

# ORIGINALISM AND *BROWN V. BOARD OF EDUCATION*

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## INTRODUCTION

On May 17, 2014, Americans celebrated the sixtieth anniversary of the United States Supreme Court's 1954 decision in

*Brown v. Board of Education*.<sup>1</sup> The legendary *Brown* opinion eviscerated the “separate but equal” doctrine in the context of public school education.<sup>2</sup> In the nearly sixty years since *Brown* was decided, there have been many academic debates about the ramifications of the *Brown* decision for constitutional theory and interpretation. One recurring argument has been that *Brown* was a “revolutionary” opinion, which cannot be justified in light of the original meaning of the Fourteenth Amendment.<sup>3</sup> The individuals who make this argument claim that, as a result, originalism itself must not be a valid method of constitutional interpretation.<sup>4</sup> Any theory of constitutional interpretation that is incapable of explaining and justifying *Brown* is *ipso facto* so flawed that the theory of interpretation must, therefore, be invalid. As Professor Michael McConnell<sup>5</sup> said in his by now famous 1995 law review article on *Originalism and the Desegregation Decisions*:

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>6</sup>

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

2. *Id.* at 494-95.

3. Robert Justin Lipkin, *Constitutional Revolutions: A New Look at Lower Appellate Review in American Constitutionalism*, 3 J. APP. PRAC. & PROCESS 1, 4 (2001) (“*Brown* was a quintessential constitutional revolution, creating a new constitutional paradigm of equal protection and thereby abandoning the reigning paradigm enunciated in *Plessy v. Ferguson*.”); see also Thomas B. McAfee, *The Brown Symposium—An Introduction*, 20 S. ILL. U. L.J. 1, 1 (1995) (“*Brown* symbolizes not only a legal and social revolution, namely the dismantling of the Jim Crow system, it also embodies the spirit of modern constitutional law. *Brown* links in the minds of constitutional thinkers a connection between the Constitution and our evolution to a more just society.”).

4. Lipkin, *supra* note 3, at 4-5; McAfee, *supra* note 3, at 2.

5. At the time Professor McConnell wrote his article, he was a professor at the University of Chicago Law School. *Michael W. McConnell*, STANFORD LAW SCH., <https://www.law.stanford.edu/profile/michael-w-mcconnell> (last visited Oct. 11, 2014). However, in November 2002, Professor McConnell was confirmed as judge for the United States Court of Appeals for the Tenth Circuit. *Id.* Professor McConnell then resigned his judgeship, and he is today a Professor of Law at Stanford University. *Id.* But since Judge McConnell wrote his article while he was a professor, for purposes of this Article, we will refer to him as Professor McConnell.

6. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995). See generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

Thus, Professor McConnell explained that most constitutional scholars including Jack Balkin, Alexander Bickel, Alfred Avins, Michael Klarman, Robert Bork, Mark Tushnet, Raoul Berger, Ronald Dworkin, Richard Kluger, Earl Maltz, Bernard Schwartz, Laurence Tribe, Thomas Grey, Donald Lively, Richard Posner, David Richards, and “countless others” agree that *Brown* cannot be justified on purely originalist grounds.<sup>7</sup> With respect to the argument that *Brown* cannot be explained with an originalist understanding, these scholars have claimed that “[t]he evidence is ‘obvious’ and ‘[un]ambiguous,’ the conclusion is ‘inevitable’ and ‘inescapable,’ and ‘[v]irtually nothing’ supports the opposite claim, which is said to be ‘fanciful.’”<sup>8</sup> Therefore, since many believe that *Brown* and originalism cannot coexist, originalism itself is said *ipso facto* not to be a legitimate method of constitutional interpretation.<sup>9</sup>

In his 1995 work, however, Professor McConnell set forth an originalist justification for *Brown*.<sup>10</sup> McConnell primarily based his originalist defense of *Brown* on the congressional debates and records leading up to the passage of the Civil Rights Act of 1875, and he concluded, based on the post-1868 evidence, that the Fourteenth Amendment was intended to prohibit segregation in the public schools.<sup>11</sup> Professor McConnell’s bold defense of *Brown* with an originalist argument thus goes against the grain of most of the scholarship on the issue.

This Article will attempt to bolster Professor McConnell’s argument and demonstrate that in the debate over whether *Brown* can be justified as an original matter, Professor McConnell has the better of the argument. *Brown v. Board of Education* can in fact be justified on originalist grounds. This Article builds on an earlier article

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7. McConnell, *supra* note 6, at 951-52; see also Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1866 (1997) (“Minor tinkering with the originalist view of legitimacy cannot reconcile it with the virtually unchallengeable proposition that *Brown* was rightly decided. Instead, *Brown*’s rightness challenges originalism head-on.”); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1881 (1995) (“[T]he overwhelming consensus among legal academics has been that *Brown* cannot be defended on originalist grounds.”); Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 434 (1998) (“[A] ‘true’ originalist would have to find *Brown* was incorrectly decided.”).

8. McConnell, *supra* note 6, at 951 (second and third alterations in original).

9. See *id.* at 952.

10. See generally *id.* at 953-55.

11. *Id.* at 984-1117.

written by Professor Calabresi and Andrea Matthews that justifies *Loving v. Virginia*<sup>12</sup> and Justice Harlan's dissent in *Plessy v. Ferguson*<sup>13</sup> on originalist grounds. In *Originalism and Loving v. Virginia*, Professor Calabresi and Andrea Matthews argue that the Privileges or Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment were originally meant to constitutionalize the Civil Rights Act of 1866.<sup>14</sup> The Civil Rights Act of 1866 had outlawed the Black Codes by which the southern states sought in 1865 and 1866 to reduce the freed African-American slaves to the status of second-class citizenship.<sup>15</sup> The Civil Rights Act, and therefore the Fourteenth Amendment, forbade giving any citizens an abridged or shortened or lessened set of privileges or immunities as compared to those enjoyed by white citizens.<sup>16</sup> Since a white citizen had the right to contract to marry another white citizen or to contract to ride in a certain railway car, the Civil Rights Act of 1866 quite literally gave African-American citizens "the same right."<sup>17</sup> The Fourteenth Amendment constitutionalized this guarantee because liberty of contract was a privilege or immunity of state citizenship, which no state could "abridge."<sup>18</sup>

Professor Calabresi and Andrea Matthews's article acknowledges that the text of § 1 of the Fourteenth Amendment is broader than the Civil Rights Act of 1866 in ways that are crucial to the originalist argument in support of *Brown v. Board of Education*.<sup>19</sup> The Civil Rights Act of 1866 forbade discrimination on the basis of race as to all common law rights like the rights to contract, to own property, to sue in torts, to inherit, and to testify in court, but the Civil Rights Act of 1866 did not forbid racial discrimination against children in access to public schools.<sup>20</sup> For *Brown v. Board of Education* to be right as an original matter, the Fourteenth Amendment has to be broader than the Civil Rights Act of 1866.

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12. 388 U.S. 1 (1967).

13. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

14. Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393, 1408, 1411-12.

15. *Id.* at 1403.

16. *Id.* at 1418.

17. *Id.* at 1423-26.

18. U.S. CONST. amend. XIV, § 1.

19. Calabresi & Matthews, *supra* note 14, at 1405.

20. *See id.*

Happily, Calabresi and Matthews show in their article that this is the case.<sup>21</sup>

The text of the Fourteenth Amendment forbids any law that “abridge[s] the privileges or immunities of citizens of the United States.”<sup>22</sup> It is thus worded more broadly than a clause that banned only all laws that “abridge the common law rights of state citizenship.”<sup>23</sup> The phrase “privileges or immunities” (Article IV uses “and;” the Fourteenth Amendment uses “or”) is borrowed from Article IV, § 2, which says that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>24</sup> The Article IV Privileges and Immunities Clause has always been understood as entitling out-of-state citizens to *all* of the

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21. See generally *id.*

22. U.S. CONST. amend. XIV, § 1.

23. Modern scholarship on the original meaning of the Privileges or Immunities Clause began with John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387-88 (1992), in which Harrison argued that the Clause was on an anti-discrimination guarantee and not a font of substantive due process individual rights. Philip Hamburger reaches the same conclusion in *Privileges or Immunities*, 105 NW. U. L. REV. 61 (2011); see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS: 1789–1888*, at 342-51 (1985). Akhil Reed Amar and Randy Barnett read the Clause as protecting both against discrimination and as conferring un-enumerated individual rights. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 157-58 (2012); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 62-65 (2004). Kurt Lash argues in a series of three law review articles, which he is turning into a book, that the Privileges or Immunities Clause protects both against discrimination and that it also protects enumerated but not un-enumerated individual rights. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art*, 98 GEO. L.J. 1241 (2010); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329 (2011); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1886*, 101 GEO. L.J. 1275 (2013). Robert G. Natelson argues in *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1122 (2009) for the John Harrison and Philip Hamburger interpretation of the Privileges and Immunities Clause of Article IV, § 2. As Professor Calabresi has previously argued, the Privileges or Immunities Clause of the Fourteenth Amendment protects: (1) against laws that discriminate on the basis of class or caste and that are not just laws enacted for the good of the whole people; and (2) both enumerated individual rights and un-enumerated individual rights that are deeply rooted in history and tradition subject always to the caveat that the states can override such rights if they pass a just law that is enacted for the general good of the whole people. Our reading grows out of the foundational case of *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

24. U.S. CONST. amend. XIV, § 1; U.S. CONST. art. IV, § 2.

fundamental legal rights that in-state citizens enjoy and not merely to the common law rights that in-state citizens enjoy.<sup>25</sup> Article IV, § 2 confers on out-of-state citizens not only the common law right to liberty of contract, but also all the fundamental rights in-state citizens enjoy under state constitutional and statutory law except for the political rights to vote and to serve on a jury.<sup>26</sup> The Fourteenth Amendment's Privileges or Immunities Clause, which draws much of its meaning from the Privileges and Immunities Clause of Article IV, is thus much broader than the Civil Rights Act of 1866. Its plain text forbids state laws that give an abridged set of state constitutional rights to one class of citizens—African-Americans—as compared to another class of citizens—white Americans.<sup>27</sup> If state constitutions in 1868 guaranteed state citizens the right to a public school education, then that right is a privilege or immunity of state citizenship as to which racial discrimination is barred by the Privileges or Immunities Clause of the Fourteenth Amendment. We will argue in this Article that the right to a public school education was already by 1868 a fundamental state constitutional right of state citizenship and that segregation in public schools was therefore unconstitutional from 1868 on.

Our argument builds on and is different from Professor McConnell's in several ways. First, Professor McConnell primarily focused on the post-enactment legislative history of the Fourteenth Amendment. McConnell surveyed the evidence surrounding the proposal, debates, and passage of the Civil Rights Act of 1875, but he did not offer up much evidence as to the original meaning of the Fourteenth Amendment in 1868 as opposed to what people had taken to claiming what it meant, in 1875. As a result, McConnell opened himself up for criticism on the ground that he had failed<sup>28</sup> to account for the possibility of a change in sentiment between 1866 (when the Fourteenth Amendment was first proposed) and the 1870s (the years from which McConnell draws most of his key evidence).<sup>29</sup> In contrast, this Article will focus on evidence of the constitutional meaning of the Privileges or Immunities Clause and Equal Protection Clause in 1868—the year in which the Fourteenth Amendment was

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25. *Corfield*, 6 F. Cas. at 551-52.

26. See Calabresi & Matthews, *supra* note 14, at 1414, 1417, 1419-20.

27. U.S. CONST. amend. XIV, § 1.

28. For criticisms of Professor McConnell's argument, see Klarman, *supra* note 7, at 1903-11; Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 223 (1996).

29. Klarman, *supra* note 7, at 1903; Maltz, *supra* note 28, at 229.

actually passed. We think Professor McConnell's post-enactment legislative history supports the original meaning textual argument that we advance as to why a public school education was in 1868 a privilege or immunity of state citizenship that could not be abridged on the grounds of race, but we think McConnell's evidence alone is not enough to prove his case.

In fact, the criticisms made of Professor McConnell's argument have some real punch to them because there is good reason to believe that public sentiment on racial equality shifted in a liberalizing direction between 1868 and 1875. With respect to voting rights, for example, African-Americans were quite deliberately not protected by the Fourteenth Amendment, which was adopted in 1868, but African-Americans were given voting rights a mere two years later with the passage of the Fifteenth Amendment, when public sentiment became more liberal. Although Professor McConnell briefly discussed some evidence that existed regarding public sentiment as to school segregation between 1866 and 1868,<sup>30</sup> he only concluded that the evidence from 1866 to 1868 "is not intended to establish that the Fourteenth Amendment as originally understood outlawed school segregation, but merely that these aspects of the history do not conclusively establish the contrary position."<sup>31</sup> Our Article differs from Professor McConnell's in that we will show that the Fourteenth Amendment prohibited segregated schools as an original matter based exclusively on evidence drawn from its public meaning in 1868.

Second, Professor McConnell's article looked primarily at evidence from congressional hearings, debates, and records surrounding the passage of the Civil Rights Act of 1875, which, he claims, shed valuable light on the original intent of the Framers of the Fourteenth Amendment.<sup>32</sup> In contrast, our Article focuses on the state constitutions that were in effect at the time the Fourteenth Amendment was adopted, in 1868, to determine whether a public school education was at that time a privilege or immunity of state citizenship. More specifically, we look at the various articles and provisions of state constitutions in 1868 that addressed the issue of the right of citizens at that time to a public school education. We conclude that by 1868, when the Fourteenth Amendment was adopted, citizens in thirty out of thirty-seven states had a

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30. See McConnell, *supra* note 6, at 955-84.

31. *Id.* at 956-57.

32. See generally *id.* at 984-1100.

fundamental right to a public school education that was a privilege or immunity of state citizenship.<sup>33</sup> As a result, the Fourteenth Amendment forbade racial segregation in public schools from the moment it was adopted. Thus, the original public meaning of the text of the Fourteenth Amendment prohibited racial segregation in public schools.

In Part II of this Article, we will explain the significance of the number of states that recognized the right to a public school education in their respective state constitutions in 1868, when the Fourteenth Amendment was adopted, and in 1954, when *Brown v. Board of Education* was decided. Specifically, we argue that because three-quarters of the states recognized the right to a public school education in 1868, the right to a public school education was a fundamental, or civil, right in 1868.<sup>34</sup> We claim that the Privileges or Immunities Clause of the Fourteenth Amendment<sup>35</sup> protected all citizens from racially discriminatory schools from the beginning, in 1868, and not only from 1954 on.<sup>36</sup>

In *Originalism and the Desegregation Opinions*, McConnell acknowledged that it is debatable whether or not access to a public school education was a civil right in 1868, when the Fourteenth Amendment was passed.<sup>37</sup> But, McConnell concluded that it was clear that access to a public school education had become a fundamental right by the turn of the century and certainly by 1954, when *Brown v. Board of Education* was decided.<sup>38</sup> The evidence that

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33. See *infra* Section II.B.

34. See *infra* Subsection II.A.1.

35. *Brown* was decided based on the Equal Protection Clause of the Fourteenth Amendment. However, one could argue that, as an original matter, the Privileges or Immunities Clause would have been the better choice. Although the *Slaughter-house Cases* seemed to have eviscerated the Privileges or Immunities Clause from protecting fundamental rights, some scholars have argued that the Privileges or Immunities Clause would be the better choice for protection of fundamental rights under the Fourteenth Amendment. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); Harrison, *supra* note 23, at 1389.

36. See *infra* Part II.

37. See generally McConnell, *supra* note 6.

38. See *id.* at 1135 (“The Court correctly noted that the place of education in American life had undergone a dramatic transformation in the years between enactment of the Fourteenth Amendment and the decision in *Brown*, and that these changes were relevant to the constitutional question. In the earlier era, no child—white or black—could be said to have a ‘right’ to a common school education in much of the nation. The common school system, especially in the South, was uneven, spottily funded, and in many localities nonexistent. This gave some

Professor McConnell seemed to rely on is that “[b]y the turn of the century . . . a right to public education in some form was included in almost every state constitution.”<sup>39</sup> Therefore, in Part III of this Article, we will look at the state constitutional provisions regarding public school education that were in effect both in 1868 and in 1954. The two important questions we will address are: (1) whether state constitutions in a given time period conferred a right to a public school education; and (2) whether state constitutions in a given time period required racial segregation in public schools.

Our comparison of state constitutional law clauses bearing on access to a public school education leads to a surprising—perhaps shocking—conclusion. In 1868, at least thirty of the thirty-seven states had provisions in their respective state constitutions that seemed to clearly recognize the right to a public school education,<sup>40</sup> and an additional three states arguably had a right to a public school education in their respective state constitutions.<sup>41</sup> Moreover, in 1868 only four states did not seem to recognize the right to a public school education,<sup>42</sup> and none of the thirty-seven states had provisions requiring segregated schools.<sup>43</sup>

By 1954, however, at least forty-four of the forty-eight states recognized access to a public school education as being a constitutional right<sup>44</sup> with an additional two states that arguably recognized the right.<sup>45</sup> Although only two states did not seem to

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plausibility to the claims of those opponents of school desegregation legislation who claimed that education was not a civil right. As the *Brown* Court noted, however, things had changed by 1954, and this should have produced a different legal conclusion.” (footnote omitted); see also Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1950 (1995) [hereinafter McConnell, *Reply to Professor Klarman*] (“The ultimate compromise version of the Civil Rights Act of 1875, which forbade segregation in common carriers but not schools, but which blocked explicit endorsement of separate-but-equal schools, can be seen as reflecting the view that schooling was not a civil right.”); *id.* at 1951 (“[E]ven under key arguments of those opponents who denied that education was a civil right under the conditions of the 1870s, education would become a civil right by the turn of the century and certainly by the time of *Brown*.”).

39. McConnell, *Reply to Professor Klarman*, *supra* note 38, at 1951.

40. See *infra* notes 97-126 and accompanying text.

41. See *infra* notes 127-29 and accompanying text.

42. See *infra* notes 130-33 and accompanying text.

43. See *infra* notes 135-36 and accompanying text.

44. See *infra* notes 180-223 and accompanying text.

45. See *infra* notes 224-27 and accompanying text.

recognize the right to a public school education in 1954,<sup>46</sup> at least fifteen of the forty-eight states in 1954 had provisions in their state constitutions that required segregated public schools.<sup>47</sup> The state constitutional provisions requiring racially segregated schools, however, only began to appear in the 1870s, and most of those provisions continued to remain in effect until they were explicitly deemed unconstitutional by *Brown v. Board of Education* in 1954.<sup>48</sup> Thus, as an original matter, there was a fundamental right to a desegregated public school education in 1868, but by 1954 state constitutional law had evolved to favor segregation in more than one-quarter of the states.

Although the state constitutional evidence overwhelmingly points to the conclusion that segregated schools were prohibited in 1868, Part IV considers state statutes and state case law to determine if those sources of law alter the conclusion we reach with respect to state constitutional law. While some states in 1868 had statutes calling for segregated schools and a few state courts had upheld segregated schools in the face of a challenge, neither the statutes nor the case law are sufficient to refute the state constitutional evidence that access to a public school education was a fundamental right in 1868.<sup>49</sup>

In Part V, we address some other issues that are raised by our conclusion that access to a public school education was a fundamental right in 1868 based on state constitutional law. We look at a 1998 article by Professor John Eastman that focuses on the historical state constitutional provisions regarding education as they existed in various historic time periods.<sup>50</sup> We also discuss the United States Supreme Court's five-to-four holding in *San Antonio Independent School District v. Rodriguez*, which approved the State of Texas's system of financing its public schools.<sup>51</sup> The Supreme Court explicitly declared in that case that a public school education was not a fundamental right that all persons were entitled to under the Equal Protection Clause of the Fourteenth Amendment.<sup>52</sup>

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46. See *infra* notes 228-30 and accompanying text.

47. See *infra* notes 232-48 and accompanying text.

48. See *infra* notes 137-39 and accompanying text.

49. See *infra* Part IV.

50. See generally John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776-1900*, 42 AM. J. LEGAL HIST. 1 (1998).

51. 411 U.S. 1, 54-55 (1973) (5-4 decision).

52. *Id.* at 35.

Although Professor McConnell concluded that by 1954 access to a public school education had certainly become a civil right,<sup>53</sup> Professor McConnell failed to mention the *Rodriguez* case, even in passing. We conclude that our originalist argument as to why *Brown v. Board of Education* was rightly decided as an original matter can be justified notwithstanding the Supreme Court's holding in *Rodriguez*.

We conclude, therefore, that *Brown v. Board of Education* can be justified on originalist grounds, as Professor McConnell found. In fact, *Brown v. Board of Education*'s abolition of segregated schools was not in conflict with the original meaning of the Fourteenth Amendment, but was instead a return to the original understanding of 1868. We claim, therefore, that not only can *Brown v. Board of Education* be reconciled with originalism, but also that *Brown* is *only* justifiable on originalist grounds—at least if one focuses on the right to a public school education as it stood in state constitutional law in 1868 and in 1954.

#### I. THE FOURTEENTH AMENDMENT ONLY PROTECTS FUNDAMENTAL RIGHTS

In perhaps the most important fifty-two words of the United States Constitution, § 1 of the Fourteenth Amendment says:

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>54</sup>

The Privileges or Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment were meant to protect the citizens of the states from discrimination as to certain rights.<sup>55</sup> In

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53. See *supra* notes 38-39 and accompanying text.

54. U.S. CONST. amend. XIV, § 1.

55. There is a fundamental debate regarding the clauses of the Fourteenth Amendment and which clause is the source for protecting certain rights. The *Slaughter-house Cases* basically eviscerated the use of the Privileges or Immunities Clause from protecting individuals from state action denying its citizens certain rights. See 83 U.S. 36, 76-79 (1873) (holding that the Privileges or Immunities Clause is only available to protect certain natural rights). The demise of the Privileges or Immunities Clause caused the Supreme Court to protect rights under the Equal Protection Clause and the Due Process Clause, known as substantive due process. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (plurality opinion). However, there have been some arguments for the reinvigation of the

fact, § 1 of the Fourteenth Amendment was publicly understood as providing a constitutional basis for the Civil Rights Act of 1866, which in turn protected the civil rights of individuals, but not their political rights.<sup>56</sup> Therefore, at a bare minimum, § 1 of the Fourteenth Amendment must protect all those common law rights of state citizenship that were mentioned in the Civil Rights Act of 1866.<sup>57</sup> This includes liberty of contract, including the right to make interracial marriage contracts and the right to contract to ride in any car on a railroad.<sup>58</sup> But, the protections of the Fourteenth Amendment extend much further than does the list of rights mentioned in the Civil Rights Act of 1866. The rights protected by the Civil Rights Act of 1866 were fundamental, but they were not the only fundamental rights protected by the Privileges or Immunities Clause or by the Equal Protection Clause of the Fourteenth Amendment.<sup>59</sup> Thus, in order to determine whether a particular right is protected by the Fourteenth Amendment, one must first determine if the right at issue is or is not a fundamental right.

#### A. The “Three-Quarters of the States” Test and Fundamental Rights

The Fourteenth Amendment was only meant to protect fundamental civil rights that are deeply rooted in American history and tradition. This is clearly suggested by Justice Washington’s opinion in *Corfield v. Coryell*,<sup>60</sup> and a majority of the Supreme Court has said as much recently in *Washington v. Glucksberg*<sup>61</sup> and in *Gonzales v. Carhart*.<sup>62</sup> It is therefore necessary that we develop a set of criteria, or a test, for establishing whether a specific historic right is or is not protected as a fundamental right by the Fourteenth

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Privileges or Immunities Clause as a source of protecting certain rights under the Fourteenth Amendment. *See, e.g.*, Harrison, *supra* note 23, at 1473-74.

56. McConnell, *supra* note 6, at 958.

57. *See, e.g., id.* at 957-58 (explaining that § 1 of the Fourteenth Amendment was intended to provide a constitutional basis for the Civil Rights Act of 1866 and that only *civil* rights were protected, not social or political rights). Note that for purposes of this Article “civil right” and “fundamental right” refer to the same type of rights and, therefore, may be used interchangeably.

58. *See* Calabresi & Matthews, *supra* note 14, at 1474, 1476.

59. *See supra* notes 19-21 and accompanying text.

60. 6 F. Cas. 546, 550 (C.C.E.D. Pa. 1823) (No. 3,230); *see, e.g.*, McConnell, *supra* note 6, at 1027-28.

61. 521 U.S. 702, 761, 766-68 (1997).

62. 550 U.S. 124, 168 (2007); *see* Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1520-21 (2008).

Amendment. The starting point for any effort to determine the original meaning of the Fourteenth Amendment is 1868. Any right that existed widely in 1868, the year the Fourteenth Amendment was passed, could fairly be argued to be a fundamental right that is deeply rooted in American history and tradition and that is therefore a “Privilege or Immunity” of national or state citizenship.<sup>63</sup> We know for sure that the Framers of the Fourteenth Amendment thought that rights recognized at common law, such as the right to enter into contracts and the right to own property, were fundamental rights and were, therefore, protected by the Fourteenth Amendment.<sup>64</sup> As Professor McConnell has explained:

The most fundamental conception of the Fourteenth Amendment was that it would extend to the citizens of each state, without regard to race or color, the same legal rights (privileges and immunities) that would have been available to citizens of other states under Article IV. This included such civil rights as the right to contract, own property, and sue, but not political rights such as the right to vote, hold office, or serve on a jury.<sup>65</sup>

The Fourteenth Amendment means at a bare minimum that a state cannot prohibit an African-American citizen from entering into a contract that a white person would be permitted to enter into nor could a state forbid an African-American resident from owning a piece of property that a white person would be permitted to own.<sup>66</sup> Therefore, all citizens are guaranteed equal treatment under the law as to common law rights.

The right to a public school education, however, is not a right that was traditionally protected at common law. But, neither the

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63. If a right was a fundamental right in 1868, that right would certainly be protected by the Fourteenth Amendment as an original matter. But even if the right did not exist in 1868, that does not necessarily end the inquiry for determining whether the right was protected by the Fourteenth Amendment, as an original matter. As explained above, the original understanding of the Privileges or Immunities Clause contemplated change. Therefore, if a right becomes a fundamental right it may still be protected by the Fourteenth Amendment, consistent with the original understanding of the Fourteenth Amendment. *See infra* Section II.B.

64. *See, e.g.,* Michael J. Perry, Brown, Bolling, & *Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. ILL. U. L.J. 53, 62 (1995) (“No one who sat in Congress or in the state legislatures that dealt with the Fourteenth Amendment doubted that Section 1 was designed to put to rest any doubt about the power of the national government to protect basic common law rights of property and contract.” (quoting WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 163 (1988))).

65. McConnell, *supra* note 6, at 1024 (footnote omitted).

66. *See* Calabresi & Matthews, *supra* note 14, at 1474, 1476.

freedom of speech nor the freedom of religion were rights that were fully protected at common law, and yet, we have no doubt today that these are fundamental rights protected by the Fourteenth Amendment. We therefore need some other way to determine which rights are protected under the Fourteenth Amendment. Professor Calabresi and Sarah E. Agudo have suggested a solution to this problem in an article entitled *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*.<sup>67</sup> Calabresi and Agudo propose that, at a minimum, all state constitutional rights that were protected by three-quarters of the state constitutions in 1868 should be presumed to be Fourteenth Amendment rights that are deeply rooted in American history and tradition.<sup>68</sup> But, at a bare minimum, any right protected by more than three-quarters of the states in 1868 in their state constitutions is a strong candidate to be a Fourteenth Amendment fundamental right.

The three-quarters-of-the-states test for determining whether a right is fundamental under the Fourteenth Amendment builds on the fact that Article V of the federal Constitution requires a three-quarters consensus of the states to amend the Constitution.<sup>69</sup> Rights as to which there was a three-quarters-of-the-states consensus in 1868 meet the Article V rule of recognition, which requires a broad consensus of the states to make federal constitutional law.<sup>70</sup> Moreover, new constitutional rights can only be created where there is a three-quarters consensus of the states. Similarly, the Constitution itself went into effect only after it was ratified by nine of the original thirteen states—a number which also points toward a three-quarters consensus of the twelve states that sent delegates to the Philadelphia

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67. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008).

68. *Id.* at 16-17.

69. See U.S. CONST. art. V.

70. Article V of the United States Constitution states:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

Constitutional Convention. (Tiny Rhode Island boycotted the Convention and was thus ignored.) The reason for requiring a three-quarters consensus of the states to make federal constitutional law is perfectly clear. Under the Supremacy Clause of Article VI, the Constitution and its amendments trump any state law or state constitutional provision because the Constitution of the United States is the “supreme Law of the Land.”<sup>71</sup> Although the Constitution permits amendments with the approval of three-quarters of the states, to date only twenty-seven amendments to the Constitution have been passed. Clearing the three-quarters-of-the-states rule of Article V has thus proven historically to be a very high threshold to satisfy.

The fact that a three-quarters consensus of the states is sufficient to amend the Constitution, the supreme law of the land, indicates that a supermajority of three-quarters of the states is significant for constitutional purposes and for the enacting of constitutional changes. We thus think that it is plausible for purposes of identifying fundamental rights protected by the Fourteenth Amendment to find such rights where three-quarters of the states recognized or protected those rights in 1868. Thus, an Article V consensus of three-quarters of the states in 1868 should be sufficient for establishing that a right is “fundamental,” since it would be sufficient for approval of a constitutional amendment. The Article V rule of recognition for constitutional change is a three-quarters consensus of the states.<sup>72</sup>

Doing a head count of how many states protect a certain right is nothing new in American constitutional law. In fact, the United States Supreme Court has used precisely such a head counting analysis in the context of the Eighth Amendment, where the Supreme Court must determine whether a given punishment has or has not become unusual. For example, in the death penalty context, the Court used the head counting analysis to determine whether sentencing a minor<sup>73</sup> or an individual with an intellectual disability<sup>74</sup> to death

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71. U.S. CONST. art. VI, § 2, cl. 2.

72. On rules of recognition, see H.L.A. HART, *THE CONCEPT OF LAW* 92 (1961).

73. See *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion) (prohibiting the execution of a fifteen year old); *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (prohibiting the execution of anyone under the age of eighteen when they committed a crime).

74. Compare *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (permitting the execution of individuals with intellectual disabilities), with *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (prohibiting the execution of individuals with intellectual

violates their Eighth and Fourteenth Amendment right to be free from cruel and unusual punishments. Although the Supreme Court did not look to see in any of these cases whether exactly three-quarters of the states had laws prohibiting execution of individuals with intellectual disabilities or of minors, the Court did look at a head count of the states before concluding that the executions in these cases were unconstitutional.<sup>75</sup> The Supreme Court ought to look for the presence or absence of an Article V consensus of three-quarters of the states in construing the Eighth and Fourteenth Amendments. Thus, doing a head count of states by looking at the formal state laws or state constitutions on the books at any given time is a technique that the Supreme Court is familiar with in other areas of constitutional law.<sup>76</sup>

If an Article V consensus of three-quarters of the states in 1868 is sufficient for something to be considered a Fourteenth Amendment fundamental right, one must next ask whether such rights must appear in state constitutions for them to be counted as being part of the Article V consensus. Conceivably such a consensus could be attained as well by looking at state statutes or state supreme court opinions. We will focus in this Article on state constitutional provisions in determining whether the right to a public school education was a fundamental right in 1868.<sup>77</sup> However, for the sake of completeness, we also look briefly at state statutes as well as state cases in effect around 1868 to determine if those statutes or cases lead to a different result than is suggested by the state constitutions.<sup>78</sup>

Professor McConnell punted on the question of whether there was a fundamental right to a public school education in 1868, when the Fourteenth Amendment was enacted. Professor McConnell did say that “education would become a civil right by the turn of the century and certainly by the time of *Brown*.”<sup>79</sup> The reason that Professor McConnell gave for concluding that a public school education had become a fundamental right by 1900 is that “[b]y the turn of the century . . . a right to public education in some form was

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disabilities based on the current trend in state legislation, which was moving in a direction opposed to the execution of individuals with mental disabilities).

75. See *Thompson*, 487 U.S. at 824-29; *Roper*, 543 U.S. at 564-68; *Penry*, 492 U.S. at 333-35; *Atkins*, 536 U.S. at 313-16.

76. See *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

77. See *infra* Section II.B.

78. See *infra* Sections IV.A-B.

79. McConnell, *Reply to Professor Klarman*, *supra* note 38, at 1951.

included in almost every state constitution.”<sup>80</sup> Thus, Professor McConnell seemed to rely on the education provisions of the various state constitutions in determining when the right to an education became a civil right, further indicating the significance of state constitutions for federal constitutional law.

## B. Limitations of the Three-Quarters-of-the-States Test

There may well be some constitutional rights that are fundamental even if they were not recognized as being so by an Article V consensus of three-quarters of the states in 1868, when the Fourteenth Amendment was passed. All we really mean to claim here is that if a right was recognized by an Article V consensus of three-quarters of the states it is *ipso facto* a Fourteenth Amendment fundamental right. Our argument does not foreclose the possibility that new fundamental rights could come into existence so long as they do not erase historical fundamental rights that were already there. Professor Calabresi has argued in another article that the Fourteenth Amendment protects only rights that are deeply rooted in history and tradition because the framers of the Fourteenth Amendment repeatedly assured everyone that this was so, relying on *Corfield v. Coryell*.<sup>81</sup> By 1868, the American public almost certainly believed that *Corfield* was the beginning and the end of any fundamental rights constitutional analysis.

Justice Washington assured everyone that the Privileges and Immunities Clause of Article IV protected only rights that were fundamental and that were deeply rooted in American history and tradition.<sup>82</sup> This fixed the original public meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, but Justice Washington was almost certainly wrong about the Privileges and Immunities Clause of Article IV. As Professor Philip Hamburger has shown, Justice Washington read the Article IV Privileges and Immunities Clause too narrowly.<sup>83</sup> Justice Washington’s opinion described privileges and immunities as only including fundamental rights that were deeply rooted in history and tradition because as a southern slaveholder he was appalled at the prospect that the

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80. *Id.*

81. Calabresi, *supra* note 62, at 1532-33.

82. *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230).

83. Hamburger, *supra* note 23, at 79.

Privileges and Immunities Clause might give free northern African-Americans free speech and gun rights when they were in the South.

The language of the Privileges and Immunities Clause of Article IV was in some respects open ended, and its *original* implication may well have been that its meaning could change over time.<sup>84</sup> “Privileges” and “immunities” are not clearly defined terms with a fixed historical meaning. Instead, they could be argued to be positive law terms that could change in meaning as the positive law changes. As we have shown, the Fourteenth Amendment borrowed the terms “privileges” and “immunities” from Article IV of the United States Constitution. Article IV states: “The Citizens of each State shall be entitled to all *Privileges and Immunities* of Citizens in the several States.”<sup>85</sup> This constitutional provision means that if a citizen from state *A* goes to state *B*, state *B* must give the citizen of state *A* the same protections of the state *B* laws that the citizens of state *B* receive, as long as the state *A* citizens remains in state *B*. Therefore, if state *B* permitted its citizens, for example, to purchase cigarettes at the age of fifteen, if a citizen of state *A* (which does not permit a fifteen year old to purchase cigarettes) goes to state *B*, state *B* must allow the citizen of state *A* to purchase cigarettes at the age of fifteen, just as all the residents of state *B* are permitted to do. Thus, any time a state passes a new law, the citizens of the other states have new “privileges and immunities” that are protected when they visit that state under Article IV of the Constitution.

The privileges and immunities protected by Article IV, therefore, were inherently intended to change in meaning over time as state positive law changed in meaning over time. It could thus be argued that when the “privileges or immunities” language was borrowed from Article IV by the Fourteenth Amendment, the privileges or immunities protected by that Amendment would also change over time as the positive law of three-quarters of the states changed. What this would mean is that if a certain right was not recognized as a fundamental right at the time the Fourteenth Amendment was adopted because there was no Article V consensus

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84. The “Privileges or Immunities” Clause is open-ended because no one can definitively say what a “privilege” or “immunity” includes. In contrast to the open-ended language of the “Privileges or Immunities” Clause, the Constitution sometimes speaks in more specific terms. For example, the constitutional requirement that the President of the United States be thirty-five-years old and a resident of the United States for fourteen years are clear, unambiguous requirements that are not open ended or unclear. U.S. CONST. art. II, § 1, cl. 5.

85. U.S. CONST. art. IV, § 2, cl. 1 (emphasis added).

that the right in question was fundamental,<sup>86</sup> that would not necessarily preclude such a right from becoming a fundamental right at a later point in time when three-quarters of the states had come to concur on the fundamentality of the right in question.

In fact, Professor McConnell seems to adopt precisely this living Constitution approach with respect to the right to a public school education between 1868 and 1954. While Professor McConnell is ambivalent as to whether there was a fundamental right to an education in 1868,<sup>87</sup> he argues that “[b]y the turn of the century” education *had become* a civil right.<sup>88</sup> Therefore, Professor McConnell implies that the Fourteenth Amendment could have come by 1954 to protect the right to a public school education, even though the Fourteenth Amendment might not have protected such a right in 1868.

Professor McConnell’s approach may at first glance seem contrary to originalism, but it could in reality be consistent with the original understanding of the Fourteenth Amendment. Because the Fourteenth Amendment borrowed the Privileges or Immunities Clause from Article IV of the Constitution, one could argue that the original understanding of the Fourteenth Amendment contemplated that its protected privileges and immunities would change over time. Therefore, if a right was a fundamental right at the time the Fourteenth Amendment was passed, that right would certainly fall within the confines, and receive the protections, of the Fourteenth Amendment. If, however, a right was not a fundamental right but became a fundamental right sometime after the Fourteenth Amendment was passed, the right would still be protected by the Fourteenth Amendment, consistent with the original understanding of the Privileges or Immunities Clause.

Under this reading of the Fourteenth Amendment, new rights, like the right to privacy, could conceivably develop over time so long as there was an Article V consensus as to the rights in question of three-quarters of the states, which there arguably was in *Griswold v. Connecticut*.<sup>89</sup> The argument against giving the Fourteenth Amendment such an evolutionary reading is that Justice Washington denied that the Privileges and Immunities Clause of Article IV had such an evolving meaning in *Corfield v. Coryell, and everyone in*

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86. See *infra* Section II.A.

