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National Review

November 15, 2010

The Race Exception - That originalism does not justify our civil-rights jurisprudence is no argument against originalism

BYLINE: Robert VerBruggen

LENGTH: 4209 words

Of our nation's many accomplishments, its triumphs over slavery and Jim Crow have been two of the most important. Through a devastating war, followed by a century of legislative and judicial action, the U.S. put an end to two of its gravest sins. In modern discourse, these triumphs are rightly seen as unimpeachable. Anyone proposing a return to slavery, or celebrating racial segregation, would and should be drummed out of polite society.

This taboo, however, is overapplied. It protects not only the ends of America's struggle against racism, but also its means. We assume that any measure we undertook to fight racism is inherently good, and that any principle that warns against such a measure is inherently evil.

This assumption distorts our discourse. When it comes to conservative principles that are in tension with the means we have used to fight racism -- for example, principles that call into question the Supreme Court's decision in Brown v. Board of Education and some of the civil-rights policies that Congress passed in the 1960s -- right-wing commentators too often contort themselves to deny that any tension exists. Liberals, meanwhile, present the tension as evidence of conservatism's insensitivity toward racism -- ignoring the fact that their own philosophy conflicts with some of the means employed in the fight for civil rights.

To hold positions that are consistent with the facts of U.S. history, conservatives and liberals alike must simply concede that in America through the 1960s, debates involving race weren't settled according to the normal democratic and constitutional rules. Before the Civil War, American blacks -- Africans who had been sold as property to white Americans, and these Africans' descendants -- did not enjoy even the most basic protections the law granted to everyone else, up to and including protections against physical abuse, sexual assault, and murder. After the Civil War, southern governments continued to deny blacks equal protection, looking the other way as whites perpetrated lynchings and other forms of violence against newly freed blacks. Businesses and schools, throughout the country but especially in the South, continued to segregate and discriminate against blacks. To fight these problems, lawmakers and courts bent the rules in blacks' favor, and were right to do so. That doesn't mean the rules themselves -- those that govern how the Constitution's text should restrict judicial and legislative conduct, and how the federal government should relate to private businesses -- are bad, or that, as a general matter, setting them aside is fine.

In other words, many American anti-racism measures were right because an extreme situation justified them, not because they were inherently legitimate. Modern debates about similar measures must also revolve around whether the situation is extraordinary enough to justify them -- not around whether they were sorely needed in a completely different context.

Jim Crow took hold in the South after Reconstruction ended in 1877, and especially following Plessy v. Ferguson in 1896. The first serious blow to this regime was Brown v. Board of Education, a 1954 case in which the Supreme Court ruled that school segregation violated the Fourteenth Amendment. This amendment proclaimed that states owed their citizens the "equal protection of the laws," "due process," and the "privileges or immunities" of citizenship.

Over the last several decades, various liberal commentators have tried to use Brown as a weapon against originalism. Originalism, the method of constitutional interpretation that conservatives prefer, holds that when a

law is enacted, it means what an informed member of the public would take the words in it to mean. It also holds that laws' meanings do not change over time. These liberals claim that originalism would not have permitted Brown -- and that since Brown is sacrosanct, originalism must be unsound.

Some conservatives counter that if the justices who decided Brown had used originalist methodology, they still could have concluded that the Fourteenth Amendment forbade school segregation. This is cold comfort, however. "Could have" is not the same as "would have"; the evidence is simply too murky for us to be able to determine with any certainty what the public in 1868 thought the Fourteenth Amendment meant for school segregation. If anything, the evidence indicates that the amendment was not intended to ban the practice.

We have several sources of information about what contemporary observers thought of the Fourteenth Amendment -- the federal and state legislatures that debated and passed it, the courts that interpreted it, and the subsequent federal legislatures that passed laws pursuant to it.

