

**Episode 2,366: The Civil Rights Revolution Gave Us a New Constitution**

**Guest: Jesse Merriam**

**WOODS:**  I'm really delighted to be talking for the first time ever to Jesse Merriam, who is the author of something more than just an article here, on a topic of the utmost importance.

He's a professor at Patrick Henry College, and the piece we're talking about is called "How We Got our Anti-Racist Constitution: Canonizing *Brown versus Board of Education* in Courts and Minds."

And Jesse, I read the PDF of this, but given the length, we're talking about not just an article, but it looks like – does the *Claremont Institute* have a series called "Provocations"?

**MERRIAM:** We do, yeah. So, I in addition to being a professor at Patrick Henry College am a research fellow at Claremont Center for the American Way of Life. And that research center in Washington, DC has been releasing a series of booklets, and this is one in that series.

**WOODS:** Okay. Well, let me say that in years and years gone by, I had my issues with the *Claremont Institute*, and I don't think I was the most popular person on earth with them.

And then things started to thaw. They gave me a very nice, very generous, review of my book, *Meltdown*, saying that some of my analysis made them have to rethink some of their Hamiltonian convictions.

And I thought: *Oh, well, what a generous thing of them to say*. And then in recent years, I read so many interesting and important and indeed provocative pieces coming out of there that whatever the issue I had with them, whatever hatchet that is, I hope is long buried.

Because I don't really know that many outlets that would publish what you just wrote. But what you just wrote has got to be talked about. So, first of all, let me just say it's a courageous piece of work. It helps that you're at Patrick Henry College where you're not likely to be fired for it.

**MERRIAM:** Yeah, I think that does help.

**WOODS:** Yes. Right. Doesn't hurt. So, let's first talk about what you call the anti-racist constitutional order. And then we're going to talk about the role of *Brown versus Board of Education* in building that.

I wrote a book with Kevin Gutzman (who by coincidence happens to be the person who first brought your piece to my attention) called, *Who Killed the Constitution?* And we have a chapter in there on *Brown versus Board of Education.*

Now, nobody wants that. Because, I mean, you're in effect saying *Brown versus Board of Education* has, in effect, become a constitutional amendment. So, nobody is allowed to say anything critical of it anymore, even if they used to be.

But prior to this, even before we get to *Brown*, you're describing what you call the anti-racist constitutional order under which both sides operate today.

So, that even if you see the conservative wing of the court or whatever, generally – maybe with some exceptions with Clarence Thomas – generally they are operating under constraints. And these constraints are the pillars of the anti-racist constitutional order.

What are those pillars?

**MERRIAM:** Yeah. So, what interests me is that with all the divisions that we have in American politics and in American constitutional law over things like living constitutionalism versus originalism, we don't have much division when it comes to these two moral pillars that I've identified as not coming directly from *Brown*, but indirectly through what I call the canonization of *Brown*.

And those two moral pillars are that diversity is the constitutional good. And that means that anything that conflicts with the promotion of diversity must be, if not resisted, perhaps even eliminated.

And also, in addition, that discrimination, even if it is private discrimination, is a constitutional evil which likewise must be eliminated no matter the cause.

**WOODS:** Maybe we might add a third principle to this that – it's not expressly to be found in *Brown*. And by the way, a lot of these things are not expressly to be found there. But if you pull it apart and you keep building on it and building on it, you can insert them.

But this third one might be the doctrine of disparate impact. That even if you're doing something that on the face of it doesn't appear to have discriminatory intent, that doesn't matter if it has discriminatory outcome in the sense that it affects different races differently.

And so, you can see that in some of the ways that the *Brown* decision was ultimately enforced in that freedom of choice plans were set aside because they didn't have the right outcomes. The outcomes were still disparate.

And so, you can see – Heather McDonald in her recent book really emphasizes the role of disparate impact in spreading beyond the legal order into just every aspect of society, into symphony orchestras and whatever.

Anything we do is held to this disparate impact standard. So, maybe we might say that's also part of it.

**MERRIAM:** Obviously, out of the *Griggs* decision, we have an extensive disparate impact analysis, and it's part of the Civil Rights Act. But I consider that to be subordinate or adjunct to a diversity value.

The reason that we have the disparate impact analysis is because diversity is good. And that means that if we have a test, for example, like what was the issue with the *Griggs* case, it's going to be subject to judicial scrutiny if it does not promote a diverse workplace.

