Dworkin vs. Scalia

1 Robert Bork, the original originalist

than troubled by the need for neutrality. A court required to decide *Brown* would perceive two crucial facts about the history of the fourteenth amendment. First, the men who put the amendment in the Constitution intended that the Supreme Court should secure against government action some large measure of racial equality. That is certainly the core meaning of the amendment. Second, those same men were not agreed about what the concept of racial equality requires. Many or most of them had not even thought the matter through. Almost certainly, even individuals among them held such views as that blacks were entitled to purchase property from any willing seller but not to attend integrated schools, or that they were entitled to serve on juries but not to intermarry with whites, or that they were entitled to equal physical facilities but that the facilities should be separate, and so on through the endless anomalies and inconsistencies with which moral positions so frequently abound. The Court cannot conceivably know how these long-dead men would have resolved these issues had they considered, debated and voted on each of them. Perhaps it was precisely because they could not resolve them that they took refuge in the majestic and ambiguous formula: the equal protection of the laws.

But one thing the Court does know: it was intended to enforce a core idea of black equality against governmental discrimination. And the Court, because it must be neutral, cannot pick and choose between competing gratifications and, likewise, cannot write the detailed code the framers omitted, requiring equality in this case but not in another. The Court must, for that reason, choose a general principle of equality that applies to all cases. For the same reason, the Court cannot decide that physical equality is important but psychological equality is not. Thus, the no-state-enforced-discrimination rule of *Brown* must overturn and replace the separate-but-equal doctrine of *Plessy v. Ferguson.* The same

(Bork, 1971, pp. 14–15)

2 Dworkin on Bork on *Brown*

"the Supreme Court's famous decision in *Brown v. Board of Education*, which used the equal protection clause to declare racial segregation of public schools unconstitutional ... is a potential embarrassment to any theory that emphasizes the importance of the framers' intentions. For there is no evidence that any substantial number of the congressmen who proposed the Fourteenth Amendment thought or hoped that it would be understood as making racially segregated education illegal. In fact, there is the strongest possible evidence to the contrary. The floor manager of the bill that preceded the amendment told the House of Representatives that "civil rights do not mean that all children shall attend the same school," and the same Congress continued the racial segregation of the schools of the District of Columbia, which it then administered.

When the Supreme Court nevertheless decided, in 1954, that the Fourteenth Amendment forbids such segregation, many distinguished constitutional scholars ... had serious misgivings. But the decision has by now become so firmly accepted, and so widely hailed as a paradigm of constitutional statesmanship, that it acts as an informal test of constitutional theories. No theory seems acceptable that condemns that decision as a mistake. (I doubt that any Supreme Court nominee would be confirmed if he now said that he thought it wrongly decided.) So Bork's discussion of *Brown v. Board of Education* provides a useful test of what he actually means when he says that the Supreme Court must never depart from the original intention of the framers.

Bork says that the *Brown* case was rightly decided because the original intention that judges should consult is not some set of very concrete opinions the framers might have had, about what would or would not fall within the scope of the general principle they meant to lay down, but the general principle itself. Once judges have identified the principle the framers enacted, then they must enforce it as a principle, according to their own judgment about what it requires in particular cases, even if that means applying it not only in

circumstances the framers did not contemplate, but in ways they would not have approved had they been asked." (Dworkin, 1987)

3 Some actual, and fictional, history

Michael McConnell argued that, despite appearances, *Brown* conforms to the original, historical meaning of the Fourteenth Amendment (McConnell, 1995a). Michael Klarman criticized McConnell's argument (Klarman, 1995). McConnell, in turn, replied to Klarman (McConnell, 1995b).

As Dworkin suggested, the political significance of *Brown* outstrips the respect it gets from legal scholars. So the scholars wrote their own decisions (Balkin, 2002). It's a bit like the Speluncean Explorers, only the case is real.

An article by H. Jefferson Powell gives historical evidence that the framers of the Constitution did not believe that their intentions should govern subsequent interpretations of the Constitution (Powell, 1985).

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