87. See McConnell, *supra* note 6, at 1135; see also McConnell, *Reply to Professor Klarman*, *supra* note 38, at 1950-52.

88. McConnell, *Reply to Professor Klarman*, *supra* note 38, at 1951.

89. 381 U.S. 479, 485 (1965) (plurality opinion).

1868 seemed to believe him. Professor Calabresi is of the view that the privileges and immunities language in Article IV is evolutionary while the very same language in the Fourteenth Amendment is not. Different generations of Americans understood the same language to mean different things at different points in our history. The right to receive a public school education was a fundamental right in 1868, and so that right was protected by the Fourteenth Amendment, as it was originally understood.<sup>90</sup>

We now turn to the state constitutional provisions regarding the right to a public school education that were in place at the time the Fourteenth Amendment was passed in 1868. We seek an answer to the question of whether three-quarters of the states in 1868 thought that there was a fundamental right to receive a public school education.

## II. THREE-QUARTERS OF THE STATES RECOGNIZED A RIGHT TO A PUBLIC SCHOOL EDUCATION BOTH IN 1868 AND IN 1954

The right to a public school education was not one of the rights explicitly protected by the Civil Rights Act of 1866, and for that reason Raoul Berger thought *Brown v. Board of Education* was wrongly decided as a matter of original meaning.<sup>91</sup> We disagree. The Fourteenth Amendment forbids discrimination in the making and enforcing of laws that “abridge the privileges or immunities of citizens” and not merely laws that abridge citizens’ common law rights.<sup>92</sup> We think the Fourteenth Amendment’s antidiscrimination command thus applies at a minimum to rights that were recognized in state constitutional law by three-quarters of the states in 1868. It turns out that the right to a public school education is such a right.

Moreover, if one looks at the changes in the state constitutional provisions between 1868 and 1954, it becomes clear that between 1868 and 1954 there was a continuous fundamental right to a desegregated public school education. The Fourteenth Amendment forbids discrimination based on race as to all fundamental rights or privileges or immunities. Because access to a public school education was a fundamental right in 1868, racially segregated

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90. See *infra* Part II.

91. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 244-45 (1977).

92. U.S. CONST. amend. XIV, § 1.

schools were then and are now unconstitutional given the original meaning of the Fourteenth Amendment.

In determining whether there was a fundamental right to a public school education based on state constitutional law in 1868, there are two questions that must be addressed. The first is whether the constitutions of three-quarters of the states recognized a right to a public school education at all. The second is whether the constitutions of more than one-quarter of the states had provisions that explicitly provided for racially segregated schools. We will now examine these two questions in turn.

#### A. The Right to a Public School Education in 1868

Chief Justice Earl Warren said in the unanimous opinion in *Brown v. Board of Education* that “we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted.”<sup>93</sup> Nonetheless, the starting point of an originalist inquiry requires us to do precisely what Chief Justice Warren said could not be done.<sup>94</sup> We must ask what state constitutions said or did not say in 1868 about the right to a public school education.

##### 1. *State Constitutional Provisions Regarding Education in 1868*

There were thirty-seven states that were members of the Union in 1868,<sup>95</sup> and their state constitutional provisions on the right to a public school education can be divided into three categories. The first group consists of those states that explicitly recognized the right to a public school education.<sup>96</sup> In these states, the state constitutions

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93. 347 U.S. 483, 492 (1954).

94. *Id.*

95. These states include: Alabama, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin.

96. Although the language of each state’s constitution was different, for purposes of this Article, any language that required the legislature to establish a system of public schools is sufficient to create a right to a public school education in that state. A state was considered to recognize the right to a public school education if the constitutional provision stated that the state legislature “shall” or has the “duty” to establish a system of public schools. See *infra* notes 97-126 and accompanying text (providing the actual constitutional provisions that recognized

explicitly required that a system of public schools be established by the state. The state constitutions in these states all said explicitly that the state legislature “shall” (i.e. it has the “duty” and therefore it “must”) establish a system of free public schools. We count as being in this first category of states any state whose constitution contained mandatory language which made the establishment of free public schools open to all students obligatory. Astonishingly, this first group of state constitutions includes thirty of the thirty-seven states that were in the Union in 1868. These thirty states include: Alabama,<sup>97</sup> Arkansas,<sup>98</sup> California,<sup>99</sup> Delaware,<sup>100</sup> Florida,<sup>101</sup> Georgia,<sup>102</sup> Indiana,<sup>103</sup> Kansas,<sup>104</sup> Louisiana,<sup>105</sup> Maine,<sup>106</sup> Maryland,<sup>107</sup>

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the right to a public school education). However, as will be explained below, some constitutional provisions referenced education, public schools, or a school fund in some way, but it is less clear whether such provisions are sufficient to establish a right to a public school education.

97. ALA. CONST. of 1867, art. XI, § 6, *reprinted in* 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 82, 95 (William F. Swindler ed., 1973) (“It shall be the duty of the board to establish, throughout the State, in each township or other school-district which it may have created, one or more schools, at which all the children of the State between the ages of five and twenty-one years may attend free of charge.”).

98. ARK. CONST. of 1868, art. IX, § 1, *reprinted in* ARK. CODE ANN. 549, 567 (1987) (“A general diffusion of knowledge and intelligence among all classes being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain a system of free schools for the gratuitous instruction of all persons in this State between the ages of five and twenty-one years.”).

99. CAL. CONST. of 1849, art. IX, § 3, *reprinted in* 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 97, at 447, 456 (“The legislature shall provide for a system of common schools, by which a school shall be kept up and supported in each district at least three months in every year; and any school district neglecting to keep up and support such a school, may be deprived of its proportion of the interest of the public fund during such neglect.”).

100. DEL. CONST. of 1831, art. VII, § 11, *reprinted in* DEL. CODE ANN. 285, 301-02 (2007) (“The legislature shall, as soon as conveniently may be, provide by law for ascertaining what statutes and parts of statutes, shall continue to be in force within this State . . . for establishing schools, and promoting arts and sciences.”).

101. FLA. CONST. of 1868, art. IX, § 1, *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 353, 361 (William F. Swindler ed., 1973) (“It is the paramount duty of the State to make ample provision for the education of all the children residing within its borders, without distinction or preference.”).

102. GA. CONST. of 1868, art. VI, § 1, *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 101, at 497, 509 (“The general assembly, at its first session after the adoption of this constitution, shall provide a thorough system of general education, to be forever free to all children of the State, the expense of which shall be provided for by taxation or otherwise.”).

Massachusetts,<sup>108</sup> Michigan,<sup>109</sup> Minnesota,<sup>110</sup> Mississippi,<sup>111</sup> Missouri,<sup>112</sup> Nebraska,<sup>113</sup> Nevada,<sup>114</sup> New Hampshire,<sup>115</sup> New York,<sup>116</sup>

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103. IND. CONST. of 1851, art. VIII, § 1, *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 378, 387 (William F. Swindler ed., 1974) (“Knowledge and learning generally diffused throughout a community being essential to the preservation of a free government, it shall be the duty of the general assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge, and equally to all.”).

104. KAN. CONST. of 1859, art. VI, § 2, *reprinted in* 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 82, 90 (William F. Swindler ed., 1975) (“The legislature shall encourage the promotion of intellectual, moral, scientific, and agricultural improvement, by establishing a uniform system of common schools, and schools of a higher grade, embracing normal, preparatory, collegiate, and university departments.”).

105. LA. CONST. of 1868, tit. VII, art. 135, *reprinted in* 4-A SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 145, 158 (William F. Swindler ed., 1975) (“The general assembly shall establish at least one free public school in every parish throughout the State, and shall provide for its support by taxation or otherwise. All children of this State between the years of six and twenty-one shall be admitted to the public schools or other institutions of learning sustained or established by the State in common, without distinction of race, color, or previous condition. There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana.”).

106. ME. CONST. of 1819, art. VIII, *reprinted in* 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 104, at 314, 323 (“A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people, to promote this important object, the legislature are authorized, and it shall be their duty, to require the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools . . .”).

107. MD. CONST. of 1867, art. VIII, § 1, *reprinted in* 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 104, at 448, 472 (“The general assembly, at its first session after the adoption of this constitution, shall by law establish throughout the State a thorough and efficient system of free public schools, and shall provide by taxation or otherwise for their maintenance.”).

108. MASS. CONST. ch. V, § 2 (1780), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 92, 106 (William F. Swindler ed., 1975) (“Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools, and grammar-schools in the towns . . .”).

109. MICH. CONST. of 1850, art. XIII, § 4, *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 222, 234 (“The legislature shall, within five years from the adoption of this constitution, provide for

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and establish a system of primary schools, whereby a school shall be kept, without charge for tuition, at least three months in each year, in every school-district in the State, and all instruction in said schools shall be conducted in the English language.”).

110. MINN. CONST. of 1857, art. VIII, § 1, *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 303, 311 (“The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature to establish a general and uniform system of public schools.”).

111. MISS. CONST. of 1868, art. VIII, § 1, *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 377, 385 (“As the stability of a republican form of government depends mainly upon the intelligence and virtue of the people, it shall be the duty of the legislature to encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools, by taxation or otherwise, for all children between the ages of five and twenty-one years, and shall, as soon as practicable, establish schools of higher grade.”).

112. MO. CONST. of 1865, art. IX, § 1, *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 515, 531 (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free schools for the gratuitous instruction of all persons in this State between the ages of five and twenty-one years.”).

113. NEB. CONST. of 1866, art. I, § 16, *reprinted in* 6 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 150, 152 (William F. Swindler ed., 1976) (“Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship and to *encourage schools and the means of instruction.*”) (emphasis added).

114. NEV. CONST. of 1864, art. XI, § 2, *reprinted in* 6 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 113, at 263, 275 (“The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school-district at least six months in every year, and any school-district neglecting to establish and maintain such a school . . . may be deprived of its proportion of the interest of the public-school fund during such neglect or infraction . . .”).

115. N.H. CONST. part II (1784), *reprinted in* 6 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 113, at 344, 355 (“K[nowledge], and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and the magistrates, in all future periods of this government to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people.”).

North Carolina,<sup>117</sup> Ohio,<sup>118</sup> Oregon,<sup>119</sup> Pennsylvania,<sup>120</sup> Rhode Island,<sup>121</sup> South Carolina,<sup>122</sup> Texas,<sup>123</sup> Vermont,<sup>124</sup> West Virginia,<sup>125</sup> and Wisconsin.<sup>126</sup>

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116. N.Y. CONST. of 1846, art. IX, *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 192, 205 (William F. Swindler ed., 1978) (“The capital of the common-school fund, the capital of the literature fund, and the capital of the United States deposit fund, shall be respectively preserved inviolate. The revenues of the said common-school fund shall be applied to the support of common schools; the revenues of the said literature fund shall be applied to the support of academies, and the sum of twenty-five thousand dollars of the revenues of the United States deposit fund shall each year be appropriated to and made a part of the capital of the said common-school fund.”).

117. N.C. CONST. of 1868, art. IX, § 2, *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 116, at 414, 427 (“The general assembly, at its first session under this constitution, shall provide, by taxation and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years.”).

118. OHIO CONST. of 1851, art. VI, § 2, *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 116, at 558, 566 (“The general assembly shall make such provisions, by taxation or otherwise, as, with the interest arising from the school trust-fund, will secure a thorough and efficient system of common schools throughout the State; but no religious or other sect or sects shall ever have any exclusive right to or control of any part of the school-funds of this State.”).

119. OR. CONST. of 1857, art. VIII, § 3, *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 205, 215 (William F. Swindler ed., 1979) (“The legislative assembly shall provide by law for the establishment of a uniform and regular system of common schools.”).

120. PA. CONST. of 1838, art. VII, § 1, *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 119, at 296, 302 (“The legislature shall, as soon as conveniently may be, provide by law for the establishment of schools throughout the State, in such manner that the poor may be taught gratis.”).

121. R.I. CONST. art. XII, §1 (1842), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 119, at 386, 395 (“The diffusion of knowledge, as well as of virtue, among the people being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools, and to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education.”).

122. S.C. CONST. of 1868, art. X, § 3, *reprinted in* 2 AMERICAN CONSTITUTIONS 276, 302 (Franklin B. Hough ed., 1872) (“The General Assembly shall, as soon as practicable after the adoption of this Constitution, provide for a liberal and uniform system of free public schools throughout the State, and shall also make provision for the division of the State into suitable school districts. There shall be kept open, at least six months in each year, one or more schools in each school district.”).

123. TEX. CONST. of 1868, art. IX, § 1, *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 296, 309 (William F. Swindler ed.,

The second group of state constitutions in 1868 consists of states whose constitutions arguably conferred a right to a free public school education. In both Kentucky and Tennessee, for example, the state constitutions mentioned a school fund that had to be established, but it could be argued that these two state constitutions stop somewhat short of actually requiring the state legislature to set up a system of public schools.<sup>127</sup> We think that if a state constitution

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1979) (“It shall be the duty of the legislature of this State to make suitable provisions for the support and maintenance of a system of public free schools, for the gratuitous instruction of all the inhabitants of this State between the ages of six and eighteen years.”); *id.* § 4, at 310 (“The legislature shall establish a uniform system of public free schools throughout the State.”).

124. VT. CONST. ch. II, § 41 (1793), *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 123, at 507, 514 (“Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force and duly executed; and a competent number of schools ought to be maintained in each town, for the convenient instruction of youth, and one or more grammar-schools be incorporated, and properly supported in each county in this State. And all religious societies or bodies of men that may be hereafter united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates which they in justice ought to enjoy, under such regulations as the general assembly of this State shall direct.”).

125. W. VA. CONST. of 1861, art. X, § 2, *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 341, 358 (William F. Swindler ed., 1979) (“The legislature shall provide, as soon as practicable, for the establishment of a thorough and efficient system of free schools.”).

126. WIS. CONST. of 1848, art X, § 3, *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 125, at 418, 433 (“The Legislature shall provide by law for the establishment of District Schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition, to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein.”).

127. *See* KY. CONST. of 1850, art. XI, § 1, *reprinted in* KY. GEN. STAT. 90, 117 (1873) (“The capital of the fund called and known as the ‘Common School Fund,’ consisting of one million two hundred and twenty-five thousand seven hundred and sixty-eight dollars and forty-two cents . . . shall be held inviolate, for the purpose of sustaining a system of common schools.”); TENN. CONST. of 1834, art. XI, § 10, *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 123, at 152, 162-63 (“Knowledge, learning, and virtue being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State being highly conducive to the promotion of this end, it shall be the duty of the general assembly, in all future periods of this government, to cherish literature and science. And the fund called the ‘common-school fund,’ and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the general assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall

explicitly required that a school fund be maintained, then, in our opinion, the state constitution implicitly recognized an individual child's right to a free public school education. It is pretty hard to see what purpose a mandatory state school fund would serve if the state were not in fact compelled to maintain a system of free public schools. We therefore are strongly inclined to count Kentucky and Tennessee along with the thirty other states whose constitutions mandated the creation of a free system of public schools.

Another odd wrinkle is present in the Iowa Constitution of 1857, which had mandatory language calling for a system of schools to be established. Such language would generally be sufficient to include Iowa in the category of states that recognized a child's right to a free public school education.<sup>128</sup> But in 1864, Iowa passed laws relating to "education and schools" and established a Board of Education, while the constitutional provisions calling for a system of free public schools to be established were abolished.<sup>129</sup> However, the

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remain a perpetual fund, the principal of which shall never be diminished by legislative appropriation, and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund, or any part thereof, to be diverted to any other use than the support and encouragement of common schools . . .").

128. Iowa's constitution of 1846 stated, "The educational interest of the State, to include common schools and other educational institutions, shall be under the management of a board of education." IOWA CONST. of 1846, art. IX, § 1, *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 103, at 434, 444. It also stated, "The members of the board of education shall provide for the education of all the youths of the State, through a system of common schools. And such school shall be organized and kept in each school-district at least three months in each year." *Id.* § 12. In 1857, Iowa adopted a new constitution. IOWA CONST., *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 103, at 451. Article IX, § 1 and § 12 contained identical provisions to those sections of the 1846 constitution, as stated above, except that § 12 also stated, "Any district failing, for two consecutive years, to organize and keep up a school may be deprived of their portion of the school-fund." *Id.* §§ 1, 12, at 461-62. The 1857 constitution, as amended, is still valid today and this was applicable in 1868 and 1954, as amended in those years. *See* IOWA CONST. (West, Westlaw through Nov. 2012 amendments).

129. However, in 1864, the first part of Article IX (which related to "education and school" and established the Board of Education) was abolished, leaving only the second part of Article IX dealing with "school fund and school land." IOWA CONST. art. IX. However, there were statutes that were enacted that related to the same subject matter. *See* IOWA CODE § 256.3. Therefore, with the 1864 abolition of these provisions one could argue that it was unclear whether or not there was a right to a free public school education in 1868 or 1954, based on the then-current state constitution. It also seems as though the provisions addressing

constitutional provisions regarding the school fund and its mandatory character remained intact. Thus, one could argue over whether in 1868 the Iowa Constitution still included mandatory language calling for a system of free public schools to be established. As with Kentucky and Tennessee, the Iowa Constitution did require that a school fund be established, so we lean toward the view that in Iowa, as well, state law did recognize a mandatory right on the part of a child to a free public school education. This brings the number of states recognizing such a right in 1868 up to thirty-three out of thirty-seven.

Finally, some states' constitutions in 1868 did not specifically mention education or the establishment of a system of free public schools. Although these states could be argued not to recognize the right to a free public school education in 1868, only four states, Connecticut,<sup>130</sup> Illinois,<sup>131</sup> New Jersey,<sup>132</sup> and Virginia<sup>133</sup> fall in that

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“school fund and school lands” were still applicable. It is not at all clear why this would matter if there were no right to a free public school education or a requirement that the legislature establish a system of public schools.

To further confuse things, the constitutions in the statutes in 1897, 1949, and 1962 still contain Article IX, § 12 which states:

The board of education shall provide for the education of all the youths of the state, through a system of common schools, and such schools shall be organized and kept in each school district at least three months in each year. Any district failing, for two consecutive years, to organize and keep up a school, as aforesaid, may be deprived of their portion of the school fund.

IOWA CONST. art. IX, § 12, *reprinted in* IOWA CODE 60, 103 (1897); IOWA CONST. art. IX, § 12, *reprinted in* IOWA CODE ANN. 91, 298 (West 1949); IOWA CONST. art. IX, § 12, *reprinted in* IOWA CODE lxvi, lxxviii (1962). But in the 1949 statutes, there is a pocket part from 1989 that seems to indicate that these provisions were abolished. IOWA CONST. art. IX, *reprinted in* IOWA CODE ANN. 13, 62 (West Supp. 1989).

130. In 1868, the Connecticut Constitution of 1818 was in effect and that constitution stated:

The fund called the school fund shall remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public or common schools throughout the State, and for the equal benefit of all the people thereof. The value and amount of said fund shall, as soon as practicable, be ascertained in such manner as the general assembly may prescribe, published, and recorded in the comptroller's office; and no law shall ever be made authorizing said fund to be diverted to any other use than the encouragement and support of public or common schools among the several school societies, as justice and equity shall require.

CONN. CONST. of 1818, art. VIII, § 2, *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 101, at 144, 150. In 1955, Connecticut

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adopted another constitution, which contained the same language regarding education that was quoted above from the 1818 constitution. *See* CONN. CONST. of 1955, art. VIII, § 2, *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 101, at 154, 164-65. In 1965, Connecticut adopted yet another constitution. CONN. CONST. art. XIV. The 1965 constitution provides, “There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.” WESLEY W. HORTON, THE CONNECTICUT STATE CONSTITUTION: A REFERENCE GUIDE 144 (1993). The paragraph from the 1818 and 1955 constitutions quoted above now appears in Article VIII, § 4. CONN. CONST. art. VIII, § 4. This historical account of the constitutions of Connecticut is relevant because “[i]t was only in 1965, however, that the Constitution guaranteed a free public elementary and secondary education. The legal significance of this guarantee is that it made education a fundamental right.” HORTON, *supra*, at 145. Thus, education was not a fundamental right in Connecticut in 1868.

131. Illinois adopted constitutions in 1818 and 1848. ILL. CONST. of 1818 & 1848, *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 103, at 237, 250. But neither the constitution of 1818 nor the constitution of 1848 referenced education, establishing public schools, or the right to a free public education. *Id.* at 237-47, 250-71 (lacking references to education in the 1818 constitution). The draft of the 1862 constitution stated that “[t]he general assembly shall provide for a uniform, thorough and efficient system of free schools throughout the state.” ILL. CONST. of 1862, art. X, § 3 (draft), *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 103, at 274, 283. However, the draft constitution was just that, a draft, and Illinois did not formally adopt a new constitution until 1870. ILL. CONST. of 1870, *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 103, at 286. The constitution of 1870 stated, “The general assembly shall provide a thorough and efficient system of free schools, whereby all the children of this State may receive a good common-school education.” *Id.* at 300. But the 1870 constitution was not in effect in 1868. Thus, although the 1848 constitution, as amended, was still effective as of 1868, there seems to be an indication that the right to an education was recognized as least by 1862, and certainly by 1870. However, in 1868, the 1848 constitution still controlled, which did not mention education.

132. In New Jersey, the constitution of 1844 was in effect in 1868. *See* N.J. CONST. of 1844, *reprinted in* A DIGEST OF THE LAWS OF NEW JERSEY xix, xix (Lucius Q. C. Elmer & John T. Nixon eds., 4th ed. 1868). New Jersey adopted a new constitution in 1947, which does contain a clause establishing a right to an education. N.J. CONST. art. VIII, § 4, ¶ 1, *reprinted in* N.J. STAT. ANN. 115, 543-44 (West 1971). The constitution of 1947, which is reprinted in the current code of New Jersey, states, “The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.” *Id.* The historical note to this section explains that this section comes from the 1844 constitution as amended in 1875. *Id.* at 544. This is correct based on Westlaw’s version of the current statutes. N.J. CONST. art. VIII, § 4, ¶ 1. Thus, it seems like the right did not exist in 1868 because this clause first appeared in 1875. In fact, the older statutes of New Jersey seem to confirm this change as the clause establishing public schools was not in the constitution that appeared in the 1861 Code of New Jersey, but it did

category, and all four adopted clauses mandating the creation of free

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appear in the 1896 Code. New Jersey Constitution Article IV, § 7, Paragraph 6, *reprinted in* Digest of the Laws of New Jersey states:

The fund for the support of free schools, all money, stock, and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public schools, for the equal benefit of all people of the state; and it shall not be competent for the legislature to borrow, appropriate, or use the said fund or any part thereof, for any other purpose, under any pretence whatever.

N.J. CONST. art. IV, § 7, ¶ 6, *reprinted in* A DIGEST OF THE LAWS OF NEW JERSEY xix, xxiv (Lucius Q. C. Elmer & John T. Nixon eds., 3d ed. 1861). This provision could create an arguable right to education in 1861 because it establishes a school fund even if the specific § 4 was not in the constitution yet. Also, the constitutions that appear in the Code of 1937 and in the current code confirm that the clause was added in 1875. N.J. CONST. art. IV, § 7, ¶ 6, *reprinted in* N.J. REV. STAT. 139, 146 (1937); N.J. CONST. art. VIII, § 4, ¶ 1, *reprinted in* N.J. STAT. ANN. 18, 720 (West 2009). In the 1937 Code, the provision is in Article IV, § 7, Paragraph 6. N.J. CONST. art. IV, § 7, ¶ 6, *reprinted in* N.J. REV. STAT. 139, 146 (1937).

133. Virginia adopted constitutions in 1776, 1829, 1851, 1864, 1870, 1902, and 1970. *See* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 3 (William F. Swindler ed., 1979). The website <http://confinder.richmond.edu> states that the constitutions of Virginia were passed in 1776, 1830, 1851, 1861, 1864, 1869, 1872, and 1902. One page of the website states that there were constitutions of 1829, 1851, and 1861. CONSTITUTION OF 1861, CONSTITUTION FINDER, *available at* <http://confinder.richmond.edu/admin/docs/va1861.pdf>. Another page shows there were constitutions of 1776, 1872, and 1902. *See* CONSTITUTION FINDER, <http://confinder.richmond.edu/> (last visited Oct. 11, 2014). However, 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra*, indicates the years slightly differently and seems to be missing two years. Regardless of which of these dates are correct, the constitution of 1864 was the one in effect in 1868. There seems to be no mention of schools or education in the 1776, 1829, 1851, or 1864 constitutions. *Id.* at 217-18 (indicating that the first education provision arose in the constitution of 1870). Thus, it seems like there was no right to an education in 1868 because the constitutional right first appeared in 1870. Virginia's Constitution of 1870 had an education article. This article provided:

The general assembly shall elect, in joint ballot, within thirty days after its organization under this constitution, and every fourth year thereafter, a superintendent of public instruction. He shall have the general supervision of the public free-school interests of the State, and shall report to the general assembly for its consideration within thirty days after his election a plan for a uniform system of public free schools.

VA. CONST. of 1870, art. VIII, § 1, *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra*, at 112, 133. The language “plan for a uniform system of public free schools,” although not dispositive, is certainly indicative that such a system did not exist prior to this constitution of 1870.

public schools very soon after 1868. Thus, thirty states clearly recognized a child's right to a free public school education in 1868, when the Fourteenth Amendment was adopted, an additional three states that arguably recognized that right in 1868, and only four states did not seem to recognize the right in 1868, although those four all recognized it fairly soon thereafter. It is thus as clear as day that there was an Article V consensus of three-quarters of the states in 1868 that recognized that children have a fundamental right to a free public school education.<sup>134</sup> A child's right to a free public school education was clearly a privilege or immunity of state citizenship in 1868 as to which racial discrimination was forbidden by the Fourteenth Amendment. The outcome of *Brown v. Board of Education* was thus a correct outcome not only in 1954 but also in 1868.

It might be objected that state constitutional clauses imposing a mandatory duty on the states to provide children with a free public school education do not confer rights in the way that state constitutional bills of rights did with their free speech and free exercise of religion clauses. We disagree with this objection. Suppose a state constitution said, "the government of this state shall not abridge the freedom of speech of any individual." Suppose then the government did abridge the freedom of speech of a citizen of the state named John Stuart Mill who was prosecuted for having given a speech about an upcoming election. Surely, John Stuart Mill in that case would be able to successfully defend himself from his state prosecution by saying that the government had violated a constitutional duty and command in trying to prosecute him. The phrase "shall not abridge the freedom of speech" means "must not and cannot abridge the freedom of speech." We think therefore that where state constitutions say a state "shall" or "must" observe their duty to provide a child with a free public school education an individual right has clearly been created. The states' obligation or duty to provide a public school education is merely the flip side of the child's right to such an education.

As we said above, thirty-three states either explicitly or implicitly recognized a child's right to a free public school education

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134. Three-quarters of thirty-seven is 27.75. Thus, with thirty state constitutions clearly recognizing the right to a public school education the three-quarter requirement was satisfied by considering the states that clearly recognized the right. With an additional three states that arguably recognized the right, the overwhelming majority of state constitutions in effect in 1868 recognized the right to a public school education.

in 1868, and no state constitution in 1868 explicitly required racially segregated public schools,<sup>135</sup> although the constitution of one state, Missouri, did explicitly permit racially segregated schools.<sup>136</sup> In fact, at least two state constitutions in 1868, the constitutions of Louisiana and South Carolina, explicitly *prohibited* racial discrimination or segregation in public schools.<sup>137</sup> The protection of racially integrated public schools in 1868 by two formerly Confederate states undoubtedly reflects the pressure brought to bear on those states by the Reconstruction Congress, which imposed stern conditions on the states that had seceded prior to allowing them back into the Union. Nonetheless, the fact remains that during the magic moment of 1868, when the Fourteenth Amendment was ratified and when its original public meaning was fixed for all time: (1) no state constitution required racially discriminatory public schools; (2) only one state constitution permitted such schools; and (3) two state constitutions actually required racially integrated public schools. There is thus no support in the state constitutional ethos of 1868 for racial segregation in public schools. Such segregation undoubtedly existed *de facto*, but it did not exist *de jure* in state constitutional law. A formalist looking

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135. It is accurate to say that in 1868 no state constitution required segregated schools. However, it is slightly misleading to say that the first clause requiring segregated schools appeared in 1870 because the Texas Constitution of 1866 had a clause requiring segregated schools. TEX. CONST. of 1866, art. X, § 7, *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 123, at 278, 294 (“That all the sums arising from said tax which may be collected from Africans, or persons of African descent, shall be exclusively appropriated for the maintenance of a system of public schools for Africans and their children; and it shall be the duty of the legislature to encourage schools among these people.”). However, Texas passed a new constitution in 1868, which did not mention the requirement for segregated schools. TEX. CONST. of 1868, art. X, § 7, *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 123, at 309-10. Thus, even Texas, which did require segregated schools prior to 1868, did not require segregation in its 1868 constitution.

136. See MO. CONST. of 1865, art. IX, § 2, *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 515, 531 (“Separate schools *may* be established for children of African descent.”) (emphasis added).

137. See LA. CONST. of 1868, tit. VII, art. 135, *reprinted in* 4-A SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 105, at 145, 158 (“There shall be no separate schools or institutions of learning established exclusively for any race by the State of Louisiana.”); S.C. CONST. of 1868, art. X, § 10, *reprinted in* 2 AMERICAN CONSTITUTIONS, *supra* note 122, at 276, 303 (“All the public schools, colleges, and universities of this State, supported in whole or in part by the public funds, shall be free and open to all the children and youths of the State, without regard to race or color.”).

at state constitutional texts would have to conclude that there was essentially no support in enacted positive state constitutional law in 1868 for racial segregation of public schools.

This happy state of affairs unfortunately began soon to unravel in the years after 1868. Beginning in 1870, state constitutional provisions requiring segregation started to appear, especially in the former Confederate states, which by then had been readmitted to the Union. The first state constitutional provision that required segregated public schools after 1868 appeared in Tennessee's Constitution of 1870.<sup>138</sup> Such provisions continued to appear in other state constitutions up through the early 1900s.<sup>139</sup> But by 1870, the original meaning of the Fourteenth Amendment as to school segregation had hardened into cement. An overwhelming three-quarters majority of the thirty-seven states either explicitly or implicitly recognized the right to a public school education in 1868, and no state constitution required segregated public schools in

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138. TENN. CONST. of 1870, art. XI, § 12, *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 123, at 171, 186 (“No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school.”); *see also* Eastman, *supra* note 50, at 29 (noting that Tennessee’s Constitution of 1870 was the first state constitution to require segregated schools). *But see* MO. CONST. of 1865, art. IX, § 2, *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 515, 531 (“Separate schools *may* be established for children of African descent.”); *see also supra* note 135 (explaining that Texas’s Constitution of 1866 required segregated schools, but Texas’s Constitution of 1868 did not require segregated schools).

139. OKLA. CONST. art. XIII, § 3 (1907), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 119, at 95, 137 (“Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained. The term ‘colored children’ as used in this section, shall be construed to mean children of African descent. The term ‘white children’ shall include all other children.”). Although Oklahoma was the last state to require segregation in its constitution, Louisiana’s Constitution of 1921 also had a provision requiring segregated schools. *See* LA. CONST. of 1921, art. XII, § 1, *reprinted in* 4-A SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 105, at 329, 402 (“Separate free public schools shall be maintained for the education of white and colored children . . .”). However, Louisiana’s Constitution of 1898 also required segregated schools. LA. CONST. of 1898, art. 248, *reprinted in* 4-A SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 105, at 216, 269. Thus, when Oklahoma became a state in 1907 and required segregated schools, Louisiana’s Constitution of 1898 was in force, which required segregated schools. Therefore, Oklahoma was the last state to require segregated schools, but Louisiana’s Constitution of 1921 may have been the last adopted constitution to require segregated schools.

1868.<sup>140</sup> It is thus as clear as day from a formalist perspective that there was a fundamental right to a non-segregated public school education as an original matter under the Fourteenth Amendment. There may well have been de facto school segregation in 1868, but it was contrary to state constitutional law and thus did not exist de jure.

## 2. *Evidence Suggesting that Education Was Not a Fundamental Right in 1868*

Notwithstanding the overwhelming state constitutional evidence supporting the claim that children did have a fundamental right to a public school education in 1868, Professor McConnell mentioned in his article *Originalism and the Desegregation Decisions* several state practices of the 1860s that he thinks imply that children did not have a fundamental right to a public school education in 1868, when the Fourteenth Amendment was adopted.<sup>141</sup> These de facto state educational practices must be evaluated in light of the overwhelming state constitutional evidence from 1868 in support of the proposition that children did have a fundamental right to a public school education at that time. But as we will show below, the circumstantial evidence that concerns Professor McConnell is insufficient to refute the overwhelming de jure evidence from state constitutional law in 1868.

### a. Southern State Practices Regarding Segregation

One of the arguments that is often cited for the proposition that *Brown v. Board of Education* cannot be justified on originalist grounds is that “the practice of school segregation was widespread in both Southern and Northern states, as well as the District of Columbia, at the time of the proposal and ratification of the Amendment, and almost certainly enjoyed the support of a majority of the population even at the height of Reconstruction.”<sup>142</sup> Professor McConnell thus explains that it is unlikely that “Congress would have proposed, or that the people of the various states would have ratified, an Amendment understood to outlaw so deeply engrained an institutional practice.”<sup>143</sup>

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140. *But see* MO. CONST. of 1865, art. IX, § 2, *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 515, 531.

141. McConnell, *supra* note 6, at 955-56.

142. *Id.*

143. *Id.* at 956.

Additionally, although state constitutions even in the southern states recognized a constitutional right to a public school education in 1868,<sup>144</sup> Professor McConnell points out that the “common school system, especially in the South, was uneven, spottily funded, and in many localities nonexistent.”<sup>145</sup> These arguments seem to suggest that regardless of the formal state constitutional law in place de jure in 1868, actual practice de facto suggests that education was not a fundamental right, especially in the South.<sup>146</sup>

We have several reasons for thinking that the points mentioned by Professor McConnell are not fatal to our argument. First, an underlying difference between our argument and Professor McConnell’s is nothing less than the difference between formalism and realism. From a formalist perspective, the focus should be on the text of state constitutional provisions as they were formally written and in place in 1868. As we explained above, the constitutional provisions in effect in 1868 overwhelmingly said that children had a fundamental right in 1868 to a public school education. Professor McConnell’s focus on the actual practices of the states in the 1860s reflects a kind of realism that disregards the law and the actual text of the state constitutions.

Second, we think it is a mistake to overlook the fact that no state required racially segregated schools in a constitution that was in effect in 1868, while two state constitutions explicitly forbade it.<sup>147</sup> The evidence that Professor McConnell points to regarding the “uneven, spottily funded, and in many localities nonexistent”<sup>148</sup> public schools in the South overlooks the fact that it was specifically the southern states that seceded from the Union that needed Congress to approve their state constitutions to make sure that they were “in conformity with the Constitution of the United States in all respects.”<sup>149</sup> With respect to the issue of racial segregation of public schools, “[t]he Southern states followed a consistent pattern” by either explicitly prohibiting public school segregation, as in South Carolina and Louisiana, or they were at least silent on the matter.<sup>150</sup> Professor McConnell notes that “[d]elegated to virtually every

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144. See *supra* notes 97-126 and accompanying text.

145. McConnell, *supra* note 6, at 1135.

146. *Id.* at 955-56.

147. See *supra* notes 135-37 and accompanying text.

148. McConnell, *supra* note 6, at 1135.

149. *Id.* at 962 (quoting Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429).

150. *Id.*

Southern state constitutional convention argued that desegregated education was necessary to comply with the new national norms of equality.<sup>151</sup> Additionally, Professor McConnell explains that “no constitutional convention of a Southern state seeking readmission to the Union openly adopted a policy of racially segregated education. Although amendments to this effect were proposed, they were uniformly rejected.”<sup>152</sup>

Moreover, the only two states that expressly prohibited racially segregated schools in their state constitutions in 1868 were the southern states of Louisiana and South Carolina.<sup>153</sup> If the southern states specifically did not include provisions requiring segregated schools because those provisions would have prevented the state’s constitution from being approved and the state from being readmitted to the Union, the southern states seemed to have been conscious of the fact that school segregation was unacceptable to the Reconstruction Congress and was quite possibly also a violation of the Fourteenth Amendment, which was then being ratified. From the formalist perspective of a Supreme Court Justice like Antonin Scalia or Clarence Thomas, the lack of state constitutional clauses requiring segregation is significant because it means that, formally, no state constitutions (except for one) even permitted racial segregation in the public schools. The other state constitutions explicitly require that a system of common public schools be required, presumably for the benefit of all children and not only some. But, even if we grant Professor McConnell his focus on the actual practices of the states, we must also take into account the obvious fact that the southern states seem to have consciously omitted constitutional phrases requiring segregation in public schools in their post-Civil War state constitutions, presumably out of fear that such clauses would prevent the readmission of those Confederate States to the Union. We think that this evidence suggests that even realists must concede that any racial school segregation taking place in the South in 1868 was in fact unconstitutional.

Finally, with respect to the concern that it is unlikely “that the people of the various states would have ratified” the Fourteenth Amendment if it were “understood to outlaw [a] deeply

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151. *Id.* at 963 (citing John P. Frank & Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws,”* 1972 WASH. U. L.Q. 421, 459 (1972); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877*, at 322 (1988)).

