A Critique of Justice Antonin Scalia’s Originalist Defense of Brown v. Board of Education

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ABSTRACT

How would Justice Antonin Scalia, an avowed and prominent originalist, have voted if he were a member of the U.S. Supreme Court at the time of the Court’s seminal 1954 decision in Brown v. Board of Education? In a public appearance Justice Scalia stated that he would have voted with Justice John Marshall Harlan, the lone dissenter from the Court’s 1896 validation of the separate-but-equal doctrine in Plessy v. Ferguson. Additionally, in his recently published book, Justice Scalia stated that Justice Harlan’s dissent in Plessy is “thoroughly originalist” and, in a 1990 dissenting opinion, noted that Plessy was “upheld only over the dissent” of Justice Harlan, “one of our most historically respected Justices.” This Essay examines and criticizes Justice Scalia’s reliance on Justice Harlan as iconic authority for the proposition that Brown can be squared with Justice Scalia’s original public meaning variant of originalism.

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INTRODUCTION

How would Justice Antonin Scalia, an avowed and prominent originalist, have voted if he were a member of the U.S. Supreme Court at the time of the Court’s seminal 1954 decision in Brown v. Board of Education?1 This question is posed to Justice Scalia “so often in his public appearances that he will say things like ‘Waving the bloody shirt of Brown again, eh?’”2 For example, in 2009 Justices Scalia and Stephen G. Breyer appeared at the University of Arizona and discussed principles of constitutional and statutory interpretation.3 When the conversation turned to the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution,4 Justice Breyer said to his colleague: “Where would you be with school desegregation? . . . It’s certainly clear that at the time they passed the 14th Amendment, which says people should be treated equally, there was school segregation and they didn’t think they were ending it.”5 Justice Scalia initially responded, “As for Brown v. Board of Education, I think I would have . . . ” before stating that he would have voted with the dissent in the Court’s 1896 Plessy v. Ferguson decision, suggesting that he would have sided with the Brown majority.6

More recently, in their book Reading Law: The Interpretation of Legal Texts,7 Justice Scalia and Bryan Garner submit that a “frequent line of attack against originalism consists in appeal to popular Supreme Court decisions that are assertedly based on a rejection of original meaning.”8 Noting that Brown is the most often cited exemplar of the contention that “only nonoriginalism could have produced . . . generally acclaimed results,”9 Scalia and Garner write that the text of the Thirteenth and Fourteenth Amendments, and in particular the Equal Protection Clause of the Fourteenth Amendment, can reasonably be thought to prohibit all laws designed to assert the

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4. See U.S. CONST. amend. XIV, § 1 (1868) (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).
8. Id. at 87.
9. Id.
separateness and superiority of the white race, even those that purport to treat the races equally. Justice John Marshall Harlan took this position in his powerful (and thoroughly originalist) dissent in Plessy v. Ferguson.10

Justice Scalia presented this Thirteenth Amendment/Fourteenth Amendment analysis, augmented by a reference to tradition, in a 1990 dissenting opinion:

In my view the Fourteenth Amendment's requirement of "equal protection of the laws," combined with the Thirteenth Amendment's abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid. Moreover, even if one does not regard the Fourteenth Amendment as crystal clear on this point, a tradition of unchallenged validity did not exist with respect to the practice in Brown. To the contrary, in the 19th century the principle of "separate-but-equal" had been vigorously opposed on constitutional grounds, litigated up to this Court, and upheld only over the dissent of one of our most historically respected Justices.11

Thus, Justice Scalia argues that Brown is consistent with the text of the Thirteenth and Fourteenth Amendments, and that that position is one taken by Justice Harlan in his dissent in Plessy. As I argue herein, Justice Scalia's approach and reliance on Justice Harlan as iconic authority for the Brown-is-originalist proposition cannot be squared with the original public meaning variant of originalism.

