

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Publications

Colorado Law Faculty Scholarship

---

1995

### Forty Years in the Desert

Paul F. Campos

*University of Colorado Law School*

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Constitutional Law Commons](#), [Education Law Commons](#), [Fourteenth Amendment Commons](#), [Jurisprudence Commons](#), [Law and Politics Commons](#), [Legal Education Commons](#), and the [Supreme Court of the United States Commons](#)

---

#### Citation Information

Paul F. Campos, *Forty Years in the Desert*, 20 S. ILL. U. L.J. 109 (1995), available at <https://scholar.law.colorado.edu/faculty-articles/1161>.

#### Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Publications by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact [rebecca.ciota@colorado.edu](mailto:rebecca.ciota@colorado.edu).

# HEINONLINE

Citation: 20 S. Ill. U. L. J. 109 1995-1996

Provided by:

William A. Wise Law Library



Content downloaded/printed from [HeinOnline](http://heinonline.org)

Fri Jul 14 11:43:02 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

# FORTY YEARS IN THE DESERT

Paul F. Campos\*

The participants in this symposium have been asked to do directly what constitutional theorists have been doing indirectly for more than a generation: Rewrite a Warren Court opinion to make the putative basis for its result more consonant with the craft values taught in contemporary American law schools. We have, it is true, been given the option of explaining why the actual opinion in *Brown v. Board of Education*<sup>1</sup> was "appropriate." Yet I venture to guess that our hosts would be almost as appalled by assertions that *Brown* was correctly reasoned as they would by any intimation that it was incorrectly decided. Nevertheless, without wishing to abuse their generous hospitality, I propose that we accept *Brown* for what it is, and in doing so focus on some of the fundamental premises of modern constitutional scholarship, and indeed American legal theory.

If we understand it as an exercise in textual interpretation, modern constitutional law is taken up almost wholly with the defense of the indefensible.<sup>2</sup> From *Lochner v. New York*<sup>3</sup> to *Roe v. Wade*,<sup>4</sup> from the appearance of the incorporation doctrine to the disappearance of the Commerce Clause,<sup>5</sup> the United States Reports are filled with landmarks of hermeneutic reasoning which require of their audience a willing suspension of disbelief. Legal academia has, of course, been up to this task, and never more so than with *Brown*. Seas of ink have been spilled to "save" *Brown*; furthermore, while undertaking these rescue missions law professors cannot resist displaying their interpretive talents through attempts to salvage other, even more problematic examples of jurisprudential art.<sup>6</sup> By now we all know that in the course of these herculean endeavors the typical constitutional theorist will explain why the meaning of the Constitution is more or less exactly coterminous with his or her

---

\* Associate Professor of Law, University of Colorado School of Law

1. 347 U.S. 483 (1954).

2. For elaboration, see Paul Campos, *Against Constitutional Theory*, 4 YALE J. L. & HUMAN. 279 (1992); Paul F. Campos, *Advocacy and Scholarship*, 81 CAL. L. REV. 817 (1993); Paul Campos, *Three Mistakes About Interpretation*, 92 MICH. L. REV. 388 (1993).

3. 198 U.S. 45 (1905).

4. 410 U.S. 113 (1973).

5. U.S. CONST. art. I, § 8 cl. 3.

6. For a good summation and critique of this interpretive project, see MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

political commitments, whether these reflect those of a welfare state liberal, a laissez faire libertarian, or a radical Marxist in Ivy League drag. The following story, told by one of our best legal scholars, should serve as a cautionary tale:

Grading the final examinations in my class on constitutional law last semester, I realized that for my students there was no gap, no disjunction, between the Constitution and their own political perspective. As a committed legal realist, trained to discern, question, and clarify the political purposes of the law, I had apparently succeeded only in making the law for my students utterly transparent to their own political will. I took some comfort in the fact that this influence would surely prove only temporary for the vast majority of my students who would become practitioners. Practicing lawyers learn quite quickly not to confuse their own political will with that of the larger culture, from which law properly springs . . . I also realized, however, that there was no obvious mechanism to convey this message to those few of my students fated to become academics. In fact all our academic assumptions point in the opposite direction.<sup>7</sup>

Why do all our legal academic assumptions point in the opposite direction? Here I think we confront in its purest form the pernicious influence of what Ronald Dworkin recommends as the "internal perspective." He describes this perspective in his major work, *Law's Empire*:

