Were Separate-But-Equal and Antimiscegenation Laws Constitutional?: Applying Scalian Traditionalism to *Brown* and *Loving*

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> The conversation-stopping question "How should judges decide cases?" has remained the central question in the theory of law.[1]

> I answer [the question of what constitutes a denial of equal protection by looking to] the "time-dated" meaning of equal protection in 1868.[2]

I. INTRODUCTION

In interpreting constitutional provisions[3] and adjudicating constitutional issues, judges refer to the United States Constitution's text, structure, history, precedential readings, juridical constructions, and traditions as pertinent factors.[4] That the latter factor, tradition, has always played some role in the Court's interpretive enterprise[5] is not remarkable.[6] Tradition can be important, for "constitutional interpretation must take into account past legal and political practice as well as what the framers themselves intended to say."[7] What is remarkable and worthy of

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1. ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 107 (1996).

2. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 148–49 (Amy Gutmann ed., 1997).

3. Interpretation is, of course, a necessary function, because the Constitution does not and cannot interpret itself. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 12 (1994).

4. *See generally* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 119–22 (1993); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1185–94 (1996); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 76 & n.20 (1991); Renata Adler, *Irreparable Harm*, NEW REPUBLIC, July 30, 2001, at 29, 34.

5. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Wisconsin v. Yoder, 406 U.S. 205 (1972); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Hurtado v. California, 110 U.S. 516 (1884); Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring); Dred Scott v. Sandford, 60 U.S. 393, 407, 426 (1857).

6. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 192 (1996) ("Though it is traditional for Supreme Court justices to rely on tradition, today some scholars and judges seem to pay more lip service to history and tradition than ever."); *id*. at 198 ("Throughout its recent history . . . the Supreme Court has repeatedly recognized that the Fourteenth Amendment must be interpreted in view of our 'history and traditions.'"); Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 178 (1993) ("'Tradition' . . . has been an important source of authority for almost all schools of constitutional interpretation." (footnote omitted)).

7. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 9–10 (1996); *see also* David A. Strauss, *Common Law Constitutional*

comment and analysis is the view, articulated and championed by Justice Antonin Scalia, that traditionalism—the interpretation and application of the Constitution "in accordance with the long-standing and evolving practices, experiences, and tradition of the nation"[8]—can and should play a dispositive role in constitutional law and adjudication.[9] The Justice, looking to and relying on his notion of traditionalism in cases involving the preservative and tradition protecting Due Process Clause,[10]

Interpretation, 63 U. CHI. L. REV. 877, 891 (1996) ("The central traditionalist idea is that one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time.").

8. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1133 (1998).

> Traditionalism is the idea that the words of the Constitution should be understood as they have been understood by the people over the course of our constitutional history, from enactment through the present. To accomplish this, the interpreter looks at what decentralized and representative bodies have done, over time, and treats their consensus as authoritative.

Id. at 1136.

9. During Scalia's confirmation hearings before the United States Senate, Senator Howard Metzenbaum quoted Scalia as having said in an earlier article:

> It would seem to be a contradiction in terms to suggest that a State practice engaged in and widely regarded as legitimate from the early days of the Republic down to the present time, is unconstitutional. I do not care how analytically consistent with analogous precedents such a holding might be, nor how socially desirable in a judge's view. If it contradicts long and continuing understanding of the society, as many of the Supreme Court's recent Constitutional decisions . . . , in fact, do, it is quite simply wrong.

Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary United States Senate, 99th Cong. 88 (1986). Senator Howard Metzenbaum was concerned that Justice Scalia's view suggested that "the Constitution means what the majority says it means," *id.* at 89, and asked, as does this Article, how Justice Scalia's approach could be squared with the Court's ruling outlawing segregated public schools. *See id.* at 88. Justice Scalia answered that discrimination on the basis of race was unconstitutional because it was "facially contrary" to the language of the Fourteenth Amendment. *Id*. at 88–89; *see also* TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION 13 (2000) (discussing Justice Scalia's testimony regarding tradition and the Constitution). For more on this subject, see *infra* notes 291–95 and accompanying text.

10. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); *id*. at amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."). The "Due Process Clause is generally tradition-protecting . . . [and] safeguards rights related to those long-established in Anglo-American law." Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 67 (1996) [hereinafter Sunstein, *Leaving Things Undecided*]; *see also* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 67 (2001) [hereinafter SUNSTEIN, DESIGNING DEMOCRACY] (discussing preservative constitutions that "attempt to protect long-standing practices

has urged that the United States Supreme Court should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified;"[11] that a plaintiff seeking to maintain a substantive due process claim must demonstrate "that the State has deprived him of a right historically and traditionally protected against state interference;"[12] and that abortion is not a protected liberty because "the Constitution says absolutely nothing about it, and . . . the longstanding traditions of American society have permitted it to be legally proscribed."[13]

In other cases construing and applying the transformative and tradition correcting Equal Protection Clause,[14] Justice Scalia has argued that fundamental constitutional rights "should be limited to 'interest[s] traditionally protected by our society;'"[15] that the Court should not strike down a practice "not expressly prohibited by the text of the Bill of Rights" where that practice "bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic;"[16] and that the meaning of equal protection is "time-dated" circa 1868.[17] This Article examines Justice Scalia's traditionalism and applies that methodology to the results reached by the Court in *Brown v. Board of Education*[18] and *Loving v. Virginia*.[19] *Brown*, of

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that, it is feared, will be endangered by momentary passions"); William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1185 (2000) ("The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack." (quoting Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988))).

11. Michael H. v. Gerald D., 491 U.S. 110, 127–28 n.6 (1989) (Scalia, J.).

12. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 294 (1990) (Scalia, J., concurring).

13. Planned Parenthood v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part).

14. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). The Equal Protection Clause "might be thought to have some counterhistorical content." Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 38 (1991) (Scalia, J., concurring); *see also* SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 10, at 68 (noting the transformative elements of the Constitution "rejecting slavery and authorizing the national government to do a great deal to promote equality"); Sunstein, *Leaving Things Undecided*, *supra* note 10, at 67 ("[T]he Equal Protection Clause is tradition-correcting . . . [and] sets out a normative ideal that operates as a critique of existing practices . . . .").

15. United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (quoting Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (Scalia, J.)).

16. *Id*. at 568 (quoting Rutan v. Republican Party, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting)).

17. *See* SCALIA, *supra* note 2, at 149.

18. 347 U.S. 483 (1954).

19. 388 U.S. 1 (1967).

course, officially interred the nation's longstanding, traditional, and noxious separate-but-equal doctrine. Justice Scalia has argued that tradition did not require a different outcome in that case because, in his view, the Fourteenth Amendment's equal protection guarantee, when combined with the Thirteenth Amendment, "leaves no room for doubt that laws treating people differently because of their race are invalid."[20] *Loving* held that antimiscegenation laws prohibiting marriage and sexual relations between Blacks and Whites were unconstitutional.[21] In Justice Scalia's view, adherence to tradition would not have required the Court to uphold such laws, as "[a]ny tradition in that case was contradicted *by a text*—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value."[22]

The discussion proceeds as follows: Part II focuses on *Brown* and *Loving* and the traditionalist arguments made to the Court by the state defendants who sought to preserve and maintain the segregationist status quo. Part III turns to and surveys Justice Scalia's traditionalism in Due Process and Equal Protection Clauses cases.[23] Part IV evaluates Scalian

20. *Rutan*, 497 U.S. at 95 n.1. It has been reported that, in a speech given at Columbia Law School, Justice Scalia indicated that he would vote against the plaintiffs in *Brown* if the case was one of first impression. *See* Patricia J. Williams, *Postcard from Heathrow: Diary of a Mad Law Professor*, NATION, May 5, 1997, at 8. While not ignoring this report, this Article assumes that Justice Scalia's *Rutan* dissent sets forth his official position on *Brown*.

21. *Loving*, 388 U.S. at 12. The word "miscegenation" is a combination of "the Latin words *miscere* ('to mix') and *genus* ('race') . . . ." RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 20 (2003). The term "miscegenation" was first used in an 1864 pamphlet discussing the theory of the blending of the races. Emily Field Van Tassel, *"Only the Law Would Rule Between Us": Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 896 n.93 (1995). "Miscegenation is an awkward term to use . . . ; the implication it carries is that 'race' is a meaningful construct and that sex and reproduction between the races is something akin to bestiality. But it is impossible to write about anti-miscegenation laws without using the term." Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559, 560 n.1 (2000).

22. Planned Parenthood v. Casey, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., concurring in part and dissenting in part).

23. Justice Scalia's traditionalism is not and should not be confused with two other interpretive methodologies, originalism and textualism. "Originalism is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of enactment." McConnell, *supra* note 8, at 1136; *see also* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 13–25 (2001). "The advocates of originalism argue that the meaning of the Constitution (or of its individual clauses) was fixed at the moment of its adoption, and that the task of interpretation is accordingly to ascertain that meaning and apply it to the issue at hand." JACK N. RAKOVE, ORIGINAL

traditionalism, and applies the methodology to the separate-but-equal and antimiscegenation laws challenged in *Brown* and *Loving*, decisions which rejected and broke with discriminatory traditions, which are an unfortunate, but very real, part of this nation's history.[24] In doing so, this Article takes issue with Scalia's position that the text of the Fourteenth Amendment prohibited the entrenched institutions and manifestation of apartheid and Jim Crowism.[25] Application of Scalian

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MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION, at xiii (1996) (emphasis omitted). This interpretive approach "is what remains in American politics of the Machiavellian concept of *ridurre ai principii*—the belief that the preservation of the republic requires a periodic return to its founding principles and condition." *Id*. at 340; *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (noting "that in a crunch I may prove a faint-hearted originalist"); SCALIA, *supra* note 2, at 38 ("[T]he Great Divide with regard to constitutional interpretation is . . . that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning."). "Traditionalism thus differs from originalism, which draws its normative authority not from historical practice but from a social contract theory of precommitment by the American people." John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1241 (1998).

Under a textualist approach, the "text is the law, and it is the text that must be observed" through a reasonable construction "to contain all that it fairly means." SCALIA, *supra* note 2, at 22, 23. Where, and if, the language of a constitutional provision provides the answer to the question being litigated, no extratextual analysis is required. One commentator has observed that the "Constitution is phrased in such broad terms that a judge who adheres simply to the text can do essentially anything he or she wants." David A. Strauss, *The New Textualism in Constitutional Law*, 66 GEO. WASH. L. REV. 1153, 1157 (1998). As we will see, Justice Scalia resorts to textualism in support of his view that *Brown* and *Loving* were correctly decided. *See infra* notes 291–95, 301–05 and accompanying text.

Justice Scalia has employed traditionalist, originalist, and textualist methodologies in his constitutional analysis. Noting that "these aspects of Justice Scalia's jurisprudence are sometimes in tension" and that it may not be "possible to be entirely consistent," Michael McConnell has concluded that:

> these various methods have something very important in common: they all respect the will of the people, as expressed at various points in time. But by failing to articulate the connection between these methods, or to explain how to decide cases when they are in conflict, Justice Scalia leaves himself open to the charge of inconsistency.

McConnell, *supra* note 8 at 1137 & n.45. The correctness of that charge is beyond the scope of this Article; the point, for present purposes, is that the Justice's traditionalism is different from, and should not be confused with, originalism and textualism.

24. "The truth is that the tradition of racial oppression, including racial segregation, has always enjoyed some form of state sanction . . . ." Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 674; *see also* Judge Damon J. Keith, *What Happens to a Dream Deferred: An Assessment of Civil Rights Law Twenty Years After the 1963 March on Washington*, 19 HARV. C.R.-C.L. L. REV. 469, 483 (1984) ("[T]here is another American 'tradition'—one of slavery, segregation, bigotry and injustice." (quoting William T. Coleman, Jr., *Equality—Not Yet*, N.Y. TIMES, July 13, 1981, at 15)).

25. The term "Jim Crow," as a way of characterizing Black people, had its origins in minstrelsy in the early nineteenth century. Thomas 'Daddy' Rice, a white minstrel, popularized the term. Using burned cork to blacken his face, attired in the ill-fitting, tattered garment of a beggar, and grinning broadly, Rice

traditionalism in 1954 and 1967 would have required the Court to take into account and to defer to then extant legal, political, and social practices, leading to the conclusion that state sanctioned racial segregation and miscegenation prohibitions were not unconstitutional. This Article also questions whether Justice Scalia, in grounding his analysis in text rather than tradition, has adjusted or distorted his approach in a way that avoids the (for some uncomfortable, if not unthinkable) conclusion that *Brown* and *Loving* were wrongly decided.[26] To the extent that he has, the integrity of his proclaimed traditionalist methodology is implicated.

II. *BROWN* AND *LOVING*

Some traditions favored by, and the entrenched beliefs of, a majority of a society may be noxious and harmful to some members of the community. Two such traditions, those of "race"[27] and racism, have

> imitated the dancing, singing, and demeanor generally ascribed to Negro character. [Rice called the dance routine] "Jump Jim Crow" . . . . By the 1830s, minstrelsy had become one of the most popular forms of mass entertainment, 'Jim Crow' had entered the American vocabulary, and many whites . . . came away from minstrel shows with their distorted images of black life, character, and aspirations reinforced. Less clear is how a dance . . . became synonymous with a system designed by whites to segregate the races.

LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW, at xiv (1998).

26. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 77 (1990) ("[A]ny theory that seeks acceptance must, as a matter of psychological fact, if not of logical necessity, account for the result in *Brown*."); FALLON, *supra* note 23, at 56 ("[A] constitutional theory is widely thought to be disqualified from acceptance if it could not justify the result in *Brown*."); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 23 (2000) ("[A]ll constitutional commentators, whether on the left or the right, agree *Brown* was correctly decided, and any theory to the contrary is impossible to sustain."); Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1930 (1995) ("[I]t is perfectly understandable, if unfortunate, that conservatives have felt compelled to adjust/distort their constitutional theories to accommodate *Brown*."); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995) (commenting that constitutional theories not leading to the result in *Brown* are "seriously discredited"); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374 (1990) ("No constitutional theory that implies that *Brown v. Board of Education* . . . was decided incorrectly will receive a fair hearing nowadays."). *But see* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1463 n.295 (1992) ("An interpretation of the Constitution is not wrong because it would produce a different result in *Brown*.").