**WOODS:** Right. Yeah. So, fair enough. So, let's go down to the *Brown versus Board of Education* decision, 1954, a unanimous court. What's the significance here? It's a huge question, but the significance of the case does not fully become clear, I think, for a number of years.

Because as you point out in your piece, in the ensuing years, you can find very distinguished critics of the case. You can find liberals who oppose the reasoning in it, who thought that it could lead to outcomes that nobody would want.

And then you trace how those people eventually fell. After a while, you find absolutely no liberals who will say a word about it. And then the conservatives, as usual, after a while, not a word from them anymore.

But you trace out several different stages by which *Brown* goes from just being a Supreme Court decision to being canonized. You refer to the process of canonization. So, first of all, what is the *Brown* decision itself? Let's start there.

**MERRIAM:** Okay, great. So, one thing we should clarify before we get started with *Brown* is that there's no reference to colorblindness as a value. This is the way that many conventional conservatives like to celebrate *Brown*, as though it stands for colorblindness.

There's a plausible reading of that into how the NAACP litigated the case, although I think that's questionable in itself. But the *Brown* decision in itself does not mention anything resembling colorblindness.

And the great mischief out of the opinion comes from really three words. Those words are "feelings of inferiority". The Supreme Court holds that because separate education has the effect of creating feelings of inferiority in black schoolchildren, that means that any sort of law that creates these feelings will be subject to heightened scrutiny.

And that has two very important effects. One is that it treats even private action that creates such feelings as though it has a constitutional significance. And second, it treats forced association as the remedy for these feelings of inferiority.

**WOODS:** Now, are the feelings of inferiority coming from the very fact of single-race schools?

**MERRIAM:** Yeah, that seems to be the case, but the court isn't clear. Of course, the famous doll study...

**WOODS:** That's what I was getting at.

**MERRIAM:** Yeah. So, the famous doll study is based on the idea that black schoolchildren prefer the white dolls to the black dolls. But if I recall correctly – I haven't read this in a while. The Kenneth Clark study was really misinterpreted by the court.

Again, I haven't looked at this in a while, but I think that the black schoolchildren actually showed a greater preference if they attended an integrated school than a...

**WOODS:** Oh, yeah, that's true. Yeah. The black students in integrated schools preferred the white doll even more.

**MERRIAM:** Yeah. It obviously didn't show that the feelings of inferiority were coming from the segregated schools. But the court's reasoning was that segregation is subject to this scrutiny, not because it wasn't colorblind.

And of course, there's a way in which people did think it was colorblind. But the point is that feelings of inferiority have a constitutional status.

**WOODS:** Right. And you know what's interesting about that? I wonder the extent to which they really believed that or if that was the best they could come up with in order to reach the outcome they wanted.

Because remember, there was even an NAACP lawyer who, when asked later about what he thought of the doll studies, he replied, "I may have used the word crap." So, even they kind of realized there's something not very impressive about this.

But then when later on, when some of these freedom of choice plans came out and you could decide which school to send your kids to, the black parents generally wanted to send their kids to schools with other blacks.

If that was giving them a sense of inferiority, why would you send your own kids into a school that was making them feel inferior?

So, it goes to show that black parents didn't believe this, or why would they voluntarily send their kids to a single race school?

**MERRIAM:** Yeah, so there was a big division within the NAACP leading up to Brown as to whether to fight for more funding for black schools or to fight for integrated schools. And the NAACP lawyers ended up going in the integrated schools direction, and that's how you get *Brown*.

But it's very interesting to look at the development of the litigation, beginning with the Nathan Margold report, which was written in 1930. So, you have roughly 25 years in between the beginning and the development of the strategy and its fruition in *Brown*.

And then, of course, it takes a while for *Brown* to crystallize into those two principles that we discussed earlier.

**WOODS:** So, let's walk through these various phases that we go through and the first of these phases by which *Brown versus Board of Education* becomes canonized, and by – well, I was about to define that.

When you say that the case ultimately becomes canonized, what do you mean by that?

**MERRIAM:** Yeah. So, that's a term that constitutional scholars have developed to explain why some Supreme Court decisions, whatever their constitutional warrant, are beyond criticism.

So, we may think of *Marbury v Madison*, despite some of the criticisms of Marshall's reasoning, as being canonized. We may think of some of the New Deal Supreme Court decisions dealing with federal power and the Commerce Clause as having been canonized, although I think that's questionable.

