THE CIVIL WAR AMENDMENTS TO THE CONSTITUTION: THE RELEVANCE OF ORIGINAL INTENT

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The Bicentennial, in combination with heightened interest in the nature of judicial review, has made original intent a timely and controversial subject. The contours of the debate are well known. For years supporters of judicial activism have extolled the virtues of a "living Constitution" that could be adapted to the changing needs of society through judicial interpretation. In actuality, say the defenders of activism, the United States is (and always has been) governed under an unwritten constitution which permits judges to consult concepts of political philosophy, justice, and morality not contained in the written Constitution.[1] Critics contend that courts should decide cases on the basis of the text of the Constitution and the purposes of the framers. In the last few years the debate has heated up considerably, with Attorney General Meese calling for a jurisprudence of original intent, and Supreme Court Justice Brennan dismissing professions of fidelity to the intentions of the framers as "little more than arrogance cloaked as humility."[2]

This debate has been carried on at a high level of abstraction. It may be useful, therefore, to adopt a more empirical approach, and consider whether the concept of original intent forms an actual part of the constitutional order. Has it been historically an essential element in American constitutionalism? And if so, how have we ascertained original intent? By definition the question of original intent is historical in nature. But what kind of history has been employed in the search for original intent? Is it the impartial analysis that historians profess as their discipline, or a more pragmatic inquiry shaped by political and social goals?

These questions can perhaps most interestingly and profitably

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1. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

2. Speech by Justice William J. Brennan, Jr., to the Text and Teaching Symposium, Georgetown University, Oct. 12, 1985, *reprinted in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 14 (1986).

be asked of the Founding Fathers and the framers of the Civil War amendments. Of course the differences between the framers of 1787 and those of the 1860s are apparent. Although politically motivated, the Founding Fathers acted under conditions of secrecy and nonpartisanship, whereas the framers of the Civil War amendments were intensely partisan members of Congress acting in full public view. Nevertheless, more than at any other time in our history, the end of the Civil War was an opportunity for constitutional statesmanship. From the outset, the founders' decisions in giving the nation its fundamental law were considered important enough to give rise to controversy over their purposes and intent. Has the same been true of the drafters of the Civil War amendments? Has original intent been a contested and conspicuous issue in application and interpretation of the amendments?

I

Justice Brennan has said that although the original intent argument pretends to depoliticize constitutional decisionmaking, it actually does the opposite. Justice Brennan contends that originalism "expresses antipathy to claims of the minority rights against the majority." Upholding constitutional claims only if they are within the specific contemplation of the framers, he reasons, in effect establishes a presumption of resolving ambiguities against the asserted claims. "Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution," Justice Brennan concludes, "turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance."[3] Justice Brennan may be summarizing the outlook of contemporary judicial liberalism. As a historical commentary on the politics of originalism, however, Justice Brennan's assessment is misleading; those seeking to vindicate constitutional claims have been among the most vigorous proponents of adhering to the original intent of the Civil War amendments.[4]

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3. *Id.* at 15.

4. A brief summary of the historical situation that produced the Civil War amendments will provide a framework for analyzing the significance of original intent thinking in their subsequent application and interpretation. The thirteenth amendment proposed in January and ratified in December 1865, confirmed and extended the Emancipation Proclamation by prohibiting the existence of slavery in the United States. In 1866, after restored southern state governments enacted legislation known as the black codes regulating the status and rights of the former slaves, Congress took steps to define and secure the civil liberty resulting from the abolition of slavery. It passed the Civil Rights Act and the Freedmen's Bureau Act, protecting United States citizens including blacks, in the exercise of ordinary civil rights such as making contracts, buying and selling property, bringing legal action, and testifying in court. Concurrently, the Thirty-ninth Congress recommended the fourteenth amendment,

Perhaps it will not be surprising to students of history that the intention of the framers has always been a major issue in the interpretation of the Civil War amendments. In the 1873 *Slaughter-House Cases*, the Supreme Court invoked original intent as a principal reason for rejecting the claim by white butchers that a Louisiana law granting a monopoly in the slaughtering trade violated the fourteenth amendment. Reviewing the abolition of slavery and measures adopted in its aftermath, Justice Miller's majority opinion said: "The most cursory glance at these articles [i.e., the Civil War amendments] discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning." The "one pervading purpose found in them all," Miller observed, was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[5]

The Court's statement of the "Negro-freedom" theory of original intent has usually been viewed as an insincere mask for the real purpose of abandoning the former slaves. This is an overly harsh judgment. It fails to consider the legitimate interpretive possibilities available in the language of the amendments, and overlooks the recognition of federal authority to protect civil rights actually contained in the *Slaughter-House Cases* and other decisions in the 1870s.[6] A similar evaluation applies to the *Civil Rights Cases* of 1883. Although declaring the Civil Rights Act of 1875 unconstitutional, the Court affirmed the Negro-freedom theory. It recognized the power of Congress, under the thirteenth amendment, to remove the "badges and incidents" of slavery through legislation prohibiting racially motivated private discrimination.[7]

In *Plessy v. Ferguson* (1896) the Court again maintained the Negro-freedom thesis. Adhering to lower court precedents, it decided that racially segregated transportation facilities required by

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declaring that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States; depriving any person of life, liberty, or property without due process of law; nor denying to any person the equal protection of the laws. The fifteenth amendment, declaring that the right to vote shall not be denied or abridged by the United States or any state on account of race, color, or previous condition of servitude, was ratified in 1870. To enforce the amendments Congress enacted a series of civil rights statutes between 1870 and 1875.

5. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

6. Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39-79; Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739.

7. Civil Rights Cases, 109 U.S. 3, 20 (1883).

state law did not violate the equal protection clause. Odious as the decision would become in later years, it was consistent with the main goal of contemporary racial moderates and liberals, namely, to prevent the exclusion of blacks from public facilities and accommodations.[8] Accordingly the Court's reiteration of the Negro-freedom thesis should not be dismissed as mere racism. There was truth in the Court's statement that "[t]he object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law." But there was truth, too, in the further assertion that the amendment was not intended to abolish all distinctions of color, "or to enforce social, as distinguished from political, equality . . . ."[9]

For two decades after Reconstruction the Supreme Court recognized the Negro-freedom theory of the origin and intent of the Civil War amendments. This is not to say that the Court generally decided cases involving Negro rights in accordance with the theory as later generations would understand it, or that only blacks could invoke the protections of the fourteenth amendment.[10] The Negro-freedom theory may be viewed as a residual and attenuated legacy of radical Reconstruction, the practical significance of which was to oppose the demand for national judicial protection of economic rights.

In the 1890s, however, the Court embraced laissez-faire constitutionalism, liberty of contract, and substantive due process. The Court did not justify its new interpretation on the basis of original intent; instead, the Court merely exercised traditional judicial power to prevent unreasonable denial of rights including destruction of property.[11] To reform-minded critics, however, substantive due process signified judicial usurpation; it was a doctrine provoked by fear of democratic control of property interests and unjustified by the text of the fourteenth amendment or the intent of its framers.[12] An alternative explanation posited a new original intent theory. This was the conspiracy theory of the fourteenth amendment, advanced most strenuously by the famous progressive historian

8. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the Separate but Equal Doctrine, 1865-1896*, 28 AM. J. LEGAL HIST. 17 (1984).

9. 163 U.S. 537 (1896).

10. McLaughlin, *The Court, the Corporation, and Conkling*, 46 AM. HIST. REV. 45 (1940).

11. *See* Reagan v. Farmers' Loan and Trust Co., 154 U.S. 362 (1894); Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1889).

