 (2011) (originalism “almost always assumes that the meaning of any particular constitutional provision is fixed at some historical moment”).

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

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

10. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995). See also J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY* 17 (Geoffrey R. Stone ed., 2012) (“*Brown* affords living constitutionalists a nonoriginalist case whose ultimate salutary effect on American equality properly renders the result nearly immune from criticism.”); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 280 (2006) (“Some have claimed that any respectable account of constitutional adjudication must be able to justify *Brown*. In view of such claims, theorists have gone to implausible lengths to square their accounts with *Brown*.”); Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 358 (“*Brown* has become a litmus test for theories of constitutional interpretation, as any theory worth its salt must accommodate the decision”); Pamela S. Karlan, Lecture, *What Can Brown® Do For You: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009) (“Precisely because *Brown* has become the crown jewel of the *United States Reports*, every constitutional theory must claim *Brown* for itself. A constitutional theory that cannot produce the result reached in *Brown* . . . is a constitutional theory without traction.”); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 958 (2002) (“[C]onservatives who are generally sympathetic to originalism cannot openly say that *Brown v. Board*

The late Justice Antonin Scalia was a member of the *Brown*-is-originalist camp. He was a prominent advocate of originalism,<sup>11</sup> more specifically, of original public meaning originalism: “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”<sup>12</sup> In his view, “the Great Divide with regard to constitutional interpretation is not that between Framers’ intent and objective meaning, but rather that between *original* meaning . . . and *current* meaning.”<sup>13</sup> He urged that the purpose of this approach to constitutional interpretation and application is the obstruction of modernity and the preservation of past values.<sup>14</sup>

Justice Scalia also observed that the “greatest defect” of originalism “is the difficulty of applying it correctly” as “it is often exceedingly difficult to plumb the original understanding of an ancient text.”<sup>15</sup> Originalism, done correctly, “requires the consideration of an enormous mass of material” and “immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.”<sup>16</sup> In

*of Education* was wrongly decided” and they “concoct implausible accounts of the Reconstruction Era understanding of segregation.”).

11. In addition to originalism, Justice Scalia also employed two other interpretive methodologies—textualism and traditionalism—in deciding constitutional cases. See Ronald Turner, *Were Separate-But-Equal and Antimiscegenation Laws Constitutional?: Applying Scalian Traditionalism to Brown and Loving*, 40 SAN DIEGO L. REV. 285, 289 n.23 (2003). Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1137 n.45 (1998) (noting that “these aspects of Justice Scalia’s jurisprudence are sometimes in tension,” Michael McConnell has noted that “by failing to articulate the connection between these methods, or to explain how to decide cases when they are in conflict, Justice Scalia leaves himself open to the charge of inconsistency.”). For more on textualist, originalist, and traditionalist judging, see Richard A. Primus, *Limits of Interpretivism*, 32 HARV. J.L. & PUB. POL’Y. 159 (2009).

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

13. *Id.*; see also Justice Antonin Scalia, *Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C.* (June 14, 1986), in ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (1987) (an interpreter must ask “What was the most plausible meaning of the words of the Constitution to the society that adopted it—regardless of what the Framers might secretly have intended?”).

14. See Antonin Scalia, *Modernity and the Constitution*, in CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 313, 315 (Eivind Smith ed., 1995).

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

16. *Id.* at 856–57. Elsewhere I referred to and quoted Justice Scalia’s immersion analysis. See Ronald Turner, *A Critique of Justice Antonin Scalia’s Originalist Defense of Brown v. Board of Education*, 62 UCLA L. REV. DISC. 170, 175 (2014). Reacting to and criticizing this point in a blog posting, Lawrence Solum argued that the immersive originalism approach and examination of the “prevalent political and intellectual atmosphere” constitutes an unjustifiable “public atmosphere originalism.” Lawrence Solum, *Turner on Scalia & Brown v. Board*, LEGAL THEORY BLOG (Feb. 4,

addition, Justice Scalia occasionally employed “no one” originalism, as he did in his dissent in *Obergefell v. Hodges*, the recent Court decision striking down state-law bans on same-sex marriage: “When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and *no one* doubted the constitutionality of doing so. That resolves these cases.”<sup>17</sup>

Did Justice Scalia believe that originalism could pass the “acid test” and “justify what is now almost universally regarded as the Supreme Court’s finest hour: its decision in *Brown*”?<sup>18</sup> In *Reading Law: The Interpretation of Legal Texts*, Justice Scalia and his co-author Bryan Garner noted that a “frequent line of attack against originalism consists in appeals to popular Supreme Court decisions assertedly based on a rejection of original understanding.”<sup>19</sup> Pointing to *Brown* as the most oft-cited exemplar of the assertion that “only nonoriginalism could have produced . . . [the] generally acclaimed results,”<sup>20</sup> Justice Scalia and Garner wrote that *Brown* “purported to rely on public education’s new importance, its changed place in American life throughout the nation.”<sup>21</sup> But, they stated, “it is far from clear—indeed, it is probably not true—that the [*Brown*] Court’s reliance on changed times was necessary.”<sup>22</sup> In Scalia and Garner’s view:

The text of the Thirteenth and Fourteenth Amendments, and in particular the Equal Protection Clause of the Fourteenth Amendment, can reasonably be thought to prohibit all laws designed to assert the separateness and superiority of the white race, even those that purport to treat the races equally. Justice John Marshall Harlan took this position in his powerful (and thoroughly

---

2015) <http://solum.typepad.com/legaltheory/2015/02/turner-on-scalia-brown-v-board.html>. As the call for consideration of “the political and intellectual atmosphere of the time” was made not by me but by Justice Scalia, Solum’s argument/complaint regarding what he (and not I) labeled “public atmosphere originalism” takes issue with Justice Scalia’s own words and originalist analysis and not some made-up and new-fangled theory of my purported creation.

17. 135 S. Ct. 2584, 2628 (2015) (Scalia, J. dissenting) (emphasis added); see also *Antonin Scalia*, CALIF. LAWYER (Jan. 2011), <http://www.callawyer.com/2011/01/antonin-scalia/> (“In 1868 . . . I don’t think anybody would have thought that equal protection applied to sex discrimination, or certainly not to sexual orientation. . . . Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t. . . . Nobody ever voted for that.”)

18. GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 105 (1992).

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

20. *Id.*

21. *Id.* at 87–88.

22. *Id.* at 88.

originalist) dissent in *Plessy v. Ferguson*. Recent research persuasively establishes that this was the original understanding of the post-Civil War Amendments.<sup>23</sup>

Justice Scalia and Garner thus posited that one can reasonably believe that, upon adoption, the 1865 Thirteenth Amendment and the 1868 Fourteenth Amendment prohibited any and all white-supremacist and separationist laws. They contend, moreover, that this blanket prohibition is supported by the first Justice Harlan's "thoroughly originalist" dissent in *Plessy v. Ferguson*.<sup>24</sup> If this is correct (I argue herein that it is not), a straight line can be drawn (1) from the texts of the amendments (2) through Justice Harlan's 1896 *Plessy* dissent (3) to *Brown's* 1954 invalidation of the separate-but-equal doctrine in the context of public school education.

This essay examines Justice Scalia's and Garner's originalist justification of *Brown*<sup>25</sup> and concludes that their analysis is flawed in at least three respects. First, as discussed in Part I, Justice Scalia's and Garner's reading of the texts of the Thirteenth and Fourteenth Amendments is atextual, acontextual, and ahistorical and does not inexorably lead to the conclusion that "all laws designed to assert the separateness and superiority of the white race, even those that purport to treat the races equally,"<sup>26</sup> were prohibited in 1865 and 1868. The Thirteenth Amendment's formal prohibition of slavery and involuntary servitude says nothing regarding the constitutionality of segregation laws. Further, the text of the Fourteenth Amendment does not explicitly contain the word "race," nor does it expressly command racial equality or "unambiguously forbid racial segregation."<sup>27</sup> And importantly, the Scalia/Garner analysis does not explain, let alone consider, the legal and analytical irrelevance of, the Reconstruction-era civil/political/social rights trichotomy.<sup>28</sup> That trichotomy distinguished between civil rights protected by the Thirteenth and Fourteenth Amendments, political rights protected

---

23. *Id.* (citing Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995)).

24. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

25. In focusing solely herein on the specifics of Justice Scalia's and Garner's attempt to provide an originalist justification for *Brown*, I of course know that other originalist scholars have proffered their own analyses and justifications for the Court's decision. See Ronald Turner, *On Brown v. Board of Education and Discretionary Originalism*, 2015 UTAH L. REV. 1143, 1180–98. Those other efforts must be critiqued and investigated on their own terms and analyzed in all their particulars and are beyond the scope of this project.

26. SCALIA & GARNER, *supra* note 19, at 88.

27. CASS R. SUNSTEIN, *CONSTITUTIONAL PERSONAE* 12 (Geoffrey R. Stone ed., 2015).

28. See *infra* notes 92–128 and accompanying text.

by the Fifteenth Amendment, and social rights beyond the protective scope of the Civil War Amendments (such as the right to marry a person of another race).<sup>29</sup>

Second, Justice Scalia and Garner problematically invoke Justice Harlan's *Plessy* dissent as support for their argument that originalism would have produced *Brown*'s result. As explored in Part II, the consensus regarding the then-extant legal understandings of "rights" in post-Civil War America are on display in Justice Harlan's opinion. As found in that opinion, the Thirteenth and Fourteenth Amendments protected civil rights, and the Fifteenth Amendment outlawed racial discrimination in voting. Distinguishing protected civil rights from social rights not falling under the Reconstruction amendments' mandates, Justice Harlan made clear his view that "social equality cannot exist between black and white races in this country"<sup>30</sup> and denied that racial integration implied social rights or social equality. His understanding that not all categories of rights were protected by the Civil War amendments is in tension with Justice Scalia's and Garner's argument and contradicts their thesis. And, as noted in Part III's discussion of *Brown*, Justice Harlan's dissent played no role whatsoever—indeed it was not even mentioned—in the Court's 1954 invalidation of the separate-but-equal doctrine in the public schools. As Justice Harlan viewed racial integration in public schools as a social and not a civil right, Justice Scalia's and Garner's reliance on Harlan's *Plessy* dissent, as evidence that Harlan would have reached the same result reached by the *Brown* Court in 1954, is misplaced.