27. While the word "race" is used herein for the sake of convenience, it should be noted that the term is a sociopolitical and not a biological concept. *See* STEPHEN JAY

prevailed in various forms and degrees throughout the history of the United States.[28] Those traditions have included the problem of the color line separating Whites and Blacks and subordinating members of the latter group;[29] the view of Blacks as "the less than human negro"[30] who, in addition to being genetically and intellectually inferior to Whites,[31] were "dull, tasteless, and anomalous" in imagination;[32] the Constitution's protection of slavery and that document's description of Blacks as "other persons" and three-fifths of a human being;[33] the Supreme Court's early view of Blacks as property and not constitutional citizens;[34] the demise of the post-Civil War Reconstruction and the rise of the racist institutions of the Black Codes and Jim Crow;[35] and other laws and political, legal, and social institutions and norms that purposely placed and kept many Blacks "in the lowest status, least remunerative jobs"[36] and hampered the ability of many to accumulate wealth in the same manner and quantity enjoyed by those not similarly subjected to such discrimination.[37]

GOULD, THE MISMEASURE OF MAN 397–407 (rev. and expanded ed. 1996); GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 65–67 (2002). For additional discussions of the construct of race, see generally IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); SCOTT L. MALCOMSON, ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE (2000); ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS (1997); Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994).

28. *See generally* Norman Redlich, *"Out, Damned Spot; Out, I Say": The Persistence of Race in American Law*, 25 VT. L. REV. 475 (2001).

29. *See* W.E. BURGHARDT DU BOIS, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES 13 (2d ed. 1903); JOHN HOPE FRANKLIN, THE COLOR LINE: LEGACY FOR THE TWENTY-FIRST CENTURY, at xiii–xiv (1993).

30. A. Leon Higginbotham, Jr. & Aderson Bellegarde Francois, *Looking for God and Racism in All the Wrong Places*, 70 DENV. U. L. REV. 191, 193 (1993).

31. *See* MICHAEL GOLDFIELD, THE COLOR OF POLITICS: RACE AND THE MAINSPRINGS OF AMERICAN POLITICS 48 (1997) ("[R]acist ideology . . . defined Black people as biologically inferior and socially undesirable . . . .").

32. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 139 (William Peden ed., 1954). For a discussion of Jefferson's views on Blacks, see DAVID MCCULLOUGH, JOHN ADAMS 330–31 (2001); GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 218–28 (1978); and Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 DUKE L.J. 624, 649–50.

33. U.S. CONST. art. I, § 2, cl. 3; *see* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 54 (1998).

34. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 481–82 (1857).

35. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863–1877 (1988); W.E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA: 1860–1880 (1935); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d rev. ed. 1974).

36. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1073 (1991).

37. *See generally* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK

Included in this nation's legal, political, economic, and societal traditions are the traditions of racial segregation in public education[38] and prohibitions against interracial[39] marriage and sexual relations. Both traditions, and the Supreme Court's treatment of them in 1954 and 1967, respectively, are discussed in this Part.

A. Tradition, Segregation in Education, and the Constitution

This discussion of racial segregation begins with *Plessy v. Ferguson*.[40] This well-known and apparently collusive case[41] referred to tradition in holding that the doctrine of separate-but-equal, as applied in the context of a Louisiana statute requiring segregation in public transportation, did not violate the Equal Protection Clause of the Fourteenth Amendment.[42] Justice Brown's opinion for the Court, over the lone dissent of Justice Harlan,[43] noted that laws permitting or requiring the separation of Blacks

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WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995).

38. On the tradition and history of segregation in public school education, see generally PETER IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE *BROWN* DECISION 1–42 (2002).

39. Although the word "interracial" is used in this Article, it should be noted that use of the term is subject to the objection that "it implies fixed categories of race and therefore an overly natural quality to those categories." MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH 9 (1997).

40. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954). *See generally* CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL-HISTORICAL INTERPRETATION (1987); Michael J. Klarman, *The* Plessy *Era*, 1998 SUP. CT. REV. 303; Earl M. Maltz, *"Separate but Equal" and the Law of Common Carriers in the Era of the Fourteenth Amendment*, 17 RUTGERS L.J. 553 (1986).

41. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 73 (1975). The argument in *Plessy* that the Equal Protection Clause prohibited separate-but-equal railroad accommodations was "suggested by the railroad in a contrived case as a last resort to strike down a statute that was making it very expensive to run a railroad." Hovenkamp, *supra* note 32, at 647.

42. *Plessy*, 163 U.S. at 550–51. The Court also concluded that the state law did not violate the Thirteenth Amendment's ban on slavery or involuntary servitude. *See id.* at 543 ("A statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."); *see also* U.S. CONST. amend. XIII.

43. Harlan's dissent is well known for its statement that "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." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Often omitted in discussions of Justice Harlan's colorblind statement is this passage from that opinion:

> 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

and Whites "have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power."[44] Pointing to the establishment of separate schools for Black and White children, Justice Brown opined that this form of segregation had "been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."[45] Similar laws enacted by Congress and a number of states had been sustained by the courts, he continued, as had "universally recognized" laws forbidding interracial marriages.[46]

Of significance to this Article is the *Plessy* Court's view that the Louisiana statute was a reasonable regulation, with reasonableness determined "with reference to the 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."[47] Employing these criteria, the Court concluded that it could not

> say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.[48]

The question of the constitutionality of segregation in another context,

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> doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

Id. For discussions of this aspect of Harlan's dissent, see Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 172 (1996) (arguing that while Harlan "believed the Fourteenth Amendment rendered African Americans 'our equals *before the law*' . . . [i]t is not so clear that Harlan thought African Americans were the moral equals of the majority race"); Molly Townes O'Brien, *Justice John Marshall Harlan As Prophet: The* Plessy *Dissenter's Color-Blind Constitution*, 6 WM. & MARY BILL RTS. J. 753, 761 (1998) ("For Harlan, however, social and economic inequality was simply part of the natural order of things, a result of the superiority of white civilization.").

44. *Plessy*, 163 U.S. at 544.

45. *Id*.

46. *Id*. at 545. Legal bans on interracial marriages had also been noted in Chief Justice Roger Taney's opinion for the Supreme Court in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). In Taney's view, antimiscegenation laws evidenced a

> perpetual and impassable barrier erected between the white race and the one which [Whites] had reduced to slavery . . . and which they looked upon as so far below them in the scale of created beings that intermarriages between white persons and negroes and mulattoes were regarded as unnatural and immoral, and punished as crimes.

Id. at 409.

47. *Plessy*, 163 U.S. at 550.

48. *Id*. at 550–51; *see also* FALLON, *supra* note 23, at 57 (noting that "in the wake of *Plessy*, legally mandated race-based segregation had suffused the social and political fabric of many states, especially in the South").

that of public education, was considered and answered by the Court in post-*Plessy* cases wherein the Court held that a school board's decision to fund a high school for White children and not fund a separate school for Black children was not unconstitutional[49] and that the constitutional rights of a Chinese-American citizen were not infringed when a Mississippi school district excluded her from attending because she was not White.[50] Later cases dealing with the segregation issue in the professional school setting held that the states had failed to meet their duty to afford separate-but-equal educational opportunities to Blacks,[51] but did so without overruling *Plessy*.[52] The question whether *Plessy* should be overruled was before the Court in the *Segregation Cases* involving challenges to public school racial segregation in Kansas, South Carolina, Virginia, and Delaware.[53] *Brown v. Board of Education*,[54] decided by a three-judge panel, rejected the plaintiffs' claim that a Kansas statute authorizing the maintenance of separate schools for Black and White children in grades below high school was unconstitutional.[55] Segregation itself, if "equal," did not violate the Fourteenth Amendment, the court stated, citing *Plessy* and noting that the Supreme Court had refused to overrule *Plessy* on numerous occasions.[56]

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49. *See* Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 545 (1899).

50. *See* Gong Lum v. Rice, 275 U.S. 78, 87 (1927).

51. *See* McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 642 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631, 633 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 352 (1938); *see also* McKissick v. Carmichael, 187 F.2d 949, 954 (4th Cir. 1951) (holding that a state established law school for Blacks was inferior to the University of North Carolina School of Law and ordering the admission of Black applicants).

52. *See, e.g.*, *Sweatt*, 339 U.S. at 636.

53. Another case challenged school segregation in the District of Columbia. In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the district court dismissed the plaintiffs' compliant alleging that the segregation of Black children deprived them of due process of law under the Fifth Amendment to the Constitution. *Id.* at 498. (Unlike the Fourteenth Amendment, the Fifth Amendment, applicable to the District of Columbia, does not contain an equal protection clause. *Id.* at 498–99.) The Supreme Court, noting its prohibition of segregation under the Equal Protection Clause in *Brown v. Board of Education*, 347 U.S. 483 (1954), concluded that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling*, 347 U.S. at 500 (footnote omitted). Accordingly, the Court held that "racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment." *Id*.

54. 98 F. Supp. 797 (D. Kan. 1951), *rev'd*, 347 U.S. 483 (1955).

55. *Id.* at 797, 800.

56. *Id.* at 798–99.

The South Carolina case, *Briggs v. Elliott*,[57] refused to hold that the segregation of the races in public schools violated the Equal Protection Clause. Concluding that it was bound by *Plessy*,[58] the court stated: "We think . . . that segregation . . . , so long as equality of rights is preserved, is a matter of legislative policy for the several states, with which the federal courts are powerless to interfere."[59] In an explicitly traditionalist passage, the court stated that:

> [W]hen seventeen states and the Congress of the United States have for more than three-quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that court included Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights. It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. *The constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts.* The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics.[60]

Davis v. County School Board[61] concluded that a Virginia constitutional provision mandating separate schools for Black and White children was a constitutional exercise of the state's police power and would be upheld as a reasonable and uniform regulation. Segregation was "ingrained and

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57. 98 F. Supp. 529 (E.D.S.C. 1951), *rev'd sub nom.*, Brown v. Bd. of Educ., 349 U.S. 294 (1955).

58. *Id.* at 537. The court distinguished the issue of segregation in graduate and professional schools from the issue of segregation in lower grades in public schools. *Id.* at 535.

59. *Briggs*, 98 F. Supp. at 532. Opining that state self-determination and local customs should be free from federal regulation, the court stated:

> One of the great virtues of our constitutional system is that, while the federal government protects the fundamental rights of the individual, it leaves to the several states the solutions of local problems. In a country with a great expanse of territory with peoples of widely differing customs and ideas, local self government in local matters is essential to the peace and happiness of the people in the several communities as well as to the strength and unity of the country as a whole. It is universally held, therefore, that each state shall determine for itself, subject to the observance of the fundamental rights and liberties guaranteed by the federal Constitution, how it shall exercise the police power, i. e., the power to legislate with respect to the safety, morals, health and general welfare. And in no field is this right of the several states more clearly recognized than in that of public education.

Id.

60. *Id*. at 537 (emphasis added).

61. 103 F. Supp. 337 (E.D. Va. 1952), *rev'd sub nom.*, Brown v. Bd. of Educ., 349 U.S. 294 (1955).

wrought in the texture" of Virginia life,[62] had "an unbroken usage in Virginia for more than eighty years,"[63] and

> rests neither upon prejudice, nor caprice, nor upon any other measureless foundation. Rather the proof is that it declares one of the ways of life in Virginia. Separation of white and colored "children" in the public schools of Virginia has for generations been a part of the mores of her people. To have separate schools has been their use and wont.[64]

In the fourth case, *Belton v. Gebhart*,[65] the Delaware court concluded that Black schools were inferior to White schools in the training of teachers, student-teacher ratio, physical plant, and other matters and ordered the admission of Black students to previously White-only schools. The court also found that "[s]tate-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated."[66] Notwithstanding that finding, the court considered itself bound by the Supreme Court's view that segregation below the college level was not unconstitutional. The "'separate but equal doctrine' in education should be rejected," the court stated, "but . . . its rejection must come from" the Supreme Court's reexamination of *Plessy*.[67]

In 1952, the United States Supreme Court granted review of the aforementioned decisions.[68] Traditionalist arguments were prominent as the states asked the Court to apply and adhere to *Plessy*. For example, the brief of the Topeka, Kansas, board of education in the *Brown* case relied on *Plessy*'s statement that laws permitting and requiring segregation "have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their

62. *Id.* at 340.
63. *Id.* at 339.
64. *Id.*
65. 87 A.2d 862 (Del. Ch. 1952), *aff'd*, 91 A.2d 137 (Del. 1952), *aff'd sub nom.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954).
66. *Id.* at 865.
67. *Id.*
68. *See* Gebhart v. Belton, 344 U.S. 891 (1952) (granting certiorari for the Delaware case). The Kansas case, *Brown v. Board of Education*; the South Carolina case, *Briggs v. Elliott*; and the Virginia case, *Davis v. County School Board*, each came to the Supreme Court under a direct right of appeal under 28 U.S.C. § 1253. In *Brown v. Board of Education*, 344 U.S. 1 (1952), the Court noted probable jurisdiction in the Virginia case and further held that the Kansas, South Carolina, and Virginia cases would be heard together.

police power" and have "been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been the longest and most earnestly enforced."[69]

In his December 1952 oral argument before the Court, the school board's counsel, Paul E. Wilson, urged that a ruling in favor of the plaintiffs

> will necessarily overrule the doctrines expressed in [*Plessy* and *Gong Lum*] and, at the same time, will say that the legislatures of the seventeen or twenty-one states, that the Congress of the United States, that dozens of appellate courts have been wrong for a period of more than seventy-five years, when they have believed and have manifested a belief that facilities equal though separate were within the meaning of the Fourteenth Amendment.[70]

Justice Burton asked if Wilson recognized "that within seventy-five years the social and economic conditions and the personal relations of the nation may have changed, so that what may have been a valid interpretation of them seventy-five years ago would not be a valid interpretation of them constitutionally today?"[71] Wilson responded: "We recognize that as a possibility. We do not believe that this record discloses any such change."[72]

Arguing for the school district in the *Briggs* litigation, John W. Davis referred to the "condition of those who framed" the Fourteenth Amendment:

> The resolution proposing the Fourteenth Amendment was proffered by Congress in June 1866. In the succeeding month of July, the same Congress proceeded to establish or to continue separate schools in the District of Columbia, and from that good day to this Congress has not waivered [sic] in

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69. Brief for Appellees at 22–23, Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951) (No. 8), *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 89–90 (Philip B. Kurland & Gerhard Casper eds., 1975) (quoting Plessy v. Ferguson, 163 U.S. 537, 554 (1896)) [hereinafter LANDMARK BRIEFS AND ARGUMENTS].

70. Oral Argument Dec. 9, 1952, at 24, Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951) (No. 8), *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 301. During the argument, Justice Frankfurter commented that the state legislation and "a long course of utterances by this Court and other courts in dealing with the subject, from the point of view of relevance as to whether a thing is or is not within the prohibition of the Fourteenth Amendment, is from my point of view almost as impressive as a single decision, which does not mean that I would be controlled in a constitutional case by a direct adjudication." *Id*. at 12, *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 289. In his view, the court had "to face in this case the fact that we are dealing with a long-established historical practice by the states, and the assumption of the exercise of power which not only was written on the statute books, but has been confirmed by state courts, as well as by expressions of this Court." *Id*.

