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## SEGREGATION AND THE ORIGINAL UNDERSTANDING: A REPLY TO PROFESSOR MALTZ

*Michael W. McConnell\**

In *Originalism and the Desegregation Decisions*,<sup>1</sup> I relied heavily on the prior work of Professors Earl Maltz and John Harrison, two of the most careful, dispassionate, and learned scholars of the constitutional doctrine of the Fourteenth Amendment. Now they have written responses to that article. Interestingly, Maltz devotes his essay to questioning whether public education was considered a privilege or immunity of citizenship—a point on which Harrison, without elaboration, says I am “correct”<sup>2</sup>—while Harrison devotes his essay to a textual and doctrinal analysis of how segregation could be considered unequal, a point that Maltz passes by in silence. I will devote my response to Maltz, since he, unlike Harrison, ultimately rejects my thesis that the original understanding of the Fourteenth Amendment supports the holding in *Brown*.

Maltz contends that the Fourteenth Amendment compels the states to fund black and white schools equally and may empower Congress to prohibit segregation, but does not forbid segregation of its own force. Is Maltz’s analysis of the evidence consistent with this interpretation of the Amendment?

Let us begin with the enforcement power. Maltz hypothesizes that some members of Congress may have voted for the schools provision in the civil rights bill, even though they did not believe that de jure school segregation violates Section One of the Amendment, because they understood the congressional power to enforce the Amendment under Section Five to go beyond the dictates of Section One. Maltz argues that this would make sense of Senator Sherman’s confused speech in which he appeared to concede the constitutionality of segregated schools,

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1. 81 Va. L. Rev. 947 (1995).

2. John Harrison, *Equality, Race Discrimination, and the Fourteenth Amendment*, 13 Const. Comm. 243, 243 n.4 (1996).

while voting *for* a bill outlawing school segregation and *against* amendments that would have allowed separate but equal schools.<sup>3</sup>

The difficulty with this hypothesis is that neither Sherman nor any other supporter of the bill referred to any supposed difference between the substantive requirements of Section One and the discretionary power of Congress under Section Five when defending the constitutionality of the bill. Maltz cites speeches by Robert Hale<sup>4</sup> and William Lawrence<sup>5</sup> giving broad interpretations of the Section Five power. But Hale, who proudly identified himself as the sole Republican representative to have voted against the Fourteenth Amendment, offered his interpretation of Section Five as a *criticism* of the Amendment,<sup>6</sup> not as a justification for supporting the school segregation bill (which, indeed, he voted against<sup>7</sup>). Nor is Lawrence (who, unlike Hale, was a leading supporter of the bill) an example. It is true that Lawrence offered a fairly expansive interpretation of Section Five, but he also explained in some detail why the school desegregation bill was required by Section One. He concluded: "The fourteenth amendment was designed to secure this equality of rights; and we have no discretion to say that we will not enforce its provisions. There is no question of discretion involved except as to the means we may employ. The real question is, whether, knowing our duty, we will perform it."<sup>8</sup> Many other Republican supporters of the bill similarly argued that the bill merely provided enforcement for rights under Section One, and that Con-

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3. Maltz says that Sherman "stated that he viewed the maintenance of segregated schools as constitutional, so long as the black schools received their *pro rata* share of school funding." Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 Const. Comm. 223, 225 (1996). While Maltz's reading is legitimate, it might be more accurate to say the speech was a bit of a muddle. After stating agreement with a decision of the Ohio Supreme Court approving "separate schools for colored children" in "certain cases defined by the law," Sherman stated that in "ordinary cases" black and white children were educated in mixed schools—a situation that he praised at some length. Following this, he stated his "opinion" that in the South, "for a time it might be a matter of municipal regulation, it might be a matter of convenience assented to both by whites and blacks to keep them in separate schools." Cong. Globe, 42d Cong., 2d Sess. 3193 (1872). This might indicate that he believed that a transitional period would be permissible (all deliberate speed?), or, alternatively, that he was distinguishing—like many Republican supporters of the bill—between *de jure* segregation and *de facto* segregation by common consent of both races.