152. *Id.*

153. *See supra* note 137 and accompanying text.

engrained . . . practice” like school segregation,<sup>154</sup> it is Professor McConnell himself who points out that this is exactly what happened with respect to voting rights under the Fifteenth Amendment.<sup>155</sup> As Professor McConnell explains:

Consider the Fifteenth Amendment. Given the clarity of its language, I do not suppose . . . anyone else would dispute that the Amendment’s purpose was to give otherwise qualified black citizens the vote. Yet the evidence of popular opinion and actual practice on this issue is virtually the same as that regarding school desegregation: enfranchisement of black citizens was wildly unpopular, had been rejected overwhelmingly by popular referenda in numerous states, was repudiated by the Republican platform in 1868, and had been adopted in actual practice only by a small handful of states. . . . [I]f we focus on evidence of popular opinion rather than the legal concepts embodied in the Amendment[,] the Fifteenth Amendment cannot possibly mean what it says.<sup>156</sup>

Just as the language of the Fifteenth Amendment gave black citizens the right to vote, even though popular opinion may have been to the contrary, the language of the Fourteenth Amendment gave all children the right to an integrated public school education, even though popular opinion may have been against it.<sup>157</sup> Moreover, in the immediate aftermath of the Supreme Court’s decision in *Brown v. Board of Education*, public opinion polls from 1954 suggested that at least 40% of the U.S. population was still opposed to desegregated public schools.<sup>158</sup> Thus, if one focuses on public opinion, one could easily argue that *Brown* itself was decided incorrectly as well. For this reason, it is important for constitutional lawyers to focus on the language of the state constitutional provisions in effect in 1868 and not on what public opinion was like at the time. The whole purpose of the Fourteenth Amendment was to change entrenched practices, which suggests it is a mistake to interpret that Amendment in 1868 in light of some of the very practices it was meant to change. The fact that many members of Congress and of the state legislatures did not understand what they were voting for with the Fourteenth Amendment is likewise irrelevant. It is the text of the Amendment that was

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154. McConnell, *supra* note 6, at 956.

155. McConnell, *Reply to Professor Klarman*, *supra* note 38, at 1939.

156. *Id.*

157. *Id.*

158. *The Gallup Poll #538*, GALLUP BRAIN,

<http://brain.gallup.com/documents/questionnaire.aspx?STUDY=AIP00538&p=3>  
(last visited Oct. 11, 2014).

constitutionalized, not the original expected applications of those who voted for it.<sup>159</sup>

The fact that some of the schools in the South may have been unfunded, undeveloped, or nonexistent in the wake of the absolute devastation caused by the Civil War or that popular opinion may have been against desegregated schools is totally irrelevant. The question of whether or not children had a Privileges or Immunities Clause right under the Fourteenth Amendment to a public school education is a question of law and not of fact. Well over three-fourths of the state constitutions in effect in 1868 explicitly and textually guaranteed this right.<sup>160</sup> Even if the states did not have a fully developed public school system in 1868, that does not change the fact that state constitutions required that common public schools be maintained and established. State constitutional law makes it clear that there was a fundamental right to a free public school education in 1868.

It is true that in 1868 the public schools maintained by the federal government in the District of Columbia were racially segregated by law, but this does not change our legal analysis a bit, as we explain below.<sup>161</sup> Professor McConnell himself shows why the practice in the District of Columbia law is not as relevant as it may at first seem.<sup>162</sup>

#### b. Compulsory School Attendance Laws

The argument that there was no fundamental right of a child to have a free public school education in 1868 is sometimes supported by the lack of compulsory education laws at that time. These laws are significant because Chief Justice Warren's opinion in *Brown v. Board of Education* relied on state compulsory school attendance laws, at least in part, when it said that "education is perhaps the most important function of state and local governments."<sup>163</sup> Chief Justice Warren added that the importance of a free public school education in our democratic society is shown by "[c]ompulsory school attendance laws and [by] the great expenditures [made by the states] for education."<sup>164</sup> Chief Justice Warren added that "[e]ven in the

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159. See generally JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011).

160. See *supra* notes 134-35 and accompanying text.

161. See *infra* text accompanying notes 278-288.

162. See *infra* text accompanying note 288.

163. 347 U.S. 483, 493 (1954).

164. *Id.*

North, the conditions of public education did not approximate those existing today.”<sup>165</sup> The Warren Court thus focused on the facts that “[t]he curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and *compulsory school attendance was virtually unknown*.”<sup>166</sup> Thus, Chief Justice Warren’s opinion seems to imply that there was no meaningful right of children to receive a free public school education until the development of compulsory school attendance laws made school education obligatory as well as free.

This argument is faulty. Compulsory school attendance laws did not get passed as a historical matter solely because of the perceived importance of a grade school education. These laws were motivated first by “a benevolent or paternal humanitarianism that was aimed at protecting the poor and the immigrant from exploitation by greedy manufacturers.”<sup>167</sup> Many children from poor or immigrant families were forced into working to provide food for their families.<sup>168</sup> The compulsory school attendance laws were often passed as much to protect these children from being made to work as to require that they attend school.<sup>169</sup> Second, “the more affluent or comfortable classes” were opposed to “the uncouth habits, ignorance, and loose morals of the lower class, rural, and village peoples who had crowded into the cities.”<sup>170</sup> Thus, “there was undoubtedly a religious motive” behind compulsory school attendance laws “on the part of native-born Protestants to try to prevent the spread of what they considered not only ‘foreign’ language cultures but an alien Roman Catholic religion.”<sup>171</sup> “[T]he educational and social reformers of the mid-1800s turned to compulsory attendance laws” not only out of benevolence and regard for education, but also out of anti-immigrant and anti-Catholic sentiment.<sup>172</sup> Most laws requiring all children to attend school did not go into effect until after the Civil War.<sup>173</sup>

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165. *Id.* at 490.

166. *Id.* (emphasis added).

167. R. FREEMAN BUTTS, PUBLIC EDUCATION IN THE UNITED STATES: FROM REVOLUTION TO REFORM 102 (1978).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 102-03.

173. *Id.* at 103.

[B]etween 1836 and 1854 the New England states and Pennsylvania passed laws requiring certain periods of school attendance for *working* children. The ages affected ranged from those under 12 to those under 15; the length of schooling ranged from 11 weeks to 4 months; usually there was no provision for enforcement.

When it became clear that this kind of legislation was not going to do the job, the child labor abolitionists and the school reformers turned to the task of requiring *all* children to attend school. After the Civil War the movement for compulsory attendance laws applying to all children picked up momentum. In the 1870s, 14 states enacted laws; in the 1880s, another ten.<sup>174</sup>

Although most of the state constitutions required the state legislatures to establish a system of free and common schools, most of the state constitutions and statutes in effect in 1868 did not mandate attendance in the public schools. Not everything that you are freely able to obtain is also compulsory for you to buy. The fact that free public schools did not become compulsory for children to attend until the 1870s and 1880s does not detract at all from the overwhelming state constitutional evidence in favor of a fundamental right to an education in 1868. It is quite possible for one to be entitled to something as a right without it being compulsory that one claim the right. For example, modern Americans living today usually have a right to receive welfare benefits if they should need them,<sup>175</sup> but that does not obligate anyone to take welfare. Similarly, the development of compulsory education laws between 1868 and 1954 does not detract from or limit the fact that there was a right to receive a free education that was guaranteed by three-quarters of the state constitutions in 1868. This is especially the case since it is doubtful whether those laws were originally passed primarily because of the importance of education or simply to protect school-aged children that were being coerced to work for their families or because of anti-Catholic sentiment.

#### B. Changes in the State Constitutional Provisions Regarding Education Between 1868 and 1954

The next question for us to consider is how the state constitutional provisions regarding the right to a public school education changed between 1868 and 1954. Between 1868, the year

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174. *Id.*

175. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (“[Welfare] benefits are a matter of statutory entitlement for persons qualified to receive them.”).

the Fourteenth Amendment was adopted, and 1954, the year when *Brown v. Board of Education* was decided, there were two important changes to the state constitutional provisions regarding education. The first change was that eleven more states entered the union between 1868 and 1954.<sup>176</sup> Therefore, the Union grew from a federation of thirty-seven states, in existence when the Fourteenth Amendment was adopted,<sup>177</sup> to a federation of forty-eight states in 1954. This increase in the number of states led to an increase in the number of states necessary to satisfy the “three-quarters-of-the-states” test between 1868 and 1954.<sup>178</sup> This increased an Article V consensus of the states from twenty-eight states in 1868 to thirty-six states in 1954. It also increased the number of states required to block an Article V consensus from ten states in 1868 to thirteen in 1954.

The biggest change, however, that occurred in state constitutional law relating to education between 1868 and 1954 was that by 1954 a large number of state constitutions contained language that required racial segregation in public schools, even though none of those provisions had appeared in state constitutional law in 1868.<sup>179</sup> This Section will first look at the state constitutional provisions regarding a right to a public school education that were in effect in 1954 to show that Americans still believed in 1954 that a child’s access to a public school education was favored in more than three-quarters of the states. We will then address the effect of the many new state constitutional provisions in 1954 that required segregated schools and that had not existed in 1868.

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176. The following eleven states joined the union in the years indicated parenthetically: Arizona (1912), Colorado (1876), Idaho (1890), Montana (1889), New Mexico (1912), North Dakota (1889), Oklahoma (1907), South Dakota (1889), Utah (1896), Washington (1889), and Wyoming (1890). *Statehood Dates*, 50 STATES, [http://www.50states.com/statehood.htm?sort\\_by\\_date#.VAsg1WRdX2o](http://www.50states.com/statehood.htm?sort_by_date#.VAsg1WRdX2o) (last visited Oct. 11, 2014).

177. See *supra* note 95 and accompanying text.

178. Three-quarters of thirty-seven is 27.75. Therefore, for the necessary three-quarters of the states in 1868, twenty-eight states would have needed to recognize the right to a public school education. But with forty-eight states in 1954, three-quarters of forty-eight is thirty-six. Thus, at least thirty-six states would have needed to recognize the right to a public school education in 1954.

179. See McConnell, *supra* note 6, at 965-66 & n.71.

1. *State Constitutional Provisions Granting the Right to a Public School Education in Force in 1954*

The state constitutional provisions regarding a child's access to a free public school education that were in effect in 1954 can be divided into three categories. The first category consists of those states whose constitutions clearly and unambiguously recognized a child's right to a free public school education in 1954. These state constitutions all used mandatory language by requiring that their legislature has a "duty" or that it "shall" establish a system of free and common public schools. Forty-four of the forty-eight states clearly recognized the right to a public school education in 1954. These states include: Alabama,<sup>180</sup> Arizona,<sup>181</sup> Arkansas,<sup>182</sup>

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180. ALA. CONST. art. XIV, § 256 (1901) ("The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years.").

181. ARIZ. CONST. art. XI, § 1 (1910) ("The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include: 1. Kindergarten schools. 2. Common schools. 3. High schools. 4. Normal schools. 5. Industrial schools."). Furthermore, the Arizona Supreme Court has used sections one and six of Article XI to "establish[] that education is a 'fundamental right' of every person between the ages of six and twenty-one" and that the State has an obligation to "'assure'" that every child receives a "'basic education.'" JOHN D. LESHY, *THE ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE* 247-48 (1993) (quoting *Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973)).

182. ARK. CONST. of 1874, art. XIV, § 1, *reprinted in* ARK. CODE ANN. 37, 284 (1987) (noting in a publisher's note that prior to amendment, this section said, "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction"); ARK. CODE ANN. 453 (1987) (discussing, in a publisher's note, the adoption of Amendment 53 in 1968). In 1968, Arkansas amended the education article of its constitution and that Amendment currently states:

Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education. The specific intention of this amendment is to authorize that in addition to existing constitutional or statutory provisions the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it.

ARK. CONST. art. XIV, § 1, *amended by* ARK CONST. amend. 53, *reprinted in* ARK. CODE ANN. 284 (1987).

California,<sup>183</sup> Colorado,<sup>184</sup> Delaware,<sup>185</sup> Florida,<sup>186</sup> Georgia,<sup>187</sup> Idaho,<sup>188</sup> Illinois,<sup>189</sup> Indiana,<sup>190</sup> Kansas,<sup>191</sup> Kentucky,<sup>192</sup> Louisiana,<sup>193</sup>

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183. CAL. CONST. art. IX, § 5 (1879), *reprinted in* 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 97, at 488 (“The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.”). The 1879 constitution also provided:

The public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools, and technical schools, as may be established by the Legislature, or by municipal or district authority; but the entire revenue derived from the State School Fund, and the State school tax, shall be applied exclusively to the support of primary and grammar schools.

*Id.* § 6.

184. COLO. CONST. art. IX, § 2 (1876), *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 101, at 64, 79 (“The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the State wherein all residents of the State between the ages of six and twenty-one years may be educated gratuitously. One or more public schools shall be maintained in each school-district within the State at least three months in each year; any school-district failing to have such school shall not be entitled to receive any portion of the school-fund for that year.”).

185. DEL. CONST. art. X, § 1 (1897), *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 101, at 260 (“The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means.”).

186. FLA. CONST. art. XII, § 1 (1885) (“The Legislature shall provide for a uniform system of public free schools, and shall provide for the liberal maintenance of the same.”).

187. GA. CONST. art. VIII, § 1 (1945) (“The provision of an adequate education for the citizens shall be a primary obligation of the State of Georgia, the expense of which shall be provided for by taxation.”); *Id.* § 10 (“Public schools systems established prior to the adoption of the Constitution of 1877 shall not be affected by this Constitution.”).

188. IDAHO CONST. art. IX, § 1 (1890) (“The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.”).

189. ILL. CONST. art. VIII, § 1 (1870), *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 103, at 286, 300 (“The general assembly shall provide a thorough and efficient system of free schools, whereby all the children of this State may receive a good common-school education.”).

190. IND. CONST. art. VIII, § 1 (1851), *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 103, at 378, 387

Maine,<sup>194</sup> Maryland,<sup>195</sup> Massachusetts,<sup>196</sup> Michigan,<sup>197</sup> Minnesota,<sup>198</sup> Mississippi,<sup>199</sup> Missouri,<sup>200</sup> Montana,<sup>201</sup> Nebraska,<sup>202</sup> Nevada,<sup>203</sup> New

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(“Knowledge and learning generally diffused throughout a community being essential to the preservation of a free government, it shall be the duty of the general assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge, and equally to all.”).

191. KAN. CONST. art. VI, § 2 (1859), *reprinted in* 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 104, at 82, 90 (“The legislature shall encourage the promotion of intellectual, moral, scientific, and agricultural improvement, by establishing a uniform system of common schools, and schools of higher grade, embracing normal, preparatory, collegiate, and university departments.”).

192. KY. CONST. § 183 (1891) (“The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools . . .”).

193. LA. CONST. art. XII, § 1 (1921), *as amended* (1954) (“The Legislature shall provide for a public educational system of the State to consist of all public schools and all institutions of learning operated by State agencies . . .”).

194. ME. CONST. art VIII (1820) (“A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorised, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools; and it shall further be their duty to encourage and suitably endow, from time to time, as the circumstances of the people may authorise, all academies, colleges, and seminaries of learning within the State: *Provided*, That no donation, grant or endowment shall at any time be made by the Legislature, to any Literary Institution now established, or which may hereafter be established, unless, at the time of making such endowment, the Legislature of the State shall have the right to grant any further powers to, alter, limit or restrain any of the powers vested in, any such literary institution, as shall be judged necessary to promote the best interests thereof.”).

195. MD. CONST. art. VIII, § 1 (1867), *reprinted in* 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 104, at 448, 472 (“The general assembly, at its first session after the adoption of this constitution, shall by law establish throughout the State a thorough and efficient system of free public schools, and shall provide by taxation or otherwise for their maintenance.”); *id.* § 2 (“The system of public schools, as now constituted, shall remain in force until the end of the said first session of the general assembly, and shall then expire, except so far as adopted or continued by the general assembly.”).

196. MASS. CONST. ch. V, § 2 (1780), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 92, 106. The section reads:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them;

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especially the university at Cambridge, public schools, and grammar-schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, and good humor, and all social affections and generous sentiments, among the people.

*Id.* Additionally, there are some relatively recent cases from the Massachusetts Supreme Court that state that there is a constitutional duty on the Commonwealth to ensure education of children in the public schools. *See, e.g., McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516, 519 (Mass. 1993).

197. MICH. CONST. art. XI, § 9 (1908), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 249, 266 (“The legislature shall continue a system of primary schools, whereby every school district in the state shall provide for the education of its pupils without charge for tuition; and all instruction in such schools shall be conducted in the English language. If any school district shall neglect to maintain a school within its borders as prescribed by law for at least 5 months in each year, or to provide for the education of its pupils in another district or districts for an equal period, it shall be deprived for the ensuing year of its proportion of the primary school interest fund.”).

198. MINN. CONST. art. VIII, § 1 (1857), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 303, 311 (“The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature to establish a general and uniform system of public schools.”); *id.* § 3 (“The legislature shall make such provisions, by taxation or otherwise, as, with the income arising from the school-fund, will secure a thorough and efficient system of public schools in each township in the State.”).

199. MISS. CONST. art. VIII, § 201 (1890), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 394, 418 (“It shall be the duty of the legislature to encourage by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools, by taxation, or otherwise, for all children between the ages of five and twenty-one years, and, as soon as practicable, to establish schools of higher grade.”). Additionally, it stated:

A public school shall be maintained in each school district in the county at least four months during each scholastic year. A school district neglecting to maintain its school four months, shall be entitled to only such part of the free school fund as may be required to pay the teacher for the time actually taught.

*Id.* § 205, at 418-19.

200. MO. CONST. art. IX, § 1 (1945), as it read in the 1951 and 1970 statutes (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.”). Additionally, several Missouri cases hold that education is a fundamental right in the State of Missouri. *See State ex rel. Roberts v. Wilson*, 297 S.W. 419, 420 (Mo. Ct. App. 1927) (holding there is a fundamental right to attend public school and it cannot be denied); *Lehew v. Brummell*, 15 S.W. 765, 766 (Mo. 1891)

(holding that the right for children to attend public schools is not a privilege or immunity belonging to citizens of the United States, but it is a right created by the state, and a right belonging to the citizens of the state).

201. MONT. CONST. art. XI, § 1 (1889), *reprinted in* 6 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 113, at 72, 95 (“It shall be the duty of the Legislative Assembly of Montana to establish and maintain a general, uniform and thorough system of public, free common schools.”); *id.* § 6 (“It shall be the duty of the Legislative Assembly to provide by taxation, or otherwise, sufficient means, in connection with the amount received from the general school fund, to maintain a public, free, common school in each organized district in the State, for at least three months in each year.”); *id.* § 7 (“The public free schools of the State shall be open to all children and youth between the ages of six and twenty-one years.”).

202. The Nebraska Constitution of 1875 was in effect in 1954. However, the education article was amended prior to 1954. Therefore, the following provisions regarding education were in place in 1954. “The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years.” NEB. CONST. art. VII, § 6 (1875), *reprinted in* 1954 Neb. Laws Ext. Sess. 11, 36. It also stated:

Provision shall be made by general law for equitable distribution of the income of the fund set apart for the support of the common schools among the several school districts of the state and no appropriation shall be made from said fund to any district for the year in which school is not maintained for the minimum term required by law.

*Id.* § 7.

203. The Nevada Constitution of 1864 was in effect in 1954. The provisions of that constitution as they appeared in 1954 stated, “The Legislature shall encourage, by all suitable means, the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements; and also provide for the election, by the people, at the general election, of a Superintendent of Public Instruction, whose term of office shall be two years . . . .” NEV. CONST. art. XI, § 1 (1864). It also stated:

The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.

NEV. CONST. art. XI, § 2 (amended 1938), *reprinted in* 1955 Nev. Stat. 54. The Nevada Constitution further stated:

The legislature shall have power to establish normal schools, and such different grades of schools, from the primary department to the university, as in their discretion they may deem necessary, and all professors in said university, or teachers in said schools, of whatever grade, shall be required to take and subscribe to the oath as prescribed in article XV of this constitution.

*Id.* § 5, at 55.

Hampshire,<sup>204</sup> New Jersey,<sup>205</sup> New Mexico,<sup>206</sup> New York,<sup>207</sup> North Carolina,<sup>208</sup> North Dakota,<sup>209</sup> Ohio,<sup>210</sup> Oklahoma,<sup>211</sup> Oregon,<sup>212</sup>

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204. N.H. CONST. pt. II (1784), *reprinted in* 6 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 113, at 344, 355 (“K[nowledge], and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and the magistrates, in all future periods of this government to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people.”).

205. N.J. CONST. art. VIII, § 4, ¶ 1 (1947) (“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”).

206. New Mexico’s Constitution of 1910 was effective in 1954 and it stated, “A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the State shall be established and maintained.” N.M. CONST. art. XII, § 1 (1910), *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 116, at 97, 118. It also states, “A public school shall be maintained for at least five months in each year in every school district in the State.” *Id.* § 4; *see also* CHUCK SMITH, THE NEW MEXICO STATE CONSTITUTION: A REFERENCE GUIDE 134 (1996) (noting that art. XII, § 1 does “not create a contractual relationship for which a person may sue for breach of contract” (citing *Rubio v. Carlsbad Mun. Sch. Dist.*, 744 P.2d 919, 921 (N.M. Ct. App. 1987))).

207. Although New York’s Constitution of 1897 was the current constitution in 1954, at the 1938 New York Constitutional Convention, the constitution of 1897 was reorganized and renumbered. Thus, for purposes of determining the relevant provisions that were in place in 1954, we will look at the version of the constitution after the 1938 Convention. The original constitution of 1897 stated, “The Legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this State may be educated.” N.Y. CONST. art. IX, § 1 (1897), *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 116, at 234, 269. After the 1938 Convention, the education article appeared in Article XI. The first section was the same as the previous Article IX, § 1 and read, “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. CONST. art. XI, § 1 (renumbered 1938).

208. North Carolina adopted a constitution in 1868. N.C. CONST. (1868), *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 116, at 414. However, it is unclear whether North Carolina adopted a new constitution in 1876 or if there was just a constitutional convention that amended the constitution of 1868. While N.C. CONST. (1876), *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 116, at 433 seems to

indicate that a new constitution was adopted in 1876, some of the annotated notes on the North Carolina constitutions seem to indicate that there was a constitutional convention in 1875, but the changes were changes to the 1868 constitution and not a new constitution. For example, the annotated notes to the current constitution (appearing in the current North Carolina statutes) states that the first section comes from the constitution of 1868, not 1876. N.C. CONST. art. IX, § 1, *reprinted in* N.C. GEN. STAT. (2013). Also, the annotated notes in the version of the constitution appearing in the North Carolina statutes of 1943 states that the segregation clause in Article IX, § 2 was taken from the convention of 1875, while the rest of the provision was from the 1868 constitution. N.C. CONST. art. IX, § 2, *reprinted in* N.C. GEN. STAT. 55 (1944). However, for purposes of this Article, the result is the same regardless of whether the 1876 constitution was a constitution by itself or just a convention with changes added to the 1868 constitution. The 1868 constitution was in effect in 1868 and the 1876 version was in effect in 1954.

Article IX addressed education and stated, “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” N.C. CONST. art. IX, § 1 (1876), *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 116, at 433, 444. This section is almost identical to the provision that appeared in 1868 (the 1868 constitution does not have the word “the” before “happiness”). N.C. CONST. of 1868, art. IX, § 1, *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 116, at 414, 427. The next section was also similar to the 1868 constitution, *id.* § 2, and it stated, “The general assembly, at its first session under this constitution, shall provide by taxation and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years.” N.C. CONST. art. IX, § 2 (1876), *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 116, at 444. The Constitution also stated:

Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least four months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section they shall be liable to indictment.

*Id.* § 3, at 444-45.

209. N.D. CONST. art VIII, § 147 (1889), *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 116, at 485, 503 (“A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the State of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.”). The constitution also stated, “The legislative assembly shall provide, at its first session after the adoption of this constitution, for a uniform system for free public schools throughout the state, beginning with the primary and extending through all grades up to and including the normal and collegiate course.” *Id.* § 148.

210. OHIO CONST. art. VI, § 2 (1851), *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 116, at 558, 566 (“The

Pennsylvania,<sup>213</sup> Rhode Island,<sup>214</sup> South Dakota,<sup>215</sup> Texas,<sup>216</sup> Utah,<sup>217</sup> Vermont,<sup>218</sup> Virginia,<sup>219</sup> Washington,<sup>220</sup> West Virginia,<sup>221</sup>

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general assembly shall make such provisions, by taxation or otherwise, as, with the interest arising from the school trust-fund, will secure a thorough and efficient system of common schools throughout the State; but no religious or other sect or sects shall ever have any exclusive right to or control of any part of the school-funds of this State.”).

211. OKLA. CONST. art. XIII, § 1 (1907), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 119, at 95, 137 (“The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated.”).

212. OR. CONST. art. VIII, § 3 (1857), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 119, at 205, 215 (“The legislative assembly shall provide by law for the establishment of a uniform and regular system of common schools.”).

213. PA. CONST. art. X, § 1 (1873), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 119, at 310, 326 (“The general assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose.”).

214. Rhode Island’s Constitution of 1842 was in effect in 1954 and, with respect to public school education, it stated:

The diffusion of knowledge, as well as of virtue, among the people being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools, and to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education.

R.I. CONST. art. XII, § 1 (1842), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 119, at 386, 395.

215. S.D. CONST. art. VIII, § 1 (“The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education.”).

216. TEX. CONST. art. VII, § 1 (1870), *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 123, at 319, 336 (“A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”).

217. UTAH CONST. art. X, § 1 (1895), *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 123, at 436, 454 (“The legislature shall provide for the establishment and maintenance of a uniform system of public schools, which shall be open to all the children of the State and free from sectarian control.”). This section appears exactly the same in 1953 and is similar to the constitution printed in the current Utah Code (except that these two sources state “be free from sectarian control”). UTAH CONST. art. X, § 1, *reprinted in* UTAH CODE

ANN. 246 (Allen Smith 1953); UTAH CONST. art. X, § 1, *reprinted in* UTAH CODE ANN. 81 (Michie Supp. 1990). The current Utah Code (1953; 1990 replacement) states, “The Legislature shall provide for the establishment and maintenance of the state’s education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control.” UTAH CONST. art. X, § 1, *reprinted in* UTAH CODE ANN. 81 (Michie Supp. 1990). This is slightly different than the 1895 Constitution. Thus, this provision was in effect in 1954. However, § 2 of this Article was amended in 1906 and 1910, and in the 1953 statutes it stated:

The public school system shall include kindergarten schools; common schools, consisting of primary and grammar grades; high schools, an agricultural college; a university; and such other schools as the Legislature may establish. The common schools shall be free. The other departments of the system shall be supported as provided by law.

UTAH CONST. art. X, § 2 (amended 1906, 1910), *reprinted in* UTAH CODE ANN. 246-47 (Allen Smith 1953).

218. Vermont’s Constitution of 1793 is the most recent constitution of the State of Vermont. Therefore, the 1793 constitution was in effect in 1954. Although there were some amendments to the provisions addressing education that are relevant to 1954, the changes do not seem to substantively change the right to a public school education. With respect to education, the original 1793 constitution stated:

Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force and duly executed; and a competent number of schools ought to be maintained in each town, for the convenient instruction of youth, and one or more grammar-schools be incorporated, and properly supported, in each county in this State. And all religious societies or bodies of men that may be hereafter united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates which they in justice ought to enjoy, under such regulations as the general assembly of this State shall direct.

VT. CONST. ch. II, § 41, *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 123, at 507, 514. The Constitution reprinted in the current version of the Vermont Statutes states:

Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth. All religious societies, or bodies of people that may be united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they in justice ought to enjoy, under such regulations as the general assembly of this state shall direct.

VT. CONST. ch. II, § 68, (amended 1954, 1964), *reprinted in* VT. STAT. ANN. (2013). Furthermore, the annotated notes to the Constitution reprinted in the current Vermont statutes cite *Vermont Educational Buildings Financing Agency v. Mann*, 247 A.2d 68, 71 (Vt. 1968) for the proposition that “[t]his section ‘imposes on the

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general assembly a duty in regard to education that is universally accepted as a proper public purpose.” VT. CONST. ch. II, § 68 (amended 1954, 1964), *reprinted in* VT. STAT. ANN. (2013) (quoting *Mann*, 247 A.2d at 71).

219. VA. CONST. art IX, § 129 (1902), *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 133, at 146, 174 (“The General Assembly shall establish and maintain an efficient system of public free schools throughout the State.”). It also stated, “The General Assembly may establish agricultural, normal, manual training and technical schools, and such grades of schools as shall be for the public good.” *Id.* § 137, at 175. The next section stated,

The General Assembly may, in its discretion, provide for the compulsory education of children between the ages of eight and twelve years, except such as are weak in body or mind, or can read and write, or attending private schools, or are excused for cause by the district school trustees.

*Id.* § 138. The next section provided, “Provision shall be made to supply children attending the public schools with necessary text-books in cases where the parent or guardian is unable, by reason of poverty, to furnish them.” *Id.* § 139, at 175-76.

The only amendment to the constitution of 1902 that is relevant for how the constitution appeared in 1954 was a 1920 amendment to § 138. The constitution in the 1942 Code has the identical provisions to the one quoted above, except that § 138 states, “The general assembly may, in its discretion, provide for the compulsory education of children of school age.” VA. CONST. art IX, § 138 (amended 1920), *reprinted in* VA. CODE (1942).

220. WASH. CONST. art. IX, § 1 (1889), *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 133, at 288, 304 (“It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.”). The next provision stated:

The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund, and the state tax for common schools, shall be exclusively applied to the support of the common schools.

*Id.* § 2.

221. W. VA. CONST. art. XII, § 1 (1870), *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 133, at 364, 390 (“The Legislature shall provide, by general law, for a thorough and efficient system of free schools.”). This identical provision appears in the West Virginia statutes of 1955 and the current statutes. Section 6 stated, “The school districts into which any county is now divided shall continue until changed in pursuance of law.” *Id.* § 6, at 391. This exact provision appeared in the 1955 version, but the current version has an additional sentence, which was added through amendment in 1986. The current version of the statutes states:

The school districts into which the state is now divided shall continue until changed pursuant to act of the Legislature: Provided, That the school board of any district shall be elected by the voters of the respective district without reference to political party affiliation. No more than two of the members of such board may be residents of the same magisterial district within any school district.

W. VA. CONST. art. XII, § 6 (amended 1986).

Wisconsin,<sup>222</sup> and Wyoming.<sup>223</sup> The second category of states with rights in their state constitutions that bear on the availability of free and common public schools consists of those states that arguably had a right to a public school education. Based on the state constitutional provisions that were in force in 1954, we think that two states, Iowa and Tennessee, can be classified as arguably having a right to a public school education.<sup>224</sup> Both Iowa and Tennessee were classified

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222. WIS. CONST. art X, § 3 (1848), *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 133, at 418, 433 (“The Legislature shall provide by law for the establishment of District Schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition, to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein.”). This provision appears in the original 1848 constitution, *id.*, the constitution printed in the Wisconsin statutes of 1872, WIS. CONST. art X, § 3, *reprinted in* WIS. STAT. 116 (1872), and in the constitution printed in the Wisconsin statutes of 1955, WIS. CONST. art X, § 3, *reprinted in* WIS. STAT. 46 (1955). The above quoted provision was amended in 1972. The 1972 Amendment changed “four” to “4” and “twenty” to “20” and added on the following clause: “but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.” WIS. CONST. art X, § 3. The 1972 amendment, however, is not relevant to how the constitution appeared in 1954, nor does it substantively change the provision.

223. WYO. CONST. art VII, § 1 (“The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.”). This provision still appears in the current version of Wyoming’s constitution, and it also appeared in 1954. *See* WYO. CONST. art VII, § 1, *reprinted in* WYO. STAT. ANN. 107 (1945 & Supp. 1957).

224. Both Iowa and Tennessee were members of the union in 1868 as well and were also classified as arguably having a right to a public school education. *See Statehood Dates*, *supra* note 176; *see also supra* notes 127-29 and accompanying text. Tennessee’s Constitution of 1870 was in effect in 1954 and that constitution stated:

Knowledge, learning, and virtue being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State being highly conducive to the promotion of this end, it shall be the duty of the general assembly, in all future periods of this government, to cherish literature and science. And the fund called the common-school fund, and all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the general assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriation; and the interest thereof shall be inviolably appropriated to the support and

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encouragement of common schools throughout the State, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund, or any part thereof, to be diverted to any other use than the support and encouragement of common schools.

TENN. CONST. art. XI, § 12 (1870), *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 123, at 171, 185-86. This is the identical provision to Tennessee's Constitution of 1834, which was in effect in 1868 and was classified as arguably creating a right to a public school education. *See supra* note 127 and accompanying text. Although not relevant for 1954, it is interesting to note that the education provision of the Tennessee Constitution was amended in 1978 and currently states:

The state of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such post-secondary educational institutions, including public institutions of higher learning, as it determines.

TENN. CONST. art. XI, § 12 (amended 1978).

Iowa's Constitution of 1846 was in effect in 1954, and that constitution seemed to originally have a provision establishing a right to a public school education. *See* IOWA CONST. art. IX, § 12 (1846), *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 103, at 434, 444 ("The members of the board of education shall provide for the education of all the youths of the State, through a system of common schools. And such school shall be organized and kept in each school-district at least three months in each year."). However, in 1864, this and many other provisions in the education article were abolished because the legislature passed certain laws guaranteeing the right to a public school education. *See supra* notes 127-29 and accompanying text. Thus, the constitutional provisions were superseded by statute and no longer necessary. But some versions of the statutes after 1864 that contain the constitution include the provisions that seem to have been abolished in 1864. *See supra* note 129. Perhaps the later statutes that include the provisions were only reprinting the original version of the constitution, even though it contained provisions that were no longer in force. But in contrast to South Carolina and Connecticut, which did not constitutionally recognize a right to a public school education in 1954, *see infra* notes 228-30 and accompanying text, it seems that Iowa's constitutional provisions regarding education were only abolished because they were no longer necessary—the right was codified by statute.

However, it is unclear why the State of Iowa would abolish a constitutionally created right even if that right was codified by statute. If, for example, the state legislature decided to repeal the law, or if the state supreme court found the law unconstitutional for some reason, there is no longer a constitutional provision as the backbone to guarantee the citizens of the state a right to a public school education. Thus, it is not entirely clear what the status of the right to a public school education was in 1954 (and in 1868 for that matter). For purposes of this Article, we are assuming that there "arguably" was a right to a public school education in Iowa in 1954. For a further discussion of the provisions of the Iowa Constitution and whether it is sufficient to create a right to a public school education, *see supra* notes 127-29 and accompanying text.

as arguably having a right to an education in 1868,<sup>225</sup> and because the same constitutional provisions regarding education were still in force in 1954, Iowa and Tennessee should still be deemed to arguably confer on a child the right to a free and common public school education. Kentucky, which was classified as arguably having a right to an education in 1868 based on the constitution of 1850, which was then in effect,<sup>226</sup> clearly recognized a child's right to a free and common public school education in 1954 because the state constitution of 1890 was by then in effect.<sup>227</sup>

The third and final category consists of those states that clearly did not recognize a child's right to a free and common public school education in 1954. Even in 1954, there were two states, Connecticut and South Carolina, which did not recognize the right to a public school education in the text of their state constitutions. All eleven of the states that entered the union between 1868 and 1954 did recognize a child's right to a free and common public school education.<sup>228</sup> Of the four states that did not recognize such a right in 1868, only one of those four states, Connecticut, still failed to recognize the right in 1954.<sup>229</sup> Additionally, only one state, South Carolina, which had recognized a child's right to a free and common public school education in 1868, did not seem to recognize that right in 1954, even though it did recognize a child's right to a public school education as late as 1952 and once again recognized such a

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225. See *supra* notes 127-29 and accompanying text.

226. See *supra* note 127 and accompanying text.

227. KY. CONST. § 183 ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.").

228. See *supra* note 176 (listing the eleven states that entered the union between 1868 and 1954); *supra* notes 180-223 (providing all the constitutional provisions granting the right to a public school education that were in effect in 1954).

229. Of the four states that did not recognize the right to a public school education in 1868 (Connecticut, Illinois, New Jersey, and Virginia), only Connecticut did not recognize the right by 1954. See *supra* notes 130-33 and accompanying text. In Connecticut, the right to a public school education only became a fundamental right when Connecticut's Constitution of 1965 was passed. See CONN. CONST. art. VIII, § 1 (1965) ("There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation."); see also HORTON, *supra* note 130, at 145 ("It was only in 1965, however, that the Constitution guaranteed a free public elementary and secondary education. The legal significance of this guarantee is that it made education a fundamental right."). Thus, education was not a fundamental right in Connecticut in 1954.

right in 1972 or 1973.<sup>230</sup> Thus, with forty-four out of forty-eight states clearly recognizing the right to a free and common public

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230. Whether there was a fundamental right to a public school education in South Carolina in 1954 based on the state constitutional provisions as they appeared in 1954 is difficult to determine. The starting point for this determination is South Carolina's Constitution of 1895, which, as amended, is the current Constitution of South Carolina and, therefore, was also the constitution in effect in 1954, as amended. Article XI of the original 1895 constitution had an elaborate education article consisting of twelve sections. S.C. CONST. art. XI (1895), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 119, at 502, 532-35. However, the current Article XI only contains four sections. S.C. CONST. art. XI. Thus, the 1895 constitution has had several amendments.

The first four sections of the original constitution of 1895 addressed the superintendent and the Board of Education, which are not relevant to this Article. S.C. CONST. art. XI, §§ 1-4 (1895), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 119, at 532-33. Therefore, those provisions have been omitted. Section 5 stated:

The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years, and for the division of the Counties into suitable school districts, as compact in form as practicable, having regard to natural boundaries, and not to exceed forty-nine nor be less than nine square miles in area . . . .

