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Brown and the Doctrine of Precedent: A Concurring Opinion

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INTRODUCTION

I concur in those opinions finding a violation of the Equal Protection Clause of the Fourteenth Amendment[1] in *Brown v. Board of Education.*[2] I find persuasive the argument that any other decision would permit states to evade the core purpose of the Fourteenth Amendment. Nevertheless, I write separately to indicate why I would join in this judgment even if I remain unpersuaded that the evidence from the historical context of the Fourteenth Amendment demonstrates that the Equal Protection Clause was intended to invalidate segregated schools. The historical arguments that raise doubts about the application of the Equal Protection Clause to racial segregation have been uniformly rejected by all three branches of the federal government for more than eighty years.[3] Since I am unwilling to discard eighty years of unquestioned constitutional practice in favor of contested arguments from the historical materials, it strikes me as quite unnecessary, whatever one's conclusions about the weight of the historical evidence, to fashion any extraconstitutional principle with which to decide the case. I write to clarify why such an approach is reconcilable with the emphasis in *Marbury v. Madison*[4] placed on the idea of a fixed Constitution and why such an approach does not lend support to methods of constitutional interpretation that would undermine this foundational concept of our constitutionalism.[5] Part I of this opinion seeks to defend the doctrine of precedent against the idea that it is irreconcilable with the notion of a fixed Constitution. Part II, in turn, attempts to make the case that the

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1. U.S. CONST. amend. 14, § 1.
2. Brown v. Board of Educ., 347 U.S. 483 (1954).
3. *See infra* notes 22–40 and accompanying text.
4. 5 U.S. (1 Cranch) 137 (1803).
5. These conclusions are especially important given the suggestion by at least one of the "justices" writing for this exercise that we should decide this case as we have on the basis of a once-only application of an essentially extra constitutional principle so as to avoid damaging the fabric of our constitutional order. Steven D. Smith, *Brown v. Board of Education*, 20 S. ILL. U. L.J. (forthcoming Fall 1995). This opinion suggests why I think such an unprecedented step is unnecessary and, therefore, unwise to consider.

application of the doctrine of precedent warrants reliance on longstanding constitutional doctrine that point to the result we have reached today.

I. THE CASE FOR A DOCTRINE OF PRECEDENT

In my view, the principle that there comes a time of repose in which issues are deemed resolved applies to the field of constitutional law just as it does to common law and statutory interpretation. All of law, fundamental law included, inevitably grapples with the tensions generated by our quest for the correct substantive outcomes and our recognition that we must grant the authority to decide so as to achieve some certainty and stability in our legal relations. As an illustration, our constitutional order is based on a moral vision that humans have rights which they do not forfeit when joining civil society. At the same time, we recognize that the people are the supreme judiciary as to the content of those rights when they engage in the sovereign act of creating or amending the Constitution, a document which will in various ways define and limit those rights. There is no way out of this tension–our natural law aspirations must inevitably play themselves out through some system of human decision-making, and historically we have believed that the popular sovereignty manifest in the constitution-making process is likely to yield superior results to rule by judges or a system in which each individual becomes the judge of his own obligations to enacted law.

The same is true of the Constitution itself. However committed we may be to the idea of a fixed and written Constitution, as well as to the idea of objective interpretation, in the final analysis, fallible human beings will implement those ideals. We need not embrace the simplistic slogan that the Constitution means what this Court says it means. Sooner or later, authoritatively adopted judicial decisions may be embraced by the nation as a whole and become a settled part of our constitutional order. What is being recognized is not an unrestrained power to amend the Constitution outside of Article V,[6] but the authority to determine and fix the meaning of the Constitution.