Third, Justice Scalia and Garner cite one 1995 article, Michael McConnell's *Originalism and the Desegregation Decisions*, in support of their effort to justify *Brown*.<sup>31</sup> Part IV highlights the notable absence of any reference to other scholarship critiquing and finding unpersuasive the analysis set forth in that article, including observations that McConnell focuses, not on the 1866-1868 framing and ratification period of the Fourteenth Amendment, but on post-ratification views of members of

29. See David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1169 (2012) (The Reconstruction era Congress did not protect "social rights (of which the clearest example was the right to marry a person of another race)."); Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 130 n.241 (2013) ("Another possible reason why marriage would not be covered by the Fourteenth Amendment is that it was regarded as a social right rather than a civil right."); McConnell, *supra* note 10, at 1018 ("A significant undercurrent in the discussion of social rights was the fear that intermixing would lead to miscegenation, and that the theory of the Fourteenth Amendment . . . would logically extend to a right of racial intermarriage.").

30. *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

31. See SCALIA & GARNER, *supra* note 19, at 88 n.41.

Congress and “[i]ronically . . . on the legislative history of the Fourteenth Amendment, which should be anathema to Scalia.”<sup>32</sup>

The essay concludes with brief summary remarks.

## I. THE ATEXTUAL, ACONTEXTUAL, AND AHISTORICAL READINGS OF THE THIRTEENTH AND FOURTEENTH AMENDMENTS

### A. *The Thirteenth and Fourteenth Amendments: Text and Context*

#### 1. *The Thirteenth Amendment*

“The question that galvanized the 39th Congress into action on the issue of ‘civil rights’ was the prospective eradication of African American slavery and what had come to be called its ‘badges and incidents.’”<sup>33</sup> That galvanization resulted in the framing and 1865 adoption of the Thirteenth Amendment to the Constitution<sup>34</sup>:

Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

While the amendment’s text expressly abolished slavery, it made no reference to freedmens’ post-emancipation, constitutionally-protected rights and freedom from then-extant racial segregation. Whether the amendment was to be read broadly as a provision “establishing African Americans’ civil and even political rights as well as abolishing slavery,” or narrowly as a provision limited to the abolition of slavery, was debated

---

32. Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 23, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism>.

33. G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RES. L. REV. 775, 771 (2014).

34. U.S. CONST. amend. XIII, § 1. The amendment’s exception for the punishment of those duly convicted of a crime “was a gaping hole—one big enough to allow the re-establishment of slavery by another name.” IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS* 39 (2014). African Americans convicted of crimes were heavily fined and many were leased by states to railroads and companies until the fine was paid. See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).



prior to ratification.<sup>35</sup> “For many white Americans, the elimination of slavery meant” the latter “and nothing more.”<sup>36</sup>

The Thirteenth Amendment’s formal prohibition of slavery and emancipation of enslaved persons was met by a backlash of violence, white vigilantism, and the paramilitary Ku Klux Klan’s campaign of intimidation, terror, and murder.<sup>37</sup> “Black Codes,” state laws enacted across the south by former Confederates,<sup>38</sup> returned freedpersons to “a condition as close to their former one as it was possible to get without actually reinstating slavery[,]”<sup>39</sup> if not worse.<sup>40</sup> The Black Codes were designed “to retain a coercive, race-based labor system by denying or restricting blacks from contract rights, property ownership, legal recourse and access to courts, freedom of travel, control over their own labor, and rights of family and relationships.”<sup>41</sup>

The Black Codes’ overtly white-supremacist legal regime was hailed and viewed positively by Columbia University professor (and at one time president of both the American Historical Association and the American Political Science Association) William Archibald Dunning.<sup>42</sup> In his 1907 book on Reconstruction, Dunning stated that the Black Codes were

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

35. LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION* 103 (2015); see also PAUL D. MORENO, *BLACK AMERICANS AND ORGANIZED LABOR: A NEW HISTORY* 19 (2006) (“The civil and political status of the freedmen remained unclear at war’s end, it being uncertain whether the Thirteenth Amendment did anything more than abolish the legal condition of chattel slavery.”).

36. EDWARDS, *supra* note 35, at 103.

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

38. See DOUGLAS R. EGERTON, *THE WARS OF RECONSTRUCTION: THE BRIEF, VIOLENT HISTORY OF AMERICA’S MOST PROGRESSIVE ERA* 171 (2014).

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

40. See WILLIAM A. SINCLAIR, *THE AFTERMATH OF SLAVERY: A STUDY OF THE CONDITION AND ENVIRONMENT OF THE AMERICAN NEGRO* 74 (1905) (Southerners used the Black Codes “to suppress the colored man” and “make his condition worse under emancipation than it was under slavery, depriving him of every protection, making him an outcast”).

41. James W. Fox Jr., *Publics, Meanings & the Privileges of Citizenship*, 30 *CONST. COMMENT.* 567, 584 (2015).

42. See Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 *YALE L.J.* 521, 523 n.12 (1989).

with the whites; and this fact was recognized by constituting them a separate class of the civil order.<sup>43</sup>

Dunning “treated the period of ‘Radical Reconstruction’ . . . as a nightmarish mistake whose horrors exceeded those of the Civil War.”<sup>44</sup> As noted by Eric Foner, the “Dunning school of Reconstruction historiography” assumed “‘negro incapacity’” and “portrayed African Americans either as ‘children,’ ignorant dupes manipulated by unscrupulous whites, or as savages, their primal passions unleashed by the end of slavery.”<sup>45</sup> Dunning “equated an egalitarian, color-blind franchise with black domination, praising those whites who, subjugated by adversaries of their own race, thwarted the scheme which threatened permanent subjection to another race.”<sup>46</sup>

The Thirteenth Amendment also provides that “Congress shall have power to enforce this article by appropriate legislation.”<sup>47</sup> Exercising that power for the first time, Congress overrode the veto of white supremacist and “fervent Negrophobe” President Andrew Johnson<sup>48</sup> and enacted the Civil Rights Act of 1866. Seeking to “destroy all these discriminations” found in the Black Codes,<sup>49</sup> Section 1 of the legislation provided:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full

---

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

44. LEMANN, *supra* note 39, at 122.

45. ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* xxii (2005); *see also* W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 641–43 (2013) (discussing Dunning’s attack on Reconstruction).

46. EGERTON, *supra* note 38, at 327 (quotation marks omitted).

47. U.S. CONST. amend. XIII, § 2.

48. RANDALL KENNEDY, *THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY* 42 (2011); *see also* ANNETTE GORDON-REED, *ANDREW JOHNSON: THE AMERICAN PRESIDENTS SERIES* 124 (Arthur M. Schlesinger, Jr. & Sean Wilentz eds., 2011).

49. *See* CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Lyman Trumbull). Drafters of the Civil Rights Act used the Black Codes as models for the legislation and “made it clear that the Act overrode any black codes to the contrary.” G. EDWARD WHITE, *LAW IN AMERICAN HISTORY, VOLUME TWO: FROM RECONSTRUCTION THROUGH THE 1920S* 19 (2016).

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

The Act defined United States citizenship and set forth a list of civil rights granted to and enjoyed by citizens “of every race and color” born in the United States and its territories. That list “reflected those rights that had been deemed so valuable to the white South that they needed to be denied to blacks.”<sup>51</sup> As explained by Senator and Judiciary Committee chair Lyman Trumbull of Illinois, the Act was “confined exclusively to civil rights and nothing else, no political and no social rights.”<sup>52</sup> Not included in the list of protected rights were “voting rights, rights to travel and reside within a state, rights to equal taxes, or rights to acquire and to pursue happiness.”<sup>53</sup> Thus, “[i]n 1866 there was no place for black suffrage in the claim of full citizenship, and certainly no space for ‘social’ citizenship, for equal access to public spaces in a way that would accord full civil status to black citizens.”<sup>54</sup> The 1866 Act “stopped well short of protecting full participation in public life.”<sup>55</sup>

---

50. 14 STAT. 27, § 1 (1866). A prior version of the bill provided that “[t]here shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery.” CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866). Kurt Lash reports that House sponsor James Wilson “stressed that the Act would leave the ‘political right’ of suffrage ‘under the control of the several States,’” and that the proposed statute would not “force racial integration of juries and schools because they are not civil rights or immunities.” KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF CITIZENSHIP* 120 (2014) (brackets omitted). Wilson deleted the “civil rights and immunities” phrase from the legislation so as to “obviate . . . the difficulty growing out of any other construction beyond the specific rights named in the section . . .” CONG. GLOBE, 39th Cong., 1st Sess. 1367 (1866); LASH, *supra*, at 134.

51. Fox, *supra* note 41, at 585.

52. CONG. GLOBE, 42d Cong., 2d Sess. 901 (1872) (statement of Sen. Trumbull).

53. White, *supra* note 33, at 773; GEORGE RUTHERGLEN, *CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866* 54 (2013) (“Political rights did not make the list of protected civil rights, either under the traditional definition or under the 1866 Act, and in this respect, the act followed the black codes in rejecting any attempt to achieve political equality.”).

54. James Fox, *Fourteenth Amendment Citizenship and the Reconstruction-Era Black Public Sphere*, 42 AKRON L. REV. 1245, 1257 (2009) (bracketed material added).

55. RUTHERGLEN, *supra* note 53, at 11.

## 2. *The Fourteenth Amendment*

Responding to concerns about the constitutionality of the Civil Rights Act of 1866,<sup>56</sup> the 39th Congress proposed and in 1868 the nation ratified the Fourteenth Amendment to the Constitution.<sup>57</sup> Section 1 of the Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>58</sup>

The first sentence of Section 1 overruled *Dred Scott v. Sandford*<sup>59</sup> and restated the 1866 Civil Rights Act's definition of United States citizenship, with an important addition: persons not born but naturalized in the United States are also citizens. The second sentence "connected citizenship to civil rights, turning the Civil Rights Act's lengthy list of guarantees into more general promises of equity."<sup>60</sup>

Notably absent from the text of Section 1 is the term "race." This was not an accident or oversight. In drafting Section 1, the Congressional Joint Committee on Reconstruction considered but declined to include the following language: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude."<sup>61</sup> This language was successfully opposed by Republicans who were "apparently too leery of seeming too attached to black interests, and they probably wanted to protect white

---

56. See PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 35 n.29 (2011) ("[I]t is the consensus view of historians that Republicans passed the Fourteenth Amendment in part to remove all doubt about its constitutionality."); accord John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 *GEO. L.J.* 1693, 1762 (2010); David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 *HARV. L. REV.* 1, 42 (2015).