71. *Id*. at 24, *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 301.

72. *Id*.

> that policy. It has confronted the attack upon it repeatedly. During the life of Charles Sumner, over and over again, he undertook to amend the law of the District so as to provide for mixed and not for separate schools, and again and again he was defeated.[73]

Davis also made a count-the-states argument in support of segregation:

> What did the states think about this at the time of the ratification? At the time the Amendment was submitted, there were 37 states in the Union. Thirty of them had ratified the Amendment at the time it was proclaimed in 1868. Of those thirty ratifying states, 23 either then had, or immediately installed, separate schools for white and colored children under their public school systems. Were they violating the Amendment which they had solemnly accepted? Were they conceiving of it in any other sense than that it did not touch their power over their public schools?[74]

Davis further noted that, as of 1952, seventeen states provided for racially segregated schools, with four others permitting segregation "so that you have 21 states today which conceive it their power and right to maintain separate schools if it suits their policy."[75]

The oral argument in the *Davis* case similarly referenced tradition. J. Lindsay Almond, arguing for the defendant, expressed his concern about

> the impact of a decision that would strike down, contrary to the customs, the traditions and the mores of what we might claim to be a great people, established through generations, who themselves are fiercely and irrevocably dedicated to the preservation of the white and colored races. . . .
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> . . . .
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> . . . [O]ur people, deeply ingrained within them, feel that it is their custom, their use and their wont; and their traditions, if destroyed, as this record shows, will make it impossible to raise public funds through the process of taxation, either at the state or the local level, to support the public school system of Virginia, and it would destroy the public school system of Virginia as we know it today. That is not an idle threat.[76]

After discussing the cases in conference in December 1952,[77] the

73. Oral Argument Dec. 10, 1952, at 2–3, Briggs v. Elliot, 98 F. Supp. 529 (E.D.S.C. 1951) (No. 101), *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 331–32.

74. *Id*. at 4, *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 333.

75. *Id*. at 4–5, *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 333–34.

76. Oral Argument Dec. 10, 1952, at 36–37, Davis v. County Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952) (No. 191), *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 383–84.

77. In a 1952 conference memorandum to Justice Jackson entitled, "A Random Thought on the Segregation Cases," Justice Jackson's clerk (and current Chief Justice)

Supreme Court, fearing and seeking to postpone what may have been a split decision,[78] ordered reargument and asked the parties to submit additional briefs on five specific questions, the first of which asked the following: "What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?"[79] Prior to the reargument, Chief Justice Vinson suffered a fatal heart attack,[80] and President Eisenhower appointed Earl Warren as the Court's Chief Justice.[81] The plaintiffs' brief on reargument called for the overruling of *Plessy*.

> [T]he very purpose [of the Civil War Amendments] was to effectuate a complete break with governmental action based on the established usages, customs and traditions of the slave era, to revolutionize the legal relationship between Negroes and whites, to destroy the inferior status of the Negro and to place him upon a plane of complete equality with the white man.[82]

In their view, *Plessy* gutted the Fourteenth Amendment.

William H. Rehnquist wrote: "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdahl's *American Dilemma*." 117 CONG. REC. S44,880 (1971) (quoting memorandum). According to Chief Justice Rehnquist, this memorandum set forth Justice Jackson's views and not his own. The veracity of that statement has been the subject of much debate. *See* JOHN W. DEAN, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT 274–84 (2001); KLUGER, *supra* note 41, at 605–09.

78. According to one account, four Justices—Black, Douglas, Burton, and Minton—indicated in conference that they would vote to end public school segregation, with Chief Justice Vinson and Justice Reed suggesting that they would vote to affirm *Plessy*. The remaining Justices—Frankfurter, Jackson, and Clark—were ambivalent. *See* KLUGER, *supra* note 41, at 613; *see also* POWE, *supra* note 26, at 23 ("The reason for reargument was that the Court, after the initial argument, was badly split."); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 72, 77–78 (1983) (describing how Justice Frankfurter's fear of a split Court led him to seek reargument on additional questions posed by the Court). For a differing view of the December 1952 conference and the positions of the Justices, see MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 194 (1994).

79. Brown v. Bd. of Educ., 345 U.S. 972 (1953) (mem.). This question was based on a partially erroneous premise, as no state conventions were held to consider ratification of the Fourteenth Amendment. *See* KLUGER, *supra* note 41, at 615 n*.

80. Remarking on Chief Justice Vinson's death, Justice Frankfurter stated, "This is the first indication that I have ever had that there is a God." SCHWARTZ, *supra* note 78, at 72.

81. Prior to the Court's decision in *Brown*, President Eisenhower, referring to Southerners, said to Chief Justice Warren: "These are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes." ROBERT A. CARO, MASTER OF THE SENATE 778 (2002).

82. Brief for Appellants at 42, Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951 (No. 8), *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 555.

> When the Court employed the old usages, customs and traditions as the basis for determining the reasonableness of segregation statutes designed to resubjugate the Negro to an inferior status, it nullified the acknowledged intention of the framers of the Fourteenth Amendment, and made a travesty of the equal protection clause.[83]

If traditions, customs, and usages were the touchstones, "ours indeed would become a stagnant society. Even if there be some situations in which custom, usage, and tradition may be considered in testing the reasonableness of governmental action, customs, traditions, and usages rooted in slavery cannot be worthy of the constitutional sanction of this Court."[84]

In its brief, the State of Kansas argued that it was a "fact of history that racial segregation in the public schools was an established pattern in a majority of the states when the amendment was adopted."[85] In an appendix to its brief, the State listed twenty-four states in which "segregation existed with legislative or constitutional sanction contemporaneous with and/or subsequent to the adoption of the Fourteenth Amendment," ten states with laws authorizing or requiring segregation enacted by the same legislatures ratifying the amendment, and thirteen states where segregation had not been authorized.[86]

During the December 1953 oral reargument, John W. Davis, counsel for the school district in *Briggs*, contended that: "the Congress which submitted, and the state legislatures which ratified, the Fourteenth Amendment did not contemplate and did not understand that it would abolish segregation in public schools."[87] In his view, "the intent of Congress was clear not to enter this field. We say the intent of the ratifying states was equally clear, the majority of them, not to enter this field."[88] T. Justin Moore, representing Prince Edward County, emphasized that in twenty-three states the "same legislature that adopted the

83. *Id*. at 43, *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 556.
84. *Id*.
85. Brief for the State of Kansas on Reargument at 52, Brown v. Bd. of Educ., 98 F. Supp 797 (D. Kan. 1951) (No. 8), *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 811.
86. *Id*. at 91, *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 847.
87. Oral Reargument Dec. 7, 1953, at 33, Briggs v. Elliot, 98 F. Supp. 529 (E.D.S.C. 1951) (No. 101), *reprinted in* 49A LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 481.
88. *Id*. at 35, *reprinted in* 49A LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 483.

Fourteenth Amendment passed . . . laws that required segregation"[89] and that seven other states allowed pre-existing segregation to continue even after the Fourteenth Amendment went into effect.[90] Moore continued: "The record is perfectly clear. And how these gentlemen [the plaintiffs' attorneys] try to explain away that record with respect to those states is beyond our understanding."[91] The Court was faced with deciding between the States' arguments grounded in traditional views of the constitutionality of state-sanctioned segregation and the rejection of such views under an approach recognizing changed circumstances during the post-*Plessy* period and contemporary dynamics of and views on segregation.

In its unanimous ruling issued on May 17, 1954, the Court noted that the reargument of the case "was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868" and covered congressional consideration of the Amendment, state ratifications, "then existing practices in racial segregation, and the views of proponents and opponents of the Amendment."[92] The Court was convinced "that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive."[93]

Turning to *Plessy* and its prior decisions involving the separate-but-equal doctrine, the Court stated that: "[i]n none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff."[94] The Court also noted that its previous decision, *Sweatt v. Painter*, reserved decision on the issue of the applicability of *Plessy* to public education.[95] That issue was now before the Court. "Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education."[96] The Court then said that:

> *we cannot turn the clock back to 1868* when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and *its present place* in American

89. Oral Reargument Dec. 8, 1953, at 5, Davis v. County Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952) (No. 191), *reprinted in* 49A LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 506.

90. *Id*.

91. *Id*. at 6, *reprinted in* 49A LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 507.

92. Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954).

93. *Id. See generally* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) (discussing the Court's treatment of the history of the adoption of the Fourteenth Amendment).

94. *Brown*, 347 U.S. at 492.

95. *Id.*; *see supra* notes 49–51 and accompanying text.

96. *Brown*, 347 U.S. at 492.

> life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[97]

Having adopted a contemporary, as opposed to a backward looking, approach to the issue, the Court declared that "education is perhaps the most important function of state and local governments" 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."[98] When a state provides public education, it provides "a right which must be made available to all on equal terms."[99]

The Court concluded that race-based segregation of children in the public schools deprived them of equal educational opportunities, even where physical facilities and other tangible factors were equal.[100] In support of this conclusion, the Court quoted a finding of the lower court in the Kansas litigation:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[101]

The Court agreed with the Kansas court's finding: "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."[102] The Court thus concluded that:

> in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[103]

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97. *Id*. at 492–93 (emphasis added).
98. *Id*. at 493.
99. *Id*.
100. *Id.*
101. *Id.* at 494 (quoting Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951)).
102. *Id*. at 494–95 (footnote omitted). The Court's reference to modern authority was supported by the infamous footnote eleven, a note containing citations to sociological works by Kenneth Clark, Gunnar Myrdal, and others. *See id*. at 494–95 n.11.
103. *Id*. at 495. On the same day that it decided *Brown*, the Court held that school

Brown is one of the seminal decisions of the Supreme Court. While the Court's ruling did not itself undo segregation[104] and may well have increased White southerners' resistance to school desegregation,[105] the Court did put in place an equality principle that was invoked in later cases holding that segregation in other contexts was unconstitutional.[106]

Brown broke with and ruled in the face of, and in spite of, entrenched discriminatory traditions grounded in longstanding readings and understandings of the Fourteenth Amendment. As noted by Jack M. Balkin, "the Court held unconstitutional well-settled and long-established practices of many different states and thousands of localities. It struck down precedents that had stood for well over half a century, all in the name of higher constitutional values."[107] Balkin went on:

> *Brown*'s rejection of laws enforcing segregation symbolized to many that democracy meant more than majority rule. The New Deal dictum that courts should defer to the considered judgments of democratically elected majorities rang particularly hollow when the laws in question were the results of centuries of racial prejudice, and when blacks as a group were effectively denied the right to vote throughout much of the South. The country's democratic ideals required more than formal majority rule: they also required enforceable guarantees of equality, fundamental rights, and legal safeguards for minorities. Thus, *Brown* stood as the key precedent for a responsible form of judicial activism . . . [,] an enlightened judicial activism that protected fundamental rights and minority interests from the tyranny of majorities.[108]

One measure of *Brown*'s break with traditional views concerning the legality of segregation is the reaction to the Court's decision. May 17, 1954, the day of the issuance of the Court's ruling, was "Black Monday" for many segregationists.[109] Senator Harry Byrd of Virginia called *Brown* "the most serious blow that has yet been struck against the rights

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segregation in the District of Columbia violated the Due Process Clause of the Fifth Amendment. Bolling v Sharpe, 347 U.S. 497, 500 (1954); *see supra* note 53.

104. It has been argued that desegregation efforts were more effectively addressed and implemented by the Civil Rights Act of 1964. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 55–57 (1991).

105. *Cf. id*. at 127 (discussing polls charting a decline in Southerners' support for desegregation in the years after *Brown*, but concluding that there is scant evidence that *Brown* affected attitudes about school desegregation in the South).

106. *See* Johnson v. Virginia, 373 U.S. 61, 62 (1963) (public buildings); Watson v. City of Memphis, 373 U.S. 526, 529 (1963) (public parks and other recreational facilities); Burton v. Wilmington Parking Auth., 365 U.S. 715, 724–26 (1961) (eating places); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (park facilities); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (transportation).

107. Jack M. Balkin, Brown *as Icon*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3, 15 (Jack M. Balkin ed., 2001).

108. *Id*. at 15–16.

109. *See* TOM P. BRADY, BLACK MONDAY (1955). As noted by Randall Kennedy, Brady's book "asserted that the attack on racial segregation in the public schools was aimed not at attaining equity in education but rather at fostering racial amalgamation." KENNEDY, *supra* note 21, at 24.

of the states in a matter vitally affecting their authority and welfare."[110] Mississippi Senator James Eastland announced that the South "will not abide by or obey this legislative decision by a political court."[111] James J. Kilpatrick, editor of the *Richmond News Leader*, wrote editorials calling for a resurrection of the doctrine of interposition, a theory positing that Supreme Court decisions were not valid if objected to by the states.[112] A poll taken in the aftermath of *Brown* revealed that eighty percent of southern Whites opposed school desegregation, and the Louisiana Legislature went so far as to censure the Court for its opinion.[113]

Thereafter, in 1955, the Court remanded the *Segregation Cases* to the lower courts for further proceedings and the issuance of decrees "as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."[114] In response to the *Brown* decision, more than ninety percent of southern United States Representatives and Senators signed a *Declaration of Constitutional Principles*, also known as the "Southern Manifesto," drafted by United States Senators Strom Thurmond, Sam Ervin, Harry Byrd, Richard Russell, and others.[115] That document

110. KLUGER, *supra* note 41, at 710; *see also* POWE, *supra* note 26, at 38.

111. KLUGER, *supra* note 41, at 710–11. Georgia governor Herman Talmadge stated that, after *Brown*, the Constitution was "a mere scrap of paper." *Id.* at 710. Newspaper columnist James Reston complained that the Court's decision rejected "history, philosophy and custom" and "read more like an expert paper on sociology than a Supreme Court decision." *Id.* at 711.

112. POWE, *supra* note 26, at 58; *see also* DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS 86 (2d ed. 2000) (discussing the view that "states had the constitutional authority to 'interpose' themselves between the federal government and its citizens—a doctrine that sounded remarkably like the one sketched out by John C. Calhoun in the 1830s and 1840s"); Anne S. Emanuel, *Turning the Tide in the Civil Rights Revolution: Elbert Tuttle and the Desegregation of the University of Georgia*, 5 MICH. J. RACE & L. 1, 9 n.30 (1999) ("[I]nterposition was a completely discredited theory that each state could interpose it's [sic] own sovereignty between the national government and the people of the state."); Carl Tobias, *Public School Desegregation in Virginia During the Post*-Brown *Decade*, 37 WM. & MARY L. REV. 1261, 1269 (1996) (discussing the Virginia Assembly's announcement of its "firm intention to take all appropriate measures honorably, legally and constitutionally available . . . [in order] to resist [*Brown's*] illegal encroachment upon [Virginia's] sovereign powers" (quoting S.J. Res. 3, 1956 Va. Acts 1213) (alterations in original))).

