

# Saint Louis University Law Journal

---

Volume 50  
Number 2 *A Tribute to the Honorable Michael A.  
Wolff (Winter 2006)*

---

Article 17

2006

## Originalism and the Sense–Reference Distinction

Christopher R. Green  
*University of Notre Dame*

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

---

### Recommended Citation

Christopher R. Green, *Originalism and the Sense–Reference Distinction*, 50 St. Louis U. L.J. (2006).  
Available at: <https://scholarship.law.slu.edu/lj/vol50/iss2/17>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

## ORIGINALISM AND THE SENSE–REFERENCE DISTINCTION

CHRISTOPHER R. GREEN\*

### ABSTRACT

*I deploy the sense–reference distinction and its kin from the philosophy of language to answer the question of what in constitutional interpretation should, and should not, be able to change after founders adopt a constitutional provision. I suggest that a constitutional expression’s reference, but not its sense, can change. Interpreters should thus give founders’ assessments of reference only Skidmore-level deference. From this position, I criticize the theories of constitutional interpretation offered by Raoul Berger, Jed Rubenfeld, and Richard Fallon, and apply the theory to whether the Fourteenth Amendment forbids racial segregation in public schools.*

### I. INTRODUCTION

Twice this past spring, disputes broke out among members of the Supreme Court about whether the Constitution changes. In his dissents in *Roper v. Simmons*<sup>1</sup> and *McCreary County v. ACLU of Kentucky*,<sup>2</sup> Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, sets out a vision of an unchanging Constitution. In both episodes, Justices Stevens, joined by Justice Ginsburg, opposes the originalist trio’s efforts on behalf of a living, changing Constitution. These disputes reveal the Justices’ failure to appreciate certain distinctions from the philosophy of language. Were these distinctions more clearly understood, a neglected middle ground would emerge for those who desire both to obey the historic, unchanging meaning conveyed in constitutional language and to take proper account of facts that have changed since the founding, or which the founders may have misperceived. The philosophy of language can thus uncover an attractive yet neglected position

---

\* Ph.D. candidate, philosophy, University of Notre Dame; J.D., 1998, Yale Law School.

The author wishes to thank Bruce Ackerman, Larry Alexander, Paddy Blanchette, Jeff Goldsworthy, Bonnie Green, Ray Hain, Lynn Joy, Matt Kennedy, Andy Koppelman, Alasdair McIntyre, Luther Munford, Stephen Sachs, David Solomon, David Thunder, and participants in discussions at the University of Notre Dame and University of Texas at Austin.

1. 543 U.S. 551 (2005).

2. 125 S.Ct. 2722 (2005).

and offer the prospect of closure to a debate that seems interminable. Indeed, these distinctions are urgently needed in order to rescue the Court from continued confusion over the relevance of historical materials in cases like *Roper* and *McCreary County*, or indeed in any case involving basic interpretive controversy.

In the juvenile death penalty case, *Roper*, Scalia ridicules the Court for suggesting that constitutional outcomes can properly change: “What a mockery today’s opinion makes of Hamilton’s expectation [that the judiciary would be ‘bound down by strict rules and precedents’], announcing the Court’s conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court’s decision 15 years ago was *wrong*, but that the Constitution *has changed*.”<sup>3</sup> Later, he says, “In a system based upon constitutional and statutory text democratically adopted, the concept of ‘law’ ordinarily signifies that particular words have a fixed meaning. Such law does not change . . . .”<sup>4</sup> A footnote disparages cases that have given “brave new meaning” to constitutional provisions.<sup>5</sup> Scalia thereby suggests that *any* change in constitutional outcomes amounts to a change in the meaning of constitutional language.<sup>6</sup>

In response, Justice Stevens’s concurrence, joined by Justice Ginsburg, suggests that even the *meaning* of the Constitution can change. He denies that “the meaning of [the Eighth] Amendment [was] frozen when it was originally drafted,”<sup>7</sup> and claims that the Framers would agree that “our understanding of the Constitution does change from time to time.”<sup>8</sup> However, Stevens does not

---

3. 543 U.S. at 608 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

4. *Id.* at 629.

5. *Id.* at 627 n.9 (citing *Lawrence v. Texas*, 539 U.S. 558, 571–73 (2003); *United States v. Virginia*, 518 U.S. 515, 532–34 (1996); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847–50 (1992)).

6. I should issue a caveat here about Justice Scalia’s views. In his *Roper* and *McCreary County* dissents, Justice Scalia suggests that originalism forbids any change in constitutional outcomes. But elsewhere, he claims that changing constitutional outcomes are not a problem for the originalist if a provision, like the Fourth Amendment, refers to a separate changing body of law. *See, e.g., Georgia v. Randolph*, 126 S. Ct. 1515, 1540 (2006) (“Justice STEVENS’ attempted critique of originalism confuses the original import of the Fourth Amendment with the background sources of law to which the Amendment, on its original meaning, referred. . . . [C]hanges in the law of property to which the Fourth Amendment referred would not alter the Amendment’s meaning. . . . There is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change.”). I do not attempt here to give a comprehensive or systematic account of Scalia’s views, but simply set out his views as he states them in his *Roper* and *McCreary County* dissents. To the extent that Justice Scalia allows for changing constitutional outcomes, his commitment in *Roper* to a fully unchanging constitutional law and his unqualified allegiance in *McCreary County* to the Framers’ views regarding constitutional outcomes would need to be tempered or further explained.

7. *Id.* at 587 (Stevens, J., joined by Ginsburg, J., concurring).

8. *Id.*

give any indication of how we might know when one of those times might be here again, explaining only that “the pace of that evolution is a matter for continuing debate.”<sup>9</sup> Indeed, Stevens not only leaves the *pace* of constitutional evolution unclear and unmotivated, but also its *direction*: he exhibits no principle to explain either *where* to go with the Constitution or how fast.

In his dissent in the Kentucky Ten Commandments case, *McCreary County v. ACLU of Kentucky*, Justice Scalia, with the same allies, again suggests that in order to maintain a stable constitutional *meaning*, we must adhere to the Founders’ *practices*:

It is no answer for Justice STEVENS to say that the understanding that these official and quasi-official actions reflect was not “enshrined in the Constitution’s text.” The Establishment Clause, upon which Justice STEVENS would rely, *was* enshrined in the Constitution’s text, and these official actions show *what it meant*. . . . What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?<sup>10</sup>

The Founders’ *actions*, for Scalia, are the best possible evidence of the *meaning* of their language. He considers the Framers’ actions alone, and thus neglects any possibility that an explanation from the Framers of *why* their actions were consistent with their language might shed better light on the text’s meaning.

In response, Justice Stevens, joined again by Justice Ginsburg, again denies that the Constitution’s meaning is stable. Responding to Scalia’s dissent in his own dissent in the Texas Ten Commandments case, *Van Orden v. Perry*,<sup>11</sup> Stevens says,

It is our duty . . . to interpret the First Amendment’s command that “Congress shall make no law respecting an establishment of religion” not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause’s text and history the broad principles that remain valid today.<sup>12</sup>

Stevens then cites racial school segregation, sex discrimination, and his concurrence in *Roper* as cases in which the Court properly departed from the original history of the Constitution.<sup>13</sup> He then says, “We serve our constitutional mandate by expounding the meaning of constitutional provisions

---

9. *Roper*, 543 U.S. at 587.

10. 125 S. Ct. at 2754–55 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (internal citation omitted).

11. 125 S. Ct. 2854 (2005).

12. *Id.* at 2888 (Stevens, J., joined by Ginsburg, J., dissenting).

13. *Id.* (citing *Brown v. Board of Education*, 349 U.S. 294 (1955); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Roper*, 534 U.S. at 551–607 (Stevens, J., joined by Ginsburg, J., concurring)).

with one eye towards our Nation's history and the other fixed on its democratic aspirations."<sup>14</sup> However, as in *Roper*, Stevens sets out no criterion for when the original history should be defeated by "democratic aspirations."

Justices Scalia and Stevens construct arguments with a critical implicit common premise. In effect, Scalia reasons this way:

- (1) Constitutional outcomes properly change only if constitutional meaning properly changes;
- (2) Constitutional meaning cannot properly change; therefore
- (3) Constitutional outcomes cannot properly change.

Preferring *modus ponens* to Scalia's *modus tollens*, Stevens agrees with (1), but instead implicitly reasons

- (1) Constitutional outcomes properly change only if constitutional meaning properly changes; but
- (~3) Constitutional outcomes *can* properly change; therefore
- (~2) Constitutional meaning *can* properly change.

However, the shared premise (1) is false. Distinguishing sense from reference reveals that changing constitutional outcomes can coexist with stability in constitutional meaning. Correcting this mistake, embraced by a majority of the Court in *Roper*, *McCreary*, and *Van Orden*, lies at the beginning of sound thinking about how to interpret the Constitution.

While five of the Justices took sides in the Scalia/Stevens fray, the other four—O'Connor, Kennedy, Souter, and Breyer—did not.<sup>15</sup> Neither, however, did they offer any competing middle ground. I want to offer such middle ground here. This is ground sadly neglected in the long-running debate of which Stevens's and Scalia's disputes this spring were a part. Jonah Goldberg summarized the public debate last year: "A 'living' Constitution grows and changes with the times. Generally speaking, liberals want a living Constitution and conservatives don't . . . [O]f course, I want a dead Constitution."<sup>16</sup> In

14. *Id.* at 2889.

15. In *Roper*, however, Justice O'Connor did seem to cite Stevens's concurrence favorably. *Roper*, 543 U.S. at 589 (O'Connor, J., dissenting). Justice Breyer sets out his views on interpretation in his just-released 2005 book *Active Liberty: Interpreting Our Democratic Constitution*, which includes an extensive discussion and criticism of originalism, or "literalism," as he puts it, but he does not mention the Scalia/Stevens disputes in *Roper* and *McCreary/Van Orden* directly.

16. Jonah Goldberg, *It's Alive! Why the Constitution Should Remain Dead*, NAT'L REV. ONLINE, July 8, 2003, <http://www.nationalreview.com/goldberg/goldberg070803.asp>. For more typical statements on whether the Constitution changes, see RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 21–22 (2d ed. 1997) ("[A]ntiactivists (originalists) maintain that judges are not authorized to revise the Constitution and that it is to be construed in light of the Founders' explanations of what they meant to accomplish, no more, no less." (footnote omitted)); Raoul Berger, *Some Reflections On*

contrast both to Goldberg and his opponents, I think that we have a partially living and partially dead Constitution.

In this Article I explain how distinctions of long standing in the philosophy of language can present a compelling distinction between which of the Constitution's attributes change and which do not. Judges and lawyers who ignore the progress that philosophers have made in understanding how language works will only find themselves repeating old mistakes and maintaining old confusions. The Justices' failures to appreciate the difference between the meaning historically *expressed* by constitutional language, on the one hand, and the tangible outcomes *accomplished* by that language, on the other, lead to a frustrating dynamic. Justices Stevens and Ginsburg and their allies insist rightly that the Constitution must take account of our changing world, but they have no generally agreed-upon theory for why or when these changing facts should matter for constitutional outcomes. On the other hand, Justices Scalia and Thomas and Chief Justice Rehnquist and their allies insist rightly that to accomplish its job the Constitution must remain stable, but they frequently remain blind to the possibility that outdated facts, or factual mistakes, may have underlain the Founders' conclusions about constitutional outcomes. The theory I present will make clear how we can get the best of both views. We can make a precise accounting of the relevance of factual change to change in constitutional outcomes, while still preserving a stable anchor of constitutional meaning which, combined with the facts, produces those outcomes. My view thus meets both a *theoretical* need—resolving this long-standing dispute over the extent to which the Constitution is alive and changing—and a *practical* need to determine exactly what sorts of historical

---

*Interpretivism*, 55 GEO. WASH. L. REV. 1, 1 (1986) [hereinafter Berger, *Reflections*] (“[Interpretivism] conceives the judicial role as *interpreting*, not revising, the Constitution.”); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40 (Amy Guttmann ed., 1997) (“It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.”); Stephen Reinhardt & Howard Bashman, 20 Questions for Circuit Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit, Feb. 2, 2004, [http://legalaffairs.org/howappealing/20q/2004\\_02\\_01\\_20q-appellateblog\\_archive.html](http://legalaffairs.org/howappealing/20q/2004_02_01_20q-appellateblog_archive.html) (Judge Stephen Reinhardt of the Ninth Circuit recently describing himself as one of those “judges who treat[s] the Constitution as a living, breathing instrument”); Goldberg, *supra* (quoting Al Gore: “I would look for justices of the Supreme Court who understand that our Constitution is a living and breathing document, that it was intended by our Founders to be interpreted in the light of the constantly evolving experience of the American people.”); Joseph Sobran, *Does the Constitution “Grow”?*, SOBRAN’S, Oct. 5, 2000, <http://www.sobran.com/columns/1999-2001/001005.shtml> (“The Constitution didn’t ‘grow’; it was never supposed to. Written law must be stable, or it isn’t law. A government that can change the very meaning of old words is tyrannical.”); Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL’Y 283, 285 (1995) (“Those who argue on behalf of originalism are not inclined to intone the virtues of . . . adaptability [or] flexibility . . .”).

evidence should constrain courts deciding cases like *Roper*, *McCreary County*, or *Van Orden*.

The simple question whether or not the Constitution changes—whether it is living or dead—is not well posed without refinement. No reasonable theorist will contend either (a) that *everything* about the Constitution—everything relevant for constitutional law—is fixed at the time of the framing, or (b) that *none* of the Constitution’s legally relevant attributes are fixed at the framing. If we define originalism in a strong way, as requiring that *nothing* about the Constitution change, no one will be an originalist. But if we define it weakly, as saying merely that *some* things about the Constitution stay the same, everyone will be an originalist.

Instead of mooting such a coarse-grained question as whether *everything* or *nothing* changes about the Constitution, and arguing about which represents the real definition of originalism, those interested in originalism should ask what particular aspects of the Constitution legitimately change and which do not. Answers to these questions will be important, whether they amount to an affirmation of originalism, or a departure from it. I will here defend an answer based on Frege’s sense–reference distinction:<sup>17</sup> the *sense* of a constitutional expression is fixed at the time of the framing, but the *reference* is not, because it depends on the facts about the world, which can change. At the risk of indulging in a pun that may grow tiresome, I call my theory the Theory of Original Sinn, after Frege’s word for sense, *Sinn*.

Were the Theory of Original Sinn accepted, Justices Stevens and Scalia would not be debating the broad question whether the meaning of the Constitution can ever change, but instead whether or not the framers were right about the specific reference-yielding facts. While the meaning and sense of the constitutional language are, as Justice Scalia insists, fixed, the reference of that language depends on particular facts that the framers might have misunderstood or that may have changed. Unfortunately, none of the Justices addressed this precise question in *Roper*, *McCreary County*, or *Van Orden*.

While the framers are fallible regarding the reference of their constitutional language, they are still extremely useful guides. As I explain later, under the Theory of Original Sinn, framers’ assessments of reference would receive the deference described in *Skidmore v. Swift & Co.* The framers’ assessments of reference,

while not controlling upon [later interpreters of the Constitution] by reason of their authority, do constitute a body of experience and informed judgment to which [later interpreters] may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident

---

17. See Gottlob Frege, *Über Sinn und Bedeutung*, 100 ZEITSCHRIFT FÜR PHILOSOPHIE UND PHILOSOPHISCHE KRITIK 25 (1892), translated in 57 PHIL. REV. 209 (1948) [hereinafter Frege, *Sense and Reference*].

in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.<sup>18</sup>

The quality of the Framers' *rationales* for thinking that the Establishment Clause allows non-coercive governmental endorsements of monotheism, or for thinking that the Eighth Amendment allows the death penalty for 17 year olds, is critical. If errors or obsolete facts were involved, their conclusions on these issues alone are not interpretively controlling. The Theory of Original Sinn therefore points to a more searching examination of the Framers' thinking than other forms of originalism would require.

Besides sense and reference, I will deploy two kindred distinctions to present my theory: John Stuart Mill's distinction between connotation and denotation<sup>19</sup> and Rudolph Carnap's distinction between intensions and extensions.<sup>20</sup> These distinctions, particularly the distinction between intension and extension, may differ slightly from the sense-reference distinction, but only in matters of detail not immediately relevant for my use of the distinctions for constitutional theory. The Theory of Original Sinn could equivalently be explained as holding to a fixed constitutional *connotation*, but evolving constitutional *denotation*, or as holding to a fixed constitutional *intension*, but evolving constitutional *extension*.

While a full defense of the use of these distinctions to analyze the Constitution would involve a full defense of the philosophical viability of the distinctions, I will here simply rely on the prestige of the distinctions and the fact that philosophers of widely differing views have found them helpful and important. Law and philosophy are both in the distinction business, and law would benefit from attention to distinctions that have survived considerable philosophical scrutiny. While that scrutiny has, to be sure, not persuaded all philosophers of the viability of the distinction between sense and reference, I leave the task of persuading holdouts to other occasions and other

---

18. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). For more on *Skidmore*, see *infra* notes 98–102 and accompanying text.

19. 1 JOHN STUART MILL, *A SYSTEM OF LOGIC* 34–41 (8th ed. 1872) (Book I, chapter ii, section 5).

20. RUDOLF CARNAP, *MEANING AND NECESSITY* § 40, at 177–78 (1947). Unlike Mill and Frege, Carnap did not invent his terminological distinction. Also, *Meaning and Necessity* does not clearly explain intensions, as I will below, as functions from possible worlds to extensions. Richard Montague credits Carnap's unpublished work as providing the germ of this idea. Richard Montague, *On the Nature of Certain Philosophical Entities*, 53 *THE MONIST* 159, 164 (1969). The basic terminology appears in Rudolf Carnap, *Replies and Systematic Expositions*, in *THE PHILOSOPHY OF RUDOLPH CARNAP* 859–1013 (Paul Arthur Schilpp ed., 1963). See *id.* at 891 (referring to “possible states of the universe of discourse” with models, rather than linguistic entities, as in earlier work).

philosophers. I come not to praise the sense–reference distinction but simply to use it, presupposing its praiseworthiness.

I will take as my interlocutors three constitutional theorists. The late Raoul Berger,<sup>21</sup> who condemned the modern Supreme Court for departing from the specific expectations of the Framers, probably comes closest among modern theorists to contending that everything should stay the same about the Constitution as it bears on constitutional law. Despite this appearance, I will argue that, if he is to make sense of simple Framer ignorance, Berger’s theory cannot really hold all of constitutional culture fixed.

Two other thinkers who promote, as I do, a partially changing, partially immutable interpretation of the Constitution are Jed Rubenfeld<sup>22</sup> and Richard Fallon.<sup>23</sup> Rubenfeld thinks constitutional interpretation should take as its anchor the original tangible paradigm cases, while original understandings of the general categories encompassing these cases can be neglected. Richard Fallon thinks that constitutional interpretation should be guided by a recognition of five different modes of constitutional argument—text, original history, precedent, structure, and policy. Fallon thinks all of these modes are legitimate and should be brought into coherence if possible, but with a ranking of modes in case of disagreement. I will argue that the Theory of Original Sinn offers a more economical and more compelling theory, particularly when we consider the possibility of factual errors by the Framers.

Finally, I will give a sketch of how the Theory of Original Sinn might be deployed to assess whether the Fourteenth Amendment forbids racially segregated public schools, interacting both with Berger’s, Rubenfeld’s, and Fallon’s arguments on the question and with Michael McConnell’s revisionary account.<sup>24</sup>

---

21. See Berger, *Reflections*, *supra* note 16.

22. See generally Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119 (1995) [hereinafter Rubenfeld, *Reading*]; Jed Rubenfeld, *On Fidelity in Constitutional Law*, 65 FORDHAM L. REV. 1469 (1997) [hereinafter Rubenfeld, *Fidelity*]; Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085 (1998) [hereinafter Rubenfeld, *Moment*]; JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001) [hereinafter RUBENFELD, *FREEDOM AND TIME*]; JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* (2005) [hereinafter RUBENFELD, *REVOLUTION*].

23. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987). Fallon builds on the similar theory set out in PHILIP BABBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

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

## II. SENSE, REFERENCE, AND THE THEORY OF ORIGINAL SINN

First I will briefly explain Frege's distinction between sense and reference and its kin. A word's Fregean referent is the tangible actual thing in the world that the word picks out, while the Fregean sense expressed in a word gives the word's cognitive value and the mode of presentation of the referent. Because the sense of a word is what is strictly conveyed and expressed by the language alone, sense is a natural touchstone for those who take constitutional language as paramount. Frege introduces sense as the manner in which language presents an object—the object's mode of presentation:

It is natural, now, to think of there being connected with a sign (name, combination of words, letter), besides that to which the sign refers, which may be called the referent of the sign, also what I would like to call the *sense* of the sign, wherein the mode of presentation is contained.<sup>25</sup>

To use an expression to pick out a particular object we must first grasp the property conveyed in the word's sense, and only then see what object has that particular property. Frege says, "A proper name (word, sign, sign combination, expression) *expresses* its sense, *refers to* or *designates* its referent. By means of a sign we express its sense and designate its referent."<sup>26</sup> While Frege does not give any algorithm for discovering or grasping sense, the existence of functioning languages shows that it is possible: "The sense of a proper name is grasped by everybody who is sufficiently familiar with the language or totality of designations to which it belongs."<sup>27</sup>

Frege's basic insight is that we can pick out an object by means of different unique properties. The same thing may have multiple informationally distinct descriptions. A fork on the northeast corner of a table may be referred to as either "the easternmost fork on this table" or "the northernmost fork on this table." Each description *picks out* the same fork. But the descriptions do not *mean* the same thing. To the question, "Is the northernmost fork the same as the easternmost fork?" Frege offers terminology for a nuanced response: the *referents* of "the northernmost fork" and "the easternmost fork" are the same, but their *senses* are different, because north does not mean east. Imagine that we have one fork in the northeast quadrant of a table with empty northwest and southeast quadrants. The rules "remove all forks on the northern half of the table" and "remove all forks on the eastern half of the table" will be two different ways to accomplish the command to remove the same fork. But the rules are obviously different. Even though the reference of "all forks on the northern half of the table" is the same as the reference of "all forks on the eastern half of the table," the senses of these two expressions are different.

---

25. Frege, *Sense and Reference*, *supra* note 17, at 210.

26. *Id.* at 214.