*Id.* § 5, at 533. Section 7 stated, "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race." *Id.* § 7, at 534. These two relevant provisions (§§ 5 and 7 from the 1895 constitution), however, changed by 1954. The constitution reprinted in the South Carolina statutes of 1952 stated, "The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years, and for the division of the Counties into suitable school districts." S.C. CONST. art. XI, § 5 (amended 1952), *reprinted in* S.C. CODE ANN. 326 (1952). In the Code of Laws of South Carolina of 1962, the constitution in that volume notes that § 5 was eliminated and cites 1952 and 1954 for this change. S.C. CONST. art. XI, § 5 (eliminated 1952), *reprinted in* 16 S.C. CODE ANN. 290 (1962). Furthermore, with respect to § 7 (requiring segregation as stated in 1895), both the constitutions as they appeared in the South Carolina Code in 1952 and 1962, respectively, had this section. *Id.* § 7, at 291. However, the annotated notes to this section in the 1962 edition cite *Brown* and note that segregation is unconstitutional. *Id.*

The education article that appears in the Constitution reprinted in the current Code of South Carolina has only four sections. *See* S.C. CONST. art. XI. The first addresses the Board of Education; the second addresses the State Superintendent of Education, and the third section is entitled "System of free public schools and other public institutions of learning." *Id.* The section states, "The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable." *Id.* § 3. There is an indication that this section was added or amended in 1972 and 1973. *Id.* Finally, the fourth section provides, "No money shall be paid from public funds nor

school education in 1954, an additional two states arguably recognizing such a right, and only two states failing to recognize this right, there was clearly still an Article V consensus of three-quarters of the states that recognized a child's right to receive a free and common public school education in 1954. Furthermore, because all of the eleven states that joined the Union between 1868 and 1954 recognized the right to a public school education in their original state constitutions,<sup>231</sup> there was a continuous Article V consensus of three-quarters of the states that recognized a child's fundamental right to a free and common public school education throughout the eighty-six year period between 1868 and 1954. There was never a time between 1868 and 1954 when fewer than three-quarters of the states recognized a child's right to a free and common public school education in state constitutional law.

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shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." *Id.* § 4.

The session laws' referenced in the current Constitution, regarding the clause that seems to grant the right to a public school education indicate that § 5 was amended in 1952 to appear as it did in the statutes of 1952. S.C. CONST. art. XI, § 5 (amended 1952), *reprinted in* S.C. CODE ANN. 326 (1952). The entire provision, however, was deleted in 1954. Then, in 1972 and 1973 they amended Article XI to the four sections, which currently appear in the Constitution and as it appears in the current statutes, including the right to a public school education. The current laws only reference the 1973 Amendment. Moreover, a copy of the South Carolina Constitution, as amended April 2, 1954, only a month before *Brown* was decided, states that § 5—"Free public schools; school districts"—was "eliminated." S.C. CONST. art XI, § 5, (repealed 1954), *reprinted in* S.C. CODE ANN. 17 (1952 & Supp. 1954). Thus, the historical development of the right to a public school education dating from 1868 until the present is somewhat convoluted. South Carolina recognized a right to a public school education in 1868. *See* S.C. CONST. art. X, § 3 (1868), *reprinted in* 2 AMERICAN CONSTITUTIONS, *supra* note 122, at 276, 302. Moreover, in 1868 discrimination based on race in the school system was constitutionally prohibited. *Id.* § 10, at 303 ("All the public schools, colleges, and universities of this State, supported in whole or in part by the public funds, shall be free and open to all the children and youths of the State, without regard to race or color."). When South Carolina passed its constitution of 1895, there was still a right to a public school education, but segregated schools were required as well. *See* S.C. CONST. art. XI, §§ 5, 7 (1895), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 119, at 533-34. These provisions remained in effect until the education article was amended in 1952. By 1954, the provision granting the right to a public school education had been eliminated. In 1972-1973 the provision granting the right to a public school education reappeared in South Carolina's amended constitution of 1895. Therefore, for purposes of this Article, because the clause in the state constitution that seemed to grant the right to a public school education had been eliminated and not in force in 1954, there was no constitutionally granted right to a public school education.

231. *See supra* notes 180-223 and accompanying text.

## 2. *State Constitutional Provisions Requiring Segregated Schools in Force in 1954*

The very big and very sad change, however, that we see in state constitutional law between 1868 and 1954 is that by the time *Brown v. Board of Education* was decided, many state constitutions had been amended to require racially segregated schools. In 1868, not even a single state had required racially segregated schools,<sup>232</sup> but by 1954, fifteen state constitutions required separate schools for white and “colored” children. These fifteen segregationist states included: Alabama,<sup>233</sup> Delaware,<sup>234</sup> Florida,<sup>235</sup> Georgia,<sup>236</sup> Kentucky,<sup>237</sup>

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232. See *supra* note 135 and accompanying text.

233. ALA. CONST. art. XII, § 1 (1875), *reprinted in* 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 97, at 103, 126 (“[S]eparate schools shall be provided for the children of citizens of African descent.”); ALA. CONST. art. XIV, § 256, *amended by* ALA. CONST. amend. CXI, § 256, *reprinted in* 1 CONSTITUTIONS OF THE UNITED STATES NATIONAL AND STATE 43, 112 (2d ed. 1974) (“Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.”). Section 256 uses the quotation, but Amendment CXI states “the legislature may authorize parents or guardians of minors, who desire that such minors shall attend schools provided for their own race . . . .” ALA. CONST. amend. CXI, § 256, *reprinted in* CONSTITUTIONS OF THE UNITED STATES NATIONAL AND STATE, *supra*, at 112.

234. DEL. CONST. art. X, § 2 (1897), *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 101, at 232, 260 (“[S]eparate schools for white and colored children shall be maintained.”).

235. FLA. CONST. art. XII, § 12 (1885), *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 101, at 372, 394 (“White and colored children shall not be taught in the same school, but impartial provision shall be made for both.”).

236. GA. CONST. art. VIII, § 1 (1877), *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 101, at 514, 540 (“[S]eparate schools shall be provided for the white and colored races.”); GA. CONST. art. VIII, § 1 (1945) (“Separate schools shall be provided for the white and colored races.”).

237. KY. CONST. § 187 (1890), *reprinted in* 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 104, at 187, 216 (“[S]eparate schools for white and colored children shall be maintained.”); LA. CONST. art. 248 (1898), *reprinted in* 4-A SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 105, at 216, 269 (“There shall be free public schools for the white and colored races, separately established by the General Assembly, throughout the State, for the education of all the children of the State between the ages of six and eighteen years . . . .”).

Louisiana,<sup>238</sup> Mississippi,<sup>239</sup> Missouri,<sup>240</sup> North Carolina,<sup>241</sup> Oklahoma,<sup>242</sup> South Carolina,<sup>243</sup> Tennessee,<sup>244</sup> Texas,<sup>245</sup> Virginia,<sup>246</sup> and West Virginia.<sup>247</sup> The provisions requiring racial segregation in public schools began to make their way into state constitutional law beginning with Tennessee in 1870, and they continued to be added to

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238. LA. CONST. of 1921, art. XII, § 1 (amended 1954) (“Separate public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years . . .”).

239. MISS. CONST. art. VIII, § 207 (1890), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 394, 419 (“Separate schools shall be maintained for children of the white and colored races.”).

240. MO. CONST. art. XI, § 3 (1875), *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 544, 569 (“Separate free public schools *shall* be established for the education of children of African descent.”) (emphasis added).

241. N.C. CONST. art. IX, § 2 (1876), *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 116, at 433, 444 (“[T]he children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination made in favor of, or to the prejudice of, either race.”).

242. OKLA. CONST. art. XIII, § 3 (1907), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 119, at 95, 137 (“Separate schools for white and colored children with like accommodation shall be provided by the Legislature and impartially maintained. The term ‘colored children,’ as used in this section, shall be construed to mean children of African descent. The term ‘white children’ shall include all other children.”).

243. S.C. CONST. art. XI, § 7 (1895), *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 119, at 502, 534 (“Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race.”).

244. TENN. CONST. art. XI, § 12 (1870), *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 123, at 171, 186 (“No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school.”).

245. TEX. CONST. art. VII, § 7 (1870), *reprinted in* 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 123, at 319, 336 (“Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both.”).

246. VA. CONST. art. IX, § 140 (1902), *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 133, at 146, 176 (“White and colored children shall not be taught in the same school.”).

247. W. VA. CONST. art. XII, § 8 (1870), *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 133, at 364, 392 (“White and colored persons shall not be taught in the same school.”).

state constitutions that were adopted in the early 1900s during the so-called Progressive Era.<sup>248</sup>

The fact that at least fifteen states out of forty-eight explicitly required racially segregated schools in 1954 means that whereas there was an Article V consensus favoring integrated public schooling in state constitutional law in 1868, there was not such a consensus in 1954 when Chief Justice Warren wrote *Brown v. Board of Education*. So much for the idea that Americans were more enlightened in 1954 than they had been in 1868. What this means is that as a matter of the original meaning of the Fourteenth Amendment in 1868, the Amendment prohibited segregation in the public schools, and all of the fifteen state constitutional clauses requiring segregation in schools, which appeared after 1868, were, and always had been, unconstitutional. Moreover, with fifteen states requiring segregated schools, at most thirty-three states could have required non-segregated schools. But in reality, even fewer than thirty-three states required desegregated schools in 1954 because not all forty-eight states necessarily recognized a child's right to a free and common public school education in 1954.<sup>249</sup>

Moreover, an Article V consensus of three-quarters of the states in 1954 would require that thirty-six of the forty-eight states recognize the right to an integrated public school education as being a fundamental right. Since fifteen states explicitly provided for racial segregation in the schools, the evolved present-day meaning of the Fourteenth Amendment in 1954 was actually less favorable to integration than was the original meaning back in 1868. Thus, a headcount of the states would not only find much more formal textual evidence of racism in 1954 than in 1868, but it would also show that the direction of change was toward more racism, not less. Since the direction in which change is moving is sometimes said to

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248. The first state that had a provision requiring segregated schools after 1868 was Tennessee in its constitution of 1870. See TENN. CONST. art. XI, § 12 (1870), reprinted in 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 123, at 186. The last state to require segregated schools through a constitutional provision was Oklahoma in 1907. See OKLA. CONST. art. XIII, § 3 (1907), reprinted in 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 123, at 137. All of the other state constitutional provisions requiring segregated schools were adopted between 1870 and 1907. See *supra* notes 233-47 and accompanying text. But see *supra* note 139 and accompanying text (explaining that Louisiana's Constitution of 1921 required segregated schools, but the first Louisiana Constitution to require segregated schools was adopted in 1898).

249. See *supra* notes 228-30 and accompanying text.

be as important as the headcount of states itself, this is a very disturbing conclusion.<sup>250</sup>

Professor McConnell argues that even though education may not have been a civil right in 1868, it had arguably become a fundamental right by 1900, and certainly by 1954.<sup>251</sup> But by 1900, and certainly by 1954, fifteen state constitutions had already enacted state constitutional provisions requiring racial segregation in public schools.<sup>252</sup> In fact, Professor McConnell points out a similar inconsistency between the two principle views held by southern segregationists.<sup>253</sup>

On the one hand, southern segregationists argued that even if education was a fundamental right that was protected by the Fourteenth Amendment, there was no constitutional violation so long as racially segregated schools and facilities were equal and “otherwise comparable in quality or cost.”<sup>254</sup> On the other hand, southern segregationists also argued that the administration of the public schools was a strictly local activity and that the Fourteenth Amendment did not give Congress or the federal courts the right to interfere here with the state power.<sup>255</sup> Professor McConnell notes that education “is not a civil right” at all according to the second segregationist theory,<sup>256</sup> but this would suggest that “there is no constitutional requirement that facilities must be ‘equal,’ or indeed, that black children be allowed to attend school at all.”<sup>257</sup> The answer for evolutionary constitutionalists is that: (1) in 1954 an Article V consensus of more than three-quarters of the state constitutions recognized access to a free and common public school education as being a fundamental right, but that (2) fifteen state constitutions in 1954, well more than one-quarter of the total, required racial segregation in public schools when *Brown v. Board of Education* was decided. In other words, access to a public school education as a fundamental right does not occur according to Professor McConnell until a point in our history when there is no longer an Article V

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250. See generally ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1st ed. 1970).

251. McConnell, *Reply to Professor Klarman*, *supra* note 38, at 1951.

252. See *supra* text accompanying notes 228-230; see also *supra* notes 233-47 and accompanying text.

253. McConnell, *supra* note 6, at 1005-06.

254. *Id.* at 1005.

255. *Id.* at 1005-06.

256. *Id.* at 1006.

257. *Id.*

consensus of three-quarters of the states that segregation in public schools is unconstitutional.

The solution both for Chief Justice Warren in *Brown v. Board of Education* and for Professor McConnell would be to “turn the clock back to 1868 when the [Fourteenth] Amendment was adopted.”<sup>258</sup> At that point, everything would fall into place. In 1868, children had a fundamental right to a free and common public school education as a privilege or immunity of state citizenship,<sup>259</sup> and the Fourteenth Amendment would bar racial discrimination or abridgement of that right. But if one does not turn the clock back to 1868, then public school education only becomes a fundamental right in 1954 when fifteen states required segregation in their state constitutions, and there was no longer an Article V consensus of three-quarters of the states recognizing a right to a desegregated public school education. In contrast, in 1868 there was an Article V consensus of three-quarters of the states recognizing that children had a fundamental right to a public school education as to which the Fourteenth Amendment barred racial abridgements.

Thus, not only is *Brown* justifiable on originalist grounds, it is *only justifiable on originalist grounds*. There was a fundamental right to a desegregated public school education in 1868, but by 1954, constitutional evolution had led to the vile “separate but equal” rule of *Plessy v. Ferguson*.<sup>260</sup> *Brown v. Board of Education*, therefore, did not require a revolution in constitutional theory, as so many scholars have believed, but it required instead a simple return to the formal original understanding. The rule of 1868 was that children had a state constitutional right to a public school education as it had existed in 1868 when the Fourteenth Amendment was adopted. The Fourteenth Amendment forbade laws that abridged that right on account of race. And, the original understanding was therefore one of desegregation.

### III. THE RELEVANCE OF STATE STATUTES AND CASE LAW

State constitutional law shows that children had a fundamental right to a free and common public school education in 1868, but it is important to ask if there were any state statutes or state cases that lead to a contrary conclusion. This Part will first look at the state

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258. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954).

259. *See supra* Section II.B.

260. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled by Brown*, 347 U.S. at 494-95.

laws in effect in 1868 to see whether there were state statutes that required segregated schools in 1868, even though none of the state constitutions then in place did so. Next, we will look at state court cases circa 1868 to see if and how the state courts dealt with the constitutionality of segregated schools in light of the state constitutional textual evidence that we have already discussed. We will show that even though a few states had statutes that provided for racially segregated schools and although some state courts upheld racially segregated schools in the face of a challenge, neither state statutory law nor state case law are remotely sufficient to overcome the overwhelming state constitutional evidence in support of the conclusion that children had a fundamental right to a free and common public school education in 1868.

#### A. State and District of Columbia Laws Regarding Segregated Schools

The best way to determine whether or not children had a fundamental right to a free and common public school education in 1868 is by looking at the text of the state constitutional provisions we discussed above. We cannot overlook, however, the fact that some states and the District of Columbia had statutes on the books that required racially segregated schools in 1868. We will show here that some states did have laws calling for racially segregated schools, while other states explicitly prohibited racially segregated schools. Other state statutory law was silent on this question. We conclude that the state statutory law evidence is insufficient to refute the overwhelming state constitutional evidence summarized above.

Professor McConnell says that in 1867 Senator Charles Sumner of Massachusetts “proposed legislation that would compel the states of the former confederacy to establish ‘public schools [which shall be] open to all, without distinction of race or color.’”<sup>261</sup> Sumner’s proposal led to an evenly split vote in the Senate (twenty to twenty), and it therefore did not pass, “but it was a show of strength for Sumner’s position.”<sup>262</sup> The twenty-to-twenty tie vote in the Senate sheds only limited light on the original meaning of the Fourteenth Amendment because the legislation was proposed before the Fourteenth Amendment was adopted “and the source of

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261. McConnell, *supra* note 6, at 964 (quoting CONG. GLOBE, 40th Cong., 1st Sess. 165, 166 (1867)).

262. *Id.* (citing CONG. GLOBE 170).

congressional authority was likely some combination of the war power and the Guarantee Clause.<sup>263</sup> It is nonetheless striking that even prior to the ratification of the Fourteenth Amendment half the Senate thought that it had the power and that it would be a good idea to require racially integrated schools in the South.<sup>264</sup>

Even though all but one of the state constitutions in effect in 1868 did not require or permit segregated schools, Professor McConnell notes that “[s]hortly after gaining readmission with [the] colorblind state constitutions, most Southern state legislatures enacted laws permitting or requiring segregated schools, and Congress had no authority (or no inclination) to review the domestic legislation of sovereign states.”<sup>265</sup> Professor McConnell then provides a brief summary of some of the states that passed statutes providing for racially segregated schools.<sup>266</sup> Although some of the state laws calling for segregated schools were in place in 1868, many of these laws were passed after 1868, by which time the original meaning of the Fourteenth Amendment was frozen in place.<sup>267</sup>

We begin here with the oft-cited District of Columbia law that called for segregated schools even after the Fourteenth Amendment was ratified and then consider relevant state statutes.

### 1. *District of Columbia Law Requiring Segregated Schools*

The most frequently cited point that is said to suggest that the Fourteenth Amendment contemplated racially segregated schools is the fact that Congress itself authorized creation of racially segregated schools in the District of Columbia.<sup>268</sup> In fact, Professor McConnell explained:

The single piece of evidence most often cited in support of the proposition that the framers of the Fourteenth Amendment did not deem school segregation unconstitutional is the fact that the schools of the District of Columbia . . . remained segregated by law during the entire period of proposal, ratification, and enforcement of the Amendment (and indeed remained segregated until after *Brown*).<sup>269</sup>

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263. *Id.*

264. *Id.*

265. *Id.* at 965 (footnotes omitted).

266. *Id.* at 965-71.

267. *Id.* at 965.

268. *Id.* at 977.

269. *Id.*

But a closer look at the District of Columbia law on which these commentators rely seems to deflate the argument that segregation was recognized and permitted by Congress in the District of Columbia.

Professor McConnell provides a brief historical account of the D.C. law requiring segregated schools. Shortly after the District was emancipated, in 1862, Congress passed laws “‘initiating a system of education of colored children,’ to be financed by a special tax on property ‘owned by persons of color.’”<sup>270</sup> Before this 1862 statute, “‘there were no publicly supported schools for black children in the District.”<sup>271</sup> In 1864, Congress passed a new law requiring the school authorities to fund the education of black children with “a proportionate share of the common school fund[.]”<sup>272</sup> Professor McConnell explained that the new 1864 law “‘evidently assum[ed] that the schools would be separate.”<sup>273</sup> After these laws were in place, the Fourteenth Amendment was proposed in 1866, and Professor McConnell says that “‘in the same year, Congress made appropriations for the two separate school systems without reexamining the segregation issue.”<sup>274</sup> Finally, after the Fourteenth Amendment was ratified, in 1870 and 1871 there were bills proposed by Congress (led by Senator Sumner) that would have eliminated school segregation in the District of Columbia.<sup>275</sup> But ultimately, no such bill was ever passed in a final vote by both houses of Congress.<sup>276</sup>

The relevant portion of the 1864 D.C. law relating to racial school segregation provided, “‘That it shall be the duty of the said commissioners to provide suitable and convenient houses [of] rooms for holding schools for colored children.”<sup>277</sup> The next section then explained that with respect to the school fund, “‘such a proportionate part thereof as the number of colored children, between the ages of

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270. *Id.* (quoting Act of May 20, 1862, ch. 77, § 35, 12 Stat. 394, 402 (pertaining to the county of Washington in the District of Columbia), *invalidated by* *Bolling v. Sharpe*, 374 U.S. 497, 500 (1954); Act of May 21, 1862, ch. 83, § 1, 12 Stat. 407, 407 (pertaining to the cities of Washington and Georgetown in the District of Columbia), *invalidated by* *Bolling*, 374 U.S. at 500).

271. *Id.*

272. *Id.* at 977-78 (citing Act of June 25, 1864, ch. 156, §§ 18, 23, 13 Stat. 187, 191, 193, *invalidated by* *Bolling*, 374 U.S. at 500 (1954)).

273. *Id.*

274. *Id.*

275. *Id.* at 978.

276. *Id.* at 979.

277. § 17, 13 Stat. at 191.

six and seventeen years, in the respective cities bear to the whole number of children thereof, for the purpose of establishing and sustaining public schools in said cities for the education of colored children.<sup>278</sup> This original law was later codified in the laws of the District of Columbia.<sup>279</sup> This codified version is the law cited by *Plessy* in its decision upholding the constitutionality of separate-but-equal accommodations in railway cars.<sup>280</sup>

It is thus true that in 1868 there was a law on the books providing for segregated schools in the District of Columbia when the Fourteenth Amendment was passed.<sup>281</sup> But, the law permitting the creation of racially segregated schools in the District of Columbia was passed in 1864<sup>282</sup>—a time when slavery was still permissible and two years before Congress had passed the Civil Rights Act of 1866 and proposed to the states the ratification of the Fourteenth Amendment. Thus, in a country that did not yet even prohibit slavery, much less guarantee equal civil rights, it is perhaps not so surprising that a law might be passed providing for racially segregated schools. Moreover, even though the school segregation law was codified in the District of Columbia laws in 1873, after the Fourteenth Amendment had been enacted, there are at least two reasons for thinking that that is not so problematic for our thesis. First, all of the laws that had been passed by Congress for the District of Columbia were codified at that time. Thus, the law which required segregated schools had already been passed in 1864, and it was therefore on the books at the time the District of Columbia laws in general were codified. A simple recodification of all D.C. laws in 1873 should not be read to suggest that Congress still approved of and endorsed all those laws.

Second, even if the Fourteenth Amendment was originally meant to prohibit racially segregated schools, such a prohibition does not necessarily preclude Congress from accidentally passing an unconstitutional law after 1868. Congress frequently passes laws that are later struck down as unconstitutional.<sup>283</sup> But, until a particular law

278. *Id.* § 18.

279. Act of Dec. 1, 1873, ch.12, §§ 281-83, 310, 319, 1873 D.C. Rev. Stat. 31, 33, 36, 37.

280. *Plessy v. Ferguson*, 163 U.S. 537, 545, 550-51 (1896) (majority opinion), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

281. § 17, 13 Stat. at 191.

282. *Id.*

283. U.S. CONST. art. I, § 7, cl. 2-3. Once a particular bill passes both the House of Representatives and the Senate, the bill is presented to the President. *Id.* If

is challenged in court as a constitutional violation, the law will not be struck down, unless Congress thinks to repeal it. We think that children had a fundamental right to a free and common public school education under the Fourteenth Amendment, but we do not mean to argue that it was crystal clear in 1868 that racially segregated schools had become unconstitutional. Most scholars would agree that *Brown v. Board of Education* clearly prohibited racially segregated public schools in 1954;<sup>284</sup> yet, even after the decision in *Brown*, many states still continued to operate segregated schools well into the 1960s and 1970s. Some state laws that called for segregated schools were not in fact struck down by the state courts until those laws were challenged in light of the holding in *Brown v. Board of Education*.<sup>285</sup> In fact, some of these racially segregated schools were still in existence in the 1960s and 1970s.<sup>286</sup> Although a legal defense of the constitutionality of racially segregated schools was almost certain to fail in court after the decision in *Brown v. Board of Education*, some states still maintained their segregated schools until the courts ordered them to desegregate or integrate.<sup>287</sup> Therefore, if even after *Brown v. Board of Education*'s clear statement that racially segregated schools violated the Fourteenth Amendment segregated schools still existed, it should not surprise us that even after the Fourteenth Amendment's less clear prohibition of segregated schools, racial segregation, in fact, persisted to some degree.

The most troublesome aspect of Congress's provision for racially segregated schools in the District of Columbia after 1868 is that if Congress really believed that the Fourteenth Amendment had prohibited school desegregation, then one must ask why Congress did not act affirmatively to desegregate the D.C. schools after 1868. Professor McConnell eloquently addresses this point by saying:

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the President signs the bill, it becomes a law. *Id.* But until an aggrieved party challenges a particular law and a court strikes down the law, the law is enforceable. *Id.* Thus, unless the 1864 law of District of Columbia was challenged, the law would not have been struck down.

284. *Brown*, 347 U.S. at 495. It is hard to conclude otherwise with the Court's statement: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place." *Id.*

285. See generally Lisa M. Fairfax, *The Silent Resurrection of Plessy: The Supreme Court's Acquiescence in the Resegregation of America's Schools*, 9 TEMP. POL. & CIV. RTS. L. REV. 1, 1-3, 10-20 (1999) (discussing segregation cases in the post-*Brown* era).

286. *Id.* at 12.

287. *Id.* at 12-14.

The segregation of schools in the nation's capital was a powerful symbol. But as a legal matter it is less significant than may appear. At no time after the Fourteenth Amendment did Congress vote in favor of segregated schools in the District (although Congress appropriated money for the segregated schools that already existed). The sin was one of omission. More importantly, since the Fourteenth Amendment did not apply to congressional legislation, senators were free to vote in accordance with their assessments of practical impact (and even according to their personal preferences about the schools their children attended) rather than according to the perceived dictates of the Constitution. Opponents of desegregation followed a strategy of preventing an up-or-down vote, and extraordinary numbers of representatives and senators failed to vote even on procedural motions. One member said outright that he could not cast a vote that might be interpreted as condoning segregation, but that he preferred that the issue not be raised. To read this as proof that the Congress of the day viewed segregation as constitutionally legitimate is to overread the evidence.<sup>288</sup>

Well before Professor McConnell addressed the implications of segregated schools in the District of Columbia on the original understanding of the Fourteenth Amendment with respect to public schools, the United States government addressed the issue in its brief as *amicus curiae* in *Brown*.<sup>289</sup> The government argued that “[t]here is room for reasonable argument that in the pertinent statutes Congress *assumed* the existence of a system of segregated schools in the District of Columbia, but [that it] did not make it mandatory upon the responsible District authorities to maintain and continue such segregation.”<sup>290</sup> In contrast to the state constitutional provisions and statutes that require segregation,

[n]o similarly explicit and mandatory language, manifesting an unmistakable intention to make racial segregation compulsory in the public schools of the District of Columbia, is to be found in the pertinent Acts of Congress. If Congress had expressly required such segregation, a grave and difficult question under the Fifth Amendment would arise. This question could be avoided if these Acts were construed as meaning only that in them Congress assumed, but neither approved nor disapproved, the fact of a segregated school system in the District.<sup>291</sup>

Thus, the federal laws governing the District of Columbia did not require segregated schools, and of course as is discussed above, the Fourteenth Amendment did not even apply to the District of Columbia since it applies only to the states. However, the federal

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288. McConnell, *supra* note 6, at 980 (footnote omitted).

289. Brief for the United States as Amicus Curiae at 14-17, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 8, 101, 191, 413, 448).

290. *Id.* at 15.

291. *Id.* at 16 (footnote omitted).

government in 1954 seems quite properly to concede that if one read federal law as requiring racial segregation in schools in the District of Columbia in 1954, such a law would have been an unconstitutional violation of the Fifth Amendment.<sup>292</sup>

## 2. State Laws Regarding Segregated Schools

The District of Columbia was not the only legal entity in 1868 that had a law permitting racially segregated schools.<sup>293</sup> Several states had such laws as well.<sup>294</sup> These state laws are particularly significant since the state constitutions in 1868 overwhelmingly suggest that (1) all children had a fundamental right then to a public school education and (2) no provision was made in state constitutional law allowing racial segregation in public schools. It is therefore crucial for us to determine whether the state statutes in effect in 1868 contradict the state constitutional evidence. In a 1910 work, Gilbert Thomas Stephenson provided a comprehensive account of all of the state statutes that called for racially segregated public schools.<sup>295</sup> Stephenson divided his discussion between the southern and non-southern states,<sup>296</sup> but in order to determine if these state statutes are instructive regarding the original meaning of the Fourteenth Amendment, we will look both at the southern and the non-southern states and at the specific years in which the states adopted such racially segregating statutes. A brief summary of Stephenson's findings is extremely helpful in aiding both our understanding the status of the school segregation statutes and of which state statutes were in place and thus were relevant in 1868.

### a. Segregation Laws in the Southern States

In Alabama, the constitutions of 1875 and 1901 called for segregated schools, although obviously the Alabama constitution in place in 1868 did not.<sup>297</sup> Nevertheless, the Alabama statutes in place in 1868 did state: "In no case shall it be lawful to unite in one school both colored and white children, unless it be by the unanimous

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292. *Id.*

293. *See generally* GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 170-90 (1910).

294. *Id.* at 188-89.

295. *Id.* at 170-90.

296. *Id.* at 170, 177.

297. *Id.* at 170.

consent of the parents and guardians of such children; but said trustees shall in all other cases provide separate schools for both white and colored children.”<sup>298</sup> Stephenson also pointed out that separate schools were also required by Alabama laws enacted in 1878 and in 1884.<sup>299</sup>

The Arkansas constitution did not have a provision requiring separate schools, but Arkansas did have a statute on the books in 1867 a law that said, “No Negro or mulatto shall be permitted to attend any public school in this State, except such schools as may be established exclusively for colored persons.”<sup>300</sup> Additionally, Arkansas also adopted an 1873 statute that called for racially separate schools.<sup>301</sup> Thus, both Alabama and Arkansas seemed to have state statutes requiring segregated schools in 1868.

Florida’s Constitution of 1887 called for racially segregated schools, and an 1895 Florida statute made it “a penal offence to educate white and Negro children in the same schools, whether public or private or parochial.”<sup>302</sup> In Georgia, an 1866 statute provided that free education was offered to “any free white citizen[s].”<sup>303</sup> Stephenson claimed that “[t]his would seem to leave out the colored children.”<sup>304</sup> A similar Kentucky statute in 1870 also seemed to give only to white children a right to a free education,<sup>305</sup> and “apparently no provision was made for the colored children.”<sup>306</sup> Kentucky’s Constitution of 1891 required that the school fund be distributed without any distinction based on race.<sup>307</sup> Kentucky’s law is not especially surprising since, as Professor McConnell points out, Kentucky did not ratify the Fourteenth Amendment.<sup>308</sup>

As we explained above, the constitution of Louisiana that was in effect in 1868 was one of only two state constitutions that

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298. *Id.* (citing 1868 Ala. Acts 148).

299. *Id.*

300. *Id.* (citing Act of Feb. 6, 1867, No. 35, § 5, 1867 Ark. Acts 98, 100).

301. *Id.* (citing Act of Apr. 29, 1873, No. 130, § 108, 1873 Ark. Acts 392, 423).

302. *Id.* (citing Act of May 29, 1895, ch. 4335, No. 14, § 1, 1895 Fla. Laws 96-97).

303. *Id.* at 170-71 (citing Act of Dec. 18, 1866, No.108, § 3, 1866 Ga. Laws 58, 59).

304. *Id.* at 171.

305. *Id.* (citing Act of Mar. 21, 1870, ch. 854, art. 6, § 9, 1870 Ky. Acts 112, 127).

306. *Id.*

307. *Id.* (citing KY. CONST. § 187).

308. McConnell, *supra* note 6, at 969.

explicitly prohibited segregated schools.<sup>309</sup> Louisiana had one of the oldest, best educated, and most economically successful communities of free African-Americans of any state in the Union in 1868. Nevertheless, Stephenson points out that the slave-era Louisiana constitutions of 1845 and 1852 did require racially segregated schools.<sup>310</sup> This fact “makes th[e] provision of the constitution of 1868 all the more significant.”<sup>311</sup> The constitution of 1879 did not explicitly prohibit segregated schools like the constitution of 1868, but it also did not expressly call for racially segregated schools either.<sup>312</sup> Louisiana did finally come to require racially segregated schools in its 1898 constitution.<sup>313</sup> Although the Louisiana constitutions generally addressed the question of racially segregated public schools (both prohibiting and requiring them at different points), there did not seem to be any statute that required segregated schools, beyond the constitutional provisions.<sup>314</sup>

An 1870 Maryland statute stated that all “taxes paid for school purposes by the colored people . . . should be set aside for maintaining schools for colored children.”<sup>315</sup> Additionally, Maryland passed a law in 1872 that required the commissioner to establish one or more schools for black children in each district, as long as other public schools in the district were open.<sup>316</sup> These laws are not surprising because, as Professor McConnell points out, Maryland did not ratify the Fourteenth Amendment.<sup>317</sup> In Mississippi, the constitution of 1890 required racially separate schools, and an 1878 Mississippi statute also prohibited teaching white and black children in the same school.<sup>318</sup>

Missouri’s Constitution of 1865 permitted racial segregation in public schools,<sup>319</sup> and the Missouri statutes of 1865,<sup>320</sup> 1868,<sup>321</sup>

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309. See *supra* note 137 and accompanying text.

310. STEPHENSON, *supra* note 293, at 171.

311. *Id.*

312. *Id.* at 172.

313. See *supra* note 139 and accompanying text.

314. See STEPHENSON, *supra* note 293, at 171-72.

315. *Id.* at 172 (citing Act of Apr. 4, 1870, ch. 311, sec. 18, § 1, 1870 Md. Laws 535, 555-56).

316. *Id.* (citing Act of Apr. 1, 1872, ch. 377, sec. 18, § 1, 1872 Md. Laws 629, 650); see also Act of Apr. 11, 1874, ch. 463, sec. 18, § 2, 1874 Md. Laws 686, 690.

317. McConnell, *supra* note 6, at 969.

318. STEPHENSON, *supra* note 293, at 173 (citing MISS. CONST. art. VIII, § 207 (1890); Act of Mar. 5, 1878, ch. 14, § 35, 1878 Miss. Laws 89, 103).

319. *Id.* (citing MO. CONST. art. IX, § 2 (1865)).

1869,<sup>322</sup> and 1889,<sup>323</sup> as well as the constitution of 1875,<sup>324</sup> explicitly prohibited white and black children to be taught in the same school. Given that the Missouri constitution permitted racially segregated public schools, it is not surprising that the state required such racially segregated schools by statute as early as 1865. Moreover, Professor McConnell points out that resistance to civil rights was particularly strong in Missouri.<sup>325</sup> In North Carolina, the constitution of 1875 called for racially segregated public schools,<sup>326</sup> and in 1901<sup>327</sup> and 1903<sup>328</sup> North Carolina passed statutes defining who was an African-American since African-Americans were not then allowed to attend white schools.

Although Oklahoma did not become a state until 1907 and therefore is not included in the thirty-seven states in existence at the time the Fourteenth Amendment was adopted, Stephenson provides some insights regarding the public schools in the Territory of Oklahoma. From 1890 until 1901, every three years each county would hold a vote to determine if there should be racially separate schools in that particular county.<sup>329</sup> If the vote was against segregation, then white and black children could attend the same school; but if the vote was in favor of segregation, separate schools were required.<sup>330</sup> In 1901 at the start of the Progressive Era, however, racially separate public schools were required in all parts of the Territory.<sup>331</sup> Oklahoma became a state in 1907, and both the state

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320. *Id.* (citing Act of Mar. 29, 1866, § 20, 1865 Mo. Laws 170, 177). The statutes of 1864 state that children should be taught without regard for race. *See* Act of Feb. 20, 1865, § 2, 1864 Mo. Laws 125, 126.

321. STEPHENSON, *supra* note 293, at 173 (citing Act of Mar. 25, 1868, § 24, 1868 Mo. Laws 165, 170).

322. *Id.* (citing Act of Mar. 1, 1869, § 1, 1869 Mo. Laws 86, 86).

323. *Id.* (citing Act of May 28, 1889, § 7051a, 1889 Mo. Laws 214, 226; MO. REV. STAT. §§ 9774-76 (1906)).

324. *Id.*; MO. CONST. art. XI, § 3 (1875).

325. McConnell, *supra* note 6, at 969-70.

326. N.C. CONST. art IX, § 2 (1875).

327. STEPHENSON, *supra* note 293, at 174 (citing Act of Mar. 11, 1901, ch. 4, § 68, 1901 N.C. Sess. Laws 45, 64).

328. *Id.* (citing Act of Mar. 4, 1903, ch. 435, § 22, 1903 N.C. Sess. Laws 751, 756).

329. *Id.*

330. *Id.* (citing OKLA. STAT. tit. 79, §§ 6464-72 (1890)).

331. *Id.* (citing Act of Mar. 8, 1901, ch. 28, §§ 1-11, 1901 Okla. Sess. Laws 205, 205-09).

constitution<sup>332</sup> and a state statute of 1907<sup>333</sup> required segregated schools.

As discussed above,<sup>334</sup> the Reconstruction Constitution of South Carolina was similar to the Reconstruction Constitution of Louisiana because they were the two states (both southern) whose constitutions in 1868 explicitly prohibited segregated schools.<sup>335</sup> However, the Constitution of South Carolina of 1895 required racially segregated public schools,<sup>336</sup> and Stephenson cites in passing an 1896 and a 1902 law, which seem to require racially segregated public schools pursuant to the constitution of 1895.<sup>337</sup>

Tennessee's Constitution of 1870 was the first state constitution to require segregated public schools, and it was adopted two years after the Fourteenth Amendment was passed, as discussed above.<sup>338</sup> However, prior to the constitution of 1870, Tennessee also had a statute enacted in 1866, which required racially segregated public schools.<sup>339</sup> Tennessee adopted a similar law in 1873,<sup>340</sup> which is not surprising since the constitution of 1870 required racially segregated public schools.

The Texas Constitution of 1876 required racially segregated public schools,<sup>341</sup> and the state passed laws in 1884,<sup>342</sup> 1893,<sup>343</sup> and 1895<sup>344</sup> that also required racially segregated public schools. Finally, as we mentioned above, the State of Virginia did not seem to recognize a child's right to a free and common public school education in 1868 because its constitution lacked a provision with

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332. OKLA. CONST. art. XIII, § 3 (1907).

333. STEPHENSON, *supra* note 293, at 175 (citing Act of May 5, 1908, ch. 77, 1908 Okla. Sess. Laws 694-95; OKLA. STAT. §§ 6551-56 (1908)).

334. *See supra* note 137 and accompanying text.

335. S.C. CONST. of 1868, art. X, § 10.

336. S.C. CONST. art. XI, § 7 (1895).

337. STEPHENSON, *supra* note 293, at 175-76 (citing Act of Mar. 9, 1896, No. 63, § 58, 1896 S.C. Acts 150, 171; S.C. CODE ANN. § 9-24-1231 (1902)).