113. POWE, *supra* note 26, at 39; STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 103 (1997).

114. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

115. *See* CARO, *supra* note 81, at 785; CARTER, *supra* note 112, at 86; DAVID R.

rejected *Brown* as an exercise of unlawful "naked power,"[116] "reaffirmed reliance on the Constitution," and "pledged to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution."[117]

B. Tradition, Antimiscegenation, and the Constitution

Like the entrenched practice of segregation in public education, related concerns about sex between Blacks and Whites—more specifically, between Black men and White women[118]—was "a historical development that evolved out of particular social, political, and economic circumstances."[119] White supremacy—premised on a notion

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GOLDFIELD, BLACK, WHITE, AND SOUTHERN: RACE RELATIONS AND SOUTHERN CULTURE, 1940 TO THE PRESENT 84 (1990); POWE, *supra* note 26, at 61. House Speaker Sam Rayburn and Senate Majority Leader Lyndon Johnson were not asked to and did not sign the Manifesto. Senators Albert Gore and Estes Kefauver of Tennessee did not sign. Twenty-three additional Southern members of the House of Representatives, representing Texas, Tennessee, North Carolina, and Florida, also did not sign. Two of the three nonsigners from North Carolina were defeated in the following Democratic primary. *See* POWE, *supra* note 26, at 61–62.

116. ROSENBERG, *supra* note 104, at 78; *see also* GOLDFIELD, *supra* note 115, at 84–86.

117. POWE, *supra* note 26, at 61 (quoting *Declaration of Constitutional Principles*, 102 CONG. REC. 4515–16 (1956)).

118. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 159 (1996) ("[B]lack male-white female was the paradigmatic act that the miscegenation taboo prohibited.").

119. HODES, *supra* note 39, at 1. Some were concerned that desegregation in public education would lead to miscegenation.

> The fear of "mongrelization" permeated white southern thought; it was assumed that if white and African-American children went to school together, they would grow to like each other, date each other, and ultimately some would marry each other. *Look* magazine editor William Attwood wrote that the southerner "will tell you that, sooner or later, some Negro boy will be walking his daughter home from school, staying for supper, taking her to the movies . . . and then your Southern friend asks you the inevitable, clinching, question: "Would *you* want your daughter to marry a Nigra?" Attwood's hypothetical southern friend was hardly hypothetical; in the first national poll on interracial marriage, a bare 4 percent of white respondents said they approved.

POWE, *supra* note 26, at 69 (footnote omitted); *see id*. at 36 (reporting that President Eisenhower told Chief Justice Warren that southerners were concerned that their "sweet little girls [would] be seated alongside some big black bucks" in schools); *see also* Berea College v. Commonwealth, 94 S.W. 623, 628 (Ky. 1906) ("From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage."), *aff'd*, 211 U.S. 45 (1908); MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 50 (1998) ("It had long been feared that school desegregation would bring to the surface all the repressed terrors associated with the specter of interracial sex, a specter that had always played a major part in American race relations."); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY, at xix (2001) (quoting the organizer of the National Association for the Advancement of White People: "My daughters will never attend a school with Negroes so long as there is breath in my body and gunpowder will burn.").

of "the purity of the southern woman, the purity of white blood, the purity of the South itself"[120]—was constructed and policed by the enslavement of Blacks, with the bright and dividing line between, on one side, Black slavery and subordination and, on the other side, White freedom and the establishment of social, political, and economic boundaries maintaining a racial hierarchy.[121] Black persons crossing that line faced retaliatory violence, including lynchings and murder.[122] For those concerned about a blurring or melding of Black and White and a concomitant diminution of White supremacy and White civilization[123] (especially in the post-Civil War world),[124] the "taboo of sex between black men and white women" and the fear of the "loss of control over sex between blacks and whites" were matters of great importance.[125] Because miscegenation "called into question the distinctive and superior status of being white," it "became the central symbol of the necessity of racial segregation."[126]

Laws prohibiting miscegenation were upheld in a number of early state court decisions. The Georgia Supreme Court opined in one case that:

> [t]he amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race.[127]

The Missouri Supreme Court noted the "well authenticated fact" that an

120. POWE, *supra* note 26, at 69.
121. *See* HODES, *supra* note 39, at 147.
122. *See* RALPH GINZBURG, 100 YEARS OF LYNCHINGS 36, 69, 95, 156, 159, 217, 240 (1988); STEPHEN J. WHITFEILD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL 130 (1988); Ronald Turner, *Remembering Emmett Till*, 38 HOW. L.J. 411, 420 (1995).
123. *See* TUKUFU ZUBERI, THICKER THAN BLOOD: HOW RACIAL STATISTICS LIE 61 (2001) ("Miscegenation, or race mixing, was thought to be a degenerative act resulting in the undermining of 'white' civilization.").
124. With the end of formal slavery, "it was the newfound autonomy of the men among the former slaves that carried the gravest danger, especially in the eyes of white patriarchs." HODES, *supra* note 39, at 147. Freed Black slaves seeking to create and enforce property and inheritance rights from White fathers could not be and was not countenanced. *See* LINDA WILLIAMS, PLAYING THE RACE CARD: MELODRAMAS OF BLACK AND WHITE FROM UNCLE TOM TO O.J. SIMPSON 181–82 (2001). *See generally* Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999).
125. HODES, *supra* note 39, at 147.
126. KOPPELMAN, *supra* note 118, at 159.
127. Scott v. State, 39 Ga. 321, 324 (1869); *accord* Eggers v. Olson, 231 P. 483, 484 (Okla. 1924).

interracial couple could not have any progeny, a fact justifying "those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments."[128] And a 1921 decision by the Oregon Supreme Court concluded that antimiscegenation statutes "have been universally upheld as a proper exercise of the power of each state to control its own citizens."[129]

The United States Supreme Court, in *Pace v. Alabama*,[130] rejected an equal protection challenge to a state law providing for incarceration for two to seven years as a penalty for interracial adultery or fornication and a maximum of two years imprisonment for the same conduct between persons of the same race. Justice Field, writing for the Court, reasoned that interracial adultery

> cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed . . . is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.[131]

And thirteen years later, in *Plessy v. Ferguson*,[132] the Court referred to the "universally recognized laws" forbidding interracial marriages in the course of its decision upholding a separate-but-equal law applied to public transportation.[133]

Running against the tide of decisions sanctioning antimiscegenation measures was the California Supreme Court's 1948 decision in *Perez v. Lippold.*[134] Invalidating California's prohibition of interracial marriages,[135] the court rejected arguments that antimiscegenation laws were justified because they prevented the contamination of the White race by those

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128. State v. Jackson, 80 Mo. 175, 179 (1883).

129. *In re* Paquet's Estate, 200 P. 911, 913 (Or. 1921).

130. 106 U.S. 583 (1883).

131. *Id*. at 585; *see also* Jackson v. State, 72 So. 2d 114 (Ala. Ct. App. 1954) (holding that the law prohibiting Blacks and Whites from marrying or living together did not violate the Constitution), *cert. denied*, 348 U.S. 888 (1954); LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 35 (2002) (describing the use of formal neutrality by supporters of antimiscegenation laws who argued "that the law was constitutional because it prohibited whites from marrying blacks in the same way that it prohibited blacks from marrying whites").

132. 163 U.S. 537 (1896); *see* discussion *supra* notes 40–48 and accompanying text.

133. *Plessy*, 163 U.S. at 545.

134. 198 P.2d 17 (Cal. 1948).

135. The California law provided: "All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void," and no marriage license "may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race." *Id*. at 18.

who were physically and mentally inferior to Whites[136] and stated that persons wishing to intermarry came from the "dregs of society" and their offspring would burden the community,[137] that such laws diminish racial tensions and prevent the birth of children who may become social problems,[138] and that "Negroes are socially inferior and have so been judicially recognized."[139]

Seven years after the decision in *Perez*, the Supreme Court of Appeals of Virginia considered the constitutionality of that state's antimiscegenation law in *Naim v. Naim*.[140] Ruby Elaine Naim, who was White, sought a divorce on the ground of adultery from her husband, Ham Say Naim, who was Chinese.[141] The trial judge did not rule on the divorce action; instead, he granted the wife an annulment under Virginia's Act to Preserve Racial Integrity.[142] That annulment exposed Mr. Naim to deportation because he would not be validly married to a United States citizen.[143] The state high court, affirming the annulment and voiding the

136. *Id.* at 23–24.
137. *Id.* at 25.
138. *Id.* at 25–26.
139. *Id*. at 26. Dissenting, Justice Shenk argued that antimiscegenation laws "have been in effect in this country since before our national independence and in this state since our first legislative session. They have never been declared unconstitutional by any court in the land although frequently they have been under attack." *Id*. at 35 (Shenk, J., dissenting). Counting the states, Justice Shenk wrote that California and twenty-nine other states had antimiscegenation laws, with six of those states prohibiting such marriages by constitutional provisions and several states refusing to recognize such marriages even if they were valid in the state in which they were performed. *Id.* at 38. After citing and discussing scholarly and scientific works on the adverse effects of miscegenation, *id.* at 44–45, Justice Shenk argued that "under our tripartite system of government this court may not substitute its judgment for that of the Legislature as to the necessity for the enactment where it was, as here, based upon existing conditions and scientific data and belief." *Id*. at 46.
140. 87 S.E.2d 749 (Va. 1955), *vacated and remanded*, 350 U.S. 891 (1955) (per curiam), *aff'd*, 90 S.E.2d 849 (1956), *appeal dismissed*, 350 U.S. 985 (1956) (per curiam). For a discussion of the history of Virginia's antimiscegenation laws, see A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD 19–60 (1978). *See generally* Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia*, *1860s–1960s*, 70 CHI.-KENT L. REV. 371 (1994).
141. *See* Gregory Michael Dorr, *Principled Expediency: Eugenics,* Naim v. Naim*, and the Supreme Court*, 42 AM J. LEGAL HIST. 119, 119 (1998).
142. *See id*. Section 20-54 of the Virginia Code provided that it was "unlawful for any white person . . . to marry any save a white person, or a person with no other admixture of blood than white and American Indian." *See Naim*, 87 S.E.2d at 750 (quoting VA. CODE § 20-54 (1950)).
143. *See* POWE, *supra* note 26, at 71.

marriage, noted two of its prior decisions in which it said that "the preservation of racial integrity is the unquestioned policy of this state, and that it is sound and wholesome, cannot be gainsaid."[144] In addition, the court quoted from a section on miscegenation in an *American Jurisprudence* volume,[145] cited multiple decisions from states upholding intermarriage bans, and noted that "[m]ore than half of the States of the Union have miscegenation statutes. With only one exception they have been upheld in an unbroken line of decisions in every State in which it has been charged that they violate the Fourteenth Amendment."[146] And, the *Naim* court continued, in *Plessy v. Ferguson*, the United States Supreme Court said that laws forbidding the intermarriage of the races were universally recognized as within a state's police power. State regulation of marriage "may be maintained in accordance with established tradition and culture and in furtherance of the physical, moral and spiritual well-being of its citizens."[147]

Naim came before the United States Supreme Court on the husband's appeal. Concerned about the enforcement of *Brown*, Justice Frankfurter urged the Court to not take and decide the case. In his words: "The moral considerations are, of course, those raised by the bearing of adjudicating this question to the Court's responsibility in not thwarting or seriously handicapping the enforcement of its decision in the segregation cases."[148] In November 1955 the Court issued a per curiam decision stating that the "inadequacy of the record as to the relationship of the parties" to Virginia and their return to that state, "and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation . . . [from] being considered 'in clean cut and concrete form,' unclouded by such problems."[149]

On remand, the Supreme Court of Appeals of Virginia held that the record before it and the trial court was adequate for resolution of the issues on review and that its decree and the decree of the trial court were "final so far as these courts are concerned."[150] Learning of that decision, Chief Justice Warren remarked: "That's what happens when you turn your ass to the grandstand!"[151] The United States Supreme Court again

144. *Naim*, 87 S.E.2d at 752 (quoting Wood v. Commonwealth, 166 S.E. 477, 477 (Va. 1932)).
145. *Id.* at 753 (quoting 36 AM. JUR. *Miscegenation* § 3, at 452 (1941)).
146. *Id*.
147. *Id*. at 756.
148. SCHWARTZ, *supra* note 78, at 159.
149. Naim v. Naim, 350 U.S. 891 (1955) (quoting Rescue Army v. Mun. Court, 331 U.S. 549, 584 (1947).
150. Naim v. Naim, 90 S.E.2d 849, 850 (Va. 1956) (per curiam).
151. SCHWARTZ, *supra* note 78, at 162.

refused to hear the case, ruling that the Virginia court's decision "leaves the case devoid of a properly presented federal question."[152] By refusing to hear Naim's appeal, the Court avoided addressing and deciding the constitutionality of antimiscegenation laws.