But there are some things that you can imagine in a Supreme Court confirmation hearing that you could not question. So, for example, if you were to say you disagree with *Marbury v Madison*, you're not going to get confirmed.

Perhaps if you disagreed with some of the Commerce Clause decisions and 10th Amendment decisions coming out of the New Deal you're not going to get confirmed.

But the number one thing you're not allowed to say in a confirmation hearing (everyone knows this) is that you think *Brown v Board* was decided incorrectly. Even if you are the most ardent integrationist around, no matter what your political preferences, if you disagree with *Brown* as a constitutional matter, you won't get confirmed.

So, that's what canonization refers to. So, we all know it exists. What I'm interested in is, really, how it exists, how that process works, and what is the result of that process? So, what happens as a result of canonization?

**WOODS:** All right. So, let's start with the first phase. What's happening then?

**MERRIAM:** Yeah. So, I've identified three phases. I'm not the first one to think about canonization in these ways. I am drawing on the work of a Yale law professor named Bruce Ackerman.

There are some other people who have written about this. Jack Balkin, another Yale Law School professor has written about canonization.

I'm looking at it slightly differently in that I'm thinking about it as three discrete phases. So, the first phase that I think is critical to making a Supreme Court decision canonized is what I call the construction phase, which means that there's debate about the issue, and that has the effect of broadening its significance.

So, in 1954, for example, if you were to talk about *Brown v Board*, it was limited to desegregation contexts. But once you move into the 1960s and you have the advancement of the civil rights movement resulting in the big pieces of legislation in the mid 1960s, it's clear that *Brown* no longer stands merely for school desegregation.

Now it stands for something much broader, namely that diversity is a good and discrimination is an evil.

You can see this in how affirmative action programs really take off in the 1960s, in the name of diversity, you have various colleges and universities that – I discuss this in the book – that are relying on *Brown* as the basis for their affirmative action programs.

And you also see the development of anti-discrimination legislation, particularly in the Civil Rights Act of 1964, invocations of *Brown* as the basis for the legislation.

So, that's all part of the construction phase, where *Brown* is no longer just about schools and desegregating the South. It stands much more broadly for a national project of promoting diversity and eliminating discrimination.

**WOODS:**  All right. So, in this first phase, you do see (as I was saying before) people like – and this is still the first phase, right? Where we see Learned Hand speaking about his concerns about it, Zora Neale Hurston, people like that, we still hear constitutionally based criticism.

So, going to the heart of the case, not the kind of thing we see afterward in the '70s where the case is wonderful, but it has 1 or 2 little things we might nitpick. We're still seeing this in the late '50s.

**MERRIAM:** Yes, that's an important point. And probably the most significant criticism came from Herbert Wechsler, who was a Columbia Law School professor who, in 1959, as part of the annual Oliver Wendell Holmes lectures at Harvard Law School, explained why he thought that *Brown* – and he included two other decisions in this discussion – why these decisions represented a derogation from the rule of law.

And his term for why they were derogations is that they did not rely on neutral principles of law. In Wechsler's argument, as applied to *Brown* for why it was illegitimate, is that it relied on this idea that integration is a good and that preventing people from associating, people who preferred integration, was evil.

But it did not give the same right to those who did not prefer integration. So, it gave an associational right to pro integrationists, but not an associational right to anti-integrationists. So, it wasn't a neutral principle of law as a result. And therefore, did not satisfy what he considered to be a basic element of the rule of law.

So, it's notable that Wexler, first of all, was a political liberal and he was in the New Deal administration, the FDR administration. He had no sort of conservative agenda, but he was concerned about the role of the Supreme Court in a constitutional democracy.

And he wasn't concerned that this was inconsistent with the 14th Amendment. He accepted wholeheartedly that the Supreme Court's job is not to enforce the original meaning of the constitution. So, if his complaint was not that: *Well,* Brown *is inconsistent with the 14th Amendment's original meaning.*

His concerned was that the Supreme Court, in being activist was not being neutral.

**WOODS:** And, I mean, today this must sound crazy to people that: Well, why would you be neutral between good and evil? Is the way they would look at it.

**MERRIAM:**  Right. This is, of course, before diversity was seen as a constitutional good and discrimination was seen as a constitutional evil. It's the beginning of it.

But you could see how someone like Herbert Wechsler, a brilliant Columbia law professor, would not see things that way because he saw these as really indifferent things.

Some people like integration, other people don't. And the role of the Supreme Court is simply to permit people to associate in a way that would fulfill their wishes.