This Article critiques Justice Scalia's defense of Brown and his invocation of Justice Harlan's Plessy dissent as support for that defense. Part I provides an overview of originalism and Justice Scalia's original public meaning variant of that interpretive theory. Part II examines and critiques Justice Scalia's Brown-is-originalist position. First, I discuss the Reconstruction-era taxonomy of rights and the operative meaning and scope of the Fourteenth Amendment. Next, I consider the Court's nonoriginalist, if not antioriginalist, decision in Brown. Finally, I comment on Justice Scalia's reliance on Justice Harlan—a Justice who believed in racial hierarchy, endorsed white supremacy, and rejected the idea that African Americans were the social equals of whites—as authority for the proposition that Brown is consistent with originalism.

10. Id. at 88 (footnote omitted).
I. JUSTICE SCALIA’S ORIGINALIST APPROACH

Originalism is the label given to a family of theories according to which “the discoverable meaning of the Constitution at the time of its initial adoption [is] authoritative for purposes of constitutional interpretation in the present.”12 Those who choose constitutional originalism over other interpretive methodologies13 may select from a menu of originalist theories, including ones that prioritize the original intent of the framers, the original expected application of constitutional provisions, the original understanding of the ratifiers, or the original public meaning, along with original methods originalism, and framework originalism.14 These originalisms, developed over time as originalism was “working itself pure,”15 comprise a “big tent” of “diverse and, to some extent, conflicting theories unified by a core commitment to the interpretive primacy of the ‘fixed’ meaning of the constitutional text at the time of enactment.”16

Justice Scalia champions the original public meaning variant of originalism. He writes, “[t]he Great Divide with regard to constitutional interpretation is not that between Framers’ intent and objective meaning, but rather that between original meaning (whether derived from Framers’ intent or not) and current meaning.”17 He thus looks for “the original meaning of the text, not what the original draftsmen intended.”18 While originalists will not always agree “as to what the original meaning was” or “how that original meaning applies to the situation before the court . . . the originalist at least knows what he is looking for:

14. For an overview and discussion of originalist theories and approaches, see Thomas B. Colby & Peter J. Smith, Living Originalism, 59 DUKE L.J. 239 (2009); Whittington, supra note 12.
18. Id.; see also District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (The Court was "guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.").
the original meaning of the text.” Justice Scalia has observed that understood correctly, originalism “requires the consideration of an enormous mass of material” and necessitates “immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.”

What is the original public meaning of the Equal Protection Clause, if one exists at all? Justice Scalia has stated that the “[d]enial of equal protection” is unconstitutional, and that the question of what constitutes a denial of equal protection must be answered “on the basis of the ‘time-dated’ meaning of equal protection in 1868.” Applied to Brown, does that time-dated meaning permit or outlaw school segregation? Much rides on the answer to that question, for “[s]uch is the moral authority of Brown that if any particular theory does not produce the conclusion that Brown was correctly decided, the theory is seriously discredited.” It is understandable that some originalists are concerned that the conclusion that Brown was wrongly decided could delegitimize originalism. But when squaring Brown with originalism is achieved only by deviating from originalist dictates and departing from the announced focus of one’s chosen originalist analysis (for Justice Scalia, original public meaning), the validity of the methodology is fairly called into question.

The next Part examines whether Justice Scalia’s originalism is consistent with the result in Brown and concludes that it is not.

19. Scalia, supra note 17, at 45.
21. Scalia, supra note 17, at 148, 149.
22. Michael W. McConnell, Originalism and the Desegregation Decisions, 81 VA. L. REV. 947, 952 (1995); see also Pamela S. Karlan, What Can Brown Do For You?: Neutral Principles and the Struggle Over the Equal Protection Clause, 58 DUKE L.J. 1049, 1060 (2009) (“Precisely because Brown has become the crown jewel of the United States Reports, every constitutional theory must claim Brown for itself. A constitutional theory that cannot produce the result reached in Brown is a constitutional theory without traction.”). But see ADRIAN UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF JUDICIAL INTERPRETATION 280 (2006) (arguing that under a Thayerian regime of judicial review Brown was indeed “wrongly decided” and that “the view that accounts of constitutional interpretation and judicial review should be tested against any particular decision is seriously misguided”).

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II. **Justice Scalia’s Defense of *Brown***

As previously noted, Justice Scalia instructs that Equal Protection Clause questions must be answered by appeal to the time-dated meaning of equal protection circa 1868, and that ascertaining that meaning requires immersion into the political and intellectual atmosphere and the beliefs and prejudices of that time. The following Subpart applies Justice Scalia’s method to the Equal Protection Clause to ascertain its original public meaning.