The question ducked in *Naim* eventually came before the Court in another Virginia case.[153] In 1958, two residents of Caroline County, Virginia—Richard Perry Loving, a White man, and Mildred Jeter, a Black woman—left Virginia, were married in Washington, D.C., and returned to Virginia to live as husband and wife. They were indicted and convicted for violating Virginia's antimiscegenation law and were sentenced to one year in jail, with the sentences suspended so long as they left the state and did not return for twenty-five years.[154] The trial judge left no doubt as to the purpose of the state law:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[155]

The Lovings challenged their convictions, asserting that Virginia law violated the federal and state constitutions and denied them due process and equal protection of the laws.[156] That challenge was rejected by the Virginia Supreme Court of Appeals; relying on *Naim*, that court rejected the Lovings' argument that *Naim* should be reversed because that decision relied on *Plessy*, which had been reversed by *Brown*. *Brown* did not invalidate antimiscegenation laws, the Virginia court concluded, because six months after *Brown*, the Court denied certiorari in an Alabama case upholding a ban on interracial marriages.[157] The Virginia court also noted that the Supreme Court did not rule on the

152. Naim v. Naim, 350 U.S. 985 (1956) (per curiam).
153. Loving v. Virginia, 388 U.S. 1 (1967).
154. *See* RACHEL MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 95 (2001). As noted by Moran, "Caroline County had been called 'the passing capital of America' because of the number of light-skinned blacks who were taken for white." *Id*. (footnote omitted).
155. *Loving*, 388 U.S. at 3 (quoting the trial court).
156. Loving v. Commonwealth, 147 S.E.2d 78, 80 (Va. 1966), *rev'd*, 388 U.S. 1 (1967).
157. *Id.* at 81 (citing Jackson v. State, 72 So. 2d 114 (Ala. Ct. App. 1954), *cert. denied*, 72 So. 2d 116 (Ala. 1954), *cert. denied*, 348 U.S. 888 (1954)). It should be noted that the Court's denial of certiorari imparts no expression of the Court's view of or opinion on the merits of a case. *See* Teague v. Lane, 489 U.S. 288, 289, 296 (1989); Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 365–66 n.1 (1973).

constitutionality of antimiscegenation laws in its 1964 decision in *McLaughlin v. Florida*.[158]

Moreover, the Virginia court was not persuaded by the Lovings' references to "texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages," and declined to engage in what it called "judicial legislation in the rawest sense of that term."[159] "Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate."[160] Finding no "sound judicial reason, therefore, to depart from our holding in the *Naim* case," the court concluded: "Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes."[161] Accordingly, the court held that the Virginia law did not violate the United States or Virginia Constitutions.[162]

The United States Supreme Court reviewed the Virginia court's decision. In their brief to the Court, the Lovings argued that the "broad guarantees of the Fourteenth Amendment . . . were open-ended and meant to be expounded in light of changing times and circumstances."[163] Responding to that argument, Virginia looked to the views of the state at the time of the ratification of the Amendment:

> If the intent of the State Legislatures which ratified the Fourteenth Amendment is deemed controlling, then surely the question of whether or not the Fourteenth Amendment forbids enactment of anti-miscegenation statutes by the States must be decided contrary to the contention of appellants [the Lovings], for those States which ratified the Fourteenth Amendment clearly signified their intent by continuation of their anti-miscegenation laws contemporaneously with the ratification of the Fourteenth Amendment. In this connection, a comparison of the States which retained their anti-miscegenation laws as late as 1951 with the list of States which ratified the Fourteenth Amendment reveals that a majority of such States maintained their anti-miscegenation laws in force after ratification of the Fourteenth Amendment.[164]

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158. *Loving*, 147 S.E.2d at 81–82 (citing McLaughlin v. Florida, 379 U.S. 184, 195 (1964)). In *McLaughlin*, the Court held that a Florida law that applied only to and mandated punishment for a White and Black couple who were unmarried and habitually lived in and occupied the same room at night violated the Equal Protection Clause; the Court expressed no views on the state's law banning interracial marriages. *McLaughlin*, 379 U.S. at 195.

159. *Loving*, 147 S.E.2d at 82.

160. *Id*.

161. *Id*.

162. *Id.*

163. Brief for Appellants at 30, Loving v. Virginia, 147 S.E.2d 78 (Va. 1966) (No. 395) (citations omitted), *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 778.

164. Brief and Appendix on Behalf of Appellee at 28, Loving v. Virginia, 147

Virginia further argued that Congress and federal and state courts "clearly indicated that anti-miscegenation statutes of the various States are not violative of the Fourteenth Amendment."[165] According to Virginia, the conflicting views of scientists on the wisdom of interracial marriages, and the prevention thereof, made antimiscegenation a state law matter.

> In such a situation, it is the exclusive province of the legislature of each State to make the determination for its citizens as to the desirability, character and scope of a policy of permitting or preventing such alliances—a province which the judiciary may not, under well settled constitutional doctrine, invade.[166]

On April 10, 1967, the Supreme Court heard oral argument. Bernard S. Cohen, counsel for the Lovings, was asked whether there had been any legislative efforts to repeal the Virginia law. Remarking that no such efforts had been made, Cohen explained that: "candidates who run for office for the State Legislature have told me that they would, under no circumstances, sacrifice their political lives by attempting to introduce such a bill. . . . [M]ost of them have indicated that it would be political suicide in Virginia."[167] With regard to the application of the Fourteenth Amendment, Cohen averred that the Amendment "grows and can be applied to situations as our knowledge becomes greater and as our progress is made, and that there will be no problem in finding that this set of statutes in Virginia are odious to the Fourteenth Amendment."[168]

R.D. McIlwaine III, arguing on behalf of Virginia, asserted that the Fourteenth Amendment "has no effect whatever upon the power of the states to enact antimiscegenation laws . . . forbidding the intermarriage of white and colored persons," that the Court "is not authorized to infringe the power of the State," and that the Amendment "does not, read in light of its history, touch, much less diminish, the power of the states in this regard."[169] Alternatively, and assuming that the Amendment was

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S.E.2d 78 (Va. 1966) (No. 395), *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 821.

165. *Id*. at 29, *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 822.

166. *Id*. at 50, *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 843.

167. Oral Argument Apr. 10, 1967, at 10, Loving v. Virginia, 147 S.E.2d 78 (Va. 1966) (No. 395), *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 969.

168. *Id*. at 13, *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 972.

169. *Id*. at 20, *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 979.

applicable, McIlwaine argued that Virginia's law expressed a policy that the state had a right to adopt and served "a legitimate legislative objective of preventing the sociological and psychological evils which attend interracial marriages."[170] Relying on the historical views of the states, he said that:

> we go fundamentally to the proposition that for over 100 years, since the Fourteenth Amendment was adopted, numerous states—as late as 1956, the majority of states—and now even 16 states, have been exercising this power without any question being raised as to the authority of the state to exercise this power.[171]

Antimiscegenation law and policy should be left to legislatures, McIlwaine asserted. "Each individual state has the right to make this determination for itself, because under the Fourteenth Amendment it was intended to leave the problem here."[172] McIlwaine thought it "unlikely that judges from all the states, and from both judiciaries, could have for so long a period of time acted in disregard of the provisions of the Constitution or in any ignorance of what its provisions were intended to accomplish."[173]

Issuing its decision in June 1967, the Supreme Court held that Virginia's law violated both the Equal Protection and Due Process Clauses.[174] Chief Justice Warren's opinion for a unanimous Court looked to the "central meaning of those constitutional commands."[175] Miscegenation "arose as an incident to slavery," was "common in Virginia since the colonial period," and the Court noted that Virginia was one of sixteen states that prohibited interracial marriages as of 1967.[176] The law challenged by the Lovings "dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War."[177] Describing the state supreme court's decision in *Naim* as "obviously an endorsement of the doctrine of White Supremacy,"[178] Chief Justice Warren rejected an equal application construction of the Fourteenth Amendment[179] and

170. *Id*.
171. *Id*. at 41, *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 1000.
172. *Id*. at 42, *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 1001.
173. *Id*.
174. Loving v. Virginia, 388 U.S. 1, 2 (1967).
175. *Id.*
176. *Id*. at 6.
177. *Id*.
178. *Id*. at 7.
179. The Court rejected Virginia's argument that the state's law did not invidiously discriminate on the basis of race because Whites and Blacks in interracial marriages were punished equally. *Id.* at 8–9. In the Court's view, "the fact of equal application

was not persuaded by the argument that statements made in the Thirty-ninth Congress indicated that the framers of the Amendment had no intention of invalidating antimiscegenation laws.[180]

The Court then reasoned that the "clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."[181] Virginia's miscegenation ban made race-based distinctions and prohibited "generally accepted conduct if engaged in by members of different races."[182]

> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. . . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.[183]

As for the Due Process Clause claim, the Court held that the Lovings were deprived of liberty without due process of law. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[184] "Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[185]

Loving's rejection of Virginia's tradition-based arguments in favor of that state's antimiscegenation laws made clear that state bans on interracial marriages were unconstitutional and explicitly rejected the maintenance of White supremacy as a permissible goal of the state. Although some states resisted the Court's decision in *Loving*, a number of states implemented the Court's ruling.[186] "In fact, less than two months after *Loving*, the first modern interracial union in Virginia occurred without incident when a black man married a white woman in a Jehovah's

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does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id*. at 9.

180. Relying on *Brown*, the Court stated "that although these historical sources 'cast some light' they are not sufficient to resolve the problem" and were inconclusive. *Id*. (quoting Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954)).

181. *Id*. at 10.

182. *Id*. at 11.

183. *Id*. at 11–12 (footnote omitted).

184. *Id*. at 12.

185. *Id*.

186. *See* MORAN, *supra* note 154, at 101.

Witness ceremony in Norfolk."[187] Whether this legal pronouncement of the unconstitutionality of antimiscegenation laws changed public and social attitudes is, however, a different question. Seventy-two percent of respondents in a 1968 Gallup poll indicated that they tolerated, but did not approve of, interracial marriages.[188] A 1991 poll revealed that forty-five percent of Whites disapproved of such marriages, with forty-four percent approving.[189] And, as we begin a new century, it is apparent that race continues to be an important factor in the selection of marriage partners.[190]

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As discussed in this Part, both *Brown* and *Loving* can be seen as breaks with traditional practices of segregation and antimiscegenation laws, practices which the State defendants wished to continue free from Court review and invalidation. If allowed to stand, the tradition protective holdings made and reasoning offered by the lower courts would have constitutionalized segregative state actions relegating Blacks to race-based and race-defined places and spaces. With this backdrop in mind, we now turn to and review Justice Scalia's traditionalism.

III. JUSTICE SCALIA'S TRADITIONALISM

As previously noted, tradition has been referenced and used by

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187. *Id*.

188. See Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1156 n.250 (1999) (discussing the Gallup poll).

189. *See* Elizabeth Kristen, *The Struggle for Same-Sex Marriage Continues*, 14 BERKELEY WOMEN'S L.J. 104, 114 n.98 (1999); Mark Strasser, *Toleration, Approval, and the Right to Marry: On Constitutional Limitations and Preferential Treatment*, 35 LOY. L.A. L. REV. 65, 76 n.57 (2001) (discussing the poll).

190. On this point Rachel Moran comments on "three types of evidence that race continues to matter in marriage decisions." MORAN, *supra* note 154, at 102.

> First, although intermarriage rates have risen since *Loving*, all groups continue to marry out at rates lower than would be predicted at random. Over 93 percent of whites and blacks marry within their own group, while 70 percent of Asians and Latinos and 33 percent of Native Americans do. Second, outmarriage patterns within groups differ for men and women, depending on how racial and sexual stereotypes interact. Blacks and Asian Americans are the two groups with the most intense history of racialization through vigorous application of antimiscegenation laws. These groups show strong gender differences in outmarriage, arguably as a result of ongoing racialized images of sexuality. Third, the assimilative power of intermarriage also varies by group. For example, marrying across the color line is least successful as an assimilative device for blacks because children of black-white marriages typically cannot claim the privileges of a white racial heritage.

Id. at 102–03 (footnote omitted).

Supreme Court Justices in a number of cases.[191] A particular type of tradition-based analysis has been articulated and applied by Justice Scalia in cases presenting due process and equal protection challenges to state laws. That methodology is discussed in this Part.

A. The Due Process Clause

Any discussion of Justice Scalia's traditionalist jurisprudence must begin with *Michael H. v. Gerald D.*,[192] in which the Court held that a California statute creating the presumption that a child born to a married woman living with her husband was a child of the marriage did not violate the biological father's procedural and substantive due process rights. Writing for a plurality of the Court, Justice Scalia stated that interpretation of the Due Process Clause is guided and limited by an insistence that the interest viewed as a fundamental liberty must be an interest "traditionally protected by our society" and must be a protection "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[193] The purpose of limiting the clause in this way "is to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones."[194]

How are we to identify the relevant tradition(s)? In *Michael H.*, Justice Scalia referred to several items in support of his traditionalistic approach: (1) an 1836 book on adulterine bastardy,[195] (2) Blackstone's *Commentaries*,[196] (3) the common law of England and the United States as explicated in 1882 and 1957 works on family law and in Kent's *Commentaries on American Law*,[197] and (4) a 1957 *American Law Reports* annotation on the presumption of the legitimacy of a child conceived or born during wedlock.[198]

The father in *Michael H.* asserted that he had the right to be declared

191. *See supra* notes 3–6 and accompanying text.
192. 491 U.S. 110 (1989). For discussions of this case, see ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 77–109 (2000); and LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 97–109 (1991).
193. *Michael H.*, 491 U.S. at 122 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
194. *Id*. at 122 n.2.
195. *Id*. at 124 (citing H. NICHOLAS, ADULTURINE BASTARDY 1 (1836)).
196. *Id*. (citing 1 BLACKSTONE'S COMMENTARIES 456 (J. Chitty ed. 1826)).
197. *Id*. at 125.
198. *Id*. at 125–26 (citing R.D. Hursh, Annotation, *Who May Dispute Presumption of Legitimacy of Child Conceived or Born During Wedlock*, 53 A.L.R.2d 572 (1957)).

the natural father of his daughter and to obtain parental privileges.[199] Rejecting that argument, Justice Scalia turned to tradition:

> What he [the biological father] must establish . . . is not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them. Even if the law in all States had always been that the entire world could challenge the marital presumption and obtain a declaration as to who was the natural father, that would not advance Michael's claim. Thus, it is ultimately irrelevant . . . that the present law in a number of States appears to allow the natural father—including the natural father who has not established a relationship with the child—the theoretical power to rebut the marital presumption. . . . What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.[200]

In footnote six of his opinion, joined only by Chief Justice Rehnquist, Justice Scalia explained and defended his traditionalist analysis. His approach was not novel, he argued, because in *Bowers v. Hardwick*[201] the Court looked to the sodomy laws of the states in 1868 (the year of the adoption of the Fourteenth Amendment), 1961, and 1986 (the year of its decision).[202] "[W]e concluded from that record, regarding that very

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199. Michael H. and Carole D. (who was married to Gerald D.) had an affair. In May 1981, Carole gave birth to Victoria D. Gerald was listed as the father on the birth certificate and held Victoria out as his child. Carole subsequently informed Michael that she believed that Michael could be the father of the child. A blood test showed, by a probability of 98.07 percent, that Michael was Victoria's biological father. Michael held Victoria out as his child when Carole visited him. Carole then lived with another man, Scott K.; she later returned to and lived with Gerald, and then left Gerald and lived with Michael. After signing a stipulation that Michael was Victoria's natural father, Carole left Michael and reconciled with Gerald. Michael and Victoria brought a court action seeking certain rights. *See id.* at 113–15. Gerald argued that, under California law, "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." *Id.* at 115 (quoting CAL. EVID. CODE § 621(a) (West Supp. 1989)). That presumption could be rebutted by blood tests upon motion of either the wife or the husband within two years of the date of the child's birth. *Id.* (citing CAL. EVID. CODE § 621 (c)–(d) (repealed 1994; current version at CAL. FAM. CODE §§ 7540–7541 (West 1994 & Supp. 2003))). The trial court granted summary judgment to Gerald, and that ruling was affirmed by the California appellate court. *See id.* at 115–16.