Some modern advocates of originalist constitutional interpretation have contended that fidelity to the Constitution as the supreme law requires us to treat the best evidence of original meaning as authoritative over any prior

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6. U.S. CONST. art. V.

decisions, however long or universally accepted.[7] But this view seems not only perfectionistic and utopian, but also decidedly nonoriginalist. The text of the Constitution, after all, says nothing about precedent one way or the other. While the historical evidence for judicial review appears to be quite strong, despite the arguments of its detractors over the years,[8] there is very little evidence bearing on the question whether the founders intended a doctrine of precedent or, to the contrary, that all constitutional questions were to remain open to reconsideration in perpetuity.[9] If the doctrine of judicial review is an appropriate inference from the text of the Constitution, rooted in the framers' conceptions of the ordinary role of courts in deciding cases, the inference that they assumed that the doctrine of *stare decisis* would apply, is at least as reasonable as any contrary inference.[10]

Despite suggestions to the contrary,[11] the logic that legislative judgments inapposite to the Constitution do not generally bind the courts, as *Marbury*[12] reasoned, hardly addresses the more refined question whether courts might in appropriate cases be bound by precedent. The real linchpin of *Marbury* was not the supremacy of the Constitution, but the authority of the courts to profess the law. More specifically, it was the fairly novel assertion, historically speaking, that this law-declaring judicial role extended to fundamental law.[13] However,

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7. *E.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Robert W. Bennett, *Judicial Review as Law*, 75 ILL. B.J. 202, 204–05 (1986) (construing "originalism" as entailing this outcome).

8. Among the works I consider to be most persuasive, I would include RAOUL BERGER, CONGRESS V. THE SUPREME COURT (1969); CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT (1960); Henry M. Hart, Jr., *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456 (1954) (book review).

9. For a brief treatment, see Thomas B. McAffee, *Berger v. The Supreme Court-The Implications of His Exceptions-Clause Odyssey*, 9 U. DAYTON L. REV. 219, 256–58 (1984).

10. Lawson, *supra* note 7, at 25–28.

11. In the most elaborate and effective defense of judicial review in the context of the Constitution's ratification, Alexander Hamilton emphasized that courts are "bound down by strict rules and precedents" in order to avoid "an arbitrary discretion." THE FEDERALIST No. 78, at 529 (Alexander Hamilton)(Jacob Cooke ed., 1961). As suggested by Hamilton's reference to common law methods of judicial decision-making, many proponents of judicial review may well have viewed the doctrine of precedent as one of the safeguards that justified placing the power of construing the Constitution into the hands of the judiciary. *But see* Lawson, *supra* note 7, at 29 (responding to this sort of historical justification for reliance on precedent in constitutional law; relying, however, on an interpretation of the logic of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), that is disputed below).

12. 5 U.S. (1 Cranch) at 178.

13. Professor Lawson's argument that the logic of *Marbury* precludes a doctrine of precedent presumes the centrality of the opinion's emphasis on the supremacy of the Constitution in the hierarchy of laws to which the courts may look while attempting to resolve a legal dispute. but it has long been observed that in emphasizing the supremacy of the Constitution in our legal order-which is straight forwardly asserted in Article VI-*Marbury* itself largely begged the question as to why a single

if the judicial branch's construction of the Constitution can, in general, bind other branches, as *Marbury* implicitly asserts, it may also be that some sorts of decisions, including those carefully and deliberately resolved by all three branches and accepted by the nation over many decades, can bind subsequent interpreters (judicial or otherwise) as well. This certainly was the belief held by James Madison, who, despite warning against views of constitutional interpretation that rested on the assumption that the Constitution was changeable,[14] nevertheless acquiesced in the nation's judgment about the constitutionality of the national bank, even though it conflicted with his own original view.[15] As I understand it, Madison's view was neither that the nation's choice had persuaded him that he had been incorrect nor that the people held a limitless right to amend the Constitution outside Article V; rather, it was that the nation as a whole was empowered to judge finally the meaning of the Constitution.[16] If an institutional implication of *Marbury* is that judicial

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branch's construction, and in particular the judiciary's, should bind the other branches (rather than, for example the legislature's judgment binding the Court). For our purposes, the more important point is that whether the question of "who decides" was adequately confronted or not, *Marbury* in fact decided it and thus stands for the proposition that some constructions of the Constitution are more authoritative than others. But *Marbury* answered that question only in the narrow context of the Court confronting an initial claim of conflict between a statute and the superior law of the Constitution.