This book takes up the internal participant's point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face. We will study formal legal argument from the judge's viewpoint . . . because judicial argument about claims of law is useful paradigm for exploring the central, propositional aspect of legal practice.<sup>8</sup>

As my colleague Pierre Schlag has argued, the professional identification the legal academic typically makes with the persona of the appellate court judge has been in many ways a disaster for American legal scholarship.<sup>9</sup> For example, it should come as no surprise that in *Law's Empire*, "a useful paradigm for exploring law" is soon transmogrified into a totalizing, quintessentially juridical account of what "the law" requires. Dworkin's account relies on the fact that, in our legal culture, the *judicial* vocation requires the ability to make supremely

---

7. Robert Post, *Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship*, 11 CONST. COMMENT. 185, 193 (1994).

8. RONALD DWORKIN, *LAW'S EMPIRE* 14 (1986).

9. See generally Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991); Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053 (1993).

confident declarations about the law. That it is integral to a legal scholar's vocation is, or should be, a far more troubling proposition.<sup>10</sup>

Let us consider that proposition from the perspective of this conference. We have been asked to put ourselves in the place of the nine men who, forty years ago, decided to declare that segregated schools violated the Equal Protection Clause of the Fourteenth Amendment.<sup>11</sup> It is a commonplace that Chief Justice Earl Warren's opinion for the Court is in many ways unsatisfactory. Indeed, that assumption is central to this symposium. The opinion asserts that the legislative history of the Equal Protection Clause<sup>12</sup> is inconclusive regarding the question of segregated schools.<sup>13</sup> This is disingenuous: At the time of the Fourteenth Amendment's adoption, eight northern states had segregated public schools, and five others simply banned black children from public schools altogether.<sup>14</sup> As Raoul Berger has pointed out, even the Senate galleries who listened to the debates concerning the Fourteenth Amendment were segregated by race.<sup>15</sup> Congress allowed the District of Columbia's schools to remain segregated until the Supreme Court declared this situation unconstitutional the same day it decided *Brown*.<sup>16</sup> The historical record is not really in doubt: Those who adopted the Equal Protection Clause<sup>17</sup> never believed that it prohibited the segregation of public schools.

Another difficulty with the Court's argument is that it is purportedly based on assumed psychologically—and by inference educationally—detrimental effects of segregation on black children. This is even more implausible than the Court's handling of the Fourteenth Amendment's historical meaning. The Court soon demonstrated that it could not have believed its own argument by issuing a series of per curiam decisions which declared unconstitutional the segregation of public beaches, golf courses, parks, courtrooms, and other facilities.<sup>18</sup> *Brown's* weak reasoning, and the incongruous claim that these results were entailed by it, demanded explanation. Hence, law professors have been rewriting the case ever since.

These alternative opinions tend to follow one of two patterns, which, following Thomas Grey's coinage, I will call "interpretive" and

---

10. See Campos, *Advocacy and Scholarship*, *supra* note 2, at 849–54.

11. U.S. CONST. amend. XIV, § 1.

12. *Id.*

13. *Brown v. Board of Educ.*, 347 U.S. 483, 489–90 (1954).

14. RICHARD KLUGAR, *SIMPLE JUSTICE* 633–34 (1975).

15. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 125 (1977).

16. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

17. U.S. CONST. amend. XIV, § 1.

18. See, e.g., *Holmes v. Atlanta*, 350 U.S. 879 (1955); *Baltimore v. Dawson*, 350 U.S. 877 (1955).

"noninterpretive" accounts.<sup>19</sup> Interpretive accounts usually claim that, properly understood, the intentions of the Fourteenth Amendment framers support the holding in *Brown*. By contrast, noninterpretive accounts argue that some extra-textual source of legal meaning dictates the same result. To elucidate, I will examine two paradigmatic examples of the respective genres.