57. On the ratification of the amendment, see *infra* notes 56–72 and accompanying text.

58. U.S. CONST. amend. XIV, § 1 (1868).

59. 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (1868); see *infra* notes 94–99 and accompanying text.

60. EDWARDS, *supra* note 35, at 105.

61. BENJAMIN B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 296 (1914).

unionists in the South from oppression by reconstructed state governments controlled by ex-Confederates.”<sup>62</sup>

Nor does the Fourteenth Amendment’s text “unambiguously forbid racial segregation”<sup>63</sup> or facially require racial or other forms of equality. Rather, the text prohibits, among other things, state denial of the “equal protection of the laws,” a vague phrase<sup>64</sup> that does not seem “to forbid separation, even separation on grounds ordinarily considered invidious, such as sex and race.”<sup>65</sup> Staring at the “cryptic language” of the text of the Equal Protection Clause does not inexorably reveal an express no-segregation mandate or a clear textual answer to the question whether state-required racial segregation violates the Constitution.<sup>66</sup>

Context pertinent to the adoption and understanding of the Fourteenth Amendment must also be considered. The amendment was proposed by a “partial, ‘rump’ Congress . . . devoid of Southern representation.”<sup>67</sup> As the post-Civil War readmission of Confederate states into the Union was conditioned on those states’ ratifications of the amendment,<sup>68</sup> it has been remarked that the amendment was “forced down the throat of the southern political establishment”<sup>69</sup> and “was ratified not by the collective assent of the American people, but rather at gunpoint.”<sup>70</sup> At the time of its ratification in 1868, some derisively described the amendment as the “negro equalization amendment.”<sup>71</sup> Southerners were “terrified” that

62. John Harrison, *Time, Change, and the Constitution*, 90 VA. L. REV. 1601, 1606–07 (2004); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 18 (2004) (arguing that some Radical Republicans opposed ratification of the Fourteenth Amendment after the rejection of language prohibiting racial classifications “because they thought the amendment’s limited reach rendered it a party trick designed only for electioneering purposes”).

63. SUNSTEIN, *supra* note 27, at 12.

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

65. RICHARD A. POSNER, *HOW JUDGES THINK* 344 (2008); see also SUNSTEIN, *supra* note 27, at 12 (“[I]t is hardly clear that racial segregation counts” as a denial of equal protection).

66. VERMEULE, *supra* note 10, at 280.

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

68. See An Act to Provide for the More Efficient Government of the Rebel States (Military Reconstruction Act), ch. 153, 14 Stat. 428 (1867) (readmission of Confederate states into the United States would be permitted when those states established new governments and constitutions, ratified the Fourteenth Amendment, and granted the right to vote to African Americans); GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT* 129–31 (2013).

69. Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 1009 (2012).

70. Colby, *supra* note 67, at 1629; see also WILLIAM D. WORKMAN, JR., *THE CASE FOR THE SOUTH* 14 (1960) (The Fourteenth Amendment was “adopted in . . . an uncivil, unrighteous and manifestly unconstitutional manner.”).

71. Colby, *supra* note 67, at 1647.

African Americans would be politically and socially equal to whites, that state laws prohibiting interracial marriage would be banned, and that whites would be forced “to live . . . with the sickening stench of degraded humanity.”<sup>72</sup>

Also of relevance is the fact that Reconstruction was a “painful and embarrassing” failure.<sup>73</sup> Developments in the early years of that era were positive, as African Americans were elected to Congress and to state legislatures and offices.<sup>74</sup> But the desired hope and change did not last. In the 1876 presidential election, Democratic candidate Samuel J. Tilden won the popular vote and lost by one vote in the Electoral College to Republican candidate Rutherford B. Hayes. Democrats in Florida, Louisiana, and South Carolina challenged the election results, and Congress created a fifteen-member commission (comprised of ten Congressmen equally divided between the Democratic and Republican parties and five Supreme Court Justices) to resolve the dispute.<sup>75</sup> With the deciding vote cast by commission member and Supreme Court Justice Joseph P. Bradley, a Republican, the commission ruled in favor of Hayes.<sup>76</sup> Hayes then promised Democrats that, in exchange for their acceptance of the commission’s decision, he would withdraw federal troops from the South and would not enforce the Fifteenth Amendment’s prohibition of racial discrimination in voting.<sup>77</sup> Tilden electors from five southern states switched their votes to Hayes. Upon assuming the presidency, Hayes removed federal troops from the South, ending the federal government’s protection of African Americans there. In the aftermath of this deal

every Southern state had fallen under the control of white opponents of Reconstruction who sought openly to reimpose the norms of racial subordination. Within two decades, they had succeeded overwhelmingly, erecting structures of racial oppression so entrenched and complex that they are still being undone.<sup>78</sup>

---

72. *Id.* at 1647 (noting the existence of these views).

73. Greene, *supra* note 69, at 981.

74. See KENNEDY, *supra* note 48, at 47–48.

75. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 579 (updated ed. 2014); Justice John Paul Stevens (Ret.), *Glittering Generalities and Historical Myths*, 51 U. LOUISVILLE L. REV. 419, 426–27 (2013).

76. See Stevens, *supra* note 75, at 427.

77. See CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 248–49 (2008); ROY MORRIS, JR., FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876 (2003).

78. Stevens, *supra* note 75, at 533. On the entrenched impact and aspects of racial segregation

Though it is commonly remarked that the Hayes-Tilden Compromise marked the end of Reconstruction, the legal history of that period did not end in 1877; rather, this “episode in American legal and constitutional history . . . extended into the 1890s.”<sup>79</sup> As a result of the Compromise, “*Plessy* and later cases were decided by Justices appointed by Democratic presidents, or Republicans after their party decided not to keep African American suffrage high on the list of priorities.”<sup>80</sup>

### B. *The Scalia/Garner Textual Analysis and Argument*

With the foregoing backdrop in mind, attention now returns to the Scalia/Garner argument that the texts of the Thirteenth and Fourteenth Amendments proscribed all white-supremacist and separationist laws.

In *Reading Law*, Justice Scalia and Garner argue that the texts of the Thirteenth and Fourteenth Amendments provide a basis for an originalist justification of *Brown*.<sup>81</sup> Consider, first, the Thirteenth Amendment: “Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”<sup>82</sup> While Court decisions issued in the 1870s and 1880s made declarations concerning the civil-

and subjugation, see RUTH THOMPSON-MILLER ET AL., *JIM CROW’S LEGACY: THE LASTING IMPACT OF SEGREGATION* (2015).

79. WHITE, *supra* note 49, at 6.

80. Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 117 (2008).

81. This was not the first time that Justice Scalia found a justification for *Brown* in the Thirteenth and Fourteenth Amendments and invoked Justice Harlan’s *Plessy* dissent as confirmatory support. In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), Justice John Paul Stevens stated that “[i]f the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure.” *Id.* at 82 (Stevens, J., concurring). Justice Scalia retorted that the “customary invocation of *Brown v. Board of Education* as demonstrating the dangerous consequences of this principle is insupportable.” *Id.* at 95 n.1 (Scalia, J., concurring). In his view, “the Fourteenth Amendment’s requirement of ‘equal protection of the laws,’ combined with the Thirteenth Amendment’s abolition of slavery, leaves no room for doubt that laws treating people differently because of their race are invalid.” *Id.* Justice Scalia further argued that “even if one does not regard the Fourteenth Amendment as crystal clear on this point, a tradition of *unchallenged* validity did not exist with respect to the practice in *Brown*,” as the separate-but-equal doctrine was “vigorously opposed on constitutional grounds, litigated up to this Court, and upheld only over the dissent of one of our historically most respected Justices.” *Id.*

Justice Scalia is correct that racially segregated railway accommodations were challenged, albeit unsuccessfully, in *Plessy*. Of course, Homer Plessy’s unsuccessful challenge validated and left in place the separate-but-equal regime governing public transportation, and the issue of the constitutionality of that doctrine as applied in the separate and distinct public school context was not before the Court. In fact, and with no disagreement from Justice Harlan, state-mandated racial segregation in public schools was cited by the seven-Justice *Plessy* majority as support for the holding that segregated railway accommodations were constitutional. See *infra* notes 162–64 and accompanying text.

82. U.S. CONST. amend. XIII, § 1 (1865).

rights-protective purpose and meaning of this amendment,<sup>83</sup> the text itself says nothing regarding the constitutionality of segregation laws falling outside the amendment's slavery/involuntary servitude scope. As for the Fourteenth Amendment, the text does not contain the word "race,"<sup>84</sup> does not expressly "or unambiguously forbid racial segregation,"<sup>85</sup> and does not (as Justice Scalia once stated) "explicitly establish[] racial equality as a constitutional value."<sup>86</sup> As Michael Dorf has observed, that statement by Justice Scalia is "*entirely wrong*" and "is a mind-blowing whopper of an error."<sup>87</sup> The textual prohibition of denial of "the equal protection of the laws" does not expressly mandate racial equality and prohibit racial segregation, and "'separate but equal' is consistent at the textual originalist level with 'equal protection.'"<sup>88</sup>

In sum, the texts of the Thirteenth and Fourteenth Amendment, read separately or together, do not unequivocally state and cannot reasonably be viewed as communicating a blanket constitutional prohibition of "all laws designed to assert the separateness and superiority of the white race. . ."<sup>89</sup> Accordingly, Justice Scalia's and Garner's textual-originalist reading of the Thirteenth and Fourteenth Amendments is a misreading grounded on the erroneous premise that those provisions invalidated all apartheid laws in one fell swoop.

### C. *The Civil/Political/Social Rights Trichotomy*

An informed analysis of the Scalia/Garner thesis must go beyond the text of the Thirteenth and Fourteenth Amendments and consider the

---

83. See Civil Rights Cases, 109 U.S. 3, 22 (1883) (the Civil Rights Act of 1866, "passed in view of the thirteenth amendment," sought to secure to all citizens "those fundamental rights which are the essence of civil freedom, namely, the right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens").

84. See Andrew Koppelman, *Passive Aggressive: Scalia and Garner on Interpretation*, 41 BOUNDARY 2: INT'L LITERATURE & CULTURE 227, 230 (2014).

85. Sunstein, *supra* note 27, at 12.

86. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

87. Michael Dorf, *A Text So Clear It's Invisible*, Dorf on Law (July 28, 2014), <http://www.dorfonlaw.org/2014/07/a-text-so-clear-its-invisible.html>.