As for the legislatures that actually proposed and ratified the Fourteenth Amendment, the record regarding school segregation is, by all accounts, incredibly sparse -- which, in light of the context, suggests that they didn't think the amendment banned segregation. The federal government oversaw the D.C. school system, which had been created recently and was segregated (and remained so until the mid-20th century). It would be hypocritical and bizarre for Congress to ban segregated schools in the states while overseeing some itself, and one would at least expect the discrepancy to inspire debate. Also, as Rutgers Law's Earl M. Maltz has noted, segregated schools were prevalent (and popular) in many of the northern states that ratified the amendment, and yet in promoting the amendment to the northern states, congressional Republicans argued that it would have little effect outside the South.

The courts, meanwhile, didn't really know what to do. In a series of decisions that started soon after the Fourteenth Amendment's ratification and culminated in the notorious ("separate but equal") Plessy v. Ferguson majority opinion of 1896, many courts upheld segregation in schools and elsewhere -- and consistently failed to offer any legitimate reason for doing so. Several decisions cited, as precedent, cases that had been decided before the Fourteenth Amendment had been enacted, as though these cases could shed light on the Fourteenth Amendment itself. Even Plessy is full of dubious assertions (such as that segregation doesn't imply the racial inferiority of the minority group) and citations of pre-Fourteenth Amendment precedent. In other Fourteenth Amendment cases, however, culminating in Justice John Marshall Harlan's rousing dissent in Plessy, courts offered broad, sweeping language that seemed to rule out nearly all government distinctions based on race.

The best evidence that the Fourteenth Amendment was understood to ban school segregation comes from the debates that led to the Civil Rights Act of 1875, which banned discrimination and segregation in some public accommodations until the Supreme Court overturned it in the Civil Rights Cases less than a decade later. Federal judge Michael McConnell was the first scholar to assemble the evidence from this period that pertains to school segregation, in a massive 1995 Virginia Law Review article and in a debate that followed.

During the 1870-75 period, opposition to school segregation was surprisingly high. Majorities in both houses of Congress wanted to ban the practice, and there was much debate regarding its constitutionality. (Procedural hiccups kept these efforts from becoming part of the civil-rights law that passed.) Of the legislators who had voted for the Fourteenth Amendment and remained in Congress, virtually all supported outlawing school segregation under the amendment, at least until the 1874 elections made it clear that support for civil rights was a political liability even for Republicans.

Many legislators claimed the amendment not only authorized but required them to enact and enforce a ban on school segregation -- which eventually became the basic finding in Brown. At first, many of them said that the right to attend a publicly funded school was a "privilege or immunity" of citizenship, but when the Supreme Court gutted the privilege-or-immunities clause in the Slaughter-House Cases in 1873, they united behind the equal-protection clause as a justification instead.

McConnell makes a good case, but it's not unusual for legislators to exaggerate the constitutional justifications for their actions -- and, as Maltz noted in a response to McConnell, that seems to have happened with some other facets of the Fourteenth Amendment. For example, at the time the amendment passed, it was generally accepted that the Fourteenth Amendment did not affect blacks' right to serve on juries (that was a "political right," like voting, whereas the Fourteenth Amendment protected only "civil rights" such as those to sue, sign contracts, and own property). Nonetheless, in the 1870s, Republicans cited the amendment as a justification for a law ensuring that right, just as they cited it as a reason to end school segregation.

It is unlikely that strict adherence to originalist methodology would lead to Brown. And those who find McConnell's argument plausible should not forget another aspect of conservative judicial philosophy: restraint. That is, when the courts have anything short of a clear and convincing reason to override the elected branches, they shouldn't.

If conservatives are misguided to claim their interpretive method justifies Brown, liberals are misguided to see Brown as a cornerstone of American jurisprudence. Liberal judicial philosophy -- which conservatives refer to derisively as "judicial activism" -- contends that the Constitution is "living" or "evolving," and that progressive judges, because of their superior ability to think, should be given the authority to decide what the Constitution is evolving into. But when viewed in a strictly logical and legal light, the Brown decision was a train wreck, a fact evident to anyone of any political persuasion who takes the time to read it and dig into the materials it cites. It violates virtually any reasonable standard that could govern how judges decide cases. We may wish that the justices had employed better arguments, but when defending Brown as it actually was decided, even liberals need to admit that while the ends were noble, the means were questionable.

