Landmark cases *Brown v. Board of Education I* & *II* were massive victories in the effort to destroy racial segregation and promote full racial equality under the law. *Brown I* cast aside the infamous “separate but equal” doctrine established in *Plessy v. Ferguson* to say that separation carries inherent inequality. Advocates for originalist methods of Constitutional exegesis hold up this decision as a prime example of “judicial activism” where judges substitute their preference for the law in place of what it actually says. Originalism requires the source of individual rights and governing power be the history surrounding the drafting, debate, ratification, and early public understanding of the Constitution, while modern political and social realities hold less (if any) weight. This interpretive method can hold back, both in history and progress, the evolution of individual rights, and so opponents of racial equality in the law trotted out originalism as a tool to critique *Brown I & II*. In fact, political scientist Calvin Terbeek argues that the conservative embrace and popularization of originalism grew directly out of political resistance to *Brown I & II.*[[1]](#footnote-1)But modern originalism is a broad interpretive framework, and its methods can produce varying constructions of Constitutional meaning and support diametrically opposed arguments for a given case. Father of originalism, Antonin Scalia, called it an agreed upon starting point more than anything else.[[2]](#footnote-2)

At question here is the proposition that the Court’s ruling in *Brown v. Board of Education I & II* is fundamentally incompatible with originalism. I stand against and will argue that one can make legitimate originalist arguments in support of this ruling. Certainly, many originalist arguments exist to justify racial segregation in schools, but it isn’t necessarily true that all mobilizations of originalism lead to this conclusion. To quote former Judge Michael W. McConnel, “At a minimum, history shows that the position adopted by the Court in *Brown* was within the legitimate range of interpretations commonly held at the time.”[[3]](#footnote-3)

**Outlining Originalism**

General overview of the approach and what factors are important when originalists interpret the constitution

Explain that it exists on a spectrum, with ample space between the endpoints of pure and fainthearted originalism

* Can prioritize some sources of evidence over others
* Can view some constitutional provisions as having evolutionary content
* Original intent vs. meaning and the debate over whether original content is understood more by drafters intent, ratifiers debate and understanding, or common public understanding

Not a zero sum game where opinions are either originalist or not at all. An opinion can include originalist arguments alongside other considerations

Scalia’s statement on what most originalist opinions will actually be debating??

**History Preceding 13th and 14th Amendments**

Brief reminder of history immediately preceding the Reconstruction Amendments and what they aimed to remedy

**History of Drafting, Ratification, and Current Social/Political Conditions**

Using an originalist argument, create a general interpretation of the Reconstruction Amendments, which we’ll later apply to the particular cases in *Brown*

* Something closer to Justice Harlan’s history

Concede that society would’ve been familiar with some levels of segregation, even in free states, but argue this doesn’t mean the Amendments allow for such. In fact, these are the exact vestiges of slavery and inequality which the amendments sought to overhaul.

* Could also claim that some segregation and racial disparity existed, but there was general public recognition and acceptances that these were dying practices which would soon be gone (just hadn’t been enough time yet).

Difficult to conclusively discern original public meaning given breadth of feelings towards racial equality

Does the fact that these amendments were basically forced upon states under federal marshall law undermine the legitimacy of original intent or meaning? Maybe our construction should be more heavily grounded in a close reading of the exact words of the Amendments.

**Textual Argument I**

13th and 14th have evolutionary content which makes them more general and flexible

* Fits nicely with Harlan’s history

**Introducing Brown v. Board of Education I**

Details of the case

Major constitutional question at hand

Court’s opinion

Restate claim to preface the next section

**Why the opinion is originalist**

1. “Clocks Must Always be Turned Back”: *Brown v. Board of Education* and the Racial Origins of Constitutional Originalism by Calvin Terbeek [↑](#footnote-ref-1)
2. Originalism: The Lesser Evil by Antonin Scalia, p. 3, para. 2 [↑](#footnote-ref-2)
3. The Originalist Case for *Brown v. Board of Education* (1995) , Michael W. McConnel, Harvard Journal of Law and Public Policy, Vol. 19, p. 458, para. 3 [↑](#footnote-ref-3)