

SCHOOL SEGREGATION AND PROFESSOR AVINS HISTORY A DEFENSE OF BROWN v BOARD OF EDUCATION

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For Professor Avins the conclusion is inevitable: "The rule of *Brown v. Board of Educ.* is not now, nor has it ever been, the supreme law of the land."¹ He is not the first to express this view and, unfortunately, he will not be the last.² His article commands attention, however, because it is the product of historical research by a scholar with impressive credentials. His evidence and his reasoning are, nonetheless unconvincing: they simply do not lead to the conclusion that the school segregation cases were wrongly decided.

Professor Avins' article is an attempt to reduce the broad guarantees of the fourteenth amendment to a series of fixed, mechanical rules.³ He finds it unnecessary even to consider the basic judgment of the *Brown* decision that a state denies Negro children equal treatment by compelling them to attend segregated schools. For in his view the command of the fourteenth amendment that "No state shall deny to any person the equal protection of the laws" does not apply to school segregation even if such segregation in fact constitutes unequal treatment. His reason: despite its seemingly broad language, the amendment, as originally understood by the Congress that sent the amendment to the states, was not intended to apply to school segregation. Therefore, a judicial decision in 1954, purporting to rest upon the fourteenth amendment and

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¹Because of the publication schedule, it will not be possible for the author to cite by page or footnote to Professor Avins' article which immediately precedes this reply. Uncited quotations are to that article.

²I do not mean to imply that all criticism of the Court's decision is irresponsible. Legal scholarship is quite fortunate, for example, to have such a provocative, critical assessment of the Court's opinion as Professor Wechsler's *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959).

But there is a difference, to my ear at least, between the statement that a case was incorrectly decided and Avins' assertion that *Brown* is not the supreme law of the land. One might believe, of course, that an incorrect decision by the Supreme Court is not "law" in some theoretical sense. In the context in which it is offered, however, Avins' statement will lead some to think that he believes that a citizen has no obligation to comply with the holding. While I do not read him as urging citizens or officials to disobey the law, I think that his choice of language is, at best, unfortunate. See *Cooper v. Aaron*, 358 U.S. 1 (1958).

³A further exposition of Professor Avins' views on the interpretation of the

holding segregated public school systems unconstitutional, is an unwarranted exercise of non-existent authority

The first problem with Avins thesis is that the evidence he presents concerning the "intention of Congress is implausible. He states first that the 1866 Congressional debates on the fourteenth amendment offer only scanty and inconclusive evidence of the amendment's intended impact on segregation in public schools. He claims, however, that abundant "reflected" evidence of Congress intention can be found in proceedings that occurred *eight years after the fourteenth amendment was promulgated*, when a later Congress considered, as a part of the Civil Rights Act of 1875, a proposed clause providing for desegregated public schools. How do the actions of the 43d Congress reflect upon the intention of the 39th Congress that passed the fourteenth amendment? Avins argues as follows. Congress failed to enact the school desegregation clause in 1874 because the Moderate Republicans in Congress declined, for various reasons, to support such a provision. He therefore assumes that had the fourteenth amendment, when it was considered in 1866, contained a specific school desegregation clause, Moderate Republicans would not have supported the amendment. Without the support of the Moderates the fourteenth amendment would not have received the two-thirds vote necessary for passage. Thus, (in Avins words) as a matter of simple arithmetic the amendment does not apply to school segregation.

For several reasons, this 1874 evidence is virtually worthless as an indicator of the intention of the Congress that promulgated the fourteenth amendment in 1866. In the first place the membership of Congress and of the Moderate block changed substantially between 1866 and 1874.⁴ To the extent that different people are involved, it is highly questionable to assume that the views of the "Moderates of 1874 can be read back as being the views of the "Moderates of 1866.

Even more troublesome is the problem of ascertaining the meaning of the Moderates opposition to the 1874 school clause. At one point Avins asserts that by their 1874 statements and votes against the proposed school clause the Republican Moderates demonstrated their constitutional judgment that "the fourteenth amendment neither compelled of itself

fourteenth amendment may be found in recent articles dealing with other aspects of racial discrimination. See Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966); Avins, *Anti-Miscegenation and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966).

⁴In the instant article Avins states that in 1874 only a handful of Republicans sat in the House who had been in the 39th Congress and voted for the fourteenth amendment. In his related article in the *Columbia Law Review* Avins states that sixteen of the thirty-three Senators who voted for the fourteenth amendment participated in the debates on the Civil Rights Act of 1875. Avins, *supra* note 3, at 875.

nor gave Congress the power to compel school desegregation. Neither the debates recounted nor the votes recorded are adequate to support Avins claim.

Granted, the proposed school clause of 1874 attracted insufficient support to be enacted. One should hesitate, however, before relying upon that naked fact. To give affirmative content to the failure of Congress to pass proposed legislation is often misleading. A legislature does not enact a principle by failing to enact its opposite. In this particular instance, the fact that a given congressman voted against the desegregation clause does not necessarily mean that he approved (even in 1874) of segregated schools or that he thought such segregation constitutional. More than one congressman, for example, is quoted as having decried the harsh penalties incorporated into the school clause of the 1874 bill. One might very well believe that segregated schools violate the fourteenth amendment and yet shrink from a bill that would enforce desegregation (as this one would have) by subjecting school board members, principals, and teachers to the criminal sanctions of fine and imprisonment.⁵

Nor do the debates on the school clause justify the assumption that the Moderates cast their negative votes for constitutional reasons. Admittedly, some Moderates who had voted for the fourteenth amendment expressed the retrospective view that the amendment neither compelled of itself nor gave Congress the power to compel school desegregation. Avins article itself, however, is replete with other reasons for the votes against the clause. Frequently the statement was made that passage of the clause would result in the destruction of the public school system in the South. (This argument was made so often that it is referred to as the stock argument about school closing.) Avins, in fact, states that those Republicans who opposed the school clause did so either because of personal belief that the fourteenth amendment did not require school desegregation *or* because of fear of voter reaction, personal hostility to desegregation, or a combination of these views.