4. Maltz, 13 Const. Comm. at 226 (cited in note 3).

5. *Id.*

6. 3 Cong. Rec. 979-80 (1875).

7. *Id.* at 1011.

8. 2 Cong. Rec. 414 (1874).

gress had no power to go beyond this.<sup>9</sup> Even Professor Michael Klarman, a critic of the originalist argument for desegregation, finds the evidence “persuasive” that “congressional support for school desegregation should be understood not merely as a policy preference, but also as probative of constitutional interpretation—that is, most congressmen at the time would have understood the congressional enforcement power under Section Five of the Fourteenth Amendment as limited in scope to the rights protected against state interference by Section One.”<sup>10</sup>

Thus, while it is logically possible that the bill could have been justified on the theory that Congress had power to go beyond the requirements of Section One, there is no direct evidence in support of this interpretation, and a great deal of evidence to the contrary.

Maltz next argues that the debates over the Civil Rights Act of 1875 are unreliable indicators of the original meaning of the Fourteenth Amendment, which was proposed in 1866 and ratified in 1868. I have addressed this issue elsewhere,<sup>11</sup> and will not repeat those arguments. Maltz makes the point, however, that the jury service provision of the 1875 Act is inconsistent with the proposition that the Fourteenth Amendment “had no impact on political rights, including the right to serve on juries.”<sup>12</sup> He suggests that if the Act reflects an inaccurate understanding of the Amendment with respect to juries, it might be similarly inaccurate with respect to school segregation.

The jury provisions of the 1875 Act, however, were defended not on the basis of the potential jurors’ right to serve (which would be a political right) but on the basis of the litigants’ right not to have members of their race excluded from the jury box, which could be seen as a due process right, an equal protection right, or a privilege or immunity of citizenship.<sup>13</sup> One of the most serious obstacles to enforcement of civil rights for the freedmen was the unwillingness of all-white juries in the South to do justice. The jury provisions of the 1875 Act were essential to enforcing the civil rights of blacks who needed to defend their

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9. See speeches cited in Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 1115-17 (1995).

10. Michael Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881, 1882 (1995).

11. McConnell, 81 Va. L. Rev. at 1105-07, 1115-17 (cited in note 9); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 Va. L. Rev. 1937, 1944-47 (1995).

12. Maltz, 13 Const. Comm. at 227-28 (cited in note 3).

13. See Cong. Globe, 42d Cong., 2d Sess. 848 (1872) (Sen. Frelinghuysen); McConnell, 81 Va. L. Rev. at 1064 & n.584 (cited in note 9).

rights in court. So understood, the jury provisions were consistent with the original understanding of Section One.

Maltz next argues that it was unlikely that the Amendment was understood to affect school segregation, in light of the unpopularity of mixed schools throughout the country. While this is a good point, it cannot be decisive; black suffrage was equally unpopular with white voters and the Fifteenth Amendment unquestionably was understood as giving the vote to blacks. It is apparent that Republicans during Reconstruction were willing to buck public opinion in the service of constitutional reform.

Maltz buttresses this argument with the point that Congress continued to support the segregated school system in the District of Columbia. "To contend that Republicans would at the same time knowingly act against school segregation by a nationally-applicable constitutional amendment," Maltz comments, "is to attribute to them an almost Orwellian mentality."<sup>14</sup> Perhaps. But the Fourteenth Amendment did not apply to the District of Columbia, and Congress has been known to enact for the country laws that it does not apply in its own backyard. In any event, the same congressional forces who fought for school desegregation through the civil rights bill also came close to requiring desegregation in the District (winning in the Senate by a margin of 35-20 on a procedural vote,<sup>15</sup> and losing in the House by 71-88, on a vote marked by extraordinarily many absences<sup>16</sup>). Their tactical judgment to devote political energies after 1871 to nationwide reform, which appeared to be within their reach, should not be mistaken for a considered constitutional judgment in favor of segregation.<sup>17</sup>