338. *See supra* note 138 and accompanying text.

339. STEPHENSON, *supra* note 293, at 176 (citing Act of May 26, 1866, ch. 40, § 4, 1866 Tenn. Pub. Acts 65, 65).

340. *Id.* (citing Act of Mar. 15, 1873, ch. 25, § 30, 1873 Tenn. Pub. Acts 39, 46).

341. *Id.* (citing TEX. CONST. art. VII, § 7 (1876)).

342. *Id.* (citing Act of Feb. 6, 1884, ch. 25, § 7, 1884 Tex. Gen. Laws 38, 40).

343. *Id.* (citing Act of May 20, 1893, ch. 122, § 58, 1893 Tex. Gen. Laws 182, 198).

344. *Id.* (citing Act of Mar. 21, 1895, ch. 24, § 58, 1895 Tex. Gen. Laws 29, 29).

respect to education.<sup>345</sup> Virginia's Constitution of 1870 did provide for a child's right to a free and common public school education, and it did not require racially segregated public schools.<sup>346</sup> Racially segregated public schools did come to be required during the so-called Progressive Era when Virginia's Constitution of 1902<sup>347</sup> and its statutes of 1882<sup>348</sup> and 1896<sup>349</sup> all provided for racial segregation in public schools.

The only southern states, according to Stephenson's comprehensive analysis, that clearly had statutes calling for racially segregated public schools, or that at least implied that there should be racial segregation in public schools, at the time the Fourteenth Amendment was adopted in 1868 were five out of eleven southern states: Alabama, Arkansas, Georgia, Missouri, and Tennessee. The Missouri law is explained because it was the only state whose constitution permitted racial segregation in public schools in 1868. As to racial segregation in public schools in Georgia, Stephenson claims that Georgia law only implied that there should be racial segregation in public schools; it did not require racially segregated public schools outright.

#### b. Segregation Laws in the Non-Southern States

In addition to the southern states, Stephenson considered the "[s]tates [o]utside [the] South" that had statutes requiring segregated schools.<sup>350</sup> During the legislative session of 1869–1870, the State of California passed a law requiring that "[t]he education of children of African descent and Indian children shall be provided for in separate schools."<sup>351</sup> This law was upheld as being constitutional in *Ward v. Flood*, as will be discussed in detail below, so long as the state provided separate-but-equal public schools for its black children.<sup>352</sup> In 1880, California amended this statute to say expressly that unless separate schools are actually being provided for black children in

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345. See *supra* note 133.

346. See *supra* note 133.

347. VA. CONST. art. IX, § 140 (1902).

348. STEPHENSON, *supra* note 293, at 176 (citing Act of Jan. 26, 1882, ch. 40, sec. 1, § 58, 1882 Va. Acts 36, 36-37).

349. *Id.* (citing Act of Feb. 18, 1896, ch. 318, sec. 1, § 1492, 1895-1896 Va. Acts 352, 352).

350. *Id.* at 177-90.

351. *Id.* at 177 (quoting Act of Apr. 4, 1870, ch. 556, § 56, 1870 Cal. Stat. 839).

352. 48 Cal. 36, 52 (1874); see *infra* notes 481-90 and accompanying text.

California, such children must be admitted to the white schools in that state along with the white school children.<sup>353</sup> Stephenson explained that after the 1880 amendment, black children could attend any public school they wished, even if separate schools existed.<sup>354</sup> However, this was not the case for Japanese, Chinese, or Korean children.<sup>355</sup>

Delaware law in 1881 specifically appropriated money “for the education of colored children,”<sup>356</sup> and in 1889 three racially separate schools were established.<sup>357</sup> Additionally, in 1898 Delaware established racially separate kindergartens.<sup>358</sup> Stephenson explained that “Delaware is as strict as the Southern States in requiring separate schools for the races.”<sup>359</sup>

Illinois had a law in place in 1896 making it an offense to exclude black children from the public schools.<sup>360</sup> Yet, there were numerous cases that showed that school administrators did not always follow this law.<sup>361</sup> Stephenson pointed out that “[a]lthough all of these cases were decided against race separation they show that there is still an appreciable feeling in Illinois against the white and colored children being taught in the same schools.”<sup>362</sup>

Indiana law in 1869 required racially segregated public schools.<sup>363</sup> As will be discussed below, that law was upheld by the Indiana Supreme Court in *Cory v. Carter*.<sup>364</sup> In 1877, Indiana amended its 1869 law so that school directors were permitted to establish racially separate schools if they wanted to, but they were not required to do so.<sup>365</sup> In Iowa, Stephenson noted that no law since 1865 ever “required or permitted a separation of the races in schools.”<sup>366</sup> In fact, in *Clark v. Board of Directors*, decided just

353. STEPHENSON, *supra* note 293, at 177.

354. *Id.* at 177-78.

355. *Id.* at 178.

356. *Id.* (citing Act of Mar. 22, 1881, ch. 362, § 1, 16 Del. Laws 385 (1881)).

357. *Id.* (citing Act of Jan. 1, 1889, chs. 539-43, 18 Del. Laws 650-51, 655, 658 (1889)).

358. *Id.* (citing Act of Jan. 11, 1898, ch. 67, § 22, 21 Del. Laws 193 (1898)).

359. *Id.*

360. *Id.* at 178-79 (citing Act of May 1, 1896, ch. 122, § 292, 1896 Ill. Laws 3730).

361. *Id.* at 179 (citing *Chase v. Stephenson*, 71 Ill. 383, 385 (1874)).

362. *Id.* at 180.

363. *Id.* at 181 (citing Act of May 13, 1869, ch. 16, § 2, 1869 Ind. Acts 41).

364. 48 Ind. 327, 366 (1874); *see also infra* notes 514-36.

365. STEPHENSON, *supra* note 293, at 182 (citing Act of Mar. 5, 1877, ch. 81, § 1, 1877 Ind. Acts 124).

366. *Id.* at 183.

before the adoption of the Fourteenth Amendment, the Iowa Supreme Court explicitly prohibited the racial segregation of public schools.<sup>367</sup>

The Kansas statutes of 1868 granted cities with more than 150,000 residents “the ‘power to organize and maintain separate schools for the education of white and colored children.’”<sup>368</sup> This provision was omitted from the statute books in 1876,<sup>369</sup> and it therefore was “repealed by implication.”<sup>370</sup> However, a specific provision for racial segregation in public schools was revived in Kansas in 1879 “‘except in the high school, where no discrimination shall be made on account of color.’”<sup>371</sup> Kansas was, of course, Linda Brown’s home state, and it was Kansas thus that helped give rise to the case of *Brown v. Board of Education*.

Nevada law in 1865 did not allow Negroes, Mongolians, and Indians to attend the public schools, but racially separate public schools supported by the school fund were permitted.<sup>372</sup> In 1872, the Nevada Supreme Court held that black children had to be admitted to the public schools if no racially separate school was established for them.<sup>373</sup> Stephenson concluded that “[n]o subsequent reference to the subject appears in the statutes or reports, so it may be assumed that separate schools no longer exist in Nevada.”<sup>374</sup>

New Jersey passed a statute in 1881 that prohibited its public schools from excluding anyone based on their “‘religion, nationality, or color.’”<sup>375</sup> However, the State of New York passed a law in 1864, which was reenacted in 1894, that permitted racially separate public schools when the school authorities believed such schools were appropriate.<sup>376</sup> In fact, in *People ex rel. King v. Gallagher*, the New York Court of Appeals permitted the exclusion of black students

367. 24 Iowa 266, 277 (1868); see also *infra* notes 546-57 and accompanying text.

368. STEPHENSON, *supra* note 293, at 183 (quoting Act of Feb. 18, 1868, ch. 18, sec. 5, § 75, 1868 Kan. Sess. Laws 146).

369. *Id.* (citing Act of Jan. 11, 1876, ch. 122, 1876 Kan. Sess. Laws 238).

370. *Id.*

371. *Id.* (quoting Act of Jan. 14, 1879, ch. 81, § 1, 1879 Kan. Sess. Laws 163).

372. *Id.* at 184 (citing Act of Mar. 20, 1865, ch. 145, § 50, 1865 Nev. Stat. 413, 426).

373. *State v. Duffy*, 7 Nev. 342, 348 (1872).

374. STEPHENSON, *supra* note 293, at 184.

375. *Id.* (quoting Act of Mar. 23, 1881, ch. 149, § 1, 1881 N.J. Laws 186).

376. *Id.* at 185 (citing Act of Apr. 23, 1864, tit. 5, § 1, 1864 N.Y. Laws 1281; Act of Apr., 27, 1894, ch. 556, sec. 11, § 28, 1894 N.Y. Laws 1288).

from the all-white schools so long as separate-but-equal schools were established for the black students.<sup>377</sup> In 1900, New York repealed its old public school law and enacted a new law, which stated, “No person shall be refused admission [in]to or be excluded from any public school in the State of New York on account of race or color.”<sup>378</sup>

An Ohio statute adopted in 1878 expressly permitted state boards of education to establish racially separate public schools for its black students,<sup>379</sup> but “[t]his law was repealed in 1887, and thereafter all public schools were open to colored children.”<sup>380</sup> Ohio ended de jure segregation in 1887.

Pennsylvania passed a statute in 1854, before the abolition of slavery, that specifically called for the creation of racially segregated schools if there were more than twenty black students in a particular school district.<sup>381</sup> Additionally, in 1869 black students “were not admitted to the sub-district schools of Pittsburg, Pennsylvania.”<sup>382</sup> However, this segregationist 1869 law was repealed in 1872,<sup>383</sup> and the segregationist 1854 law was repealed in 1881.<sup>384</sup> No separate schools were permitted in the State of Pennsylvania after 1881.<sup>385</sup> Professor McConnell points out that when Pennsylvania repealed its 1854 law in 1881, the sponsor of the 1881 law stated:

In proposing the repeal of the act of 1854, which in terms would be prohibited by the present State and Federal Constitutions, it seems a matter of surprise that an act so directly in conflict with the Fourteenth and Fifteenth Amendments of the Constitution of the United States should have been permitted to have remained in the statute book until this time.<sup>386</sup>

West Virginia law in 1865 required that racially separate public schools be maintained for black students in school districts where

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377. 93 N.Y. 438, 456 (1883); *see also infra* notes 505-13 and accompanying text.

378. STEPHENSON, *supra* note 293, at 185 (quoting Act of Apr. 18, 1900, ch. 492, § 1, 1900 N.Y. Laws 1173).

379. *Id.* (citing Act of May 11, 1878, ch. 9, § 1, 1878 Ohio Laws 507, 513).

380. *Id.* (footnote omitted) (citing Act of Feb. 21, 1887, §§ 1-2, 1887 Ohio Laws 31, 34).

381. *Id.* at 185-86.

382. *Id.* at 185 (citing Act of Feb. 12, 1869, no. 132, § 54, 1869 Pa. Laws 160).

383. *Id.* (citing Act of Apr. 9, 1872, no. 999, § 1, 1872 Pa. Laws 1048-49).

384. *Id.* at 186 (citing Act of June 8, 1881, no. 83, § 2, 1881 Pa. Laws 76).

385. *Id.*

386. McConnell, *supra* note 6, at 970 (quoting 242 PENN. CONG. REC. 1881 (daily ed. May 26, 1881) (statement of Sen. Sill)).

there were thirty or more black students.<sup>387</sup> However, if the average daily attendance was fewer than fifteen students in a particular month, the school should be closed for any period not more than six months.<sup>388</sup> West Virginia's Constitution of 1872<sup>389</sup> and a statute of 1871<sup>390</sup> also required the creation of racially segregated public schools, and the state supreme court held in 1896 and 1898 that racially segregated public schools did not violate the Fourteenth Amendment.<sup>391</sup> "Thus, West Virginia is as strict as Virginia or any Southern State in separating the races in schools,"<sup>392</sup> which is not surprising given West Virginia's resistance to protecting civil rights.<sup>393</sup>

Wyoming passed a statute in 1887 that stated, "When [sic] there are fifteen or more colored children within any school district, the board of directors thereof, with the approval of [the] county superintendent of schools, may provide a separate school for the instruction of such colored children."<sup>394</sup>

Although Arizona was not admitted to the Union until 1912, until 1909 the federal Territory of Arizona did prohibit the exclusion of children from the public schools because of their race.<sup>395</sup> But in 1909, over a governor's veto, two-thirds of the Arizona legislature passed a statute that permitted racially segregated public schools if there were at least eight African-American students in the school district in question.<sup>396</sup>

Colorado's Constitution of 1876<sup>397</sup> and Idaho's Constitution of 1889<sup>398</sup> explicitly prohibited racially segregated public schools, and

387. STEPHENSON, *supra* note 293, at 186 (citing Act of Jan. 17, 1865, ch. 59, § 17, 1865 W. Va. Acts 54).

388. *Id.* (citing § 17).

389. W. VA. CONST. of 1872, art. XII, § 8.

390. STEPHENSON, *supra* note 293, at 186 (citing Act of Feb. 28, 1871, ch. 152, § 19, 1871 W. Va. Acts 206; Act of Apr. 9, 1872, no. 999, § 1, 1872 W. Va. Acts 1048-49; Act of Jan. 12, 1881, ch. 15, § 17; 1881 W. Va. Acts 176-77).

391. *Id.* (citing *Martin v. Bd. of Educ.*, 26 S.E. 348 (W. Va. 1896); *Williams v. Bd. of Educ.*, 31 S.E. 985 (W. Va. 1898)).

392. *Id.*

393. McConnell, *supra* note 6, at 969-70.

394. STEPHENSON, *supra* note 293, at 186-87 (quoting Act of Jan. 1, 1887, ch. 3, § 3947, 1887 Wyo. Sess. Laws 831, 836).

395. *Id.* at 187 (citing Act of 1901, ch. 11, § 101, 1901 Ariz. Sess. Laws 605).

396. *Id.* (citing Act of Mar. 17, 1909, ch. 67, § 1-2, 1909 Ariz. Sess. Laws 171).

397. COLO. CONST. art IX, § 8.

398. IDAHO CONST. art IX, § 6.

Stephenson points out that “the judicial decisions of those States do not show any attempts by the school boards to draw color lines.”<sup>399</sup> Similarly, Massachusetts eliminated segregated public schools with a historic statute adopted in 1855;<sup>400</sup> and Michigan,<sup>401</sup> Minnesota,<sup>402</sup> the Territory of New Mexico,<sup>403</sup> and Rhode Island<sup>404</sup> also all prohibited racially segregated public schools.

Thus, Stephenson summarized the status of the state laws calling for segregated schools in 1910 as follows:

The separation of the races in public schools is required by the Constitutions of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Complete separation is required by statute in all of the above-named States and, besides those, also in Arkansas, Maryland, and Delaware. A discretionary power is given to the school boards to establish separate schools in Arizona; in Indiana; in California, as to schools for Indians, Chinese, and Mongolians; in Kansas, in cities of over 150,000 inhabitants; and in Wyoming, in districts having fifteen or more colored pupils. The following States that once had separate schools now prohibit them: Illinois, Massachusetts, Nevada, New Jersey, New York, Ohio, and Pennsylvania. In addition to these, separate schools are not allowed in Colorado, Idaho, Iowa, Michigan, Minnesota, New Mexico, and Rhode Island. There are other States which have never seen fit to make any mention one way or the other of race distinctions in schools, either in statutes or court reports; so one is warranted in inferring that the schools are open to all. They are Connecticut, Maine, Montana, New Hampshire, North Dakota, Oregon, South Dakota, Utah, Vermont, Wisconsin, and Washington.<sup>405</sup>

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399. STEPHENSON, *supra* note 293, at 187.

400. *Id.* (citing Act of Apr. 28, 1855, ch. 256, 1854 Mass. Acts 674).

401. *Id.* (citing Act of Feb. 28, 1867, no. 34, § 28, 1867 Mich. Pub. Acts 42, 43).

402. *Id.* at 188 (citing Act of Feb. 28, 1877, ch. 74, sec. 6, § 1, 1877 Minn. Laws 115, 141).

403. *Id.* (citing Act of Mar. 21, 1901, ch. 78, § 1, 1901 N.M. Laws 147). Note that New Mexico did not become a state until 1912, so the law being cited here is the law from the Territory of New Mexico. The law made it a misdemeanor to exclude a student based on race or national origin. *Id.* (citing § 1, 1901 N.M. Laws at 147).

404. *Id.* at 189.

405. *Id.* at 188-89. Note that of the states mentioned by Stephenson in this paragraph, Arizona and New Mexico were not yet admitted to the Union. Additionally, Stephenson failed to account for two states: Missouri and Nebraska. While Missouri had a constitutional provision and statutes requiring segregated schools, Stephenson did not mention Nebraska at all, not even in the list of states that are silent on segregation. MO. CONST. of 1875, art. XI, § 3; Act of Mar. 2, 1889, § 7051a, 1889 Mo. Laws 214, 226.

So what do all these state statutes regarding racial segregation of the public schools show us in terms of discerning better the original understanding of the Fourteenth Amendment right to a public school education in 1868 when the Amendment was ratified? We think that because slavery itself was only prohibited by the adoption of the Thirteenth Amendment in 1865,<sup>406</sup> any pre-1865 law calling for racially segregated schools is inherently suspect as an indicium of original public meaning in 1868, since such pre-1865 laws were passed at a time when slavery was still legal. We conclude that pre-1865 laws providing for racial segregation in public schools should not be and cannot be relied on in determining the original understanding of the Fourteenth Amendment. We also think that any law that was passed after 1868 is not reflective of the original understanding of the Fourteenth Amendment. Obviously, the original public meaning of the Fourteenth Amendment was frozen for all time on July 9, 1868, when it was finally ratified.<sup>407</sup> Post-1868 laws that racially discriminate are thus irrelevant in discerning the original public meaning of the Fourteenth Amendment on July 9, 1868.

Stephenson's findings show us that there were ten states that had laws requiring, permitting, or at least implying segregated schools in 1868.<sup>408</sup> These states include: Alabama, Arkansas, Georgia, Kansas, Missouri, Nevada, New York, Pennsylvania, Tennessee, and West Virginia.<sup>409</sup> However, two of these states, New York and Pennsylvania, had pre-1865 laws that were allegedly still in effect in 1868.<sup>410</sup> Because these laws were passed before slavery was abolished, we think they should not be counted in any head count of states that seeks to determine the original understanding of the Fourteenth Amendment, which was passed three years after slavery had been abolished. No state constitution required racially segregated schools in 1868,<sup>411</sup> and only eight states out of thirty-seven (less than one-quarter) had statutes that required, permitted, or implied racial segregation in public schools that had been passed

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406. U.S. CONST. amend. XIII, § 1.

407. U.S. CONST. amend. XIV.

408. STEPHENSON, *supra* note 293, at 170-86.

409. *Id.*

410. *Id.* at 185. The New York law passed in 1864 and the Pennsylvania law was passed in 1854. *Id.*

411. Missouri's Constitution of 1865 permitted segregated schools. MO. CONST. of 1865, art. IX, § 2. However, since Missouri passed laws in 1865 and 1868 requiring segregated schools, we are accounting for Missouri in the analysis regardless of its constitutional provision.

after 1865 but that were still in force in 1868. We therefore conclude that an Article V consensus of at least three-quarters of the thirty-seven states in 1868 did not require or permit racially segregated public schools when the Fourteenth Amendment was adopted. There was a clear Article V consensus of three-quarters of the state constitutions in 1868 that recognized a child's fundamental right to a free and common public school education, and less than one-quarter of the states required or permitted racially segregated public schools by statute. The Reconstruction Era Article V consensus is that as of July 9, 1868, all children born in the United States had a fundamental right to a racially integrated public school education.

We are not, however, quite done with this topic yet. Besides the state constitutions and state statutes that were in effect in 1868, there was also case law in the state courts on the subject of racial segregation in the public schools. We turn to that subject next.

## B. State Case Law

State constitutions and state statutes from 1868 all indicate that every child had a fundamental right to a desegregated free and common public school education in 1868. But there is a final source of law—state case law—that must be addressed before we can claim to have proven our case. The state cases that discussed racial segregation in public schools were virtually divided on the issue, but even the most racist state court opinions were either opinions that followed the *Slaughter-house Cases* in saying that a public school education was not a privilege or immunity or that, in the case of Ohio, anticipated the *Slaughter-house Cases* by one year.<sup>412</sup> We thus think that *state* case law does not refute the conclusion we have argued for so far that every child had a fundamental right to a free and racially integrated public school education under the Fourteenth Amendment after July 9, 1868.

The starting point for analysis of the case law on school segregation is the infamous U.S. Supreme Court opinion in *Plessy v. Ferguson*,<sup>413</sup> which was handed down on May 18, 1896. We start with the Supreme Court's opinion in *Plessy v. Ferguson*, even though it was decided twenty-eight years after the ratification of the

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412. See *The Slaughter-house Cases*, 83 U.S. 36 (1872); *State ex rel. Gurnes v. McCann*, 21 Ohio St. 198 (1872).

413. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

Fourteenth Amendment, because *Plessy v. Ferguson* is the foundational segregationist case of all time. *Plessy v. Ferguson* upheld the concept of “separate but equal” by stating that “[t]he object of the [Fourteenth] amendment was undoubtedly to [ensure] 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.”<sup>414</sup> The actual issue raised by *Plessy v. Ferguson* was whether a Louisiana state law that required separate railroad cars for whites and blacks was consistent with the Fourteenth Amendment.<sup>415</sup> But, the Supreme Court ruled as it did in *Plessy v. Ferguson* by explicitly relying on the supposed legality of anti-miscegenation laws<sup>416</sup> and of laws providing for racial segregation in public schools. Justice Brown, writing for the Supreme Court’s seven-to-one majority<sup>417</sup> said:

Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have 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.<sup>418</sup>

Thus, *Plessy v. Ferguson* seems to indicate that twenty-eight years after the ratification of the Fourteenth Amendment in 1896, racially segregated public schools were not only permitted but had even become commonplace throughout the states. We have already seen that some state constitutions and statutes requiring racially segregated public schools were passed in the years immediately after 1868. The reality, however, is even grimmer because in 1877 Reconstruction itself came to an end, and the Democratic majority in the House of Representatives that was first elected in the midterm

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414. *Plessy*, 163 U.S. at 544.

415. *Id.* at 540, 542.

416. For an explanation as to why *Plessy* was wrong on anti-miscegenation laws, see Calabresi & Matthews, *supra* note 14, at 1432-33.

417. See ANDREW KULL, THE COLOR-BLIND CONSTITUTION 263 n.4 (1992) (explaining that Justice Brewer did not participate in the decision due to “ill health”). However, Kull explains that based on Justice Brewer’s dissent in *Board of Education v. Tinnon*, 26 Kan. 1, 23 (1881) (Brewer, J., dissenting), “there is no doubt that Brewer would have voted in the majority in *Plessy*.” KULL, *supra*, at 263 n.4.

418. *Plessy*, 163 U.S. at 544.

elections of 1874 succeeded eventually in 1877 in forcing the withdrawal of all Union troops from the southern states. The withdrawal of northern troops from the South in 1877 coincided with the swift rise of Jim Crow Era racial segregation. We therefore think the most relevant case law to the question of the original meaning of the Fourteenth Amendment as to racial segregation in the public schools should be limited to those cases that were decided between the abolition of slavery in 1865 and the final ratification of the Fourteenth Amendment on July 9, 1868. Pre-1865 cases are tainted by the existence of a system of race-based slavery while post-1868 cases reflect at best the early practice under the Fourteenth Amendment, which is not necessarily coincident with the Amendment's original meaning. Cases decided after the *Slaughterhouse Cases* had eviscerated the Privileges or Immunities Clause in 1873 or after the end of Reconstruction and the withdrawal of the Union army in 1877 are worthless as indicia of the original meaning of the Fourteenth Amendment.

This Section, therefore, will first examine the racial public school segregation cases on which *Plessy v. Ferguson* relied when the Supreme Court said that “[t]he most common instance of” racial segregation was in the context of public schools.<sup>419</sup> We think the cases that *Plessy* cited are not indicative of the original understanding of the Fourteenth Amendment with respect to the right to a public school education. All of these cases were either decided before the abolition of slavery in 1865, after the *Slaughterhouse Cases* had eviscerated the Privileges or Immunities Clause in 1873, or after the end of Reconstruction in 1877. Moreover, it turns out that there are some very important cases that *Plessy* failed to mention that clearly indicate that racial segregation in the public school was prohibited by the Fourteenth Amendment. Finally, we consider in this Section of our Article racial segregation outside the context of public schools. We explain why racial segregation in those contexts does not affect our theory that racial segregation in public schools was prohibited as an original matter under the Fourteenth Amendment from July 9, 1868, to the present.

In the first part of his article, Professor McConnell briefly discusses some of the cases that consider racial segregation in public schools.<sup>420</sup> However, Professor McConnell did not classify which of these cases were cited by the Supreme Court in *Plessy v. Ferguson* as

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419. *Id.*

420. See McConnell, *supra* note 6, at 971-77.

being in support of racially segregated schools and which ones *Plessy* failed to mention. Rather, Professor McConnell discusses several cases from the northern states only in a section entitled “Northern States: Early Judicial Interpretation.”<sup>421</sup> Although Professor McConnell talks about racially segregated schools in both the North and South in 1868, he only discusses cases decided by the supreme courts of various northern states. Professor McConnell says that the issue of the constitutionality of racial segregation of public schools only “reached the supreme courts of nine Northern States,”<sup>422</sup> but we were able to find a few additional opinions on the constitutionality of racial segregation that Professor McConnell did not mention—both in northern and in southern states. We will look at all the racial school segregation cases we were able to find and have supplemented our explanation and analysis of the cases with Professor McConnell’s explanation where appropriate.

### 1. *School Segregation Cases that Plessy Relied Upon*

Although the facts of *Plessy v. Ferguson* did not concern the question of racial segregation in public schools, the Supreme Court in its opinion in *Plessy* relied on the alleged fact that segregated public schools were widespread in 1896.<sup>423</sup> This fact then led the Court to uphold the Louisiana law at issue in *Plessy*, which required racial segregation in railroad cars.<sup>424</sup> In support of the proposition that “[t]he most common instance of [segregation] is connected with the establishment of separate schools for white and colored children,”<sup>425</sup> *Plessy* cited eight state court cases.<sup>426</sup> It is instructive to look at these eight cases closely to determine if and how they affect the theory of this Article, that racially segregated public schools were unconstitutional as an original matter under the Fourteenth Amendment.

The first case that is often cited in favor of segregated schools was the 1849 decision of the Supreme Judicial Court of

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421. *Id.*

422. *Id.* at 971.

423. 163 U.S. at 544.

424. *Id.* at 548.

425. *Id.* at 544.

426. *Plessy* also cited the oft-cited District of Columbia law, which authorized segregation, which was discussed in detail above. *See supra* Subsection III.A.1.

Massachusetts in *Roberts v. City of Boston*.<sup>427</sup> In *Roberts*, a black child sought admission to a school for white children because it was closer to her father's house.<sup>428</sup> The challenge was based on an 1845 Massachusetts law "that any child unlawfully excluded from public school instruction, in this commonwealth, shall recover damages therefor, in an action against the city or town, by which such public school instruction is supported."<sup>429</sup> The issue before the court was "whether, upon the facts agreed, the plaintiff has been unlawfully excluded from such instruction."<sup>430</sup> The Massachusetts court rejected the black girl's argument that exclusion from the school was a violation of the statute because "[t]he power of general superintendence vests a plenary authority in the committee to arrange, classify, and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare."<sup>431</sup> Although future Senator Charles Sumner argued on behalf of the plaintiff "that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion,"<sup>432</sup> the Massachusetts Supreme Judicial Court rejected the argument.<sup>433</sup> Ultimately, the court concluded:

This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence, and we cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment.<sup>434</sup>

While *Roberts* has been cited in support of many state laws that permitted or required racially segregated public schools, the opinion is essentially irrelevant to the question of whether racially segregated schools were permissible as an original matter under the Fourteenth Amendment after July 9, 1868. Even if the *Roberts* case had been

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427. 59 Mass. (5 Cush.) 198 (1849).

428. *Id.* at 205.

429. *Id.* at 204.

430. *Id.*

431. *Id.* at 208.

432. *Id.* at 209.

433. *Id.* at 209-10.

434. *Id.*

correctly decided in 1849, under Massachusetts law as it existed in 1849, Professor McConnell quite rightly points out that after *Roberts*, “[t]he legislature promptly responded . . . with legislation ending the segregation of Massachusetts schools.”<sup>435</sup> Moreover, *Roberts* was decided nineteen years prior to the adoption of the Fourteenth Amendment and sixteen years prior to adoption of the Thirteenth Amendment to the United States Constitution in 1865, which abolished slavery.<sup>436</sup> Thus, it is not surprising, and it is perhaps even to be expected, that an 1849 case might uphold racial segregation in public schools at a time when a system of racial slavery was still widespread throughout the United States.

The Thirteenth and Fourteenth Amendments were adopted in 1865 and in 1868 to change the anti-black sentiment that had existed previously and to abolish all legal distinctions made on the basis of race.<sup>437</sup> Thus, looking at an 1849 pre-Fourteenth Amendment case to support the proposition that segregated public schools were constitutional even after the Fourteenth Amendment was passed on July 9, 1868, is utterly absurd. The whole point of adopting the Fourteenth Amendment in 1868 was to overrule and change previously existing ideas about racial segregation and equality. Thus, the *Roberts* opinion is completely irrelevant to the original understanding of the Fourteenth Amendment as it bears on rights to an integrated public school education.

*Plessy* cited seven other state cases in addition to *Roberts* that allegedly support its conclusion that racially segregated public schools were constitutional in 1896.<sup>438</sup> In the 1871 Ohio case of *State ex rel. Garnes v. McCann*,<sup>439</sup> a black citizen sued a school district alleging that “the teacher, under the direction of the local directors, wholly neglect[ed] and refuse[d] to impart instruction to them, or treat them as scholars, and denie[d] them the educational advantages of the school.”<sup>440</sup> The school district maintained that the black children should be educated in the separate school for black children that had been established in the joint district.<sup>441</sup> In rejecting the claims of the black school children, the Ohio Supreme Court relied

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435. McConnell, *supra* note 6, at 968.

436. See U.S. CONST. amend. XIII, § 1.

437. Calabresi & Agudo, *supra* note 67, at 99.

438. See *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

439. 21 Ohio St. 198 (1871).

440. *Id.* at 203.

441. *Id.* at 204.

on the Ohio State Constitution as well as on Ohio laws.<sup>442</sup> The court discussed two provisions of the Ohio constitution. First, the Ohio constitution said that “it shall be the duty of the [G]eneral [A]ssembly to pass suitable laws . . . to encourage schools and the means of instruction.”<sup>443</sup> Second, the Ohio constitution also said that “[t]he General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State.”<sup>444</sup> The Ohio Supreme Court explained that these state constitutional provisions gave “discretion [to] the general assembly, in the exercise of [its] legislative power . . . to determine what laws are ‘suitable’ to secure the organization and management” of the constitutionally mandated system of schools.<sup>445</sup>

Ohio had adopted a law “[t]o provide for the reorganization, supervision and maintenance of Common Schools” on March 14, 1853,<sup>446</sup> and § 31 of that law was entitled “schools for colored children.”<sup>447</sup> Section 31 provided:

The township boards of education in this State, in their respective townships, and the several other boards of education, and the trustees, visitors, and directors of schools, or other officers having authority in the premises, of each city or incorporated village, shall be, and they are hereby authorized and required to establish within their respective jurisdictions, one or more separate schools for colored children, when the whole number by enumeration exceeds thirty, so as to afford them, as far as practicable under all the circumstances, the advantages and privileges of a common school education . . . .<sup>448</sup>

On March 18, 1864, § 31 was amended *to require* a school for black children if the number of students exceeded twenty.<sup>449</sup> The

442. *Id.* at 204-06, 209, 211.

443. *Id.* (quoting OHIO CONST. art. I, § 7).

444. OHIO CONST. art. VI, § 2.

445. *Garnes*, 21 Ohio St. at 204-05.

446. *See* Act of Mar. 14, 1853, § 1, 1853 Ohio Laws 429.

447. *Id.* § 31, at 441.

448. *Id.*

449. Act of Mar. 18, 1864, § 4, 1864 Ohio Laws 31, 32-33. The full text of § 31 from the 1864 law stated:

The township boards of education in this state, in their respective townships, and the several other boards of education, and the trustees, visitors and directors of schools, or other officers having authority in the premises, of each city or incorporated village, shall be and they are hereby authorized and required to establish, within their respective jurisdictions, one or more separate schools for colored children, when the whole number, by enumeration, exceeds twenty, and when such schools will afford them, as far

Ohio Supreme Court held the Ohio legislature had thus acted through its exclusive constitutional grant of authority, and the court held that the racially separate schools that had thus been established were constitutional based on the power of the legislature.<sup>450</sup>

The Ohio Supreme Court in this 1872 case also addressed the argument that racial segregation of public schools was unconstitutional in light of the newly adopted Fourteenth Amendment ratified in 1868.<sup>451</sup> The court first explained quite correctly that black people were citizens of the state by stating:

At all events, the statutes classifying the youth of the State for school purposes on the basis of color, and the decisions of this court in relation thereto, were not at all based on a denial that colored persons were citizens, or that they are entitled to the equal protection of the laws. It would seem, then, that these provisions of the amendment contain nothing conflicting with the statute authorizing the classification in question, nor the decisions heretofore made touching the point in controversy in this case.<sup>452</sup>

The Court then argued quite unconvincingly that the Ohio statutes in question did not violate either the Privileges or Immunities Clause or the Equal Protection Clause of the Fourteenth Amendment.<sup>453</sup> With respect to the Privileges or Immunities Clause, the Ohio Supreme Court explained that the language and context of the clause “affords strong reasons for believing that it includes only such privileges or immunities as are derived from, or recognized by, the constitution of the United States.”<sup>454</sup> Because “all the privileges of the school system . . . are derived solely from the constitution and laws of the State,” therefore, the Privileges or Immunities Clause of the Fourteenth Amendment “has no application to this case.”<sup>455</sup>

It is important to pause here and note a huge and consequential legal error. The Ohio Supreme Court made exactly the same mistake in this case in 1872 as the U.S. Supreme Court was about to make in the *Slaughter-house Cases*, which were argued on January 11, 1872, reargued on February 3–5, 1873, and decided on April 14, 1873.<sup>456</sup>

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as practicable, the advantages and privileges of a common school education .

. . .

*Id.*

450. *Garnes*, 21 Ohio St. at 207-08, 211-12.

451. *Id.* at 209-10.

452. *Id.* at 209.

453. *Id.* at 209-11.

454. *Id.* at 209-10.

455. *Id.* at 210.

456. 83 U.S. 36 (1873).

The Ohio Supreme Court held that the Privileges or Immunities Clause of the Fourteenth Amendment protected from race discrimination in the making of laws only the privileges or immunities of national citizenship and not those of state citizenship.<sup>457</sup> Since one's right to a public school education is a privilege or immunity of state citizenship, the Ohio Supreme Court had no trouble at all in saying that the State of Ohio could discriminate in the making and enforcing of its public school laws. Under this same theory, Ohio could also have made or enforced laws that limited the rights of African-Americans to enter into contracts, to own property, to inherit, or to testify in courts since these rights, too, are all privileges or immunities of state citizenship rather than being privileges or immunities of federal citizenship.

The Ohio Supreme Court's ruling on the scope of the Privileges or Immunities Clause, like the U.S. Supreme Court's ruling on the same question in the *Slaughter-house Cases*, is nothing short of absurd. Both courts, in effect, deny that the Fourteenth Amendment constitutionalized the Civil Rights Act of 1866 even though everyone alive in the 1860s knew that this is precisely what the Fourteenth Amendment had in fact done. The Ohio Supreme Court did *not* hold in *State ex rel. Garnes v. McCann* that a child's right to a public school education was not a privilege or immunity.<sup>458</sup> The court instead held that that right was not a privilege or immunity of national citizenship, but that it was instead a privilege or immunity of state citizenship.<sup>459</sup> Under this theory of the Fourteenth Amendment, the Black Codes would still be alive and well today. The *Garnes* and *Slaughter-house* reading of the Privileges or Immunities Clause errs because the Fourteenth Amendment makes all of us both national citizens and citizens of the state wherein we reside. The privileges or immunities of a citizen of the United States therefore necessarily include the privileges or immunities granted by state law in the state wherein a person resides.

On the Equal Protection Clause question, the Ohio Supreme Court said simply that the racially separate public schools were equal.<sup>460</sup> This too is preposterous because the word equal means the same or identical, and African-American school children plainly do not have the same rights as white children if they cannot go to the

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457. *Garnes*, 21 Ohio St. at 209-10.

458. *Id.*

459. *Id.* at 210.

460. *Id.* at 210-11.

same school. The Ohio Supreme Court said that “[e]quality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school.”<sup>461</sup> Therefore, because the Ohio education laws were passed under the state constitution’s grant of authority to the legislature and because the laws were not in violation of the Fourteenth Amendment, the Ohio Supreme Court upheld the lower court’s decision that the plaintiff’s rights were not infringed.<sup>462</sup>

Both of the Ohio state laws cited by the state supreme court in *Garnes* were pre-1868 laws.<sup>463</sup> Therefore, it is certain that once the Fourteenth Amendment was passed, these laws had become unconstitutional. But, the troubling aspects of this case is that it was decided in 1872, almost four years after the Fourteenth Amendment was ratified and that it came from the State of Ohio, a state that one would have expected to be opposed to segregation. As Professor McConnell explained, “This opinion carried particular weight because it was rendered in a generally progressive state by a court composed entirely of Republicans.”<sup>464</sup> If, as we argue in this Article, the original understanding of the Fourteenth Amendment prohibited racially segregated public schools, one would have expected the Ohio Supreme Court to find in favor of the plaintiffs in this case. Professor McConnell points out, however, that in 1887 “Ohio reversed the judicial decision upholding segregation and banned separate schools.”<sup>465</sup> And even beyond that, there is simply no way to read *Ohio ex rel. Garnes v. McCann* as being consistent with the Fourteenth Amendment’s having constitutionalized the Civil Rights Act of 1866. The Ohio Supreme Court’s opinion in *Ohio ex rel. Garnes v. McCann* is simply absurd on its face.