In the first of its six main findings, the Court noted that "the history of the Fourteenth Amendment is inconclusive as to its intended effect on public education." It took this as license to interpret the amendment as it saw fit -- that is, to decide whether school segregation violates the Fourteenth Amendment without actually analyzing the Fourteenth Amendment.

In doing so, the Court simply morphed the core question from a legal one into a sociological one. Before launching into the crux of its analysis, the Court said it sought to determine whether "segregation in public schools deprives these plaintiffs of the equal protection of the laws." Two paragraphs later, the question had been transformed into whether segregation deprives children "of equal educational opportunities." The intervening text demonstrated that education had become very "important" in the years since the amendment became law, but made no attempt to explain why "equal educational opportunities" are inherent in "equal protection of the laws." Today, it may seem obvious that "equal protection of the laws" means that all government action must be race-blind, but as Ramesh Ponnuru noted in this magazine in 2003, the phrase may have merely required "states that protected the lives, limbs, and property of some people to extend those protections to all people." "Not even the broadest plausible originalist account of the Fourteenth Amendment holds it to forbid all governmental discrimination by race," he also wrote.

And when the Court engaged in sociology, it engaged in bad sociology. The basic results of Kenneth and Mamie Clark's "doll experiments" -- in which black children were shown a black doll and a white doll and asked to pick one based on various criteria -- are explained in every high-school-civics textbook: Black children tend to say the white doll has good qualities and the black doll has bad ones. The Brown court cited this research as evidence that segregation was harming black children. The studies, however, fail to support that conclusion.

Clark conducted one for a court case that later became part of Brown. In Clarendon County, S.C., he gave the doll test to some black children -- but did not compare the results with those of white children, or with those of black children in integrated schools. In other words, there was no control group, and thus the results are scientifically meaningless.

In other experiments, Clark did compare black southern children in segregated schools with black northern children in integrated schools, and -- believe it or not -- repeatedly found that the northern children did worse. In one, Clark and his wife conducted the doll test on black children from Hot Springs, Pine Bluff, and Little Rock, Ark., as well as on black children from the integrated schools in Springfield, Mass. They asked the children to identify the doll they'd like to play with, the nice doll, the doll that looks bad, and the doll with a nice color. On every single measure, the southern children performed better -- relative to the northern children, they were especially likely to call the black doll the "nice" one (46 percent to 30 percent).

In a different experiment, the Clarks asked black children to color in the outline of a child, first as the color that they themselves were, and then as the color they preferred children to be. Again, the southern children performed better: They were more likely to color themselves an accurate color, though not significantly so (91 percent to 86 percent), and they were twice as likely to choose brown as their preferred color (70 percent to 36 percent). In their report, the Clarks noted this "greater emotional conflict" in northern children.

In yet another study, the Clarks had nursery-school children "show the experimenter which one of a series of drawings of white and colored boys, animals and a clown they considered to be themselves." The subjects included children in a segregated Washington, D.C., school, as well as children in two New York schools, one

"semi-segregated" (two members of the staff were white) and one integrated. "A trend toward identifying with the colored boy is more pronounced in the Negro children in the semi-segregated group and even more so in the all-Negro nursery schools," the Clarks wrote in their report.

Of course, because of all the differences between northern and southern children that had nothing to do with school segregation, this result fails to prove that segregation doesn't harm black children. In retrospect, it seems that integration was good for educational outcomes: Despite the many problems that accompanied it (which Stuart Buck details in his book Acting White), the black-white achievement gap shrank in the subsequent decades. But the Court's ruling hinged almost entirely on social science, and Clark's studies of black children were far and away the most influential pieces of work on the effects of segregation -- yet the conclusion the Court drew from Clark's data is not actually supported by the data.