In any event, as Maltz agrees, the question "ultimately depends on a doctrinal analysis of Section 1,"<sup>18</sup> rather than on any indirect evidence of political opinion. Maltz argues that the Privileges or Immunities Clause could not have been understood to forbid school segregation because it requires equality only with respect to "rights of national citizenship,"<sup>19</sup> and the right to attend public schools "is rather clearly not included" among these.<sup>20</sup>

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14. Maltz, 13 Const. Comm. at 229 (cited in note 3).

15. Cong. Globe, 42d Cong., 2d Sess. 3124 (1872).

16. Cong. Globe, 41st Cong., 3d Sess. 1367 (1871).

17. For a fuller treatment of this issue, see McConnell, 81 Va. L. Rev. at 977-80 (cited in note 9).

18. Maltz, 13 Const. Comm. at 229 (cited in note 3).

19. Id. at 231.

20. Id.

As I will explain below, this doctrinal argument is questionable. But the real puzzle is how it can be squared with Maltz's own interpretation: that the Fourteenth Amendment compels the states to fund black and white schools equally but does not forbid segregation. If the "right to attend public schools"<sup>21</sup> was a "local right"<sup>22</sup> and not a right "associated with national citizenship,"<sup>23</sup> then the schools could not only be segregated, but they could be unequal. Indeed, black children could be excluded from the schools altogether. This was an argument even many opponents of the Act repudiated.<sup>24</sup>

Perhaps Maltz would respond that the constitutional requirement of equality of resources is grounded in the Equal Protection Clause rather than the Privileges or Immunities Clause. But for this claim to be persuasive, one would have to argue that the "equality" required for equal protection is different from the "equality" required for privileges or immunities—that segregation is unequal for purposes of one Clause but not the other. Maltz cites no evidence to support this theory, and I am not aware of any.<sup>25</sup> Supporters of the school desegregation bill invoked both Clauses,<sup>26</sup> and the general shift from privileges or immunities to equal protection was a reaction to the *Slaughterhouse* decision rather than to any differences between the Clauses with respect to the legitimacy of segregation.<sup>27</sup> Moreover, to the extent that Maltz intends this theory as an explana-

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21. *Id.*

22. *Id.* at 230.

23. *Id.*

24. See 2 Cong. Rec. app. 359 (1874) (statement of Sen. Merrimon); 2 Cong. Rec. 555 (1874) (statement of Rep. Vance).

25. Harrison distinguishes between several different forms of equality, focusing particularly on the difference between "requirements of universal equality as to certain legal rights," Harrison, 13 Const. Comm. at 247 (cited in note 2), and "anti-discrimination rules," *id.* at 248, noting that the language of the Fourteenth Amendment is most plausibly understood as an example of the former, while the prohibition on segregation is best understood as the latter. My researches into the debates over the 1875 Act have not uncovered any evidence that this distinction was understood or thought significant at the time. But even assuming that the distinction has importance for interpretation of the Amendment, it would not support the notion that the conception of equality in the Privileges or Immunities Clause is different from the conception of equality in the Equal Protection Clause. Harrison gives *both Clauses* as examples of the conception of equality as a requirement of universal equality as to certain legal rights. *Id.* at 246.

26. See Cong. Globe, 42d Cong., 2d Sess. 761-63 (1872) (Sen. Carpenter, relying on Privileges or Immunities Clause); *id.* at 843-44 (Sen. Sherman, relying on Privileges or Immunities Clause); 2 Cong. Rec. 340 (1873) (Rep. Butler, relying on Privileges or Immunities Clause); *id.* at app. 26 (Sen. Edmunds, relying on Equal Protection Clause); 2 Cong. Rec. 409 (1874) (Rep. Elliott, relying on Equal Protection Clause); *id.* at 412-414 (Rep. Lawrence, relying on Equal Protection Clause).

