1996

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ORIGINALISM AND THE DESEGREGATION DECISIONS—A RESPONSE TO PROFESSOR McCONNELL

*Earl M. Maltz**

In *Originalism and the Desegregation Decisions*[1] Professor Michael W. McConnell makes a bold effort to justify *Brown v. Board of Education*[2] in terms of originalist theory. Unlike commentators who have previously dealt with this issue, Professor McConnell does not focus his primary attention on the period from 1866 to 1868—the time in which the Fourteenth Amendment itself was drafted and ratified. Rather, he argues that the treatment of Sen. Charles Sumner's Civil Rights Bill in the 1870s suggests that at that time Republicans generally believed that the Fourteenth Amendment outlawed segregated schools. He further maintains that Republican attitudes in the 1870s should be considered authoritative evidence of the original understanding.

The article bears many of the characteristics that have made Professor McConnell one of our leading constitutional scholars. Meticulously researched and carefully argued, the article adds greatly to our understanding of the doctrinal arguments that surrounded the desegregation issue in the 1870s, as well as the political dynamic that resulted in the elimination of the school-related provisions from the Civil Rights Act of 1875.[3] Unfortunately, however, Professor McConnell fails in his attempt to demonstrate that the decision in *Brown* is consistent with the original understanding.

Refutation of Professor McConnell's argument is a two step process. The first step is to explain why congressional treatment of the school desegregation issue in the 1870s does not demonstrate that the original understanding was that the Fourteenth Amendment outlawed school desegregation. The second step is to show that other historical evidence indicates that the framers

* Distinguished Professor of Law, Rutgers (Camden).

1. 81 Va. L. Rev. 947 (1995).
2. 347 U.S. 483 (1954).
3. 183 Stat. 335 (1875).

did not believe that they were forbidding states from maintaining segregated schools.

I. CONGRESSIONAL TREATMENT OF SUMNER'S CIVIL RIGHTS BILL DOES NOT NECESSARILY SUPPORT THE VIEW THAT *BROWN* WAS RIGHTLY DECIDED

The use of the congressional treatment of Sumner's Civil Rights Bill to support *Brown* in originalist terms faces two separate problems. The first problem is doctrinal: while *Brown* dealt with the impact of the Fourteenth Amendment *per se* on school segregation, the issue in the debate on the Civil Rights Act was whether Congress had the power to require public schools to be desegregated. The second problem is temporal: the Civil Rights Act was not considered and adopted until several years after the Fourteenth Amendment was ratified, and political conditions had changed substantially in the interim.

THE DOCTRINAL PROBLEM

The constitutional issue that was debated in the 1870s was whether Congress had the power to order school desegregation under Section 5 of the Fourteenth Amendment. This question is analytically distinct from that of whether Section 1 by its terms requires desegregation (although the two issues obviously are related). Moreover, there is substantial reason to believe that at least some Republicans understood this distinction and knew that they were dealing only with the Section 5 issue.

As Professor McConnell notes, Republican Rep. William Lawrence of Ohio enunciated the basic constitutional theory underlying the provisions of the Civil Rights Bill that dealt with schools. Lawrence argued that "[w]hen the States by law create and protect, and by taxation on the property of all support, benevolent institutions designed to care for those who need their benefits, the dictates of humanity require that equal provision should be made for all."[4] This theory—also cited by Republican Senators Oliver H. P. T. Morton and John Sherman as the justification for including public education in the Civil Rights Bill[5]—draws its support from antebellum legal authorities defining the scope of the right to protection of the laws. In relevant part, these authorities did not rely on either a particular distaste for

4. 2 Cong. Rec. 412 (1874).
5. Cong. Globe, 42d Cong., 2d Sess. 3190-93 (1872).

racial classifications or an assessment of the importance of particular government benefits. Rather, they were based on the view that where a class of people was taxed to support a given benefit and then denied access to that benefit, that class was, in essence, subject to an uncompensated taking and, as such, denied the right to protection *from* government.[6]

This doctrine played an important role in the 1860 Senate debate over the funding of education in the District of Columbia. As initially proposed, the bill before the Senate provided simply that the city authorities could impose a general property tax to benefit the public schools in the District and that the federal government would provide matching funds of up to $25,000 per year. Senate Republicans pressed for an amendment that would have required the city government to use at least part of the funds to educate blacks as well as whites. One of the mainstays of the Republican argument was the contention that "taxing [blacks] to support schools for the exclusive benefit of the white children . . . would be a kind of legal robbery"[7]—a clear reference to the principles of the state taxation cases. At the same time, however, the limitations of the doctrine became clear when Republican Daniel Clark, the sponsor of the amendment to require that blacks be admitted to the schools, stated that he would accept exclusion of free blacks so long as they were exempted from the property tax and their *pro rata* share of the federal contribution was withheld.[8]