12. A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1960); Haines, *The History of Due Process of Law After the Civil War*, 3 TEX. L. REV. 1 (1924), *reprinted in* 1 SELECTED ESSAYS ON CONSTITUTIONAL LAW 268-302 (1938).

Charles A. Beard. Because this theory figures so prominently in the modern historiography of the Civil War amendments, it warrants brief comment.

The conspiracy theory held that the Supreme Court was persuaded to adopt an economic-rights interpretation of the fourteenth amendment by the argument of former Senator Roscoe Conkling in *San Mateo County v. Southern Pacific Railroad*, a railroad tax case. Quoting from the journal of the Joint Committee on Reconstruction, of which he was a member, Conkling implied that the authors inserted the word "person" into the due process clause with a view toward protecting corporations against state taxation and regulation. Conkling's principal reliance, however, was on the traditional legal doctrine, flourishing since the days of John Marshall that a corporation was a person. He argued that regardless of the framers' conscious intent, the language of the fourteenth amendment required extending the protection of the equal protection clause to corporations.[13] Charles A. Beard, however, in effect defending the Supreme Court against the charge of usurpation, treated Conkling's argument as evidence of a covert intention on the part of the framers to bring corporations under its protection.[14] Many works of progressive history followed Beard in regarding the conspiracy theory as a true account of the original intent and a decisive factor in the Supreme Court's decision to protect corporations and property rights.[15]

As progressivism changed into modern liberalism, this interpretation of the fourteenth amendment came under scholarly attack. Hostility toward corporations as well as dissatisfaction with the Supreme Court for its opposition to New Deal legislation lay behind this changed outlook.[16] To question the conspiracy theory was to place the onus for laissez-faire constitutionalism on the Supreme Court. It also implied restoration of the Negro-freedom

13. Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 N.Y.U. L. REV. 19 (1938).

14. On the general question of the legitimacy of judicial review, Beard defended the Supreme Court against the charge of usurpation in THE SUPREME COURT AND THE CONSTITUTION (1912). At the same time he impugned the motives of the framers of the Constitution in AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913). His development of the conspiracy theory, in CONTEMPORARY AMERICAN HISTORY (1914) and THE RISE OF AMERICAN CIVILIZATION (1927), conforms to this pattern of interpretation.

15. H. GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM 31-34 (1968).

16. *Id.* at 25.

theory of the intent of the fourteenth amendment.[17] Perhaps not coincidentally, the Supreme Court contemporaneously decided a few cases in favor of Negro civil rights claims. A new phase in the interpretation of the Civil War amendments, and in the search for original intent, was beginning.

Between 1938 and 1951 Howard Jay Graham and Jacobus ten Broek wrote pioneering studies that revised and greatly expanded interpretations of Negro rights. Their work provided the foundation for the modern understanding of the amendments among constitutional scholars in the era of the civil rights movement.

Graham renewed the search for original intent by demolishing the conspiracy theory of the fourteenth amendment. He then traced the meaning of the amendment from the Republican framers of the 1860s back to the abolitionist movement of the 1830s. Seeking a practical application for his historical thesis and deeply committed to racial equality, Graham proposed an investigation of antislavery constitutional theory as "the key to a better understanding of the Fourteenth Amendment." Far from being empty generalities, he reasoned, the privileges and immunities, due process, and equal protection clauses had a substantive natural-rights content that was derived from the Declaration of Independence. Graham offered his new theory of original intent, resting it on "an ethical interpretation of our national origins and history which most Americans today proudly accept as a challenge and an ideal," and calling it the answer to "[e]ighty years of tortured progress in race relations" growing out of the failures of Reconstruction.[18] Years later, Graham candidly acknowledged that his purpose was to aid the "bootstrap constitutionalism" that he said his research had celebrated.[19] Defending "law-office history" as something that "can educate and liberate," he wrote that "History and Criticism *are* undervalued, indispensable parts of Constitutionalism. Scholarship itself is a process—a vital, primary part of *due* process." Indeed, according to Graham, law-office history was indispensable to the progress of modern constitutionalism.[20]

Political scientist Jacobus ten Broek was the second great reformer to exploit an original intent jurisprudence for the Civil War amendments, and a theorist of modern equal protection law. ten Broek theorized that in the era of pervasive government regulation,

17. For a reassertion of the Negro rights view of the purpose of the fourteenth amendment, see Conn. General Life Ins. Co. v. Johnson, 303 U.S. 77 (1938) (Black, J., dissenting).

18. Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 610, 660.

19. *Cf.* Levy, Foreword, in H. GRAHAM, *supra* note 15, at vii-viii.

20. *Id.* at 21, 268, 337.

"equality supplants liberty as the dominant ideal and constitutional demand."[21] Encouraged by pro-Negro Supreme Court decisions in the 1940s, ten Broek observed that the equal protection clause was "now coming into its own." To promote this development, and to help the clause attain the "preeminence" and scope intended by its framers, he proposed to discover the original intent of the Civil War amendments by examining abolitionist constitutional theory.[22]

Like Graham, ten Broek found constitutional arguments describing a paramount national citizenship, protected by the federal government against state denial, that comprehended the full range of natural rights. This was the intent of the thirteenth and fourteenth amendments, which were thus "a culmination of the historic abolitionist movement."[23] The momentous result was not only the nationalization of civil rights, but also the destruction of federalism. "To the extent that abolitionism was consummated in the Thirteenth Amendment and reconsummated in the Fourteenth Amendment," ten Broek wrote, "a fundamental and revolutionary reallocation of the powers of government between the states and the nation was sanctified by the organic law of the land."[24] ten Broek believed that the discovery of this original intent "dissipates much of the confusion resulting from the congressional and ratification debates" and "settles the answers" to key questions in constitutional law raised by eighty years of interpretation.[25]

ten Broek's pursuit of original intent was a significant change in his approach to constitutional adjudication. In the late 1930s, ten Broek rejected the idea that the language of the document, the debates and proceedings of framing and ratifying conventions, the history of the times, and the commentaries of lawmakers, judges, and legists could be considered valid evidence of the framers' intent. Against the traditional theory, ten Broek and most liberals of the day asserted an adaptive theory of constitutional change. If courts invoked original intent, said ten Broek, the intent they discovered was determined by the conclusion they sought. ten Broek was especially critical of the idea that the history of the times, or the climate of opinion surrounding a constitutional provision, reliably indicated the framers' intent.[26] This stance becomes rather ironic in light of

21. Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 380 (1949).

22. *Id.* at 341.

23. J. TEN BROEK, EQUAL UNDER LAW 123 (rev. ed. 1965).

24. *Id.* at 130.

25. *Id.* at 27, 29.