27. See McConnell, 81 Va. L. Rev. at 1002-04, 1070 (cited in note 9).

tion for Senator Sherman's position, it does not work. Sherman labeled "the right of the parent of every child to have that child share on equal terms and equal facilities with all others in participating and sharing in the school fund" as among "the rights, immunities, and privileges of citizens."<sup>28</sup> If Maltz is right, then Sherman was wrong.

Maltz's assumption that the Privileges or Immunities Clause applies only to rights "associated with national citizenship,"<sup>29</sup> is, moreover, implausible (despite its rough congruence with the holding in the *Slaughterhouse* cases<sup>30</sup>). The rights most clearly falling within the Clause—namely, the rights protected by the Civil Rights Act of 1866: to make and enforce contracts, acquire, own, and dispose of property, sue and be sued, be subject to equal penalties, and the like—have no obvious connection to national citizenship. These rights arise under state law, and become rights of national citizenship only by virtue of the Fourteenth Amendment itself. Contrary to *Slaughterhouse*, the Fourteenth Amendment does not confine itself to what already were rights of national citizenship; rather, it converted certain rights that previously had arisen under state law into rights of national citizenship.

In any event, many Republicans associated education with national citizenship, linking access to school to access to the ballot. Sumner, for example, argued:

In a republic Education is indispensable. A republic without education is like the creature of imagination, a human being without a soul, living and moving blindly, with no just sense of the present or the future. It is a monster. Such have been the rebel States. They have been for years nothing less than political monsters. But such they must be no longer.<sup>31</sup>

Of course, this was disputed. Lyman Trumbull, for example, said that the right to go to school "is not any right at all" because it "depends upon what the law of the locality is."<sup>32</sup> But, as explained in the *Originalism* article, Trumbull's was a minority position—implying, as it did, that the Fourteenth Amendment had no application to public schools, even if blacks were excluded altogether. In any event, to the extent that public schooling was associated with republican citizenship, it would fall within even

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

29. Maltz, 13 Const. Comm. at 230 (cited in note 3).

30. 83 U.S. (16 Wall.) 64-65 (1873).

31. Cong. Globe, 40th Cong., 1st Sess. 166-67 (1867).

32. Cong. Globe, 42d Cong., 2d Sess. 3190 (1872).

Maltz's limited definition of the scope of the Privileges or Immunities Clause.

Maltz makes an alternative argument that public education could not have been thought a privilege or immunity of citizenship under the Fourteenth Amendment because it was not deemed to be one of the privileges and immunities protected under the Comity Clause of Article Four. This is a more plausible objection to my thesis, at least insofar as the thesis rests on the Privileges or Immunities Clause rather than the Equal Protection Clause. As Maltz points out, "a child from state A, visiting for one week in state B, would [not] have a right under the comity clause to attend the public schools of state B during his visit."<sup>33</sup> This is confirmed by numerous court decisions during the 19th century, which consistently hold that the privilege of free attendance at a public school is limited to bona fide residents of the school district.<sup>34</sup> But these cases are best explained, I think, not on the ground that public education is not a civil right, but on the ground that the limitations were based on *residence in the district* rather than on *citizenship in the state*. This was relevant for two reasons. First, many early decisions held that, while discrimination against citizens of other states was unconstitutional, discrimination against nonresidents was not. Citizenship and residence, these decisions held, are not necessarily the same thing.<sup>35</sup> Second, because the school attendance restrictions were based on the locality, not the state, a New Yorker

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33. Maltz, 13 Const. Comm. at 231 (cited in note 3).