Although *Plessy* did not cite the Nevada Supreme Court’s case of *State ex rel. Stoutmeyer v. Duffy*,<sup>466</sup> Professor McConnell does cite that case in connection with *Garnes* because they were both decided in 1872.<sup>467</sup> Professor McConnell explains that the Nevada Supreme Court said in dicta “that a statute establishing separate schools for

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461. *Id.* at 211.

462. *Id.* at 211-12.

463. *Id.* at 206-08.

464. McConnell *supra* note 6, at 973.

465. *Id.* at 975 (footnote omitted).

466. 7 Nev. 342 (1872).

467. McConnell, *supra* note 6, at 973 n.117.

‘Negroes, Mongolians and Indians’ violated the ‘spirit’ but did not violate the ‘letter’ of the United States Constitution.”<sup>468</sup> Because, as Professor McConnell points out, the relevant language of the court was in dicta, it need not concern us, although it is regrettable.

The next case cited by *Plessy* in support of segregated public schools was *Lehew v. Brummell*,<sup>469</sup> an 1891 Missouri opinion. This case involved the only four black children that lived in a Missouri school district, and these four children were denied admission to an all-white school.<sup>470</sup> Although there was no separate school for black children in the district, there was a racially separate school in another district 3.5 miles away.<sup>471</sup> Relying on Missouri’s state constitution, as well as on the state laws enacted under the state constitution, the court held that the four black children could and should attend the racially separate all-black school 3.5 miles away.<sup>472</sup> Therefore, the court held that the four black children had no right to be admitted to the all-white school.<sup>473</sup>

While this case may seem to be similar to *Garnes*, and therefore also potentially problematic to our theory, a closer look reveals that this case is irrelevant to our thesis. As discussed above, by 1954 fifteen state constitutions had evolved to actually require racially segregated public schools even though not a single state constitution had been so written in 1868 when the Fourteenth Amendment was ratified.<sup>474</sup> The state constitutional provisions requiring racial segregation in public schools did not begin to appear until the 1870s, and they were thus not in effect at the time the Fourteenth Amendment was adopted.<sup>475</sup> Missouri was the only state whose constitution in effect in 1868 *permitted* segregated schools, and it was one of the fifteen states that required segregated schools in a post-1868 constitution.<sup>476</sup> Missouri’s Constitution of 1875 thus said that “[s]eparate free public schools shall be established for the education of children of African descent.”<sup>477</sup> Under this state constitutional provision, the Missouri legislature adopted an Act on

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468. *Id.* at 973 (quoting *Duffy*, 7 Nev. at 346).

469. 15 S.W. 765 (Mo. 1891).

470. *Id.*

471. *Id.*

472. *Id.* at 766.

473. *Id.*

474. *See supra* Subsection III.A.2.

475. *See supra* Subsection III.A.2.

476. *See supra* notes 319-25 and accompanying text.

477. MO. CONST. of 1875, art. XI, § 3, *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra* note 108, at 544, 569.

March 31, 1887, which said that “[w]hen there are within any school district in this state fifteen or more colored children of school age, the school board of such school district shall be and [are] hereby authorized and required to establish and maintain, within such school district, a separate free school for said colored children.”<sup>478</sup> Professor McConnell did not mention this Missouri case because he only explicitly mentioned cases from northern states that arose during Reconstruction, and this was a Missouri case decided in 1891.

*Lehew v. Brummell* was decided in 1891 and it was based on an 1887 state law that was passed pursuant to a constitutional provision adopted in 1875.<sup>479</sup> Neither the state law nor the state constitutional provision it was enacted under were in effect in 1868 at the time the Fourteenth Amendment was adopted, and therefore, they should not have any effect at all on the original understanding of the Fourteenth Amendment. Moreover, as we explained above, most of Reconstruction took place between 1866 and 1871. But beginning in 1877, many of the states opposed to Reconstruction began passing new state constitutions with clauses that were meant to bring Reconstruction to an end. As we have seen, at least fifteen states eventually chose to require segregated schools during the years between 1868 and 1954.<sup>480</sup> This 1891 Missouri case was based on a post-1868 constitutional clause authorizing segregation, and it is therefore irrelevant to the original understanding of the Fourteenth Amendment in 1868.

The fourth case cited by *Plessy* in support of the proposition that racially segregated schools were permissible is California’s 1874 opinion in *Ward v. Flood*.<sup>481</sup> In this case, an African-American child was denied admission to an all-white school.<sup>482</sup> The *guardian ad litem* for the child sued claiming that the denial of admission to the all-white school was a violation of the Thirteenth and Fourteenth Amendments to the United States Constitution.<sup>483</sup> The basis for separate schools was a California law that had been passed on April 14, 1870, entitled “An Act to amend an Act to provide for a system of common schools.”<sup>484</sup> Section 56 of the 1870 law said that “[t]he education of children of African descent, and Indian children, shall

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478. Act of Mar. 31, 1887, § 1, 1887 Mo. Laws 264.

479. 15 S.W. 765, 765 (Mo. 1891).

480. See *supra* Subsection III.A.2.

481. 48 Cal. 36 (1874).

482. *Id.* at 56.

483. *Id.* at 49.

484. Act of Apr. 4, 1870, ch. 556, 1870 Cal. Stat. 824.

be provided for in separate schools.”<sup>485</sup> The California court rejected the petitioner’s Thirteenth Amendment claim stating “that the mere exclusion of the petitioner from this particular school, does not assume to remit her to a condition of slavery or involuntary servitude . . . or that there is any—even the slightest—relation between the case here and the prohibition contained in the Amendment referred to.”<sup>486</sup>

On the Fourteenth Amendment claim, the California court held that the right to a public school education is not a right that is guaranteed by the United States Constitution, and it therefore also held that the denial of such a right is not a violation of the Privileges or Immunities Clause.<sup>487</sup> By 1874, when this case was decided, the *Slaughter-house Cases* had already been handed down, and the Privileges or Immunities Clause of the Fourteenth Amendment had been eviscerated.<sup>488</sup> It is hard to fault the California court in *Ward v. Flood* for following erroneous U.S. Supreme Court precedent, nor should we read much into this action. Under the reasoning of the *Slaughter-house Cases*, *Ward v. Flood* is probably right.

Moreover, the California court in *Ward v. Flood* noted that the black children suing in that case were not denied the right to any public school education, but only the right to attend the same schools as did white children.<sup>489</sup> The California court said that

in the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense.<sup>490</sup>

Thus, the California court denied the plaintiff’s claim seeking admission to the all-white school.<sup>491</sup> This Equal Protection Clause construction is also erroneous, but the biggest mistake made in this case was the result of the U.S. Supreme Court’s faulty opinion in the *Slaughter-house Cases*.

Another key thing to remember here is that *Ward v. Flood* was an 1874 decision based on an 1874 law.<sup>492</sup> Therefore, the case arose

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485. *Id.* § 56, at 839.

486. *Ward*, 48 Cal. at 49.

487. *Id.* at 49-50.

488. The *Slaughter-house Cases*, 83 U.S. 36, 80 (1873).

489. *Ward*, 48 Cal. at 52.

490. *Id.*

491. *Id.* at 56.

492. *Id.* at 39.

and was decided post-1868, and it could not have had any bearing on the original meaning of the Fourteenth Amendment, which went into effect on July 9, 1868. Thus, this is a second case (together with *Garnes v. McCann*), which may have adverse implications for our theory that segregated schools were prohibited as an original matter under the Fourteenth Amendment. Both cases, however, come out the way they do only because, like the *Slaughter-house Cases*, they both wrongly say that the Privileges or Immunities Clause protects only one's rights as a national citizen and not also one's rights under state law. Neither the *Garnes* court nor the *Ward* court denies that an entitlement to a public school education is a privilege or immunity of state citizenship.

Professor McConnell explains that the California decision permitting racial segregation in public schools was less significant than the decision of the Ohio Supreme Court.<sup>493</sup> In contrast to Ohio, which was a notoriously Republican state, California was "dominated by Democrats, the party hostile to Reconstruction."<sup>494</sup> Moreover, California had not ratified the Fourteenth Amendment.<sup>495</sup> It is not surprising, therefore, that the California Supreme Court upheld the segregated schools in *Ward*.

The fifth case cited by *Plessy* in support of the supposedly widespread acceptance of racially segregated public schools was an 1878 Louisiana opinion, *Bertonneau v. Board of Directors of City Schools*.<sup>496</sup> In this circuit court case, African-American children were denied admission to an all-white school in Louisiana.<sup>497</sup> The court noted that there was no disagreement in this case over whether the children were excluded based on race, and there was also no claim made that the school set aside for black children was inferior.<sup>498</sup> The only question raised by the case was whether there had been a deprivation of a right guaranteed by the United States Constitution.<sup>499</sup> The Louisiana circuit court held that there was no such violation.<sup>500</sup>

The interesting aspect of this 1878 case was that at the time the case was decided, Louisiana's Constitution of 1868 was still in effect. As we said above, that constitution was one of only two

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493. McConnell, *supra* note 6, at 974.

494. *Id.*

495. *Id.*

496. 3 F. Cas. 294 (C.C.D. La. 1878) (No. 1,361).

497. *Id.* at 295.

498. *Id.*

499. *Id.*

500. *Id.* at 296.

constitutions in 1868 that explicitly prohibited racial segregation in public schools.<sup>501</sup> Although Louisiana's subsequent constitutions of 1898 and 1921 did require racial segregation in public schools,<sup>502</sup> neither of these two constitutions were in effect at the time this case was decided. Although the Louisiana State Constitution at this time explicitly prohibited racial segregation in public schools, the federal court decided the case otherwise saying, "If I am not in error in holding that the requiring of white and colored children to attend separate schools, even when such schools are supported at the public cost, does not deprive either class of their equal rights."<sup>503</sup> The court concluded, "As the bill does not present the case of an impairment of a right granted by the constitution of the United States, and as all the parties to it are citizens of the state of Louisiana it does not disclose any case of which this court can take jurisdiction."<sup>504</sup>

The vital thing to note here is that this case was decided in 1878 in Louisiana. During this time in Louisiana there were strong efforts being made to reverse Reconstruction in every possible way, and the *Slaughter-house Cases* had wrongly limited the Privileges or Immunities Clause to apply only to rights of national citizenship. Thus, it is actually not at all surprising that a Louisiana court would find no Fourteenth Amendment violation in 1878, and therefore, this opinion should have no impact on our analysis here.

Professor McConnell did not mention the *Bertonneau* case even though it was decided between 1868 and 1883 for two reasons. First, Louisiana was a southern state and Professor McConnell only discussed opinions from northern states. Second, Professor McConnell only discussed opinions from supreme courts of the northern states, and this was a lower court opinion. We think the case is irrelevant to the original meaning of the Fourteenth Amendment with respect to school segregation because the case was decided after Reconstruction had come to an end.

The sixth public school case that *Plessy* relied on was the 1883 New York State case of *People ex rel. King v. Gallagher*.<sup>505</sup> In this case, a black child sought admission to an all-white school, which was closer to her home.<sup>506</sup> The court focused on the state laws in question, and it held that denying admission to a black student was

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501. See *supra* note 137 and accompanying text.

502. See *supra* notes 237-38 and accompanying text.

503. *Bertonneau*, 3 F. Cas. at 296.

504. *Id.*

505. 93 N.Y. 438 (1883).

506. *Id.* at 451.

not a violation of her constitutional rights.<sup>507</sup> The New York court in this case explained that the common schools of Brooklyn were organized under an 1850 law.<sup>508</sup> Section 4 of that law said that “[t]he board of education shall have power to organize and establish schools for colored children, and such evening schools as it may, from time to time, deem expedient, and shall adopt the necessary rules for the government of the same.”<sup>509</sup> In addition to this 1850 law, there was also a similar law passed in 1864, which provided for racially separate public schools in New York.<sup>510</sup> Both the New York state law of 1850 and the law of 1864, which called for segregated schools, were passed before the abolition of slavery and well before the adoption the Fourteenth Amendment in 1868. Thus, one might conclude that if, as an original matter, the Fourteenth Amendment prohibited segregated public schools, these 1850 and 1864 laws were rendered unconstitutional by the passage of the Fourteenth Amendment.

The problem is, however, that the New York state court, after quoting from the law from 1850, which gave the school board the right to establish segregated schools, said, “The powers conferred upon the board of education by this act were, by section 1, title 16, chapter 863 of the Laws of 1873, made applicable to the reorganized department of public institutions for such city, created by said act.”<sup>511</sup> Thus, the New York Court of Appeals in 1883 was able to say that the school segregation “law has, therefore, been in existence for over thirty years, and its operation and effect have hitherto been found unobjectionable and apparently satisfactory to all parties.”<sup>512</sup>

It is significant to note that this case was decided in 1883, which was well after the end of Reconstruction in 1877. But, this case arose out of New York state, and as Professor McConnell explains, “[w]ith the exception of a New York case in 1883, no court in any other Northern state upheld school segregation after 1874.”<sup>513</sup> *Gallagher* is thus the one exceptional case after 1874 where a northern court upheld racial segregation in the public schools. *Gallagher* is clearly, however, irrelevant to the original

507. *Id.*

508. Act of Apr. 4, 1850, ch. 143, 1850 N.Y. Laws 237.

509. *Id.* § 4, at 238.

510. Act of May 2, 1864, ch. 555, sec. 10, § 1, 1864 N.Y. Laws 1211, 1281.

511. *Gallagher*, 93 N.Y. at 444 (citing Act of June 28, 1873, ch. 863, sec. 16, § 1, 1873 N.Y. Laws, 1290, 1362).

512. *Id.*

513. McConnell, *supra* note 6, at 975 (footnote omitted).

understanding of the Fourteenth Amendment in 1868. The law at issue in the case originated when slavery was legal in 1850, and the New York court's decision in the case came in 1883 after Reconstruction had ended. The only problem for an originalist here is that the law in question was allowed to stand in an 1873 revision of the codes, which is, all things considered, a fairly minor omission. And even that omission may have escaped the notice of the New York court only because the *Slaughter-house Cases* had wrongly interpreted the Privileges or Immunities Clause as not applying to rights of state citizenship.

The seventh case cited by *Plessy* that upheld segregated schools was an 1874 Indiana Supreme Court case, *Cory v. Carter*.<sup>514</sup> In this case, the plaintiff, an African-American man, lived in a school district where his children and grandchildren, who "were all negroes of the full blood," lived with him.<sup>515</sup> The children and the grandchildren sought to be admitted to the local public school in the district in which the father and grandfather lived, but they were denied admission "for the reason that the . . . school was a school for white children, and not for negro children."<sup>516</sup> In denying the claim for admission of the black students, the Indiana court relied in this case on the Indiana state constitution as well as on state statutes.<sup>517</sup> Indiana's Constitution of 1851 was in force when this case was decided in 1874.<sup>518</sup> The relevant constitutional provision said:

"[K]nowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide by law for a general and uniform system of common schools."<sup>519</sup>

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514. 48 Ind. 327 (1874).

515. *Id.* at 329.

516. *Id.* at 330.

517. *Id.* at 331-32.

518. It is important to note that the constitution that was in effect at the time this case was decided was the constitution of 1851. This is significant because the court relies on the historical interpretation and intent of the framers of the constitution of 1851. Even though the relevant law was passed in 1869, the court seems to focus on the history of the constitution. It seems absurd for the court to focus on the understanding and sentiment toward segregation as it existed in 1851, fourteen years before slavery was abolished and seventeen years before the Fourteenth Amendment was passed instead of the intent of those that passed the law in 1869.

519. *Id.* at 334 (quoting IND. CONST. art. VIII, § 1).

In addition to this constitutional provision, there was an act passed on May 13, 1869, which contained several relevant clauses regarding the public schools.<sup>520</sup> However, the Indiana court in this case explained that before the law of 1869, black children had not been entitled to receive an education in the state even though it would seem from reading the state constitution as if they should have been so entitled.<sup>521</sup> The Indiana Supreme Court traced the history of various Indiana state constitutional provisions and laws and concluded:

In the light of the foregoing history, constitutional provisions, legislative acts, and judicial constructions thereof, it is very plain and obvious to us, that persons of the African race were not in the minds or contemplation of the wise and thoughtful framers of our constitution, when they prepared and agreed upon the above quoted sections, or of the people of the State when they ratified and adopted the constitution containing such provisions.<sup>522</sup>

The Indiana Supreme Court concluded that it did not believe that “the children of the African race should participate in the advantages of a general and uniform system of common schools.”<sup>523</sup> The only construction of that which “will preserve the unity, harmony, and consistency of our state constitution . . . is, to hold that

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520. These relevant sections stated, “[A]ll property, real and personal, subject to taxation for State and county purposes, shall be taxed for the support of common schools without regard to the race or color of the owner of the property.” Act of May 13, 1869, ch. 297, § 1, 1869 Ind. Acts 472. The next section stated:

All children of the proper age, without regard to the race or color, shall hereafter be included in the enumeration of the children of the respective school districts, townships, towns and cities of this State for school purposes; but in making such enumeration the officers charged by law with that duty shall enumerate the colored children of proper age, who may reside in any school district, in a separate and distinct list from that in which the other school children of such school district shall be enumerated.

*Id.* § 2. The third section stated, “The trustee or trustees of each township, town or city, shall organize the colored children into separate schools, having all the rights and privileges of other schools of the township.” *Id.* § 3. The fourth section provided, “All laws relative to school matters, not inconsistent with this act, shall be deemed applicable to colored schools.” *Id.* § 4. Section 23 of the 1854 constitution was also relevant and that section stated, ““The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.” *Cory*, 48 Ind. at 334 (quoting IND. CONST. art. I, § 23).

521. *Cory*, 48 Ind. at 338.

522. *Id.* at 341.

523. *Id.* at 342.

it was made and adopted by and for the exclusive use and enjoyment of the white race.”<sup>524</sup>

The Indiana Supreme Court also asked whether there had been a violation in *Cory v. Carter* of the Fourteenth Amendment to the Federal Constitution.<sup>525</sup> The Indiana Supreme Court relied on the impeccable, if erroneous, U.S. Supreme Court decision in the *Slaughter-house Cases*.<sup>526</sup> The Indiana Supreme Court concluded that there had been no violation of the Privilege or Immunities Clause because the right to a public school education is not a right granted by the constitution to the citizens of the United States, but is rather instead a right of state citizenship granted by a state to its own citizens.<sup>527</sup> Only rights of national citizenship, the court held, were covered by the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>528</sup> It is hard to fault the Indiana Supreme Court for following an erroneous U.S. Supreme Court decision that had been handed down only the year before *Cory v. Carter* was decided.

Moreover, because the Indiana statute in question in *Cory v. Carter* provided for separate schools for both black and white children, the Indiana Supreme Court thought there was no violation of the Fourteenth Amendment’s Equal Protection Clause.<sup>529</sup> As the Indiana Supreme Court explained, “[i]n our opinion, the classification of scholars, on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class.”<sup>530</sup>

Although the Indiana state law that authorized racially separate schools in this case had been passed in 1869, one year after the adoption of the Fourteenth Amendment, the Indiana Supreme Court gave a lengthy discussion of the history of the ratification of the various Indiana state constitutions between 1816 and 1851.<sup>531</sup> This discussion of Indiana original intent, however, overlooked both the adoption of the Thirteenth Amendment, abolishing slavery in 1865, and the primary purpose of the Fourteenth Amendment adopted in 1868, whose purpose was quite precisely to cause a change in the

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524. *Id.*

525. *Id.* at 331.

526. *Id.* at 350.

527. *See id.*

528. *Id.*

529. *Id.* at 362.

530. *Id.*

531. *Id.* at 338-44.

social practices from those that had previously existed in Indiana as well as elsewhere. In fact, one could stipulate that Indiana was a racist state in 1816 and in 1851, and this stipulation would still in no way affect the original meaning of the Thirteenth and Fourteenth Amendments. These amendments were meant to abolish slavery and racism once and for all. Therefore, the only troubling issue raised by this opinion was not the poorly reasoned decision itself, which followed the *Slaughter-house Cases*, but the fact that Indiana did have a post-1868 law requiring racial segregation in its public schools.

Professor McConnell notes that “Indiana was notoriously the most racist of the Northern states,”<sup>532</sup> and that moreover, the Indiana Supreme Court was led by Democrats who were opposed to Reconstruction efforts, as in California.<sup>533</sup> Professor McConnell points out that “the author of the Indiana [Supreme Court] opinion [in this case] had issued a decision three years earlier holding the Civil Rights Act of 1866 unconstitutional.”<sup>534</sup> The California and Indiana Supreme Court decisions permitting segregated schools are not surprising, given the decision in the *Slaughter-house Cases* and given the racist constituencies in both states and on their courts.<sup>535</sup> The decision of the Ohio Supreme Court in *Garnes*, from a strongly Republican state, is the only case that is concerning, and it does not offer a remotely plausible construction of how the text of the Fourteenth Amendment works.<sup>536</sup>

The final case related to segregated schools that *Plessy* relied on was a Kentucky decision in 1884 in *Dawson v. Lee*.<sup>537</sup> Unlike the seven cases discussed so far, all of which involved a black child who was denied admission to a school for white children, this case arose in a property-related lawsuit.<sup>538</sup> The issue was a \$154.28 tax “assessed and collected from negroes in pursuance of an act, entitled ‘An act to establish a uniform system of common schools for the colored children of this Commonwealth,’ approved February 23, 1874.”<sup>539</sup>

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532. McConnell, *supra* note 6, at 974.

533. *Id.*

534. *Id.*

535. *Id.*

536. *Id.* at 974-75.

537. 83 Ky. 49 (1884).

538. *Id.* at 50-51.

539. *Id.* at 55 (citing Act of Feb. 23, 1874, ch. 18, sec. 1, § 1, 1874 Ky. Acts 265).

The Kentucky court in *Dawson v. Lee* explained that if the tax to fund all-African-American public schools had been collected in violation of the federal Constitution, then the State of Kentucky would not be entitled to the tax money.<sup>540</sup> The court said:

If the rule adopted by the Supreme Court in all other cases involving the construction of the fourteenth amendment to the Constitution be applied in the matter of the common school system of this State, it follows that State taxation for purposes of education should be provided for by general laws applicable to all classes and races alike, and that all children of the State are entitled to an equal share of the proceeds of the "Common School Fund," and of all the State taxation for purposes of education.<sup>541</sup>

The court concluded:

It was obviously the intention of the Legislature, and such is the proper construction of the act, to exclude the negro children of the State from any share of the proceeds of the "Common School Fund" set apart by the Constitution, as well as from the annual tax levied under general laws on the property of white persons for school purposes, and to give them the benefit of only the fund provided for in the special act. In this respect, as well as regards the partial and discriminating taxation provided for, the act is, in our opinion, in violation of the fourteenth amendment to the Constitution of the United States, as interpreted by the Supreme Court.<sup>542</sup>

Although *Plessy* cited this case in support of segregated schools, the court seems to be saying that any distinction based on race in the area of public education is prohibited by the Fourteenth Amendment.<sup>543</sup> While the narrow issue in this case was only the legality of a tax imposed only on black citizens to support schools for only black children, the Kentucky court actually says that any discrimination in the context of public school education is prohibited by the Fourteenth Amendment.<sup>544</sup> It is therefore unclear, to say the least, as to why the U.S. Supreme Court would cite this case in *Plessy v. Ferguson* as supporting the constitutionality of racial segregation in the public schools.

Professor McConnell did not mention this Kentucky case because: (1) it was decided in 1884 and McConnell's survey only discussed cases from 1868 to 1883; (2) the case was not primarily about school segregation since the issue only arose tangentially here as a result of the taxes owed for a particular transaction; (3) Kentucky is a southern state, and McConnell only discussed cases

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540. *Id.* at 55-56.

541. *Id.* at 56.

542. *Id.* at 57.

543. *See id.*

544. *Id.*

decided by northern state courts; and (4) this case was not decided by the Kentucky Supreme Court, and McConnell's survey only discussed state supreme court cases.

Therefore, to sum up, of the eight cases cited by *Plessy v. Ferguson* in support of the proposition that racially segregated public schools had "been generally, if not uniformly, sustained by the courts,"<sup>545</sup> only the Ohio case seems to be potentially relevant to the original understanding of the Fourteenth Amendment as it applied to the right to a public school education. All the other cases are completely explained by the obligation of the state courts to follow the U.S. Supreme Court's prior opinion in 1873 in the *Slaughterhouse Cases*, while the 1872 Ohio case is at worst the result of a state court anticipating the U.S. Supreme Court's *Slaughterhouse Cases* mistake by one year. And one case cited by *Plessy* actually does not stand for the proposition it was cited for.

But, it turns out that the eight cases cited by *Plessy v. Ferguson* were not the only state cases that addressed the issue of the legality of racially segregated public schools. In fact, there were several other cases that *Plessy* failed to mention that quite explicitly prohibited racial segregation. Therefore, it is not at all clear that the states de jure embraced, encouraged, or even permitted racially segregated public schools either in 1868 or in the years to follow. We will now look at the cases involving segregated schools that *Plessy v. Ferguson* failed to mention.

## 2. *The Desegregation Cases That Plessy Failed to Mention*

The U.S. Supreme Court in *Plessy v. Ferguson* failed to mention several cases that support the claim that a child's access to a public school education was a fundamental right in 1868 as to which the states were foreclosed from discriminating on account of race. This Subsection will look at those school cases that *Plessy* failed to mention. Some of these decisions were discussed by Professor McConnell, while others were not. Wherever Professor McConnell adds insights as to these cases, we have incorporated his comments into the discussion.

In *Clark v. Board of Directors*, the Iowa Supreme Court in 1868 affirmed a lower court's judgment, and it required a public school for white children to admit a black child who had sought

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545. *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

admission.<sup>546</sup> The Iowa Supreme Court in 1868 relied on the Iowa state constitution and the Iowa state laws, and the court held that the plain text of the Iowa constitution requires a system of schools ““for the education of *all the youths of the State* through a system of common schools.””<sup>547</sup> The Iowa Supreme Court specifically required that all children in Iowa of any race be admitted to the same schools, and the court held that racially separate public schools were unconstitutional based on the Iowa state constitution.<sup>548</sup> The court stated that

all the youths are equal before the law, and there is no discretion vested in the board of directors or elsewhere, to interfere with or disturb that equality. The board of directors may exercise a uniform discretion equally operative upon all, as to the residence, or qualifications, or freedom from contagious disease, or the like, of children, to entitle them to admission to each particular school; but the board cannot, in their discretion, or otherwise, deny a youth admission to any particular school because of his or her nationality, religion, color, clothing or the like.<sup>549</sup>

The state supreme court gave a historical account of Iowa law and concluded that the law, as it existed in 1868, “in effect” denied the discretion to the legislature of establishing separate schools.<sup>550</sup> There are several interesting aspects of this case that should be noted. First, as Professor McConnell points out, this was “[t]he first state supreme court decision on school segregation after the Civil War.”<sup>551</sup> Second, this case was actually decided in 1868, “shortly before” the adoption of the Fourteenth Amendment, and so, it is arguably relevant to the original meaning of that Amendment.<sup>552</sup> Third, even though the Iowa State Supreme Court decision was based strictly on Iowa law, without mention of the yet-to-be-ratified Fourteenth Amendment, it is significant that a state supreme court prohibited segregation based on a state law in 1868. The case was decided in June 1868, a month before the Fourteenth Amendment was passed, and as Professor McConnell points out, the Fourteenth Amendment was not at issue.<sup>553</sup> The Iowa Supreme Court could not in fact have relied on the Fourteenth Amendment in reaching its

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546. 24 Iowa 266, 277 (1868).

547. *Id.* at 274 (quoting IOWA CONST. art. IX, § 12 (1857)).

548. *Id.* at 277.

549. *Id.*

550. *Id.* at 273.

551. McConnell, *supra* note 6, at 972.

552. *Id.*

553. *Id.*

conclusion because the Amendment had not yet been ratified.<sup>554</sup> The Iowa Supreme Court's opinion in this case is striking because it could fairly be said to reflect sentiment about racially segregated public schools at the time the Fourteenth Amendment was ratified. This opinion, which was handed down essentially contemporaneously with the adoption of the Fourteenth Amendment, shows that, at least in 1868, there was some sentiment in a northern state in favor of racially integrated public schools.

Professor McConnell explains that *Coger v. North Western Union Packet Co.*, decided in 1873, was the first case decided by the Iowa Supreme Court after the passage of the Fourteenth Amendment concerning racial segregation in public schools.<sup>555</sup> Professor McConnell shows that “the Iowa Supreme Court explicitly associated the principle of *Clark* with the new Amendment, and [it] extended the requirement of desegregation to common carrier transportation.”<sup>556</sup> In addition to these two cases, we were able to find two additional cases decided by the Iowa Supreme Court after *Clark* that also required all-white schools to admit black children.<sup>557</sup> These two 1875 cases reaffirm *Clark*, instead of reversing it, and they also show that the Iowa Supreme Court in 1875 still thought that *Clark* had been decided correctly in 1868. If *Clark* was correctly decided in 1868, the original understanding of the Fourteenth Amendment might well have been one that foreclosed racially segregated public schools.

Several other state supreme courts ruled in favor of black plaintiffs who sought admission to all-white schools. For example, Professor McConnell discusses the 1869 decision in *People ex rel. Workman v. Board of Education*, where a father sought to have his

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554. *Id.*

555. *Id.* at 972-73 (citing *Coger v. N. W. Union Packet Co.*, 37 Iowa 145 (1873)). *Coger* was a case involving segregation in a common carrier, not in public schools. 37 Iowa at 147, 149.

556. McConnell, *supra* note 6, 972-73.

557. See *Dove v. Indep. Sch. Dist.*, 41 Iowa 689 (1875) (affirming the judgment of a lower court, which required admission of an African-American boy to a white school because the denial of admission was solely based upon his race, which was prohibited); *Smith v. Dirs. of Indep. Sch. Dist.*, 40 Iowa 518 (1875) (affirming the judgment of a lower court, which required admission of an African-American boy to a white school because the denial of admission was solely based upon his race which was prohibited). The court stated, “This brings the case within the rule settled by this court in *Clark*[,] . . . which holds that a pupil may not be excluded the schools [sic] because of his color, or required to attend a separate school for colored children.” *Smith*, 40 Iowa at 519-20.

child, who was more than one-fourth African blood, admitted to the all-white public school system.<sup>558</sup> The 1867 law on which the father relied stated: “All residents of any district shall have an equal right to attend any school therein. Provided that this shall not prevent the grading of schools according to the intellectual progress of the pupils, to be taught in separate places when deemed expedient.”<sup>559</sup> Based on this law, the court held as to segregation that

[i]t cannot be seriously urged that with this provision in force, the school board of any district which is subject to it may make regulations which would exclude any resident of the district from any of its schools, because of race or color, or religious belief, or personal peculiarities. It is too plain for argument that an equal right to all the schools, irrespective of all such distinctions, was meant to be established.<sup>560</sup>

Professor McConnell points out that the opinion in this case was written by Chief Justice Thomas Cooley, “the most celebrated constitutional scholar and judge of the last half of the nineteenth century.”<sup>561</sup> Moreover, the opinion relied exclusively on the 1867 Michigan state statute.<sup>562</sup> Professor McConnell points to the last sentence of Chief Justice Cooley’s opinion as “an oblique reference to the Fourteenth Amendment.”<sup>563</sup> This sentence says, “As the statute of 1867 is found to be applicable to the case, it does not become important to consider what would otherwise have been the law.”<sup>564</sup> Chief Justice Cooley seems here to imply that the court might have found the exclusion of a black child from an all-white school to be in violation of the Fourteenth Amendment had that issue been necessarily raised.

Professor McConnell also relies on an 1874 Illinois Supreme Court decision in *Chase v. Stephenson*.<sup>565</sup> In that case, an Illinois school district set up a racially separate public school “for the purpose of carrying on a school for colored children, exclusively, at the expense of the district.”<sup>566</sup> In affirming the lower court’s decision in favor of the taxpayers, the Illinois Supreme Court said:

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558. 18 Mich. 400 (1869).

559. *Id.* at 409 (quoting Act of Feb. 28, 1867, no. 34, § 28, 1867 Mich. Pub. Acts 42, 43); *see also* McConnell, *supra* note 6, at 973.

560. *Workman*, 18 Mich. at 409-10.

561. McConnell, *supra* note 6, at 973.

562. *Id.*

563. *Id.*

564. *Id.* (quoting *Workman*, 18 Mich. at 414).

565. *Id.* (citing *Chase v. Stephenson*, 71 Ill. 383 (1874)).

566. *Chase*, 71 Ill. at 383-84.

[T]he conduct of the directors in this case, in the attempt to keep and maintain a school solely to instruct three or four colored children of the district, when they can be accommodated at the school house with the other scholars of the district, can only be regarded as a fraud upon the taxpayers of the district, any one of whom has a right to interfere to prevent the public funds from being squandered in such a reckless, unauthorized manner.<sup>567</sup>

Professor McConnell shows that although the attorney for the school board cited the Ohio Supreme Court's opinion in *Garnes v. McCann* "for the proposition that a requirement of 'equality' is not inconsistent with segregation,"<sup>568</sup> the Illinois Supreme Court found that the state law, which required the State to provide "'all'" children with an "'equal'" education, prohibited the school district from establishing a racially separate school only for black children.<sup>569</sup> It was significant that the Illinois Supreme Court found the *Garnes* argument unpersuasive because the Illinois Supreme Court was made up of a five-to-two Democratic majority.<sup>570</sup> The court explained that the directors of the schools "'have no power to make class distinctions, neither can they discriminate between scholars on account of their color, race or social position.'"<sup>571</sup>

In a similar Illinois case, *People ex rel. Longress v. Board of Education*,<sup>572</sup> the court reviewed a challenge to a rule that all students were required to attend their neighborhood schools but that the black children were required to attend separate schools.<sup>573</sup> The court ruled

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567. *Id.* at 386.

568. McConnell, *supra* note 6, at 974 (citing ROBERT L. MCCAUL, THE BLACK STRUGGLE FOR PUBLIC SCHOOLING IN NINETEENTH-CENTURY ILLINOIS 132 (1987)).

569. *Id.* (quoting *Chase*, 71 Ill. at 385).

570. *Id.*

571. *Id.* at 974-75 (quoting *Chase*, 71 Ill. at 385). However, in a footnote, Professor McConnell acknowledged that the issue of truly separate-but-equal schools was not before the court. *See id.* at 974 n.121. The court noted:

Had the district contained colored children sufficient for one school, and white children for another, and had the directors, in good faith, provided a separate room for each, where the facilities for instruction were entirely equal, that would have presented a question not raised by this record, and upon which we express no opinion.

*Chase*, 71 Ill. at 385-86.

572. 101 Ill. 308 (1882).

573. *Id.* at 311.

That the colored schools of said city shall be composed of colored pupils who shall be of the prescribed age, and *bona fide* residents of said city; that no pupil of African descent shall be permitted to attend any of the public schools of the city other than the colored schools, and that all the

in favor of the black children seeking admission to the white school, and in doing so, the court relied on both the Illinois state constitution and on state statutory law.<sup>574</sup> The Illinois constitution at that time said that “[t]he General Assembly shall provide a thorough and efficient system of free schools, whereby *all* children of this State may receive a good common school education.”<sup>575</sup> The Illinois court explained that the state constitution imposed a duty “which makes no distinction in regard to the race or color of the children.”<sup>576</sup> Illinois amplified this duty in 1872 when it passed another law, which required the establishment of “a sufficient number of free schools for the proper accommodation of all children in the district.”<sup>577</sup> It amplified this duty even further with an 1874 statute, which said

that all directors of schools, boards of education, or other school officers whose duty it now is or may be hereafter to provide, in their respective jurisdictions, schools for the education of all children between the ages of six and twenty-one years, are prohibited from excluding, directly or indirectly, any such child from such school on account of the color of such child.<sup>578</sup>

The Illinois Supreme Court observed that the language of this statute was “so plain, and its terms are so clear, that its purport [cannot] be misunderstood.”<sup>579</sup> There could thus be no doubt that excluding a black child from an Illinois school was a violation of state law.

The Illinois Supreme Court based its holding exclusively on this crystal clear state statute, but the state supreme court did mention the Fourteenth Amendment in its analysis, although it did

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colored pupils in said city shall attend a certain public school in said city, called the Lincoln school, and no other.

*Id.* (internal quotation marks omitted).

574. *Id.* at 311, 317. It should be noted that Illinois’s Constitution of 1870 was in effect at this time, which established the right to a public school education in Illinois. See ILL. CONST. art VIII, § 1 (1870). However, prior to the constitution of 1870, Illinois’s Constitution of 1848 was in effect. See *supra* note 131. The constitution of 1848 did not contain a right to a public school education, and was therefore not included in the count of those states that recognized the right to an education in 1868. See *supra* note 131. But the Illinois case being discussed here that prohibited segregation was decided prior to *Plessy* and the objective is to point to adverse authority to that cited by *Plessy*. See *Longress*, 101 Ill. at 317.

575. *Longress*, 101 Ill. at 313 (quoting ILL. CONST. art. VIII, § 1 (1870)).

576. *Id.*

577. *Id.* at 313-14 (quoting Act of Apr. 1, 1872, § 48, 1872 Ill. Laws 700, 720).

578. *Id.* at 314 (quoting ILL. REV. STAT. ch. 122, ¶ 100 (1874)).