200. *Id*. at 126–27.

201. 478 U.S. 186 (1986). For an illuminating essay discussing this case, see generally Sidney Buchanan, *A Constitutional Cross-Road for Gay Rights*, 38 HOUS. L. REV. 1269 (2001).

202. *Michael H.*, 491 U.S. at 127 n.6. In concluding that there was no fundamental right to engage in homosexual sodomy, the *Bowers* Court reasoned:

> Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today,

specific aspect of sexual conduct, that 'to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.'"[203] And, he continued, in *Roe v. Wade*[204] the Court "spent about a fifth of our opinion negating the proposition that there was a longstanding tradition of laws proscribing abortion."[205]

Justice Scalia then opined that the Court should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[206] Selecting the most specific level of generality avoids the problem of "imprecise guidance" provided by general traditions and the additional problem of judges dictating, rather than discerning, society's views.[207] In his view, reference to the most specific level avoids arbitrary decisionmaking, does not leave "judges free to decide as they think best when the unanticipated occurs," and promotes the rule of law because a rule "that binds neither by text nor by any particular, identifiable tradition is no rule of law at all."[208]

> 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Bowers, 478 U.S. at 192–94 (citations and footnotes omitted).

203. *Michael H.*, 491 U.S. at 127 n.6 (quoting *Bowers*, 478 U.S. at 194).

204. 410 U.S. 113 (1973).

205. *Michael H.*, 491 U.S. at 127 n.6.

206. *Id*. at 127–28 n.6.

207. *Id*. at 128 n.6.

208. *Id.* In Justice O'Connor's view, Justice Scalia's footnote "sketches a mode of historical analysis . . . that may be somewhat inconsistent with our past decisions in this area." *Id*. at 132 (O'Connor, J., concurring in part). Citing *Loving v. Virginia* and other cases, Justice O'Connor wrote that "the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available." *Id.* Accordingly, she "would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis." *Id*.

Dissenting, Justice Brennan (joined by Justices Marshall and Blackmun) objected that tradition "can be as malleable and as elusive as 'liberty' itself." *Id*. at 137 (Brennan, J., dissenting). Justice Brennan did not argue that tradition was irrelevant, for he noted that running through the Court's decisions is "the theme that certain interests and practices—freedom from physical restraint, marriage, childbearing, childrearing, and others—form the core of our definition of 'liberty.'" *Id*. at 139. Justice Brennan noted that, rather than asking whether parenthood is an interest historically protected by the Court ("the answer to that question is too clear for dispute," *id*.), the plurality instead asked "whether the specific variety of parenthood under consideration—a natural father's relationship with a child whose mother is married to another man—has enjoyed such protection." *Id*. "If we had asked, therefore, [in other cases] whether the specific interest under consideration

Having set forth his traditionalist analysis in *Michael H.*, Justice Scalia adhered to the approach in subsequent due process cases. In *Cruzan v. Director, Missouri Department of Health*,[209] his concurring opinion argued that no substantive due process claim of a right to assisted suicide could be maintained "unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state interference."[210] Tradition did not support the right asserted in *Cruzan*, he argued, first, because suicide resulted in criminal liability under English common law. Second, case law at the time of the adoption of the Fourteenth Amendment generally criminalized suicide, with twenty-one of the thirty-seven states and eighteen of the ratifying states prohibiting assisted suicide. Further, a proposed penal law system presented to the United States House of Representatives in 1828 would have criminalized assisted suicide; the penal code adopted in the Dakota Territory in 1877 prohibited attempted and assisted suicide; and most states without an explicit assisted suicide prohibition in 1868 recognized that assisted and attempted suicide were unlawful in the fifty years following the ratification of the Fourteenth Amendment.[211] "Thus, 'there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed "fundamental" or "implicit in the concept of ordered liberty."[212] As neither the text of the Constitution nor tradition said anything about the issue, Justice Scalia was concerned that:

> [t]o raise up a constitutional right here we would have to create out of nothing . . . some constitutional principle whereby, although the State may insist that an individual come in out of the cold and eat food, it may not insist that he take medicine; and although it may pump his stomach empty of poison he has ingested, it may not fill his stomach with food he has failed to ingest.[213]

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had been traditionally protected, the answer would have been a resounding 'no.' That we did not ask this question in those cases highlights the novelty of the interpretive method that the plurality opinion employs today." *Id*. at 139–40.

For discussions of Justice Scalia's and Justice Brennan's views on and uses of tradition in *Michael H.*, see DAVID E. MARION, THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN, JR.: THE LAW AND POLITICS OF "LIBERTARIAN DIGNITY" 101–04 (1997); FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 104–08 (1999); J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1614–29 (1990). *See generally* Robin West, *The Ideal of Liberty: A Comment on* Michael H. v. Gerald D., 139 U. PA. L. REV. 1373 (1991).

209. 497 U.S. 261 (1990) (holding that the Due Process Clause does not prohibit a state from requiring clear and convincing evidence of an incompetent person's wishes regarding the withdrawal of life-sustaining treatment and refusal of lifesaving hydration and nutrition).

210. *Id*. at 294 (Scalia, J., concurring).

211. *Id*. at 294–95.

212. *Id*. at 295 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

213. *Id*. at 300. In a dissenting opinion, Justice Brennan also looked to tradition:

In *Planned Parenthood v. Casey*,[214] Justice Scalia's traditionalist approach was expressly addressed in the joint opinion for the Court issued by Justices O'Connor, Kennedy, and Souter. In the course of reaffirming the essential holding of *Roe v. Wade*,[215] the joint opinion stated:

> It is . . . tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*.[216]

The Court further stated: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."[217] It is an "inescapable fact," the Court wrote, that "reasoned judgment" must be exercised in the adjudication of substantive due process claims.[218]

"The right to be free from medical attention without consent, to determine what shall be done with one's own body, *is* deeply rooted in this Nation's traditions . . . ." *Id*. at 305 (Brennan, J., dissenting); *see also id*. at 343 (Stevens, J., dissenting):

> Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' . . . .
> . . . .
> . . . Our ethical tradition has long regarded an appreciation of mortality as essential to understanding life's significance.

Id. (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

214. 505 U.S. 833 (1992).

215. 410 U.S. 113 (1973).

216. *Planned Parenthood*, 505 U.S. at 847–48 (joint opinion).

217. *Id*. at 848.

218. *Id*. at 849. On this point, Justice Scalia retorted that reasoned judgment "turns out to be nothing but philosophical predilection and moral intuition." *Id*. at 1000 (Scalia, J., concurring in part and dissenting in part). Justice Scalia predicted that going beyond text and tradition, which are "facts to study," to value-based constitutional adjudication will change public perception of the Court, and "a free and intelligent people's attitudes towards us can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better." *Id*. at 1000–01.

In a subsequent decision, *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court, by a five to four vote, held that a Nebraska statute criminalizing the performance of "partial

Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, disagreed with the Court's analysis. Abortion is not a liberty protected by the Constitution, Justice Scalia argued, "not because of anything so exalted as my views concerning the 'concept of existence, of meaning, of the universe, and of the mystery of human life,'"[219] but "because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed."[220] Responding to the joint opinion's statement that adhering to tradition would have required the Court to uphold antimiscegenation laws in *Loving v. Virginia*, Justice Scalia asserted that "[a]ny tradition in that case was contradicted *by a text*—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value."[221]

The traditionalist analysis of due process claims consistently called for by Justice Scalia was embraced by a majority of the Court in its 1997 decision in *Washington v. Glucksberg*.[222] There, the Court held that the Due Process Clause was not violated by a Washington state statute providing that any person who knowingly caused or aided another person to attempt suicide was guilty of a felony. Chief Justice Rehnquist (writing for himself and Justices O'Connor, Scalia, Kennedy, and Thomas) cited to and relied on Justice Scalia's concurring opinion in *Cruzan*[223] and set out two primary features of the Court's due process analysis: (1) the protection of "those fundamental rights and liberties

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birth abortions" violated the Constitution. *Id.* at 922. Dissenting, Justice Scalia argued that the Court's ruling was:

> a democratic vote by nine lawyers, not on the question whether the text of the Constitution has anything to say about this subject (it obviously does not); nor even on the question (also appropriate for lawyers) whether the legal traditions of the American people would have sustained such a limitation upon abortion (they obviously would); but upon the pure policy question whether this limitation upon abortion is "undue"—*i.e*., goes too far.

Id. at 955 (Scalia, J., dissenting). The Court "should not overcome the judgment of 30 state legislatures," he wrote, and "should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed." *Id*. at 955–56.

219. *Planned Parenthood*, 505 U.S. at 980 (Scalia, J., concurring in part and dissenting in part) (quoting the majority opinion).

220. *Id.*; *see also* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990) (Scalia, J., concurring) (arguing that "the Constitution contains no right to abortion"); Webster v. Reprod. Health Servs., 492 U.S. 490, 532–37 (1989) (Scalia, J., concurring in part and concurring in the judgment) (arguing that *Roe v. Wade* should be overruled).

221. *Planned Parenthood*, 505 U.S. at 980 n.1 (Scalia, J., concurring in part and dissenting in part).

222. 521 U.S. 702 (1997); *see also* Vacco v. Quill, 521 U.S. 793, 797 (1997) (holding that a New York law criminalizing aid to persons in committing or attempting to commit suicide did not violate the Equal Protection Clause).

223. *Glucksberg*, 521 U.S. at 713.

which are, objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,'" and (2) "a 'careful description' of the asserted fundamental liberty interest."[224]

Philosophical, legal, and cultural heritages oppose and condemn suicide and assisted suicide, Chief Justice Rehnquist wrote.[225] As support for that observation, he referred to seven hundred years of Anglo-American common-law tradition punishing or otherwise disapproving such acts, cited Henry de Bracton's thirteenth century treatise and Blackstone's *Commentaries*, noted the views of the early American colonies as well as provisions of the *Model Penal Code*,[226] and pointed out that "voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide."[227] Employing what he called a "restrained methodology," the Chief Justice declared that history, legal traditions, and practices provide the guideposts for the Court's "responsible decisionmaking," an approach tending to "rein in the subjective elements that are necessarily present in due process judicial review."[228]

One could understandably read *Glucksberg* and conclude that Justice Scalia's traditionalism had emerged triumphant as the preferred interpretive methodology in due process cases.[229] However, in *County of Sacramento v. Lewis*,[230] the Court held that a police officer did not violate the Fourteenth Amendment's due process guarantee by causing death during a high speed automobile chase aimed at apprehending a suspect. The Court opined that "in such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation."[231] Finding no such purpose in the officer's instinctive conduct or any improper or malicious motive, the Court concluded that the chase

224. *Id.* at 720–21 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937); Reno v. Flores, 507 U.S. 292, 302 (1993)).
225. *Id.* at 711.
226. *Id.* at 711–16.
227. *Id*. at 716.
228. *Id*. at 721–22.
229. *See* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 665–66.
230. 523 U.S. 833 (1998).
231. *Id*. at 836. In applying this standard, the Court followed its precedent set forth in *Rochin v. California*, 342 U.S. 165, 172 (1952).

did not "shock the conscience" and was not unconstitutional.[232]

Justice Scalia, joined by Justice Thomas, agreed that the Due Process Clause had not been violated, but lamented that the Court had not applied the *Glucksberg* methodology. The Court should have asked whether the nation had traditionally protected the right asserted by the party suing the officer and should not have asked whether the officer's conduct "shocks my unelected conscience."[233] While the people of California and their representatives may vote for and prefer a tort law system holding police officers liable for reckless driving during high-speed chases, Justice Scalia stated, the state had chosen to not hold public employees liable for civil damages arising from such pursuits. "But for judges to overrule that democratically adopted policy judgment on the ground that it shocks *their* consciences is not judicial review but judicial governance."[234]

B. The Equal Protection Clause

What role does tradition play in Justice Scalia's analysis of the Equal Protection Clause? In *J.E.B. v. Alabama ex rel. T.B.*,[235] the Court held that the Equal Protection Clause was violated by intentional gender-based discrimination in employing peremptory strikes in jury selection. Dissenting, Justice Scalia argued that the Court's "thoroughly up-to-date and right-thinking" opinion "disapprov[ing] the male chauvinist attitudes of our predecessors"[236] "imperils a practice that has been considered an essential part of fair jury trials since the dawn of the common law. The Constitution of the United States neither requires nor permits this vandalizing of our people's traditions."[237]

In *Romer v. Evans*[238] the Court held that a Colorado state constitutional amendment prohibiting the enactment of laws designed to provide legal protection for gays, lesbians, and bisexuals was "not within our constitutional tradition"[239] and violated the Equal Protection Clause. Justice Scalia, dissenting, characterized the amendment as a "modest attempt by seemingly tolerant Coloradans to preserve traditional sexual

232. *Lewis*, 523 U.S. at 855.
233. *Id*. at 862 (Scalia, J., concurring).
234. *Id*. at 865 (Scalia, J., concurring). For other examples of Justice Scalia's reference to and use of tradition in due process cases, see City of Chicago v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting); Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 24–25, 27–28, 37–39 (1991) (Scalia, J., concurring); Burnham v. Superior Court of California, 495 U.S. 604, 610–23, 627 n.5 (1990) (Scalia, J.).
235. 511 U.S. 127 (1994).
236. *Id*. at 156 (Scalia, J., dissenting).
237. *Id*. at 163.
238. 517 U.S. 620 (1996).
239. *Id*. at 633.

mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[240] In his view, the Court's ruling frustrated the state's "reasonable effort to preserve traditional American moral values,"[241] "disparag[ed] as bigotry adherence to traditional attitudes,"[242] and took "sides in the culture wars"[243] in a ruling that was "an act, not of judicial judgment, but of political will."[244] As the Constitution is silent on the subject before the Court, Justice Scalia would leave it "to be resolved by normal democratic means, including the adoption of provisions in state constitutions."[245]

In a later decision, *United States v. Virginia*,[246] the Court held that the Equal Protection Clause was violated by Virginia's categorical exclusion of women from the educational opportunities provided by the Virginia Military Institute (VMI). That holding was derided by Justice Scalia, who accused the majority of ignoring the "history of our people" and counting "for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government."[247] Moreover, he stated, the Court deprecated the "closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education."[248] Such closed-mindedness was, for him, not problematic:

> Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable.