26. ten Broek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction* (pts. 1-5), 26 CALIF. L. REV. 287, 437, 664 (1938), 27 CALIF. L. REV. 157, 399 (1939).

his later writing on the original intent of the Civil War amendments. Clearly ten Broek experienced an intellectual epiphany, for his book on the origins of the Civil War amendments, published in 1951, rested on the assumption that the constitutional text did not change its meaning, that history could reveal this meaning, and that constitutional construction should be governed by history, even as contemporary legal concerns reciprocally guided and informed historical research.[27]

II

When the Supreme Court decided that school segregation was unconstitutional in 1954, what might have been a gratifying confirmation of Graham's and ten Broek's historical discoveries proved to be quite otherwise. In *Brown v. Board*, the Court chose not to rely on the original intent of the fourteenth amendment. Instead, the Court cited sociological and psychological evidence attesting to the high value placed on education in contemporary American society and the harmful effects of racial separation on black children. In a new edition of his book on the antislavery origins of the fourteenth amendment, ten Broek subsequently observed that it was "little short of remarkable that the Chief Justice [in *Brown*] should have cut himself off from these historical origins and purposes, casually announcing . . . that 'at best, they are inconclusive.' "[28]

ten Broek, along with other opponents of segregation, had reason to be disappointed, for the Supreme Court before rendering its decision had pointedly asked the parties to discuss the original intent of the Civil War amendments. When the Supreme Court found itself deadlocked over how to decide the desegregation cases in 1953, it asked for reargument specifically directed to the question of the intent of the framers of the Civil War amendments in relation to segregated schools. The Court's request stimulated and gave a kind of official sanction to the search for original intent.[29]

While the historical research undertaken by the parties encompassed broader issues,[30] the original intent inquiry posed by the

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27. *Cf.* Abel, Book Review, 40 CALIF. L. REV., 474 (1952).

28. J. TEN BROEK, *supra* note 23, at 25.

29. R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 613-16 (1975); Kelly, *The School Desegregation Case*, in QUARRELS THAT HAVE SHAPED THE CONSTITUTION 259-64 (J. Garraty ed. 1964).

30. The principal historical facts defining the original intent problem as it appeared in 1953 were as follows: The thirteenth amendment, ratified in December 1865, prohibited slavery and thus by necessary implication guaranteed a condition of civil liberty. It was unclear, however, what specific civil rights, if any, the amendment secured beyond a right of personal liberty and locomotion. In express terms the amendment did not specify rights, so the ques-

Supreme Court was more specific. The Court asked these questions: Did Congress in proposing the fourteenth amendment intend to abolish segregation in public schools? If not, did the framers intend that future Congresses might abolish school segregation under the fourteenth amendment, or that the judiciary might construe the amendment as abolishing such segregation of its own force?[31]

A few facts in the framing of the fourteenth amendment stood out as particularly relevant to these questions. First, as originally introduced, the Civil Rights bill contained a provision stating: "There shall be no discrimination in civil rights or immunities" among the inhabitants of any state on account of race, color, or previous slavery. This provision was deleted because, in the opinion of several members of Congress, it would prevent the states from making any distinction among citizens on the basis of race, including the establishment of racially segregated schools.[32] As adopted, therefore, the Civil Rights Act appeared to be evidence of an intention not to prohibit segregated schools. On the other hand, the broader language of the fourteenth amendment arguably swept beyond the confines of the Civil Rights Act. A second key fact was that section 1 of the fourteenth amendment, as originally drafted, provided that "Congress shall have power to make all laws which

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tion could not be answered simply by reference to the constitutional text. The issue could be alternatively phrased by asking what was the meaning or definition of slavery prohibited by the thirteenth amendment, which prohibition Congress was authorized to enforce by appropriate legislation. Congress in effect answered these questions in 1866 when it passed the Freedmen's Bureau Act and the Civil Rights Act. Both measures secured specific rights to make and enforce contracts; inherit, lease, or own property; sue, be parties, and give evidence in court; and generally to have the full and equal benefit of all laws for the security of person and property, the same as was enjoyed by white persons.

At the most basic level, then, the original intent question was whether the framers of the thirteenth amendment intended to give Congress power to secure civil rights in the manner contemplated by the legislation of 1866. From the very fact that the Civil Rights Act was passed before Congress recommended adoption of the fourteenth amendment, one could conclude that even if members of the Thirty-eighth Congress in framing the amendment did not intend such an exercise of power, a majority of the Thirty-ninth Congress thought the language of the amendment authorized it. The debates in Congress show, however, that many lawmakers doubted the constitutional sufficiency of the thirteenth amendment as a basis for the Civil Rights Act, and that this doubt was the major reason for including in the proposed fourteenth amendment, the main purpose of which was to settle the problem of political representation in the former Confederate states, a section defining civil rights and authorizing Congress to legislate in support thereof. This fact raises the second major original intent question concerning the Civil War amendments: Was section 1 of the fourteenth amendment intended to restate and confirm in appropriate language the Civil Rights Act, or was it intended to provide broader protection and secure additional specific rights beyond those enumerated in the statute?

31. R. KLUGER, *supra* note 29, at 615-16. There were additional questions concerning the power of courts to find school segregation in violation of the fourteenth amendment apart from any original intent authority.

32. CONG. GLOBE, 39th Cong., 1st Sess. 504-05 (1866).

shall be necessary and proper to secure the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."[33] Several Republicans objected that if adopted in this form, the amendment would effect a general transfer of sovereignty over civil rights from the states to the federal government, while effectively failing to limit the exercise of state power that had produced the black codes.[34] Accordingly the proposal was postponed, and a substitute measure adopted, namely, section 1 as it presently stands, prohibiting the states from depriving persons or citizens of their civil rights. On its face the change appeared to mean that the framers did not intend to give Congress direct plenary power over civil rights, but rather a corrective power to use in situations when the states denied or deprived persons and citizens of civil rights.

The Supreme Court's request for reargument produced a considerable body of historical research. And although the Court chose not to utilize the historical approach in its opinion, the research it stimulated went a far way toward establishing a new interpretation of the origins and intent of the Civil War amendments. Of the scholarly integrity and professional quality of this history, however, one may be permitted to have reservations. Alfred H. Kelly, a leading historian enlisted by the NAACP, wrote that the NAACP brief presented "manipulated history in the best tradition of American advocacy, carefully marshaling every possible scrap of evidence in favor of the desired interpretation and just as carefully doctoring all the evidence to the contrary, either by suppressing it when that seemed plausible, or by distorting it when suppression was not possible."[35] This is not to say that accounts that originated in courtroom advocacy, such as those of Professor Kelly himself, were partisan tracts bearing none of the marks of scholarly discipline and objectivity. It appears, however, that such writings continued to reflect the attitude of partisan engagement in which they

33. *Id.* at 1034.

34. H. BELZ, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS 1861-1866, at 171-74 (1976); Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221 (1986); Zuckert, *Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five*, 3 CONST. COMM. 123 (1986).

35. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 144. Assisting the NAACP were historians Kelly, Howard Jay Graham, C. Vann Woodward, John Hope Franklin, all of whom subsequently wrote highly regarded and influential works dealing with the Civil War amendments and Reconstruction. Alexander Bickel, as law clerk to Justice Frankfurter, studied the original intent question and published his findings as a law review article. R. KLUGER, *supra* note 29, at 623-26.

were conceived,[36] more so than is usual in historical literature. Of course the historical analysis of original intent that was introduced in the school segregation cases by the defendant states was also one-sided, law-office history. Very little of this material was subsequently published, however, and it had no apparent impact on historical writing on the Civil War amendments and Reconstruction.[37]

The historical argument that failed to persuade the Supreme Court, but nevertheless helped shape the dominant view of the Civil War amendments in the 1950s and 1960s, went beyond the Graham-ten Broek focus on the writings of abolitionists in the antebellum period. Given the questions posed by the Supreme Court, it was necessary to pay close attention to the political context and specific arguments advanced by Republican lawmakers in 1865-66. The problem for liberal historians in particular was to explain how and why the egalitarian purposes of the framers, those that would prevent segregation from being established or permit its dismantling, had not been carried out in the postwar years.