88. RICHARD A. POSNER, REFLECTIONS ON JUDGING 344 (2013). See also Posner, *supra* note 32 ("In 1868 . . . 'equal protection of the laws' meant that states . . . must not deny legal protection to the newly freed slaves (and to blacks more generally). In particular, states could not, without facing legal consequences, turn a blind eye to the Ku Klux Klan's campaign of intimidation of blacks and carpetbaggers. Had the provision been thought, in 1868, to forbid racial segregation of public schools, it would not have been ratified.").

89. SCALIA & GARNER, *supra* note 19, at 88.



historical context relative to their adoption, including the Reconstruction-era civil/political/social rights trichotomy mentioned in this section.

In the antebellum United States, “rights” were conceptualized and divided into three categories: civil, political, and social. Discussing the first two categories in *Luther v. Borden*, the Supreme Court stated, “Civil rights belong equally to all. Every one has the right to acquire property, and even in infants the laws of all governments preserve this. But political rights are matters of practical utility. A right to vote comes under this class.”<sup>90</sup> In 1854, Abraham Lincoln made clear that “his ‘own feelings’ did not embrace making former slaves ‘politically and socially our equals’”<sup>91</sup> and he later declared “his opposition to negro suffrage, and to everything looking towards placing negroes upon a footing of political and social equality with the whites . . . .”<sup>92</sup> Thereafter, in 1857, the Court issued its decision in *Dred Scott v. Sandford*,<sup>93</sup> a case that has been described as “the original sin of originalism.”<sup>94</sup> The Court, in an opinion by Chief Justice Roger Brooke Taney, held that Africans and their descendants were not and could not be citizens of the United States.<sup>95</sup> The Court further declared that enslaved persons were “beings of an inferior order . . . altogether unfit to associate with the white race”<sup>96</sup> and were “so far inferior, that they had no rights which the white man was bound to respect.”<sup>97</sup> These purportedly “inferior” persons “were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State . . . .”<sup>98</sup>

During the Civil War era, the question whether social rights should be granted to African Americans was contemplated as “the possibility of ending chattel slavery became more immediate. As the question of what

90. 48 U.S. 1, 28 (1849).

91. Kate Masur, *Civil, Political, and Social Equality After Lincoln: A Paradigm and a Problematic*, 93 MARQ. L. REV. 1399, 1399 (2010) (quoting Abraham Lincoln, *Speech at Peoria, Illinois*, Ill. J., Oct 1 21, 1854), reprinted in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 247, 256 (Roy P. Basler et al. eds., 1953)).

92. Pamela Brandwein, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 27 (1999).

93. 60 U.S. 393 (1857), superseded by U.S. CONST. amend. XIV (1868).

94. B. Jessie Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the ‘Pragmatic Moment,’* 91 TEX. L. REV. 1815, 1833 (2013). Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 22 n.51 (2009) (“Given the universal opprobrium that attaches to *Dred Scott*, it is unsurprising that Originalists would seek to disavow it.”).

95. 60 U.S. at 404.

96. *Id.* at 407.

97. *Id.*

98. *Id.* at 412; see also *id.* (“Indeed, when we look to the condition of this race in the several States at the time, it was impossible to believe that these rights and privileges were intended to be extended to them.”).

freedom meant became more pressing, the concept of social equality gained currency.<sup>99</sup> In the aftermath of the Civil War, the civil/political/social rights trichotomy was the subject of debates over Reconstruction reforms and policies.<sup>100</sup> While “[m]ost white Southerners simply dismissed the notion that blacks were entitled to equal rights,”<sup>101</sup> “most Republicans . . . adhered to a political vocabulary inherited from the antebellum era, which distinguished sharply between . . . civil, political, and social rights.”<sup>102</sup>

As discussed above,<sup>103</sup> the Thirteenth and Fourteenth Amendments protected civil rights. The “rights that most obviously had to be extended to blacks if the Slave Power were to be dismantled were the rights of contract, property, personal mobility, and access to law, and those rights were from the very beginning classified as ‘civil.’”<sup>104</sup> Those two amendments did not cover or protect political rights, such as the right to vote protected by the Fifteenth Amendment.<sup>105</sup> As for the “very amorphous area called social rights or social equality . . . [n]obody who was talking about the Fourteenth Amendment except Charles Sumner believed in social equality.”<sup>106</sup>

Numerous scholars recognize the Reconstruction-era rights trichotomy. As noted by Bruce Ackerman:

For Reconstruction Republicans, only three spheres of life were worth distinguishing: the political sphere, which involved voting and the like; the civil sphere, which included the legal protection of life and liberty; and the social sphere, which involved everything else. Within this traditional trichotomy, the Reconstruction

99. BRANDWEIN, *supra* note 56, at 70.

100. *See id.*

101. JAMES E. BOND, *NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT* 3 (1997).

102. FONER, *supra* note 75, at 231.

103. *See supra* notes 51–55, 59–60 and accompanying text.

104. RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 159 (1999).

105. *See* U.S. CONST. amend. XV, § 1 (1870) (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.”). That the Fourteenth Amendment did not provide and protect the right to vote is evidenced by § 2 of the amendment, which provides that when the right to vote “is denied to any male inhabitants of [a] State, being twenty-one years of age, and citizens of the United States . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.” *Id.*, amend. XIV, § 2 (1868).

106. Eric Foner, *The Original Intent of the Fourteenth Amendment: A Conversation with Eric Foner*, 6 *NEV. L.J.* 425, 438 (2005–2006).

Amendments protected political and civil rights but not social rights.<sup>107</sup>

Michael Klarman has noted the separate and distinct categories of Reconstruction-era rights. Civil rights included “freedom of contract, property ownership, and court access—rights guaranteed in the 1866 Civil Rights Act, for which the Fourteenth Amendment was designed to provide a secure constitutional foundation.”<sup>108</sup> Political rights, “such as voting or jury service,” were not enjoyed by all citizens,<sup>109</sup> and racial discrimination in voting was prohibited by the Fifteenth Amendment. Social rights “such as interracial marriage or school integration” were resisted by many, including by some Republicans.<sup>110</sup>

On the Reconstruction-era rights distinction, Eric Foner observed:

Equality in civil rights—equal treatment by the courts and civil and criminal laws—most Republicans now deemed nearly as essential, for an individual’s natural rights could not be secured without it. Although Radicals insisted black suffrage must be a part of Reconstruction, the vote was commonly considered a “privilege” rather than a right; requirements varied from state to state, and unequal treatment or even complete exclusion did not compromise one’s standing as a citizen. And social relations—the choice of business and personal associates—most Americans deemed a personal matter, outside the purview of government. Throughout Reconstruction, indeed, the term “social equality” conjured up fantastic images of blacks forcing their way into whites’ private clubs, homes, and bedrooms.<sup>111</sup>

Consider Pamela Brandwein’s description of the trichotomy:

*Civil rights* pertained to the economic sphere and were regarded as basic and fundamental. *Political rights* (or political privileges, as they were sometimes called) were granted by the political collective and were not seen (initially) as necessary for freedom. The *social rights* category designated a sphere in which “association” took

107. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 130 (2014).

108. KLARMAN, *supra* note 62, at 19.

109. *Id.*

110. *Id.*; see also Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 325 (“Many northern Republicans in 1866 continued to resist the extension to blacks of either equal political rights . . . or social rights, such as interracial marriage or school integration.”).

111. FONER, *supra* note 75, at 231.

place. There was a consensus that social equality could not be maintained by legislation.<sup>112</sup>

Social rights were “a matter of social standing” of blacks as determined by whites; that category “delimit[ed] a sphere where racial caste was maintained.”<sup>113</sup> Social rights thus “fell under state control in some way” and it was understood that the state could prohibit social equality in the areas of interracial mixing “in public places like schools and railroad cars or in marriage.”<sup>114</sup>

Also noting the distinction between civil, political, and social rights at the time of the adoption of the Fourteenth Amendment, Michael McConnell wrote that

[t]he “social rights” argument was based on a tripartite division of rights, *universally accepted at the time but forgotten today*, between civil rights, political rights, and social rights. Supporters and opponents. . . agreed that the Fourteenth Amendment had no bearing on “social rights.” . . . To the Republicans of the Reconstruction period, equality of civil rights was not necessarily linked to equality in general, and particularly not to social equality.<sup>115</sup>

Thus, the Fourteenth Amendment “did not require equality with respect to everything, but only with respect to civil rights, the ‘privileges or immunities of citizens,’” McConnell observed, and “[i]t was generally understood that the nondiscrimination requirement of the Fourteenth Amendment applied only to ‘civil rights.’ Political and social rights, it was agreed, were not civil rights and were not protected.”<sup>116</sup> Though this tripartite division of rights “plays no part in current interpretation of the Fourteenth Amendment,” it “forms the essential framework for interpreting the Amendment as it was originally understood.”<sup>117</sup>

The Reconstruction-era trichotomy is on display in Jack Balkin’s “tripartite theory of citizenship.” The “key point of the tripartite theory was that equal citizenship and equality before the law meant something less than what it does for us today: civil equality, but not political or social

---

112. BRANDWEIN, *supra* note 56, at 71.

113. *Id.* at 72.

114. LINDA PRZYBYSEWSKI, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* 81 (1999).

115. McConnell, *supra* note 10, at 1016 (emphasis added).

116. *Id.* at 1024.

117. *Id.* at 1025.

equality.”<sup>118</sup> Balkin contends that, unlike Radical Republicans who sought full equality for African Americans,<sup>119</sup> the majority of Republican members of Congress who voted for the proposed Fourteenth Amendment were moderates or conservatives who “did not want to give blacks the right to vote,” “did not consider blacks to be full social equals with whites,” and “believed that states should still be able to restrict interracial marriage and perhaps even segregate some public facilities.”<sup>120</sup> The notion that the social rights of African American would receive constitutional protection “would have been politically explosive.”<sup>121</sup>

That the civil/political/social rights trichotomy was a known and significant feature of the Reconstruction era is a “familiar and important point[.]”<sup>122</sup> long recognized by many scholars.<sup>123</sup> A now forgotten

118. JACK M. BALKIN, *LIVING ORIGINALISM* 222–23 (2011).

119. *See id.* at 223.

120. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 146 (2011).