27. *Id.* at 210.

Frege's distinction has been enormously influential in the past century of philosophy of language.<sup>28</sup> Much of this influence is transmitted through one of Frege's last students, Rudolph Carnap, whose distinction between intension and extension is closely related to the distinction between sense and reference and represents one of its most important refinements.<sup>29</sup> Carnap's extensions are Fregean referents: actual tangible objects in the world. As standardly glossed, Carnap's intensions are functions from possible worlds to extensions, and are determined by an expression's sense.<sup>30</sup> This formulation makes particularly clear that the *facts about the world* stand in the gap between intension and extension. The same is true of the gap between sense and reference. To learn the referent of a word, we must first know its sense. The sense of an expression will determine a function from how the world is to the referent; we then plug in the way the world is and finally have our referent. In our fork example, the phrase "all forks on the eastern half of the table" will express a sense that determines a function from the set of different ways the table could be arranged to the set of particular forks on the table's eastern half. To know what "eastern half of the table" means, I must be able, given an arrangement of the table, to say whether an object is on the eastern half. To apply our command to remove the eastern-half forks, we must (a) know this function, i.e., know what "fork on the eastern half of the table" means, and (b) know what to plug into the function, i.e., know the arrangement of the table. In giving the Framers only the authority to determine sense, and hence intension, of their language, but not the authority to determine that language's reference or extension, the Theory of Original Sinn thus divides authority between the Framers and later interpreters: the Framers are in charge of setting the sense; later interpreters are in charge of assessing the reference-yielding facts.

Intensions are closely related to senses, but are not quite the same. Senses are more finely grained, and intensions less so. Intensions *supervene* on senses: that is, two expressions could not have the same sense, but express

---

28. See, e.g., *infra* note 66.

29. See Jerrold J. Katz, *The Problem in Twentieth-Century Philosophy*, 95 J. PHIL. 547, 553 (1998) ("Frege defined sense as the determiner of reference, and the subsequent Carnapian doctrine on which sense is a function from possible worlds to extensions is only a slight modification that brings Frege's definition in line with the modal expansion of the universe.").

30. See, e.g., David J. Chalmers, *On Sense and Intension*, 16 PHIL. PERSPECTIVES 135, 145 (2002) [hereinafter Chalmers, *Sense and Intension*] ("[A]n expression's sense might be seen as an *intension*: a function from possibilities to extensions. This function takes a given possibility, and associates it with an extension relative to that possibility."); William G. Lycan, *What is the "Subjectivity" of the Mental?*, 4 PHIL. PERSPECTIVES 109, 113 (1990) ("Each concept or Fregean intension can be represented in the standard way as a function from possible worlds to extensions."); Katz, *supra* note 29; see also MORRIS R. COHEN & ERNEST NAGEL, AN INTRODUCTION TO LOGIC 31 (2d ed. 1962) ("Why a term is applied to a set of objects is indicated by its intension; the set of objects to which it is applicable constitutes its extension.").

different functions from possible worlds to referents; sense determines intension.<sup>31</sup> If two words point to something different in some possible world, then they cannot have the same informational content. My theory that provisions of the Constitution have unchanging senses therefore requires that the provisions of the Constitution have unchanging intensions. But two words or expressions *could* have the same intensions but different senses; intension does not fully determine sense. For instance, “five minus two” has the same referent as “seven minus four” in every possible world, and thus the same intension, because numbers do not vary among different possible worlds. But the expressions have different senses; they have different cognitive values. Likewise, it is also plausible that two proper names might express the same intension, because there is, for instance, no possible world in which Clark Kent is not identical to Superman, but these two names represent different modes of presentation of the one man.<sup>32</sup>

Notwithstanding this distinction between sense and intension, the gap between intension and extension will be enough for my purposes. I want to assess what about the Constitution should change when the state of the world changes. Different ways in which a series of words can express the same function from possible worlds to referents—that is, cases where expressions have the same intension but different sense—will therefore not be my immediate concern. The stronger view that provisions of the Constitution have unchanging senses entails the weaker view that provisions of the Constitution have unchanging intensions. The weaker view, however, will be enough for me to distinguish and criticize other theories.

Frege’s predecessors also drew very similar distinctions. The most important in English-language philosophy was John Stuart Mill, who introduced “connotation” and “denotation” in his *A System of Logic*: “[W]henever the names given to objects convey any information, that is, whenever they properly have any meaning, the meaning resides not in what they *denote*, but in what they *connote*.”<sup>33</sup> Just as Fregean sense is the cognitive value carried by a term, Millian connotation is the information a term conveys. “[B]y learning what things it is a name of, we do not learn the meaning of the name: for to the same thing we may, with equal propriety, apply many names, not equivalent in meaning.”<sup>34</sup> Millian connotation is the “information[al]” content of an expression, which seems equivalent, at least for present purposes, to Fregean sense. The Millian denotation of an expression is, like reference and extension, the “things it is a name of.”

---

31. See COHEN & NAGEL, *supra* note 30, at 30–31.

32. See SAUL A. KRIPKE, *NAMING AND NECESSITY* (2d ed. 1980).

33. 1 MILL, *supra* note 19, at 36.

34. *Id.* at 40.

I cannot here give a full defense of the Theory of Original Sinn,<sup>35</sup> but let me give a brief initial motivation for the theory. We might be tempted to think that it is only the referents of constitutional expressions—the particular, actual tangible constitutional consequences with which we must deal—that matter. We are practical people, concerned first and foremost with tangible constitutional consequences, and life is short. If the sense is not reducible to actual, tangible constitutional consequences, why should we care about it as a constitutional matter? The core intuition is this: sense matters because it matters what the Constitution *says* about the actual, tangible constitutional consequences. Constitutional sense is critical (a) because it matters what *information the constitutional text conveys* about the constitutional consequences, (b) because it matters *under what mode of presentation* the Constitution gives us its consequences, and (c) because it matters what implications the Constitution would have for a *range* of possible worlds including, but not limited to, the actual one.

Indeed, it seems very plausible to me to say more. Our concern for the constitutional referent, as those who live under the authority of the Constitution, seems *derivative from* our concern for constitutional sense. Not only is it not the case that we care only about particular actual constitutional consequences to the *exclusion* of concern for constitutionally borne information, constitutional mode of presentation, and constitutional implications across multiple possible worlds, but our concern for particular, tangible constitutional consequences *derives from* our concern for such constitutional information and mode of presentation. We care about the constitutional referent because the Constitution, by expressing its sense, conveys information about it and *thereby* points us to it, forbidding or commanding it.

If we care about the reference, extension, and denotation of constitutional language only because we care about that language's sense, intension, and connotation, then the Theory of Original Sinn is the natural position to take. The sense of constitutional language is a sensible constitutional touchstone and

---

35. In a work in progress, I consider one way to use the Constitution's self-referring clauses (the clauses which use "this Constitution" or "here" or "now") to construct an argument that, if we agree with the Constitution's view of itself, we should think of it as a historically embodied textual assertion of authority, and that such a constitutional ontology would point toward some form of originalist textualism as the proper theory of constitutional law (if we agree with that assertion of authority). For a similar argument, produced independently of my own views, see Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127–31 (2003). "The document itself . . . appears to prescribe textualism (in some form or another) as the proper mode of interpretation and application of the Constitution by those holding office under it." *Id.* at 1128 (arguing from the Supremacy Clause). But here, I am mainly concerned to give an explanation of my view and distinguish it from other prominent theories in a way that can highlight some problems with those rivals.

compelling candidate for what we should hold fixed when time passes and the world changes. Whatever we hold fixed constitutionally as the world changes should be the sort of thing that can *take into account* differences in possible worlds, and not be subject to them: a function from possible worlds to outcomes fits the bill. Likewise, what we keep fixed in the Constitution should, in advance of knowing the facts about how the world may change, give us information about our constitutional outcomes and tell us in what guise or mode of presentation we should look for them. Connotation and sense accomplish this task.<sup>36</sup>

---

36. At this point I should acknowledge my debt, not just to the United States Supreme Court and High Court of Australia, whose statements suggesting the Theory of Original Sinn I will exposit below, but to many other contemporary thinkers about the Constitution who have hinted at a similar position. None of them, however, has rested a full-blown theory of constitutional change on the sense-reference distinction. Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 582 (1998), defend at length “a distinction between two uses of the term ‘meaning’ to diagnose the flaw in a seemingly natural line of argument leading to the proposition that constitutional interpretation must respect original practices.” At one point, they cite Frege, without much extensive deployment of the philosophy of language. *Id.* at 588–89 n.84. Michael W. McConnell criticizes *Marsh v. Chambers*, 463 U.S. 783 (1983), and “those who interpret the Constitution as if it froze into place the conclusions reached at the time of the framing about the application of constitutional principles to concrete situations.” Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 361–62 (1987). Robert Bork briefly suggests such a view in the midst of an excess of bomb-throwing rhetoric. He defends *Brown* on the ground of factual change and/or Framers error, suggesting that what is really fixed at the time of the framing is, as the Theory of Original Sinn would have it, a fact-unsaturated major premise, i.e., a function from possible worlds to outcomes. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 162–63 (1990) (“[A]ll that a judge committed to original understanding requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That major premise is the principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action. The judge must then see whether that principle or value is threatened by the statute or action challenged in the case before him. The answer to that question provides his minor premise, and the conclusion follows.”); *id.* at 82 (allowing for Framers error: “[E]quality and segregation were mutually inconsistent, though the framers did not understand that.”); see also Charles Fried, *Sonnet LXV and the “Black Ink” of the Framers’ Intention*, 100 HARV. L. REV. 751, 758 (1986) (“[I]t is the very essence of general terms that they are capable of governing particular cases not envisaged by their authors. General terms are not mere compendia of the specific instances imagined by those individuals who first enunciated them. What the miracle of language requires is that words, ideas, and concepts reach new instances.”) (footnote omitted); Patrick J. Kelley, *An Alternative Originalist Opinion for Brown v. Board of Education*, 20 S. ILL. U. L.J. 75, 76 (1995) (“[T]he intended general meaning of statutory language is not reducible to the set of specifically intended applications of that statutory language. . . . [L]egislative intent is best understood as the intent to adopt directive language with a particular general meaning and to bring about the consequences flowing from the consistent application of that general meaning in particular circumstances. Thus, although the intended general meaning is fixed by legislative action and does not thereafter change, the set of factual applications of that fixed general meaning may expand or contract with the application of the fixed general meaning to changed circumstances. New situations, unheard of at the time the statute was enacted, may

fall squarely within the fixed intended meaning.”); Gerard V. Bradley, *The Bill of Rights and Originalism*, 1992 U. ILL. L. REV. 417, 420 (“The Constitution is not a collage of photographs of early national America, much less of ancient Palestine. The Constitution is comprised of principles whose practical import changes with time—as America changes—even as the principles remain the same.”); Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. 1, 31 (1997) (expositing the theory adopted by the Australian High Court: “The distinction between connotation and denotation derives from the philosophy of John Stuart Mill, and is similar to if not equivalent to the modern distinctions between sense and reference, and intension and extension. . . . [T]he world which the word refers to; its connotation, sense or intension consists of the criteria which define it, and thereby determine its denotation.”). *But see id.* at 32 (“But in many cases the connotation/denotation distinction can be very difficult, and perhaps in some cases impossible, to apply.”). For a parallel suggestion regarding statutes, see M.B.W. Sinclair, *Legislative Intent: Fact or Fabrication?*, 41 N.Y.L. SCH. L. REV. 1329, 1358–63 (1996) (reviewing WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994), and suggesting that an emphasis on intension over extension in statutory interpretation can resolve several objections to legislative intent).

Without presenting a general theory of interpretation, Hugo Adam Bedau deploys Frege on sense and reference against Professor Berger:

[N]o general term, in or out of the Constitution, in 1789 or today, ever *means* the things to which it *refers*. For a century at least, philosophers have been explaining this lesson to all who will listen and think. [Bedau here cites Frege.] *A fortiori*, the constitutional phrase “cruel and unusual punishments” does not mean those particular punishments (whatever they all were) to which it was initially used to *refer*—or, for that matter, those to which you or I might use it to refer today. What the term does mean, to be sure, is related to certain (authentic or putative) properties of the class of things to which it refers. What are those properties? More precisely, what were they in 1789? Until we know this clearly and indisputably, we cannot claim to know what the term *means* . . . . [I]n keeping with the fact that “cruel and unusual punishments” is a general term, not a proper name or an abbreviation for a handful of definite descriptions of specific punishments, neither Berger nor anyone else can cash it in favor of an exhaustive list of all and only those punishments that in 1789 were judged by the Framers to meet this description. The “Framers and Ratifiers” chose to formulate their prohibition in general and (*pace* [member of the First Congress William L.] Smith) “indefinite” terms, and they must be presumed to have intended the semantic consequences of this act.

Hugo Adam Bedau, *Berger’s Defense of the Death Penalty: How Not to Read the Constitution*, 81 MICH. L. REV. 1152, 1161–62 (1982) (reviewing RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT’S OBSTACLE COURSE* (1982)). In reply, Berger agreed that for him, “The Founders clearly tied ‘meaning’ to ‘reference.’” Raoul Berger, *Death Penalties and Hugo Bedau: A Crusading Philosopher Goes Overboard*, 45 OHIO ST. L.J. 863, 873 (1984). For a discussion, see *infra* text accompanying notes 68–72.

My view is briefly suggested and rejected, in a Millian rather than Fregean guise, by Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1031 (1977) (“While it is true that the meaning of a term (‘connotation’) can remain constant even though the objects to which it applies (‘denotation’) may change, [here Munzer and Nickel footnote to Mill’s *A System of Logic*] this simple distinction is not helpful when new items included under a term are significantly dissimilar from those previously recognized.”).

It is also worth mentioning that E.D. Hirsch, Jr., who holds that an interpreted text has a fixed “meaning” but changing “significance,” uses Frege on sense and reference as the basis for

Let me deal here with two objections to using Frege or other philosophers of language in this way: vagueness, and the doctrine that sense determines reference.

The first objection is that Frege did not intend his analysis to apply to actual, functioning languages, but only to an *ideal* language; he did not aim to describe how words actually functioned, but only how they *might* function, if we were to eliminate a number of infelicities that infect languages like German and English. The chief idealization that Frege made was in assuming that conceptual boundaries are sharp, with no vagueness.<sup>37</sup> But actual language is vague.

I cannot give a full account here of the role of vagueness in the law. Vagueness itself has an enormous philosophical literature, and philosophers have not themselves reached any sort of consensus on what they have learned about it.<sup>38</sup> There is thus surely no prefabricated “what philosophy has learned about vagueness” that we can simply import into constitutional interpretation.

---

his distinction. See E.D. HIRSCH, JR., VALIDITY IN INTERPRETATION 242 (1967). The fact that Hirsch relies on sense and reference for his theory of interpretation suggests strongly that the Theory of Original Sinn should be compatible with a view that, as Hirsch’s does, makes the author’s intention primary. I do not have the time or space here to make clear how to reconcile my view with such intentionalism, but I believe that it can be done; the main point in such a reconciliation would be the thought that we have good reason to think that an author intends the textually expressed sense, rather than his understood reference, to bind interpreters. For a different approach, in which the author’s intent might side with reference or with sense on different occasions, see Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 357, 369 (Andrei Marmor ed., 1995) [hereinafter Alexander, *All or Nothing at All?*] (“What we want to know—given some fact situation, the authorities’ semantic understandings, the true nature of that to which their terms refer, and so on—is what they determined should be the legal effect of their action. Because the authorities’ exemplars may be inconsistent . . . with the true nature of the terms’ referents, the question is which did they intend to dominate in cases of such inconsistency. In some cases, perhaps, referents will dominate definitions and exemplars. In other cases, definitions or exemplars will dominate.”) (footnote omitted); see also *id.* at 361 n.11 (relying on a later article by Hirsch, *Counterfactuals in Interpretation*, in INTERPRETING LAW AND LITERATURE (Sanford Levinson & Steven Mailloux eds., 1988)); LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 106 (2001) [hereinafter ALEXANDER & SHERWIN, THE RULE OF RULES] (repeating the passage just quoted from *All or Nothing at All?*); *id.* at 243 n.9 (again relying on Hirsch).

37. See, e.g., Gary Kemp, *Frege’s Sharpness Requirement*, 46 PHIL. Q. 168, 168 (1996) (“[Frege] also stressed that there can be no such thing as a concept which is not, as he put it, *sharp*: for every concept and object whatsoever, either the object falls under the concept, or it falls under its contradictory. Thus only sentences whose predicates are defined for every object whatsoever as argument can be true. And that seems manifestly wrong.”).

38. See, e.g., Alphabetical Bibliography on Vagueness and the Sorites Paradox, [http://www.btinternet.com/~justin.needle/bib\\_alpha.htm](http://www.btinternet.com/~justin.needle/bib_alpha.htm) (last visited Nov. 8, 2005) (listing several hundred philosophical discussions of vagueness). For one systematic application of vagueness to the law, see generally TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW (2000).

However, a sketch of my theory of vagueness and how it might apply to the law should be helpful. We should distinguish three different phenomena related to whether an instance falls under a concept: (a) *ignorance* about where the boundaries of a concept lie; (b) *intermediacy* in the application of a concept, so that it applies only somewhat, neither applying to the instance completely nor not applying to the instance at all; and (c) *indeterminacy* about whether a concept applies to an instance, so that there is no right answer to whether the concept applies. My view of vagueness, as a general matter, is this: we can explain away the appearance of indeterminacy as a mixture of ignorance and intermediacy. Expressions might only *partially* apply to some instances, and we might not *know* whether expressions apply to particular instances, but there are no predicates for which there is *no answer* about whether, and to what extent, they apply.

Consider an instance of vagueness: how many hairs does Harry need to lose to be bald? Suppose that if he had 100,000 hairs on his head, he would clearly not be bald, and if he had none, he would clearly be bald. Imagine plucking out Harry's hair one by one: a sequence of cases from 100,000 hairs down to 0. Where is the dividing line where baldness begins? I would say that at some point, it is right to say that Harry begins to be *a little bit* bald. He goes from being not bald at all to being bald to approximately degree  $1/n$ , where  $n$  is the number of hairs in the transition stage. We do not know exactly which hair's removal would make the difference—this is where ignorance fits into my story—but this ignorance is not a problem, because the hair only marks the difference between being bald to degree 0 and being bald to degree  $1/n$  for fairly large  $n$ .

To apply my theory of vagueness to the law, we would need to decide what to do with the two phenomena to which I would reduce it: intermediacy and ignorance.

The law could recognize intermediacy, or partial constitutionality, in different ways. It is not clear what courts should do in cases where it seems that an action is only somewhat constitutional—neither fully allowed nor fully forbidden. One way to perform such baby-splitting is through the use of partial liability rules, rather than property rules.<sup>39</sup> In a case of partial constitutionality, an actor could be made to pay some cost for its actions, but not as much as in a case of fully unconstitutional behavior. Alternatively, the law might continue to draw sharp boundaries around its concepts, but recognize that the rules it implements do not precisely replicate the constitutional categories: they implement the Constitution, rather than simply

---

39. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

enforcing it.<sup>40</sup> There may be important elements, for this reason and for many others, for which constitutional *law* must go beyond constitutional *interpretation*; my concern here is chiefly with interpretation.

The second phenomenon to which I would reduce vagueness, besides intermediacy, is ignorance. Ignorance of the law is, of course, a common phenomenon. Ignorance is why we have to have lawyers and academics, and why constitutional interpretation is hard work. We should not be surprised that we are constitutionally ignorant; indeed, there would be no need for a theory of constitutional interpretation if we could always easily know the answers to interpretive questions. The historical work necessary to discern what sense was expressed by an expression can be substantial—it can be as hard as learning a foreign language. Further, it can also be hard to find out the reference-yielding facts. The Theory of Original Sinn leaves ample room for constitutional ignorance, but this fact renders the theory plausible, not useless.<sup>41</sup>

A second objection to the use of Frege in this way is his doctrine that “sense determines reference”—not that sense determines reference in conjunction with the facts, but that it determines reference full-stop, all on its own. This complaint is related to Frege’s much-discussed troubles regarding indexicals such as “here,” “now,” and “I.”<sup>42</sup> Frege claimed that the word “I” has a different sense when I use it than when you do.<sup>43</sup> We can see why this makes some sense. The word “I” surely expresses a different function from possible worlds to individuals when different people use it. Sense, for Frege, does not attach to expressions as such, but to expressions *used in a context*. But at certain points, Frege *does* seem to use Sinn to refer to the qualities of an

---

40. See generally RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001) [hereinafter FALLON, IMPLEMENTING THE CONSTITUTION]; Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) [hereinafter Fallon, *Foreword*]. I respond below to Fallon’s claims about originalism and *Brown v. Board of Education*. See *infra* text accompanying notes 252–59.

41. Ignorance chiefly points to the need for hard work, but it would also be good to have an account of constitutional presumptions that would tell us what to do when constitutional ignorance seems ineliminable. For one such account, see Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL’Y 411 (1996).

42. See John Perry, *Frege on Demonstratives*, 86 PHIL. REV. 474, 488–91 (1977); David Kaplan, *Demonstratives: An Essay on the Semantics, Logic, Metaphysics, and Epistemology of Demonstratives and Other Indexicals*, in THEMES FROM KAPLAN 481 (Joseph Almog et al. eds., 1989) [hereinafter Kaplan, *Demonstratives*]; David Kaplan, *Afterthoughts*, in THEMES FROM KAPLAN, *supra*, at 565 [hereinafter Kaplan, *Afterthoughts*].

43. Gottlob Frege, *The Thought: A Logical Inquiry*, BEITRAGE ZUE PHILOSOPHIE DES DEUTSCHEN IDEALISMUS, (1918–1919), reprinted in 65 MIND 289, 296 (1956) (“The same utterance containing the word ‘I’ will express different thoughts in the mouths of different [people], of which some may be true, others false.”).

expression as such.<sup>44</sup> Kaplan alleges that Frege confuses what Kaplan calls *content* and *character*.<sup>45</sup> Kaplan's content is essentially Carnapian intension—a function from possible worlds to individuals, or something that determines intension.<sup>46</sup> But Kaplan's character is a function from contexts of utterance to content.<sup>47</sup> So the phrase "my dog" has a certain character attached to it in virtue of the role of that expression (which is in turn determined by the roles of its constituents) in our language. When I speak the phrase "my dog," I do so in a particular context that makes clear that *I* am the one speaking, and that it is *my* dog that I am talking about. We plug that context into the character of the expression "my dog" and learn the content of that expression on that occasion—that is, a function that points to my dog (i.e., Chris Green's dog) in every possible world where I have a dog. We plug the actual world into the function and find that the expression refers to my dog.