That *Marbury* determined that in such a case, courts are empowered to authoritatively construe the Constitution, does not necessarily answer the question whether, for example, judges might be impeached and convicted for engaging in what members of the legislative branch deemed to be judicial usurpation. *See* FEDERALIST NO. 81, at 545–46 (Alexander Hamilton) (Jacob cooke ed., 1961) (an important advocate of judicial review justifying impeachment of judges for encroachment on the powers of the legislature). Similarly, it does not answer the question whether some prior decisions, either by the Supreme Court itself or by the nation as a whole acting through all three branches, might not be deemed authoritative by subsequent Courts. Any assertion that the Supreme Court "must disregard the statute," in cases like *Marbury*, in accordance with its duty to follow the superior law, does not logically demand that it also view itself as bound by its current membership's interpretation of constitutional text when it conflicts with prior decisions of the Court, as well as the uniform judgment of the other branches of the national government. Lawson, *supra* note 7, at 29.

14. Madison asserted that "there can be no security for a consistent and stable, more than for a faithful exercise of [the Constitution's] powers" if it were not construed according to its original meaning. Letter from James Madison to Henry Lee (June 25, 1824), *in* Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMM. 77, 105 (1988).

15. PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 18 (Paul Brest & Sanford Levinson eds., 2d ed. 1983) (observing that in 1815 Madison supported the establishment of the second Bank of the United States, despite his constitutional objections to the creation of the first national bank).

16. Madison justified his change of position on the ground that the constitutional issue was settled "by repeated recognitions, under varied circumstances, of the validity of such an institution." PROCESSES, *supra* note 15, at 18 (quoting BRAY HAMMOND, BANKS AND POLITICS FROM THE REVOLUTION TO THE CIVIL WAR 233 (1957)).

decisions might bind the nation in law, unless and until they are overruled, it should hardly be unthinkable that decisions long-entrenched, upon which the nation and its institutions have proceeded, could be binding as well.

The acknowledgment that some constitutional questions might be deemed settled should not be confused with the vastly more general notion of an infinitely flexible or changeable Constitution. The point of acknowledging that many questions will be definitively resolved is not to insulate as much innovation as possible, but to recognize that many debatable questions require resolution so that society can get on with the task of conforming to established ground rules. This is why this Court has long recognized that correction of constitutional error provides a powerful argument for rejection of the doctrine of stare decisis in particular cases, even while recognizing that many questions are now beyond debate or reconsideration.

There can be little question, for example, that the seminal decisions of the Marshall Court, especially *Marbury* and *McCulloch v. Maryland*,[17] have become established as central elements of our constitutional order. All of us know that it is of little consequence that these decisions provoked controversy during the eras in which they were decided and that scholars through the years have continually debated their merits as constructions of constitutional meaning. And it is all but irrelevant, in my view, that I happen to believe that *Marbury* was almost certainly correctly decided, but that *McCulloch* stands on much shakier ground as an original interpretation of the Constitution adopted in 1787. Of course, many do not share my assessment of the original merits of these decisions, but the more fundamental point is that our constitutional law and practice have grown from these foundational decisions. I would not reconsider *McCulloch* even if my convictions about its original credentials were much stronger than they are, for I hardly consider the matter to be free from doubt. No practical people, as our constitutional founders surely were, would expect the Court to overrule a critical rule of decision that has become part of the foundation of our legal order for 150 years, merely because five of its members are, at long last, convinced that the Court that decided *McCulloch* was in error.[18]

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17. 17 U.S. (4 Wheaton) 316 (1819).