121. BALKIN, *supra* note 118, at 223.

122. Strauss, *supra* note 29, at 1169.

123. In addition to the scholars discussed above, see WHITE, *supra* note 49, at 11 (In the Reconstruction era “[m]ost Americans drew a distinction between ‘civil’ and what was termed ‘social’ rights” and “did not anticipate the federal government’s enforcing the compulsory integration of blacks and white[s] in nearly all aspects of public life.”); BOND, *supra* note 102, at 7 (During Reconstruction debates southerners “sharply distinguished among civil, political, and social equality.”); ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 1* (1996) (noting the post-Civil War “distinction between social and political equality, and the exclusion of the former from antidiscrimination concerns”); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Laws*, 66 STAN. L. REV. 1205, 1210 (2014) (Most participants in Reconstruction-era debates in Congress “agreed that the Thirteenth and Fourteenth Amendments” and the Civil Rights Act of 1866 “focused on protecting civil rights . . . and no provision of federal law protected equality in social rights.”); Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1474 (2012) (noting “the basic compromise underlying the Reconstruction Amendments[.]” which is that “Blacks were entitled to civil equality, such as the right to make contracts and own property, but not social equality—that is, the right to associate with whites as equals”); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 413 (2011) (Reconstruction Republicans were concerned with eliminating discrimination in civil rights, “not with what many would have then called ‘social’ rights such as the right to associate freely, even in public or quasi-public institutions.”); Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 29 (2011) (During the Reconstruction era “courts assessed the constitutionality of antidiscrimination laws by determining whether such laws conferred civil, political, and social rights.”); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 974 n.67 (2002) (“[S]ocial rights” were “sometimes said to be entirely outside the purview” of the Fourteenth Amendment.); David E. Bernstein, *Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 823 (1998) (The “Court’s distinction between social rights, which were not protected by the Fourteenth Amendment, and civil rights, which redemption were protected, was arguably consistent with the intent of the framers of the Fourteenth Amendment.”); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 291 (1998) (“Through most of Reconstruction and the years that followed, it was generally understood that blacks were constitutionally entitled to the same civil rights as whites but not necessarily to the same social and political rights.”); Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1208–09 (1992) (The Fourteenth

“nineteenth-century vocabulary of rights” that “has disappeared from common usage,”<sup>124</sup> the trichotomy must not be forgotten or ignored. As demonstrated, social rights and social equality—including the claimed right to attend a desegregated public school—were viewed as involving matters outside the protective scope of the Reconstruction Amendments. The phrase “social right” had a “racially charged meaning” and was viewed as “a code word for miscegenation and racial intermarriage. The idea (or rather the fear) was that the relative status of blacks and whites as a group would be altered if society had a preponderance of mixed-race children, or if blacks and whites regarded themselves as members of the same family.”<sup>125</sup>

Social equality “was a label . . . enemies had long attempted to pin on the proponents of equal public rights in order to associate public rights with private intimacy and thereby to trigger the host of fears connected with the image of black men in physical proximity to white women.”<sup>126</sup> Any analysis of the Thirteenth and Fourteenth Amendments’ textual meanings that does not take into account the historical fact and legal significance of the civil/political/social rights trichotomy is foundationally and analytically deficient.

## II. *PLESSY* AND THE HARLAN DISSENT

Justice Scalia and Garner contend that their thesis that originalism produces *Brown*’s result is supported by Justice Harlan’s “powerful (and

---

Amendment protected civil but not social rights.); Henry Paul Monaghan, *Comment on Professor Van Alstyne’s Paper*, 72 IOWA L. REV. 1309, 1310 (1987) (referring to the 39th Congress and “the general understanding then that section 1 of the fourteenth amendment embraced only civil rights, not political and social rights”); Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 AM. J. HIST. 884, 886 (1987) (“The lawmakers who discussed equality during Reconstruction accepted midcentury conceptions that distinguished equality with respect to civil rights, to social rights, and to political rights.”); Alfred Avins, *Social Equality and the Fourteenth Amendment*, 4 HOUS. L. REV. 640, 655 (1967) (Reconstruction Republicans “consistently disclaimed any intention of enacting social equality.”); John P. Frank & Robert Munro, *The Original Understanding of the Equal Protection of the Laws*, 50 COLUM. L. REV. 131, 148 (1950) (“[T]here are two kinds of relations of men, those that are controlled by the law and those that are controlled by purely personal choice. The former involves civil rights, the latter social rights.”).

124. PRZYBYSZEWSKI, *supra* note 115, at 81.

125. BALKIN, *supra* note 121, at 145.

126. Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777, 781 (2008); see also Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1120 (1997) (“Social rights were those forms of association that, white Americans feared, would obliterate status distinctions and result in ‘amalgamation’ of the races.”).

thoroughly originalist) dissent in *Plessy v. Ferguson*.<sup>127</sup> As discussed in this part, Justice Harlan's dissent complicates the Scalia/Garner argument, contradicts their thesis, and provides no jurisprudential support for the result reached in *Brown*. Before turning to *Plessy* and Justice Harlan's dissent, a brief discussion of the Justice's pre-*Plessy* views on the meaning and scope of the Fourteenth Amendment may be helpful.

*A. Prefatory Note on Justice Harlan's Pre-Plessy Fourteenth Amendment Jurisprudence*

In *Pace v. Alabama*<sup>128</sup> a unanimous Court, Justice Harlan included, rejected an equal protection challenge to a state law providing that any white person and black person who "intermarry or live in adultery or fornication with each other" would, upon conviction, be imprisoned for not less than two or more than seven years.<sup>129</sup> A separate section of the law provided that any man and woman convicted for the first time of fornication or living together in adultery could be fined not less than one hundred dollars and imprisoned not more than six months.<sup>130</sup> The law thus punished different-race couples convicted of adultery or fornication more severely than same-race couples convicted of the same offenses. Tony Pace, an African-American man, and Mary J. Cox, a white woman, were convicted of living together in a state of adultery or fornication, and each was sentenced to two years' imprisonment in an Alabama penitentiary. Their conviction and incarceration did not violate the Equal Protection Clause, the Court concluded, because "both offenders, the white and the black," received the same sentence.<sup>131</sup> Under this equal application analysis, the different punishments were "directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same."<sup>132</sup> As noted by one commentator, the challenged law involved "paradigmatic issues of social equality" and "the power of states to

---

127. SCALIA & GARNER, *supra* note 19, at 88.

128. 106 U.S. 583 (1883), *overruled in part by* *McLaughlin v. Florida*, 379 U.S. 184 (1964).

129. 106 U.S. at 583 (quoting Ala. Code § 4189).

130. *See id.* (noting Ala. Code § 4184).

131. *Id.* at 585.

132. *Id.* In 1964, the Court rejected this equal application analysis: *Pace* "represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin v. Florida*, 379 U.S. 184, 188 (1964).

regulate them was (presumably) unaffected by the Reconstruction Amendments and hence states could discourage mixing of the races.”<sup>133</sup>

In *The Civil Rights Cases*<sup>134</sup> the Court struck down the Civil Rights Act of 1875's prohibition of racial discrimination in public accommodations.<sup>135</sup> (Interestingly, as initially proposed, the law would have prohibited racial discrimination in public schools. That prohibition was opposed and the provision stricken prior to its 1875 enactment.)<sup>136</sup> Writing for the Court, Justice Bradley<sup>137</sup> opined that the Thirteenth and Fourteenth Amendments did not empower Congress to enact the challenged legislation. He determined that the Civil Rights Act of 1866, “passed in view of the thirteenth amendment,” sought to secure to all citizens “those fundamental rights which are the essence of civil freedom, namely, the right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens.”<sup>138</sup> Congress “did not assume, under the authority given by the thirteenth amendment, to adjust what may be called the social rights of men and races in the community . . .”<sup>139</sup> An

133. Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 707 (2005).

134. 109 U.S. 3 (1883).

135. See 18 Stat. 335 (1875).

136. See RUTHERGLEN, *supra* note 53, at 88; Mark A. Graber, *Subtraction by Addition?: The Thirteenth and Fourteenth Amendments*, 112 COLUM. L. REV. 1501, 1539 (2012).

137. Recall that Justice Bradley was a member of the commission deciding the Hayes-Tilden election dispute who cast the deciding vote in favor of the Republican candidate Hayes.

138. 109 U.S. at 22.

139. *Id.* at 23. Justice Bradley had earlier expressed his view that social rights were distinct from legally protected civil rights in 1876 correspondence with Justice William Woods. Bradley wrote:

Surely Congress cannot guaranty to the colored people admission to every place of gathering and amusement. To deprive white people of the right of choosing their own company would be to introduce another kind of slavery. . . . Surely a lady cannot be enforced by Congressional enactment to admit colored persons to her ball or assembly or dinner party.

.....

It never can be endured that the white shall be compelled to lodge and eat and sit with the negro. . . . The antipathy of race cannot be crushed and annihilated by legal enactment. . . . The 13th amendment declares that slavery and involuntary servitude shall be abolished, and that Congress may enforce the enfranchisement of the slaves. Granted: but does freedom of the blacks require the slavery of the whites? An enforced fellowship would be that. The 14th amendment declares that no state shall make or enforce any laws which shall abridge the privileges and immunities of citizens of the United States. True. But is it a privilege and immunity of a colored citizen to sit and ride by the side of white persons? It declares that no person shall be denied the equal protection of the laws. But are they denied that protection when they are required to eat and sit and ride by themselves, and not with whites. . . . [S]urely it is no deprivation of civil right to give each race the right to choose their own company.

White, *supra* note 49, at 39 (quoting CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION 1864–88*, PART TWO 564 (1987)).



individual's refusal to provide an accommodation to any person "has nothing to do with slavery or involuntary servitude" prohibited by the Thirteenth Amendment, Justice Bradley concluded.<sup>140</sup>

It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.<sup>141</sup>

Turning to the Fourteenth Amendment, Justice Bradley resolved that Section 1 prohibits state action and did not reach and regulate private rights: "Individual invasion of individual rights is not the subject-matter of the amendment."<sup>142</sup> The 1875 Civil Rights Act was unconstitutional, he opined, because it was not predicated on any state violation of the Fourteenth Amendment and was not corrective of constitutional wrongs committed by the states. "[C]ivil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings."<sup>143</sup>

Justice Harlan dissented from the Court's ruling. He agreed with the majority that the Thirteenth Amendment "established and decreed universal civil freedom throughout the United States" and that the rights specified in the Civil Rights Act of 1866 prohibited racial discrimination.<sup>144</sup> Interestingly, Justice Harlan also agreed with Justice Bradley that "government has nothing to do with social, as distinguished from technically legal, rights of individuals."<sup>145</sup> In Justice Harlan's words:

No government ever has brought, or ever can bring, its people into social intercourse against their wishes. Whether one person will permit or maintain social relations with another is a matter with which government has no concern. I agree that if one citizen chooses not to hold social intercourse with another, he is not and cannot be made amenable to the law for his conduct in that regard;

---

140. 109 U.S. at 24.