Now, all of this is how Kaplan cleans up Frege's discussion of indexicals. Words do not always pick out referents on their own, but only given (a) a context of utterance and (b) a state of the world. From what Frege says about indexicals, it is relatively clear that Frege includes context within Sinn; the same word in different contexts produces different senses.<sup>48</sup> Some interpreters would claim that Frege also includes *the state of the world* within Sinn, so that a change in the state of the world would, like a change in context, produce a

44. See *id.* at 296–98.

45. See Kaplan, *Demonstratives*, *supra* note 42, at 501 n.26, 506–07; Kaplan, *Afterthoughts*, *supra* note 42, at 568 ("Fregean Sinn conflates elements of two quite different notions of meaning. One, which I called *character*, is close to the intuitive idea of linguistic meaning (and perhaps of cognitive content). Another, which I called *content*, is what is said or expressed by an expression in a particular context of use. The *content* of an utterance of a complete sentence is a truth-bearing proposition.").

46. See Kaplan, *Demonstratives*, *supra* note 42, at 500–05. "Just as it was convenient to represent contents by functions from possible circumstances to extensions (Carnap's intentions [sic]), so it is convenient to represent characters by functions from possible contexts to contents." *Id.* at 505.

47. See *id.* at 505–07.

48. See, e.g., Frege, *supra* note 43, at 296.

If a time indication is needed by the present tense one must know when the sentence was uttered to apprehend the thought correctly. Therefore the time of the utterance is part of the . . . thought. . . . The case is the same with words like "here" or "there". In all such cases the mere wording, as it is given in writing, is not the complete expression of the thought, but the knowledge of certain accompanying conditions of utterance, which are used as means of expressing the thought, are needed for its correct apprehension. The pointing of fingers, hand movements, glances may belong here too. The same utterance containing the word "I" will express different thoughts in the mouths of different [people], of which some may be true, others false.

*Id.*

different Sinn.<sup>49</sup> The advantage of this interpretation is that then Sinn has *everything* required to produce a referent. Sense determines reference, full-stop, no need for fussing with qualifications like “given the state of the world.”

There are at least two reasons to think, though, that Frege would not make this move, reasons why he would consider the facts of the world to be separate from sense. First, he repeatedly says that sense is what a word *expresses*.<sup>50</sup> And while it is plausible to say that a word expresses its context, merely by being uttered *in* that context, it is not plausible at all to say that a word expresses *the facts about the world* that determine what it designates. Second, Frege explicitly characterizes Sinn as the content that gets passed on *from generation to generation*.<sup>51</sup> Assuming that Frege thought that the state of the world changes, it follows that Sinn *can* be stable, changes in the reference-yielding state of the world notwithstanding.<sup>52</sup>

David Chalmers’s comments on whether sense needs the facts to determine reference, or does it all by itself, seem just right.<sup>53</sup> “Strong determination”

49. See *infra* note 53; but see Alonzo Church, Review, 8 J. SYMB. LOGIC 45, 47 (1943) (reviewing Willard V. Quine, *Notes on Existence and Necessity*, 40 J. PHIL. 113 (1943)) (“[T]o determine that two names or other expressions have the same sense it should be sufficient to understand the expressions, but to determine that two names have the same denotation it is commonly necessary to investigate the world.”).

50. See, e.g., Frege, *Sense and Reference*, *supra* note 17, at 214 (“A proper name (word, sign, sign combination, expression) *expresses* its sense . . .”).

51. See *id.* at 212 (“[T]he sign’s sense . . . may be the common property of many and therefore is not a part or a mode of the individual mind. For one can hardly deny that mankind has a common store of thoughts which is transmitted from one generation to another.”) (footnote omitted).

52. On the other hand, if Frege thought the state of the world does *not* change, perhaps because facts about the future are in some sense already in existence now, then we could rephrase talk about “changing” reference to talk about a “temporally variant” reference. Rather than saying the referent *changed* between 1868 and today, we should say that part of the referent *is located in* 1868 and part of it is located in 2004. To get the portion of the referent located in 2004, we would need the temporally uniform sense, plus the portion of the facts of the world located in 2004. In what follows, I will retain the assumption that the world changes, though it would not be difficult to translate my theory into the language of temporal variation rather than change.

53. See Chalmers, *Sense and Intension*, *supra* note 30, at 140.

We might say that sense *strongly* determines extension if sense determines extension on its own, without any further contribution from the world. In contemporary terms, we might say that sense *strongly* determines extension if any two possible expressions that have the same sense have the same extension. On this view, it seems that an expression’s extension must somehow be present at least implicitly within its sense. While there are some indications of this sort of view in Frege, this idea arguably stands in tension with the idea that sense reflects cognitive significance. For example, the two terms “the morning star” and “the evening star” have the same extension, but this sameness of extension does not seem to be implicit in the cognitive roles of the terms. It is natural to suppose that someone in a different environment might use a term with the same cognitive role but a

requires no reference-yielding facts, but “weak determination” does. Chalmers’s weak determination is what I will use to present my Theory of Original Sinn. I will proceed, then, on the assumption that Chalmers and Carnap are right, and that there is an important phenomenon, which may or may not be Fregean sense, but which determines reference only given the state of the world. I may thereby sacrifice some Fregean prestige for my position, relying only on that of Carnap, Mill, and their followers, but that seems enough to motivate us to think the distinction viable.

### III. THE THEORY OF ORIGINAL SINN AND THE COURTS

#### A. *The United States Supreme Court*

The Theory of Original Sinn is in essence an elaboration of the theory of fixed meaning and mutable application once endorsed (and never repudiated) by the Supreme Court itself. Justice Brewer, writing for the Supreme Court in 1905 in *South Carolina v. United States*, wrote:

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning.<sup>54</sup>

Through Justice Sutherland, the Court elaborated on the same idea while referring to a statute in its 1926 decision, *Missouri Pacific Railroad Co. v. United States*.<sup>55</sup> The Court appealed to the “universal law of language,” which allows that “words do not change their meaning; but the application of words

---

different extension. Similarly, it is not clear how the truth of a statement such as “There are 90 chemical elements that occur in nature” could be determined by its cognitive role alone.

Alternatively, we can say that sense *weakly determines* extension if extension is determined by sense in conjunction with the world. It is natural to suppose that the sentence just mentioned is true not just because of its sense, but because of the way the world is. Likewise, it seems plausible that a term such as “the morning star” refers to the planet Venus not just because of its sense, but because of the way the world is.

*Id.* One of the philosophers most responsible for Frege’s influence, Alonzo Church, read Fregean sense as requiring facts about the world to determine reference. See Church, *supra* note 49, at 47; Alonzo Church, Review, 7 J. SYMB. LOGIC 47, 47 (1942) (reviewing Frege, *Sense and Reference*, *supra* note 17) (“Two proper names coinciding in sense must have the same denotation—although to determine the denotation, given the sense, may require settling a question of extra-linguistic fact.”).

54. 199 U.S. 437, 448–49 (1905).

55. 271 U.S. 603 (1926).

grows and expands.”<sup>56</sup> Justice Sutherland said much the same thing about the Constitution, writing for the Court later in 1926, in *Village of Euclid, Ohio v. Ambler Realty Co.* The Court said:

[W]hile the meaning of constitutional guaranties [sic] never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. . . . [A] degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles . . . .<sup>57</sup>

The *South Carolina* and *Euclid* doctrine of constitutional change has not been invoked much recently by the Supreme Court, but it has not been repudiated.<sup>58</sup> It is instructive to note that some of the critics of *South Carolina*'s doctrine on constitutional change have explicitly embraced a theory of language that denies any room for Fregean sense, as distinct from reference. After quoting the formulation above, Jacobus tenBroek condemns it because “a word or expression possesses no intrinsic significance; the meaning of a word or expression is the thing or things to which it refers.”<sup>59</sup> He later stresses, “The

---

56. *See id.* at 607.

But it is urged that thus to construe the act of 1916 is to enlarge the authority of Congress under the land grant acts, so as to permit that body to require the land grant roads, without compensation, to perform service in addition to that embraced within the word “transportation.” It is said that railway postal cars originated after the passage of the land grant acts. But it does not follow that such cars are not fairly within the meaning of those acts as essentially incident to transportation. The provision reaches into the future, and, while its meaning does not change, its application may well embrace new conditions and new instrumentalities which come within the scope of the terms employed. This is in accordance with the universal law of language. In a sense, words do not change their meaning; but the application of words grows and expands with the growth and expansion of society.

*Id.* (citation omitted).

57. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

58. Justice Thomas was the latest Justice to invoke this doctrine, arguing in a separate opinion, “When interpreting the Free Speech and Press Clauses, we must be guided by their original meaning, for ‘[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.’” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring) (quoting *South Carolina*, 199 U.S. at 448) (alteration in original).

59. Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CAL. L. REV. 399, 415 (1939).

Now the striking thing about this statement, and most of those which are patterned after it, is not the clear view which it gives of the unadjustability of the intent theory to the fact of the changing meaning of the Constitution, but the flagrant begging of the question and subterfuge of words in which the Court indulges when seeking to force a process of constitutional development into the confines of a theory which describes it as fixed and static. The exact theoretical problem in each constitutional case is one of constitutional

meaning of terms cannot be changeless if their application is extensible because their meaning is not only determined by, but is the extent of their application.”<sup>60</sup> TenBroek’s constitutional universe contains only reference, extension, and denotation: he allows only a collection of constitutional consequences, and no textually expressed meaning that might be stable while circumstances change. He has no room for sense, intension, or connotation. Insofar as tenBroek’s position follows, as I think it does, from his rejection of any notion of the sense of a word (as distinguished from its referent), it is plain that the sense–reference distinction or its kin are critical to maintaining the view of *South Carolina*.

### B. *The High Court of Australia*

It is very interesting to add here that the High Court of Australia and other courts in Australia have been quite explicit in using Millian language to explain essentially the same theory that the United States Supreme Court set out in *South Carolina* and that I defend here. Justice Windeyer explained in 1959 in *Ex Parte Professional Engineers’ Ass’n*:

We must not, in interpreting the Constitution, restrict the denotation of its terms to the things they denoted in 1900. The denotation of words becomes enlarged as new things falling within their connotations come into existence or become known. But in the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they could have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes.<sup>61</sup>

---

meaning; namely, whether the particular matter before the Court does or does not fall within the meaning of the language used in the document. This problem cannot be solved by saying that the Constitution “embraces in its grasp all new conditions which are within the scope of the powers in terms conferred” or by urging that the powers granted apply “to all things to which they are in their nature applicable” because the precise inquiry is whether the matter before the Court is or is not “within the scope of the powers in terms conferred” or whether the powers granted are “in their nature applicable” to it. *In the progress of that inquiry, it must not be forgotten that a word or expression possesses no intrinsic significance; the meaning of a word or expression is the thing or things to which it refers.* And in deciding whether or not the new matter before the Court is a referent of a constitutional clause, that constitutional clause is being redefined and its meaning changed.

*Id.* (emphasis added). A bit later, tenBroek quotes Justice Sutherland’s comment regarding constitutional provisions: “[T]heir *meaning* is changeless; it is only their *application* which is extensible.” *Id.* at 416 (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 451 (1934) (Sutherland, J., dissenting)).

60. *Id.*

61. 107 C.L.R. 208, 267 (Austl.). A long string of other opinions have followed this language. Justice Taylor explained in 1964,

It may, no doubt, be true to say that the ordinary principles of interpretation require that constitutional provisions conferring authority upon Parliament to make laws shall bear the meaning which they had at the time of Federation but it is beyond question that, although the meaning of these terms does not change, their denotation must extend as new concepts develop.

*Lansell v. Lansell* (1964) 110 C.L.R. 353, 366 (Austl.). Justice Windeyer added in the same case, “The content of a constitutional power is determined by the connotation of the words in which it is expressed, not limited by their denotation at any particular time.” *Id.* at 370. Chief Justice Barwick noted in 1970, “I can see no reason why, whilst the connotation of the word ‘gas’ will be fixed, its denotation cannot change with changing technologies.” *Lake Macquarie Shire Council v. Aberdare County Council* (1970) 123 C.L.R. 327, 331 (Austl.). Chief Justice Barwick explained in 1972,

There are some basic propositions of constitutional construction which are beyond controversy. . . . The connotation of words employed in the Constitution does not change though changing events and attitudes may in some circumstances extend the denotation or reach of those words. These propositions are fully documented in the reported decisions of this Court which has the task of finally and authoritatively deciding both the connotation and the denotation of the language of the Constitution.

*King v. Jones* (1972) 128 C.L.R. 221, 229 (Austl.). In 1979, Chief Justice Barwick added, The full connotation of the description “trading corporation” cannot be displaced by the denotation it may have had at any past time. It is a power evidently intended to be available in circumstances current in future times. Like other descriptive expressions in the Constitution, e.g., [.] telephonic communication, the description “trading corporation” must be allowed to embrace all that may fall within it according to its natural meaning and the circumstances of the time at which a decision as to validity or constitutional power has to be made.

*The Queen v. Federal Court of Austl.; ex parte W.A. Nat’l Football League* (1979) 143 C.L.R. 190, 208 (Austl.). Judge Bignold of the Land and Environment Court of New South Wales noted in 1996, in *South Sydney City Council v. C. Maloney Pty Ltd.*:

[T]he connotation of the word in question, has, and necessarily will, remain the same. It is the denotation (or the particularisation of the referents of a word) that is held to have changed. . . . [W]hile the connotation of “hotel” has remained unchanged since 1946, its denotation has varied over time and today embraces, for example, the use of pool tables and casino/gaming machines.

*S. Sydney City Council v. C. Maloney Pty Ltd.*, (1996) No. 40199, at 14–15 (Land and Env’t Court of New S. Wales), available at <http://austlii.edu.au/au/cases/nsw/NSWLEC/1996/48.html>. Justice McHugh explained in 1999 in the case *Re Wakim; ex parte McNally*, just before quoting Justice Windeyer’s explanation from 1959, “Where the interpretation of individual words or phrases of the Constitution is in issue, the current doctrine of the Court draws a distinction between connotation and denotation or, in other words, between meaning and application.” *In re Wakim* (1999) 198 C.L.R. 511, 551 (Austl.) (McHugh, J.). Regarding this suggestion and his use of it, Justice McHugh went on to add, “Philosophers are now said to regard the distinction between connotation and denotation as outdated.” *Id.* at 552 (footnote omitted) (For my response to this comment, see *infra* note 63–67 and accompanying text.). Justice McHugh repeated much the same thing in 2001 in the case *Re Patterson*, also quoting Justice Windeyer’s explanation from 1959:

[T]he current doctrine of the Court draws a distinction between connotation and denotation or meaning and application. . . . The Constitution contains terms “intended to apply to the varying conditions which the development of our community must involve.”

A cousin of the Theory of Original Sinn is alive and well in Australia, but is not without its critics and is accompanied by some controversy. Justice Kirby noted his disagreement with the connotation–denotation distinction in *Eastman v. The Queen*, albeit without explanation.<sup>62</sup> Further, even as he cited earlier statements of the original-connotation theory, Justice McHugh commented in the case *Re Wakim*, “Philosophers are now said to regard the distinction between connotation and denotation as outdated.”<sup>63</sup> This would be an important criticism of the Theory of Original Sinn if philosophers really thought that. But this statement turns out not to be founded on any explicit work by philosophers. The source on whom Justice McHugh relies, law professor Leslie Zines, gives no argument against the sense–reference distinction, saying only, “Generally, the court has drawn a now outdated philosophical distinction between connotation and denotation.”<sup>64</sup> Zines does not elaborate on why he thinks the distinction is “outdated” and cites no philosophers or other discussions; indeed, this comment and its context have remained unchanged (and unsupported) from his treatise’s first edition in 1981 to its fourth edition in 1997.<sup>65</sup>

Do philosophers really think the connotation–denotation distinction and its kin are outdated? Obviously, I do not think so. David Chalmers offered one recent extensive defense.<sup>66</sup> However, Justice McHugh was also mistaken in

---

This Court has rarely hesitated to apply particular words and phrases to facts and circumstances that were or may have been outside the contemplation of the makers of the Constitution.

*Re Patterson*; *ex parte Taylor* (2001) 207 C.L.R. 391, 426–27, 434 (Austl.) (footnote omitted). “[A]lthough the meaning of a constitutional term remains constant, its denotation—the matters, persons or things to which it applies—may change.” *Id.* at 434. Justice McHugh noted in 2000, yet again quoting Justice Widener from 1959 and Chief Justice Barwick from 1972, “[T]he jurisprudence of this Court has traditionally drawn a distinction between the *connotation* and *denotation* of words.” *Eastman v. The Queen* (2000) 203 C.L.R. 1, 45 (Austl.) (emphases added) (footnote omitted).

62. 203 C.L.R. at 80 (“Yet the Court, looking at the constitutional words with today’s eyes, read them [in another case] so as to derive their contemporary meaning. There are many similar illustrations. They are sometimes explained by reference to the disputable philosophical distinction between the *connotation* and *denotation* of verbal meaning. I contest that distinction.”) (footnote omitted). Alas, Justice Kirby did not further explain his dissent from the connotation–denotation distinction.

63. 198 C.L.R. at 552 (citing LESLIE ZINES, *THE HIGH COURT AND THE CONSTITUTION* 16 (3d ed. 1992)).

64. LESLIE ZINES, *THE HIGH COURT AND THE CONSTITUTION* 17 (4th ed. 1997).

65. *See id.*; LESLIE ZINES, *THE HIGH COURT AND THE CONSTITUTION* 15 (1st ed. 1981).

66. *See* Chalmers, *Sense and Intension*, *supra* note 30, at 178–79 (“[A] broadly Fregean account of meaning is tenable. On this account, the notion of an epistemic intension plays the role of a Fregean notion of sense. Epistemic intensions are not the same as Fregean sense in all respects, but they are similar in many respects, and they allow versions of the core Fregean requirements on sense to be satisfied. . . . [T]here is a strong *prima facie* case that epistemic intensions exist and have the properties I have attributed to them. . . . [T]he most obvious

his suggestion that the philosophical viability of the distinction between connotation and denotation matters little to the law.<sup>67</sup> I disagree: the philosophical viability of the connotation–denotation distinction is surely decisively relevant to the law’s *use* of that distinction. If a distinction really does not work when philosophers think carefully about it in their armchairs, it will not work any better when judges think carefully about it in their chambers, as they write appellate opinions. TenBroek is right to this extent: if we really do think that there is nothing more to the meaning of a word than the collection of tangible objects it picks out, then the Euclidean view of the interpretation of an unchanging Constitution and its antipodal cousin are doomed. To be fair to Justice McHugh, perhaps the courts could fashion a *different* rationale for the application of words to circumstances outside the contemplation of the Framers, but the rationale they now use should surely be abandoned if the distinction on which it is based is philosophically flawed.

I now turn to three prominent alternative contemporary views of the nature of the Constitution, and explain how the Theory of Original Sinn improves upon them.

#### IV. BERGER: CONSTITUTIONAL STASIS?

I have already quoted two of Raoul Berger’s contentions that nothing about the Constitution should change. In fact, in response to one reviewer, Hugo Adam Bedau, who pressed Frege’s sense–reference distinction against him,<sup>68</sup> Berger claimed, “All this may be most edifying to philosophers, but . . . [t]he Founders clearly tied ‘meaning’ to ‘reference.’”<sup>69</sup> He has been explicit in

---

counterarguments can be rebutted.”). One philosopher who prominently dissents from many aspects of Frege’s philosophy of language would nevertheless retain the sense–reference distinction. *Foreword* to R.M. SAINSBURY, *DEPARTING FROM FREGE*, at i, i (2002) (“Gottlob Frege is now regarded as one of the world’s greatest philosophers and the founder of modern logic. In addition to his work on the foundations of mathematics, his writing on sense and reference remains deeply influential. *Departing from Frege* takes Frege’s work as a point of departure, but argues that we must depart considerably from Frege’s own views if we are to work towards an adequate conception of natural language. Mark Sainsbury suggests that the two aspects that are most important to retain in Frege’s work are the distinction between sense and reference, and the possibility of sense without a referent.”).

67. *See Re Wakim*, 198 C.L.R. at 552 (“But whether criticism of the distinction is or is not valid should not be seen as decisive. What is decisive is that, with perhaps only two exceptions, the Court has never hesitated to apply particular words and phrases to facts and circumstances that were or may have been outside the contemplation of the makers of the Constitution.”) (footnote omitted).

68. Bedau, *supra* note 36, at 1161 (“[N]o general term, in or out of the Constitution, in 1789 or today, ever *means* the things to which it *refers*. For a century at least, philosophers have been explaining this to all who will listen and think.”); *id.* at 1161 n.43 (citing Frege as “[t]he classic source . . .”).

69. Berger, *supra* note 36, at 872–73. To support this “identification of ‘meaning’ and ‘reference,’” Berger cites *Thomson v. Utah*, 170 U.S. 343, 350 (1898), apparently invoking this

insisting that we should allow the Framers to determine both the constitutional sense and reference.

Berger might be called a WWFD theorist. He seems to think that a simple, one-step “What Would the Framers Do?” question can be asked of the historical record to produce constitutional outcomes directly.<sup>70</sup> But he has trouble, I think, dealing with the cases in which the Theory of Original Sinn would produce different results: the cases of Framer ignorance and Framer error. Imagine that the Framers of a proportional system for states’ representation in the House all thought, incorrectly, that the population of New Jersey was bigger than that of Connecticut. Thinking this, they enact a provision: “States shall have a number of representatives in proportion to their population.” So they all *thought* that the provision they enacted would give New Jersey more representatives than Connecticut. But once the relevant later-in-time interpreters conduct a census and discover their mistake, no one would say that the effect of the provision should be to give New Jersey more representatives, Connecticut’s larger population notwithstanding. Obviously, the Framers would all have been wrong at the time of the framing about the tangible consequences of the provision, but they would change their minds when they found out the facts. They would think that their provision fixed not actual imagined numbers of representatives, but a function from the relative populations to numbers of representatives. Had the Framers wanted to give New Jersey twice the representatives that Connecticut had, they could have simply said, “New Jersey shall have twice the number of representatives as Connecticut.” *That* provision would express a function from possible worlds to constitutional outcomes that would not depend on population. But if the provision mentions relative populations, then relative populations obviously have to control the outcome, Framers’ expectations to the contrary notwithstanding. We obviously cannot allow those sorts of errors to bind us as later interpreters.