**WOODS:** So, what happens then? It's rather ominous the way the second phase is titled "submission". Okay, so in other words, it's not persuasion. It's not a matter of: *Well, we hashed it out. And one side had the better of the argument, and so we conceded it.*

It's not quite that.

**MERRIAM:** No, it doesn't look like that to me. It looks much more like forced capitulation. And this is a long period. So, whereas the construction period looks like from the *Brown* decision to the late 1960s – I take the Nixon election as the completion of the construction phase.

With submission, what we have are a series of events where conservatives – and now it's only conservatives. So, in the 1950s and '60s, the critics included people who were on the left and people who were on the right.

So, I think most interestingly, Hannah Arendt wrote a very long article in dissent on the *Brown* decision and what it would mean for a constitutional republic. She was very concerned that a regime built around anti-discrimination would soon become totalitarian in its operations.

So, that becomes really unheard of by the 1970s. But what you do have are various conservatives still expressing some concerns about where the diversity project, the anti-discrimination project, where that is headed.

So, you could see this in Nixon's judicial nominations. You could see this in the first confirmation of William Rehnquist. You could see this in the writings at *National Review*.

And as this scrutiny develops, as it grows, the resistance weakens over time. So, you find that at *National Review* in its first 20 years, from 1955 to 1975, I couldn't find a single essay – I went through all of the National Review issues of that period – a single one that was actually praising the Supreme Court decision in *Brown*.

You do find a few that have a mixed treatment in the 1970s. And then all of a sudden around the mid 1970s, late 1970s, you start to see a sprinkling of positive treatments. Not too positive, but you could see that mood is changing.

And I think this is a product of what was happening with regard to the Nixon administration, the Rehnquist confirmation hearings, and then this is completed, I think, in the 1980s. And a lot of that, I think, has to do with both the Rehnquist confirmation hearing to be chief justice in 1986.

And then probably more importantly, Robert Bork's confirmation hearing in 1987, which really forced his submission after that. You don't find much criticism of Brown after that.

**WOODS:** Well, and as a matter of fact, in Bork's book – which is otherwise a pretty good book, *The Tempting of America*.

He has a chapter in which he's obviously trying to set up a method of constitutional interpretation that is not a humiliating capitulation on his part, that seems consistent with what he's believed, but that leads to *Brown* as the outcome.

And you state at one point that after Bork, the understanding is: Whatever method of constitutional interpretation you use, it has to lead to *Brown* as the outcome. So, we assume a priori that *Brown* is correct.

Or, we don't have to assume it's correct. We assume it's desirable, and therefore it's constitutionally mandated, which are two completely different things. And so, that is indeed where we are now.

And so, I guess we're in the third stage now. We're in the stage of weaponization. So, now that these ideas are entrenched, to the point where everybody celebrates them, calls them sacred. What does that now look like?

**MERRIAM:** Yeah. So, the Bork book, *The Tempting of America* does seek to defend *Brown* as an originalist matter. I don't think it's a wholehearted defense, but it certainly signifies where constitutional discourse is going.

And I think that this is really necessary at that point. I mean, there was no way for originalism to develop the way that it has if it didn't develop a mechanism for dealing with *Brown* after it was so deep into the canonization process.

And it's important to remember that originalism, when Bork was thwarted in 1987, originalism was an ascendant but not fully developed methodology.

It's something that really Raoul Berger was the first one to do, I think, in a sophisticated manner. And in his book, *Government by Judiciary,* in 1977, he openly criticized *Brown* as inconsistent with the 14th Amendment.

So, when originalism develops in the 1980s, under the aegis of the Reagan administration and the Federalist Society, well, now it's going to have to be able to come to terms with what Berger had done with originalism and the 14th Amendment.

So, it's going to need to find a new way to do originalism so that it can accommodate the *Brown* decision and become acceptable.

And a big turning point here is Michael McConnell, a law professor at Chicago at the time, wrote a law review article, a University of Virginia law review article in the mid 1990s in which he sought to defend *Brown* as an originalist matter using the 1875 Civil Rights Act debates.

Berger assailed that on the basis that the 1875 Civil Rights Act, of course, passed into law seven years after the 14th Amendment was already ratified. But the point is that now originalists had a way to defend *Brown*.

And once that happened in mid 1990s, that's when you transition to what I call the weaponization phase.