A. **The Fourteenth Amendment and the Reconstruction-Era Taxonomy of Rights**

The Fourteenth Amendment was officially added to the Constitution in 1868. Accordingly, any discussion of the operative meaning and scope of the Fourteenth Amendment must consider the Reconstruction-era taxonomy of rights and what Jack Balkin calls the “tripartite theory of citizenship.” During the debates over the Fourteenth and other Reconstruction Amendments, members of Congress understood rights as falling into one of three categories: (1) civil rights, (2) political rights, and (3) social rights. Civil rights included “freedom of contract, property ownership, and court access—rights guaranteed in the 1866 Civil Rights Act, for which the Fourteenth Amendment was designed to provide a secure constitutional foundation.” Political rights, including the right to vote and to serve on juries, were not enjoyed by all persons, as African Americans and unmarried women were deemed civilly but not politically equal to white men. Social rights were understood to include the right to marry a person of another race and to attend a racially integrated school.

Many, including some Republicans, resisted the notion that African Americans should have constitutionally protected social rights. At the time of the Fourteenth Amendment’s passage, Southerners were “terrified” that the amendment (referred to and derided by some as the “negro equalization amendment”) “would ‘giv[e] negroes political and social equality with

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23. *See supra* note 20 and accompanying text.
26. *Id.*
28. KLARMAN, supra note 25, at 19.
29. *See id.*
whites," would "someday be interpreted to preclude laws banning interracial marriage," and "would ‘compel [whites] to live on a level with the sickening stench of degraded humanity.’" Indeed, the concept of social equality for African Americans had a “racially charged meaning” and was viewed as “a code word for miscegenation and racial intermarriage. The idea (or rather the fear) was that the relative status of blacks and whites as a group would be altered if society had a preponderance of mixed-race children, or if blacks and whites regarded themselves as members of the same family.”

Given this political and intellectual atmosphere, what governmental practices and conduct did the Equal Protection Clause prohibit? As Michael Klarman has noted, the text of the Fourteenth Amendment (unlike that of the Fifteenth Amendment) does not expressly prohibit racial classifications.

With respect to education, African Americans "were almost universally excluded from, or segregated in, public schools when the Fourteenth Amendment was adopted." School segregation “was infrequently discussed during the legislative debates in 1866. Democrats occasionally argued that the Civil Rights Act or the Fourteenth Amendment would produce horrible consequences, such as compulsory school integration, but Republicans invariably

31. BALKIN, supra note 27, at 145 (footnote omitted); see McConnell, supra note 22, at 1018 (“A significant undercurrent in the discussion of social rights was the fear that intermixing would lead to miscegenation, and that the theory of the Fourteenth Amendment . . . would logically extend to a right of racial intermarriage.”); Rebecca J. Scott, Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge, MICH. L. REV. 777, 781 (2007) (noting that “social equality” was “a label . . . enemies had long attempted to pin on the proponents of equal public rights in order to associate public rights with private intimacy and thereby to trigger the host of fears connected with the image of black men in physical proximity to white women”).
32. The Fifteenth Amendment provides: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1 (1870).
33. See Klarman, supra note 25, at 18 (quotation marks omitted).
34. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873).
35. Id. at 19.
denied such a possibility.” Indeed, schools remained desegregated even after the Amendment’s passage.

At the time of the amendment’s adoption, the prevalent political and intellectual atmosphere was not one in which African Americans enjoyed social rights. Furthermore, schools remained racially segregated even after the passage of the Fourteenth Amendment. Therefore, a time-dated meaning approach suggests that the Fourteenth Amendment’s original meaning did not grant or constitutionalize any social rights or social equality to African Americans.

B. The Court’s Nonoriginalist Decision in Brown

Given the political and intellectual atmosphere of the time in which the Fourteenth Amendment was proposed and adopted and the then-recognized taxonomy of rights, can the result reached in Brown be squared with originalism?