So, not only does conservative judicial philosophy fail to justify the result of Brown, but the Court's own social science fails as well. We are left with only one argument to defend an important act of anti-racism: The end justified the means.

Contrary to popular myth, Brown didn't work. While the decision touched off some high-profile integration confrontations -- such as the Little Rock Nine incident in 1957 -- there was, statistically speaking, almost no school integration in the South over the next decade. Congress responded to the South's resistance by passing various civil-rights laws. These laws desegregated (and, through busing, forcibly integrated) schools, overrode Jim Crow laws that compelled businesses to segregate their customers, and forbade private businesses to discriminate by race.

Constitutionally, much of this is defensible, even uncontroversial. While the Fourteenth Amendment, in and of itself, may not have been meant to eliminate discrimination in government services, Section 5 gave Congress the power to interpret its provisions and apply them to the states. This gives Congress a certain amount of leeway, especially when the precise meaning of the law is unclear. But one particular feature of these laws -- the requirement of the Civil Rights Act of 1964 that private businesses, not just state and local governments, practice nondiscrimination in hiring and customer service -- is problematic, from both an originalist constitutional perspective and a free-market policy one.

Some conservative commentators have argued that the Fourteenth Amendment enabled Congress to forbid discrimination in privately owned businesses. For example, Ramesh Ponnuru recently wrote in this magazine:

It was entirely reasonable for a constitutionally conscientious legislator to conclude that the only way for Congress to enforce the guarantee that states offer equal protection to all citizens was to uproot the whole system: Force the states to allow blacks to vote; require hotels and theaters to treat customers without regard to race; ban employers from considering race as well; end every part of the system that could be ended. I have great respect for Mr. Ponnuru, but I think "entirely reasonable" is a stretch. Section 1 of the Fourteenth Amendment, for all its vague terminology about "equal protection" and "privileges or immunities" and "due process," was quite clear as to what entities it was intended to restrain, and as to what type of actions could count as violations: "No state shall make or enforce any law . . ." (emphases added). Again, Section 5 empowered Congress to "enforce" the other provisions, but it's a bit much to contend that mandating equal treatment in the policies of private businesses is a legitimate way of enforcing equal protection under the laws of the state.

Another argument in defense of federal anti-discrimination laws' constitutionality is mentioned in Judge McConnell's Virginia Law Review discussion of the Civil Rights Act of 1875. When the Fourteenth Amendment was enacted, certain types of businesses, such as inns and common carriers, were legally obligated to serve all comers under the "common law" -- the judge-made law that the U.S. inherited from England and continued to develop in its state courts. One can plausibly say that Congress can enforce the "equal protection" of this policy, or that it constitutes a "privilege or immunity" of citizenship. However, this aspect of the common law applies only to customer service, not to employment discrimination; it affects only certain types of businesses, primarily those that are granted special privileges by the government; southern states could have overridden the common law by statute, declaring that neither whites nor blacks had any protection against discrimination by private businesses, as Tennessee did to counteract the Civil Rights Act of 1875; private businesses could have changed their business models so as to fall outside the common-law regulations, as some inns did when they became "private boarding houses" to avoid that same act; and, in any case, the Supreme Court ruled that the Fourteenth Amendment does not apply to private discrimination in 1883 when it struck down the act.

And as with Brown, if the originalist justifications for the Civil Rights Act of 1964 are questionable, the justification

that actually saved the day was flat-out bunk: The government trotted out the interstate-commerce clause. True enough, the Constitution gives the federal government the right to regulate "interstate commerce"; unfortunately, it does not also give the federal government the right to regulate every aspect of every business that has anything to do with interstate commerce. Nonetheless, the Supreme Court said that a hotel was covered simply because most of its customers were interstate travelers. In another case it held that a family-owned restaurant had to comply, on the grounds that some of the food it served had crossed state lines.