Robert Bork is famous for insisting that "the original understanding" of a constitutional provision's meaning provides the only legitimate basis for constitutional interpretation.<sup>20</sup> Regarding *Brown*, Bork freely admits that the authors of the Fourteenth Amendment believed that the segregation of public schools was fully consistent with what they meant by "equal protection of the laws."<sup>21</sup> That admission would seem to require the conclusion that *Brown* was wrongly decided. Of course, Bork denies this.<sup>22</sup> The Equal Protection Clause,<sup>23</sup> he argues, was intended to achieve black equality.<sup>24</sup> The framers merely assumed that this intention was consistent with state-mandated segregation. Subsequent history proved them wrong:

By 1954 . . . it had been apparent for some time that segregation rarely if ever produced equality. Quite aside from any question of psychology, the physical facilities provided for blacks were not as good as those provided for whites. That had been demonstrated in a long series of cases . . . [yet] endless litigation, aside from the burden on the courts, also would never produce the equality the Constitution promised. The Court's realistic choice, therefore, was either to abandon the quest for equality by allowing segregation or to forbid segregation in order to achieve equality. There was no third choice. Either choice would violate one aspect of the original understanding, but there was no possibility of avoiding that. Since equality and segregation were mutually inconsistent, though the ratifiers did not understand that, both could not be honored. When that is seen, it is obvious that the Court must choose equality and prohibit state-imposed segregation. The purpose that brought the [F]ourteenth [A]mendment into being was equality before the law, and equality, not separation, was written into the text.<sup>25</sup>

This account begs a number of important questions. For instance, it assumes without argument that the ratifiers' concept of equality was a coherent one. Leaving such considerations aside, Bork's account nevertheless illustrates

---

19. Thomas Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

20. ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 82 (1990).

21. *Id.* at 82.

22. *Id.*

23. U.S. CONST. amend. XIV, § 1.

24. See Bork, *supra* note 20, at 82.

25. See Bork, *supra* note 20, at 82.

the insuperable difficulties faced by any mildly interventionist theory of judicial review that depends on the interpretation of the constitutional text—that is, on a historical inquiry into the intention of the text's authors. As in Bork's example, such an inquiry will, by its nature, operate almost exclusively in the realm of a radically counterfactual hypothesis. This might be called the “if John Bingham had foreseen the civil rights movement” syndrome. The interpreter is reduced to asking hypothetical questions completely alien to the authors' actual historical situation, which in turn leads almost inevitably to the assumption that the authors would have answered them just as the interpreter would like them answered. In fact, we simply have no way of knowing what the authors of the Equal Protection Clause<sup>26</sup> would have done had they understood that their simultaneous belief in equality under the law and their approval of legal segregation would lead to what law professors a century later would treat as an interpretive contradiction.

All interpretivist theories of judicial review face this problem, and most deal with it as Bork does: by abstracting the idea of the author's intent to a high enough level of generality. If one talks about the “purpose” of a provision in sufficient generalities—if, for instance, we assume that the purpose of the Equal Protection Clause<sup>27</sup> was to produce the results required by the essentially empty idea of “equality”<sup>28</sup>—then almost any result can be reconciled with the putative intentions of the text's authors. This trivializes the concept of interpretation by making the constitutional text utterly plastic for all practical, that is, litigable, purposes. Indeed, eminent legal scholars have produced “originalist” interpretations of the Constitution that have supported or condemned practically every major decision of the modern Supreme Court, including—or perhaps more accurately, beginning with—*Brown* itself.

When Robert Bork was nominated to the Supreme Court, his nomination was opposed by no more vocal or distinguished critic than Ronald Dworkin. Indeed, Dworkin went so far as to declare Bork “a constitutional radical” because “he rejects the view that the Supreme Court must test its interpretations of the Constitution against the principles latent in its own past decisions as well as other aspects of the nation's constitutional history. He regards central parts of settled constitutional doctrine as mistakes now open to repeal . . . .”<sup>29</sup> Dworkin summed up the jurisprudence of the former Alexander Bickel Professor of Law at Yale Law School by announcing that Bork's constitutional philosophy was “not just impoverished and unattractive but no philosophy at

---

26. U.S. CONST. amend. XIV, §1.

27. *Id.*

28. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

29. Ronald Dworkin, *The Bork Nomination*, NEW YORK REVIEW OF BOOKS, Aug. 13, 1987, at 3.

all.”<sup>30</sup> One would expect, then, that Dworkin's views on constitutional interpretation would have little or nothing in common with those of his antagonist. In fact, despite superficial differences, their interpretative theories are practically indistinguishable from each other.<sup>31</sup>