Over the years originalists have articulated justifications for the Court’s decision in Brown. Consider one recent originalist effort: Steven Calabresi and Michael Perl’s article Originalism and Brown v. Board of Education. Focusing on the right to public education as it stood in state constitutional law at the time of the adoption of the Fourteenth Amendment, they contend, among other things, that “Brown is only justifiable on originalist grounds.” In 1868 the constitutions of thirty of the nation’s thirty-seven states explicitly required the establishment of a public school system. Calabresi and Perl conclude that this count demonstrates a consensus of three quarters of the states recognizing a fundamental right to a free public education, and that freedom from racial discrimination in public education was a privilege or immunity of state citizenship at that time.

This analysis is problematic. Calabresi and Perl state that the “legal argument we make is complex and could easily have been missed by many if not most Americans living in 1868.” If in 1868 most of the public did not know of or could not comprehend the analysis, one must question whether and how any original public meaning regarding public school desegregation did or could exist. In addition, Calabresi and Perl frame the issue as one involving the general right

36. Id.
38. Id. at 12.
39. See id. at 24–28 (states listed therein).
40. See id. at 33.
41. Id. at 6.
to a free education and not the narrower and more carefully described right to attend desegregated public schools. Their selected level of generality has analytical significance. The fact that a number of state constitutions required the establishment of public schools in 1868 ignores the fact that there was in fact widespread school segregation in the north and south and in the District of Columbia. The requirement of a free public education circa 1868 did not mean that that education was available to all without regard to race.

Chief Justice Earl Warren seems to reject an originalist approach altogether. His opinion for a unanimous Court in *Brown* determined that the circumstances surrounding the 1868 adoption of the Fourteenth Amendment, and the views of proponents and opponents of the amendment, were inconclusive and not sufficient to resolve the issue before the Court. The Court therefore could not “turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.” Instead, Chief Justice Warren focused on the importance of public education in American life and the adverse effects of segregation on children. He opined that education “is perhaps the most important function of state and local governments;” is “required in the performance of our most basic public responsibilities, even service in the armed forces;” and is “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”

With respect to the harms of segregation, Chief Justice Warren argued that segregating children by race in grade and high schools “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” The Chief Justice supported this mid-twentieth century recognition of the enervating effects of racial segregation

42. Some scholars question the Court’s finding that such views were inconclusive. See RICHARD A. POSNER, OVERCOMING LAW 62 (1995) (“It was unclear, to say the least, that the framers or ratifiers of the Fourteenth Amendment had intended the equal protection clause to prevent racially segregated public school education.”); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 156 (1999) (noting that the Fourteenth Amendment’s supporters gave assurances that the amendment would not lead to integrated schools); Alexander M. Bickel, The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1, 64 (1955) (noting that “the immediate objectives to which section 1 of the fourteenth amendment was addressed . . . was not expected in 1866 to apply to segregation”).
44. *Id.* at 493.
45. *Id.* at 494.
with sociological evidence and rejected “[a]ny language in Plessy v. Ferguson contrary to this finding . . . .”46

Accordingly, the Court declared “that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal” and the plaintiffs had been “deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”47 That Brown is an unabashedly nonoriginalist48 if not antioriginalist49 decision has not deterred Justice Scalia and others from advocating the Brown-is-originalist position.50 The next Part critiques Justice Scalia’s invocation of Justice Harlan’s Plessy dissent and his characterization of that dissent as “thoroughly originalist.”51

C. Justice Scalia’s Misguided Reliance on Justice Harlan’s Plessy Dissent

Plessy v. Ferguson,52 one of the Court’s anti-canon decisions,53 considered an equal protection challenge to Louisiana’s Separate Car Law mandating “equal but separate accommodations for the white, and colored races” on railway cars.54 The Court opined that the Fourteenth Amendment’s conception of “equality” was not “intended to abolish the distinctions based upon color, or to enforce social, as distinguished from political, equality, or to a commingling of the two races upon terms unsatisfactory to either.”55 Referring to the aforementioned Reconstruction-era taxonomy of civil, political, and social rights,56 the Court stated: “If the civil or political rights of both races be equal, one cannot be inferior