John Sherman, one of the most prominent Republicans in the Senate, took a similarly limited view of the scope of the right protected. In 1872, Sherman stated that he viewed the maintenance of segregated schools as constitutional, so long as the black schools received their *pro rata* share of school funding.[9] Yet, the next day, Sherman voted *against* the Blair amendment, which would have specifically reserved to local governments the right to maintain segregated schools.[10] How can one explain this seeming anomaly?

The simplest answer lies in the Republican conception of the scope of the Section 5 enforcement authority. Many regular Republicans embraced the view of congressional power expressed by Chief Justice John Marshall in *McCulloch v. Mary-*

6. The development of this theory is described in detail in Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 Am. J. Legal Hist. 305 (1988).

7. Cong. Globe, 36th Cong., 1st Sess. 1681 (1860).

8. Id. at 1680.

9. Cong. Globe, 42d Cong., 2d Sess. 3193 (1872).

10. Id. at 3263.

land: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[11] Under this view, Congress clearly would have authority to prohibit some actions that would not be prohibited by the Constitution itself. This point was made by Republicans a number of times in the debate over the Civil Rights Act of 1875. Thus, for example, Rep. Robert Hale of New York explicitly relied on *McCulloch* in arguing that passage of the Civil Rights Act would not be inconsistent with the Supreme Court's decision in *The Slaughter-House Cases*.[12] Lawrence also relied on *McCulloch* in his defense of the Civil Rights Bill, declaring that "Congress . . . is the exclusive judge of the proper means to employ" in guaranteeing the rights secured by the Fourteenth Amendment[13] and that "[a] remedial power in the Constitution is to be construed liberally."[14]

Against this background, the apparent inconsistencies in Sherman's position can be reconciled. School segregation might not be unconstitutional *per se*; however, the Civil Rights Bill might still be constitutional under the *McCulloch* view of congressional power as a device to guarantee that blacks would in fact receive equal financial support in return for their tax dollars or (as Sherman apparently believed) as a means to advance the Reconstruction process generally.[15] In neither case would a vote for the school desegregation provisions of the Civil Rights Bill support the conclusion that *Brown* was rightly decided under originalist theory.

Of course, as Professor McConnell clearly demonstrates, a number of Republicans disagreed with Sherman and argued that Section 1 by its terms outlawed school segregation. Even those statements, however, are suspect from an originalist perspective. Republican pronouncements on constitutional issues in the 1870s are a demonstrably unreliable guide to the original understanding in the period from 1866 to 1868, when the Fourteenth Amendment was drafted and ratified.

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11. 17 U.S. (4 Wheat.) 316, 421 (1819).

12. 3 Cong. Rec. 980 (1875), discussing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

13. 2 Cong. Rec. 414 (1874).

14. Id. at 412, citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 476 (1793).

15. Cong. Globe, 42d Cong., 2d Sess. 3192-93 (1872).

THE TEMPORAL PROBLEM

As Reconstruction progressed, regular Republicans showed a clear willingness to move beyond the strictures of the Fourteenth Amendment in adopting civil rights measures of nationwide applicability. In pure policy terms, the evolution of the Republican position on the issue of black suffrage provides one striking example. During the drafting of the Fourteenth Amendment itself, party regulars explicitly rejected a provision that would have required the states to allow blacks to vote; moreover, they specifically noted their rejection of the black suffrage provision in the committee report accompanying the proposed amendment.[16] Only three years later, by contrast, Republicans united to pass the Fifteenth Amendment, which required states to adopt race-blind qualifications for voting.

For purposes of evaluating Professor McConnell's argument, the evolution of the Republican position on jury service is even more compelling. A section prohibiting racial discrimination in jury selection was included in the Civil Rights Act of 1875,[17] with Republicans citing the equal protection clause as the source of authority for this provision.[18] Moreover, Republican support for the jury selection provision was no less overwhelming than the support for the school provisions; for example, in 1872, an effort to delete the protection for jury service from the Sumner bill was defeated 33-16; among Republicans, only James L. Alcorn of Mississippi, Arthur I. Boreman of West Virginia, Matthew H. Carpenter of Wisconsin, and John A. Logan of Illinois supported the motion.[19]

Given this background, the same argument that supports Professor McConnell's position on the issue of racially segregated schools would also suggest that, as originally understood by its framers, the Fourteenth Amendment prohibited states from excluding free blacks from juries. However, a wide variety of commentators, including Professor McConnell himself, have concluded that in the late 1860s it was generally conceded by all parties that the Fourteenth Amendment had no impact on political

16. *Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess. xiii (1866).