This statement may seem surprising in light of Dworkin's rejection of what he calls the “speaker's meaning” view of interpretation.<sup>32</sup> Supporters of this view take what Dworkin considers the hopelessly naive position that the point of trying to determine what someone said is to figure out what they meant.<sup>33</sup> Dworkin, by contrast, suggests that in legal hermeneutics “interpretation” consists of making the text “the best it can be.”<sup>34</sup> That is, the interpreter should treat legal texts in general, and the Constitution in particular, as if they were the work of a single author, and then “interpret” them to make in particular this fictional author's text reflect the meaning most compatible with the best available political and ethical theory.<sup>35</sup>

Now, it might seem that no view could be further removed from the jurisprudence of “the original understanding.” Yet both Dworkin and Bork rely on fictionalizing the historical situation to operate on the putative object of interpretation at an extremely high level of theoretical abstraction. Both insist that they are interpreting the Constitution's text; nevertheless, neither man is much interested in that text's meaning—that is, in the extremely complex and in many ways irrecoverable historical fact of what the text's authors actually said. This is no accident: There can be little doubt that, whatever the Constitution's authors meant to say, that meaning will prove inadequate to any plausible descriptive or normative account of judicial review. Bork and Dworkin are, of course, aware of this. Hence Bork's abstraction of constitutional intent to the most manipulable level of generality, rather than accepting that intent as a set of specific historical facts, however disturbing; hence Dworkin's transformation of the constitutional text into the best it can be, rather than attempting to understand that text for what it actually is. All positive theories of judicial review depend on some variation of these functionally identical moves.

I suggest that the paradigmatic work of two such distinguished yet bitterly conflicting intellectuals tells us that constitutional theory is an impossible enterprise. Any theory that claims to reconcile the ordinary products of

---

30. *Id.* at 10.

31. For a devastating critique of the intellectual hubris that linked Bork and his most celebrated opponents, see Robert F. Nagel, *Meeting the Enemy*, 57 U. CHI. L. REV. 633 (1990).

32. DWORKIN, *supra* note 8, at 348.

33. DWORKIN, *supra* note 8, at 315-17.

34. DWORKIN, *supra* note 8, at 348.

35. DWORKIN, *supra* note 8, at 348-50.



constitutional jurisprudence with an interpretation of the Constitution's text will require from the theorist nothing less than a mortification of the intellect. Why then do so many of our most talented scholars continue to devote themselves to what a psychologist might define as a neurotic vocation?

"Human kind," the poet T.S. Eliot once said, "cannot bear very much reality."<sup>36</sup> We demand of our Constitution both that it never change, and that it reflect the morality of the present moment; that it be law—which is to say the product of fallible persons—and infallible secular scripture; that it be our own creation, and yet remain somehow fundamentally better than we are or, in truth, have ever been. It is, perhaps, the proper role of judges to fulfill these needs. They must then take on the political and ethical burden of continually rewriting history, while always calling those revisions "what the Constitution requires." Their opinions legitimate this activity by obscuring its nature; and while those texts are defensible as political acts, they cannot be defended as interpretations of the Constitution's text.

Normative constitutional theory is in essence a series of academic legitimations of those judicial legitimations. It is a kind of intellectual cheerleading for what must be by its nature an anti-intellectual practice. I once wrote that one of the greatest difficulties facing a legal academic who argues for the basic truth that an interpretation of a text is always an attempt to determine what the text's author meant is that someone immediately asks "what about *Brown v. Board of Education*?"<sup>37</sup> Well, what about *Brown v. Board of Education*? Isn't it a little late in the day to be asking this question? Do geologists, after all, gather together at conferences in order to discuss the normative implications of continental drift? Do they spend much time debating the desirability of that particular process, or discussing ways in which it might be reversed? I recommend that in the future we consider not talking about the legitimacy of *Brown* decision, if for no other reason than that it would keep people like me from talking about not talking about the legitimacy of *Brown* decision. And surely that, we can all agree, would be a good thing.

---

36. T.S. ELIOT, *Four Quartets*, in *THE COMPLETE POEMS AND PLAYS, 1909–1950*, at 117–18 (1971) ("[H]uman kind/Cannot bear very much reality.").

37. Campos, *Three Mistakes About Interpretation*, *supra* note 2, at 397.