His own admission seriously undercuts his thesis. Had he shown most of the Republican Moderates stating unequivocally that they were voting against the school clause because they believed school segregation outside the proscriptions of the fourteenth amendment, and that this had been their understanding eight years earlier when they had supplied the votes necessary for the passage of that amendment, his point would

⁵See CONG. GLOBE, 42 Cong., 2d Sess. app. 142 (1872).

⁶Even if the 1874 evidence had established unmistakably the constitutional point he sought to draw from it, such evidence still would not have foreclosed the *Brown* decision. The drastic changes that have occurred in the role of public education over the last century negate any attempt to find an explicit intention regarding the

have been stronger.⁶ As it stands, the record indicates that many of the votes cast against the clause were motivated by reasons completely unrelated to the arguments over the constitutionality of segregated schools. It is perfectly possible that a congressman could have voted for the fourteenth amendment with the understanding that the amendment was capable of supporting congressional or judicial action against segregation and then found eight years later that it was politically unfeasible for him to vote for a bill enforcing immediate desegregation of the public schools.

Apart from the inadequacy of his evidence, Avins thesis is subject to a more fundamental objection. He fails to examine the possibility that the fourteenth amendment was intended to have both immediate and long-range consequences. In his landmark study *The Original Understanding and The Segregation Decision*,⁷ Alexander Bickel concludes that the amendment was intended to carry out immediately only the limited objectives that had been embodied in the Civil Rights Act of 1866. That bill covered basic areas such as the right to sue and to

segregated schools of our time. The point has been made most sharply by Charles L. Black, Jr..

The question of the "intent" of the men of 1866 on segregation *as we know it* calls for a far chancier guess than is commonly supposed, for they were unacquainted with the institution as it functions in the American South today. To guess their verdict upon the institution as it functions in the midtwentieth century supposes an imaginary hypothesis which grows more preposterous as it is sought to be made more vivid.

Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

The use of legislative evidence—however persuasive—gleaned from debates that took place eight years after the passage of a constitutional amendment also raises serious theoretical problems. In his provocative discussion, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964), John Wofford argues that the law-giver whose intention should be consulted with regard to the meaning of a constitutional provision is not only Congress, but the state conventions or legislatures that must ratify the amendment. After including the states in the calculus of intention, the search becomes virtually impossible. One answer to Wofford is that whatever the congressional debates establish should constitute rebuttable presumption, since "it is not unrealistic, in the main, to assume notice of congressional purpose in the state legislatures. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV L. REV. 1, 7 (1955). This answer, however, does not apply to legislative history supplied in Congress *after* an amendment has been ratified by the states. The states could not, in the nature of things, have had any notice of the "intention that Avins purports to uncover from the records of 1874.

In addition to the problems of theory mentioned above, other obvious considerations should restrain a doctrine that would allow constitutional provisions, or statutes, to be restricted or repealed" by post-enactment declarations of a few men whose votes had been essential to passage.

make contracts but was not directed at such problems as jury service, suffrage or school segregation. Bickel goes on to conclude, however, that Congress did not limit the amendment to these few immediate objectives but established a general standard of equality that could be applied in the future to other problems. The important fact is that the Joint Committee on Reconstruction rejected, as a draft for the fourteenth amendment, a specific and exclusive enumeration of the limited rights embodied in the 1866 Act. They chose instead to write a broad, organic provision. They chose language dealing not only with the immediate concern of racial discrimination, but with any discrimination that deprives any person of equal protection, whether or not based on race; they chose, instead of a provision limited to equal protection of life, liberty and property one expanded to insure equal protection of the laws. While finding no specific purpose going beyond the limited protections afforded under the 1866 Act, Bickel does find an awareness on the part of the framers that it was *a constitution* they were writing, which led to a choice of language capable of growth.⁸ Through this choice of language the amendment fulfilled a dual purpose: it provided for the immediate correction of a certain set of specific, pressing evils (a set which perhaps did not include segregation) *and* it established a general anti-discrimination standard capable of later concrete application to other problems. The question of affording greater liberty in constitutional form to the Negro than would have been encompassed in a specific enumeration of the limited guarantees of the 1866 Civil Rights Act was thus deferred, and the way left open for future Congresses (by legislation) and future courts (by the principled, evolutionary techniques of the judicial process) to draw from the equal protection clause a source of authority for measures insuring full equality.⁹

Avins 1874 evidence in no way undermines the findings that Professor Bickel made ten years ago. All that Avins article tells us is that Congress and the nation were not yet ready in 1874 to apply in full measure the equalitarian principle of 1866. The principle remained unimpaired, however, awaiting another day for its full vindication.¹⁰

In short, it is Professor Avins, and not the Supreme Court, who

⁷69 HARV. L. REV. 1 (1955).

⁸*Id.* at 63.

⁹*Ibid.*

¹⁰This brief article is intended only as a reply to Professor Avins. I do not presume to answer all possible criticisms of the *Brown* decision. There is no doubt in my mind, however, that the case was correctly decided. The best affirmative argument for the decision is found in Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

seeks to rewrite the fourteenth amendment. In place of the broad guarantee of equal protection of the laws, Avins would substitute a detailed list of the rights included and excluded in the amendment. He would have the Court enforce only those rights to equality that would have been included had Congress chosen to promulgate such a detailed list. The short answer is that Congress did not so choose.