579. *Id.*

not decide whether racial segregation in public schools violated the Fourteenth Amendment.<sup>580</sup> The Illinois Supreme Court said:

Whether the [F]ourteenth [A]mendment would prohibit school directors or boards of education from excluding colored children from the public schools by the adoption and enforcement of such rules as have been adopted in this case, is a question which we do not deem it necessary to determine here. We base our decision on the constitution and [the] laws of the State. The people of the State have the right to make such a constitution, and enact such laws under it, as they deem for the best interests of the public, and so long as our laws do not conflict with the [C]onstitution of the United States they must be held valid and binding upon the people of the State. Under our law, aside from the [F]ourteenth [A]mendment, directors of schools and boards of education, like defendants in error, have no discretion to deny a pupil of the proper age admission to the public schools on account of nationality, color or religion.<sup>581</sup>

Thus, the Illinois Supreme Court did not say whether there had been a violation of the Fourteenth Amendment in this case because state law was so clear.<sup>582</sup> But, the Illinois Supreme Court did not explicitly say that this did not constitute a violation of the Fourteenth Amendment either.<sup>583</sup> Regardless of whether the Illinois Supreme Court would have found the racial segregation in public schools in this case to be in violation of the Fourteenth Amendment, the mere fact that an 1872 state statute provided “all children” with a right to a free and common public school education and that an 1874 law explicitly prohibited racial segregation in public schools is by itself quite striking. This 1882 Illinois Supreme Court case interpreting a statute as requiring integration of public schools is significant in and of itself. It suggests that there was not a widespread sentiment in the country favoring racially segregated public schools, and it indicates that in fact there were states that explicitly prohibited racially segregated public schools in the years preceding *Plessy v. Ferguson*. Professor McConnell does not discuss this case in detail, but he does refer to it in a footnote.<sup>584</sup> After discussing the Illinois Supreme Court’s holding in *Chase*, Professor McConnell notes, “[t]he prohibition on [racial] segregation [in public schools] was extended to all schools in . . . Longress.”<sup>585</sup>

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580. *Id.* at 316.

581. *Id.*

582. *Id.* at 314.

583. *Id.* at 316.

584. McConnell, *supra* note 6, at 974 n.121.

585. *Id.*

The Kansas Supreme Court addressed the issue of racial segregation in public schools in 1881.<sup>586</sup> In *Board of Education v. Tinnon*, a black boy sought admission to an all-white public school.<sup>587</sup> The issues before the Kansas Supreme Court were whether the city's board of education could set up racially separate public schools for white and black children and also whether it could exclude black "children from the schools established for white children for no other reason than that they [were] colored children."<sup>588</sup> The Kansas Supreme Court in 1881 held that the city's board of education did not have the right to exclude a black child from an all-white public school because of an 1876 Kansas state statute.<sup>589</sup> The law in question said that "there shall be established and maintained a system of free common schools, which shall be kept open not less than three nor more than ten months in any one year, and shall be free to all children residing in such city between the ages of five and twenty-one years."<sup>590</sup>

The Kansas Supreme Court patiently explained that the Kansas state legislature's law did not require or permit racially segregated public schools, even though the court said that it might be within the discretion of the state to do so.<sup>591</sup> The court did say that "this power [on the part] of the legislature may be doubted."<sup>592</sup> In fact, the Kansas Supreme Court went even further and said that "[t]he question whether the legislatures of [the] states have the power to pass laws making distinctions between white and colored citizens, and the extent of such power, *if it exists*, is a question which can finally be determined only by the [S]upreme [C]ourt of the United States."<sup>593</sup> The court provided a lengthy explanation for its holding that the Kansas state law at issue in this case did not authorize racially segregated public schools:

Has the legislature of the state of Kansas given, or attempted to give, to the boards of education of cities of the second class, the power to establish separate schools for the education of white and colored children, and to exclude from the schools established for white children all colored

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586. *Bd. of Educ. v. Tinnon*, 26 Kan. 1 (1881).

587. *Id.* at 15-16.

588. *Id.* at 16.

589. *Id.* at 20, 22-23.

590. *Id.* at 16 (quoting Act of Mar. 4, 1876, ch. 122, sec. 11, § 2, 1876 Kan. Sess. Laws 238, 269).

591. *Id.* at 16-17 (citing four cases where the state supreme court upheld the school segregation law).

592. *Id.* at 17.

593. *Id.* at 18 (emphasis added).

children, for no other reason than that they are colored children? *Prima facie*, this question should be answered in the negative. The tendency of the times is, and has been for several years, to abolish all distinctions on account of race, or color, or previous condition of servitude, and to make all persons absolutely equal before the law. Therefore, unless it appears clear beyond all question that the legislature intended to authorize such distinctions to be made, we should not hold that any such authority has been given. And we certainly should not expect to find that the legislature had given any such authority during the centennial year of 1876, when the minds of all men were inclined to adopt the most cosmopolitan views of human rights, and not to adopt any narrow or contracted views founded merely upon race, or color, or clan, or kinship.<sup>594</sup>

Thus, the Kansas Supreme Court concluded that the state statute in question clearly did not contemplate or allow racially segregated public schools, and it thus ruled in favor of the plaintiff.<sup>595</sup> Professor McConnell notes that although the Kansas Supreme Court “never reached the Fourteenth Amendment argument, the court [did] devote[] a page of its opinion to [a discussion as to] why the constitutionality of [racially] segregated public schools ‘[might] be doubted.’”<sup>596</sup> The court also discussed at length why it was “better for the grand aggregate of human society, as well as for individuals, that all children should mingle together and learn to know each other.”<sup>597</sup>

The cases that *Plessy v. Ferguson* relied on all involved challenges to state statutes authorizing racially separate public schools, while the cases we discuss here that were not cited by *Plessy* did not all involve statutes authorizing or requiring segregation.<sup>598</sup> But the fact remains that at least four state supreme courts did rule in favor of black children seeking admission to all-white schools is significant in revealing social attitudes and practice in some of the states after the original meaning of the Fourteenth Amendment with respect to racial segregation in public schools was frozen in place on July 9, 1868. There were thus at least four major state cases that were

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594. *Id.*

595. *Id.* at 20. It is interesting to note that the Kansas Supreme Court found in favor of the black student who was excluded from an all-white school because the state statute did not explicitly authorize segregation. However, in 1879 Kansas passed a law that required segregation. Act of Mar. 11, 1879, ch. 81, § 1, 1879 Kan. Sess. Laws 163, 163. This law as it existed in Kansas in 1949 was the law that the plaintiff in *Brown v. Board of Education* brought his claim against the school board. 347 U.S. 483, 486 n.1 (1954).

596. McConnell, *supra* note 6, at 975 (quoting *Tinnon*, 26 Kan. at 17-18).

597. *Tinnon*, 26 Kan. at 19.

598. McConnell, *supra* note 6, at 971.

not cited by the Supreme Court in *Plessy v. Ferguson* in which a state court refused to allow racial segregation in public schools. Indeed, one of these cases was decided only a month before the final ratification of the Fourteenth Amendment,<sup>599</sup> and another was decided less than a year after its adoption.<sup>600</sup> The fact that some state courts refused to permit racial segregation in public schools shows that there was at least some sentiment in favor of integrated public schools at the time the Fourteenth Amendment was adopted. With four state cases permitting racial segregation in public schools between 1868 and 1877 thanks to the *Slaughter-house Cases* and at least four state cases prohibiting racial segregation in public schools, it is impossible to say conclusively that the states, in general, recognized the legality of racially segregated public schools.<sup>601</sup> Thus, *Plessy v. Ferguson*'s statement that statutes authorizing or requiring racially segregated public schools "have been generally, if not uniformly, sustained by the courts"<sup>602</sup> is a gross misstatement of the law.

Professor McConnell makes an important observation about the school segregation cases, which is that he says, "with few exceptions, the cases holding school segregation unlawful were decided under state law, while the cases holding school segregation lawful generally reached the federal constitutional issue and held that school segregation is consistent with the Fourteenth Amendment."<sup>603</sup> The cases reach that conclusion as to the Fourteenth Amendment only because of the mistake made by the Supreme Court in the *Slaughter-house Cases*, which caused the state courts in question to hold wrongly that access to a public school education was not a

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599. See *Clark v. Bd. of Dirs.*, 24 Iowa 266 (1868).

600. See *People ex rel. Workman v. Bd. of Educ.*, 18 Mich. 400 (1869).

601. Although we did not find any cases that invalidated state statutes authorizing or requiring segregated schools, and the only states that refused to allow segregation did not seem to have statutes that called for segregated schools, the fact that some states prohibited segregation around the time of the Fourteenth Amendment sheds some light on the publicly accepted understanding of segregation at the time the Fourteenth Amendment was passed. Thus, even though some statutes calling for segregated schools were upheld after 1868, there were other states that did not permit segregation. Even though no statute calling for segregation was involved, the significance of these cases, which *Plessy* did not even mention, regarding the original understanding of the Fourteenth Amendment should not be diminished. See *Plessy v. Ferguson*, 163 U.S. 537, 544-45 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

602. *Plessy*, 163 U.S. at 545.

603. McConnell, *supra* note 6, at 971.

privilege or immunity of citizenship.<sup>604</sup> Professor McConnell adds that although these decisions “create[] the impression of unanimity on the federal constitution question,”<sup>605</sup> often times the state courts would address the issue first under the state law, and “if they found a basis in state law for invalidating segregation there was no need to address federal law.”<sup>606</sup> It was only when the state courts in question found that racial segregation in public schools was constitutional under state law that a court would address the Fourteenth Amendment issue.<sup>607</sup> Professor McConnell notes that “[w]hen a state court interpreted equality language in its own state constitution or statute[] as prohibiting segregation, it may be fair to infer that the court would have given the Fourteenth Amendment a similar construction had it reached the federal constitution[] issue.”<sup>608</sup> Therefore, the state courts that addressed the issue of the legality of racial segregation in public schools were far from being unanimous in thinking that racially segregated public schools were allowed under the Fourteenth Amendment.

The state case law on racially segregated public schools is, at worst, inconclusive with respect to the original understanding of the Fourteenth Amendment. That case law is therefore insufficient to refute the overwhelming evidence in state constitutions in 1868 that suggests the Fourteenth Amendment conferred on every child a right to a free and integrated public school education.

### 3. *Cases in Other Contexts that Plessy Relied Upon*

*Plessy v. Ferguson* did not only rely on cases upholding racial segregation in public schools, but it relied as well on a number of other Jim Crow Era cases in upholding the Louisiana law that mandated racial segregation in railroad cars.<sup>609</sup> These non-school Jim Crow Era cases are arguably irrelevant to a discussion of a child’s fundamental right to a free and common public school education in light of the original meaning of the Fourteenth Amendment. Nevertheless, we will address these cases and explain why we think that they do not affect the original understanding of the Fourteenth

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604. See *supra* note 55.

605. McConnell, *supra* note 6, at 971.

606. *Id.* at 971-72.

607. *Id.* at 972.

608. *Id.*

609. *Id.* at 983-84.

Amendment as it bears on a child's right to a free and common public school education.

Professor McConnell provides a brief historical synopsis of the status of segregation laws for common carriers,<sup>610</sup> and he notes that it is easier to justify the prohibition of segregation in the context of public transportation than it is to justify it for public schools.<sup>611</sup> The reason for this is that racial discrimination by common carriers raised issues under the common law long before the Fourteenth Amendment was passed.<sup>612</sup> Professor McConnell also explains that almost all the southern states "passed laws during Reconstruction guaranteeing equal access to transportation and public accommodations, and none mandated segregation by law."<sup>613</sup> The state laws requiring racial segregation by common carriers only began to appear during the Jim Crow Era in the 1880s.<sup>614</sup> By the time the State of Louisiana had passed the common carrier segregation law that was at issue in *Plessy v. Ferguson*, the states of Florida, Mississippi, and Texas had recently passed similar laws.<sup>615</sup> Thus, Professor McConnell explains that "[i]n *Plessy*, the Court spoke as if Jim Crow laws were part of the 'established usages, customs[,] and traditions of the people,' but in fact the laws were of very recent vintage."<sup>616</sup>

Justice Harlan, the lone dissenter in *Plessy v. Ferguson*, addressed the state court cases collectively, and he summarily dismissed the alleged relevance of those cases:

I do not deem it necessary to review the decisions of state courts to which reference was made in [the Court's] argument. Some, and the most important, of them, are wholly inapplicable, because rendered prior to the adoption of the last amendment[] of the [C]onstitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time when public opinion, in many localities, was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil

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610. *See id.* at 980-84.

611. *Id.* at 980.

612. *Id.* at 980-81.

613. *Id.* at 983 (footnote omitted).

614. *Id.* at 983-84.

615. *Id.* at 984 (explaining that Florida passed a law in 1887, Mississippi in 1888, and Texas in 1889).

616. *Id.* (quoting *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954)).

freedom, gave citizenship to all born or naturalized in the United States, and residing here, obliterated the race line from our systems of governments, national and state, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.<sup>617</sup>

Justice Harlan thus correctly argues that any state court decision that *Plessy v. Ferguson* relied on that was decided prior to 1865,<sup>618</sup> when the Thirteenth Amendment abolishing slavery was passed, or even prior to 1868,<sup>619</sup> when the Fourteenth Amendment was passed, was irrelevant. These cases should not have been relied upon in *Plessy* because the whole purpose of the Thirteenth and Fourteenth Amendments was to remove all distinctions based on race. Similarly, any state cases that were decided after the end of Reconstruction in 1877 should also have limited persuasive value in understanding the original meaning of the Fourteenth Amendment. After 1877, the Reconstruction efforts of the late 1860s and early 1870s fell apart, but the Fourteenth Amendment was still the law of the land, and its original meaning was frozen in time on July 9, 1868. As a result, many laws that were enacted after 1868, despite the Fourteenth Amendment, were simply not reflective of the original meaning of that Amendment. In fact, Professor McConnell explains that some historians claim that even in most southern jurisdictions, public transportation was desegregated “in actual practice (and not just in legal theory) . . . from the early 1870s until 1900.”<sup>620</sup> Other historians, however, dispute this and claim that desegregated transportation was less common and “was often confined to lower-class accommodations, such as railroad ‘smoking cars,’ and a combination of custom, company regulation, and economics often

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617. 163 U.S. at 563 (Harlan, J., dissenting).

618. See, e.g., *Day v. Owen*, 5 Mich. 520 (1858), cited in *Plessy*, 163 U.S. at 548 (majority opinion).

619. See, e.g., *W. Chester & Phila. R.R. v. Miles*, 55 Pa. 209, 214-15 (1867) (upholding a law requiring separate railroad cars for blacks and whites because the railroad had the right to promulgate regulations to avoid disruptions), cited in *Plessy*, 163 U.S. at 548. With respect to this Pennsylvania case, Professor McConnell noted that earlier in 1867, “the Pennsylvania legislature [] passed a [law] [m]aking it an offence for railroad corporations . . . to make any distinction with their passengers, on account of race or color.” McConnell, *supra* note 6, at 981 (quoting Act of Mar. 22, 1867, no. 21, 1867 Pa. Laws 38, 38).

620. McConnell, *supra* note 6, at 983 (citing C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 33-34 (3d rev. ed. 1974); C. VANN WOODWARD, *AMERICAN COUNTERPOINT: SLAVERY AND RACISM IN THE NORTH-SOUTH DIALOGUE* 253 (1st ed. 1964)).

barred black passengers from first class accommodations.”<sup>621</sup> But, the important point is that the only cases that are minimally relevant to our thesis are those decided between 1865 and 1877, and perhaps those decided after 1877, but which involved laws that were passed between 1865 and 1877.

Because the Louisiana law at issue in *Plessy v. Ferguson* regulated passengers traveling on a railroad, it is not surprising that many of the cases cited by *Plessy* involve challenges to laws that regulated railroad travel.<sup>622</sup> These railroad cases arose in various contexts. Some of these cases involved laws that called for racially separate railroad cars for blacks and whites where the statute in question was challenged by a black plaintiff as a violation of his or her rights.<sup>623</sup> Other cases involved challenges to state statutes where the argument was that the state statute in question was unconstitutional because the state law impinged on Congress’s power to regulate interstate commerce.<sup>624</sup> *Plessy v. Ferguson* itself relied on state cases that held that state laws regulating railroads did not interfere with Congress’s power to regulate interstate commerce because the state statutes were constitutional under the police power

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621. *Id.* (quoting ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877, at 368, 371-72 (1988); CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 9-17 (1987)).

622. *See Plessy*, 163 U.S. at 548. Some of the cases involved travel on steamboats. *See, e.g.,* McGuinn v. Forbes, 37 F. 639, 641 (D. Md. 1889); *Day*, 5 Mich. at 527.

623. *See, e.g.,* Chi. & Nw. Ry. v. Williams, 55 Ill. 185, 188-89 (1870) (finding that the railroad company could not discriminate based on race because there was no law establishing equal railroad cars for blacks); Chesapeake, Ohio & Sw. R.R. v. Wells, 85 Tenn. 613, 615 (1887) (holding that the separate railroad cars were equal and therefore the railroad company satisfied its obligation to provide equal treatment for blacks); *The Sue*, 22 F. 843, 848 (D. Md. 1885) (holding that the law calling for segregated passengers could be permitted but the cars were not equal); *Houck v. S. Pac. Ry.*, 38 F. 226, 229-30 (C.C.W.D. Tex. 1888) (finding in favor of the black plaintiff because the railroad car for blacks was not “equal” to the one for whites).

624. *See, e.g.,* R.R. Co. v. Husen, 95 U.S. 465, 467, 473 (1877) (invalidating a law that restricted bringing cattle into the state during certain months of the year because it was an unauthorized regulation of interstate commerce); *Louisville, New Orleans & Tex. Ry. v. Mississippi*, 133 U.S. 587, 588, 592 (1890) (upholding an 1888 statute that called for separate railroad cars for blacks because it strictly regulated state activity and was therefore within the police power of the state and did not regulate interstate commerce); *Louisville & Nashville R.R. v. Kentucky*, 161 U.S. 677, 703 (1896) (holding that the state may control whether railroad companies can consolidate based on the state’s exercise of its police power).

of the state.<sup>625</sup> The Supreme Court in *Plessy* concluded that the segregationist Louisiana statute in that case was a reasonable exercise of the State of Louisiana's police power.<sup>626</sup>

Many of the state cases involving laws calling for segregated railroad cars upheld those laws as being constitutional.<sup>627</sup> Nonetheless, in a number of cases, the state courts found that the separate railway car that was provided for black passengers was not equal to the cars provided for white passengers, and therefore, the courts found in favor of the black plaintiff.<sup>628</sup> Interestingly, Andrew Kull noted a similar finding in the Supreme Court cases that were decided after *Plessy*:

Having implied in *Plessy* that segregation laws were not unconstitutional so long as the separate facilities were "equal," and further—on the facts of the case—that the required "equality" would not be found to be destroyed by the mere fact of separateness, the Supreme Court never once found separate facilities to be "equal" when the equality of segregated facilities was challenged thereafter. "Separate but equal" described factual circumstances that had frequently been observed by nineteenth-century judges but that the Supreme Court, after *Plessy*, would never encounter again.<sup>629</sup>

Thus, although these common carrier railroad cases may seem to permit racial segregation under the terms of the state statutes in question, the state courts generally did not find the "but equal" prong of the "separate but equal" test to be satisfied. The Supreme Court in *Plessy* cited these cases for the proposition that separate but equal is permissible in the context of travel on railroad cars, even though in their particular applications some of these laws were struck down. While the Supreme Court in *Plessy* claimed that the critical aspect of these holdings is that the courts refused to strike down laws calling for segregation, an equally plausible claim is that in almost all of the cases alleging racial discrimination the state courts found in favor of the black plaintiffs on the ground that the separate accommodations were not equal. As Andrew Kull said regarding the segregation cases that were decided after *Plessy* but before *Brown*:

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625. *Plessy*, 163 U.S. at 549-50.

626. *Id.* at 550-51.

627. *Id.* at 548.

628. *See, e.g., The Sue*, 22 F. at 848 (holding that a law calling for segregated passengers could be permitted, but the cars were not equal); *Logwood v. Memphis & Charleston R.R.*, 23 F. 318, 319 (C.C.W.D. Tenn. 1885) (relying on the analysis of *The Sue*); *Houck*, 38 F. at 229-30 (finding in favor of the black plaintiff because the railroad car for blacks was not as "equal" as the one for whites).

629. KULL, *supra* note 417, at 132.

Every new decision striking down segregation on the artificially narrow grounds of unequal treatment constituted additional and more recent authority for the proposition that segregation affording equal treatment was both constitutionally unobjectionable and (by implication) possible. At the same time, the Court's unwillingness to voice its evolving hostility to racial classifications, relying instead [on] case after case . . . findings of unequal treatment, left the antidiscrimination theme of [the] Fourteenth Amendment interpretation relatively impoverished.<sup>630</sup>

Andrew Kull points to the cases after *Plessy v. Ferguson* in which state laws were struck down as being separate but unequal.<sup>631</sup> Just as striking, however, we should note that even in several of the railroad segregation cases on which *Plessy* relied, the courts also found in favor of black plaintiffs on the ground that the separate facilities provided were not equal.<sup>632</sup> In most of the cases cited by *Plessy*, the courts ultimately found in favor of the black plaintiffs, and in most of the cases decided after *Plessy*, the courts also failed to find equality in the facilities at issue. This shows that *Plessy*'s finding that the Louisiana railroad cars at issue in that case were in fact "separate but equal" was an exception to the norm even during the Jim Crow Era and that it was not the norm itself.

In addition to the railroad cases, *Plessy v. Ferguson* relied on other racial segregation cases as well. *Plessy* cited an Indiana Supreme Court case from 1871 that said that "[l]aws forbidding the intermarriage of the two races 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."<sup>633</sup> This 1871 Indiana decision was, however, contradicted by an Alabama Supreme Court opinion and a Texas court opinion from the 1870s, both of which held that anti-miscegenation laws were unconstitutional.<sup>634</sup> The argument against such laws is developed further by Professor Calabresi and Andrea Matthews in another article and is beyond the scope of this Article.<sup>635</sup> Moreover, even if anti-miscegenation laws had been constitutional, which they were

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630. *Id.* at 150. Kull continues that "[o]ne consequence is that when the Court was finally prepared to declare that 'racial segregation as such' was unconstitutional, it found itself incapable of explaining why." *Id.*

631. *Id.*

632. *See supra* note 628.

633. *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (citing *State v. Gibson*, 36 Ind. 389, 404-05 (1871)).

634. *See* *Burns v. State*, 48 Ala. 195, 197 (1872); *Bonds v. Foster*, 36 Tex. 68, 69-70 (1871).

635. Calabresi & Matthews, *supra* note 14, at 1464-74.

not, one could still have argued that interracial marriage did not implicate a constitutionally protected right; whereas education did.<sup>636</sup> The right to marry is a common law right and is a part of the right to contract, which was protected by the Civil Rights Act of 1866.<sup>637</sup> But a child's right to a free and common public school education is created by the state constitutional law of an Article V consensus of three-quarters of the states in 1868.<sup>638</sup> There can be no doubt at all that a child's right to a free and common public school education was a privilege or immunity of state citizenship when the Fourteenth Amendment was adopted.

*Plessy v. Ferguson* also mentions a few cases where laws discriminating against blacks or calling for segregation were rendered unconstitutional. These cases included *Strauder v. West Virginia*<sup>639</sup> and its progeny,<sup>640</sup> which held unconstitutional a state law that only permitted white males to sit on a jury.<sup>641</sup> The Supreme Court in *Plessy* distinguished these cases by explaining that “[t]he distinction between the laws interfering with the political equality of the negro and those requiring the separation of the two races in [to] schools, theaters, and railway carriages has been frequently drawn [out] by this court.”<sup>642</sup> Thus, when “political equality” is involved, laws limiting the rights of blacks were unconstitutional, such as in the jury cases.<sup>643</sup>

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636. See *supra* Section II.A (listing the state constitutional provisions that provided a right to an education in 1868).

637. Calabresi & Matthews, *supra* note 14, at 1474.

638. See *supra* Section III.A.

639. 100 U.S. 303, 312 (1879).

640. After *Strauder*, there were other challenges by black defendants regarding the lack of black jurors. Some of these cases were decided in favor of the black defendant, while others were distinguishable from *Strauder*. See *Virginia v. Rives*, 100 U.S. 313, 320-21 (1879); *Neal v. Delaware*, 103 U.S. 370, 397-98 (1880); *Bush v. Kentucky*, 107 U.S. 110, 122-23 (1883); *Gibson v. Mississippi*, 162 U.S. 565, 591-92 (1896).

641. *Strauder* involved a West Virginia law that permitted removal of a case from state court to federal court if an individual was denied his civil right. 100 U.S. at 304. There was another West Virginia law that prohibited black men from sitting on a jury. *Id.* When a black defendant was accused of murder, his petition for removal to federal court was denied, and he was convicted of murder. *Id.* The Supreme Court reversed holding that the refusal to put black men on the jury violated the defendant's Fourteenth Amendment rights, and therefore, removal was proper. *Id.* at 312.

642. *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

643. *Plessy*, 163 U.S. at 545.

The Supreme Court in *Plessy v. Ferguson* thus used this same reasoning to explain that

where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of color . . . the enactment was not satisfied by the company[’s] providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons.<sup>644</sup>

Therefore, in *Plessy*, the U.S. Supreme Court was able to distinguish its prior holding in *Railroad Co. v. Brown*,<sup>645</sup> “(a remarkable coincidence of names),”<sup>646</sup> which was the “first desegregation case” and which was decided in 1873.<sup>647</sup> In *Brown*, the U.S. Supreme Court held that separate-but-equal railroad cars were blatantly illegal because the charter of the railroad company in question as written by Congress said explicitly “that no person shall be excluded from the cars on account of color.”<sup>648</sup> This specific condition was imposed by the Reconstruction Congress when it granted the Alexandria and Washington Railroad Company the authority to expand its line to connect with another line in the District of Columbia.<sup>649</sup> *Plessy*’s 1896 holding seems clearly to contradict or at least to be in tension with the earlier holding in *Railroad Co. v. Brown*. Moreover, as Professor McConnell explains, the Supreme Court’s holding in *Brown* reflected “the prevailing view in Congress in the mid-1860s.”<sup>650</sup> Yet, the U.S. Supreme Court in *Plessy* distinguished its prior precedent in *Railroad Co. v. Brown* by explaining that the requirement not to exclude black people in that case was mandated by the congressional charter,<sup>651</sup> whereas no such charter was in place with respect to the Louisiana law.

Although the law in *Railroad Co. v. Brown* explicitly prohibited the exclusion of passengers based on race,<sup>652</sup> the Supreme Court could easily have found that the provision of equal cars would have satisfied the law. In fact, Professor McConnell points out that blacks were being required to sit in the front car on the route from

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644. *Id.* at 545-46.

645. 84 U.S. 445 (1873).

646. McConnell, *supra* note 6, at 1117.

647. *Id.* at 1119.

648. 84 U.S. at 452 (quoting Act of Mar. 3, 1863, ch. 110, § 1, 12 Stat. 805, 805).

649. *Id.* at 446.

650. McConnell, *supra* note 6, at 1117 (citing *Brown*, 84 U.S. at 453).

651. *Plessy v. Ferguson*, 163 U.S. 537, 545-46 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

652. *Brown*, 84 U.S. at 452.

Washington to Alexandria, but on the return trip, white people sat in the front car.<sup>653</sup> This would seem to be a true case of a “separate but equal” accommodation, but the U.S. Supreme Court held instead correctly that the statute in question required white and black people to have access to the same cars simultaneously.<sup>654</sup> Separate but equal was quite simply not acceptable. The U.S. Supreme Court in *Plessy* was therefore forced to distinguish *Railroad Co. v. Brown*, and its attempt to do so failed pathetically.

Interestingly, *Railroad Co. v. Brown* was decided in 1873 in the heart of the Reconstruction Era. Thus, it makes sense that the Court would have held then that the provision of separate-but-equal railroad cars did not satisfy the requirement of the statute. If the statute had been challenged in the post-1877 era, however, one is left to wonder if the Supreme Court would have deemed separate but equal to be consistent with the statute, especially since the exact same railroad cars were alternated between black and white people on incoming and outgoing trips. The Supreme Court’s decision in *Railroad Co. v. Brown*, therefore, even though the case was decided on the basis of a particular federal statute, might not be a better gauge of the original meaning of the Fourteenth Amendment with respect to travel on railroad cars than is *Plessy*, which was decided in 1896, in the height of the anti-Reconstruction Era and during the proliferation of the Jim Crow laws. As Professor McConnell concludes regarding *Railroad Co. v. Brown*:

The first desegregation case did not involve the Fourteenth Amendment, but presented merely a statutory question, and it is perhaps for this reason that it has been forgotten. Yet at heart, the issue is not much different from the question as it would arise under the Fourteenth Amendment: whether separate but equal facilities are a form of racial discrimination. On this point, it is significant that the Court did not merely find that its interpretation was the most plausible. It found the meaning “obvious” and the counterargument “ingenuous.” It used the term “discrimination” three times as embracing segregation. The Court specifically recalled “the temper of Congress at the time” and described it as “manifest” that Congress would not have allowed the railroad to extend its line if it were going to segregate . . . cars. . . . Just possibly, the Supreme Court [in 1873] understood “the temper of Congress at the time” of the Fourteenth Amendment better than it has been understood since.<sup>655</sup>

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653. McConnell, *supra* note 6, at 1118 (citing *Brown*, 84 U.S. at 447).

654. *Brown*, 84 U.S. at 452-53.

655. McConnell, *supra* note 6, at 1119 (footnote omitted).

## IV. RESPONSES TO OTHER POTENTIAL CRITICISM

The state constitutional provisions that were in effect in 1868 overwhelmingly demonstrate that a child's right to a free and common public school education was a fundamental right as an original matter under the Fourteenth Amendment. We seek now to respond to some potential criticisms of our argument.

## A. Professor John Eastman's Article Claiming that Education Never Became a Fundamental Right

Professor John Eastman has written an important law review article arguing against the proposition that children have a fundamental civil right to a public school education.<sup>656</sup> In his 1998 article, Professor Eastman offers a historical analysis of the state constitutional provisions from 1776 to 1900, and he concludes that the state constitutional provisions from that time period with respect to education are purely hortatory.<sup>657</sup> Professor Eastman discusses the historical origins of the state constitutional education provisions,<sup>658</sup> so a brief summary of Professor Eastman's findings and a response from us seems to be called for.

1. *Summary of Professor Eastman's Conclusions*

Professor Eastman notes that between 1776 and 1800 seven of the sixteen states in the Union mentioned the provision of a public school education in their state constitutions.<sup>659</sup> However, during this time period twelve out of the twenty-five constitutions that were passed (either because new states entered the Union or because states already in the Union passed a new constitution) contained provisions regarding a public school education.<sup>660</sup> Professor Eastman classified the constitutional provisions passed during this time period as being either "hortatory"<sup>661</sup> or as being "[f]acially [o]bligatory."<sup>662</sup> With

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656. See Eastman, *supra* note 50, at 2.

657. *Id.* at 34 ("So when does education become a civil right? At the end of the nineteenth century, at least, the answer was: 'Perhaps never, if the State is so inclined.'").

658. These time periods include: 1776-1800, *id.* at 3-10; 1800-1834, *id.* at 10-13; 1835-1860, *id.* at 13-20; 1860-1877, *id.* at 20-31; and 1874-1900, *id.* at 31-32.

659. *Id.* at 3.

660. *Id.*

661. *Id.*

respect to the hortatory provisions, Professor Eastman argues that the provisions in question “do not seem to have been intended to declare a fundamental right to education; rather, they seem merely to have articulated a goal that the constitution drafters thought [was] important to the protection of republican government.”<sup>663</sup> Professor Eastman argues that even though some of the state constitutions in place at this time had facially obligatory provisions, “[i]n none of these States, however, did the legislature immediately establish common schools according to the constitutional provision.”<sup>664</sup> Thus, Professor Eastman concludes that during this early time period the state constitutional education clauses either did not require the provision of a free and common public school education, or if they did so require, the states in question did not immediately establish common schools.<sup>665</sup> Professor Eastman concludes from this that the state constitutional education clauses in question were not in fact mandatory.<sup>666</sup>

During the second time period that Professor Eastman examines, which covers the years from 1800 to 1834, eight new states were admitted to the union, and six states already in existence adopted new constitutions.<sup>667</sup> Professor Eastman identifies two noteworthy changes in this time period, including “the . . . involvement of the Federal Government in education for the first time” and “the inclusion of an equality principle in the constitutions of Indiana and Connecticut.”<sup>668</sup> Professor Eastman focuses on the Indiana Constitution of 1816 which said, “It shall be the duty of the General Assembly, as soon as circumstances will permit, to provide, by law, for a general system of education, ascending in a regular gradation from township schools to a State University, where tuition shall be gratis, and *equally open to all*.”<sup>669</sup> Professor Eastman argues, however, that because an 1843 Indiana statute enacted under the constitution of 1816 said only that the Indiana public schools should be “open and free to all . . . white children” and because an 1850 Indiana Supreme Court case held that black children could not attend the white schools if the parents of the white children objected, that

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662. *Id.* at 8.

663. *Id.*

664. *Id.*

665. *Id.* at 8, 10.

666. *Id.* at 10.

667. *Id.*

668. *Id.* at 11.

669. *Id.* at 11-12 (quoting IND. CONST. of 1816, art. IX, § 2).

the word “[a]ll’ [in the Indiana Constitution] did not necessarily mean ‘all.’”<sup>670</sup> Professor Eastman explains that

the equality principle contained in the constitution was either not understood to protect all persons by those who drafted it, or it was significantly narrowed by legislative enactments upheld by the courts so as to exclude certain classes. In either event, it did not suffice to elevate education to the status of a civil right.<sup>671</sup>

Professor Eastman’s discussion of the Indiana Constitution may be relevant for determining how long there had been a right to education, but we do not think that a constitutional provision from 1816, a law from 1843, and a state supreme court case from 1850 are relevant in determining whether the Indiana conferred a fundamental right to a public school education in 1868. The racial provisions that Professor Eastman refers to were enacted at a time when slavery was permitted in this country and before the adoption of the Fourteenth Amendment.

The next time period that Professor Eastman analyzes is the period between 1835 and 1860. Nine new states were admitted to the Union during this period, and an additional fourteen state constitutions were revised.<sup>672</sup> Professor Eastman argues that some of these state constitutions contained hortatory language similar to the language of the early state constitutions, which he also calls hortatory, while other state constitutions contained language that Professor Eastman concedes is obligatory.<sup>673</sup> Professor Eastman says that four states<sup>674</sup> passed constitutional “provisions that were obligatory in tone, but that contained such ambiguous phrasing as ‘thorough and efficient’ or ‘general and uniform,’ thereby giving enough discretion to the legislature to render them perhaps only hortatory.”<sup>675</sup> Professor Eastman dismisses the significance of the obligatory provisions by claiming that these provisions “require[] the establishment of schools in each district, not the provision of education to all children.”<sup>676</sup> He attempts to bolster his argument by

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670. *Id.* at 12 (quoting Act of Feb. 11, 1843, ch. 15, sec. 5, § 102, 1843 Ind. Acts 305, 320) (citing IND. CONST. of 1816, art. IX, § 2; *Lewis v. Henley*, 2 Ind. 332, 334 (1850)).

671. *Id.* at 13.

672. *Id.*

673. *Id.* (stating that Michigan, Louisiana, Iowa, Wisconsin, and California had obligatory provisions).

674. *Id.* (stating that New Jersey, Ohio, Minnesota, and Oregon had facially obligatory provisions, but were perhaps only hortatory).

675. *Id.* (footnote omitted).

676. *Id.* at 14.

focusing on the Michigan provision where “the enforcement clause indicates [that] the remedy for failure to operate a school three months during the year was not an action to compel the provision of education, but the forfeiture by the school district of its share of the school fund proceeds.”<sup>677</sup>

Professor Eastman is, of course, right that the language of the state constitution education clauses focuses on the legislature’s duty to set up public schools and not on a state duty to educate children, but it is hard to imagine what purpose would be served by the establishment of a public school other than the education of children. Surely, Professor Eastman does not think the purpose behind the state constitution education clauses was to employ teachers or school administrators. The obvious explanation for state constitutional clauses creating a duty to set up public schools is a recognition that in a democracy the education of children is vital to the proper functioning of a state as well as being important for the child. At a minimum, children must be taught to read so they can read the laws for themselves—a task that many of the Framers would have thought was fundamental.

The fact that a school district’s failure to perform its duty to establish public schools led only to a forfeiture by the school district of its portion of the school fund means only that until a school district sets up the requisite system of public schools that the state constitution calls for, the school district in question will not receive any funding from the school fund. The fact that a state constitution terminates school funding for districts that fail to set up public schools does not necessarily mean that the district in question has been relieved from its “duty” to establish a system of public schools. In fact, if the school funds are paid out to each school district based on the population or the number of school-aged children living in a particular district, a state might halt all funding from the school fund if no public schools were established. But, even if all school funding is terminated, a state may still have a constitutional duty to establish a system of public schools—a duty which it is failing to live up to.

Professor Eastman claims that the adequacy provisions in state constitutions such as the clauses that require that state public schools be “thorough and efficient” or “general and uniform” were, by themselves, sufficient to render obligatory constitutional clauses into hortatory clauses instead.<sup>678</sup> But, these qualifying clauses obviously

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677. *Id.* at 15.

678. *Id.* at 13.

raise standards as to what level of education must be provided by the states. In fact, in the wake of the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*,<sup>679</sup> the most successful challenges brought by students against public school boards were those that complained about the adequacy of the public school education that was being provided by the state.<sup>680</sup> These adequacy arguments have generally been more successful than have been arguments that get made challenging the equality of the public school education being provided in one school district as compared to another.<sup>681</sup> The adequacy-of-public schools arguments stem from the state constitutional clauses creating a duty to provide public schools, particularly those clauses such as the ones which require that public schools be "thorough and efficient."<sup>682</sup> Thus, Professor Eastman's argument that the qualitative terms changed the obligatory school clauses to hortatory clauses is inconsistent with the current trend of public school litigation, which relies on these exact phrases to impose duties to provide an adequate level of education.