141. *Id.*

142. *Id.* at 11; see also *id.* at 13 (The prohibitions of the Fourteenth Amendment "are against state laws and acts done under state authority.").

143. *Id.* at 17.

144. *Id.* at 35–36 (Harlan, J., dissenting).

145. *Id.* at 59.

for no legal right of a citizen is violated by the refusal of others to maintain merely social relations with him.<sup>146</sup>

Justice Harlan disagreed with the Court, however, regarding the category in which to place the public accommodations right. For Justice Bradley, this was a social right not protected by the Constitution.<sup>147</sup> For Justice Harlan, an African-American citizen's use of a public highway on the same terms enjoyed by a white citizen was a constitutionally protected civil right,<sup>148</sup> and was "no more a social right than his right, under the law, to use the public streets of a city, or a town, or a turnpike road, or a public market, or a post-office, or his right to sit in a public building with others, of whatever race, for the purpose of hearing the political questions of the day discussed."<sup>149</sup>

In *Pace* and *The Civil Rights Cases* Justice Harlan recognized and accepted the legal distinction between civil rights and social rights, a distinction "mark[ing] a sphere of associational freedom in which law would allow practices of racial discrimination to flourish."<sup>150</sup> He did not adopt and articulate a categorical constitutional ban of all laws segregating individuals on the basis of race in all spheres and contexts.

### B. *The Plessy Majority Opinion*

*Plessy v. Ferguson* involved a constitutional challenge to the state of Louisiana's Separate Car Law mandating "equal but separate accommodations for the white, and colored races" on railways cars carrying passengers in that state.<sup>151</sup> Homer Plessy, a United States citizen who "was seven-eighths Caucasian and one-eighth African blood,"<sup>152</sup> paid for and sat in a vacant seat on a whites-only railway car. Ordered by the conductor to move to the coach "assigned to persons of the colored race," Plessy refused and was forcibly removed and subsequently convicted of violating the separate-but-equal statute.<sup>153</sup>

---

146. *Id.*

147. See *supra* note 83 and accompanying text.

148. See Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1827–28 (2006).

149. 109 U.S. at 59–60 (Harlan, J., dissenting).

150. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 YALE L.J. 441, 490 (2000).

151. 163 U.S. at 540 (quoting statute).

152. *Id.* at 541. See also BLISS BROYARD, ONE DROP: MY FATHER'S HIDDEN LIFE—A STORY OF RACE AND FAMILY SECRETS 280 (2007) ("Plessy looked white enough to enter the 'whites only' coach without calling attention to himself, but was black enough . . . to get himself arrested.").

153. 163 U.S. at 542.

The Supreme Court rejected Plessy's challenge. Writing for the Court and construing the Thirteenth and Fourteenth Amendments, Justice Henry Billings Brown determined that there was no conflict between the former amendment and the state law. The legal distinction "founded in the color of the two races . . . must always exist so long as white men are distinguished from the other race by color."<sup>154</sup> That distinction "has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude."<sup>155</sup>

As for the Fourteenth Amendment, Justice Brown declared that the

object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce *social* as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.<sup>156</sup>

"Laws permitting, and even requiring" the separation of blacks and whites "in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other," Justice Brown opined, "and have been generally, if not universally, recognized as within the competency of state legislatures in the exercise of their police power."<sup>157</sup> He "consider[ed] the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so," the Justice stated, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."<sup>158</sup>

Justice Brown analogized the "social" segregation challenged by Homer Plessy to the "common instance" of "the establishment of separate schools for white and colored children" validated by courts in states "where the political rights of the colored race have been longest and most earnestly enforced."<sup>159</sup> In his view, Louisiana's separationist law was a "reasonable regulation," and the state was "at liberty to act with reference

154. *Id.* at 543.

155. *Id.*

156. *Id.* at 544.

157. *Id.*

158. *Id.* at 551.

159. *Id.* at 544. Justice Brown also referred to laws prohibiting interracial marriage which "may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state." *Id.* at 545.

to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.”<sup>160</sup> Again buttressing his argument with a reference to racially segregated public schools, he wrote:

[W]e cannot say that a law which authorizes or even requires the separation of the two races is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.<sup>161</sup>

Justice Brown also disagreed with the proposition that “social prejudices can be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races.”<sup>162</sup> Social equality was not a concern of government, he opined:

If the two races are to meet upon terms of *social equality*, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals . . . When the government . . . has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.<sup>163</sup>

Leaving no doubt that the Reconstruction-era civil/political/social rights trichotomy informed the Court's understanding of the Fourteenth Amendment, Justice Brown concluded: “If the *civil* and *political* rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other *socially*, the constitution of the United States cannot put them upon the same plane.”<sup>164</sup>

### C. Justice Harlan's *Plessy* Dissent

Justice Harlan, the sole dissenter in *Plessy*, made clear his view that “[i]n respect of *civil rights*, common to all citizens, the constitution of the

---

160. *Id.* at 550.

161. *Id.* at 550–51.

162. *Id.* at 551.

163. *Id.*

164. *Id.* at 551–52 (emphasis added).

United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.”<sup>165</sup> Civil rights were protected by the Thirteenth and Fourteenth Amendments and the Fifteenth Amendment prohibited racial discrimination against citizens participating in the political control of the country.<sup>166</sup> Barely mentioning the Equal Protection Clause,<sup>167</sup> he opined that Louisiana’s Separate Car Law unconstitutionally interfered with Homer Plessy’s civil right to nondiscriminatory railway travel, thereby interfering with his personal freedom and liberty.

The fundamental objection . . . to the statute is that it interferes with the personal freedom of citizens. Personal liberty . . . consists in the power of locomotion, of changing situation, or removing one’s person to whatsoever places one’s own inclination may direct, without imprisonment or restraint, unless by due process of law. . . . If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on the grounds of race, can prevent it without infringing the personal liberty of each.<sup>168</sup>

Justice Harlan opined that “[e]very one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.”<sup>169</sup> The “real meaning” of the challenged law was to ensure that “inferior or degraded” African Americans could not sit in public coaches with whites.<sup>170</sup> Louisiana’s separate-but-equal law violated Homer Plessy’s civil right to purchase a railroad ticket, and denied to him the equal right to enter into a contract with the railroad concerning the railway car he wished to occupy during his trip.<sup>171</sup> This arbitrary separation of citizens on public highways on the

165. *Id.* at 554 (Harlan, J., dissenting) (emphasis added).

166. *See id.* at 555; *see also id.* at 556 (“[T]he constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government or the states against any citizen because of his race. All citizens are equal before the law.”) (quoting *Gibson v. State*, 162 U.S. 565, 591 (1896)).

167. *See* T. Alexander Aleinikoff, *Re-Reading Justice Harlan’s Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 962, 963 (“There is barely a mention of the Equal Protection Clause . . . other than a general reference to the language of the Fourteenth Amendment.”).

168. *Id.* at 557 (Harlan, J., dissenting) (quotations omitted).

169. *Id.*

170. *Id.* at 560.

171. *See* John O. McGinnis & Michael B. Rappaport, *David Souter’s Bad Constitutional History*, WALL ST. J. (June 14, 2010), 2010 WLNR 12064730.

basis of race “is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution.”<sup>172</sup>

Justice Harlan then distinguished between civil rights and social rights when he addressed the argument, “scarcely worthy of consideration,” that “social equality cannot exist between the black and white races in this country.”<sup>173</sup> He denied that racial integration implied social equality: “social equality no more exists between two races when traveling in a passenger coach or on a public highway than when members of the same races sit by each other in a street car or in the jury box,” or attend a political assembly, use a town’s or city’s streets, find themselves in the same room when placing their names on a voting registry, or approach a ballot box.<sup>174</sup>

A full and complete account of Justice Harlan’s dissent must consider other passages in his opinion. “Every man has pride of race,” he wrote, “and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper.”<sup>175</sup> And in a passage containing his well-known metaphor of a colorblind Constitution, he stated:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.<sup>176</sup>

This call for civil-rights colorblindness was immediately preceded by this passage:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.<sup>177</sup>

---

172. 163 U.S. at 562 (Harlan, J., dissenting).

173. *Id.* at 561.

174. *Id.*

175. *Id.* at 554.

176. *Id.* at 559 (emphasis added); *see also id.* (“The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.”).

177. *Id.*

That this view and white-supremacist belief was expressed by the very same Justice who proclaimed that “our constitution is color-blind” illustrates the critical importance of an informed and nuanced account and understanding of Justice Harlan’s true views.<sup>178</sup> Justice Harlan, a former slave owner who opposed the Emancipation Proclamation, the Thirteenth Amendment, and the Freedmen’s Bureau,<sup>179</sup> was not blind to race and was well aware of and endorsed white supremacy. “Thus, like most of his contemporaries, Harlan believed in the centrality of race and in the legitimacy of racial thinking . . . Although Harlan was highly unusual in the courage, integrity, and decency he showed in racial matters, he nonetheless also remained a person of his time.”<sup>180</sup> This man, a person of his time, did not posit that the Thirteenth and Fourteenth Amendments prohibited all white-supremacist and separationist laws; as he made clear in his *Plessy* dissent, those amendments recognized and protected civil but not social rights.

#### *D. Justice Harlan’s Post-Plessy Opinions*

Do Justice Harlan’s post-*Plessy* opinions shed any definitive light on how he might have answered the specific question of whether state-mandated racial segregation of public school children violated the Equal Protection Clause?

In *Cumming v. Board of Education*<sup>181</sup> a unanimous Court, in an opinion by Justice Harlan, held that a school board’s “separate-and-unequal scheme”<sup>182</sup> did not violate the Fourteenth Amendment. The school board decided to operate a high school for whites but not a separate high school for blacks. Noting that the issue of the legality of the state’s mandate that white and colored children be educated in separate schools was not before the Court, Justice Harlan concluded that it could not be said that the school board’s action denied to the African-American plaintiffs the equal

---

178. Justice Harlan also wrote about “a race so different from our own that we do not permit those belonging to it to become citizens of the United States. . . . I allude to the Chinese race.” *Id.* at 561. While members of that race are “absolutely excluded from our country . . . a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race . . . who have all the legal rights that belong to white citizens” could not. *Id.* For more on this aspect of Justice Harlan’s dissent, see Davison M. Douglas, *The Surprising Role of Racial Hierarchy in the Civil Rights Jurisprudence of the First Justice John Marshall Harlan*, 15 U. PA. J. CONST. L. 1037, 1048 (2013); Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

179. See TINSLEY E. YARDBROUGH, *JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN* 55 (1995).

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

181. 175 U.S. 528 (1899).