Building on his earlier work, Howard Jay Graham held that the prohibition of racial discrimination broadly conceived was the framers' object. The key to understanding the fourteenth amendment, and its unfortunate treatment at the hands of the judiciary during Reconstruction, Graham wrote, was the fact that its Republican authors thought it spelled out what was already in the Constitution. In other words, they considered it to be a declaratory amendment which did not change anything. This belief caused confusion, Graham explained, because members of Congress who adhered to it failed to say precisely what effect the amendment would have on existing southern laws and institutions. Moreover, the declaratory view could be turned against the purposes of the framers and used to restrict the scope of federal civil rights protection, as happened in the *Slaughter-House* and *Civil Rights Cases*.[38]

In the school segregation cases, the accounts of Alfred H. Kelly and Alexander M. Bickel, historical consultant to the NAACP and law clerk to Justice Frankfurter respectively, focused on the relationship between the Civil Rights Act and the fourteenth amendment. Both authors concluded that the principal purpose of

36. At a public lecture in 1966 Professor Kelly stated that he published his views on the original intent of the fourteenth amendment in a law review rather than historical journal because of their normative character and advocacy content.

37. The Virginia Commission on Constitutional Government published some of the arguments. D. Mays, A Question of Intent: The States, Their schools and the Fourteenth Amendment (n.d.).

38. Graham, *The Fourteenth Amendment and School Segregation*, 3 BUFFALO L. REV. 1 (1953); Graham, *Our 'Declaratory' Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954).

the amendment was to constitutionalize the civil rights law. Yet each found a more capacious original intent in the general and ambiguous language of section 1 of the amendment. They agreed that political realities, especially the persistence of racism in public opinion, precluded open avowal of radical egalitarian purposes among Republican supporters of the War amendments. But this egalitarian intent was comprehended in the open-ended language of section 1 of the amendment, which would be available as a kind of blank check for future generations to draw on as their equal-rights vision expanded.[39] While liberals thus conceded that the framers did not profess to do away with all racial classification, their view of original intent emphasized the vaguely egalitarian purpose and reformist spirit that might serve as the basis of civil rights policy in a more enlightened time.[40]

It has been suggested that the Supreme Court eschewed a historically-based decision in the school segregation cases because the starkly opposed arguments about original intent revealed the fallacy of law-office history.[41] Perhaps more simply, the weight of the historical evidence, showing the framers' limited purpose of confirming the Civil Rights Act while permitting segregated schools, was on the wrong side. In any event, the *Brown* opinion, based as it was on cultural and sociological facts more than on legal and historical considerations, called attention to the propriety of judicial policymaking rather than to the segregation question. To some observers the Court's decision not to "turn the clock back to 1868 when the [fourteenth] Amendment was adopted," and its unwillingness even to declare *Plessy v. Ferguson* wrongly decided, weakened the force of the holding.[42] Explanations of the desegregation decision showing its consistency with the basic intent of the Civil War amendments might help overcome this defect. Professor Charles L. Black, Jr., a consultant on the NAACP brief, made one of the most coherent attempts at restating the Court's decision in his acclaimed essay, "The Lawfulness of the Segregation Decision." Adopting a historical perspective, Black argued that the fourteenth amendment was intended to prohibit the states from deliberately subjecting a

39. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049 (1956).

40. C. Vann Woodward shared this point of view in arguing that legal segregation was imposed in the late nineteenth century rather than in the aftermath of emancipation. Segregation was thus not the original intention of the framers and ratifiers of the Civil War amendments. *See* C. WOODWARD, THE STRANGE CAREER OF JIM CROW (1955).

41. Kelly, *supra* note 35, at 145.

42. *Cf.* R. HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS AND THE SUPREME COURT 144-45 (1977).

racial group to disadvantage. School segregation, like Jim Crow legislation in general, aimed at and achieved precisely this result, Black reasoned, so it was plainly unconstitutional.[43]

III

By the early 1960s wrenching progress had been made in the struggle for equal rights. The challenge to public school desegregation mounted by massive southern resistance had been contained, and national support for further action against racial segregation and discrimination was growing. To many supporters of the civil rights movement, the straightforward and compelling rationale for declaring segregation unconstitutional, like that provided in Professor Black's defense of the desegregation decision, expressed the historical and contemporary reality of the race relations problem in the United States. The morally responsible and constitutionally sound way to eliminate segregation, it was widely believed, was to invoke the Civil War amendments and the framers' original intent to abolish legal distinctions based on race. What was the fourteenth amendment for, if not to proscribe the kind of blatant official discrimination embodied by Jim Crow? Others argued, however, that from the standpoint of constitutional law the best way to break down segregation in the South was to use the federal commerce power. Employed by Congress and approved by the Supreme Court as an all-purpose regulatory instrument since the New Deal, the commerce power obviated the problem of legal and historical discontinuity presented by the attempt to overthrow segregation.

In the Civil Rights Act of 1964 Congress referred to both the commerce power and the fourteenth amendment in prohibiting racial discrimination in places of public accommodation, where one could see the most visible and humiliating aspect of the equal rights problem. In upholding the legislation in *Heart of Atlanta Motel, Inc. v. United States*,, however, the Supreme Court relied on only the commerce power. The Civil War amendments and their original intent were once again passed over in a decisive Supreme Court ruling on civil rights. Yet at this point in the Court's deepening involvement in the race relations question the historical approach was not entirely ignored. It found candid expression in what might have been the landmark decision against segregation in public accommodations, the *Bell v. Maryland*[44] sit-in case, decided in June 1964 as the civil rights bill neared passage in Congress.[45]

43. Black, *The Lawfulness of the Segregation Decision*, 69 YALE L.J. 421, 430 (1960).
44. 378 U.S. 226 (1964).
45. *Bell* involved state enforcement of a criminal trespass law invoked by a restaurant

A study of the Supreme Court's use of history in the late 1960s concluded that the civil rights movement could succeed "[o]nly by escaping both the uncertain intentions of 1868 and the certain practices of the dark ages of post-Reconstruction . . . ."[46] This pessimistic conclusion underestimated the appeal of the original intent idea and the historical ingenuity of reform-minded judges and legal activists. Historians in this period, sympathetic with the civil rights movement, undertook a major revision of Reconstruction history that in significant degree was concerned with the intentions of the framers of the Civil War amendments. Revisionist history went far toward establishing lines of moral and political continuity between the purposes of the amendments and contemporary civil rights policy.

In general outline similar to the law-office history resulting from civil rights litigation, revisionist accounts were more temperate in their conclusions about the scope and intent of the Civil War amendments. Rejecting the early twentieth century view of Reconstruction as the work of cynical and aggrandizing politicians, revisionist historians interpreted civil rights measures as an expression of genuine idealism. Concentrating more on immediate political conditions, they paid less attention to abolitionist constitutional theory. Moreover, although they acknowledged the long-range egalitarian aspirations that might be considered implicit in the fourteenth amendment, revisionist scholars placed greater emphasis on the framers' more narrow purpose of substantiating the Civil Rights Act. The new Reconstruction history also took a more sober view

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owner against black sit-in protesters. The question was whether private discrimination by the restaurant owner was legal, or whether the Negroes had a constitutional right to nondiscriminatory service. The case thus offered the Court an opportunity to settle one of the central issues in the controversy over civil rights: the scope of state action under the fourteenth amendment in relation to the individual right of association, or the nature and extent of private discrimination. In an anticlimactic decision the Court remanded the case to the state court for reconsideration in light of a recently adopted state public accommodations law. Several Justices, however, took up the original intent question in concurring opinions. Justice Douglas, joined by Justice Goldberg, said the basic issue was the right of equal access to public accommodations, a right inherent in the historic purpose of the Civil War amendments and an attribute of national citizenship. Justice Goldberg, in a concurring opinion joined by Justice Douglas and Chief Justice Warren, offered a more detailed and systematic original intent argument. Goldberg held that the framers of the fourteenth amendment intended the right to be treated equally in places of public accommodation to be a right of United States citizenship. Summarizing congressional debates and contemporary judicial opinions, he contended that the concept of civil rights was understood at the time as including a right of equal access, insofar as hotels, inns, theaters and the like had traditionally been regulated by state governments. Although it was subject to criticism on historical grounds, Goldberg's opinion reflected the desire of many civil rights advocates to base national policy in race relations on the intent of the Civil War amendments. C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 100-18 (1969); Kelly, *supra* note 35, at 146-49.