240. *Id*. at 636 (Scalia, J., dissenting).
241. *Id*. at 651.
242. *Id*. at 652.
243. *Id.*
244. *Id*. at 653. A recent example of the culture wars and an expression of one jurist's views on homosexuality is found in a concurring opinion in a recent child custody case, *D.H. v H.H.*, 830 So. 2d 21 (Ala. 2002). The concurrence of Chief Justice Moore, from the Supreme Court of Alabama, stated that: "[h]omosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated." *Id*. at 26 (Moore, C.J., concurring specially). "It is an inherent evil against which children must be protected." *Id*. Moore's opinion also referred, among other things, to the common law of the state, Blackstone's *Commentaries*, *The Bible*, and early Western legal tradition. *Id.* at 27–34. "No matter how much society appears to change, the law on this subject has remained steadfast from the earliest history of the law, and that law is and must be our law today." *Id*. at 35.
245. Romer v. Evans, 517 U.S. 620, 636 (1996).
246. 518 U.S. 515 (1996).
247. *Id*. at 566 (Scalia, J., dissenting).
248. *Id*.

> The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court . . . .[249]

Reiterating his *Michael H.* analysis,[250] Justice Scalia declared that:

> the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract test we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." The same applies, *mutatis mutandis*, to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment.[251]

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249. *Id*. at 566–67.

250. *See supra* notes 192–208 and accompanying text.

251. United States v. Virginia, 518 U.S. at 568–69 (citations omitted) (quoting Rutan v. Republican Party, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting)). In *Rutan*, the Court held that certain political party patronage practices violated the First Amendment. *Rutan*, 497 U.S. at 65. Justice Scalia, in his *Rutan* dissent, wrote that a traditional and unchallenged practice not explicitly proscribed by constitutional text

> is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which this Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of *other* practices is to be figured out. When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens. I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.

Id. at 95–96 (Scalia, J., dissenting). For additional examples of Justice Scalia's reliance on tradition in First Amendment cases, see generally California Democratic Party v. Jones, 530 U.S. 567 (2000); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 517–18 (1996) (Scalia, J., concurring); Board of County Commissioners v. Umbehr, 518 U.S. 668, 686–711 (1996) (Scalia, J., dissenting) (expressing disagreement with the majority decisions in *Umbehr and O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996)); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 371–85 (1995) (Scalia, J., dissenting); and *Lee v. Weisman*, 505 U.S. 577, 631–46 (1992) (Scalia, J., dissenting). In *44 Liquormart*, Justice Scalia reiterated his view that "the long accepted practices of the American people" guides him in construing the indeterminate "freedom of speech"

Justice Scalia went on to say that VMI was as

> well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.[252]

IV. SCALIAN TRADITIONALISM EVALUATED AND APPLIED

This Part evaluates the traditionalist methodology of Justice Scalia, the "defender of traditional values,"[253] and then applies his approach to the constitutional challenges to separate-but-equal and antimiscegenation laws in *Brown v. Board of Education*[254] and *Loving v. Virginia*,[255] respectively.

A. Scalian Traditionalism: Why and Which Tradition?

Justice Scalia's reliance on tradition raises, among others, these two questions: (1) Why should we look to tradition in assessing contemporary constitutional issues and in deciding between the maintenance of the status quo or a change in established laws and practices? (2) How do we locate the pertinent tradition or traditions applicable to a particular case?

As for the "why tradition" query, Justice Scalia believes that his traditionalist approach prevents the casting aside of "important

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text of the First Amendment. 517 U.S. at 517 (Scalia, J., concurring). He considered

> more relevant the state legislative practices prevalent at the time the First Amendment was adopted, since almost all of the States had free speech constitutional guarantees of their own, whose meaning was not likely to have been different from the federal constitutional provision derived from them. Perhaps more relevant still are the state legislative practices at the time the Fourteenth Amendment was adopted, since it is most improbable that that adoption was meant to overturn any existing national consensus regarding free speech.

Id. Interestingly, Justice Scalia did not vote with a majority of the Court in decisions holding that flag burning prohibitions violated the First Amendment. *See* United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989). He explained that while he does not "like scruffy people who burn the American flag," he was bound by the text of the First Amendment. David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1423 (1999).

252. United States v. Virginia, 518 U.S. at 569 (Scalia, J., dissenting).
253. AMSTERDAM & BRUNER, *supra* note 192, at 103.
254. 347 U.S. 483 (1954).
255. 388 U.S. 1 (1967).

traditional values,"[256] deters judicial dictation (as opposed to judicial discernment) of society's views,[257] promotes the rule of law,[258] discourages judicial invention of new values and constitutional rights,[259] avoids the problem of negative public perception arising from rulings not reflecting tradition,[260] promotes and protects democratic procedures and outcomes,[261] and serves as a means to identify and check "politics-smuggled-into-law."[262]

This view of the need for and the value of tradition has great faith in and gives operative force to established legal and societal views concerning the legitimacy or illegitimacy of certain conduct and practices.[263] In assessing the constitutionality of a state's law regulating

256. Michael H. v. Gerald D., 491 U.S. 110, 122 n.2 (1989) (Scalia, J.). Such recognition and protection of (if not reverence for) tradition reflects respect for that "which is transmitted or handed down from the past to the present." EDWARD SHILS, TRADITION 12 (1981). Tradition can "structure at least some parts of social life . . . as unchanging and invariant" and tends to "develop a set of . . . conventions and routines, which may be de facto or de jure formalized for purposes of imparting the practice to new practitioners." Eric Hobsbawm, *Introduction: Inventing Traditions, in* THE INVENTION OF TRADITION 1, 2–3 (Eric Hobsbawm & Terence Ranger eds., 1984). Also used to justify and legitimize authority, tradition is communicated to persons who "accept beliefs and adopt customs and practices because of institutional authority." J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 85 (1998). This legitimizing aspect and effect of tradition can be diluted or even fail altogether when persons question the established order and experiment with new beliefs and political and social arrangements. *See* ELIZABETH COLSON, TRADITION AND CONTRACT: THE PROBLEM OF ORDER 82 (1974); EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 152 (Conor Cruise O'Brien ed., 1969) (1790). Moreover, the relationship between tradition and authority implicates another relationship, that between tradition and law, for "all authority is grounded in the capacity for reasoned elaboration, and legal authority especially so." CARL J. FRIEDRICH, TRADITION AND AUTHORITY 113 (1972). Thus, adhering to traditional values in law can favor and leave in place that which existed prior to a plaintiff's constitutional claim.

257. *See Michael H.*, 491 U.S. at 127 n.6.

258. *See id* at 127–28.

259. *See id*. at 122 n.2; *see also* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

260. *See* Planned Parenthood v. Casey, 505 U.S. 833, 999–1001 (1992) (Scalia, J., concurring in part and dissenting in part).

261. *See* Stenberg v. Carhart, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting); County of Sacramento v. Lewis, 523 U.S. 833, 865 (1998) (Scalia, J., concurring); United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting); Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

262. *See* United States v. Virginia, 518 U.S. at 569 (Scalia, J., dissenting).

263. For scholarly agreement with this position, see generally Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173. Others have questioned such legal traditionalism. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 62 (1980); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). *See generally* Katherine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 WIS. L. REV. 303; John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991).

certain conduct, a traditionalist judge's decision is not to turn on some normative notion of what is right or wrong; instead, a jurist's adjudicative and descriptive task is to identify and not disturb the traditional view and position.[264] If change is desired, the democratic process, and not unelected judges, can be turned to and activated for that purpose. On this view, normative inquiry into whether the challenged practice is right or wrong, good or bad, or desirable or undesirable is to be made, not by the courts, but by the people speaking through their representatives and the laws of the states. What counts is popular morality reflecting "a majority of opinion about appropriate behavior at some particular point in time"[265] rather than social morality, which is understood as "moral standards rooted in aspirations for the community as a whole."[266]

This type of traditionalism, and its emphasis on leaving in place the status quo unless and until it is changed through the democratic process, can be passively deferential to majoritarian views and edicts. Under Scalian traditionalism, a particular practice allowed or prohibited at a certain point in time prior to the constitutional challenge[267] may not be subject to countermajoritarian judicial review[268] and invalidation by

264. *See* RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 269–70 (1997).

265. JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 31 (1997).

266. *Id*.

267. For present purposes, the relevant point in time is 1868, the year of the adoption of the Fourteenth Amendment. *See supra* notes 202, 211 and accompanying text; *see infra* note 284 and accompanying text.

268. Judicial review and rejection of legislative enactments on constitutional grounds implicates the "counter-majoritarian difficulty." *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986). The underlying philosophy of this difficulty is "that American democracy means majority rule; that the legislatures and executives are majoritarian, but the Court is countermajoritarian; and that as a result, the Court should invalidate government actions only when they violate clear constitutional principles that exist apart from the preferences of the [Supreme Court] Justices." Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 61 n.77 (1989). This view of the Court as a countermajoritarian institution has been questioned by some commentators. *See, e.g.*, ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 190 (1989) ("[T]he views of a majority of the Justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country."); GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 19 (1993) (commenting that the Court "is ultimately unable to protect minorities from the tyranny of the majority," and is "institutionally incapable of doing anything other than reflecting the very majoritarian preferences that the traditional

unelected and unaccountable elitist judges.[269] Whether challenged practices, customs, and traditions are valid and enforceable are questions to be answered, not by judges, but by the various states acting in and through majoritarian political processes. Such an approach may be criticized as "excessively majoritarian,"[270] where the majority view prevails because it is the majority view and not because it is right or just, even where democracy-as-majoritarianism results in a consequent dilution, if not elimination, of the rights of minorities.[271]

Justice Scalia's invocations of democracy and the will of the people have great appeal for many, especially when posited as antidotes to the perceived poisons of the imperial judiciary and robed social engineers. However, his "bromides of democracy" and complaint that the Court is undemocratic "begs the question" whether the Constitution requires that the political system it created be democratic.[272] As noted by Richard Posner, the Constitution "in its inception was rich in undemocratic features, such as the indirect election of the President and the Senate

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model requires the Court to resist").

Whether the majoritarian paradigm to which the countermajoritarian difficulty thesis responds accurately accounts for and describes the nation's political structure has been the subject of debate. Laura Kalman has argued that the paradigm "ensured the dedication of constitutional theory to the search for a solution to a problem which did not exist." Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 88 n.8 (1997). In her view, the Constitution is not based on a concept of purely majoritarian rule, nor is it based on an assumption that only officials accountable to the electorate can select policies. *Id*.; *see also* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 20 (2001) ("Our actual existing democracy falls . . . far short of the soaring ideals of the theorists of democracy . . . ."); *id*. at 226 ("Ours is not a pure democracy, and we know . . . that pure democracy is as undesirable as it is unattainable."); David R. Dow, *The Plain Meaning of Article V*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 117, 119 (Sanford Levinson ed., 1995) (reasoning that "not everything ought to be subject" to majority rule and "[f]ollowing the majority *because it is the majority* is sometimes obligatory; resisting the majority *even though it is the majority* is sometimes required").

269. Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 948 (2001) ("Supreme Court decisions have been a source of complaint because judges are unelected, oligarchic, and tyrannical."); *see also* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 714 (1995) ("Mistrust of unelected judges in America has colonial roots . . . .").

270. *See* A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 413 (1999).

271. *See id*. (Justice Scalia's "approach . . . insufficiently protects minority rights."); MICHELMAN, *supra* note 208, at 102 (Justice Scalia's use of the term "tradition" "evidently refers to what people in the relevant community have actually and regularly done, not to what they have reflectively approved as right or condemned as wrong.").

272. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 149 (1999).

(and against the background of a highly restricted franchise)."[273] Other undemocratic features of the Constitution include two Senators from each state regardless of population and electoral, rather than popular, votes as the basis for the election of the President.[274] Thus, the undemocratic Court Justice Scalia criticizes and assails is not the antidemocratic aberration he claims it to be.

Furthermore, Justice Scalia's conception of democracy "requires judges to be political theorists, so that they know what 'democracy' is (unless we can accept that Justice Scalia himself has said the last word on that question), and also historians, because it takes a historian to reconstruct the original meaning of centuries-old documents."[275] A judge's conception of democracy and her identification and selection of *the* history relevant to the resolution of the constitutional issue before her flows from and is influenced by that judge's political theory and veridical methodology and understanding of the meaning of democracy. Having placed himself in the position of the protector of certain traditional democratic practices and institutions, Justice Scalia's answer to the "why tradition" query is that tradition recognizes and promotes democratic outcomes and insulates those outcomes from judicial review.

As for the "which tradition" question, Justice Scalia's traditionalist methodology assumes and rests upon the metaphysical, nonepistemological premise that "there is a tradition waiting out there to be identified," a problematic approach in that "inasmuch as every 'tradition' harbors the trace of a 'counter-tradition,' the notion that any given 'tradition' may be reduced to an objective, determinative reality is undermined."[276]

Recall that Justice Scalia calls for the protection of those interests defined at the "most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be

273. *Id*.

274. Thus, a presidential candidate with the most popular votes can still lose an election. *See* SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 10, at 38–40; JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION 275, 280–81 (2001). *See generally* ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); POSNER, *supra* note 268. For more on the undemocratic aspects of the United States political structure, see DANIEL A FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 148–51 (2002).

275. POSNER, *supra* note 272, at 150.

276. Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 73 (1995).

identified."[277] Several questions immediately come to mind. Why the most specific level? What is the most specific level? Will judges agree or disagree in answering those questions and on what bases? And is Justice Scalia's highest level of specificity inquiry really helpful in identifying and selecting a—or the—pertinent tradition, or does this approach actually render all cases ones of first impression?[278] If all cases are ones of first impression, each case will require a search for the relevant tradition upon which resolution of that specific case will rest. One would and should expect more from a purportedly explanatory and predictive methodology.

Because traditions "do not select themselves,"[279] jurists identifying the most specific tradition from a menu of possible or plausible traditions necessarily must employ discretion and reason, make choices, and act normatively in deciding and defining that which constitutes the most specific and relevant tradition applicable to a particular case. If this is correct, Justice Scalia's traditionalism has an element of subjectivity and can lead to the very same or similar judicial dictation and predilection-based decisionmaking he decries. The importance of this point lies in its analytical departure from one posited advantage of the Justice's approach—the provision of "a touchstone outside the judge's own perceptions."[280]

As previously noted, in identifying traditions Justice Scalia has looked to, among other things, treatises and publications (including commentaries by Blackstone, Kent, and Story);[281] the common law of England and the United States;[282] practices bearing the "endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the

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277. Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989) (Scalia, J.).

278. *See* SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 10, at 86 ("Defined at the highest level of specificity, every case is one of first impression and sui generis. No case is exactly like a case that has come before. We can always identify features of a current case that distinguish it from the specific tradition invoked on the plaintiff's behalf." (footnote omitted)).

279. STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 175 (1996).

280. David Crump, *How Do the Courts* Really *Discover Unenumerated Fundamental Rights?: Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 860 (1996). As argued by two commentators, Justice Scalia's opinion in *Michael H.* reeked with the Justice's perceptions:

> His entire opinion is a demonstration of the limitless license that judges acquire to reify or deify their predilections when they pretend to themselves or others that their job involves no interpretive work but consists simply of sorting the *objective* facts of cases into the *objective* categories of *objective* rules.

AMSTERDAM & BRUNER, *supra* note 192, at 108.

281. *See supra* notes 195–98 and accompanying text.

282. *See supra* notes 195–98 and accompanying text.

beginning of the Republic;"[283] and the laws of the states in 1868, the year the Fourteenth Amendment was adopted. With respect to the latter indicant, Justice Scalia has urged that questions as to the application of the Equal Protection Clause should be answered

> on the basis of the "time-dated" meaning of equal protection in 1868. Unisex toilets and women assault troops may be ideas whose time has come, and the people are certainly free to require them by legislation; but refusing to do so does not violate the Fourteenth Amendment, because that is not what "equal protection of the laws" ever meant.[284]

Under Scalian traditionalism, reliance on general notions of tradition will not do, for such generalizations do not sufficiently tether judges to "time-dated" meanings of constitutional provisions. That, for him, is problematic, for judges should not tell society what traditional views and practices are or are not, or should or should not be, constitutional and acceptable. Backward looking and protective of the status quo, Scalian traditionalism is grounded in and preservative of traditional policies and institutions and "the actual practices of the society, as reflected in the laws enacted by its legislatures."[285]

B. What About Brown *and* Loving*?*

Consider Justice Scalia's traditionalism, and recall the factual, social, and legal settings forming the backdrop of the *Brown* litigation. In the *Segregation Cases*, the State defendants, relying on *Plessy v. Ferguson*,[286] argued that segregation was a legislative matter for the several states;[287] contended that a number of the states ratifying the

283. Rutan v. Republican Party, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting). In an opinion involving the Takings Clause of the Fifth Amendment, Justice Scalia wrote an opinion for the Court in which he conceded, as largely true but irrelevant, that the Court's description of the understanding of land ownership informing that clause was "not supported by early American experience." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 n.15 (1992). "The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses . . . were out of accord with *any* plausible interpretation of those provisions." *Id*. As asked by one scholar, "What happened to the interpretive rule of text and contemporaneous tradition?" Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 81 (1992).

284. SCALIA, *supra* note 2, at 149.

285. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989).

286. 163 U.S. 537 (1896).

287. *See supra* note 59 and accompanying text.

Fourteenth Amendment in 1868 had or soon thereafter created segregated schools;[288] and advised the Court that segregation was consistent with then-extant customs, traditions, and mores.[289] Those arguments have much in common with Justice Scalia's traditionalism, for he too looks to the state of the law as of 1868; is protective of and seeks to preserve the nation's history and tradition (as he defines them); and, in certain areas, would allow states to resolve for themselves what is permitted and proscribed without fear of federal court intervention and policy dictation.[290]

As applied to *Brown*, could Scalian traditionalism lead to the conclusion that public school segregation was not unconstitutional? That question can be answered in the affirmative, for under a time-dated meaning of the Equal Protection Clause, such segregation was not unconstitutional in 1868. The states defending against the plaintiffs' constitutional challenges feared that they would no longer be allowed to do that which they had done traditionally—segregate Black and White children in public school education. In their view, the question whether segregation was or was not permissible was one for the democratic process of the several states and not for judges with their own policy preferences and philosophical predilections. On that view, longstanding and entrenched public school segregation did not violate the Equal Protection Clause, and the Court's contrary conclusion failed to recognize and give due regard to tradition. The fact that the Court had held that the separate-but-equal doctrine was unconstitutional in graduate school settings did not call for a different result, as those cases did not involve the most specific tradition protecting or denying protection to the asserted right—the application of segregation in secondary education.

Justice Scalia has argued that his traditionalist analysis is not applicable to the issue presented in *Brown*. Responding to Justice Stevens's concurring opinion in *Rutan v. Republican Party of Illinois*,[291] Justice Scalia said that:

> The customary invocation of *Brown v. Board of Education* as demonstrating the dangerous consequences of this principle is unsupportable. I argue for the role of tradition in giving content only to *ambiguous* constitutional text; no tradition can supersede the Constitution. In my view the Fourteenth Amendment's

288. *See supra* note 60 and accompanying text.
289. *See supra* note 60 and accompanying text.
290. *See supra* Parts III, IV.A.
291. 497 U.S. 62 (1990). In that concurrence, Justice Stevens noted that "[i]f the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure." *Id*. at 82 (Stevens, J., concurring) (quoting Ill. State Employees Union v. Lewis, 473 F.2d 561, 568 n.14 (7th Cir. 1972)).

> 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 historically most respected Justices.[292]

In arguing that the text of the Equal Protection Clause, when combined with the Thirteenth Amendment,[293] prohibited segregation and did not require resort to tradition, Justice Scalia moved from traditionalism to textualism.[294] That move is premised upon the Justice's conclusion that the text of the Equal Protection Clause is unambiguous as applied to matters of race generally and *Brown* specifically.[295] The unambiguity of the text, while plausible and arguable, is not automatic or obvious and reflects Justice Scalia's choice as to *the* proper reading

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292. *Id*. at 95–96 n.1 (Scalia, J., dissenting) (citations omitted).

293. *See* U.S. CONST. amend. XIII.

294. *See* discussion *supra* note 23. Justice Scalia could have, but did not make an originalist argument in support of his position. Such an argument has been noted by one scholar:

> Warren seemed to be proclaiming that racial segregation was always unconstitutional, regardless of time and place. This traditional conception of constitutional interpretation assumes that constitutional meaning is unchanging, and that what the Equal Protection Clause of the Fourteenth Amendment meant when it was adopted in 1868 is what it has continued to mean today. Under this view, when the Court declared racial segregation unconstitutional in 1954, it also meant that *Plessy* was wrongly decided in 1896.

MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 28 (1998).

For a discussion of an unsuccessful attempt by another jurist and scholar, Robert Bork, to square the result in *Brown* with the Fourteenth Amendment, see FARBER & SHERRY, *supra* note 274, at 22–25. *See generally* Ronald Turner, *Was "Separate but Equal" Constitutional?: Borkian Originalism and* Brown, 4 TEMP. POL. & CIV. RTS. L. REV. 229 (1995).

295. *See Rutan*, 497 U.S. at 95 n.1 (Scalia, J., dissenting). That same text was viewed by Justice Scalia as ambiguous in *United States v. Virginia*. *See* 518 U.S. 515, 568 (1996) (Scalia, J., dissenting). Is the text of the Equal Protection Clause, arguably unambiguous when applied to questions of racial discrimination, ambiguous when applied to sex discrimination? "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. As a matter of text, it is not apparent that the clause is unambiguous in one context (race) and ambiguous in another (sex). While it could be argued that the clause is ambiguous when applied to a subject (sex discrimination) not contemplated by the framers of the amendment, that argument references the amendment's purpose and not its text. Justice Scalia has not offered an explanation for his different readings of the clause.

and meaning of the constitutional language. Of course, for decades that same text was read by states and localities who supported and believed that segregation was constitutional and not violative of the equal protection mandate. Given the Justice's traditionalism, one would have thought that what counts is the states' readings and not the views of unelected Justice Scalia.

Furthermore, Justice Scalia's coupling of the Equal Protection Clause with the Thirteenth Amendment is extratextual, for nothing in the text of the Constitution says that those amendments should be read together. That is not to say that Justice Scalia's combination analysis is incorrect. It is to say that the Justice is making and implementing an interpretive choice with respect to the meaning of the Fourteenth Amendment as applied to public school segregation, a choice leading to a result different from that which could have been reached under traditionalism. As for Justice Scalia's additional argument that there was no "tradition of *unchallenged* validity" with respect to school segregation and that the practice had been "vigorously opposed on constitutional grounds" in the nineteenth century,[296] his focus on constitutional and oppositional challenges are again departures from the central tenets of his traditionalism. That challenges had been brought and segregation opposed should not obscure and does not negate the fact that those challenges were rejected by states tenaciously holding onto traditional segregation; thus, it could be argued that the unsuccessful challenges made clear and reinforced the segregative regime officially interred by *Brown* in 1954.

Were antimiscegenation laws traditional and therefore constitutional? Recall that such laws were part of the established mores and practices in the post-Civil War era and were consciously put in place to preserve White Supremacy and to maintain the White dominated racial hierarchy.[297] When the issue came before the Supreme Court in 1967 in a challenge to Virginia's antimiscegenation law, the state argued that the Court should look to and not change the antimiscegenation laws of the states ratifying the Fourteenth Amendment in 1868, should recognize that a number of states kept those laws in place as late as 1951, and should note that Congress and federal and state courts did not question the constitutionality of antimiscegenation.[298] Whether the policies promoted by and reflected in state antimiscegenation laws should govern the relationships between Blacks and Whites was a question to be answered by each state and not by the judiciary.[299]

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296. *Rutan*, 497 U.S. at 95–96 n.1 (Scalia, J., dissenting).
297. *See supra* notes 118–26 and accompanying text.
298. *See supra* notes 164–65 and accompanying text.
299. *See supra* notes 166, 169–73 and accompanying text.

As applied to *Loving*, Scalian traditionalism could lead to the conclusion that Virginia's antimiscegenation law was constitutional under a time-dated understanding of the Equal Protection Clause, one which looked to laws, practices, and norms circa 1868 and to subsequent developments. The traditionalist approach's protection of democratic outcomes reflected in a state's law would also be furthered by a methodology recognizing that state's right to set policy, even racially discriminatory policy, free from judicial oversight and invalidation. The Lovings and others who sought abolition of Virginia's antimiscegenation law could turn to the political process, an unattractive and hopeless exercise,[300] for what must be conserved is tradition in the face of current views and faddishness. To those who argue that this approach will leave in place ugly, harmful, and subordinating practices and ways of life, the true traditionalist's response should be that, while this may be so, the Constitution is not to be used to impose nontraditionalist views. On that view, respect for tradition, and not aversion to repugnancy, is the constitutional standard.

As with *Brown*, Justice Scalia has argued that adherence to tradition would not have required the Court to uphold antimiscegenation laws. In his partial concurrence and partial dissent in *Planned Parenthood v. Casey*,[301] he said: "Any tradition in that case was contradicted *by a text*—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value."[302] The Justice thus argues that the Equal Protection Clause's text and equality principle has always prohibited antimiscegenation laws. But is that so? State and federal courts reading and applying the same text routinely upheld such laws against equal protection challenges. The Supreme Court at one time reasoned that the equality principle was satisfied so long as Blacks and Whites were punished equally.[303] In the *Loving* oral argument before the Court, Virginia's counsel, who was surely aware of the applicable constitutional language, noted that miscegenation had been prohibited "without any question being raised as to the authority of the state to exercise this power."[304]

300. *See supra* note 167 and accompanying text.
301. 505 U.S. 833 (1992).
302. *Id*. at 980 n.1 (Scalia, J., concurring in part and dissenting in part).
303. *See supra* notes 130–31 and accompanying text.
304. Oral Argument Apr. 10, 1967, at 41, Loving v. Virginia, 147 S.E.2d 78 (Va. 1966) (No. 395), *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 69, at 1000.

That antimiscegenation laws were not declared unconstitutional by the Court before 1967 itself says something about the purported clarity of the constitutional text and principle. If one concludes (as does the Author) that applying the Equal Protection Clause to antimiscegenation laws is not self-obviously contradicted by text, tradition must still be reckoned with.[305] For the reasons stated, that reckoning is problematic for those who posit that traditionalism would not validate antimiscegenation laws.

V. CONCLUSION

"I take the need for theoretical legitimacy seriously,"[306] Justice Scalia has remarked. The Justice has also expressed his view that "[i]t is quite impossible for the courts, creatures and agents of the people of the United States, to impose upon those people of the United States norms that those people themselves (through their democratic institutions) have not accepted,"[307] as "we judges of the American democracies are servants of our peoples, sworn to apply, without fear or favor, the laws that those peoples deem appropriate."[308]

Were separate-but-equal and antimiscegenation laws constitutional under Justice Scalia's traditionalist approach to constitutional interpretation? Taking seriously the legitimacy of the traditionalist methodology and that the view of the people, rather than the courts, is paramount, the foregoing question could be answered in the affirmative for the reasons discussed in this Article. As also discussed, Justice Scalia has taken the position that tradition did not require different results in *Brown* and *Loving* because the text of the Equal Protection Clause was dispositive. Leaving it to the reader to decide whether that position is tenable and persuasive, it is the Author's view that the constitutional text does not explicitly resolve the challenges presented in those seminal cases and that separate-but-equal and antimiscegenation laws could have survived as matters of law under unmodified Scalian traditionalism.

In light of the Justice's move from tradition to text, questions remain as to the application and outcome of traditionalism, and any exceptions thereto, in race discrimination and other cases. Although those questions

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305. The *Loving* Court also held that Virginia's law violated the Due Process Clause. Loving v. Virginia, 388 U.S. 1, 12 (1967). While Justice Scalia did not address the law under that clause, it is worth noting that miscegenation could be constitutionally valid under his traditionalism with the referents of the longstanding traditions of society including the relevant laws of 1868 and thereafter, case law at the time of the adoption of the Fourteenth Amendment, and the democratically adopted policy judgments of the states. *Id*. at 7.

306. Scalia, *supra* note 23, at 862.

307. Antonin Scalia, *Commentary*, 40 ST. LOUIS U. L.J. 1119, 1119 (1996).

308. *Id.* at 1122.

warrant further inquiry and analysis, society is indeed fortunate that the Supreme Court did not adhere to tradition and was able "to see past the wreck of our own ancestors' failings."[309] In holding that the explicitly and formally racist institutions and practices attacked in *Brown* and *Loving* were unconstitutional, the Court "held unconstitutional well-settled and long-established practices . . . in the name of higher constitutional values"[310] and "refuted those who believed that Supreme Court should respect settled customs and local traditions when those customs and traditions oppressed minorities, the politically unpopular, and the weak."[311] That refutation, and not a reverence for and continuation of entrenched and traditional discriminatory practices, is a significant development in our constitutional history.

309. WALTER MOSLEY, WORKIN' ON THE CHAIN GANG: SHAKING OFF THE DEAD HAND OF HISTORY 32 (2000).
310. Balkin, *supra* note 107, at 15.
311. *Id*. at 16.