During the period between 1860 and 1877, several new states entered the Union and a large number of states wrote new constitutions, including all eleven of the Confederate States, which were obliged to write new constitutions as a condition for being allowed to re-enter the Union.<sup>683</sup> The main changes that were made in state constitutions during this time period were: (1) the requirement to educate "'all' children;"<sup>684</sup> (2) the fact that state constitutions began including detailed provisions regarding the school superintendent and school board that was to be established;<sup>685</sup> and (3) the fact that after 1868, state constitutions began to refer to separate schools for black and white children.<sup>686</sup> The most significant event in this time period was the passage in 1868 of the Fourteenth

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679. 411 U.S. 1 (1973) (5-4 decision).

680. For a further discussion of *Rodriguez*, see *infra* Section IV.B.

681. See *infra* note 727 and accompanying text.

682. Eastman, *supra* note 50, at 13.

683. *Id.* at 20, 26.

684. *Id.* at 23.

685. *Id.* at 28.

686. *Id.* at 24, 29 (explaining that Missouri's Constitution of 1865 was the first constitution to expressly permit segregated schools, and Tennessee's Constitution of 1870 was the first state constitution to require segregated schools); see also *supra* notes 233-48 and accompanying text.

Amendment.<sup>687</sup> Professor Eastman argues that the Equal Protection Clause of the Fourteenth Amendment alone was insufficient to establish a right to a public school education, and he does not address the Privileges or Immunities Clause argument we make in this Article.<sup>688</sup> Professor Eastman points out the California case of *Ward v. Flood*,<sup>689</sup> which we discussed above, and he explains that the California state constitution in that case, coupled with a state statute enacted under that constitutional provision and the Equal Protection Clause of the Fourteenth Amendment, could have been combined to create a right to an education.<sup>690</sup> However, he notes that the California Supreme Court held that the Equal Protection Clause only required that black and white children be treated equally, which according to Professor Eastman, was accomplished merely by the state establishing a separate school for black children if an all-white school also existed.<sup>691</sup> Professor Eastman deduces from this that there must not have been a fundamental right of a child to a public school education because the state still had the power to take away the right to an education if it so desired.<sup>692</sup> Therefore, with respect to the Fourteenth Amendment, Professor Eastman concludes that “the equal protection analysis does not by itself serve to guarantee all children the right to education.”<sup>693</sup> Once again, however, Professor Eastman does not address the Privileges or Immunities Clause

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687. See Eastman, *supra* note 50, at 29 (“[T]he adoption of the Fourteenth Amendment in 1868 plays a significant role in the interpretation of State constitutional provisions relating to education.”).

688. *Id.* at 29-31.

689. *Id.* at 29 (citing *Ward v. Flood*, 48 Cal. 36 (1874)). For a further discussion of this case, see *supra* notes 481-95 and accompanying text.

690. Professor Eastman explained:

Thus, for the first time, we see how an obligatory-type provision for education in a State constitution and an actual statute enacted under it providing for free education, on the one hand, and the Equal Protection Clause of the Fourteenth Amendment, on the other, combined to create a right to education.

*Id.* at 29-30.

691. *Id.* (“[T]he exclusion of colored children from schools where white children attend as pupils, cannot be supported, . . . except where separate schools are actually maintained for the education of colored children.” (quoting *Ward*, 48 Cal. at 56-57)) (alteration in original); see also *id.* at 31 (“[S]uch a combination did not at first provide a right to an integrated education. Many years of segregation were still to come.”).

692. *Id.* at 30 (“Nor is there anything in this analysis that would prevent States without mandatory constitutional language from abolishing their entire educational system.”).

693. *Id.*

argument made in this Article, and the California Supreme Court does not address that argument in *Ward v. Flood* because it was bound by the contrary but erroneous holding in the *Slaughter-house Cases*.<sup>694</sup>

The final time period that Professor Eastman addresses is the period between 1874 and 1900.<sup>695</sup> Seven new states joined the Union during this time period,<sup>696</sup> and four existing states adopted new constitutions.<sup>697</sup> Professor Eastman notes, as we do earlier in this Article, that “the most important development of th[is] period was the wholesale inclusion of provisions requiring segregation.”<sup>698</sup> This finding confirms our analysis above, that state constitutional texts only began to require racially segregated public schools in the 1870s.<sup>699</sup> Thus, Professor Eastman agrees with us that racially segregated public schools were not constitutionally required when the Fourteenth Amendment was adopted in 1868 but were required by fifteen states only in the years after the Fourteenth Amendment had been adopted.

## 2. *Why Professor Eastman’s Findings Are Helpful to Explain that Education Was a Fundamental Right in 1868*

We disagree with Professor Eastman’s conclusion that there was never a state constitutional or federal constitutional right to a free and common public school education. But, we think Professor Eastman’s history of the evolution of state constitutional education rights supports our thesis that there was in fact a fundamental right to a free and common public school education in 1868. Professor Eastman summarizes the progression of the state constitutional provisions regarding education as follows:

The education articles . . . in State constitutions developed historically from provisions that were hortatory in nature, to those that required the establishment of [certain] centralized state educational system[s] which provided for schools in every district throughout the state, and finally to

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694. See *supra* notes 481-95 and accompanying text.

695. See Eastman, *supra* note 50, at 31.

696. *Id.* at 31 & n.198 (listing Idaho (1889), Montana (1889), North Dakota (1889), South Dakota (1889), Washington (1889), Wyoming (1889), and Utah (1895)).

697. *Id.* at 31 (listing California, Kentucky, New York, and Delaware).

698. *Id.*

699. See *supra* notes 232-48 and accompanying text.

those that required that education be provided to all . . . children of the state.<sup>700</sup>

Professor Eastman dismisses the argument that the state constitutional provisions we cited above established a fundamental right to education by arguing that those provisions were either hortatory or facially obligatory but were not treated as if they were obligatory in reality.<sup>701</sup> We disagree. In our view, an Article V consensus of more than three-quarters of the states in 1868 required that the states provide a free and common public school education.<sup>702</sup> Many of the state constitutional clauses that Professor Eastman calls hortatory in early state constitutions were replaced with clauses that even Professor Eastman agrees were obligatory in 1868. More fundamentally, we think that when a state constitution said that the state “shall” establish public schools or that the state has a “duty” to establish public schools or some other similar language those state constitutions cannot be dismissed as being merely hortatory but should instead be considered as imposing a legal obligation on state governments. The words “shall” or “duty” appear in an Article V consensus of three-quarters of the state constitutions in 1868,<sup>703</sup> and they are legal terms, which are always obligatory in nature. Several scholars, starting with Robert Clinton and including Professor Calabresi, have argued that the word “shall” in the Vesting Clause of Article III means “must” and that it imposes weighty obligations on Congress.<sup>704</sup> Professor Clinton, in particular, surveys every use in the U.S. Constitution of the word “shall” and concludes that it always imposes a binding legal obligation of some kind.<sup>705</sup> Justice Joseph Story even argued in *Martin v. Hunter’s Lessee* that the word “shall” in Article III obligated Congress to create a system of lower federal

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700. Eastman, *supra* note 50, at 33.

701. *Id.*

702. See *supra* notes 95-134 and accompanying text.

703. See *supra* notes 95-134 and accompanying text.

704. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 206 (1985); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1005 (2007); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 749-50 (1984) [hereinafter Clinton, *A Guided Quest*]; Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1516 (1986).

705. Clinton, *A Guided Quest*, *supra* note 704, at 782-86 & n.147.

courts.<sup>706</sup> We therefore disagree with Professor Eastman that the state constitutional education clauses that he calls hortatory were in fact only hortatory. We think they were obligatory instead.

Professor Eastman also argues that facially obligatory state constitutional provisions were sometimes meaningless because the state legislature in question did not live up to its constitutional duty in practice to create and fund public schools.<sup>707</sup> Again, we disagree. A state legislature's failure to act does not necessarily mean that a state constitutional clause did not guarantee or establish a right to a public school education. It simply means that the state legislature violated its state's constitution. The meaning of constitutional rights guarantees does not change or become eviscerated simply because a state legislature violates those rights. The illegal acts of a state legislature do not provide a basis for interpretation of the original meaning of the text of a constitutional provision.

Although we reach a different conclusion from Professor Eastman's, we think Professor Eastman's comprehensive research helps address a potential criticism to our argument. We conclude that an Article V consensus of at least thirty states recognized a child's right to a free and common public school education in 1868, which we think was sufficient to render education a fundamental right.<sup>708</sup> But, a critic might counter-argue that such a right had not been in existence long enough in 1868 for it to be established and recognized as a fundamental right. Justice Washington says in *Corfield v. Coryell* that only rights that are so fundamental and deeply rooted in American history and tradition that they were recognized in 1776 can count as being privileges and immunities under Article IV, § 2.<sup>709</sup> Thus, a critic could argue that although our snapshot of the state constitutions in 1868 has led us to conclude that a child's right to a public school education was a fundamental right in 1868, if that right was only a newly recognized right, it might not count as being fundamental.

In any event, Professor Eastman's analysis helps to confirm that by 1868 state constitutions had recognized a state's duty to provide a free and common public school education for a very long time. Even if some of the early constitutional provisions are read to have been originally hortatory in nature, and we do not read them

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706. 14 U.S. (1 Wheat.) 304, 330-31 (1816).

707. Eastman, *supra* note 50, at 9-10.

708. See *supra* notes 95-134 and accompanying text.

709. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230).

that way, it is still the case that Professor Eastman finds that these allegedly hortatory clauses were subsequently changed to include obligatory language.<sup>710</sup> Thus, even Professor Eastman concludes that many state education clauses that were once discretionary in nature had become mandatory by 1868.<sup>711</sup> Therefore, even if the obligatory state constitution education clauses were somewhat new in 1868, the fact that the states in question changed the original hortatory language in their state constitutions to be obligatory could indicate a trend toward reading state education clauses as being mandatory by 1868. This evolution of state constitutional education clauses may further support the notion that a fundamental right to a public school education had come to be recognized by 1868. In a recent article with Sarah Agudo and Kathryn Dore, Professor Calabresi argues that five states in the period between 1787 and 1791 recognized a state's obligation to provide a free and common public school education at the time of the Founding.<sup>712</sup> A child's right to a free and common public school education is thus very deeply rooted in American history and tradition.

B. Implications for *San Antonio Independent School District v. Rodriguez*

The U.S. Supreme Court said in *San Antonio Independent School District v. Rodriguez*<sup>713</sup> that access to a free and common public school education was not a fundamental right under either the Equal Protection Clause or under its substantive due process case law.<sup>714</sup> The Court never considered the argument of this Article in 1973 because the Privileges or Immunities Clause was erased from the Constitution by the *Slaughter-house Cases*. The Supreme Court also did not consider in *Rodriguez* the history of state constitutions from 1868 to 1954 discussed in this Article. *Rodriguez* was, perhaps, the second most significant case regarding the right to a public school education in the last sixty years after *Brown v. Board of Education*. The Court did hold in *Rodriguez* that the unequal financing of state public schools based on local property taxes did

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710. Eastman, *supra* note 50, at 3-8.

711. *Id.* at 8, 33.

712. See Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1544 (2012).

713. 411 U.S. 1 (1973) (5-4 decision).

714. *Id.* at 33-35.

not itself violate the Equal Protection Clause of the Fourteenth Amendment or the Amendment's anti-discrimination guarantee.<sup>715</sup> In reaching this conclusion, a sharply divided five-to-four majority of the Supreme Court held that access to an equally funded public school education was not a fundamental right protected by the United States Constitution and therefore that an unequal school financing system in Texas was subject only to rational basis review.<sup>716</sup> The Court did say that because there was no fundamental right to a public school education, the Court did not need to apply strict scrutiny.<sup>717</sup> The Court upheld the constitutionality of Texas's local property tax funding scheme saying there was a rational basis to support it.<sup>718</sup>

The issue of the constitutionality of school funding based on local property taxes raises a subject that goes far beyond the scope of this Article. But, we would be remiss if we did not say something about *Rodriguez's* holding that access to a public school education is not a fundamental right under the Fourteenth Amendment.<sup>719</sup> How could the U.S. Supreme Court have come to the conclusion that it reached in *Rodriguez* if, as we argue above, a child's access to a free and common public school education was a fundamental right as an original matter under the Fourteenth Amendment? How could the U.S. Supreme Court in *Rodriguez*, a case that was decided more than 100 years after the Fourteenth Amendment was adopted, hold that a child's access to a free and common public school education was not a fundamental right? Professor McConnell claims that access to a free and common public school education was not a fundamental right in 1868,<sup>720</sup> but he agrees that "[b]y the turn of the century," and certainly by the time *Brown* was decided, children did have a fundamental civil right to a free and common public school

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715. *Id.* at 40, 50-55.

716. *Id.*

717. *Id.* at 17-18.

718. *Id.* at 54-55.

719. *Id.* at 34-35.

720. Compare McConnell, *Reply to Professor Klarman*, *supra* note 38, at 1950 ("A substantial majority of both Houses of Congress (and an even more substantial majority of supporters of the principles of the Reconstruction Amendments) cast votes at various times that were premised on the constitutional view that education *was* such a civil right."), *with id.* ("The ultimate compromise version of the Civil Rights Act of 1875, which forbade segregation in common carriers but not schools, but which blocked explicit endorsement of separate-but-equal schools, can be seen as reflecting the view that schooling was not a civil right.").

education.<sup>721</sup> It is perhaps surprising that none of the responses to Professor McConnell's article mention its seeming inconsistency with *Rodriguez*.<sup>722</sup>

We see several possible responses that might be made to the tension between our argument in this Article and the U.S. Supreme Court's holding in *Rodriguez*. First, it is certainly possible that *Rodriguez* was in fact decided incorrectly based on the erroneous understanding or assumption that there was no right to a public school education in 1973. If a child's access to a free and common public school education was in fact a fundamental right in 1868 (or by 1900 as Professor McConnell argues), then that right has been and would have continued to be fully protected by the Fourteenth Amendment. The Supreme Court in *Rodriguez* said that "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."<sup>723</sup> But, in saying this, the Supreme Court did not discuss the fact that at least three-quarters of the state constitutions in place in 1868 explicitly recognized a right to a public school education in 1868. This fact is obviously relevant

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721. McConnell, *supra* note 6, at 1104. As Professor McConnell explained: As has been noted, there was a substantial basis for uncertainty about the legal status of public education as late as the 1870s. Education was then at a time of transition, and it was far from clear that any child had a legally enforceable "right" to it, at least in most states. By the turn of the century, however, this uncertainty had been resolved. Every state in the Union had established a universal system of compulsory education funded by public taxation.

*Id.* (footnote omitted). Any argument or theory, either our own or Professor McConnell's, that argues that there was a right to a public school education before *Rodriguez* was decided must be able to explain *Rodriguez*'s holding in light of such a theory. On its face, *Rodriguez* is only reconcilable with those who believe that education was not, or still is not, a fundamental right. See, e.g., Eastman, *supra* note 50, at 33 (arguing that education never rose to the level of a civil right). For a further discussion of Professor Eastman's article, see *supra* Subsection IV.A.1.

722. See *supra* note 28 and accompanying text.

723. *Rodriguez*, 411 U.S. at 34-35. The Court further stated:

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

*Id.* at 33.

to the question of whether the right to an education was deeply rooted in American history and tradition. And by 1973, when *Rodriguez* was decided, almost all of the state constitutions recognized a state's duty to provide a free and common public school education.<sup>724</sup> Access to a free and common public school education has been protected as a fundamental right since the passage of the Fourteenth Amendment in 1868, and it continued to remain a fundamental right at the time *Rodriguez* was decided.

*Rodriguez* might be defensible on the ground that the financing scheme of the Texas public schools survived rational basis scrutiny.<sup>725</sup> One could argue that the history related in this Article tells us that access to a free and common public school education is a fundamental right or privilege or immunity, but that history does not tell us how public schools must be funded or administered. Public schools have in fact in this country been always administered at the local government level and not by the states. The obligation to create public schools and even to contribute to a school fund has appeared in state constitutions, but public school administration and at least some public school funding have always been local prerogatives and not prerogatives of the states. If this is so, then the *Rodriguez* holding, although not the opinion's dicta, could be consistent with the argument of this Article.

The alleged discrimination that occurs when public schools are funded by local property taxes is arguably wealth discrimination and not race discrimination. The Supreme Court has never held that wealth discrimination is subject to heightened scrutiny, and *Rodriguez* is thus arguably not a surprise. One cannot help noting, however, that the wealth discrimination at issue with local funding of public schools looks an awful lot like race discrimination because neighborhoods with predominantly black children are often poorer and generate less tax revenue than neighborhoods with predominantly white children. Still, it could be said that the difference in taxes, and levels of spending, for such schools is only a function of the location of the schools and not of their demographic makeup. Therefore, any discrimination that occurs is not because schools are established for one race or another but is rather a consequence of local control over public schools. Such local control may lead to a form of wealth discrimination (students in wealthier communities get a better education than students in poor

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724. See *supra* Section II.B.

725. *Rodriguez*, 411 U.S. at 54-55.

communities), but wealth discrimination is not subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Thus, when a law discriminates on the basis of wealth, the appropriate standard for review is the rational basis test, not strict scrutiny. Moreover, it cannot be denied that local funding of public schools is almost certainly vital to local control over public schools and their curricula. If the Supreme Court had required state funding of all public schools in *Rodriguez*, control over school curricula would certainly have been affected.

The Supreme Court's upholding of the public school financing scheme in *Rodriguez* can thus be defended on the grounds that: (1) wealth discrimination is not a type of discrimination that gets strict scrutiny and (2) local control over education is deeply rooted in American history and tradition and serves important values. Nonetheless, we cannot conclude this discussion without expressing Professor Calabresi's own view that an equal state-funded school-voucher system would be much more desirable and much fairer and supportive of parental rights than is the current public school system. Professor Calabresi has developed this argument in two recently published law review articles.<sup>726</sup>

We mean to express no final opinion as to whether the *Rodriguez* decision was right or wrong in this Article. Even if access to a public school education was a fundamental right as an original matter (or had become a civil right by 1900 as Professor McConnell suggests), Texas's local property tax system of financing its public schools could have still been upheld under rational basis review because wealth discrimination is not subject to strict scrutiny. There is language in *Rodriguez* that is inconsistent with this Article, but that does not necessarily mean the case was improperly decided.

In the wake of *Rodriguez*, several legal scholars have written about alternative rationales under which a child's right to an equally funded public school education might be secured. Many, but not all, of these scholars have looked to state constitutional law as a potential source for finding a child's right to an equally funded public school education. Claims have been made that state constitutions recognize today the right to a public school education, confer a right to a minimally adequate education, and differentiate between equality

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726. See generally Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 986-88 (2013); Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1068-72 (2013).

and adequacy rights in state provision of a public school education.<sup>727</sup> At least one prior scholar has suggested, as we do here, that the Privileges or Immunities Clause of the Fourteenth Amendment might be used to recognize access to a public school education as a fundamental right.<sup>728</sup> The articles analyzing *Rodriguez* and suggesting that education is a fundamental right based on the state constitutional provisions today generally do not focus as we do on the text of the various state constitution education clauses as they existed in 1868, when the Fourteenth Amendment was adopted.<sup>729</sup>

### C. Additional Anticipated Criticism or Potential Weaknesses to Our Argument

It remains for us to consider some additional counter-arguments that might be made to our thesis thus far and to explain why those arguments fail.

#### 1. *The Realistic Application of the State Constitutional Provisions Granting the Right to a Public School Education That Were in Place in 1868*

First, we expect that critics will challenge us for being too formalistic in looking at only the texts of state constitutions as they were in place in 1868 without considering how those state constitutional education clauses were applied in reality. We expect that critics will say that even if the overwhelming majority of the state constitutions in 1868 had clauses granting children the formal legal right to a public school education,<sup>730</sup> and even if an Article V consensus of three-quarters of the states recognized this right,<sup>731</sup> maybe the right that was granted meant only a right to a racially

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727. See, e.g., Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1326 (1992); Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1, 3 (1997); Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1109 (2000).

728. Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286, 1288 (2003).

729. But see Eastman, *supra* note 50, at 33 (focusing on historical constitutions and concluding that there is no fundamental right to education). For a detailed discussion of Professor Eastman's article, see *supra* Subsection IV.A.1.

730. See *supra* notes 95-134 and accompanying text.

731. See *supra* text accompanying note 134.

segregated public education, as this is what most states actually provided. Maybe state constitutions in 1868 said nothing about segregation in public schools because it was implicitly understood in 1868 that public schools would always be racially segregated.<sup>732</sup> Maybe, the state constitutional right to a public school education in 1868 was implicitly understood to be only a right to a segregated public school education because that is how the state constitutional provisions regarding education were understood in 1868. It could be added that the actual practice on the ground was one of racial segregation even if this was not codified into state constitutional law until after 1868.<sup>733</sup> Moreover, it could be argued that in 1896 *Plessy v. Ferguson*'s upholding of a rule of "separate but equal" in the context of railroad cars<sup>734</sup> would obviously have also extended to public schools. Thus, the segregation in public schools that may have been implicitly permitted in 1868 was written into state constitutional law in fifteen states after 1868 and was then rendered clearly constitutional after *Plessy*. This classic "*Brown* disproves originalism" argument would conclude that *Brown* was necessarily a "constitutional revolution" because until *Brown* was decided in 1954, racially segregated public schools were still constitutionally permissible.

We think this argument fails for two reasons. First, no state constitution in 1868 *required* segregated public schools.<sup>735</sup> Not a single one. In fact, two state constitutions in 1868 explicitly *prohibited* segregated public schools,<sup>736</sup> and only one state *permitted*, but did not require, segregated schools.<sup>737</sup> However, beginning in 1870 and continuing through the early 1900s, at least fifteen state constitutions were revised so that they explicitly *required* segregation.<sup>738</sup> It is possible that these explicit segregation requirements were added in response to, or despite, Reconstruction and northern public opinion. However, if southern public schools were already legally segregated on the basis of race, then why did

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732. *But see supra* note 137 and accompanying text (noting that Louisiana and South Carolina explicitly prohibited segregation in 1868); *see also supra* note 136 and accompanying text (stating that Missouri was the only state that permitted, but did not require, segregated schools in 1868).

733. *See supra* Subsection II.A.2.a.

734. *See* 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

735. *See supra* note 135 and accompanying text.

736. *See supra* note 137 and accompanying text.

737. *See supra* note 136 and accompanying text.

738. *See supra* notes 233-47 and accompanying text.

fifteen southern states, nearly one third of the total number of states in the Union in 1954, find it necessary to amend and rewrite their state constitutions to insert explicit clauses that required racial segregation in southern public schools? In other words, if racially segregated schools were commonplace and implicit in the understanding of the 1868 right to a public school education, there should have been no need for the fifteen state constitutional provisions requiring racially segregated schools that were adopted beginning in 1870.

Moreover, if no state constitution required racially segregated public schools in 1868, while fifteen state constitutions required racially segregated schools beginning in 1870, maybe racial segregation in public schools was not commonplace in 1868, and it only started to appear in 1870. In addition, we must remember that two southern states explicitly prohibited racially segregated public schools in 1868 (Louisiana and South Carolina),<sup>739</sup> presumably because of the insistence of the Reconstruction Congress. That fact suggests: (1) that Congress may have opposed racial segregation in public schools and (2) that Louisiana and South Carolina's move to require segregated schools after Reconstruction ended was a dramatic change away from an original understanding after the abolition of slavery and the passage of the Fourteenth Amendment that public schools were to be racially integrated. Thus, if state constitutional law in 1868 implicitly meant that all public schools must be racially segregated and that this was in fact the normal practice, then there would have been no need for fifteen southern states to go to the trouble of amending their state constitutions to require racial segregation in public schools.

We are under no illusions about the extent of racial prejudice in the United States in 1868. Even the Congress that had approved the Fourteenth Amendment was not yet willing to let African-American men vote. Men as enlightened as Abraham Lincoln had wondered about deporting African-Americans back to Africa. But, the period between 1865 and 1868 was a time when the North, which was appalled by the adoption in southern states of the Black Codes, rallied first to pass the Civil Rights Act of 1866 over President Johnson's veto and rallied second to constitutionalize equality as to all non-political rights in the Fourteenth Amendment. Access to a public school education was recognized by an Article V consensus of

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739. See *supra* note 137 and accompanying text.

three-quarters of the states as being a civil right in 1868.<sup>740</sup> The Fourteenth Amendment forbade any abridgements of equal civil rights, and everyone knew that this meant that black people had the same right to make contracts as white people did even if the practice was to the contrary in some northern states, as it undoubtedly was. The same reasoning applies to racial segregation in public schools. We do not claim that all Northerners realized that the Fourteenth Amendment barred racial segregation in public schools. We claim only that the original meaning of the Amendment when read with the aid of contemporary dictionaries and the texts of state constitutions as they stood in 1868 produced that outcome.

The Fourteenth Amendment eliminated a racial caste system as to all fundamental civil rights. An Article V consensus of three-quarters of the states recognized that the right to a public school education was a fundamental civil right in 1868.<sup>741</sup> The Fourteenth Amendment thus barred racial discrimination in access to public schools without regard to whether people realized that at the time the Amendment was adopted. QED—*Quod erat demonstrandum*.

## 2. *The Fifteen States That Required Segregated Schools Between 1868 and 1954*

A second argument that might be made against our originalist defense of *Brown* is to ask how fifteen states could have passed provisions requiring segregated schools if the Fourteenth Amendment barred racial segregation in public schools from 1868 on. Moreover, if we are right in our originalist defense of *Brown*, then *Plessy v. Ferguson* must have been wrongly decided in 1896. In addition, if we are right, then the conventional wisdom about *Brown* marking a revolution in constitutional theory is wrong as well. How could fifteen southern segregationist states and the United States Supreme Court in *Plessy v. Ferguson* all have screwed up so badly? Is it really plausible for us to claim that we have a better understanding writing in 2014 of the original meaning in 1868 of the Fourteenth Amendment than did the fifteen segregationist states and the *Plessy* Court in 1896?

Our first response to this point is to note that it is not at all uncommon for states to pass statutes or constitutional provisions that are unconstitutional. Moreover, the constitutional clauses in fifteen

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740. See *supra* text accompanying note 134.

741. See *supra* text accompanying note 134.

states that required racially segregated public schools only began to appear as Reconstruction was coming to an end.<sup>742</sup> The clauses in question were all enacted by southern states many of which had seceded from the Union and which were opposed to Reconstruction.<sup>743</sup> Those states were infused with virulent racism and had tried with the Black Codes to undermine the end of slavery even before they undermined the Fourteenth Amendment by passing Jim Crow laws. The Civil War was the deadliest war ever waged in American history, and it left in its wake virulent racism and regional differences in culture that persist down to the present day. It is thus not at all surprising that fifteen southern states would seek to evade the plain meaning of the Fourteenth Amendment by passing unconstitutional laws that imposed racial segregation.

Nor is it surprising that the U.S. Supreme Court by 1896 would have tired of the fight against racism and issued its decision in *Plessy v. Ferguson*. Six Justices joined Justice Henry Brown's seven-to-one majority opinion in *Plessy*.<sup>744</sup> Four of the seven Justices in the *Plessy* majority were Democrats and were thus members of the party that opposed civil rights for African-Americans in 1896.

The four Democratic Justices in the majority in *Plessy* included: Justice Stephen J. Field, a Union Democrat appointed by President Abraham Lincoln from California, a state with some Confederate sympathies; Chief Justice Melville Fuller, a former Democratic politician from Illinois and an arch conservative; Justice Edward D. White, a future Chief Justice, who had actually served in the Confederate army; and Justice Rufus W. Peckham, a Democrat and arch conservative from New York State. President Grover Cleveland appointed three of the four Democrats who joined the majority opinion in *Plessy*. Cleveland was the only Democrat to be elected president in between James Buchanan and Woodrow Wilson, whose own father, by the way, had owned slaves and had also served in the Confederate army.

The four Democrats in the majority in *Plessy* were joined by three Republicans including Justice Henry Brown himself who was, along with Justice George Shiras, an appointee of President Benjamin Harrison, an ineffectual figure who became President after losing a majority of the popular vote. The third Republican in the

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742. See *supra* notes 233-47 and accompanying text.

743. See *supra* note 149 and accompanying text.

744. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

*Plessy* majority was Justice Horace Gray, an appointee of the corrupt machine politician Chester A. Arthur, a man who became President by accident after President Garfield had been assassinated.

The only Justice who dissented in *Plessy* was Justice John Marshall Harlan, the elder, who was the distinguished appointee of President Rutherford B. Hayes, a Republican who had served as a Major General in the Union army during the Civil War and who fought valiantly for Reconstruction but who was forced by Democrats in the House of Representatives to withdraw Union troops from the South, thus ending Reconstruction. Another Republican appointee Justice David Brewer, a defender of civil rights, was unable to participate in the decision in *Plessy* because of the death of his daughter.

The reason the Supreme Court ruled as it did in *Plessy* is because Reconstruction came to an end in 1877 and most especially after President Hayes retired from office in 1881. Presidents Arthur, Harrison, and Cleveland were all undistinguished presidents who were more interested in promoting good feeling among Northerners and Southerners than they were committed to civil rights. It was during this period of time that the myth grew up of the noble struggle between two equally honorable but tragic figures: Ulysses S. Grant and Robert E. Lee, who were engaged in a struggle called the Civil War and not, as President Lincoln rightly called it, the War of the Rebellion. Between 1880 and the issuance of *Plessy v. Ferguson* on May 18, 1896, the Democrats won a majority of the popular vote in three out of four presidential elections, and they almost won the 1880 election as well. The Democrats had also won a majority of the popular vote in the presidential election of 1876, but Republican politicians stole a majority of the vote in the electoral college.

The country was just plain tired of Reconstruction by 1877, and so twelve years after the Civil War had ended in 1865, the northern troops came home and Jim Crow triumphed. This was apparent in the terrible decision in the *Civil Rights Cases*, which were decided by an eight-to-one vote over Justice Harlan's dissent in 1883<sup>745</sup> on what was at that time a Republican Supreme Court. The Supreme Court's opinion in *Plessy* is not the result of the original understanding of the Fourteenth Amendment, but it is instead a product of what Professor McConnell has felicitously called "The

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745. 109 U.S. 3 (1883).

Forgotten Constitutional Moment.”<sup>746</sup> The Forgotten Constitutional Moment is the nineteen year period of time between 1877 and 1896, when Jim Crow segregation triumphed in the voting booth and came to be constitutionalized in *Plessy v. Ferguson*.<sup>747</sup> *Plessy* reflects not the original understanding of the Fourteenth Amendment but an airbrushed rewriting of the Fourteenth Amendment based on circumstances in the years leading to the decision.

We do feel we should end by noting that while our research causes us to be certain that the Fourteenth Amendment prohibited racially segregated public schools as an original matter, we do not mean to claim that the Fourteenth Amendment we have advanced here would have been as clear a pronouncement to lay people on the unconstitutionality of public school segregation as was Chief Justice Earl Warren’s opinion for the Supreme Court in *Brown v. Board of Education*.<sup>748</sup> The legal argument we make is complex and could easily have been missed by many, if not most, Americans living in 1868 whereas Chief Justice Warren’s opinion in *Brown* was as unambiguous as a Supreme Court opinion can hope to be in its holding. We should note, however, that even after Chief Justice Warren’s clear-cut opinion in *Brown* on the unconstitutionality of racially segregated schools, many states continued to maintain racially segregated public schools until well into the 1960s and 1970s,<sup>749</sup> when they were finally forced to integrate. If racially segregated schools could continue to exist twenty years after the Supreme Court’s decision in *Brown*, it is perhaps not so surprising that racially segregated public schools also continued to exist after July 9, 1868, when the Fourteenth Amendment rendered them forever unconstitutional.

### 3. *Perhaps the Fundamental Right to a Public School Education Changed Between 1868 and 1954*

A third objection that might be made to our thesis in this Article is that perhaps the meaning of the Fourteenth Amendment evolved between 1868 and 1954 to render racial segregation of public schools, which was unconstitutional in 1868, to be permissible in 1954. This problem arises because whereas no state required racial

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746. Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115 (1994).

747. *Id.* at 122.

748. See *supra* note 284 and accompanying text.

749. See Fairfax, *supra* note 285, at 12.

segregation of public schools in 1868, fifteen states required such segregation of public schools by 1954.<sup>750</sup> Maybe the American people's understanding of the fundamental right to an education changed over time or evolved or matured—as the Supreme Court says in Chief Justice Warren's opinion in *Trop v. Dulles*.<sup>751</sup>

We think the ban on any form of a racial caste system is part of the core, hardwired original meaning of the Fourteenth Amendment and that no amount of evolution can wash that core original meaning away. The Fourteenth Amendment's ban on race discrimination is the paradigm case of what the Amendment is all about. No amount of time and no number of changes in state constitutional law can suffice to change the meaning of the Fourteenth Amendment's ban on race discrimination. This ban was frozen into constitutional law for all time on July 9, 1868, and we doubt that even an Article V constitutional amendment could change it.<sup>752</sup>

Moreover, only fifteen out of forty-eight states in 1954 had amended their state constitutions to require racial segregation in public schools,<sup>753</sup> which is less than half of the number of thirty-six states which would have been required in 1954 to form an Article V three-quarters consensus that racial segregation in public schools was now somehow okay. The right to a desegregated public school education was recognized by three-quarters of the states in 1868, when the Fourteenth Amendment was adopted.<sup>754</sup> Even if we assume that the right could be repealed by an Article V consensus of three-quarters of the states in 1954, we would still have to acknowledge that at most only fifteen states out of forty-eight required school segregation, which is less than one-third of the states that were in the Union when *Brown v. Board of Education* was decided.<sup>755</sup> There is thus no plausible living constitution argument that can be made against the holding in *Brown*. From July 9, 1868, down to the present day, it is and always was unconstitutional for the states to discriminate on the basis of race in their public schools.

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750. See *supra* notes 233-47 and accompanying text.

751. 356 U.S. 86, 103-04 (1958).

752. Such an amendment would change the basic structure of the Constitution, and it would therefore, arguably be, an unconstitutional constitutional amendment.

753. See *supra* notes 233-47 and accompanying text.

754. See *supra* note 134 and accompanying text.

755. See *supra* notes 233-47 and accompanying text.

## CONCLUSION

Professor McConnell is right that *Brown v. Board of Education* can be justified on originalist grounds, but he errs in relying too heavily on the post-1868, post-enactment legislative history. He shows that Congress almost used its power under § 5 to enforce the Fourteenth Amendment to ban racial segregation in public schools,<sup>756</sup> but he does not explain how the Congress that almost voted for that outcome might have thought that the text of the Fourteenth Amendment allowed it to reach that outcome. We have offered a theory here, which Professor McConnell has overlooked, which is that a child's access to a free and common public school education was in 1868 a privilege or immunity of state citizenship, which no state could constitutionally abridge on the basis of race. There was in short an Article V consensus of three-quarters of the states that so concluded in 1868.

Sentiment on public school education and race may well have shifted between 1868 and the debates in the 1870s leading up to the Civil Rights Act of 1875, since public attitudes on voting rights for African-Americans did shift during that period of time.<sup>757</sup> It is thus very important to look closely at the evidence of the original textual meaning of the Fourteenth Amendment on July 9, 1868, rather than in 1875. We focus on the state constitutional provisions regarding public school education that were actually in effect on July 9, 1868. We conclude from this that there was a fundamental civil right to a public school education in 1868, that right was a privilege or immunity of state citizenship, and the Fourteenth Amendment protected such rights from abridgement on account of race.

An Article V consensus of three-quarters of the states in 1868 recognized the right to a public school education by including mandatory language granting that right to the effect that states "shall" i.e. they "must" provide a free public school education.<sup>758</sup> More significantly in 1868, not a single state required segregated public schools,<sup>759</sup> and at least two southern states that had passed constitutions in 1868 to appease the Reconstruction Congress explicitly prohibited racially segregated public schools in their state

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756. McConnell, *supra* note 6, at 1117.

757. See *supra* notes 154-58 and accompanying text.

758. See *supra* Part II.

759. See *supra* note 135 and accompanying text.

constitutions.<sup>760</sup> And only one state in 1868 explicitly permitted segregated schools in its constitution.<sup>761</sup>

Between 1868 and 1954 eleven new states entered the Union raising the total number of states from thirty-seven in 1868 to forty-eight in 1954.<sup>762</sup> All eleven of these new states also recognized a child's fundamental civil right to a free public school education in their respective state constitutions.<sup>763</sup> From 1868 through 1954, the right to a public school education was at all times a fundamental right protected by an Article V consensus of three-quarters of the states and by the Fourteenth Amendment.<sup>764</sup>

Beginning in 1870, however, several states began including clauses in their state constitutions that required racially segregated public schools. By 1954, fifteen state constitutions had evolved, matured, or rotted to the point that they had come to require racially segregated public schools.<sup>765</sup> This evolution in state constitutional law is striking because with fifteen states requiring racially segregated public schools, there was no longer an Article V consensus that three-quarters of the states recognized the right to a desegregated public school education whereas there had been such a consensus on July 9, 1868.

Professor McConnell explains that the opinion in *Brown v. Board of Education* is widely viewed by scholars today as the result of a "constitutional revolution,"<sup>766</sup> which among other things delivered a knockout punch to originalism in constitutional interpretation. We agree with Professor McConnell that to the contrary *Brown v. Board of Education* is ironically correct as a matter of original meaning but more dubious as a matter of evolved constitutional meaning in 1954. We think we have found the textual and historical argument as to original meaning that supports Professor McConnell's persuasive account from the post-enactment legislative history of the Fourteenth Amendment in 1875. *Brown v.*

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760. See *supra* note 137 and accompanying text.

761. See *supra* note 136 and accompanying text.

762. See *supra* note 176 and accompanying text.

763. See *supra* notes 176-78, 181, 184, 188, 201, 206, 211, 215, 217, 220 and accompanying text.

764. See *supra* note 134 and accompanying text.

765. See *supra* notes 233-47 and accompanying text.

766. See Lipkin, *supra* note 3, at 4 ("*Brown* was a quintessential constitutional revolution, creating a new constitutional paradigm of equal protection and thereby abandoning the reigning paradigm enunciated in *Plessy v. Ferguson*.").

*Board of Education* was right on July 9, 1868; it was right on May 17, 1954; and it will remain right for all time.