Knowing that the Framers were ignorant of certain facts about the world, or might have made certain factual errors about the world, we have to modify

---

statement: “It must consequently be taken that the word ‘jury’ and the words ‘trial by jury’ were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument . . .” *See id.* at 869 n. 60; *see also Thompson*, 170 U.S. at 350.

70. For two commentators assuming that originalism is always such an approach, see Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884–85 (1995) (“For an originalist to believe that the Fourteenth Amendment forbade school segregation, it would seem necessary to show, roughly speaking, that a majority of state legislators in a supermajority of the states supported that position at the time of ratification.”), and Robert Justin Lipkin, *Beyond Skepticism, Foundationalism, and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811, 829 n.67 (1990) (“[O]riginalism is essentially an historicist methodology. It asks what the actual historical actors would choose.”).

our “What would the Framers do?” question. Instead we must ask, “What would the Framers do, *if they had the facts right?*” But which facts? If we allow all facts on which we might disagree with the Framers, including our substantive views on political morality, the WWFD question reduces to: “What would the Framers do, if they agreed with us about everything?”—that is, to: “What would we do?” And we do not need a constitution to tell us *that*.

But any attempt to cabin the scope of the relevance of Framer error or ignorance will amount to a theory of constitutional change. Filling in the X for “What would the Framers do, if they agreed with us about X?” will tell us which attributes of the Constitution are subject to change and which are not. The factors falling outside X are fixed, but those related to X are not. If we are required to correct *some* of the Framers’ errors, we need to know which ones. To the extent that it refuses to acknowledge *any* change pertaining to the Constitution, Berger’s theory will not tell us which Framer errors we need to correct, or which gaps in knowledge we need to fill.

Put another way, Berger’s emphasis on the tangible examples considered by the enactors of the Constitution does not tell us how to proceed to additional cases. There must be *some* features of the originally considered cases that are not essential to the constitutional meaning. For instance, for all of the original applications of the Fourteenth Amendment envisioned by its Framers, it is true that they *involve laws and persons that existed between 1866 and 1868*. But *that* cannot be an essential property of such applications. Without presenting a theory of how to pick among new cases lacking properties possessed by all of the originally imagined referents of a provision, Berger’s theory simply fails to be any kind of theory of an enduring Constitution. It is instead a theory of a Constitution of individual past instances, not a theory of a Constitution of categories with enduring contemporary significance.

Further, as will become clearer below, when I turn to the issue of racial school segregation, Berger in his actual work derives beliefs about the Fourteenth Amendment too quickly from the Framers’ contemporary practice. We must be wary of committing the same mistake that Chief Justice Taney made in *Dred Scott*:<sup>71</sup> assuming perfect cognitive coherence in the Framers. In his argument that the Declaration of Independence *must* have excluded black people from its language, because of the existence of other actions by its authors inconsistent with thinking that “*all men*,” black men included, are “created equal,” Taney said, “[T]he men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting.”<sup>72</sup> Alas, we are all eminently capable of asserting principles inconsistent with our actions. And it is a good thing, too, as our actions are

---

71. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

72. *Id.* at 410.

frequently the wrong ones, and we at least want our principles to be the right ones. If hypocrisy is the tribute that vice pays to virtue, it is a tribute worth paying. The possibility of a separation between principles and action allows us to think in a principled way about how we act and commit ourselves to principles that we later work into practice, rather than having to reform our actions first, and only *then* assert our principles. To be sure, if we see someone doing X, of course we have a reason to think that he does not believe X is wrong (or unconstitutional). But the reason is defeasible and frequently defeated.

It is likewise important to keep in mind the possibility that the Framers, if asked a question, would not have had a belief either way. We surely have the power to sincerely enunciate and endorse principles that we know are inconsistent with our other actions. That is, we can be consciously akratic. And it is even more obvious that we have the power to sincerely enunciate and endorse principles that, for all we know, *might* be inconsistent with our other actions. We can commit ourselves in ways the consistency of which, with our present practices, we are not at all sure about.

In sum, when we speak to the Framers and ask “Is X constitutional?” questions, we must (a) be prepared for Framers ignorance, i.e., allow Framers to mark “don’t know” as well as “yes” or “no”; and (b) in cases where we can get a yes or no, get a reason *why*, a reasoned explanation, not just a yes or no. I will apply these lessons to the issue of racial segregation of public schools below.

## V. RUBENFELD AND PARADIGM CASES

Unlike Berger, Rubenfeld takes as his fixed point merely the *central* cases—the paradigm cases—that motivated the Framers.<sup>73</sup> But even though

---

73. See Rubenfeld, *Moment*, *supra* note 22, at 1107 (“The meaning of a constitutional right is forever anchored by these core or paradigm cases. By building doctrine around a provision’s paradigm cases, interpretation will preserve the core historical meaning of a constitutional commitment, without reducing constitutional meaning to the will of any particular moment, past or present. Such paradigm cases give constitutional law its interpretive anchor and its root in the nation’s history . . . .”); see also Rubenfeld, *Reading*, *supra* note 22, at 1170 (“Paradigm cases form the spine of interpretation on the model of writing.”); *id.* at 1172 (“[F]idelity to paradigm cases is the means by which constitutional interpretation remains interpretation, rather than an exercise in rewriting. It is the constraint that preserves a commitment’s core identity over time. So long as interpretation takes its shape from the paradigm cases, constitutional law will remain an interpretation of the commitments the people undertook, even though such law neither conforms nor purports to conform with popular will at any time in the nation’s history or future.”); Rubenfeld, *Fidelity*, *supra* note 22, at 1487 (“Let us . . . look at the Constitution as a set of written political commitments whose definitive structure is and always remains given by what those who fought for the constitutional commitment fought most centrally to accomplish.”); *id.* at 1485 (“What keeps the interpretation of a constitutional commitment anchored as interpretation of this nation’s commitment (rather than what the same guarantee might mean in the life of some

his deference to the Framers' views about the constitutional referent is more limited than is Berger's, Rubinfeld's paradigm-case method is subject to essentially the same criticisms regarding Framers' ignorance and mistakes that I made of Berger.

Suppose that everyone in Congress thinks that North Korea possesses nuclear weapons and certain sorts of dangerous intercontinental missiles. The Congress passes a resolution: "The President may use force against any country possessing nuclear weapons and intercontinental missiles capable of striking American soil." The motivating paradigm case, everyone agrees, is North Korea. But suppose that we then learn that everyone in Congress was *wrong* about North Korea's capabilities—in fact, the appearances of nuclear weapons and intercontinental-missile programs were the result of a slick public relations campaign and scientists who lied to superiors in order to keep their jobs.

Obviously, if the authorization of force were written this way, it would not apply to North Korea, despite the fact that it is the paradigm, motivating case. Of course, if Congress authorized the President to "use force against North Korea," it would still apply to North Korea, even if that authorization were predicated on a mistake. But not if the authorization explicitly applies only to the countries with the characteristics Congress *thought* North Korea had. The choice of language is a choice about what sorts of changes should make a difference to the set of future applications. The sense of this provision would concern the informational content related to nuclear weapons and intercontinental missiles. The intension of the provision is a function from worlds to the countries in those worlds that possess nuclear weapons and intercontinental missiles capable of striking American soil, and *that* function does not yield North Korea when the actual world is plugged into it. It seems plain that the originally intended referent should give way whenever it conflicts with the originally intended sense, applied to the actual facts.

Rubinfeld has considered this sort of example, in which constitutional Framers have the facts wrong about their paradigm case.<sup>74</sup> But his rejoinder

---

other nation) are the paradigm cases."); *id.* at 1486 ("So long as interpretation adheres to the paradigm cases, so long as it takes its shape from them, it will remain recognizable as the interpretation of the principles to which the nation committed itself—rather than as creations of, or evolutions into, brand new ones."); RUBINFELD, *REVOLUTION*, *supra* note 22, at 118 ("Because of the distinction it draws between . . . Application and No-Application Understandings, the paradigm-case approach to the meaning of [a] commitment differs sharply from an originalist approach, which would take all of [the Framers'] original intentions as equally conclusive.").

74. See RUBINFELD, *REVOLUTION*, *supra* note 22, at 125–26 ("Say I have committed myself to eating no more unhealthy food. At the time I made this commitment, there was one particular dish I meant to put off the table: chicken-fried steak. In other words, I had an original Application Understanding that chicken-fried steak was unhealthy and that my new commitment required me to abstain from it. . . . But science proves me wrong. Chicken-fried steak, it turns

seems quite inadequate, and in a way that points toward the Theory of Original Sinn as the proper response. According to Rubinfeld, in the case of a mistake by the Framers about the facts regarding the paradigm case, we can still take the paradigm case as foundational, “taking the facts of the [paradigm] case as they were (mistakenly) taken at the time [of the framing].”<sup>75</sup> But what does this mean? One way of reading the phrase suggests that we should *abandon* our disagreement with the Framers, and adhere to the paradigm case anyway. That cannot be what Rubinfeld means. But, just as Berger faced a multiplicity of possible modifications of the “What would the Framers do?” question, Rubinfeld’s theory is incomplete if he means we should modify the Framers’ view of the paradigm case to some extent in order to find our fixed point. The Theory of Original Sinn would say that we should hold as fixed, not the paradigm case itself, but a *function from possible worlds to cases* which, when added to the Framers’ view of the state of the world, would yield the Framers’ paradigm case.

The paradigm case is only as fixed as the Framers’ factual assessments are reliable. Certainly, it would be an exceedingly odd situation in which such widespread error infects the Framers. Those who enacted the Fourteenth Amendment, for instance, thought it would prevent certain discriminatory legislation in the South, the Black Codes, and there is no reason to think that the enactors were ignorant in any relevant way about the facts that would cause their language to be applied to prohibit the Black Codes. Were we to learn, for instance, that a proposed interpretation of the Fourteenth Amendment would not, in some way, given the facts as the Reconstruction Congress saw them, cover the Black Codes then prevalent, it would therefore surely be a fatal objection to that interpretation. It is simply incredible, in *that* context, to imagine that the Framers were all wrong about the application and reference of their words. But if widespread error by the Framers is *possible*—and it surely is—our theoretical apparatus needs to account for those cases too.

I share Rubinfeld’s inclination to make the original referents—the original paradigm cases—as fixed as they can be, within the constraints that possible Framers’ error set for us. The way to do that, though, is to make the sense of a provision *fully* fixed. If both the sense of a provision *and* the relevant facts could change, then the constitutional referent would be even more malleable

---

out, helps build strong bodies twelve ways. . . . Doesn’t this simple example prove that Application Understandings can be as erroneous as No-Application Understandings?”).

75. *Id.* at 129. “[N]otwithstanding the health-food story, there remains a sense in which original core Application Understandings *cannot be mistaken.*” *Id.* at 127 (emphasis added). Rubinfeld imagines that the First Amendment framers were mistaken about a paradigm case involving John Peter Zenger. *See id.* at 128–29. He says that, after finding out that the Framers were mistaken about the paradigm case, “judges can and should continue enforcing the foundational Application Understanding, taking the facts of the Zenger case as they were (mistakenly) taken at the time.” *Id.*

than it must be, merely because of the possibility of Framer error. Maintaining paradigm cases whenever that is possible in light of the facts means maintaining the original sense in all circumstances. That is, Rubinfeld's attachment to paradigm cases, leavened with the possibility of Framer error, should push us toward the Theory of Original Sinn. Only the text can answer what *sorts* of errors should cause us to abandon adherence to the paradigm case, for only the sense expressed in that text determines which facts are the reference-yielding facts. The text does not merely pick out a particular paradigm case; it does so *for a reason*, stated in the text, whose sense is binding on other cases too.

Rubinfeld says that the paradigm case adds something that the text alone lacks: the commitment was not to particular forbidden categories, but to the tangible evils falling under those categories.<sup>76</sup> The Theory of Original Sinn would agree that the Fourteenth Amendment is a commitment both to its textually expressed constitutional sense, and to its fact-dependent constitutional referent. However, the paradigm case requires facts to hold in order to *be* the paradigm case. The facts that cause the Fourteenth Amendment's text to refer to the Black Codes are to be adhered to because they are *true*, not because they help us get to the paradigm case.

But if we really take seriously that the original sense of the constitutional text is fixed, and that it is the true unchanging foundation both for the paradigm case and for other cases, then we must discard an aspect of Rubinfeld's theory that he clearly thinks is critical: succeeding generations' interpretive liberty to craft and enforce additional, different principles that will cover the paradigm case.<sup>77</sup> The Theory of Original Sinn, though, denies the existence of that liberty. Later generations only have the liberty to assess the state of the world: to plug the actual world into the constitutional intensional function. The function itself is fixed beyond the ability of later interpreters to add or subtract. As interpreters, we can only decide what to *put into* the function; that is, we can decide what possible world we inhabit. But Rubinfeld

---

76. *Id.* at 134 (“[T]he Fourteenth Amendment is not merely a general commitment to the equal protection of the laws, the privileges and immunities of citizens, and so on. The Fourteenth Amendment committed the nation, at a minimum, not to tolerate black codes of the kind passed by numerous Southern states in the wake of the Civil War. Interpretation of the Fourteenth Amendment begins with this fact about its meaning. Any posited interpretation of the Fourteenth Amendment that knocks out that foundational paradigm case is to be rejected for that reason alone.”).

77. See Rubinfeld, *Reading, supra* note 22, at 1172 (“There is a floor, but no ceiling. The core prohibitions must be honored, but later courts are free (indeed required) to consider whether a right also entails additional prohibitions apart from or contrary to the original understanding. Indeed there is even a kind of internal pressure toward expansion. The judiciary's task is to generalize: to formulate and apply general principles or rules of application capturing the paradigm cases.”).

argues otherwise, insisting that we can always consider cases other than the paradigm with *no* deference to the Framers.<sup>78</sup>

Rubinfeld is emphatic in rejecting an approach like that of Robert Bork, who in defending *Brown v. Board of Education* explains that he aims to derive merely a major premise from history, to be filled in with a factual minor premise.<sup>79</sup> Rubinfeld's cardinal principle of interpretation is that "constitutional provisions are *not* to be interpreted merely as expressions of the democratic will of the ratifying moment, if there was such a will, whether this will is rendered in terms of specific 'original intentions' or more general 'original purposes.'"<sup>80</sup> He therefore has denied that paradigm cases can be understood as the Theory of Original Sinn would understand them: as the result of inserting the Framers' understood facts into a fixed constitutional intensional function from facts to outcomes.<sup>81</sup> He has rejected any sort of fixed point that is expressed, as is the constitutional sense, in the Constitutional text.<sup>82</sup> Rubinfeld insists that his constitutional results do not flow from the Framers' use of textual expressions that they selected at the time of the framing; they flow from our own work in developing governing principles. As long as we retain the paradigm case, he says, that is enough security that we have kept faith with the actual Constitution.<sup>83</sup> Contrary to the Theory of Original Sinn, Rubinfeld insists that adherence to the paradigm case only out of obedience to an authoritative, unchanging Constitutional text would be undemocratic.<sup>84</sup>

---

78. See RUBINFELD, FREEDOM AND TIME, *supra* note 22, at 194 ("No matter how widely held, no matter how intensely felt, the original understanding that the Fourteenth Amendment permitted racial segregation deserves *no* interpretive deference. The foundational paradigm cases of a constitutional right are absolute, but what *else* it prohibits is *always* a matter of interpretation, reserved for the future to decide.") (first and second emphases added).

79. See *id.* at 183. For Judge Bork's general defense of *Brown*, see BORK, *supra* note 36, at 81–83.

80. RUBINFELD, FREEDOM AND TIME, *supra* note 22, at 183.

81. See Rubinfeld, *Moment*, *supra* note 22, at 1107.

82. See *id.* ("A Justice determined to read the Constitution as written, and not as a vehicle for popular voice, [i.e., a Justice acting as Rubinfeld would prefer] could not be an originalist—at least not as originalism is currently understood. He could neither defer to the sum of the Founders' specific intentions, nor could he try, as today's 'soft' originalists do, to translate into present realities the Founders' more general objectives and purposes, because both of these strategies are means of interpreting the Constitution in accordance with the voice of a particular historical moment.")

83. See Rubinfeld, *Reading*, *supra* note 22, at 1172 ("So long as interpretation takes its shape from the paradigm cases, constitutional law will remain an interpretation of *the* commitments the people undertook, even though such law neither conforms nor purports to conform with popular will at any time in the nation's history or future.") (emphasis added).

84. See Rubinfeld, *Fidelity*, *supra* note 22, at 1483–84 ("[I]nterpretation cannot be wholly reduced to the original will or intentions, for then it would have privileged a single moment of democratic will and thereby contradicted its fundamental premise, which is that self-government

As noted, in response to criticisms about Framers errors regarding paradigm cases, Rubinfeld has, in his most recent work, backed away from the idea that paradigm cases are absolutely fixed, because the Framers can get the facts that stand between the text and the paradigm case wrong.<sup>85</sup> But in earlier work, he mocked the idea that we can correct the Framers' factual errors. Defending *Brown* on originalist grounds (or rather, defending originalism from the *Brown* counterexample), Robert Bork suggested that "equality and segregation were mutually inconsistent, though the [Framers] did not understand that."<sup>86</sup> Rubinfeld's response is mockery.<sup>87</sup> Now, of course, anyone can say that the death penalty really is cruel. But *showing* its cruelty is an entirely different matter. The Framers assumed three times in the Fifth Amendment that capital punishment would be practiced: (a) in referring to "capital or otherwise infamous crime," (b) in referring to those put "in jeopardy of life," and (c) in referring to those "deprived of life . . . without due process of law."<sup>88</sup> Perhaps originalists have been a little too quick in assuming that the Framers were *right* in the assumption they presumably made that the capital punishment thrice presupposed by the Fifth Amendment was consistent with the simultaneously enacted Eighth Amendment.<sup>89</sup> And perhaps Bork is a little too quick in assuming that the Framers were *wrong* in the assumption about equality and

---

must never be reduced to government in accordance with the will of the governed at any particular time.").

85. See RUBINFELD, *REVOLUTION*, *supra* note 22, at 125–27.

86. BORK, *supra* note 36, at 82.

87. See RUBINFELD, *FREEDOM AND TIME*, *supra* note 22, at 179 ("[I]f this general-purpose originalism rescues *Brown*, it surrenders all the results originalists demand elsewhere in constitutional law. Originalists have insisted a thousand times that the Constitution was never intended to forbid the death penalty. But a general-purpose originalist could simply say, quoting Bork, that the death penalty and abolishing cruel and unusual punishment were 'mutually inconsistent, though the framers did not understand that.' . . . Even a Marxist judge could now be an originalist: 'equality and [private property] were mutually inconsistent, though the framers did not understand that' either.") (alteration in original) (footnote omitted).

88. U.S. CONST. amend. V (emphasis added). The full context:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Id.*

89. But only a little bit, I think. The remaining work would require a theory of the sense attached to "cruel and unusual" as used in the Eighth Amendment. Though I have not had the opportunity to review the literature in any detail, here is one theory that seems plausible to me: the Eighth Amendment bars extreme corporal punishment, that is, punishment intending to cause a lot of pain. That is what "cruel" suggests to my mind, and I suspect it suggested the same thing to the Framers too. However, I would need to do a bit of work to verify the point.

segregation; certainly, a fuller explanation of exactly why they were wrong is important (and, of course, of great use in deciding other cases). I will consider these criticisms in more detail below. But Bork's basic point, which Rubenfeld disparages in a manner inconsistent with his treatment of the chicken-fried steak counterexample, is merely that as interpreters we must somehow be capable of identifying and taking account of Framer error. No one but the most extreme skeptic about our ability to make sense of the world would deny *that*, surely. Indeed, Rubenfeld has conceded as much in his discussions of Framer error regarding a paradigm case.<sup>90</sup>

Rubenfeld contends that his approach to considering the possibility of Framer error is somehow less dangerous than an approach, like the Theory of Original Sinn, which understands the text to fix the level of generality to which we should be unalterably attached. He says: "The higher-level-of-generality view—emasculating the core Application Understandings—would in principle free judges to ignore, if they chose, every constitutional provision's foundational paradigm cases."<sup>91</sup> This does not seem right at all. Only if an interpreter makes a compelling claim of factual error can he do this; he cannot merely "choose" to find the relevant factual error. And he has the same fact-finding liberty under Rubenfeld's views. We can make factual mistakes today, to be sure, but as long as we allow the theoretical possibility of Framer error, as Rubenfeld now does, it is simply impossible to make our paradigm cases any firmer than the reference-yielding facts. Only by "emasculating" the reference-yielding facts can we emasculate the core paradigm cases. Our quest for certainty may be fruitless, but I would regard our ability to assess facts as sufficiently sturdy to give us the security we crave against constitutional erosion. Even on Rubenfeld's theory, though, that ability to assess facts is an essential part of all the security we *have*.

The relative reliability of Framers' assessments of facts, on which the Theory of Original Sinn says that the stability of paradigm cases rests, explains a fundamental fact on which Rubenfeld relies: the fact that "intentions to permit"—i.e., Framer expectations about what their provision would *not* do—are not given the attention and deference given to "intentions to prohibit"—i.e., Framer expectations about what their provision *would* do.<sup>92</sup> A simple reason for that disparity is available to the Theory of Original Sinn: the fact that the

---

90. RUBENFELD, *REVOLUTION*, *supra* note 22, at 125–27.

91. *Id.* at 134.

92. Rubenfeld, *Reading*, *supra* note 22, at 1171 ("Interpretation of constitutional guarantees [of rights] on the model of writing takes its shape from what the Founders understood these guarantees centrally to *forbid*; it accords little or no deference to what they intended them to *permit*."); *id.* at 1172 ("[D]istinguishing between intent-to-prohibit and intent-to-permit . . . introduces an interpretive asymmetry favoring expansion. There is a floor, but no ceiling. The core prohibitions must be honored, but later courts are free (indeed required) to consider whether a right also entails additional prohibitions apart from or contrary to the original understanding.").