18. Writing during the celebration of the bicentennial of the Constitution, Dean Bennett reminded us that a theory of judicial review necessarily rests on a plausible theory of the function of law itself. Bennett, *supra* note 7, at 204–05. The Supreme Court Justices were not intended to function as philosopher-rulers nor as slavish servants to the political branches, but as judges charged with adjudicating the law. Bennett further contended that the conception of the judicial role that contemplated the invariable overruling of venerable precedent, based on new or refined historical understandings, would not be worthy of a court of law: "The legal system is a source of order and stability in society, albeit one that must provide outlets for change. To ignore precedent upon discovering convincing history is to ignore that stabilizing function. Judges are no more to be

II. APPLICATION OF THE DOCTRINE OF PRECEDENT

Even if foundational theory can justify a doctrine of precedent, many are skeptical whether a principled theory for following or overruling constitutional precedent can be articulated. Thus, originalists are viewed by many as facing "the problem of describing criteria that determine which illegitimate decisions should be overruled and which should be left inviolate."[19] While the issue is an important one, which at least a couple of prominent commentators have attempted to confront,[20] we need not address all of its subtleties in the present context. What seems most clear and relevant is that this Court ought to be especially reluctant to overrule precedent that is: (1) proven and long-established; (2) the product of the carefully considered judgment of all three branches of government; and (3) based upon the fundamental values of the sovereign people. Under such circumstances, the least that can be said is that the case for the impropriety of the original constitutional judgment should be overwhelming before this Court should even decide whether to overrule such a precedent.

It is my thesis that these elements are easily established in the present case and that the textual and historical arguments against the long-established precedents in question are in fact far from clear. There is therefore inadequate justification for this Court to reconsider the entire history of Fourteenth Amendment jurisprudence.

It is clear, first of all, that the interrelated originalist arguments offered against applying the Equal Protection Clause[21] to school segregation have been uniformly rejected by all three branches of the federal government during the entire length of our constitutional practice under the Fourteenth Amendment. The first argument is that the original context reveals that Section 1 of the Fourteenth Amendment was intended only to secure equal rights as to the rights enumerated in the Civil Rights Act of 1866,[22] or some other narrow list of

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primarily historians than they are to be moral philosophers." Bennett, *supra* note 7, at 205. I am persuaded that the framers would have agreed.

19. Earl Maltz, *Some New Thoughts on an Old Problem–The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 847 (1983).

20. Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); ROBERT BORK, THE TEMPTING OF AMERICA (1988).

21. U.S. CONST. amend. 14, § 1.

22. 42 U.S.C. § 1981.

rights.[23] The second argument is that the framers of Section 1 intended to protect a category known as "civil" rights, and not "social" or "political" rights, and that the interest in access to integrated facilities was viewed as a "social" right by those who drafted and ratified the Fourteenth Amendment.[24]

As to the first argument, it is clear that since the early 1870s, Congress enacted legislation that proceeded from the premise that states are obliged to secure legal equality for African-Americans with respect to matters that went beyond civil rights, as those rights were conceived in 1866. The Supreme Court, in turn, did not question Congress' authority to legislate in such areas. As an example, jury service was not among the civil rights listed in the 1866 Act, and indeed had been characterized by the Act's proponents as a "political" right to which the Act would not apply.[25] Nevertheless, in *Strauder v. West Virginia*,[26] the Court supplied an eloquent statement of the purpose of the Equal Protection Clause in terms of preventing hostile legislation designed to reduce some citizens to second-class status. The opinion unequivocally construed the provision as extending its limitation on legislative authority beyond the list of rights contained in the Civil Rights Act of 1866[27], and beyond any narrow category of "civil" or "natural" rights. This conclusion was not called into question until very recent times.

Similarly, as several works have shown, the entire debate in Congress over the propriety of the 1875 Civil Rights Act[28] proceeded on the assumption that the imposition of segregation by law as to governmental facilities, such as public transportation systems and public buildings, would violate the Fourteenth Amendment.[29] No one denied, for example, that states owed a duty to enforce common law rights of access equally as to all races. The notion that the interest

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23. *E.g.*, RAOUL BERGER, GOVERNMENT BY THE JUDICIARY 18, 20–36, 133, 169–71 (1977); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 106–09 (1990). Professor Maltz thus construed an argument that unequal segregated education violates Section 1 by focusing on the emphasis on the right to be free from unequal taxation, asserting that historically this was one of the privileges or immunities secured by Section 1. Maltz, *supra*, at 111-13.