Because now that originalism could be used to defend *Brown*, I found in *National Review* and in various areas of litigation that conservatives became much more aggressive in their use of *Brown* for various causes.

And you see *Brown* now weaponized. And by "weaponized", I mean marshaled for particular causes outside of its original subject area. So, all of a sudden, in the late '90s, early 2000s, you see *Brown* used, for example, in school voucher litigation, the Zelman case is a really good example of that.

Clint Bolick wrote several books using *Brown* to advance his agenda. You see it used as a basis for criticizing *Roe*. If *Roe* is bad law just like *Plessy* was bad law, and *Brown* is the greatest thing that ever happened to constitutional law, we therefore need the *Brown* of abortion.

So, that's what I mean by weaponization. And the result is the country that we inhabit today where we're not allowed to talk not just about *Brown*, but about the civil rights movement and what it's done to our constitutional order.

And that is, of course, the real problem that I have. It's not the *Brown* decision itself, which in many ways I favor. It is the fact that we cannot have honest conversations on what is happening to our constitutional system.

**WOODS:** No, it's true. And that's in large part because – I mean, you can say: *Well, conservatives had no other choice. There's a cultural shift going on in the country. Nobody's going to be patient enough to listen to constitutional arguments when their heartstrings are being pulled on*.

I mean, I hear all that. But what conservatives seem to be very good at doing is they come to accept things that they once rejected. And that thing they once rejected is actually the foundation of the very order that is currently strangling them.

They accept the foundation and then they spend their time wringing their hands over what are obviously the inevitable consequences of the very thing they're now celebrating.

And so, if we're not going to have the conversation about the consequences of this thing – I mean, all we do is talk about the consequences. We don't talk about the thing that led to the consequences. And that's what you're trying to do here.

**MERRIAM:** Yeah. And I think you could see that. I mean, there's various areas at play. But, I mean, you could see what anti-discrimination law is doing across the country in terms of the gay rights agenda, transgender rights, and so on.

Now, once we accept that discrimination is the worst thing that could ever happen to a person, we are creating the system that we live in now. Where in the *Masterpiece Cakeshop* case, of course that couple could have gone to another baker to get their cake.

But they feel constitutionally entitled – not just morally or psychologically entitled, constitutionally entitled – to mandate that this baker bake their cake for their wedding if that's what they demand.

And that is, of course, the culture coming out of *Brown*, whereby even a sole proprietor, a small baker, he is essentially a state actor with a constitutional power because feelings of inferiority or feelings of discrimination have now been given a constitutional status.

**WOODS:** Well, that's the thing. I did an analysis of one of the cases involving the – in fact, I think it might have been that one, the Jack Phillips case.

And it's so interesting, because they've accepted this set of premises – well, for example, you point out that it's quite normal and understandable why a liberal like Kagan on the court would say to Jack Phillips's legal team: *Well, okay, but if this was a cake celebrating, let's say black people or something, surely you wouldn't be in here saying that he has the right to do that.*

And they're all saying: *Oh, you're right, of course he wouldn't. That would be completely different*. And Kagan (who I don't think is that bright) asks the correct follow up question: *Okay, so, what, are you just saying race is somehow different?*

I mean, that's the correct question to ask. If you're going to accept this set of ideas, then it doesn't make sense for you to say: *Well, we can do whatever we want with regard to cakes if it has to do with homosexuality, but it has to do with anything else, then that's another matter*.

None of that makes sense. So, again, the root of the problem is this initial set of premises. Because when you read the *Masterpiece Cakeshop* decision, it is unbelievable the hoops they have to jump through to come to the conclusion this guy does not have to bake this cake.

It is unbelievable. They have to go through a history of cakes and the significance of whether there's a frosted message on them. And it's insane because how else can they argue the case given that they've tied both hands behind their backs?

**MERRIAM:** There is something insane about it. And if you think the opinions themselves have that quality, you should listen to the oral arguments, which I do discuss toward the end of the essay. The oral arguments are so revealing of what this canonization of *Brow*n has created.

In that the justices are constantly coming back to the question of, if you're allowed to discriminate against this gay couple, what about the interracial couple and so on? And it's really revealing how obsessed with race the justices are.

There's something, I imagine, kind of annoying for the litigants who have these facts that have nothing to do with race. It's one white baker discriminating against two white gay guys. It's not about race at all. And yet the justices keep talking about race.