17. 183 Stat. 335 (1875).

18. The evolution of the jury selection provision is described in detail in Earl M. Maltz, *The Civil Rights Act and the* Civil Rights Cases*: Congress, Court, and Constitution*, 44 Fla. L. Rev. 605, 623-26 (1992).

19. Cong. Globe, 42d Cong., 2d Sess. 3263 (1872).

rights, including the right to serve on juries.[20] Thus, the jury service provision stands as a clear example of a case in which regular Republicans of the 1870s were willing to seize on the Fourteenth Amendment as a source of authority for congressional action that went beyond the original understanding of the Amendment. There is no particular reason to believe that the school desegregation provision would have stood on any more secure footing.

Despite these problems, if the discussions of Sumner's Civil Rights Bill were the only available evidence, one might well conclude that *Brown* was defensible in originalist terms. A variety of other evidence, however, suggests strongly that segregated schools would have been permitted under the original understanding.

II. THE ORIGINALIST CASE AGAINST *BROWN*

The originalist case against *Brown* rests on two different arguments. First, a direct constitutional attack on segregated schools was unthinkable in the period in which the Fourteenth Amendment was drafted, passed, and ratified. Second, the doctrinal structure of Section 1 is inconsistent with the view that it was originally understood to prohibit the maintenance of segregated schools.

SCHOOL SEGREGATION AND THE FOURTEENTH AMENDMENT IN HISTORICAL CONTEXT

As Professor McConnell notes, school segregation was common in the Northern states during the period in which the Fourteenth Amendment was drafted and ratified. Segregation was particularly prevalent in the states of the lower North—the pivotal battleground states in the national elections. Thus, any direct, broad-based effort to attack segregated schools would have carried with it substantial political risks.

The moderate Republicans who controlled the drafting of the Fourteenth Amendment were disinclined to take such risks. The amendment was in large measure a campaign document, designed to outline the Republican program of Reconstruction for the upcoming elections of 1866.[21] As such, all of its provisions—including Section 1—were carefully drafted to appeal to

20. McConnell, 81 Va. L. Rev. at 1024 (cited in note 1). See also Maltz, 44 Fla. L. Rev. at 623-26 (cited in note 18).

21. The political maneuvering surrounding the adoption of the Fourteenth Amendment is described in detail in Michael Les Benedict, *A Compromise of Principle: Congres-*

swing voters in the post-Civil War electorate. As part of their strategy, mainstream Republicans repeatedly assured those voters that Section 1 would have only a minimal impact on Northern state laws—a claim they could not make if Section 1 had been generally understood to outlaw segregated schools.

The congressional treatment of the District of Columbia school system underscores the unwillingness of Republicans in the 39th Congress to attack school segregation. Issues of federalism did not constrain congressional action dealing with the District of Columbia; thus, on issues such as streetcar segregation, voting rights, and jury service, mainstream Republicans in Congress acted to protect the rights of free blacks in the District well in advance of the passage of nationally applicable measures. By contrast, contemporaneously with the Fourteenth Amendment, the same Republicans continued to support the segregated school system in the District of Columbia.[22] To contend that Republicans would at the same time knowingly act against school segregation by a nationally applicable constitutional amendment is to attribute to them an almost Orwellian mentality.

In short, contextual evidence strongly suggests that the framers of the Fourteenth Amendment did not believe that they were outlawing segregation in public schools. In theory, however, they might have inadvertently adopted language that would have made such segregation illegal under then-applicable rules of legal interpretation. Thus, the originalist case against *Brown* ultimately depends on a doctrinal analysis of Section 1.

THE DOCTRINAL ARGUMENT

As Professor McConnell correctly observes, the critical doctrinal question is whether the privileges or immunities clause of Section 1 would have been understood to prohibit the maintenance of segregated schools.[23] By its terms, this provision does not outlaw discrimination of any particular type; instead, it defines a set of rights that are brought under federal protection by the Fourteenth Amendment. At the very least, states are prohibited from using race as a criterion for limiting those rights.

In defining the scope of the privileges or immunities clause, Professor McConnell focuses his attention on the Reconstruction-era distinction between civil rights, which were protected by

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sional Republicans and Reconstruction, 1863-1869, (W.W. Norton, 1974); Eric McKitrick, *Andrew Johnson and Reconstruction* (U. of Chicago Press, 1960).