Few conservatives would view such an exaggeration of federal power as acceptable in virtually any other context -- and once again, the only way to resolve this conflict is to admit that race was an exception to the normal rules. In the 1960s, Congress and the Supreme Court threw constitutional conscientiousness out the window, and for once, they were right to do so.

Laws banning private-sector discrimination present conservatives, especially libertarians, with an important policy problem, as well: How can someone who supports the freedom of businesses to more or less do as they please, and who wants a strictly limited federal government, stand behind a federal-government policy that tells businesses which customers it must serve, and what factors it may consider in hiring?

Kentucky Republican Senate candidate Rand Paul recently admitted the obvious: There is, in fact, a tension between anti-discrimination laws and free-market ideology. (Less defensibly, he refused to answer in the negative when MSNBC's Rachel Maddow asked him whether "a private business has the right to say, 'We don't serve black people.'") Various liberals took this as conclusive proof that libertarianism is unserious, or even fundamentally racist.

In response, the libertarian Cato Institute hosted an online debate regarding how libertarians should approach anti-discrimination law. Several highly respected thinkers, including George Mason Law's David Bernstein, participated, and they made a number of important points -- among them that slavery and Jim Crow were deeply un-libertarian, and that libertarian values often informed contemporary arguments against them.

But the most important point the participants raised was this: By the 1960s, decades of state-mandated segregation (not to mention slavery before that) had created an entire caste system rooted in black inferiority. Why must such an extreme -- and extremely un-libertarian -- problem have a libertarian solution in order for libertarianism to be a good philosophy in general? Just as the necessity of Brown v. Board did not discredit originalism, the necessity of the civil-rights acts does not discredit libertarianism. In each case, an exception to a good rule was made to fight a deep-seated evil.

Further, the subsequent developments in anti-discrimination law brought to fruition libertarians' concerns about government involvement in business. Current "civil-rights" law still bans discrimination against blacks (and Hispanics), but it allows discrimination against whites and Asians (via "affirmative action") and makes it difficult for businesses to give employment tests that whites and minorities pass at different rates (this is called "disparate impact") -- even though whites and minorities pass virtually every test ever devised at different rates. As racism has become less and less of a problem, anti-discrimination law has become more and more burdensome.

And today, liberals seek to pin every social ill they perceive to the coattails of the civil-rights movement. If it was acceptable for courts and legislatures to go beyond their legitimate powers in the name of fighting Jim Crow, they reason, it must also be acceptable to use these tactics to fight everything from homophobia (courts must declare, Brown-style, a constitutional right to gay marriage) to "appearance discrimination" (Stanford Law's Deborah L. Rhode suggests in her book The Beauty Bias that we ban such discrimination in the same way we banned racial discrimination). If anyone objects, liberals ask: Couldn't those same objections have been used to defend racism? Rhode, for example, likens Hooters patrons who prefer attractive women as their waitresses to southern whites who didn't want to interact with blacks.

Conservatives are stuck trying to navigate this minefield -- trying to bat down dramatic expansions of government while defending procedurally similar measures that were enacted in the context of Jim Crow. Their task would be much easier if they frankly admitted that, in its fight against racism, America has used highly questionable means at key junctures -- means that were legitimate only because of the extreme severity of the wrong they sought to remedy.

When race is viewed as an exception to the rules, rather than as a test that the rules themselves must pass, it becomes much harder for the Left to justify the various expansions of government power it seeks. No modern social ill -- not homophobia, not "appearance discrimination," not even today's racism -- is anywhere near as

severe and damaging as racism was in the century following the Civil War.

If liberals want to fight those ills, they should do so within the confines of the Constitution, and they should debate the Right in the policy arena on the dangers of expanding government. Jim Crow warranted bending, and sometimes even ignoring, the rules that govern how laws are made. Today's problems do not.

LOAD-DATE: October 29, 2010

LANGUAGE: ENGLISH

PUBLICATION-TYPE: Magazine