46. C. MILLER, *supra* note 45, at 118.

of the changes in the federal system resulting from the Civil War amendments than did more activist scholars like Graham and ten Broek. There was a significant difference, revisionists believed, between the federal authority conferred by the original version of the fourteenth amendment, giving Congress power to make laws protecting civil rights, and the power conferred by the amendment as adopted, declaring that no state shall deprive persons of their civil rights. Nationalization of civil rights was intended, but this did not mean consolidation of power in Congress to legislate directly and plenarily against private discrimination. The intent of congressional legislation was to correct state action, not to supersede or displace it. The new view of Reconstruction established continuity between original intent and modern equal rights policy, mainly by arguing that when legal, civil, and political rights were concerned—that is, in matters exclusive of social distinctions that depended on personal preference or taste—no racial distinction or classification should enter into state action or public policy. Given the broad modern understanding of civil rights, this interpretation provided a historical foundation for contemporary civil rights policy.[47]

Long obscured if not entirely ignored, the thirteenth amendment began to supersede the fourteenth amendment as the principal focus of original intent thinking with regard to race relations and as a potential instrument of civil rights protection. The Supreme Court's decision in *Jones v. Alfred H. Mayer Co.* (1968) elevated the thirteenth amendment to a position of theoretical preeminence in national civil rights policy. The case involved the claim of a black couple that a real estate developer's refusal to sell them a house was a violation of rights guaranteed by the Civil Rights Act of 1866. At issue was whether the Civil Rights Act not only secured the legal capacity to own property, but also secured a right to buy from the seller in question. This was a question of statutory original intent. Did Congress intend to prohibit private discrimination as well as state action denying civil rights in the Civil Rights Act? Constitutional law and history had answered this question negatively. Section 1 of the act said that all citizens had the same right to purchase and lease property "as is enjoyed by white citizens." Section 2 said

47. *Cf.* W. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION 1865-1867 (1963); L. COX & J. COX, POLITICS, PRINCIPLE AND PREJUDICE, 1865-1877 (1965); H. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION (1973); M. BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863-1869 (1974); E. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (1960); P. PALUDAN, A COVENANT WITH DEATH: THE CONSTITUTION, LAW AND EQUALITY IN THE CIVIL WAR ERA (1975); THE RADICAL REPUBLICANS AND RECONSTRUCTION 1861-1870 (H. Hyman ed. 1967).

that any person who under color of any law, statute, ordinance, regulation, or custom deprived any inhabitant of rights secured by the act was guilty of a misdemeanor, and subject upon conviction to a fine of $1000 and/or one year imprisonment. This previously had meant that the statute was concerned with state action, not with private discrimination; the court of appeals in *Jones v. Alfred H. Mayer* adhered to this reading of the statute.

The Supreme Court, however, offered a new interpretation. It treated section 1 as guaranteeing a right to purchase property against infringement from any source, public or private, meaning it did not simply confer the legal capacity to buy property. The Court interpreted Section 2, meanwhile, to restrict the penalties for civil rights violations to state officials or persons acting in accordance with state law and policy. In this reading of the Civil Rights Act, although all persons were prohibited from denying the enumerated rights, only state officers were singled out for criminal penalties if they violated someone's rights. Presumably there would be some other form of legal process and enforcement to protect persons against private discrimination. The Court did not explain what this enforcement process was, or why Congress did not provide a civil action for purely private discrimination. Nor did the Court explain why, if the Civil Rights Act was understood as having such a sweeping effect, the fact went unremarked by opponents of the measure who otherwise were captious in their criticism of legislation that went beyond restricting state action.[48]

The Court's novel reading of the Civil Rights Act was the prelude to an even more novel constitutional construction. Disregarding or discounting the fact that section 1 of the fourteenth amendment was designed to supply the constitutional authority thought wanting in the thirteenth amendment with respect to civil rights legislation, the Court held that the Civil Rights Act of 1866 (section 1982) was a valid exercise of congressional power under the thirteenth amendment. The legislative history of the antislavery amendment and its early judicial interpretation formed the principal evidence supporting the Court's argument. Justice Stewart, author of the majority opinion, cited the *Civil Rights Cases* for the proposition that the thirteenth amendment "abolished slavery, . . . established universal freedom," and conferred on Congress "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." The foundation of the Court's decision, however, was the original intent of the framers of the thirteenth amendment. Justice Stewart observed approvingly

48. 1 C. FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, at 1247 (1971).

that critics of the amendment opposed it on the ground that it would give Congress "virtually unlimited power to enact laws for the protection of Negroes in every State." He then said that "the majority leaders in Congress . . . had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act." Citing a speech by Senator Trumbull containing generalities about the power of Congress to "destroy all . . . discriminations in civil rights against the black man," Justice Stewart concluded that "[s]urely Senator Trumbull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation . . . ."[49]

The trouble with the Court's opinion, as a description of historical original intent, is that in 1866 Congress was not at all sure that under the thirteenth amendment it had the power that Justice Stewart said it did. Republican leaders had doubts about the nature and scope of legislative authority under section 2 of the amendment. That was the main reason for section 1 of the fourteenth amendment, as the standard accounts of Reconstruction had long ago recognized. The *Jones* Court, however, on questionable historical grounds, rejected the traditional view of the purpose, intent, and relationships among the thirteenth and fourteenth amendments, and the Civil Rights Act of 1866.

For decades before *Jones*, in accordance with what had always seemed the intent of the framers, the fourteenth and fifteenth amendments had been the principal constitutional reliance of the civil rights movement. In the context of electoral politics and other forms of political action, civil rights advances had gradually been achieved on this basis starting in the 1930s. In the early 1960s arguments began to be made that Congress, under color of the thirteenth amendment, could eradicate segregation and discrimination as badges and incidents of slavery. This strategy gained no appreciable support because it contradicted both the common-sense belief that slavery no longer existed in the United States, and the correspondingly narrow view of the thirteenth amendment that had been written into constitutional law.[50] By the late 1960s, however, the argument from slavery was more persuasive. Indeed, the history of slavery and discrimination was relevant as never before. In some general sense, the decision to abolish slavery was thought by some

49. 392 U.S. 409 (1968).

50. Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 113 (1976).

civil rights leaders to imply an intention to confer comprehensive civil rights on blacks as a class. Discrimination that was not illegal at the time it existed was in effect to be declared retrospectively unlawful.[51]

The Supreme Court had caught up with the neo-abolitionist vision; its decision in turn prompted further rewriting of the original intent story in accordance with the new direction of civil rights policy. Law-office history thus maintained its relevance. Civil rights lawyer Arthur Kinoy wrote that history proved that the main purpose of the Civil War amendments was to make blacks equal participants in the American political community. Kinoy stressed that the thirteenth amendment did not confer "ordinary civil rights," but rather a special nationally-created right, separate, distinct and exclusively national in nature; this right was directly enforceable by the federal government. In the 1960s as in the 1860s, Kinoy reasoned, the fundamental issue was "the nature of slavery as an institution and its continued influence on the development of American political, economic, and legal relations.[52] Lawyer-historian Robert J. Kaczorowski asserted that the intent of the thirteenth and fourteenth amendments was to give Congress unlimited national authority over civil rights. "If Congress chose," Kaczorowski contended, "it could legislate criminal and civil codes that displaced those of the states." Indeed on Kaczorowski's reading of original intent Congress could even destroy the states as separate and autonomous political entities. This version of history not only

51. In *Bell*, for example, the federal government argued in an amicus curiae brief that the state action involved in recognizing and protecting slavery carried over into the post-emancipation period, making the southern states legally responsible for private discrimination. In other words, state action did not end with the abolition of slavery, or even with the abandonment of legal segregation and discrimination. State action was historical in nature and had a continuous existence in the nominally private actions of individuals. Affirmative action rested on similar logic and offered a new way of dealing with the problem of historical discontinuity that confronted civil rights reformers and the Supreme Court in the early 1950s. No longer was history to be relegated to the category of the inconclusive, as in *Brown*. As the Supreme Court invoked thirteenth amendment original intent in *Jones*, so affirmative action policymakers justified racially preferential treatment by reference to the uninterrupted pattern of slavery and discrimination that formed the central theme in American history.

Civil rights strategy based on the thirteenth amendment conformed in essentials to the original intent theory advanced in the pioneering studies of the antislavery origins of the War amendments. It was not the thirteenth amendment or the Civil Rights Act whose "hour had come round at last," as the title of a law review article on *Jones* put it, but rather the legal-historical activists Howard Jay Graham and Jacobus ten Broek. *See* Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863-940 (1986).

52. Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 410 (1967). *See also* Kinoy, *Jones v. Alfred H. Mayer Co.: An Historic Step Forward*, 22 VAND. L. REV. 475 (1969); Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company*, 22 RUTGERS L. REV. 537 (1968).

disposed of the state-action problem that had frustrated generations of civil rights reformers, but it also eliminated the division of sovereignty between federal and state governments that was thought to be essential to American constitutionalism.[53]

Legal-historical activist G. Sidney Buchanan refined the egalitarian-nationalist theory of original intent, arguing that the thirteenth amendment was designed as a comprehensive source of national enforcement authority against racial or any other kind of discrimination regardless of its source. Unfortunately, Buchanan said, instead of using its thirteenth amendment power to define and prohibit the badges and incidents of slavery, Congress made the mistake of trying to protect civil rights by other means: it passed the Civil Rights Act and proposed the fourteenth amendment. Preoccupied with the bugbear of state action, these measures pushed the thirteenth amendment out of the civil rights picture. There followed a long period of civil rights deprivation, caused mainly by judicial misunderstanding of the true nature and purpose of the thirteenth amendment that compounded the strategic mistake of Congress in the fourteenth amendment. Only with its decision in *Jones*, Buchanan wrote, did the Supreme Court recapture "the vision of the amendment's original supporters" and return it to the mainstream of the civil rights movement.[54]

IV

The dialectical relationship between courts and historico-legal activists has persisted in the period of affirmative action. Employing Kinoy's theory of a right to Negro freedom, constitutional lawyer Robert Sedler argues that preferential policies for blacks as a class are a legitimate means of rectifying past discrimination and promoting equal participation for blacks. Sedler adds a new wrinkle to the original intent argument by appealing to the "historic context" of the Civil War amendments, rather than to the intent of the framers. This has the advantage, Sedler explains, of identifying fundamental principles and ideas in the amendments, without having to prove that they were held by specific framers and ratifiers. The historic context thus "transcends" the views of the authors of

53. R. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS 1866-1876 (1985). This book is based on the author's dissertation, "The Nationalization of Civil Rights: Constitutional Theory and Practice in a Racist Society, 1866-1883," (1971) (completed at the Univ. of Minnesota). *See also* Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45 (1987).

54. Buchanan, *supra* note 50, at 136.

the constitutional text.[55] Carrying on the tradition of legal-historical advocacy, NAACP Legal Defense and Education Fund attorney Eric Schnapper defends preferential treatment because it is consistent with the apparently color-blind intent of the framers of the fourteenth amendment. Restating a Legal Defense Fund brief in the *Bakke* case, Schnapper observes that the Congress that proposed the fourteenth amendment also enacted the Freedmen's Bureau bill and other measures for the relief and benefit of Negroes. The conclusion follows, he asserts, that Congress "cannot have intended the amendment to forbid the adoption of such remedies by itself or the states." History is thus said to justify race-conscious programs designed to enable blacks to improve their conditions, without any requirement that beneficiaries of such programs prove that they were actual victims of discrimination.[56]

Legal-historical activists writing on the War amendments in the period since *Jones v. Alfred H. Mayer* may be described then as the back-to-basics, thirteenth-amendment approach to original intent and civil rights enforcement.[57] That it has influenced general

55. R. Sedler, The Constitution, Racial Preference, and the Equal Participation Objective 25, 37A n.91 (June 1985) (unpublished manuscript for American Enterprise Institute Symposium on Slavery and the Constitution).

56. Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 785 (1985). Justice Marshall included some historical material on original intent in his opinion in the *Bakke* case, declaring: "It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes." Regents of the University of California v. Bakke, 438 U.S. 265, 396-97 (1978).

57. The appeal of original intent thinking in relation to the Civil War amendments is illustrated in recent scholarship on a constitutional problem that, although peripheral to our main concern, warrants brief attention. The problem is the relationship of the fourteenth amendment to the Bill of Rights. In 1947 Justice Black touched off a major historical-legal controversy when he asserted that the fourteenth amendment was intended to incorporate and apply the Bill of Rights against the states. Howard Jay Graham wrote that the argument over full versus selective incorporation "seems to be largely an academic matter when historically considered." *See* H. GRAHAM, *supra* note 15, at 314. Such is the attraction of thirteenth amendment original intent in the period since *Jones*, however, that it has been used to resolve the incorporation question. Thus, lawyer-historian Michael Kent Curtis, seeking to prove that the authors of the fourteenth amendment intended to incorporate the Bill of Rights in the measure, introduces evidence of abolitionist and wartime Republican concern for universal freedom that formed the basis of the Graham-ten Broek thesis four decades ago. Curtis argues that the thirteenth amendment was intended to transform American constitutional law by removing the institution that had subverted the guarantees of the Constitution. Declaratory in nature, the amendment enabled the rights, privileges, and immunities of American citizens—including all the rights enumerated in amendments one through eight—to become operative restrictions on the states as well as the federal government.