Framers were more reliable in their factual assessments of motivating cases simply because they thought more extensively about them than they did about expected areas of non-application. Courts' unconsidered dicta are less persuasive than holdings, precisely because they are less carefully considered. Likewise, what the Framers thought about whether the Fourteenth Amendment would apply to prohibit explicit racial disparities in the availability of contract law is worthy of great, even conclusive, deference. But what the Framers thought about whether the Fourteenth Amendment would apply, say, to protect the free speech rights of corporations against state interference is less obviously binding on us—simply because the Framers were less obviously right about the facts that would, together with the sense of their language, yield the constitutional referent in that case.

Rubinfeld is right that there is a distinction between intentions to prohibit, which motivated a prohibition, and intentions to permit, which did not. But he is incorrect to declare confidently the inability of other theories to accommodate the distinction, and he is also mistaken to draw the distinction so sharply, to an extent that he unduly disparages the Framers' views about what lay outside the constitutional referent. Just as the distinction between holding and dicta explains why intentions to permit have *lesser* weight, it explains why they should have *some* weight: the weight of dicta. "Considered dicta" are properly given substantial, even controlling, weight,<sup>93</sup> and we should likewise

---

93. See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399, 405 (1998) ("The great body of this case law supports, either by holding or considered dicta, the position that the privilege does survive in a case such as the present one."); *Covington v. Cont'l Gen. Tire*, 381 F.3d 216, 218 (3d Cir. 2004) ("In carrying out that task [of predicting state law], we must consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.") (quoting *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1046 (3d Cir. 1993)); *Kennedy Bldg. Assocs. v. Viacom, Inc.*, 375 F.3d 731, 738 (8th Cir. 2004) (prediction of state law looks at "related state court precedents, analogous decisions, considered dicta, and other reliable sources") (quoting *Union Pac. R.R. v. Reilly Indus., Inc.*, 215 F.3d 830, 840 (8th Cir. 2000)); *McCleod v. Hartford Life & Accident Ins. Co.*, 372 F.3d 618, 628 (3rd Cir. 2004) ("While this statement is dicta, it was considered dicta, which we find persuasive."); *McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128, 1132 (9th Cir. 2004) (noting that "we have often stated, '[w]e do not treat considered dicta from the Supreme Court lightly,'" but "treat such dicta with 'due deference'" (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc)); *Johnson v. Life Investors' Ins. Co. of Am.*, 98 Fed. Appx. 814, 819 (10th Cir. 2004) ("[I]n making a prognostication of what the highest state court will decide, the decisions of lower state courts and other federal courts are of 'somewhat less importance' than even considered dicta by the state's 'highest court.'" (quoting *Florom v. Elliott Mfg.*, 867 F.2d 570, 580 (10th Cir. 1989)); *Rossiter v. Potter*, 357 F.3d 26, 31 n.3 (1st Cir. 2004) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings . . .") (quoting *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991)); *United States v. Santana*, 6 F.3d 1, 9 (1st Cir. 1993) ("Carefully considered statements of the Supreme Court, even if technically dictum, must be accorded great weight and should be treated

treat with deference carefully reasoned opinions about what a constitutional provision would not cover.

## VI. FALLON AND CONSTITUTIONAL MODES

Richard Fallon's theory considers modes of constitutional discourse pertaining to (1) the constitutional text, (2) the intent of the constitutional Framers, (3) constitutional theory, (4) judicial precedent, and (5) justice or social policy.<sup>94</sup> He sets as his aim "show[ing] how arguments of these various kinds fit together in a single, coherent constitutional calculus."<sup>95</sup> His answer is to aim for coherence among the modes, and rank them hierarchically when that is impossible.<sup>96</sup>

I think, however, that the Theory of Original Sinn can accommodate the reconciliation that Fallon seeks more simply and without the undesirable rigidity of his theory. I build on my comments about how to approach and evaluate the *Framers'* views on paradigm and peripheral cases: the same thing can be said of *anyone's* assessment of the constitutional referent. To determine how worthy an interpreter's assessment of constitutional reference is of deference, we should consider (a) the extent to which the interpreter is likely to have properly grasped the constitutional sense, and (b) the extent to which the interpreter is likely to be right about the constitutional-reference-yielding facts. We should then assimilate Framers' and later interpreters' judgments of constitutional reference, and we should evaluate both sorts of judgment according to these same two criteria. Indeed, we should also evaluate non-judicial, or non-federal, or non-governmental, assessments of reference by the

---

as authoritative when, as in this instance, badges of reliability abound. . . . '[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings . . .'" (quoting *McCoy*, 950 F.2d at 13, 19); *Montano v. Allstate Indem. Co.*, 68 P.3d 936, 945 (N.M. Ct. App. 2003) ("To the extent the statement is considered dicta, we have been admonished to give such dicta 'adequate deference and not disregard it summarily.'" (quoting *State v. Johnson*, 15 P.3d 1233, 1239 (N.M. 2000))).

94. Fallon, *supra* note 23, at 1189–90. For a similar approach, see BOBBITT, *supra* note 23.

95. *Id.* at 1190.

96. *Id.* at 1286.

The solution, which I call constructive coherence theory, has two aspects. The first relies on the central conceptual idea of constructivist coherence: the notion that the various types of argument function not autonomously but interactively. The constructivist coherence approach assumes that, even when a tentative assessment of arguments within various categories suggests a conflict among prescribed results, the balance of competing arguments frequently can be reconsidered in a successful effort to achieve a uniform prescription. Sometimes, however, the strongest arguments within the different categories will point irreversibly to different conclusions. In such cases, the theory's second aspect comes into play. The implicit norms of our constitutional practice, I have argued, require that the claims of the different kinds of arguments be ranked hierarchically.

*Id.*

same criteria. The Theory of Original Sinn includes only *two* modes of interpretive constitutional discourse, separated by a distinction that, while not completely free from doubt or criticism, has proven itself against extended philosophical scrutiny. On the one hand is the constitutional sense, which should be unchanging and fixed at the framing. But on the other hand is a tradition of assessments of constitutional reference, all of which can be seen as essentially the same mode.

Both original history and precedent represent assessments of reference. Rather than establishing a hierarchy and preferring one mode over the other in cases of conflict, we should recognize that it is possible for either of them to trump the other in an appropriate case. Sometimes the Framers get the reference-yielding facts wrong, and later interpreters get it right, but sometimes later interpreters make errors that the Framers avoided. According to Fallon's hierarchy, if the views of Framers and later interpreters on the constitutional referent are irreconcilable, we should always and everywhere prefer the Framers.<sup>97</sup> But cases of Framer error discussed above show why that cannot be right.

Furthermore, recognizing this parity of Framers and courts in the assessment of reference can allow us to expand the category so that it is not so focused on the Supreme Court. The presumption of constitutionality, for instance, represents deference to legislative assessments of constitutional reference. Lower court decisions, state court interpretations of parallel provisions, and non-governmental materials like law reviews and treatises can be helpful for the same reasons that precedent and the Framers' expectations are useful: they represent the views of those with an ability to grasp constitutional sense and make judgments about reference-yielding facts about the world.

All of these sources should receive the same treatment: they are all persuasive but defeasible indications of the constitutional referent. *All* earlier assessments of constitutional reference deserve the sort of deference the Supreme Court described (referring to certain agency decisions) in *Skidmore*. I quoted the critical language above, but let me repeat it here for convenience. Such assessments of constitutional reference,

while not controlling upon [later interpreters of the Constitution] by reason of their authority, do constitute a body of experience and informed judgment to which [later interpreters] may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and

---

97. *See id.* at 1193–94.

later pronouncements, and all those factors which give it power to persuade, if lacking power to control.<sup>98</sup>

Indeed, it is not difficult to find expressions of exactly this *Skidmore*-style attitude—persuasive, but defeasible—toward various assessments of constitutional reference.

For judicial precedent, consider *Payne v. Tennessee*: “*Stare decisis* is the preferred course,” the Court says, but is not constraining “when governing decisions are unworkable or are badly reasoned,” and it “is not an inexorable command . . . . This is particularly true in constitutional cases.”<sup>99</sup>

For original intentions as expressed, for instance, in the *Federalist*, consider *McCulloch v. Maryland*:

In the course of the argument, the *Federalist* has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and, to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed.<sup>100</sup>

For legislative interpretations, consider *Myers v. United States*: “We have devoted much space to this discussion and decision of the question of the Presidential power of removal in the First Congress, not because a Congressional conclusion on a constitutional issue is conclusive, but, first because of our agreement with the reasons upon which it was avowedly based . . . .”<sup>101</sup>

---

98. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (setting a standard for deference to agencies’ statutory interpretations when a statute does not delegate authority to the agency). On *Skidmore* deference as a model for constitutional interpretation, see Kesavan & Paulsen, *supra* note 35, at 1149 & n.129 (referring to *Skidmore* in explaining the relevance of sources of evidence of constitutional meaning that are “certainly relevant and possibly persuasive sources of constitutional meaning, but that . . . are not authoritative and hence not conclusive. They are evidence of meaning; they are not *constitutive* of meaning, and hence binding determinations of meaning in their own right.”).

99. 501 U.S. 808, 827–28 (1991).

100. 17 U.S. (4 Wheat.) 316, 433 (1819); cf. John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1339 (1998) (“[T]he principled textualist must also ask whether a given essay, examined in light of all the surrounding contextual evidence, offers a *persuasive* account of likely constitutional meaning. To borrow from another context, when a textualist judge relies on *The Federalist* in constitutional adjudication, he or she must give serious attention to ‘the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control.’” (quoting *Skidmore*, 323 U.S. at 140)).

101. 272 U.S. 52, 136 (1926).

For all of these examples of earlier interpreters' assessments of constitutional reference, then, we must retain, in the words of *McCulloch*, a "right to judge of their correctness."<sup>102</sup> But the same, of course, cannot be said regarding the sense, intension, or connotation of our constitutional provisions. In our role as interpreters of a constitutional provision that already exists, has already been enacted, and to which we may already have sworn allegiance, we do *not* retain the right to judge of the correctness of the rules expressed by the provision itself.

Fallon's "policy" and "theory" modes are most usefully thought of the same way. Given that the Framers and we are part of the same tradition of moral and political thought, our own normative judgments about what the constitutional outcome *should* be, or about what would fit best with the theoretical or structural concerns of the Constitution, are defeasible indications of what sorts of outcomes a constitutional provision would be *likely* to produce. If an outcome seems undesirable, odd, or unattractive to us, we have reason to believe that it would have seemed undesirable or odd or unattractive to the Framers, and so reason to believe that it does not fit with the unchanging sense, applied to the facts about the world. Of course, that reason is defeasible, like all other explicit or implicit judgments about constitutional reference.

#### VII. APPLICATION: THE FOURTEENTH AMENDMENT AND RACIALLY SEGREGATED SCHOOLS

How would the Theory of Original Sinn apply to the often-discussed question of whether the Fourteenth Amendment forbids racially segregated schools? In this section, I will consider what Berger, Rubinfeld, and Fallon have themselves said about *Brown v. Board of Education*.<sup>103</sup> Berger criticizes *Brown*, while Rubinfeld and Fallon defend it. I will argue that the Theory of Original Sinn can both accommodate the evidence that Berger uses to criticize *Brown* and do a better job of supplying a positive normative foundation for *Brown* than can Rubinfeld's or Fallon's theories. I will pay particular attention to Michael McConnell's originalist argument for *Brown* based on the debates preceding the Civil Rights Act of 1875,<sup>104</sup> and explain how the Theory of Original Sinn would use that sort of evidence in a somewhat different way than McConnell does.

---

102. 17 U.S. (4 Wheat.) at 433.

103. 347 U.S. 483 (1954).

104. See McConnell, *supra* note 24. I should point out that Michael Klarman, who has criticized McConnell, uses an implausible version of originalism, very different from the Theory of Original Sinn. See Klarman, *supra* note 70.

### A. *Brown on History*

Let me first clarify exactly what the Supreme Court itself said about history in *Brown*; its statements are not so contrary to the Theory of Original Sinn as they might seem at first. The Supreme Court's departure from history in *Brown*, combined with the Court's eventual vindication in the minds of most morally sensible observers, has given great encouragement to critics of originalism. The Court noted famously,

In approaching this problem, [i.e., the problem "whether *Plessy v. Ferguson* should be held inapplicable to public education"] we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.<sup>105</sup>

The Theory of Original Sinn would agree that we must consider the actual facts of the world—that is, the world of today—in order to determine the actual constitutional *referent*. But we are obligated to turn back the clock if we are to be sure that we have properly captured the *sense* of "the equal protection of the laws" and the other textual expressions in the Fourteenth Amendment. We cannot turn the clock back on reference, but we must on sense.

The Theory of Original Sinn, applied to the issue of school segregation, would delve into historical materials with the initial aim of *extracting the original sense*. That is, the theory aims to ask of the Framers concerning their tangible conclusions *why* they came to the conclusions they did. What was the textual *argument* for their conclusions? The Framers, *qua* Framers, could not be wrong about the constitutional sense, but they could be wrong about the constitutional referent. We must therefore look for reasons for their assertions about constitutional reference. If a Framers says that the Fourteenth Amendment would or would not affect school segregation, we cannot simply defer to his conclusion, but must find out *why* he thought so. The Framers, as enactors of the Fourteenth Amendment, have brute legal authority to explain the sense of the constitutional language—that language is, after all, *their* language, and is used on a particular occasion of their choosing. But they must explain themselves regarding particular instances. To be fully perspicuous and persuasive to later interpreters, Framers must show how the sense of their words, plus the facts of the world, produce the particular outcomes they expect. Insofar as Framers do *not* do this all the time, we may have a puzzle about trying to work backward from particular instances to the text in order to figure out what sense they attached to their language. Concerning these referents, even those assessed by Framers, we must keep in mind our *Skidmore-*

---

105. *Brown*, 347 U.S. at 492–93.

*McCulloch-Myers-Payne* rights and responsibilities—“a right to judge of their correctness must be retained,”<sup>106</sup> while we reject instances that are “badly reasoned,”<sup>107</sup> and attend to “the thoroughness evident in [their] consideration”<sup>108</sup> and “the validity of [their] reasoning”<sup>109</sup> to see if we have “agreement with the reasons” of the Framers.<sup>110</sup>

It is important to recall exactly what sort of historical evidence the Court in *Brown* did not consider dispositive, so that we can understand what version of originalism, if any, it may have rejected. The Court in *Brown* posed a very specific question for reargument in its Order of June 8, 1953: “What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?”<sup>111</sup> Note that the *Brown* Court did not ask exactly the chief question that the Theory of Original Sinn would ask. The chief historical question for the Theory of Original Sinn is “What sense did the Framers believe that the constitutional language expressed?” The Framers’ understandings about the application of that language to specific cases are *relevant*, insofar as (a) we can attempt to work backward from original reference to original sense by taking into account the original assessment of facts and (b) the Framers’ assessments of facts may be worthy of deference, but in no case are they dispositive. In considering only what specific applications the Framers contemplated that the Fourteenth Amendment would have, and rejecting *that* sort of evidence as dispositive, *Brown* is only rejecting Berger’s WWFD brand of originalism, not the Theory of Original Sinn.

The second question posed by the Court in 1953 is closer to what the Theory of Original Sinn would consider, but it is still not exactly the same. The Court asked,

If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the Framers of the Amendment (a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or (b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?<sup>112</sup>

---

106. *McCulloch*, 17 U.S. (4 Wheat) at 433.

107. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

108. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

109. *Id.*

110. *Myers v. United States*, 272 U.S. 52, 136 (1926).

111. *Brown v. Bd. of Educ.*, 345 U.S. 972 (1953).

112. *Id.*

What is important is not so much whether Framers in 1868 *considered* particular then-counterfactuals—though that sort of evidence would be persuasive—but the manner in which the Framers believed that their language would operate on the facts in general. That is, the Framers could be wrong about then-*present* conditions, and they could be wrong about then-*future* conditions as well. The archeologist of Sinn is bound neither by what facts the Framers thought *did* obtain, nor by what facts the Framers thought *would* obtain in the future. We as interpreters are only bound by the actual facts and the Framers' use of constitutional language to express a function from the facts to outcomes.

*B. Who are the Framers?*

Some critics of originalism suggest that originalism has a particular sort of trouble in identifying which people's opinions in 1868 should count;<sup>113</sup> because the Amendment was enacted in a process involving a Congress with many members and multiple state ratifying conventions, it is impossible to say whose intentions should count. I cannot here do justice to the problems of corporate meaning, but I will say three things.

First, *any* theory that places *any* relevance on what “the Framers” thought about an issue must make sense of who counts as “the Framers.” Those theories—and Berger's, Rubinfeld's, and Fallon's theories certainly are among these—must also answer these questions. So the problem of corporate intent is not any reason to prefer their theories to mine.<sup>114</sup>

Second, the process of making contracts, legislating, judging on multi-member courts, and innumerable other well-established legal phenomena presuppose that meaning can be shared by more than one person: that is, that two or more people can share an intention and thus speak corporately. Skepticism about group meaning would doom far more than particular theories about the Constitution, and we should therefore think it deeply implausible.

Third, I would gesture toward the law of agency and corporations as a way of understanding the verbal intentions of groups. It seems to me that “The People” as a sovereign agent is a legal fiction just like a corporation. Finding out its mental states should therefore be no more or less difficult than assessing the mental states of a corporation. That may be hard, but it is certainly not impossible or conceptually confused. Corporations of course act only through agents, and a corporation is charged with the mental states of agents acting in

---

113. John Denvir, *The New Constitutional Law*, 44 OHIO ST. L.J. 139, 140 n.8 (1983) (reviewing MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982)) (“Who are the ‘framers’? Did the framers have any unitary ‘intent’?”).

114. See, e.g., Jed Rubinfeld, *Of Constitutional Self-Government*, 71 FORDHAM L. REV. 1749, 1760 (2003) (“Yes, I am assuming that a people can act collectively—that there is such a thing as rational, purposive collective decision-making.”).

the scope of their employment. To assess the extent to which an individual representative or ratifier's beliefs or intentions represent the beliefs or intentions of The People, we must assess the extent to which an individual person is acting as the authorized agent of the sovereign people.<sup>115</sup>

I cannot settle these rules in detail; they would require a careful analysis of how agency principles apply to the constitution-amending process. However, it seems best that constitutional language should be judged according to how a hypothetical reasonable member of the public would understand it. The fact that the Constitution, in becoming law, passed through a critical public gap between Congress and the state ratifiers suggests that hypothetical reasonable members of the public should be our focus. Congress approved the constitutional language and set it forth publicly, prior to its becoming law, to the ratifying states for their consideration and legal authorization. Because, at this point, no individual ratifying body was critical to the enactment of the amendment, no individual ratifier's understanding should be controlling: rather, the public meaning as assessed by a hypothetical reasonable ratifier counts. And, of course, to repeat my theory, it is the *sense* of the provision, as grasped by a hypothetical reasonable ratifier, that is the unchanging constitutional touchstone. Originally understood referents of the actual ratifiers and originally understood referents of the Congressional Framers are relevant both (a) as a source from which, by working backwards, we can extract the original sense as grasped by a hypothetical reasonable ratifier and (b) as persuasive but defeasible sources of assessments of constitutional reference.

### C. *Berger on Brown*

Berger relies chiefly on (a) James Wilson's statement that education was excluded from an early version of the Civil Rights Bill of 1866, the Fourteenth Amendment's predecessor; (b) Northern negrophobia, which made the abolition of racial segregation unthinkable; (c) silence on school segregation during the ratification; and (d) congressional segregation of the D.C. schools.<sup>116</sup> In short, none of these actions were sufficiently explained to be decisive evidence of the Fourteenth Amendment's meaning, particularly in light of other evidence indicating at least the presence of serious cognitive dissonance in the enactors of the Fourteenth Amendment. Given particularly the Republican push to desegregate the schools under the Fourteenth Amendment just a few years later, the Framers seemed manifestly capable "of

---

115. For a different approach to corporate intentions, see ALEXANDER & SHERWIN, *THE RULE OF RULES*, *supra* note 36, at 119 (arguing that if no intention commands a majority, a rule should have no effect), and Alexander, *All or Nothing at All?*, *supra* note 36, at 387–88 (same).

116. See, e.g., Raoul Berger, *The "Original Intent"—As Perceived by Michael McConnell*, 91 *Nw. U. L. Rev.* 242 (1996).

asserting principles inconsistent with those on which they were acting.”<sup>117</sup> McConnell gives excellent evidence that the best interpretation of those principles is to be one which would desegregate the schools. If we are to defer to such *Brown*-supporting Republican theories of the Fourteenth Amendment, though, there are lessons, however, particularly regarding the resurrection of the Amendment’s Privileges or Immunities Clause, which we should take much more seriously.

I will first consider the affirmative evidence that the historical sense of the Fourteenth Amendment, when combined with the actual facts, would prohibit segregation in public schools.

Charles Sumner gave numerous explanations, shortly after the Fourteenth Amendment was enacted, why he thought that the racial segregation of public schools violated the Fourteenth Amendment.<sup>118</sup> His argument was simple: (a) the Fourteenth Amendment forbade the racial abridgement of the rights belonging to citizens, and (b) segregation of public institutions was a racial abridgement of the rights of citizens, because segregation requires that they exercise their rights subject to a stamp of inferiority. I will briefly present his explanation from January 1872. His proposed bill, initially offered as an amendment to an amnesty measure, provided for “equal and impartial enjoyment” of common-carrier rights by “all citizens of the United States.”<sup>119</sup> Sumner began by invoking “equal rights promised by a just citizenship.”<sup>120</sup>

117. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 410 (1857).

118. See CONG. GLOBE, 42d Cong., 2d Sess. 381 (1872).

119. Specifically, the bill provided:

That all citizens of the United States, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, facility, or privilege furnished by common carriers, whether on land or water; by inn keepers; by licensed owners, managers, or lessees of theaters or other places of public amusement; by trustees, commissioners, superintendents, teachers, or other officers of common schools and other public institutions of learning, the same being supported by moneys derived from general taxation or authorized by law; by trustees or officers of church organizations, cemetery associations, and benevolent institutions incorporated by national or State authority; and this right shall not be denied or abridged on any pretense of race, color, or previous condition of servitude.