34. See, e.g., *School District No. 1 v. Bragdon*, 23 N.H. (3 Fost.) 507, 516 (1851) (children not entitled to be admitted to public school where their father resided in another state and they were sent to be apprentices in the district in an attempt to evade the residency requirement); *State ex rel. German Protestant Orphan Asylum v. Directors of School District No. 14*, 10 Ohio St. 448, 448 (Ohio 1859) (orphans who are not children, wards, or apprentices of actual residents in the school district are not entitled to free admission to the public schools); *Wheeler v. Burrow*, 18 Ind. 14, 16-17 (1862) (residents of other states may not send their minor children into Indiana for the purpose of procuring an education, unless they become bona fide Indiana residents); *State ex rel. Comstock v. Joint School District No. 1*, 65 Wis. 631, 635-36, 27 N.W. 829 (1886) ("We find ourselves unable to assent to the proposition that a child residing in one school district has any absolute right, under any circumstances, to the privileges of the common school of another district."); *Binde v. Klinge*, 30 Mo. App. 285, 288-89 (St. Louis Ct. App. 1888) (unemancipated minors whose parents live outside the school district are not entitled to free admission to public schools within the district, even if they have a more or less permanent home within the district); *Board of Education of Winchester v. Foster*, 116 Ky. 484, 489, 76 S.W. 354, 355 (Ky. Ct. App. 1903) (the privilege of free admission to public schools is limited to bona fide residents); see also *Opinion of the Justices*, 42 Mass. (1 Metc.) 580, 583 (1840) (residents of federal enclave are not entitled to send their children to public schools in the district).

35. *La Tourette v. McMaster*, 248 U.S. 465, 470 (1919); *Douglas v. New Haven R. Co.*, 279 U.S. 377, 386-87 (1929); *Cummings v. Wingo*, 10 S.E. 107, 110 (S.C. 1889).



seeking to attend public school in Philadelphia would have *precisely the same right to do so* (namely, none) that a Pittsburgher would have. Since the protections of the Comity Clause pertain only to discrimination on the basis of citizenship in another state,<sup>36</sup> it would follow that district residency requirements would not violate the Clause. Under either theory, limiting the privilege of school attendance to residents of the district would be constitutional, but it would not follow that the Comity Clause would permit a state to discriminate *on the basis of state citizenship* with regard to public education.

In any event, in light of Maltz's view that the right to share in the public school fund *is* protected under the Equal Protection Clause, the point is of no practical importance. It is significant not to whether school segregation was understood as unconstitutional, but to the nice question of which Clause of the Fourteenth Amendment is the source of that constitutional principle. In *Originalism*, I treated the Privileges or Immunities Clause as the dominant and most plausible source of constitutional authority prior to *Slaughterhouse*, and assumed that the shift to equal protection after *Slaughterhouse* was simply a tactical response to that decision.<sup>37</sup> That still seems to me the most plausible theory. If Maltz is correct, however, then the Republicans, Morton and Edmunds, for example, who invoked equal protection even prior to *Slaughterhouse* had the stronger constitutional position. The Democrats' continued focus on privileges and immunities and neglect of the equal protection argument, which I interpreted as an indication that the privileges or immunities argument was the real meat of the debate, may instead have been a tacit admission that the equal protection argument was more difficult to refute.

This point is of theoretical interest to those who are concerned about the relation between the three substantive Clauses of Section One as originally understood, but it does not affect the originalist case for *Brown*. Even if the Privileges or Immunities Clause did not encompass public education, the alternative constitutional theory put forward by supporters of the 1875 Act, equal protection, would suffice.

It remains possible that the Republican majority in 1870-75 either intentionally or unintentionally misstated the principles of the constitutional amendment they had supported in 1866-68.

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36. The Supreme Court held to the contrary in *United Building & Construction Trades Council v. Camden*, 465 U.S. 208, 214-18 (1984). The decision seems wrong on textualist and originalist grounds, as Justice Blackmun (!) maintained in dissent (id. at 224-27, 233).

37. McConnell, 81 Va. L. Rev. at 1001-03 (cited in note 9).

But the most plausible and economical interpretation of the evidence is that their actions in seeking to outlaw de jure school segregation were based on their understanding of the meaning of the Amendment. That understanding, being nearly contemporaneous with ratification, is entitled to respect.