More interesting perhaps than Curtis's conclusion is his legal-historical approach to assaying original intent. Refusing to concede original intent analysis to those who he says would curtail civil rights, he proposes to find in the origins of the thirteenth amendment a tradition against which to measure anti-libertarian policies. Moreover, Curtis believes that while the language of the constitutional test is a guide to the purpose of its authors, the "meaning of an amendment should be sought in the abuses that produced it and in the polit-

historical interpretation can be seen in *Equal Justice Under Law*, the 1982 volume by Harold M. Hyman and William M. Wiecek. The authors state that because the original scope and intent of the fourteenth amendment remains unresolved, the thirteenth amendment should be consulted. Hyman and Wiecek suggest that the views of the framers of the abolition amendment in 1865 will illuminate what the framers and ratifiers of the fourteenth amendment "perceived and intended in 1866-68."[58] The framers of 1865 used the abolitionist "vocabulary of freedom" to provide for "positive enforcement" of "protection . . . from involuntary servitude and violence, and of all the full and equal rights of freedom, some of which history had identified and a multitude which remained for the inscrutable future to reveal."[59] The authors state that the thirteenth amendment provided a "mobile constitutional platform suitable for continuing ascent," and "required further national interventions in opposition to state or private acts that substantively lessened an individual's protections."[60] Hyman and Wiecek conclude that although the framers of the fourteenth amendment were distracted by the state-action question raised by the black codes, they wisely made it "a longhand restatement . . . of the thirteenth amendment."[61]

Lest the impression be received that only reform-minded lawyer-scholars have searched for the original intent of the Civil War amendments, the contributions of Raoul Berger should be noted. More than any other legal scholar of his time, Berger has insisted that constitutional decisions should be made in accordance with the original intent of the framers. A staunch defender of the legitimacy of judicial review, he is an equally passionate critic of what has been called noninterpretive review, namely, judicial decisions based not on the text and intent of the framers but on ideals of justice and conceptions of fundamental values external to the Constitution.[62] Accordingly, Berger has approached the Civil War amendments from the standpoint of a critic of judicial decisions that he believes contradict the intent of the framers of the fourteenth amendment;

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ical and legal philosophy of those who proposed it." M. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 2-12 (1986).

58. H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 387 (1982).

59. *Id.* at 390.

60. *Id.* at 403.

61. *Id.* at 406.

62. Berger's defense of judicial review is presented in R. BERGER, CONGRESS V. THE SUPREME COURT (1969). For his criticism of noninterpretive review, see R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) [hereinafter R. BERGER, GOVERNMENT].

among them are school desegregation, reapportionment, and voting rights cases in particular. Just as much the "law-office" historian as those whom he criticizes, Berger wants to refute the neo-abolitionist view that the framers built into the amendment an open-ended, radical egalitarian vision. Thus he is concerned mainly to show what Congress did not intend: no federal interference with state control over suffrage, legislative apportionment, and school segregation. Instead, the fourteenth amendment was intended to affirm the Civil Rights Act and protect the fundamental rights of the freedmen, which Berger says were narrowly defined as the rights of person, property, and equal protection of the law. Relentlessly and unapologetically polemical,[63] Berger's contention that the pervasive racism of American society in the 1860s ruled out any open-ended egalitarian intent has been especially provocative.[64]

Berger's writings have stimulated increased scholarly attention to the original intent question both as a matter of constitutional jurisprudence and with reference to the history of the Civil War amendments.[65] The Supreme Court has been more reticent. Although affirmative action in a political and social sense rests implicitly on a slavery/thirteenth amendment rationale, the leading judicial decisions in this area generally have avoided the constitutional dimensions of the problem.[66] Yet the Court has noted the relevance of the fourteenth amendment to affirmative action remedial programs, and at some point the Justices will probably feel compelled to address the question in light of the requirements, purpose, and intent of the Civil War amendments.[67] If history is any guide, it seems reasonable to predict the continued relevance of original intent thinking in this area of our constitutional law.

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63. *See* R. BERGER, GOVERNMENT, *supra* note 62, at 9.

64. *See Symposium—Historical Race Relations*, 17 RUTGERS L.J. 407, 415-16 (1986), for criticism of Berger's alleged misuse of revisionist history, static constitutionalism and historicism, and racial reductionism. The symposium presents evidence of civil rights progress for Negroes in the antebellum North, which is offered as a key to understanding the intent of the framers of the fourteenth amendment to provide full racial equality. The material on the antebellum North shows a narrow conception of civil rights consistent with Berger's view of the scope and intent of the Civil Rights Act and the fourteenth amendment. The difference between Berger and his critics lies in their differing view of the nature of the Constitution and how it changes.

65. *See, e.g.*, M. CURTIS, *supra* note 57, and *Symposium*, *supra* note 64. *See also* Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

66. In Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), the Supreme Court decided that layoffs of white teachers under a collective bargaining agreement violated the equal protection clause of the fourteenth amendment. The opinion says nothing, however, about the nature, purpose, meaning or intent of the fourteenth amendment.

67. *See* Local Number 93, International Association of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986).

V

Several conclusions may be drawn from this survey of historico-legal and judicial investigation of the origins and intent of the Civil War amendments. First, it is clear that original intent has been a persistent theme in the interpretation and application of the amendments. For students of history this may not be surprising, but it is worth underscoring the fact in view of recent debate about the wisdom of seeking original intent and the feasibility of its recovery. If the history of the Civil War amendments is any indication, original intent is integral to constitutional adjudication. It appears, moreover, that it is not the exclusive concern of any political or ideological group.

If original intent is regarded as a valid approach to constitutional interpretation, as it now appears to be, it seems less useful to ask whether it ought to be considered than to ask how the Court can most accurately and objectively ascertain it. That it can be ascertained would seem to admit of little doubt if history, as a method of knowing, a discipline, and a profession, is to be accepted as having a legitimate place in scientific investigation. Historians constantly search to determine the purpose, intent, and motivation of the action and events they describe. The essential questions are: What evidence can properly be considered as establishing the intent of constitution makers, and how much weight should be given to it? What makes the determination of constitutional original intent "very delicate and difficult," in Charles Fairman's words, is the fact that it frequently has a direct bearing on contemporary questions in government and politics.[68] Perhaps this is why, apart from the standards of historical scholarship, which are honored mostly in the breach, there is no accepted canon to guide the search for original intent. As we have seen, a wide range of materials has been considered pertinent to ascertaining the intent of the Civil War amendments: the constitutional text; speeches and writings of the framers and ratifiers; writings and commentary of like-minded reformers more than three decades before the adoption of the amendments; ideas and events that formed the historical context in which the amendments were framed; and even the speeches of opponents of the amendments. Although courts in the twentieth century have evolved certain criteria for establishing original intent as a question of constitutional law, historians and historico-legal practitioners engaged in the search for the framers' purposes have not restricted

68. C. MILLER, *supra* note 45, at 156-59; Fairman, *Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83, 87 (1956).

themselves to any particular method of inquiry or analysis.[69]

If a wide net has been cast in the search for original intent, this does not mean that all arguments are equally valid or that no firm conclusions can be drawn. A generation ago the specific issue raised by the civil rights movement was whether the fourteenth amendment was intended to prohibit school segregation, and by implication, segregation in society at large. Law-office history pursued for the sake of litigation answered this question in the negative. The larger conclusion that emerged from professional historical research in the 1950s and 1960s, however, was that the civil rights constitutional amendments and statutes were intended to establish legal, civil, and political equality for all persons without distinction of color. A second conclusion was that these measures tended toward definition and limitation rather than inclusiveness and comprehensiveness. There was always room for argument about the precise scope of civil rights while the sphere of social rights discrimination based on personal preference was lawful. There was general agreement, however, that the framers of the Civil War amendments were trying to eliminate race and color as criteria for conferring rights.[70]

Since about 1970, a year that marks the beginning of a period of affirmative action, the focus of original intent inquiry has shifted from the fourteenth amendment to the thirteenth amendment. This amendment, in turn, has been interpreted broadly as a source of power to define the badges and incidents of slavery and thus to confer universal freedom on blacks. Although this power has not been employed in congressional legislation or elaborated in Supreme Court decisions dealing with the issue, affirmative action really rests on a thirteenth amendment rationale. Operating on a theoretically permissive but realistically obligatory basis, through judicial and administrative decrees under statutory rather than constitutional law, it establishes racial preferences for the victims of slavery and general societal discrimination. Affirmative action is peculiarly historical insofar as it attributes differences between racial groups to slavery and discrimination, in the absence of which blacks would presumably be represented in the occupations and institutions of society in proportion to their percentage of the population.