24. *E.g.*, BERGER, *supra* note 23, at 30–31, 170–71; MALTZ, *supra* note 23, at 110 (relying on similar distinction between vested and natural rights on the one hand, and "rights" which legislatures may withhold at will).

25. Even so, the Supreme Court upheld federal legislation prohibiting discrimination as to jury service, and implicitly rejected the proposition that the Equal Protection Clause, U.S. CONST. amend. 14, § 1, did not apply because jury service constituted a political right. *Ex Parte* Virginia, 100 U.S. 339, 347–49 (1880).

26. 100 U.S. 303 (1880).

27. 42 U.S.C. § 1981 (1866).

28. Civil Rights Act of 1875, ch. 114, 18 Stat. 335–37 (1875).

29. *See* Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873, 881, 888–89, 912–15 (1966); McAffee, *supra* note 9 at 254–55.

in access to such facilities on equal, non-segregated terms might amount to a mere social right, but not a civil right, simply went unheeded. Instead, Congress only debated the circumstances under which privately held facilities were legitimately held to the same obligations as the state.[30] This Court's rejection of the Civil Rights Act of 1875[31] moreover, rested on the state action doctrine articulated in the *Civil Rights Cases*[32] and did not rely upon the distinction under consideration.[33] There can be little doubt that a public law mandating segregation in schools deals a much heavier blow to the idea of equal citizenship and equality under law than does the exclusion of African-Americans from places of public amusement that is addressed by the Civil Rights Act of 1875.[34] The right of African-Americans to associate with whites at privately held theatres and amusement parks can be far more plausibly characterized as a mere social right than can the right to attend public school on the same terms as whites.

It has long been recognized that this Court's decision in *Plessy v. Ferguson*[35] did not even purport to rest on any plausible theory of original intent.[36] Rather, in *Plessy* we in effect affirmed this Court's decision in *Strauder*, and then supplied dubious factual and moral grounds for distinguishing the case before us in order to justify the so-called doctrine of "separate but equal."[37] We concluded that for legal and constitutional purposes, the concept of equality before the law and the requirement that laws not be enacted for hostile purposes could be satisfied by legally mandated segregation in at least some settings.[38] Even so, considering that *Plessy* has been on the books for as long as it has, it has been suggested that there is no principled basis for deciding against the school districts by affirming the applicability of

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30. *See supra* note 29.
31. Civil Rights Act of 1875, ch. 114, 18 Stat. 335-337 (1875).
32. 109 U.S. 3 (1883).
33. Indeed, the implication of the *Civil Rights Cases*, 109 U.S. 3 (1883), read together with *Strauder*, is that Congress quite clearly could have prohibited the same discriminatory acts had they been engaged in by governmental entities.
34. Civil Rights Act of 1875, ch. 114, 18 Stat. 335-337 (1875).
35. 163 U.S. 537 (1896).
36. *See, e.g.*, Paul Oberst, *The Strange Career of Plessy v. Ferguson*, 15 ARIZ. L. REV. 389, 408-11 (1973).
37. *Plessy*, 163 U.S. at 548-50.
38. *Id.* at 550-51.

Strauder, while rejecting *Plessy* as controlling precedent.[39] I reject this conclusion for several reasons.

Perhaps least centrally, it would be quite possible to decide this case as we do without overruling *Plessy*. In *Buchanan v. Warley*,[40] we invalidated race-based public zoning laws precisely because the pretense of equality before the law could not be maintained in a case in which the law created a direct barrier to members of a particular race obtaining high quality housing.[41] Our prior education segregation cases rested on much the same point, namely, that there are so many intangibles of great importance in the educational context that at least in many cases, it is impossible to provide a truly equal educational experience in a segregated setting. I think it is accurate to say that in education, separate never can be equal.