*Id.*

120. See *id.*

Mr. President, slavery, in its original pretension, reappears in the present debate. Again the barbarous tyranny stalks into this Chamber, denying to a whole race the equal rights promised by a just citizenship.

. . . .

The precise rule is Equality before the Law; nor more nor less; that is, that condition before the Law in which all are alike—being entitled without any discrimination to the equal enjoyment of all institutions, privileges, advantages, and conveniences created or regulated by law . . . .

*Id.*

Sumner considered at length the distinction between social and civil rights, insisting that the equality pertaining to citizenship—that is, equality of civil rights—was enough to support his bill.<sup>121</sup> In support of his inclusion of transportation on common carriers and in schools within civil rights, rather than within social rights, Sumner argued at length from a number of legal treatises regarding the traditional rights to use common carriers.<sup>122</sup> He argued for the same conclusion regarding theaters and schools. He said of the “common school” that it is on a par with common carriers.<sup>123</sup>

Sumner also argued at length that legally enforced separation was a relevant inequality—a relevant abridgement of the rights of citizens. To be required to enjoy civil rights while being kept away from the dominant race with a stamp of inferiority is not to enjoy such civil rights fully.<sup>124</sup>

---

121. *See id.* at 382.

There is no colored person who does not resent the imputation that he is seeking to intrude himself socially anywhere. This is no question of society; no question of social life; no question of social equality, if anybody knows what this means. The object is simply Equality before the law, a term which explains itself. . . . [N]obody pretends that Equality in the highway, whether on pavement or sidewalk, is a question of society. And, permit me to say, that Equality in all institutions created or regulated by law, is as little a question of society.

*Id.*

122. *Id.* at 383.

The inn is a public institution, with well-known rights and duties. Among the latter is the duty to receive all paying travelers decent in appearance and conduct, wherein it is distinguished from a lodging-house or boarding-house, which is a private concern, and not subject to the obligations of the inn.

*Id.*

123. CONG. GLOBE, 42d Cong., 2d Sess. at 384.

Much is implied in this term, according to which the school harmonizes with the other institutions already mentioned. It is an inn where children rest on the road to knowledge. It is a public conveyance where children are passengers. It is a theater where children resort for enduring recreation. Like the others, it assumes to provide for the public; therefore it must be open to all; nor can there be any exclusion, except on grounds equally applicable to the inn, the public conveyance, and the theater.

*Id.*

124. *Id.* at 382–83.

Then comes the other excuse, which finds Equality in separation. Separate hotels, separate conveyances, separate theaters, separate schools, separate institutions of learning and science, separate churches, and separate cemeteries—these are the artificial substitutes for Equality; and this is the contrivance by which a transcendent right, involving a transcendent duty, is evaded; for Equality is not only a right but a duty.

How vain to argue that there is no denial of Equal Rights when this separation is enforced. The substitute is invariably an inferior article. Does any Senator deny it? Therefore, it is not Equality. . . .

Assuming what is most absurd to assume, and what is contradicted by all experience, that a substitute can be an equivalent, it is so in form only and not in reality. Every such

As McConnell points out, the Republicans like Sumner were far from alone in distinguishing *segregated* enjoyment of a privilege from full enjoyment.<sup>125</sup> *Railroad Co. v. Brown*,<sup>126</sup> decided by the Supreme Court in 1873, construed an 1863 provision concerning railroad cars, “[t]hat no person shall be excluded from the cars on account of color.”<sup>127</sup> The Supreme Court called the provision of separate cars “an ingenious attempt to evade a compliance with the obvious meaning of the requirement.”<sup>128</sup>

Equality in civil rights, or equality of the rights of citizens, was the constitutional touchstone for Sumner: “It cannot be said, according to its title, [i.e., the title of the Civil Rights Act of 1866] that all persons are protected in their civil rights, so long as the outrages I expose continue to exist; nor is Slavery entirely dead.”<sup>129</sup> In line with the language of the Privileges and Immunities Clause—“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”<sup>130</sup>—he argued, “Our rights are his rights; our equality is his equality; our privileges and immunities are his great possession.”<sup>131</sup> Senator Sherman explained a similar theory of privileges and immunities as those privileges that, in general, historically characterize citizenship.<sup>132</sup> Senator Carpenter explained his

---

attempt is an indignity to the colored race, instinct with the spirit of Slavery, and this decides its character. . . .

In arraiging this attempt at separation as a Caste, I say nothing new. For years I have denounced it as such, and here I followed good authorities, as well as reason. . . . The principle of separation on the ground of hereditary inferiority is the distinctive essence of Caste; but this is the outrage which lifts itself in our country, crying out, “I am better than thou, because I am white. Get away!”

*Id.*

125. See McConnell, *supra* note 24, at 953.

126. *R.R. Co. v. Brown*, 84 U.S. (17 Wall.) 445 (1873).

127. Act of Mar. 3, 1863, ch. 110, § 1, 12 Stat. 805, 805 (1863).

128. *Brown*, 84 U.S. (17 Wall.) at 452.

129. CONG. GLOBE, 42d Cong., 2d Sess. 383 (1872).

130. U.S. CONST. amend. XIV, § 1.

131. See CONG. GLOBE, 42d Cong., 2d Sess. at 385. The full context of the statement is: Ceasing to be a slave the former victim has become not only a man, but a citizen, admitted alike within the pale of humanity and within the pale of citizenship. As a man he is entitled to all the rights of man, and as a citizen he becomes a member of our common household with equality as the prevailing law. . . . Our rights are his rights; our equality is his equality; our privileges and immunities are his great possession. To enjoy this citizenship, people from afar, various in race and complexion, seek our shores, losing here all distinctions of birth, as, into the ocean all rivers flow, losing all trace of origin or color, and there is but one uniform expanse of water where each particle is like every other particle and all are subject to the same law. In this citizenship the African is now absorbed.

*Id.*

132. *Id.* at 843.

The fourteenth amendment . . . says:

interpretation of the Fourteenth Amendment as hinging on “the privileges and immunities which belong to a citizen as such, and which under that section the State cannot abridge.”<sup>133</sup>

These arguments represent a simple, compelling interpretation of the Privileges and Immunities Clause: it forbids the denial of the privileges and immunities generally characteristic of citizenship, like those of the common law, on racial grounds. Racially based denial of such privileges is “abridgement,” and segregation is the racially based denial of such privileges because it imparts a brand of inferiority. Sumner may go a bit too far in his definition of public institutions as including those, such as churches, that are merely *regulated* by the law, as opposed to those, like common carriers or schools, duty-bound to serve the public. But the basic explanation of the unconstitutionality of racial public-school segregation and the segregation of common carriers fits well with the language of the Privileges and Immunities Clause in light of its context. An intermediate “no-caste” principle fits well with Sumner’s invocation of the equality of the rights of citizens, based on the text of the Fourteenth Amendment.

While it is true that the Supreme Court disagreed with this theory of the Privileges and Immunities Clause in the *Slaughterhouse Cases*,<sup>134</sup> that decision seems plainly wrong, for reasons adequately canvassed by others. It is not at all controversial that understanding the original sense of the Fourteenth Amendment begins by seeing that the Supreme Court was wrong in *Slaughterhouse*. “Legal scholars agree on little beyond the conclusion that the [Privileges and Immunities] Clause does not mean what the Court said it meant in 1873.”<sup>135</sup>

It is useful to compare Sumner and his allies’ textual reasoning with those principles that some have thought provide a better support for *Brown*, such as *Strauder v. West Virginia*<sup>136</sup> and Justice Harlan’s dissent in *Plessy*.<sup>137</sup> Despite the fact that they appear after *Slaughterhouse*, the arguments of *Strauder* and Justice Harlan’s *Plessy* dissent are, like the arguments of Senator Sumner and

---

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

What are those privileges and immunities? Are they only those defined in the Constitution, the rights secured by the amendments? Not at all. The great fountain-head, the great reservoir of the rights of an American citizen is in the common law, the old charters that were wrenched by our ancestors five hundred years ago and two hundred years ago from English kings. Our rights are not limited to those given by the Constitution. . . . You must go to the common law for them . . . .

*Id.*

133. *Id.*

134. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 81 (1872).

135. *Saenz v. Roe*, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting).

136. 100 U.S. 303, 310 (1879).

137. *Plessy v. Ferguson*, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

his allies, infused with the notion of the rights of citizenship; they seem to be infected with the ghost of the *Slaughterhouse* dissents.<sup>138</sup> A fully resurrected Privileges and Immunities Clause, in line with the original sense of that provision and with Senator Sumner's arguments against the constitutionality of school segregation, would provide much more powerful normative support for these intermediate principles, and thus for *Brown*, than can current doctrine to the extent that it rests only on the perceived wisdom of those principles in the eyes of present courts.

*Strauder*, while it ultimately roots its holding in the Equal Protection Clause, bases its rhetoric and reasoning on the privileges of citizenship. It states the question presented, not in terms of the equal protection of persons, but in terms of the rights of citizens of the United States: the first question is: "whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color, because of race or color?"<sup>139</sup> The equality of civil rights and the rights of citizenship inform its crucial reasoning.<sup>140</sup> The *Strauder* court quoted and glossed the Privileges and Immunities Clause before its critical argument that the Fourteenth Amendment required the equality of "civil society."<sup>141</sup> The key

138. *Lochner* and other substantive due process cases in fact trace an even more direct lineage from the *Slaughterhouse* dissents. *Lochner v. New York*, 198 U.S. 45, 53 (1905), relies on *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897), which in turn relies on Justice Bradley's exposition of the "civil liberty of the citizen" in *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 764 (1884) (Bradley, J., concurring), which in turn relies on Bradley's dissent in *Slaughterhouse*.

139. *Strauder*, 100 U.S. at 305 (emphasis added).

140. *See id.* at 306–07.

It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race *the enjoyment of all the civil rights that under the law are enjoyed by white persons*, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave *citizenship and the privileges of citizenship* to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.

*Id.* (emphases added).

141. *See id.* at 307–08.

[The Fourteenth Amendment] ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the

term of *Strauder*—“legal discriminations, implying inferiority in civil society”<sup>142</sup>—fits much better with the language of the Privileges and Immunities Clause, which speaks of the abridgement of the privileges of citizens, than it does with equal protection.

Justice Harlan’s dissent in *Plessy* is also suffused with the language of citizenship and civil equality.<sup>143</sup> The “equality of rights which pertains to citizenship” is the key, again in line with the language of the Privileges and Immunities Clause, not the equal protection of persons. After discussing the Thirteenth Amendment and then quoting the Privileges and Immunities Clause, among others, he stated, “These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship.”<sup>144</sup> His famous conclusion lays great stress on *citizenship*, not equal protection.<sup>145</sup>

---

amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from *legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy*, and discriminations which are steps towards reducing them to the condition of a subject race.

*Id.* (emphasis added).

142. *Id.* at 308.

143. *See Plessy*, 163 U.S. at 554–55.

In respect of *civil rights, common to all citizens*, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation, as that here in question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States.

*Id.* (emphasis added).

144. *Id.* at 555.

145. *See id.* at 559.

But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling *class of citizens*. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates *classes among citizens*. In respect of civil rights, *all citizens* are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate *the enjoyment by citizens of their civil rights* solely upon the basis of race.

*Id.* (emphases added). Justice Harlan concludes, again stressing the rights of citizenship, “The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of *every right that inheres in civil freedom*, and of the equality before the law of all citizens of the United States, without regard to race.” *Id.* at 560 (emphasis added).

Parenthetically, while I cannot pursue the matter in detail, the arguments based upon privileges and immunities seem better suited than the Equal Protection Clause to support the desegregation of schools, because I am inclined to agree with those commentators such as Jacobus tenBroek,<sup>146</sup> Alfred Avins,<sup>147</sup> Earl Maltz,<sup>148</sup> and John Harrison,<sup>149</sup> who offer strong evidence suggesting that the original sense of the Equal Protection Clause makes it chiefly an entitlement to *protection*—that is, the security of person and property—rather than the absence of discrimination. There is good reason to think that the mandate “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws,”<sup>150</sup> rather than broadly forbidding purposeful discrimination, establishes the reciprocal duty of government to protect all those who must obey its decrees—that is, all those within its jurisdiction, or its speaking of the law. Only after the *Slaughterhouse* mistake were the broader purposes of the Privileges and Immunities Clause imported into the Equal Protection Clause and an affirmative right to protection neglected. A suitably resurrected constitutional right to protection would have important implications for issues regarding the role of the state in preventing private violence,<sup>151</sup> racial disparities in the provision of police services,<sup>152</sup> racial discrimination by criminal defendants in challenging jurors,<sup>153</sup> and the lower rate of executions of those who kill black victims.<sup>154</sup> I will therefore focus on the argument from the standpoint of the privileges and immunities of citizens.

According to the Theory of Original Sinn, we should set the arguments of Sumner and his congressional allies—who, as McConnell shows, repeatedly garnered congressional majorities, though not filibuster-proof supermajorities, for their views—beside the arguments for contrary conclusions. As I have emphasized repeatedly, a contrary original understanding of the referent of the constitutional expressions is only as strong as its supporting textual arguments; we must retain under *Skidmore*, *McCulloch*, *Myers*, and *Payne* the right and

---

146. JACOBUS TENBROEK, *EQUAL UNDER LAW* 122 (rev. ed., Collier Books 1965) (1951).

147. Alfred Avins, *The Equal “Protection” of the Laws: The Original Understanding*, 12 N.Y.L. FORUM 385, 425, 426 (1966).

148. See generally Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985).

149. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1433–51 (1992).

150. U.S. CONST. amend. XIV, § 1.

151. *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 197 (1989). From last term, see *Town of Castle Rock, Colo. v. Gonzales*, 125 S.Ct. 2796, 2808 (2005).

152. See Alfred Avins, *Equal Protection Against Unnecessary Police Violence and the Original Understanding of the Fourteenth Amendment: A Comment*, 19 BUFF. L. REV. 599, 601 (1970).

153. See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

154. See *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987).

duty to judge their correctness. When we use our *Skidmore*, *McCulloch*, *Myers*, and *Payne* rules, the arguments of Sumner and his allies have a critical advantage, for the simple reason that their conclusions *are reasoned*. It is not at all obvious what reasoning may or may not have led citizens in 1868 to think that the text they ratified did not affect racial segregation of public schools. On the other hand, Sumner's arguments in January 1872 that segregation enforces through its understood meaning a limitation on the rights of citizens, thereby abridging their privileges and immunities in violation of the Fourteenth Amendment, are strong and fit with common sense. The fact that Sumner could make such arguments, shortly after the adoption of the Amendment and unhindered by the wrong turn in *Slaughterhouse*, make them a powerful indication of the proper referent of the Fourteenth Amendment's language: they are quite likely to (a) grasp its sense properly, and (b) have the facts right. While other sources, such as Justice Harlan's *Plessy* dissent and *Strauder*, are also persuasive, Sumner is particularly so, because he was himself a Framers, because he gave considerable attention to the relationship of his views to the categories expressed in the constitutional text, and because he was unburdened with any obligation to fit with *Slaughterhouse*.

Congressional Democratic opponents, however, did provide a specific explanation for their contrary conclusions about the constitutionality of segregation. McConnell explains well how their two chief arguments were contradictory.<sup>155</sup> On the one hand, they argued that segregation was formally equal; it gave each group the same rights to travel or to be educated.<sup>156</sup> On the other, they argued that desegregation regarding common carriers and schools would force *social* equality, not merely civil equality.<sup>157</sup> But the argument for a right to social inequality assumed that separation was indeed, as Sumner explained so simply, an expression of inequality, by telling inferiors to keep away. What the Democratic arguments favored was, in effect, the free expression of social inequality *within the realm of civil rights*. Public streets, common carriers, and schools are simultaneously a social and a civic sphere. Those exercising their civil rights regarding common carriers or schools are not isolated from social relations more generally, and neither can social relations be isolated from the relations among those exercising their civil rights. In conceding that school segregation expressed social inequalities, the

---

155. McConnell, *supra* note 24, at 1016 (“[T]his argument [that desegregation involved social rights, not merely civil rights] contradicted the opposition’s other argument: that segregation does not constitute inequality and is equally desirable for both races. Democrats were in the awkward position of arguing that segregation does not impart a social meaning of inequality, and that the inequality it imparts is merely social.”).

156. *See id.* at 1006–14 (discussing Democratic arguments on formal equality and the lack of a social meaning of inequality).

157. *See id.* at 1014–23 (discussing Democratic arguments on the distinction between social and civil rights).

Democrats conceded the key premise regarding whether it also expressed inequalities in civil rights. On the assumption that there is an overlap, segregation can do both at once. Put another way, Democrats did not argue persuasively that segregation in schools or common carriers enforced *merely* social inequality, rather than also inequality in the enjoyment of civil rights. In conceding that they wanted to enforce social inequality, but by failing to argue convincingly that civil rights were *not* at issue, Democrats undermined arguments that formal equality was enough and that there was no brand of inferiority at issue with segregation.<sup>158</sup>

Democratic arguments for the constitutionality of segregation in the debates leading to the Civil Rights Act may have flushed out different explanations for that position that may have been tacitly accepted at the time of ratification itself. To the extent that they do, they help show us what sorts of reference-yielding facts are at issue, and give us the means to explain how the ratifiers may have been wrong. The Democratic opposition to the desegregation bill generally agreed that inequality with regard to civil rights would violate the Fourteenth Amendment.<sup>159</sup> It also offered poor, contradictory reasons to think either that segregation would not impose an unequal brand of inferiority or that only social inequality was at issue. As McConnell puts the point, “[T]he opponents of [Sumner’s] measures could not agree on any particular constitutional theory under which segregation could be defended as lawful.”<sup>160</sup>

Let me, then, review the evidence that Berger presents for his belief that the Framers thought the Fourteenth Amendment did not forbid racial segregation of public schools to see the extent to which it should push us toward that conclusion ourselves.

Senator James Wilson’s March 1866 argument that the Civil Rights Bill as originally drafted did not require common schools<sup>161</sup> is indeed important evidence that cuts the other way. But examining at the details suggests a relatively easy way out. He was discussing an early draft of the bill that stated, in terms very similar to those used to gloss the Privileges or Immunities Clause, “There shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on

---

158. *See id.* at 1006, 1042–43. The Democratic argument that education was not a civil right conflicted with their main argument that separation was not a relevant form of inequality, and so it would be separate, but equal enough. If education is not a civil right, no sort of equality at all regarding education was required. The Democratic concession that at least material equality in schooling was required thus contradicted the argument that education was not a civil right.

159. *Id.* at 1014–15.

160. McConnell, *supra* note 24, at 986.

161. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

account of race, color, or previous condition of slavery.”<sup>162</sup> Wilson defended this language, which was later removed, in this way:

This part of the bill will probably excite more opposition and elicit more discussion than any other; and yet to my mind it seems perfectly defensible. It provides for the equality of citizens of the United States in the enjoyment of “civil rights and immunities.” What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? No; for suffrage is a political right which has been left under the control of the several States, subject to the action of Congress only when it becomes necessary to enforce the guarantee of a republican form of government. Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities. Well, what is the meaning? What are civil rights? I understand civil rights to be simply the absolute rights of individuals, such as—[Wilson here quotes Kent’s *Commentaries*]

“The right of personal security, the right of personal liberty, and the right to acquire and enjoy property.” “Right itself, in civil society, is that which any man is entitled to have, or to do, or to require from others, within the limits of prescribed law.”

...

... [T]his bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. . . . It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen.<sup>163</sup>

Oddly enough, Wilson’s exposition of “civil rights and immunities” in 1866, made in part to explain why it would *not* apply to schools, is strikingly similar to the Republican senators’ expositions of “privileges and immunities” made in 1872 to explain why it *would*. The issue seems to be simply a question whether Wilson or Sumner was right about the right to education as one that “belong[s] to every citizen.” While he does not contemplate that education’s status might change in the future, Wilson does not take it to be excluded from “civil rights and immunities” as an *analytic* matter—that is, merely from the meaning of the term. In a world, such as ours, where education *is* a right given to all citizens, Wilson would seem able to agree that education would be a civil right or immunity. Suppose Wilson were to come to agree with Sumner that education was, like common carriers, “open to all,”<sup>164</sup> or agree with Representative Lynch, who thought that the desegregation bill “simply confers

162. *Id.*

163. *Id.* (citation omitted).

164. CONG. GLOBE, 42d Cong., 2d Sess. 384 (1872).

upon all citizens, or rather recognizes the right which has already been conferred upon all citizens, to send their children to any public free school.”<sup>165</sup> Notwithstanding Wilson’s exposition of the sense of “civil rights and immunities,” even assuming the phrase is synonymous with “privileges and immunities,” he could still agree that racial public-school segregation is unconstitutional. Lynch’s “right which has already been conferred upon all citizens and Wilson’s “rights . . . which already belong to every citizen” do not represent a difference of opinion regarding the sense of their provisions, but a difference of opinion regarding which rights, as a legal/sociological matter, belong to every citizen. Combining Wilson’s sense with the *actual* facts, Sumner’s conclusion is sound.

The silence during the immediate ratification period regarding desegregation is not, of course, decisive under the Theory of Original Sinn. Ratifiers obviously need not—indeed, they cannot—discuss, or even know, every implication of the constitutional categories they are enacting. To be sure, we might expect discussion of something that important, but the citizenry had a lot of other important issues to discuss.

The segregation of D.C. schools is perhaps evidence that Congress exercised its *Dred Scott*-denied power of “asserting principles inconsistent with those on which they were acting.”<sup>166</sup> But it is also important to remember that: (a) the Privileges or Immunities Clause itself did not apply to Congress; (b) Congress did not specifically re-enact a requirement of segregation during the Republican control of Congress; and (c) supermajority filibuster requirements prevented change in a Congress that included many opponents of the Fourteenth Amendment. Also, as McConnell points out, there *were* arguments made in February 1871 that desegregation of the D.C. schools was required by the spirit of the Fourteenth Amendment.<sup>167</sup> Speaking in favor of a proposal by Sumner that would do just that, Senator Harris said: “We have adopted the principle of equality in the Constitution of the United States, and I think this is a proper place to enact a law in accordance therewith.”<sup>168</sup> Sumner criticized his colleagues who seemed consciously weak-willed.<sup>169</sup> The provision for the desegregation of the D.C. schools was, in line with the equal-privileges-based argument under the Fourteenth Amendment, “for the purpose of assuring impartial and free school privileges to every child between the ages of six and seventeen years, in the District of Columbia.”<sup>170</sup>

---

165. 3 CONG. REC. 945 (1875).

166. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 410 (1856).

167. See McConnell, *supra* note 24, at 977–80.

168. CONG. GLOBE, 41st Cong., 3d Sess. 1055 (1871).

169. *Id.*

170. *Id.* at 1053.

Likewise, Northern negrophobia is only dispositive if we make Chief Justice Taney's mistake. It only indicates weakness of will—or, to look at it another way, *strength* of will to be able to assert such high constitutional principles in the face of such a racist background culture.

I should also say something about the reasoning of the early courts that ruled that segregated schools were constitutional. Their reasoning is scarce and, particularly on whether enforced separation abridges the privileges of citizens by imposing a stamp of inferiority, seems poorer than that of Sumner and his Republican allies.

*Roberts v. The City of Boston*,<sup>171</sup> from Massachusetts in 1850, briefly rejected an earlier argument, also made by Charles Sumner, that separate schools brand black people as inferior. While the state did have a constitutional provision somewhat akin to the Privileges and Immunities Clause barring “exclusive privileges” for particular men or associations,<sup>172</sup> that provision was not quoted by the court or considered in detail. The provision is importantly different from the Fourteenth Amendment's Privileges and Immunities Clause, for it is far clearer that a segregationist brand of inferiority *abridges* the privileges of black citizens than that it *gives* privileges to white citizens. No particular association of people is able to exercise a privilege under segregation.<sup>173</sup> The court only briefly considered Sumner's argument that separate schools are a brand of inferiority.<sup>174</sup> The Court, notably, did not

171. 59 Mass. (5 Cush.) 198 (1850).

172. The First Part, Art. VI of the Massachusetts Constitution provides: “No man . . . or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public . . .” MASS. CONST. Part I, art. VI, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1890 (Francis Newton Thorpe ed., 1909).

173. Sumner, while he did refer to the provision in his argument, *see Roberts*, 59 Mass. (5 Cush.) at 201 (argument of counsel) (referring to “the spirit of American institutions, and especially of the constitution of Massachusetts,” and citing Art. VI), asked the court to “declare the by-law of the school committee, making a discrimination of color among children entitled to the benefit of the public schools, to be unconstitutional and illegal, although there are no express words of prohibition in the constitution and laws,” the method by which the court had earlier abolished slavery. *Id.* at 203–04.

174. *See id.* at 209–10.

It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence, and we

actually affirm that segregation was *not* a brand of inferiority, but only said that it was a sufficiently difficult question that administrators should decide it.<sup>175</sup> Given the lack of any clear textual parallel to the Privileges and Immunities Clause spurring the court to make a more careful analysis, the decision is plainly not as persuasive as Sumner's later argument textually anchored in the Fourteenth Amendment.

*State ex rel. Garnes v. McCann*,<sup>176</sup> from Ohio in 1872, relied first on an anticipation of *Slaughterhouse*.<sup>177</sup> The court also, however, argued that it would reach the same conclusion even "conceding that the 14th amendment not only provides equal securities for all, but guarantees equality of rights to the citizens of a State, as one of the privileges of citizens of the United States."<sup>178</sup> The court's rationale for finding no violation of equality is brief.<sup>179</sup> The court did not consider any argument that separation might be a brand of inferiority, but simply assumed that both black and white students had, given the equal proportion of the school fund, "equal school advantages."<sup>180</sup> Apparently, no argument from the Equal Protection Clause was raised, suitably enough given the lack of post-*Slaughterhouse* expansion of the clause.<sup>181</sup>

*State ex rel. Stoutmeyer v. Duffy*,<sup>182</sup> from Nevada in 1872, actually struck down on state grounds a statute that forbade integrated schools; the court allowed state trustees the option of either separate or integrated schools.<sup>183</sup> The court did offer a brief reference to the federal Constitution, but not to any

---

cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment.

*Id.*

175. *Id.* at 209.

176. 21 Ohio St. 198 (1872).

177. The court argued that the Privileges and Immunities Clause "includes only such privileges or immunities as are derived from, or recognized by, the constitution of the United States." *Id.* at 210.

178. *Id.*

179. *See id.* ("The law in question surely does not attempt to deprive colored persons of any rights. On the contrary it recognizes their right, under the constitution of the State, to equal common school advantages, and secures to them their equal proportion of the school fund. It only regulates the mode and manner in which this right shall be enjoyed by all classes of persons.")

180. *Id.* at 211.

181. *See McCann*, 21 Ohio St. at 209 (stating that before the Fourteenth Amendment, "the statutes classifying the youth of the State for school purposes on the basis of color, and the decisions of this court in relation thereto, were not at all based on a denial that colored persons were citizens, or that they were entitled to the equal protection of the laws. It would seem, then, that these provisions of the amendment contain nothing conflicting with the statute authorizing the classification . . . Nor do we understand that the contrary is claimed by counsel in the case. But the clause relied on, in behalf of the plaintiff," is the Privileges and Immunities Clause)

182. 7 Nev. 342 (1872).

183. *Id.* at 347-48.

of its language.<sup>184</sup> The case's dissent, which would have allowed the school trustees to exclude black children entirely, adds a little bit more analysis in its agreement on this point, relying on the claim that education was not a right of citizens.<sup>185</sup> The court's statement in dicta that separate schools would be allowed under the state constitution<sup>186</sup> relied entirely on Massachusetts's *Roberts* and on a decision from Ohio in 1859, *Van Camp v. Board of Education of Logan*,<sup>187</sup> which had interpreted the meaning of "colored children" in separate-schools legislation without subjecting that statute to any constitutional scrutiny. The analysis of *Duffy* is too minimal to be persuasive regarding the Fourteenth Amendment, and because of its holding, the court was not squarely faced with the constitutionality of segregation.

*People ex rel. Dietz v. Easton*,<sup>188</sup> from a New York trial court in 1872, relied on formal equality. Like Ohio's *McCann*, the court anticipated *Slaughterhouse*.<sup>189</sup> The court then assumed without argument that "equal common school advantages" were not imperiled by segregation.<sup>190</sup> Like

---

184. See *id.* at 346, where the court said only this:

[R]elator replies, that such statute is opposed to the constitution and laws of the United States; and to the constitution of the state of Nevada.

While it may be, and probably is, opposed to the spirit of the former, still it is not obnoxious to their letter; and as no judicial action is more dangerous than that most tempting and seductive practice of reading between the written lines, and interpolating a spirit and intent other than that to be reached by ordinary and received rules of construction or interpretation; such course will be declined, and reference at once had to the constitution of this state.

185. See *id.* at 355 (Garber, J., dissenting).

I fully agree with my associates that this position of counsel [that the Fourteenth Amendment bars segregated schools] is utterly untenable. The statute does not abridge any privilege or immunity of the applicant, as a citizen of the United States. The privilege of admission to the common schools of this state is no more inherent in or connected with the *status* of citizenship than is the elective franchise; and to secure that against unfriendly state legislation, an additional amendment was required and was proposed.

*Id.*

186. *Id.* at 348.

187. 9 Ohio St. 407 (1859).

188. 13 Abb. Pr. 159 (N.Y. Sup. Ct. 1872).

189. "There is some reason for believing that the privileges and immunities there referred to are those only which arise under the Constitution of the United States, and not those which arise under State laws." *Id.* at 164.

190. See *id.* at 164–65.

[W]hat privilege of a citizen is abridged thereby? Certainly none, unless every citizen has the privilege of choosing to which school, in a city, he will send his children. The relator has equal common school advantages with other citizens. He does not assert that the school which is open to him is not as good as the one which is closed. He does not pretend that there is anything in its position, its pupils, or its teachers, which makes the limitation of his children to that school a practical refusal to them of common school advantages.

*McCann*, the court simply did not consider whether a brand of racial inferiority through separation was an abridgement of schooling privileges.

*Ward v. Flood*,<sup>191</sup> from California in 1874, dismissed the Privileges and Immunities Clause quickly and relied entirely on *Roberts* to reject a challenge based on equal protection.<sup>192</sup> After a long quotation from *Roberts*, the court said simply, “We concur in these views, and they are decisive of the present controversy.”<sup>193</sup> Given the weakness of *Roberts* and *Slaughterhouse* as guides to the Fourteenth Amendment, *Ward* is not compelling.

*Cory v. Carter*,<sup>194</sup> from Indiana in 1874, relied heavily on *Slaughterhouse*, quoting it for three pages.<sup>195</sup> The court briefly dismissed equal protection, which had not yet received any expansive interpretation in light of *Slaughterhouse*, with a quotation from Ohio’s *McCann*, where the issue was not raised.<sup>196</sup>

*Bertonneau v. Board of Directors of City Schools*,<sup>197</sup> decided by Circuit Judge (soon to be Justice) Woods in 1878, briefly dismissed a challenge to segregation under the Equal Protection Clause. His reasoning did not consider any sort of argument that a racial brand of inferiority abridges rights.<sup>198</sup> Woods begged the question entirely about whether “equal school advantages”

*Id.*

191. 48 Cal. 36 (1874).

192. See *id.* at 53, where the key section of the opinion asserted:

It will be seen that the language of the Massachusetts Constitution prohibiting “particular and exclusive privileges,” was fully as significant, to say the least, in its bearing on the general question in hand as is that of the Fourteenth Amendment of the Federal Constitution, securing “the equal protection of the laws.”

193. *Id.* at 56.

194. 48 Ind. 327 (1874).

195. See *id.* at 350–52.

196. *Id.* at 355 (“It would seem . . . that these provisions of the amendment contain nothing conflicting with the statute authorizing the classification in question . . . . Nor do we understand that the contrary is claimed by counsel . . . .”) (quoting *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 209 (1871)).

197. 3 F. Cas. 294 (1878) (No. 1361).

198. See *id.* at 296, where Judge Woods said only:

Both races are treated precisely alike. White children and colored children are compelled to attend different schools. That is all. The state, while conceding equal privileges and advantages to both races, has the right to manage its schools in the manner which, in its judgment, will best promote the interest of all.

The state may be of opinion that it is better to educate the sexes separately, and therefore establishes schools in which the children of different sexes are educated apart. By such a policy can it be said that the equal rights of either sex are invaded? Equality of right does not involve the necessity of educating children of both sexes, or children without regard to their attainments or age in the same school. Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the constitution of the United States. Equality of rights does not necessarily imply identity of rights.

are given by a system that imposes a brand of racial inferiority by telling blacks to keep away from whites. He did not consider Sumner's compelling argument to the contrary.

*People ex rel. King v. Gallagher*,<sup>199</sup> from New York in 1883, relied on the claim that separate schools themselves—that is, schools for black children—are not likely to be seen as a disadvantage.<sup>200</sup> The argument is very poor: it is not the separate facilities themselves, but the exclusion from the general facilities for other citizens, that is a badge of inferiority. The dissenters in *Gallagher* are far more persuasive.<sup>201</sup> The recognition by the *Gallagher* dissenters of how the privileges of citizenship were impaired by segregation is telling.

*Lehew v. Brummell*,<sup>202</sup> from Missouri in 1891, assumed without argument, like *Gallagher* and *McCann*, on which it relied, that no inequality of school privileges was at stake in segregation.<sup>203</sup> Like the courts in *Gallagher* and *McCann*, the Missouri court did not consider the argument that being required to receive an education under a badge of inferiority would abridge such a privilege: “It is to be observed, in the first place, that these persons are not denied the advantages of the public schools. The right to attend such schools, and receive instruction thereat, is guarantied [sic] to them.”<sup>204</sup> The court

199. 93 N.Y. 438 (1883).

200. *See id.* at 457.

It is not discrimination between the two races which is prohibited by law, but discrimination against the interests of the colored race. We cannot conceive it to be possible that it can be successfully maintained that in the establishment of schools, asylums, hospitals and charitable institutions for the exclusive enjoyment of particular races or classes, that the founders thereof are justly subject to the imputation of unfriendly conduct toward the class for whom such institutions are designed.

*Id.*

201. *See id.* at 465–66 (Danforth, J., joined by Finch, J., dissenting).

[A]ny regulation by which the black is kept in a state of separation is in fact one of exclusion and represents the sentiment by which the white assumed to be the superior race, a discrimination against which the law is now directly aimed. . . .

. . . .

In the case before us the city is under no obligation to maintain a separate school for children of color. But the objection is not to its existence; the objection is that the relator is compelled to attend it because of her color, and so is excluded from schools to which children of another race are permitted to resort. The exaction is, therefore, unequal, and is, I think, in violation of the law which gives to all children, within the several districts, an equal right, in like cases and under like circumstances, to go to those schools for education. I am, therefore, led to the conclusion that the relator, on account of her color, has been prevented, by a public officer and by ordinance or regulation, from enjoying an accommodation or privilege to which, as a citizen of this State, she is entitled.

*Id.*

202. 15 S.W. 765 (Mo. 1891).

203. *Id.* at 766–67.

204. *Id.* at 766.

thought that the Massachusetts case from 1850, *Roberts*, had considered “a constitutional provision similar to the fourteenth amendment.”<sup>205</sup> As I explain above, that assumption is not accurate.

In sum, there is virtually no serious consideration in these cases of whether segregation impairs educational advantages by imparting a stamp of inferiority. In the wake of *Slaughterhouse*, careful thinking about the privileges of citizenship was short-circuited.

The *Plessy* majority, dealing with mandatory segregation in transportation in 1896, did finally make an effort to rebut the charge that segregation imposes a brand of inferiority, but their argument was quite poor. The Court said,

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races.<sup>206</sup>

The Court argues that its members’ white racial pride would be enough to withstand a segregationary insult, were the situation reversed. But the hardiness of the victims’ self-confidence, notwithstanding the insult, does not mean that there has been no insult. The existence of a racial brand of inferiority does not depend on whether the victim race *believes* that it is inferior. The fact that separation is a means by which the white majority expresses its belief in black citizens’ inferiority is not changed by the fact that the minority “would not acquiesce in this assumption.”<sup>207</sup> If I am forced to receive a tattoo on my forehead that says “Defective,” I have been branded as inferior, whether I *believe* it or not. My failure to acquiesce in the assumption that the brand is *true* is beside the point. Charles Black’s comment on this “solely because the colored race chooses to put that construction on it” argument is just right: “The curves of callousness and stupidity intersect at their respective maxima.”<sup>208</sup> *Plessy*’s second argument, doubting that “social prejudices may be overcome by legislation,”<sup>209</sup> is really somewhat bizarre as a

---

205. *Id.* at 767.

206. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

207. *Id.*

208. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 422 n.8 (1960).

209. *Plessy*, 163 U.S. at 551.

defense of a law that *compelled* the segregation of common carriers. The contention that a legislative insult through segregation is an abridgement of privileges does not assume in any way that, without such an insult, social prejudices will disappear; the claim is only that such social prejudices may not *be expressed* in legislation limiting civil rights.

Further, the reasoning of cases that strike down segregation on state grounds is persuasive, insofar as it recognizes how the enforcement of a racial brand of inferiority through separation operates to abridge the enjoyment of a privilege. Indeed, it might be said that, after *Slaughterhouse*, cases interpreting state provisions analogous to the Privileges and Immunities Clause, but which were *not* strangled in the crib, are a better guide to the proper interpretation of the actual federal Privileges and Immunities Clause than are cases considering federal challenges under the Equal Protection Clause, pressed into textually awkward service to fill the privileges-and-immunities void, or cases that follow *Slaughterhouse*'s mistake.

*Clark v. Board of Directors*,<sup>210</sup> from Iowa in 1868, considered a constitutional requirement that the school board "provide for the education of *all the youths of the State*, through a system of common schools."<sup>211</sup> The court compared race to nationality.<sup>212</sup> "Equal privileges" was the key category which segregation violated, making the case persuasive regarding the Privileges and Immunities Clause.<sup>213</sup>

*People ex rel. Workman v. Board of Education of Detroit*,<sup>214</sup> from Michigan in 1869, held that a statutory requirement that "[a]ll residents of any district shall have an equal right to attend any school therein"<sup>215</sup> prohibited

---

210. 24 Iowa 266 (1868).

211. *Id.* at 271.

212. *See id.* at 276.

Our statute does not, either in letter or in spirit, recognize or justify any such distinction or limitations of right or privilege on account of nationality. For the courts to sustain a board of school directors or other subordinate board or officer in limiting the rights and privileges of persons by reason of their nationality, would be to sanction a plain violation of the spirit of our laws not only, but would tend to perpetuate the national differences of our people and stimulate a constant strife, if not a war of races.

*Id.*

213. *See id.*

Our statute has expressed the sovereign will, that all the youths of the State between the ages of five and twenty-one years shall be entitled to all the privileges and benefits of our common schools, and it is not competent for the board of directors to resist that sovereign will and declare, that, since "public sentiment in their district is opposed to the intermingling of the white and colored children in the same school," they will deny equal privileges to some of the youths.

*Id.*

214. 18 Mich. 400 (1869).

215. *Id.* at 409.

segregation.<sup>216</sup> The court saw that “equal rights”—the same concept underlying the Privileges and Immunities Clause—forbade segregation.

*Board of Education of Ottawa v. Tinnon*,<sup>217</sup> from Kansas in 1881, relied on the United States Supreme Court’s 1873 *Railroad Co. v. Brown* in recognizing that segregation would violate a requirement for schools “free to all children residing in such city.”<sup>218</sup> The court argued, “[I]f only one school out of all the schools of a city of the second class is free for colored children to attend, is that maintaining *common* schools, *free to all the children of the city*?”<sup>219</sup> The court followed Iowa’s *Clark* in striking down segregation on state grounds, and suggested that *Strauder* was inconsistent with the cases finding segregation constitutional under federal law.<sup>220</sup>

*Chase v. Stephenson*,<sup>221</sup> from Illinois in 1874, held that local authorities lacked the power to segregate public schools, which were to be open to everyone. While the court cited no authorities, its reasoning suggests that segregation would be a denial of equal civil rights.<sup>222</sup> In 1882, the court clarified *Chase* in *People ex rel. Longress v. Board of Education of Quincy*.<sup>223</sup> It adhered to its views in *Chase* and gave a fuller explanation, noting that given a statute under which districts were “prohibited from excluding, directly or indirectly, any such child from school on account of the color of such child,”<sup>224</sup> segregation was prohibited. The court’s rationale fits well with the pre-

216. Justice Cooley, one of the top constitutional scholars of the century, wrote for the Court,

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

*Id.* at 409–10.

217. 26 Kan. 1 (1881).

218. *Id.* at 20.

219. *Id.* at 20. The Court added, “[U]nder [*Railroad Co. v. Brown*], railroad cars are not *free* to a person who is excluded from all but one of them; and, on the same principle, schools are not *free* to a person who is excluded from all but one of them.” *Id.* at 21.

220. *See id.* at 23.

221. 71 Ill. 383 (1874).

222. *See id.* at 385.

The free schools of the State are public institutions, and in their management and control the law contemplates that they should be so managed that all children within the district, between the ages of six and twenty-one years, regardless of race or color, shall have equal and the same right to participate in the benefits to be derived therefrom.

While the directors, very properly, have large and discretionary powers in regard to the management and control of schools, in order to increase their usefulness, they have no power to make class distinctions, neither can they discriminate between scholars on account of their color, race or social position.

*Id.*

223. 101 Ill. 308 (1882).

224. *Id.* at 314.

*Slaughterhouse* equality-of-citizenship argument against segregation.<sup>225</sup> As in *Railroad Co. v. Brown*, “exclusion” encompassed segregation, supporting the conclusion that “abridgement” would as well.

Finally, *Commonwealth v. Davis*,<sup>226</sup> from a Pennsylvania trial court in 1881, is also very interesting in holding, relying on the *Slaughterhouse* dissents,<sup>227</sup> that the Privileges and Immunities Clause requires desegregation. Legislative desegregation mooted any appeal, but the court’s reasoning fits well with the Republican pre-*Slaughterhouse* argument.<sup>228</sup> The court offered a creative argument that education is included within “property,”<sup>229</sup> and

---

225. *See id.* at 314–15.

Under the amendment of the constitution of the United States, persons of color are citizens of the United States, and of the State where they may reside. Being citizens of the State, upon an equality with other citizens, there can be no doubt in regard to the power of the legislature to provide that no discrimination shall be made on account of color by boards of education who have the management and control of our free schools. . . . Under the rules adopted, these colored children are excluded from the public schools in the district where they reside, and are all required to attend a school composed exclusively of colored children, known as the Lincoln school. Under the operation of these rules a colored child cannot attend the school in the district where such child resides, on account of its color, but is compelled to travel perhaps several miles to a distant part of the city to a colored school. This is a direct violation of the statute, which says the board is prohibited from excluding, directly or indirectly, any such child from such school on account of color.

*Id.*

226. 10 Weekly Notes of Cases Pa.C. 156 (Crawford County C.P. 1881).

227. *Id.* at 158 (relying on Justice Swayne’s *Slaughterhouse* dissent, 83 U.S. (16 Wall.) 36, 124 (1872)).

228. *See id.*

The “privileges and immunities” of a citizen of the United States include among other things the fundamental rights of life, liberty, and property, and also the rights which pertain to him by reason of his membership in the Union, among which may be included the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject only to such restraints as the government may provide for the general good of the whole. . . . A citizen of the United States is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.

*Id.*

229. *See id.* at 159.

The privileges and immunities therefore, of every citizen of the United States which are prohibited by the XIVth Amendment from being abridged by the State, I have shown to include the fundamental rights of life, liberty, and property, with the right to acquire and possess the same freely and equally. This property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property; education is property. It is entitled to protection without abridgement. The right to make this species of property available is next in importance to the right of life and liberty. It lies to a large extent at the foundation of most other forms of property and of all solid individual and national prosperity.

*Id.*

suggested that segregation comes close to violating even the Thirteenth Amendment prohibition on involuntary servitude.<sup>230</sup> As “involving . . . the very personification of caste,”<sup>231</sup> segregation was an insulting badge of inferiority.<sup>232</sup> In short, while it may betray a dangerous degree of state-court independence from the Supreme Court, *Davis* suggests additional strength, even post-*Slaughterhouse*, in the view that segregation abridges a privilege of citizens by imposing a brand of inferiority in the civic realm.