And there's also something quite frustrating and revealing, that when someone like Kagan – I think Sotomayor pushed this point quite a bit too, in the oral arguments: *Well, why is race discrimination not going to be prevented, but gay discrimination is?*

There is not a rational answer that any of these really smart justices could come up with. And you will see the justices be able to really push these lawyers in ways that you don't see oftentimes. These lawyers are highly trained and are prepared for these questions.

But that is a question that just nobody can answer. And you'll see the solicitor general, for example, just saying: *Well, race is just different.* Because there is not an answer for why discrimination against this one group would be constitutionally prohibited, but not for the other.

**WOODS:** Yeah, that is the situation that they're in. Let me go back for a minute to Brown and its implementation. Because the text of *Brown* does not give guidance as to exactly how the desegregation of the schools is to take place.

So, it could be done coercively. It could be done with forced busing. It could be done by means of freedom of choice plans.

Well, you quote the Fifth Circuit saying at some point in the '60s, when the freedom of choice plans were not leading to the desired outcome because people were making the wrong choices. It's like, democracy is threatened every time people vote for the wrong guy, kind of thing.

So, the Fifth Circuit actually said, "Freedom of choice is not a goal in itself. It is a means to an end." Boy, now, does that not sum up, in so many ways, the leftist worldview? That we'll give you freedom of choice as long as you do what we tell you to?

**MERRIAM:** Yeah. And that was not in the '70s. That's a circuit opinion, I believe it's in 1965.

**WOODS:** Yeah, so, the '60s. Yeah. If said the '70s, I meant the '60s.

**MERRIAM:** You said the '60s. I'm just trying to correct the misconception that's out there. I'm sure you don't have this, Tom. But there is this conservative narrative that the civil rights movement was going along so well and then it just got hijacked in the 1970s.

**WOODS:** Yeah, and mysteriously, it just mysteriously led to affirmative action. Because we have language in the Civil Rights Act that says you can't do that, so we shouldn't have gotten it.

But the problem is, the entire logic of the '64 act requires it. Because how else am I supposed to prove I haven't discriminated? You can't read my mind, so you have to look at the results.

Therefore, I need quotas. There is no other way this can be implemented.

**MERRIAM:** Yeah, I agree. And you could see this, actually, in how the very institutions that were pushing for the civil rights legislation, they were developing their own affirmative action programs at the very same time.

So, you can't imagine that Harvard, for example, was so interested in civil rights and then was doing something, at the very same time developing its affirmative action program, that violated the civil rights legislation.

I think that affirmative action is simply part and parcel of this project.

**WOODS:** Yeah. So, at the end, you try to suggest that maybe we can do more than just wring our hands and write articles about it. And by the way, I don't want to say that in a disparaging way. You writing this is really important.

And I also think that the Overton Window has shifted in the past 5 to 8 years, maybe, in ways that are encouraging. That it is at least thinkable we might be able to talk about this now.

Because I think partly what's happened is the left has been so unreasonable and bizarre that I think there are people, thoughtful people, who are willing to say: *Whatever led us to this outcome has to be re-examined now?*

And you're giving us a path to doing that. But what does that pathway look like?

**MERRIAM:** That's the difficult part. And I have to confess that I am a scholar at end of the day, not a political strategist.

**WOODS:** Right. And I understand. And the thing is, I don't know what the strategy is either. But I feel like there's a house on fire, and most people don't understand either where the fire came from or whatever. At least I know that, and that's got to help to some degree.

**MERRIAM:** Yeah, I think it's important to begin there, at the very least. And I agree there is a conversation that's developing and I think it's a very important one.

Of course, Christopher Caldwell's book is a big part of that conversation and that I hope that people are thinking more critically about these matters.

In terms of how to implement the strategy – I mean, the way that I think about this is that conservatives and people who are concerned about the future of our republic with regard to the civil rights regime really would benefit from thinking of themselves as being in the same position that the NAACP was in in the 1920s and '30s.

And they didn't just write articles and complain. They developed a legal strategy in how to use the federal judiciary to pursue their ends. And I think that conservatives are starting to move in that direction.

But I don't think that conservatives are there at this point. And I think it is increasingly clear that simply reciting kind of the originalist mantra and thinking of Federalist Society as the one and only conservative legal organization that can save us, that is not going to provide a path forward.

**WOODS:** Well, that's for sure. Even though there's much to be said for the Federalist Society, and it does a lot of important and good things.

**MERRIAM:** Yeah. So, none of this (and don't want this to be misconstrued) is to suggest a criticism of originalism in itself, or the Federalist Society, or the many cases that the Roberts Court has produced recently.