At a slightly broader level, it has been accurately observed that the history of segregated schools was a history of purposeful evasion of the requirement of "equal" facilities and education.[42] Indeed, "the maintenance of facilities separated by race had invariably been a mask for an attempt to provide blacks with less desirable facilities,"[43] and it is by now quite clear that "any attempt to provide blacks with access to truly equal facilities [would] likely . . . be met by resistance in both subtle and crude forms."[44] In this historical context, even if we assumed a general unwillingness to rethink all of the reasoning in *Plessy*, this Court would be justified in finding that "all such segregation was maintained for the purpose of denying blacks equal opportunity."[45]

In short, *Plessy* could be readily distinguished as resting primarily on a factual assumption belied by the experience of the nation in the years since that decision. That factual assumption would be that segregation might be maintained for relatively benign reasons, rather than out of hostility for the interests of the racial minority. Considering that *Plessy* announced a rule that, by its terms, operated as a qualification of *Strauder's* broad rule against invidious legislation, the decision could be limited to its own facts without doing serious damage to the doctrine of precedent.

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39. Thus, Professor Maltz has suggested that a precedent-grounded defense of *Brown* necessarily runs up against the counter implication that "the Court was wrong in overruling *Plessy v. Ferguson.*" Maltz, *Some New Thoughts on an Old Problem-The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 847 (1983).
40. 245 U.S. 60 (1917).
41. *Id.* at 79.
42. Maltz, *supra* note 39, at 848-50.
43. Maltz, *supra* note 39, at 849.
44. Maltz, *supra* note 39, at 849.
45. Maltz, *supra* note 39, at 850.

Finally, the larger inference that should be clear from those points already made is that the nation's experience has taught us that the choice now is between *Strauder* and *Plessy*. As of this date, however, it is quite clear that this Court has consistently erred on the side of *Strauder*, as reflected in the general doctrine that the Equal Protection Clause[46] guarantees a large measure of equality before the law and as illustrated by a multitude of specific decisions relating to property rights, voting rights, and higher education. To reject *Strauder* in favor of *Plessy* would be to reject the largest bulk of this Court's equal protection case law, as well as federal legislative acts that have reflected–even if they have only partially implemented–the nation's acceptance of the idea that equal protection suggests a basic and quite general idea of equality under law.

The constitutional doctrines relied upon here are not only firmly established, but also reflect the long-term values of the American people. It is certainly true that many oppose the change portended by this decision, but there is no room for doubt that the American people have in general supported the trend toward the expansion of civil rights and the extension of equality under the law. There is little doubt as well that our pretensions to being the beacon of the political ideals of freedom and equality around the world call for the nation to consider our own record in extending the opportunities enjoyed by most Americans to minorities who have long been treated as second class citizens, in law as well as in social practice. These would not be sufficient reasons to justify a broad theory supporting this Court's power to informally amend the Constitution, but they constitute powerful reasons for remaining true to precedents long established for the securing of equal rights to racial minorities.

I need not spend a great deal of time and space on the question of the clarity with which these long-established precedents might be called into question. Suffice it to say that the treatments of Professors Perry[47] and Kelley[48] raise serious questions about the arguments that would preclude this result on originalist grounds. My own view is that the evidence is hardly so unequivocal as to provide a compelling reason to reconsider long-established precedent.

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46. U.S. CONST. amend. 14, § 1.

47. Michael J. Perry, *Brown v. Board of Education and Bolling v. Sharpe From an Originalist Perspective: Rightly Decided but Wrongly Reasoned*, 20 S. ILL. U. L.J. (forthcoming Fall 1995).

48. Patrick Kelley, An Alternative Originalist Opinion For Brown v. Board of Education, 20 S. ILL. U. L.J. (forthcoming Fall 1995).