182. Klarman, *supra* note 62, at 45.

protection of the laws or any privileges belonging to them as United States citizens. He also observed that the “education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in a case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined.”<sup>183</sup> “For historians looking to Harlan as the prophet of the 1954 *Brown v. Board of Education* decision, *Cumming* is a disappointment.”<sup>184</sup>

Thereafter, in *Berea College v. Kentucky*,<sup>185</sup> the Court held that a Kentucky law prohibiting the teaching of black and white children in the same private institution did not violate the Constitution. In so holding, the Court concluded that the application of the law to the college—a corporation subject to the state’s power to alter, amend, or repeal the corporation’s charter—did not constitute a denial of due process or otherwise violate the Constitution. A dissenting Justice Harlan argued that the law was “an arbitrary invasion of the rights of liberty and property guaranteed by the 14th Amendment against hostile state action, and [was], therefore, void.”<sup>186</sup> In his view, students of whatever race may choose “to sit together in a private institution of learning while receiving instruction which is not in itself harmful or dangerous to the public.”<sup>187</sup> Justice Harlan made clear, however, that his position “ha[d] no reference to regulations prescribed for public schools, established at the pleasure of the state and

---

183. 175 U.S. at 545. This passage was quoted by the Court in *Gong Lum v. Rice*, 275 U.S. 78 (1927), wherein the Court held that a citizen of the United States who happened to be Chinese was not denied the equal protection of the laws “when he was classes among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black.” *Id.* at 85. Chief Justice William Howard Taft, writing for the Court, said that the decision to place “pupils of the yellow races” with black and not white students “is within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment.” *Id.* at 87. Approvingly citing *Cumming*, the Chief Justice opined that the “right and power of the state to regulate the method of providing for the education of its youth at public expense is clear.” *Id.* at 85. He also noted that *Plessy v. Ferguson*’s validation of the separate-but-equal doctrine in the context of railway accommodations presented “a more difficult question” than the school segregation issue before the *Gong Lum* Court. With regard to “race separation” in schools, he quoted *Plessy*’s observation that such separation “has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.” *Id.* (quoting *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896)).

184. PRZYBYSZEWSKI, *supra* note 115, at 99.

185. 211 U.S. 45 (1908).

186. *Id.* at 67 (Harlan, J., dissenting). “The right to impart instruction to others is given by the Almighty for beneficent purposes” and “is a substantial right of property” and “part of one’s liberty . . .”

187. *Id.* at 68.



maintained at public expense. No such question [was] presented here and it need not now be discussed.”<sup>188</sup>

In both *Cumming* and *Berea* Justice Harlan noted the issue of whether state-required education of white and black children in separate public schools violated the Constitution; as that question was not before the Court in either case, he did not have to provide an answer. Whether he would or would not have interpreted the Thirteenth and Fourteenth Amendments as permitting state laws mandating racial segregation in public schools can only be the subject of guesswork. As things stand, there is no jurisprudential line spanning Justice Harlan’s *Plessy* dissent, his pre- and post-*Plessy* jurisprudence, and the Court’s 1954 decision in *Brown*.

\*\*\*

A close reading and rereading of Justice Harlan’s *Plessy* dissent calls into question Justice Scalia’s and Garner’s contention that the dissent supports their reading of the texts of the Thirteenth and Fourteenth Amendments. Justice Harlan’s analysis and approach (which made no reference to those who framed or ratified the at-issue amendments) recognized the Reconstruction-era distinction between civil rights and social rights. He thus understood that the amendments did not proscribe all segregationist laws even as he differed with the Court over the category in which a particular claimed right should be placed. As James Fox notes, “the Reconstruction-era understanding of the Fourteenth Amendment was that it barred *some* state-mandated segregation. But it is also true that some state-based segregation was intended to be left alone.”<sup>189</sup> Civil rights were protected by the Thirteenth and Fourteenth Amendments; social rights were not. One who is cognizant of the Reconstruction-era trichotomy could persuasively argue and conclude, *contra* Scalia and Garner, that the Thirteenth and Fourteenth Amendments, as originally understood, cannot reasonably be thought to proscribe any and all laws separating persons on the basis of race, and that Justice Harlan’s *Plessy* dissent provides no precedential support for an all-segregationist-laws-prohibited interpretation and application of those Reconstruction-era additions to the Constitution.

---

188. *Id.* at 69.

189. James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 694 (2015–2016).

### III. *BROWN*

With the foregoing discussion in mind, the focus now turns to the following query: Are Justice Scalia and Garner correct that *Brown* can be squared with and justified by their view of the original understanding of the post-Civil War Amendments to the Constitution?

#### A. *The Originalist Arguments to the Court*

*Brown* addressed the question whether state-mandated racial segregation of black and white public school students in Kansas, Virginia, South Carolina, and Delaware violated the Equal Protection Clause of the Fourteenth Amendment.

During the initial 1952 oral argument, John W. Davis, counsel for the school board in the case from South Carolina,<sup>190</sup> argued that “the same Congress” that proposed the Fourteenth Amendment in June 1866 proceeded in July 1866 “to establish or to continue separate schools in the District of Columbia.”<sup>191</sup> Davis contended that twenty-three of the thirty states that ratified the Fourteenth Amendment<sup>192</sup> “either then had, or immediately installed, separate schools for white and colored children under their public school systems. Were they violating the Amendment which they had solemnly accepted?”<sup>193</sup>

In the Court’s 1952 post-argument conference Chief Justice Fred Moore Vinson expressed his belief that “the *Plessy* case was right.”<sup>194</sup> Justice William O. Douglas thought that the vote would be 5–4 in favor of the constitutionality of public school segregation.<sup>195</sup> Reporting a different

---

190. Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 1005 (2005) (book review) (Davis, “the most elite lawyer in America,” represented South Carolina pro bono).

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

192. In 1868 the nation was comprised of thirty-seven states.

193. Oral Argument, *supra* note 192, at 333. According to Michael McConnell, school segregation was a widespread practice in both northern and southern states and the District of Columbia at the time of the proposed and ratified Fourteenth Amendment. The practice “almost certainly enjoyed the support of a majority of the population even at the height of Reconstruction.” McConnell, *supra* note 10, at 955–56. McConnell doubted that “an Amendment understood to outlaw so deeply ingrained an institutional practice” would have been proposed by Congress and ratified by the states. *Id.* at 956.

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

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

count, one author noted that four Justices (Hugo Lafayette Black, Harold Hitz Burton, Sherman Minton, and William O. Douglas) were prepared to invalidate school segregation; three Justices (Vinson, Stanley Forman Reed, and Tom Campbell Clark) were determined to uphold the practice; and the views of two Justices (Felix Frankfurter and Robert H. Jackson) were not certain.<sup>196</sup> Stalling for time, Justice Frankfurter successfully urged his colleagues to set the cases for re-argument the following Term.<sup>197</sup> The Court ordered re-argument and asked the parties to address several questions, including this query: “What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?”<sup>198</sup>

Appearing before the Court at the 1953 re-argument,<sup>199</sup> Davis repeated his count-the-states argument.<sup>200</sup> In addition, he argued that the “overwhelming preponderance of the evidence demonstrate[d] that the Congress which submitted, and the state legislatures which ratified, the Fourteenth Amendment did not contemplate and did not understand that it would abolish segregation in public schools.”<sup>201</sup> Davis advised the Court that “when we study the legislation enacted by Congress immediately before, immediately after, and during the period of the discussions of the Fourteenth Amendment, there can be no question left that Congress did not intend by the Fourteenth Amendment to deal with the question of mixed or segregated schools.”<sup>202</sup> In fact, Davis stated that when Congress was considering the Civil Rights Act of 1866, Representative James Wilson, the chair of the House Judiciary Committee, addressed the

196. See JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 305–06 (2006).

197. “Recognizing the price that the nation would pay for a divided Court on a matter of such historic magnitude, Frankfurter devised a stall. As he indicated during the conference in late 1952, he proposed holding over the cases for reargument the following term.” *Id.* at 307.

198. 345 U.S. at 972.

199. Prior to the re-argument, Chief Justice Vinson suffered a fatal heart attack and was replaced on the Court by Earl Warren. Learning of Vinson’s death, Justice Frankfurter stated, “This is the first indication that I have ever had that there is a God.” BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 72 (1983).

200. See *supra* note 195 and accompanying text. The argument that a number of states had segregated schools when the Fourteenth Amendment was adopted in 1868 or established such schools thereafter was made in the post-*Brown* “Declaration of Constitutional Principles, also known as the Southern Manifesto.” See 102 CONG. REC. 4460 (1956). “The Manifesto’s central critique asserted that the decision violated the original understanding of the Fourteenth Amendment.” Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1063 (2014).

201. 49 LANDMARK BRIEFS, *supra* note 194.

202. *Id.* at 482.

complaint that the statute “would do away with the separate schools.”<sup>203</sup> According to Wilson, “the Act did not mean” that white and black children “should attend the same school” and that such an interpretation of the Act would be “absurd.”<sup>204</sup>

### *B. The Court's Decision*

On May 17, 1954, the Court issued its unanimous decision striking down state-mandated school segregation.<sup>205</sup> At the outset, the Court, per Chief Justice Earl Warren, determined that the sources examined in the re-argument “cast some light” but were “not enough to resolve the problem with which [the Court was] faced. At best, they [were] inconclusive.”<sup>206</sup> The Court stated that at the time of the 1868 adoption of the Fourteenth Amendment, “the movement toward free common schools, supported by general taxation, had not yet taken hold” in the south.<sup>207</sup> The education of white children “was largely in the hands of private groups,” and the education of African-American children “was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states.”<sup>208</sup> Congressional debates in northern states over the Fourteenth Amendment’s impact on public education were “generally ignored.”<sup>209</sup> Accordingly, the Court declared,

we cannot turn the clock back to 1868 when the Amendment was adopted or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only

---

203. *Id.* at 485.