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69. They have generally used the modern subjective approach to intent, rather than the statutory approach which stresses the meaning of the language of the text in relation to the problem it was meant to deal with, or the underlying intent of the document or text apart from any subjective views of its authors or any legislative history surrounding its formulation and adoption. *See* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

70. "All men must be accorded the rights of men. Race and color are ignoble standards by which to judge human character and worth." Graham, *supra* note 18, at 661.

Leaving moral and philosophical comment to others, we may consider the validity of the thirteenth-amendment original intent argument that has emerged since *Jones v. Alfred H. Mayer* as a historical justification of affirmative action. Temporal sequence may not necessarily be related to logical sequence,[71] but it is neither logical nor chronological to argue that uncertainty about the fourteenth amendment can be resolved by turning to the thirteenth amendment. The authors of this amendment did not know that another one would be required a year later, nor did they project a three-part plan for nationalizing civil rights.[72] It is anachronistic to sift through their speeches for evidence of fourteenth amendment intent. Similarly, if the language of the fourteenth amendment is ambiguous, it is not reasonable to say that its meaning can be determined by invoking the language of the thirteenth amendment, an amendment that simply prohibits slavery and says nothing specifically about rights and liberties. One might argue that the framers of the thirteenth amendment further defined and clarified their purposes in passing the Civil Rights Act and proposing the fourteenth amendment, but to reverse the sequence and argue that fourteenth amendment intent is illuminated by debates on the thirteenth amendment is unhistorical.

The purpose of the thirteenth amendment was to prohibit slavery and establish an imprecisely defined but limited civil liberty centering on protection of person and property. More than the prescription for potentially expansive civil rights, the framers hoped to eliminate a well-known, clearly defined, and despised institution, namely, chattel slavery. That no centralizing and egalitarian purpose was intended can be seen in the rejection in 1864 of Charles Sumner's proposal for abolishing slavery by constitutional amendment: "All persons are equal before the law, so that no person can hold another as a slave; and the Congress shall have power to make all laws necessary and proper to carry this declaration into effect everywhere within the United States and the jurisdiction thereof."[73] The framers preferred the historical model of the Northwest Ordinance to that of French egalitarianism. The Ordinance had a well understood and circumscribed legal meaning, and had been interpreted to prohibit only the master-slave relationship, not to confer civil or political rights on Negroes. As Republicans contemplated the end of the war in 1865, their aim was to control and shape the political situation, including possible peace talks, by placing the

71. *Cf.* R. COLLINGWOOD, THE IDEA OF HISTORY 110 (1946).
72. *Cf.* TEN BROEK, *supra* note 23, at 158.
73. *See* H. BELZ, *supra* note 34, at 126.

Emancipation Proclamation and other antislavery measures on a legally unimpeachable basis. Examined in its immediate historical context, therefore, the purposes of the thirteenth amendment were a good deal more limited and politically expedient than broadly egalitarian and visionary. That Republican congressmen said it would secure "equal, universal and impartial liberty" does not gainsay this fact.[74] The thirteenth amendment was not intended as a comprehensive grant of civil rights, nor as a revolution in federalism authorizing direct and plenary legislation over civil rights.[75]

Like civil rights policy in general, the search for original intent since *Jones v. Alfred H. Mayer* has exhibited tendencies toward what might be called historicist fundamentalism. If the purposes of the fourteenth amendment are unsatisfyingly ambiguous and the limitations of state action in constitutional law cannot easily be expunged, then the simpler requirement and authority of the thirteenth amendment may provide a more useful recourse. If the securing of individual civil rights under the concept of equal opportunity does not produce the desired social results, then policies aimed at proportional equity for the victims of slavery and historic social discrimination may bring about significant change. If the racially impartial fourteenth amendment does not lend itself to the needs of present social policy, then the more fundamental thirteenth amendment, in historical context regarded as a race-conscious charter of freedom, may supply the rationale for compensatory and redistributive social policies.

If, as seems likely, the legitimacy of affirmative action will be resolved at some point with reference to the Constitution, it is worth asking what conception of equality guided the framers of the Civil War amendments. Although as a practical matter post-emancipation policy was directed principally toward the freed slaves, the statutes and amendments that defined civil rights and extended the sphere of freedom were racially impartial. American slavery had been racial slavery; American freedom accordingly had been racially qualified in historical and political reality. The Civil War amendments were intended to remove this racial qualification as a condition of republican civil liberty. In the historical circumstances, any measure to establish legal or civil equality, whether or not formulated in racial terms, could be looked on as preferential toward blacks. (President Johnson made this point in his veto messages on civil rights legislation.) It is true that a few minor relief bills passed by Congress dealt expressly and exclusively with

74. *See* M. CURTIS, *supra* note 57, at 54.
75. *See* H. BELZ, *supra* note 34, at 113-34.

blacks. The constitutional amendments and principal statutes concerned with civil rights as part of the Reconstruction settlement, however, contained no distinction of color.

Segregation was eliminated in response to the demand of the Negro protest movement for equality without distinction of color—a demand justified in part by historical analysis of the color blind original intent of the Civil War amendments. This historical interpretation of original intent, concerned specifically with legal, civil, and political rights,[76] helped rationalize the discontinuity in constitutional development signified by the overthrow of segregation. The challenge to the principle of racial impartiality raised in recent years by the need to justify affirmative action seeks to establish a different kind of continuity, one that is based on slavery and its social consequences as an enduring factor in American history and society. It posits a racially preferential intent behind the Civil War amendments that is used to justify social policies based not on the present condition of individual blacks, but simply on the different historical experiences of the two races in America.[77] Once again, historical debates about original intent are at the forefront.[78]

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76. As Paul Finkelman has recently pointed out, despite widespread racism civil rights gains for blacks were achieved in many northern states before the Civil War. These changes, securing basic legal rights and protections, defined the content of the formal legal equality for all Americans guaranteed by the fourteenth amendment. *See* Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 479-80 (1986).

77. Thurow, *The Declaration of Independence and the Equal Protection of the Laws*, in STILL THE LAW OF THE LAND? ESSAYS ON CHANGING INTERPRETATIONS OF THE CONSTITUTION 116-19 (1987).

78. It is ironic that the theory of historical victimization and the continuing presence of slavery should find support at the very moment when the idea of racial equality was substantially accepted in public opinion, and black progress in politics, society, and civil rights was plainly apparent. It is perhaps more than ironic that a desire for historical justice should obscure and interfere with the effort to establish conditions of mutual dignity and respect in race relations, based on equal rights without distinction of color, which was the goal and intent of the framers of the Civil War amendments. Of course the framers of the 1860s were concerned in a practical way with the conditions and rights of the freed slaves. They were writing a constitution to preserve and extend the rights and liberties of all Americans, however, not just those of emancipated blacks. This view of the intent of the Civil War amendments stands out most clearly in the historical record. Whether it is still a relevant and legitimate guide and standard is the central issue in the continuing controversy over civil rights in American society.