46. Id. at 494–95. The sociological evidence referenced by the Court was cited in the much-discussed footnote 11. See id. at 494 n.11.
47. Id. at 495.
51. See supra notes 6–10 and accompanying text.
52. 163 U.S. 537 (1896).
54. Plessy, 163 U.S. at 540 (quoting the Louisiana statute).
55. Id. at 544.
56. See supra notes 24–31 and accompanying text.
to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."57

Viewing the segregation of railway cars as a matter of social equality, the Court, by a 7–1 vote, held that the Louisiana law did not violate the Equal Protection Clause as it was “a reasonable regulation,” with the “question of reasonableness” answered by the state’s “liberty to act with reference to established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.”58 Laws mandating the separation of blacks and whites did not “necessarily imply the inferiority of either race to the other,”59 the Court stated, and “have been generally, if not universally, recognized as within the competency of state legislatures” to establish “separate schools for white and colored children.”60

Justice Harlan’s lone dissent rejected the Court’s determination that segregation laws did not imply the inferiority of one race to the other. He made clear his view that “[i]n respect of civil rights, all citizens are equal before the law” and that race must not be taken into account when “civil rights as guarantied by the supreme law of the land are involved.”61 For Justice Harlan, the “real meaning” of the Separate Car Law was that “colored citizens are so far inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens.”62 Therefore, this law violated Homer Plessy’s civil rights and the Equal Protection Clause.

Justice Harlan did not, however, argue for or endorse the social equality of African Americans and whites. Justice Harlan’s dissent is known for his metaphoric conception of the Constitution: “In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”63 What is sometimes not noted is that the just-quoted passage was preceded by the Justice’s declaration that “the white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds

57. Plessy, 163 U.S. at 551–52.
58. Id. at 550.
59. Id. at 544.
60. Id. at 544. The Court also recognized state laws “forbidding the intermarriage of the two races.” Id. at 545. Such laws were held to be unconstitutional in Loving v. Virginia, 388 U.S. 1 (1967).
61. Id. at 559 (Harlan, J., dissenting) (emphasis added).
62. Id. at 560.
63. Id. at 559.
fast to the principles of constitutional liberty.”

Justice Harlan thus recognized and endorsed “white superiority in the very paragraph in which he claimed fealty to colorblindness.”

Justice Harlan was acutely conscious of race and racial hierarchy. “Like most of his contemporaries, Harlan believed in the centrality of race and in the legitimacy of racial thinking. . . . Although Harlan was highly unusual in the courage, integrity, and decency he showed in racial matters, he nonetheless remained a person of his time.” He joined the Court’s pre-\textit{Plessy} decision holding that a state criminal law’s penalty enhancement for adultery and fornication engaged in by black-white couples did not violate the Equal Protection Clause. And, three years after \textit{Plessy}, Justice Harlan wrote the Court’s opinion in \textit{Cumming v. Richmond Board of Education}. In that case, the Court held that a county school board did not violate the Equal Protection Clause when it closed an all-black high school and continued to operate a high school for whites. The school board’s “separate and \textit{unequal} scheme” was deemed to be reasonable and therefore constitutional.

In light of Harlan’s views on white superiority and his prior rulings, what does Justice Scalia mean when he says that he would have voted with Justice Harlan in \textit{Plessy} and characterizes the Harlan dissent as “thoroughly originalist”? What is originalist about Justice Harlan’s dissent? One possibility is that Justice Scalia agrees with Justice Harlan that the issue of the constitutionality of state-mandated racial segregation in railway cars concerned the civil but not the social rights of African Americans. If Justice Scalia does not recognize the Reconstruction-era distinction between civil rights and social rights, the originalist ground for disregarding the views of that day and time remains unclear. If he is cognizant of and accepts the civil-social distinction, he must conclude that attending a desegregated school is a social, and therefore not a constitutionally protected, right.

Another possibility is that Justice Scalia believes that Justice Harlan’s opinion delineates or serves as a proxy for a time-dated 1868 public meaning of

\begin{itemize}
\item 64. \textit{Id.}
\item 68. See Pace \textit{v. Alabama}, 106 U.S. 583 (1883).
\item 69. 175 U.S. 528 (1899).
\item 70. KLARMAN, supra note 25, at 45.
\end{itemize}
the Equal Protection Clause as requiring school desegregation. If so, Justice Scalia must offer more than the mere conclusory statement that Justice Harlan’s *Plessy* dissent is “thoroughly originalist.” Recall Justice Scalia’s avowal that originalism “requires the consideration of an enormous mass of material,” an immersion in the relevant time (in this case, the period of the consideration and adoption of the Fourteenth Amendment), and putting on the beliefs and prejudices of that and not our day.\(^7\) An immersion in the atmosphere of the time would, at a minimum, require one to consider the tripartite theory of citizenship and grapple with the view that social rights were not deemed to be protected by the Fourteenth Amendment.