204. *Id.*

205. On that same date, the Court invalidated the District of Columbia’s racially segregated public school system. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

206. 347 U.S. at 489; see also William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2380 (2015) (The *Brown* Court “spends several pages at the very beginning of the opinion fighting the original-meaning question to a draw.”). But see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 156 (1999) (“[T]he very Congress that submitted the Fourteenth Amendment to the states for ratification also supported segregated schools in the District of Columbia,” and the amendment’s supporters assured others that the amendment would not require racially integrated schools.”); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 (1991) (“Evidence regarding the original understanding of the Fourteenth Amendment is ambiguous as to a wide variety of issues, but not school segregation. Virtually nothing in the congressional debates suggest that the Fourteenth Amendment was intended to prohibit school segregation, while contemporaneous state practices render such an interpretation fanciful.”).

207. 347 U.S. at 489–90.

208. *Id.* at 490.

209. *Id.*

in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.<sup>210</sup>

The Court then considered the school segregation issue from a contemporary perspective:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education for our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>211</sup>

---

210. *Id.* at 492–93.

211. *Id.* at 493. A draft concurring opinion authored but never issued by Justice Robert H. Jackson also focused on the present and not the past: “I am convinced that present-day conditions require us to strike from our books the doctrine of separate-but-equal facilities and to hold invalid provisions of state constitutions or statutes which classify persons for separate treatment in matters of education based solely on possession of colored blood.” Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson, and the Brown Case*, 1988 SUP. CT. REV. 245, 247 (quoting Memorandum by Mr. Justice Jackson, March 15, 1954, *Brown* file, Robert H. Jackson Papers, Library of Congress.). Justice Jackson wrote that it could not be ignored “that the concept of the place of public education has markedly changed. Once a privilege conferred on those fortunate enough to take advantage of it, it is now regarded as a right of a citizen and a duty enforced by compulsory education laws. Any thought of public education as a privilege which may be given or withheld as a matter of grace has long since passed out of American thinking.” *Id.* at 262.

During the Court’s deliberations Justice Jackson’s clerk (and later Supreme Court Chief Justice) William H. Rehnquist authored a memorandum headed “A Random Thought on the Segregation Case.” That document, signed by Rehnquist, stated: “I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by ‘liberal’ colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer’s *Social Statics*, it just as surely did not enact Myrdal’s *American Dilemma*.” *Id.* at 246 (quoting the Rehnquist memo). In his 1971 Court confirmation hearings before the Senate Judiciary Committee, nominee Rehnquist testified that the memorandum “had been written at Justice Jackson’s request and represented Jackson’s views on the segregation cases.” RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 608 (2004). Questioning Rehnquist’s testimony, Bernard Schwartz wrote, “It is hard to believe that the man who wrote the sentences holding segregation invalid in his draft held the view only a few months earlier attributed to him by” Rehnquist”. Schwartz, *supra*, at 267.

The Court asked and answered in the affirmative the question whether public school segregation on the basis of race unconstitutionally deprived minority children of equal educational opportunities “even though the physical facilities and other tangible factors may be equal . . .”<sup>212</sup> Noting its prior invalidations of state-mandated segregation in the graduate school setting,<sup>213</sup> the Court opined that intangible factors and other considerations “apply with added force to children in grade and high schools.”<sup>214</sup> Separation of those children “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>215</sup> In support of this view, the Court quoted a district court’s finding in one of the cases before it for review:

“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of the law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.”<sup>216</sup>

“Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*,” the Court concluded, “this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.”<sup>217</sup>

The *Brown* Court’s nonoriginalist, if not antioriginalist opinion,<sup>218</sup> made clear that in resolving the issue of the constitutionality of state-mandated racial segregation in public schools, the Court could not go back

---

212. 347 U.S. at 493 (quotations omitted).

213. See *id.* and cases cited therein; Ronald Turner, *Plessy 2.0*, 13 LEWIS & CLARK L. REV. 861, 882 (2009).

214. 347 U.S. at 494.

215. *Id.*

216. *Id.* (parentheses omitted).

217. *Id.* at 494–95 (footnote omitted). The “modern authority” language in the quoted text was supported by footnote 11 of the Court’s opinion and citations to social science studies. See *id.* at 494 n.11. See also ACKERMAN, *supra* note 109, at 132; ROY L. BROOKS, INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY 13–15 (1996).

218. See POSNER, *supra* note 89, at 198 (2013) (*Brown* is a nonoriginalist opinion.); Frank B. Cross, THE FAILED PROMISE OF ORIGINALISM 92 (2013) (*Brown* is “functionally an antioriginalist opinion.”).

to 1868, the year of the adoption of the Fourteenth Amendment, or to the 1896 *Plessy* decision. Nor did the Court mention Justice Harlan’s dissent. What mattered were modernity and the facts and circumstances as they existed and were understood in 1954; the “modern realities of social stigma” and “real-world understanding of the meaning of equal protection”;<sup>219</sup> and the lived experiences of African-American children negatively impacted by entrenched and legally sanctioned racial apartheid. Ruling in the present and not chained to or restrained by the past, the Court’s decision “was *deliberately and unanimously* not based on any version of original intent or meaning, despite the clear understanding of the justices that originalism was an option.”<sup>220</sup> As for Justice Scalia’s and Garner’s argument that it is not clear and “probably not true” that it was necessary for the Court to rely on “changed times,”<sup>221</sup> the problematics of the text—and Harlan analysis—offered in support of their position does not demonstrate that *Brown*’s result is consistent with their account of the original understanding and their thesis is ultimately unconvincing.

#### IV. THE “RECENT RESEARCH” SUPPORTING THE *BROWN*-IS- ORIGINALIST THESIS

Now consider Justice Scalia’s and Garner’s statement that “[r]ecent research persuasively establishes that “Brown is consistent with “the original understanding of the post-Civil War Amendments.”<sup>222</sup> As support for this position they provide a “see generally” citation to Michael McConnell’s 1995 Originalism and the Desegregation Decisions article.<sup>223</sup> Remarkably absent is any reference to critiques of that article.<sup>224</sup>

Commenting on Justice Scalia’s and Garner’s reference to one, and only one, authority, Mitchell Berman remarked: “it is simply unacceptable—not consistent with the standards that govern argumentation in law or academia—to announce that “[r]ecent research

---

219. ACKERMAN, *supra* note 108, at 298.

220. Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1200 (2007).

221. SCALIA & GARNER, *supra* note 19, at 88.

222. *Id.*

223. See McConnell, *supra* note 10.

224. See, e.g., Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995); Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223 (1996). For McConnell’s reply to Klarman, see Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1996). For his reply to Maltz, see Michael W. McConnell, *Segregation and the Original Understanding: A Reply to Professor Maltz*, 13 CONST. COMMENT. 223 (1996).

persuasively establishes' thus-and-such by citing a single article and failing to hint that it has been criticized and found unpersuasive by experts in the relevant discipline."<sup>225</sup> Scholars have noted, for instance, that McConnell focuses, not on the 1866–1868 framing and ratification of the Fourteenth Amendment, but on the “post-ratification views of members of Congress [which] are not decisive evidence about constitutional meaning;”<sup>226</sup> that his analysis, “based almost entirely on bills and floor debates in Congress,”<sup>227</sup> “focus[es] more on original intent than on [the] original meaning” sought by Justice Scalia;<sup>228</sup> and that McConnell’s “idiosyncratic—though defensible—version of originalism” has never been “used by anyone else in connection with any other question.”<sup>229</sup> A single article presented as confirming research and authority supporting the Scalia/Garner text-and-Harlan analysis cannot carry the “persuasively establishes” label placed upon it.<sup>230</sup>

---

225. Mitchell N. Berman, *Judge Posner's Simple Law*, 113 MICH. L. REV. 777, 795–96 (2015); see also Posner, *supra* note 32 (Scalia and Garner cite McConnell's article and “do not mention the powerful criticism of that article by Michael Klarman, a leading historian.”).

226. Cass R. Sunstein, *Black on Brown*, 90 VA. L. REV. 1649, 1659 (2004); see also POSNER, *supra* note 89, at 199; Turner, *supra* note 25, at 1187.

227. POSNER, *supra* note 89, at 199.

228. Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257, 260 (2005); Posner, *supra* note 32 (“[I]ronically, McConnell based his analysis on the legislative history of the Fourteenth Amendment, which should be anathema to Scalia.”).

229. Mark Tushnet, *From Judicial Restraint to Judicial Engagement: A Short Intellectual History*, 19 GEO. MASON L. REV. 1043, 1045 n.12 (2012).

230. Interestingly, McConnell's 1995 post-ratification approach differs from his recent statement that those seeking to discern what the Constitution “actually meant” must look to those “who wrote and adopted it” and comprehend “ideas as they were understood at the time.” Michael W. McConnell, *Time, Institutions, and Interpretations*, 95 B.U. L. REV. 1745, 1755 (2015). In his words:

For purposes of interpreting the Fourteenth Amendment, “the beginning” is the period of framing and ratification between 1866 and 1868, perhaps informed by the series of Reconstruction Acts passed under the authority of the new Amendments. The experience of slavery, the Civil War, and the immediate aftermath of the War provide the most pertinent necessary context, along with then-current interpretations of such legal language as “due process of law,” “equal protection of the laws,” and “privileges or immunities of citizens.”

*Id.* at 1755–56. This analysis, including the call for then-extant and not contemporary interpretations of the “equal protection of the laws” and other language and phrases in the Fourteenth Amendment are consistent with the interpretive approaches taken in this essay.



## CONCLUSION

In *Reading Law* Justice Scalia and Bryan Garner argued that the Supreme Court's seminal and nonoriginalist decision in *Brown v. Board of Education* can be squared with the original understanding of the post-Civil War Amendments to the Constitution. This essay's examination and critique of what present as an originalist justification for *Brown* has argued and concluded that the Justice Scalia's and Garner's thesis is analytically deficient in at least three respects: (1) their readings of the texts of the Thirteenth and Fourteenth Amendments as prohibiting all white-supremacist and separationist laws is atextual, acontextual, and ahistorical; (2) their invocation of Justice Harlan and his *Plessy* dissent does not support, but actually cuts against their understanding of the original understanding; and (3) relying on a single and critiqued article, with no reference to that criticism, they fail to support their conclusory argument that recent research persuasively establishes that *Brown* is consistent with the original understanding. Accordingly, *Reading Law's* originalist justification for *Brown* is flawed and ultimately unconvincing.