22. E.g., Cong. Globe, 39th Cong., 1st Sess. 708-09 (1866).

23. McConnell, 81 Va. L. Rev. at 998-1005 (cited in note 1).

the privileges or immunities clause, and social and political rights, which were outside the coverage of the Fourteenth Amendment.[24] These terms did, indeed, figure prominently in the debate over the Civil Rights Act of 1866[25] and the Fourteenth Amendment itself. However, Professor McConnell fails to note that another dichotomy was also critical in the Republican taxonomy of rights—the distinction between rights inherent in national citizenship and "local" rights, which were creatures of state law.

A number of prominent Republicans in the 39th Congress drew clear distinctions between the two sets of rights; for example, Rep. William Lawrence of Ohio declared that "all privileges and immunities are of two kinds, to wit, those which [are] inherent in every citizen of the United States, and such others as may be conferred by local law and pertain only to the citizen of the State."[26] The same distinction is reflected in the structure of the Fourteenth Amendment itself. Section 1 refers to both state citizenship and national citizenship; the privileges or immunities clause, by contrast, protects only those rights associated with national citizenship—in other words "those which [are] inherent in every citizen of the United States," rather than simply "conferred by local law."[27]

Even when considered in the abstract, the right to a free public education fits comfortably into the mold of a right "conferred by local law and pertain[ing] only to the citizen of the State."[28] Unlike, for example, the right to contract and to be free from bodily restraint, it cannot be viewed as a natural right which preexisted the establishment of governments. Unlike the right to hold real property, it is not the byproduct of allegiance to a federal government with sovereign authority. Instead, public education is a creation of state government, supported by the local taxation for the benefit of its own citizenry. As such, access to public education is the quintessential example of a right dependent on state rather than national citizenship and is thus outside the protection of the privileges or immunities clause.

This conclusion is bolstered by the status of public education under the privileges and immunities clause of Article IV—the comity clause. John A. Bingham, the author of Section 1, explic-

24. Id. at 1014-29.
25. 14 Stat. 27 (1866).
26. Cong. Globe, 39th Cong., 1st Sess. 1836 (1866). See also, e.g., id. at 600 (remarks of Sen. Trumbull); id. at app. 293 (remarks of Rep. Shellabarger).
27. Cong. Globe, 39th Cong., 1st Sess. 1836 (1866).
28. Id.

itly identified the comity clause as the source of the privileges or immunities language and, differentiating between state and national citizenship, identified the rights protected as the privileges or immunities of citizens of the United States.[29] The identity between the comity clause and the privileges or immunities language of Section 1 was recognized by many other mainstream Republicans as well.[30]

Against this background, the proper analysis of the privileges or immunities clause of Section 1 emerges rather clearly. The rights protected by the clause are rights of national citizenship, which in turn are identical with those that states must grant to sojourners from other states under the comity clause. While the nature of these rights might be unclear at the margins, the right to attend public schools is rather clearly not included. Few (if any) constitutional scholars would claim that a child from state A, visiting for one week in state B, would have a right under the comity clause to attend the public schools of state B during his visit. Thus, since the rights guaranteed by the two privileges and immunities clauses were understood to be coextensive, citizens of state B similarly cannot claim the right to attend desegregated schools under the privileges or immunities clause of Section 1.

In short, both the historical context and the doctrinal structure of Section 1 of the Fourteenth Amendment work against Professor McConnell's effort to defend *Brown* in originalist terms. Admittedly, by 1875 (or even by 1872) a substantial number of Republicans who had voted in favor of the Fourteenth Amendment may have honestly believed that the Constitution outlawed racially-segregated schools. However, the weight of the historical evidence indicates that those who drafted and ratified the Fourteenth Amendment did not share that understanding during the earlier Reconstruction period.

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29. Cong. Globe, 39th Cong., 1st Sess. 158, 1034 (1866).

30. Id. at 1054 (remarks of Rep. Higby); id. at 1095 (remarks of Rep. Hotchkiss). While Bingham himself viewed the rights protected by the first eight amendments as protected by the comity clause as well, Cong. Globe, 42d Cong., 1st Sess. app. 84 (1871), Sen. Jacob Howard of Michigan argued that the privileges or immunities clause of Section 1 protected them *in addition* to those rights protected by the comity clause. Cong. Globe, 39th Cong, 1st Sess. 2765 (1866). Even if one were to adopt Howard's view, it would not materially change the analysis.