But it is to say that we need much more, we need more people involved, different perspectives, and don't think that we can feel as though originalism as a theory of constitutional interpretation is sufficient.

**WOODS:** Wow. Okay. Well, that's an interesting answer. Although, it seems to me like – well, I want to just probe this a little bit more, if I may. Because obviously *Brown* is a departure from originalism.

And in case it's not obvious from the text, there was initially some curiosity about whether the 14th Amendment contemplated schools that were racially segregated or not. And that was just not pursued.

Instead, it just was: *Well, we have these doll studies and this sense of inferiority, so we're going to go with that.* Okay. Well, that shows, like, not a very serious concern with originalism in the sense of at least as it applies to the 14th Amendment.

So, given that *Brown* is obviously a departure from originalism, how is a return to originalism not the solution?

**MERRIAM:** So, there's two things on that point. So, one of the things on originalism. When originalism was developed, as I mentioned earlier, it was thought that *Brown* and all that came out of *Brown* was inconsistent with originalism.

Because the 39th Congress itself, the Congress, of course, responsible for the 14th Amendment, created segregated schools in Washington, DC. But over the years, originalism has become much more complicated and variegated.

So, you have, I would say, the vast majority of originalists today arguing that *Brown* is correct as an originalist matter. I can't think – actually, I said "the vast majority". I can't think of an exception to that. And I'm talking here about law school professors who are doing originalism in a professional capacity.

**WOODS:** Right. But I'm sorry to be cynical here, but could they be doing that just to save their rear ends and to not be kicked off the team and to give space for conservatives still to exist in a post *Brown* world? Isn't that probably why they're writing these articles.

**MERRIAM:** Yeah, maybe. But my point about originalism is that if originalism is that broad, broad enough to encompass these various interpretations, and we're not scrutinizing in a meaningful way what created the situation that we're in, we can't simply charge originalism.

I'm not saying originalism is not necessary. I'm saying it's not sufficient. For legal conservatives, we need to be thinking more critically about the situation that conservatives find themselves.

**WOODS:** Yeah. And so, when conservatives have conferences, I would say it's time for them not to just give rah-rah red meat speeches, but to be saying: *Look, these are the conversations we have to start having.*

*And they'll call us racist for having them, but they already call us racist. How could it get worse? They already call the entire Republican Party white supremacists, which is preposterous, ludicrous thing to say. How could it get worse?*

*So, in effect, they've opened the door for us to have any conversation we want because they're already calling us the most toxic thing possible.*

**MERRIAM:** Yeah, I agree with all of that. I think that when it comes to legal conservatism, it would help to have organizations that don't just consist of legal academics involved in the conversation. That's what I mean by, "Originalism can't be the only thing."

And I'm happy to be involved with groups like the *Claremont Institute*, where you don't just have legal academics telling us what the Constitution means.

**WOODS:**  Well, first of all, I'm going to link, of course, to your work, "How We Got Our Antiracist Constitution" on the show notes page. So, TomWoods.com/2366.

But how can people follow you if they'd like to read more? Are you on Twitter, for example? Do you have a website?

**MERRIAM:** Yeah, I was on Twitter. I'm not on Twitter anymore.

**WOODS:** Did you die of natural causes, or what happened there?

**MERRIAM:** Yeah, natural causes. I have four kids, a fifth on the way and just have too many family responsibilities to be involved in conversations on Twitter.

**WOODS:** Okay, fair enough.

**MERRIAM:** I wish I could be on Twitter, to be honest. In terms of following me, I mean, emailing me, I always welcome that. I write at *Law & Liberty* quite a bit. And I think that *Claremont* does a pretty good job of promoting my work.

I had an article on affirmative action called "The Affirmative Action Regime" in most recent *Claremont Review of Books*. So, you can find me writing a lot of different places.

**WOODS:** Huh. Okay. You know, as I say, I have such a favorable view of *Claremont* these days. And the fact that they are willing to stick their necks out on something that is going to give them nothing but grief, I think speaks really, really well for them.

So, I hope people will go to TomWoods.com/2366 and read what you've written. It's in great detail, amply footnoted. And we got to figure out, now that we've absorbed this information, what we do with it.

But in any case, Jesse, I appreciate your time. It's great to get to know you. And thank you for this important work.

**MERRIAM:** I really appreciate it, Tom. Looking forward to talk to you again in the future.