As for analyzing an issue in a way consistent with the prejudices, attitudes, and beliefs of the time, the claim that Justice Harlan’s *Plessy* dissent supports the result reached in *Brown* is unconvincing. Justice Harlan owned slaves, he opposed the Emancipation Proclamation, the Thirteenth Amendment, and the Freedmen’s Bureau,\(^7\) and he argued for the protection of civil rights but not social equality in *Plessy*. He further endorsed white supremacy and voted against equal protection challenges to racial discrimination, even writing the Court’s opinion in a case involving the closure of an all-black high school.\(^3\) Therefore, Justice Scalia is quite wrong when he claims that Justice Harlan’s *Plessy* dissent posits that the Equal Protection Clause prohibits “all laws designed to assert the separateness and superiority of the white race . . . ”\(^4\) In sum, the contention that Justice Harlan’s dissent and the views expressed therein are supportive of *Brown*’s mid-twentieth century invalidation of the separate-but-equal doctrine in the field of public education is unavailing. Lauding Justice Harlan’s dissent as “thoroughly originalist” wrongly attributes to Justice Harlan views Harlan did not hold and conclusions he did not reach.

Furthermore, Justice Scalia’s textualist/tradition-based defense of *Brown*\(^5\) is not originalist.\(^6\) As previously noted, Justice Scalia treated as unambiguous the

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71. See supra note 20 and accompanying text.
73. See supra notes 65, 69–70 and accompanying text.
74. SCALIA & GARNER, supra note 7, at 88.
76. Traditionalism is distinct from and should not be confused with originalism’s search for the fixed meaning of constitutional text. Traditionalism takes into account not fixed meaning but evolving practices and experiences. *See John C. Jeffries, Jr. & Daryl J. Levinson, The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1241 (1998) (“Traditionalism thus differs from originalism, which draws its normative authority not from historical practices but from a
phrase “equal protection of the laws,” a provision others have rightly viewed as an abstract and not self-defining principle. His traditionalist approach interprets the Constitution not according to the document’s original and fixed meaning, but rather in accordance with a tradition of challenging the constitutionality of the separate-but-equal doctrine.

This approach is problematic because “Scalia’s resort to tradition . . . wouldn’t have helped to overturn segregation . . . since segregation was a long-standing American tradition.” In fact, the Plessy Court specifically invoked the “traditions of the people” to support its view that Louisiana’s separate-but-equal law was a “reasonable regulation.” Indeed, segregation was undeniably a legally cognizable tradition. As Justice Scalia notes, nineteenth-century challenges to segregation were litigated up to the Court and rejected in Plessy. That Justice Harlan dissented does not change the fact that seven members of the Court voted to judicially sanction the practice of American apartheid.

CONCLUSION

How would Justice Scalia have voted if he were a member of the Court that decided Brown v. Board of Education? This query is not posed to wave “the bloody shirt of Brown.” It is a serious question intended to measure whether Brown can be squared with originalism as that interpretive methodology is defined and conceptualized by Justice Scalia. As argued herein, Justice Scalia’s mere conclusory statement that Brown is consistent with Justice Harlan’s “thoroughly originalist” dissent is unconvincing, as is his nonoriginalist and traditionalist approach to and defense of the Court’s seminal 1954 ruling. If Justice Scalia’s originalism will not yield the result reached in Brown, the question “how would you have voted?” should be answered in the negative, however unpalatable that may or may not be.

social contract theory of precommitment by the American people.

78. See supra note 11 and accompanying text.
79. Talbot, supra note 2, at 54.
80. See supra note 58 and accompanying text.
81. See supra note 11 and accompanying text.
82. Talbot, supra note 2, at 54.