#### D. McConnell's Theoretical Commitments

In stressing the apparent superiority of the reasoning of Sumner and his allies, and depending on McConnell's important historical research, I have a few important quibbles with McConnell's theoretical approach. He notes,

As an initial matter, it is clear beyond peradventure that a very substantial portion of the Congress, including leading framers of the Amendment, subscribed to the view that school segregation violates the Fourteenth Amendment. At a minimum, therefore, the scholarly consensus must be corrected to admit that this interpretation is within the legitimate range of interpretations of the Amendment on originalist grounds. But is it possible to say more: that this interpretation was the prevailing, or preponderant, view, and thus the best understanding of the original meaning?<sup>233</sup>

---

230. *See id.* at 160.

[W]hen a law makes a discrimination between classes of persons, and one which deprives the one class of their freedom or their property (in the sense I have heretofore used the word property) or which makes a caste of them to subserve the pride or vanity of others, or which deprives one citizen of civil rights which are secured to other citizens, it would seem to be an encroachment of his liberty, and a badge of servitude which is prohibited by the Constitution.

*Id.*

231. *Davis*, 10 Weekly Notes of Cases Pa.C. at 160.

232. *See id.*

I can see nothing destructive to our institutions in the demolition of the legal barriers that have been erected so long and so high between the colored race, and their natural, civil, and political rights and liberties.

The white race owes the colored race at least fair play in their great struggle for education and improvement and advancement, which they are making, and have a right to make in their recently emancipated condition.

If, after being accorded equal advantages and freedom from petty tyranny and studied insult, and the incentive to self-respect which is meted to others, the colored man then falls behind in the great race for human progress, it will then be time to talk of the moral and intellectual inferiority of his race. Nothing but gross uncharitableness can be jealous or envious of advancement and progress founded upon true merit.

*Id.*

233. McConnell, *supra* note 24, at 1093 (footnote omitted).

McConnell says that he is searching for the “prevailing, or preponderant, view, *and thus the best* understanding of the original meaning,”<sup>234</sup> and conducts extensive analyses of the votes to verify that, among congressional supporters of the Fourteenth Amendment, there is indeed good reason to think that a desegregationary intent was more prevalent. But the Theory of Original Sinn would not see *prevailing* assessments of reference as necessarily correct. The central examples I used to motivate the theory assume that *all* the Framers can be wrong about the constitutional referent, because they can *all* be wrong about the facts. It is obviously more important that Sumner’s reasoning regarding the manner in which the social meaning of segregation abridges civil rights, and therefore violates the Fourteenth Amendment, is persuasive than that it was widely accepted. Of course, wide acceptance is probative of persuasiveness, but not dispositive. Citing dissents is not, other things being equal, as good as citing majority opinions, but depending on the case, it can be the right thing to do.

Also, McConnell at one point suggests (albeit mildly, through his reliance on another’s arguments) that a Berger-style “What Would the Framers Do?” question is the critical one. McConnell relies on an article by Robert Lipkin for the idea that “abstract values, as opposed to concrete intentions, are a problematic basis for originalism.”<sup>235</sup> Lipkin’s argument in the footnote on which McConnell relies asserts that “originalism is essentially an historicist methodology. It asks what the actual historical actors would choose.”<sup>236</sup> But this is Berger’s WWFD approach, and is thus subject to fatal criticism in cases where the Framers are ignorant or wrong about critical factual questions. Indeed, it is an approach that McConnell himself earlier criticized compellingly, if briefly, in condemning “those who interpret the Constitution as if it froze into place the conclusions reached at the time of the framing about the application of constitutional principles to concrete situations.”<sup>237</sup> McConnell’s new preference for the concrete is unfortunate. The sense expressed by the text is always, to the extent that it relies on facts to produce reference, more or less “abstract.” Unless the text employs a name or other device for directly picking out a referent without relying on some sort of factual property of the referent, there is no avoiding a degree of abstraction in interpretation. We must supplement the historically extracted sense with the actual facts, not necessarily the facts as the Framers saw them. If this is not “originalism,” so be it.

McConnell insists stoutly, and properly, on distinguishing results that might have been preferred on policy grounds from those that were the result of

---

234. *Id.* (emphasis added).

235. *Id.* at 952 n.14 (citing Robert Justin Lipkin, *supra* note 70, at 829 n. 67).

236. Lipkin, *supra* note 70, at 829 n.67.

237. McConnell, *supra* note 36, at 361–62.

constitutional interpretation. But he would do well to distinguish results that were the result of *proper* constitutional interpretation, and a proper assessment of the reference-yielding facts, from those that might not have been. The Theory of Original Sinn requires no attachment to predominant opinions being correct. With such a standard, the Theory of Original Sinn will thus have, in one way, an easier time than McConnell of showing the consistency of *Brown* with its brand of originalism.

It is not *necessary* that our view about the reference-yielding facts be preponderant or prevailing among the Founders, and it is also not *sufficient*. McConnell's work showing the prevalence of Sumner's views is therefore, as well as not strictly being required, not enough. Preponderant error is possible. Also, an emphasis on the reasoning involved will cause problems for some of the evidence that McConnell marshals, because it is based in part on the votes in Congress, and accompanying constitutional interpretation, which are themselves based on a post-*Slaughterhouse* shift to the Equal Protection Clause. Shifting grounds in this way is understandable, but it undermines the Republicans' textual argument. McConnell dismisses one criticism by Earl Maltz by saying that 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."<sup>238</sup> He notes that he "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>239</sup> Such a tactical response, recognized as such, is not persuasive evidence of the correct interpretation of the Equal Protection Clause. McConnell argues that the distinction between the theories "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*."<sup>240</sup> Because the Republicans' textual argument is critical to their reasoning, however, the relation between the clauses is essential to an evaluation of their position under the Theory of Original Sinn, whether or not it would be important to "the originalist case for *Brown*."

Likewise, *Strauder* and Harlan's *Plessy* dissent deploy a rhetoric of the rights of citizens to which they are not really entitled, unless they mean to undo the *Slaughterhouse* mistake. Only a resurrected Privileges and Immunities Clause—not merely its ghost—can give proper support to the Republican arguments against the constitutionality of school segregation. Given the

---

238. Michael W. McConnell, *Segregation and the Original Understanding: A Reply to Professor Maltz*, 13 CONST. COMMENT. 233, 240 (1996).

239. *Id.*

240. *Id.*

number of scholars advocating the reversal of *Slaughterhouse*, however, this seems by no means a fatal problem.

E. *Rubinfeld on Brown*

In arguing for *Brown*, Rubinfeld claims in chapter ten of *Freedom and Time* that he can show why it is “an easy case” under his method.<sup>241</sup> Tellingly, Rubinfeld nowhere in this chapter quotes or reasons from the text of the Fourteenth Amendment, but begins with the foundational forbidden paradigm case, the black codes.<sup>242</sup> This paradigm case was recognized in *Slaughterhouse*,<sup>243</sup> then expanded in *Strauder*.<sup>244</sup> Rubinfeld applauds *Strauder*’s formulation quoted at greater length above—“legal discriminations, implying inferiority in civil society”<sup>245</sup>—as the proper result of later interpreters’ inventing categories to cover the paradigm case. He then applauds *Brown v. Board of Education*’s argument that segregation is unconstitutional because it “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way likely ever to be undone,” which Rubinfeld takes to be a proper expansion of *Strauder*’s “inferiority in civil society.”<sup>246</sup> Judges need only “formulate something like an anti-inferiorization or anti-caste principle for the equal protection clause” and then find that principle violated because “racial separation laws were untouchability laws.”<sup>247</sup>

I agree that an anti-inferiorization or anti-caste principle is what we need in order to legitimize *Brown*, but I disagree sharply with Rubinfeld about where we should get it. I think, in line with Sumner’s argument above, that we should *derive* such a principle from the text of the Fourteenth Amendment, as originally understood. We cannot merely “formulate” one out of our own materials. Rubinfeld mentions his desire to “do justice to the text in light of its paradigm cases,”<sup>248</sup> but he does not mention the actual text at all. His method seems better described as “doing justice, in addition to the paradigm cases.” The actual text of the Fourteenth Amendment, and the textual concept of privileges and immunities of citizens, do not do any actual work for Rubinfeld. We start with the paradigm cases and then add some principles that seem right. He concedes that “the interpretive task called for by the paradigm case method—the task of extrapolating principles from paradigm cases and

241. RUBINFELD, FREEDOM AND TIME, *supra* note 22, at 180.

242. *Id.* at 182.

243. *Id.* at 191.

244. *Id.*

245. *Id.* (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307–08 (1879)).

246. RUBINFELD, FREEDOM AND TIME, *supra* note 21, at 192.

247. *Id.* at 193.

248. *Id.* at 194; *see also id.* at 190 (“Paradigm case interpretation is the effort to do justice to a text in light of its paradigm cases.”).

applying those principles to new facts—irreducibly requires the exercise of judicial, normative, evaluative judgment.”<sup>249</sup> The idea seems to be that we, as interpreters, have our own norms and values, and we use them to produce the principles. Our interpretations are only as good as our own character on which we draw to produce those principles. But if that is right, what is the normative external *constraint* on interpretation? A normative support for *Brown* should explain *why* it is right, and why the intermediate principles it uses are right. If our interpretive method has, *itself*, an irreducibly normative element, merely in virtue of the fact that we are interpreting a constitution, then we risk a sort of circular reasoning in explaining why *Brown* is a good decision. The reasoning would seem to go like this: (a) *Brown* is a good idea, because (b) *Brown* is the best interpretation of the Constitution, because (c) *Brown* is a good idea. The Theory of Original Sinn, though, can supply a reason why intermediate principles are right, using the sense of the text as originally understood and arguments such as Sumner’s that use that text. But Rubinfeld, insisting on the freedom of later interpreters, cannot. He properly relies on intermediate principles like the anti-caste principle as enunciated in *Strauder v. West Virginia* and Justice Harlan’s dissent in *Plessy*, but disavows any reliance on textual justification for those principles.

Consider one simple example of an alternative principle that could cover paradigm cases just as well. We can cover 1868’s paradigm cases of the Fourteenth Amendment just as well if we limit our principles to situations that exist before, say, 1940. That is, we might say that the Fourteenth Amendment has a sunset provision at some point in the future. We might reason that constitutional provisions really ought to be able to get into the hearts and minds of legislators within seventy years or so, and that if a constitutional provision is still being violated after all that time, there’s no point in striking legislation down. Such a principle will do just as well in capturing the original, motivating paradigm cases, so such a principle cannot be wrong because it fails to cover the paradigm cases. The motivating paradigm cases, of course, all existed in 1868. Textualism gives a simple reason why a sunset principle is wrong: there just *isn’t* a sunset provision in the Fourteenth Amendment. If the text does not have a sunset provision, our principles cannot include one. But on Rubinfeld’s approach, I cannot see what would keep such principles out, if not the text. And the anathemas that Rubinfeld pronounces against any form of textualism prevent him from utilizing this method himself.

Rubinfeld can argue, of course, that a sunset provision is, substantively, a bad idea. Those doing paradigm-case reasoning should only use *good* principles that can also cover the paradigm case. But surely whether a constitutional provision has a sunset provision should not turn on whether present interpreters think such a provision would be a good idea. There must

---

249. *Id.* at 194–95.

therefore be more to justify an intermediate constitutional principle than (a) intrinsic desirability, and (b) ability to cover the paradigm cases. The text has always been the standard source for such justification in constitutional interpretation, and Rubinfeld gives no good explanation why we should either turn to some different source or do without one entirely.

Rubinfeld lacks what the Theory of Original Sinn supplies: a *reason* why we should pick one set of intermediate principles over another. The Theory of Original Sinn requires that we should pick those intermediate principles that either (a) correctly restate the original constitutional sense, or (b) correctly combine the original constitutional sense with the actual facts about the world. We should prefer an anti-caste principle *to the extent that it follows from the sense of the Fourteenth Amendment*: for instance, if it can truly be said that a law enforcing caste would “abridge the privileges or immunities of citizens of the United States.” In order to make that determination, we must attach particular meanings to such words as “abridge” and “privileges or immunities”—we cannot merely jump from the paradigm cases to an intermediate principle that seems good to us. Rubinfeld, though, does not want to consider how the constitutional *language* was understood, but only wants to consider the paradigm cases. Just as we require of the Framers that they give a textual *reason* why they support the intermediate constitutional principles and ultimate constitutional conclusions so that we can evaluate those reasons, we must ourselves have a better reason for our own intermediate principles and conclusions than their intrinsic attractiveness to us. Rubinfeld simply asserts his preference for the principles that he likes, and which would support *Brown*. But the Theory of Original Sinn offers the materials for a reason *why* those principles are good ones as an interpretive matter. Because the Theory of Original Sinn avoids resting constitutional interpretation on the mere *ipse dixit* of later interpreters, it is a better candidate for offering an actual *normative defense* of *Brown*, rather than a pledge of adherence to it.

As I noted above, the rules of *Strauder* and Harlan’s *Plessy* dissent use the language and argumentation pertaining to equality of the privileges of citizenship in a way that lacks good textual warrant if *Slaughterhouse* remains governing law. Overturning *Slaughterhouse* in the name of the original sense of the Fourteenth Amendment therefore allows these arguments to have a much sounder normative basis in the constitutional text.

Rubinfeld argues that the paradigm-case method makes better sense of the post-*Brown* desegregation cases than can a theory that says that the Framers were wrong because they did not know that education would become a civil right.<sup>250</sup> But we can disagree with earlier interpreters, not merely on whether

---

250. *Id.* at 192 (“Particularly irrelevant is the claim made by *Brown*’s supporters that education had become a thing of newly fundamental civil importance by 1954—a thought that, if it does some good for *Brown*, fails utterly to explain the numerous decisions that followed close

education was a civil right, but on whether the segregationary stamp of inferiority abridges the rights characteristically enjoyed by citizens. Sumner's arguments regarding common carriers are easily adequate to explain buses, golf courses, public beaches, and bathhouses. Miscegenation is a larger topic, but can be handled along the same lines: as McConnell points out, none of the Republican supporters of desegregation denied that their constitutional theory would invalidate miscegenation laws as well.<sup>251</sup>

#### F. Fallon on Brown

Fallon argues that the failure of originalist arguments to support *Brown* should give support to Ronald Dworkin's moral reading of the Constitution, which has an affinity with Fallon's fifth mode of constitutional interpretation.<sup>252</sup> Fallon relies on much the same evidence that Raoul Berger does, writing that "those who wrote and ratified the relevant provisions apparently did not understand them to forbid school segregation."<sup>253</sup> This statement may be true, but as discussed above, it is not dispositive under the Theory of Original Sinn: lack of an understanding of a particular *referent* does not entail the lack of a grasp of a *sense* which, when combined with the actual facts, produces that referent. Note as well that *not* understanding a provision to forbid segregation is distinct from *understanding* the provision *not* to forbid segregation. Charles Black stresses this point: "In [Bickel's] data I find, to be sure, a case for concluding that the relevant people did not 'intend' to abolish

---

on the heels of *Brown* in which the Court tore down America's racial separation regime in all its de jure forms, from segregated golf courses to public beaches.") (footnotes omitted). Rubinfeld cites *Gayle v. Browder*, 352 U.S. 903 (1956) (dealing with buses), *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (dealing with golf courses), *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (dealing with public beaches and bathhouses), and *Loving v. Virginia*, 388 U.S. 1 (1967) (dealing with interracial marriage). RUBENFELD, FREEDOM AND TIME, *supra* note 21, at 192–93 n.21.

251. See McConnell, *supra* note 24, at 1018 ("[I]t is striking that not a single supporter of the 1875 Act attempted to deny that under their interpretation, anti-miscegenation laws were unconstitutional.").

252. See *supra* text accompanying note 94.

253. FALLON, IMPLEMENTING THE CONSTITUTION, *supra* note 40, at 1. Fallon's evidence for this assertion is much the same as that evidence adduced by Berger:

This is certainly the consensus view among legal historians, who note, among other things, that when the Equal Protection Clause was ratified in 1868, five northern states excluded black children completely from public education, while an additional eight states permitted segregated schools. There was little or no evidence in the surrounding legislative history that either Congress in proposing the Fourteenth Amendment, or the states in ratifying it, meant to force a change in this practice. On the contrary, the Fourteenth Amendment was intended largely to constitutionalize the 1866 Civil Rights Act, and the principal sponsors of that Act specifically denied that it would force the integration of public education. Indeed, the Reconstruction Congress that proposed the Fourteenth Amendment maintained segregation in the District of Columbia schools.

*Id.* at 139 n.7 (citations omitted).

segregation, in the sense that they had no positive and consciously formed intention of doing so. That conclusion means little when one is dealing with general language.”<sup>254</sup> Black distinguishes what he thought was not shown: “[A] definitely formed intent to exclude segregation from the prohibitive ambit of the amendment’s general words—a totally different meaning of the predicate ‘did not intend.’”<sup>255</sup>

Fallon moves, however, from this more limited claim to a much more expansive dismissal of originalism on the basis of *Brown*. Fallon restates his position, “The Congress that enacted the Fourteenth Amendment apparently had no specific intent to abolish school segregation, which flourished as much after the ratification of the [Fourteenth Amendment] as it had before.”<sup>256</sup> From this lack of a specific intent, however—that is, the lack of an original understanding of the *reference* of the Fourteenth Amendment’s expressions to include desegregation—Fallon moves immediately to dismiss, on the basis of *Brown*, any binding force for the original understanding, even the original understanding of the *sense* of the constitutional language. Fallon writes:

If viewed as a “paradigm” of appropriate Supreme Court decision making, *Brown v. Board of Education* teaches [that] . . . under widely accepted norms of interpretive practice, the Supreme Court simply is not bound in every case by a narrow conception of the framers’ intent or the original understanding of constitutional language. Original understandings provide an important reference point for the assessment of constitutional meaning, but need not always prove decisive. Within limits, the Court is entitled to provide what Professor Dworkin calls a “moral reading” of the Constitution.<sup>257</sup>

Fallon overlooks the possibility that I embrace: that the “original understanding of constitutional language”—that is, the original understanding of the *sense* of constitutional language—might be binding even where the “narrow conception of the Framers’ intent”—that is, the original beliefs about the *referent* of constitutional language—is not. He moves too quickly to embrace moral theorizing as the only means whereby we might correct the Framers, neglecting the possibility that we might disagree with the Framers, not on moral questions, but simply on the reference-yielding facts. Indeed, we need not even *disagree* with the Framers on the reference-yielding facts, but

---

254. Black, *supra* note 208, at 423 n.14.

255. *Id.*

256. FALLON, IMPLEMENTING THE CONSTITUTION, *supra* note 40, at 57. Parenthetically, as McConnell documents, there was a significant movement for desegregation in the North after the Fourteenth Amendment, and some of this movement specifically invoked it. See McConnell, *supra* note 24, at 971–77; *id.* at 977 (“As the implications of the new constitutional regime came to be more fully understood in the North, segregation eventually was prohibited, either by legislative or judicial action, in every state.”).

257. FALLON, IMPLEMENTING THE CONSTITUTION, *supra* note 40, at 58 (footnote omitted).

might simply know *more* than they do; their ignorance of a constitutional referent is obviously not dispositive, whether we take a moral reading or not.

The Theory of Original Sinn does not deny that, *if* the Constitution contains moral terminology, then moral theorizing would be needed in order to figure out the Constitutional referent. For instance, the Fifth Amendment refers to “just compensation.”<sup>258</sup> Without a theory of the remedial justice pertaining to compensation, we cannot interpret this expression: if “just” expresses a moral evaluation, then finding out the facts about “just compensation” will require determining the substance of moral reality. *Sometimes*, it does seem that the Constitution allows moral reality to shape its tangible results. To know the referent of an expression using terms like “population,” interpreters must learn the facts about population. Likewise, to know the proper referent of an expression including moral terms like “just,” later interpreters have no choice but to assess the moral facts about justice.

However, I see little compelling grounds to think that the Fourteenth Amendment’s language expresses moral concepts. “The privileges and immunities of citizens of the United States” seems to refer to *legal* rights, not *moral* ones: to discover them, we are to conduct a legal and sociological study of the privileges and immunities that have characterized citizenship in the United States, not a moral study of the rights that people *ought* to have. There seems little warrant for thinking, as Fallon and Dworkin would, that they have particularly moral content. Consider the Republican view of the clause in 1872. The moral reading is not evident. Senator Sumner, while he cited the Declaration of Independence and a large variety of other documents in order to argue for the proposition that citizens should have equal rights and in arguing that his bill was a good idea, his exposition of the *substance* of the rights of citizens looks to a careful examination of the common law and the rights that generally characterize citizenship, not moral philosophy. He wanted equality in privileges “created or regulated by law.” Senator Sherman, quoted above, is most explicit in claiming that knowing the privileges of citizens requires a careful examination of the common law and other customary rights of citizens.

There is no theoretical *per se* bar to a moral reading of a morally expressed provision. A constitution-writer *could* easily say, “No State shall make or enforce unjust laws,” and to find out the reference of the expression “unjust laws,” we would need to know the facts about justice.<sup>259</sup> But the Fourteenth Amendment’s language does not seem to be moral language.

That said, our moral outrage at racial segregation is not interpretively irrelevant: we are from the same political tradition that produced Charles Sumner, and his outrage and ours may well have a common root and find

---

258. U.S. CONST. amend. V.

259. Such a provision would not be a terribly sensible one, I think, especially if it were judicially enforceable. But it is imaginable.

common expression in the Fourteenth Amendment. Given our moral opinions about segregation, to the extent that they are the moral opinions likely to be held by sensible people and to follow from sensible principles, and to the extent that the Framers, too, were sensible people and enacted sensible principles, we have *some* reason to think that the Framers would have enacted a principle from which our conclusions about segregation follow.

#### VIII. CONCLUSION

The Theory of Original Sinn puts an emphasis on the text of the Constitution as historically understood that is in line with the Supreme Court's historical approach and with the intuitive idea that office-holders swear to obey historically embedded constitutional language ("this Constitution") as the supreme law of the land. The theory that the original sense, but not the original reference, is interpretively binding makes better sense of the possible phenomena of Framer ignorance and error than do other theories that either privilege reference, like Berger's or Rubinfeld's theories, or that impose excessively complicated and rigid rules, like Fallon's theory. It offers a more successful way to give normative support to the desegregation decision in *Brown* than can these other theories.

