

Is the Constitution COLORBLIND?

DEBATING ANTONIN SCALIA'S RECORD ON RACE AND EDUCATION

Brown v. Board of Education, the landmark 1954 decision barring school segregation, is a cornerstone of the American legal tradition. After more than a half century, however, its precise meaning remains contested. While conservatives view *Brown* as prohibiting the government from using racial classifications except in extraordinary circumstances, liberals believe the ruling leaves ample room for elected officials to take race into account when seeking to promote equal opportunity. Which interpretation prevails will continue to determine the extent to which public colleges can use race as a factor in admissions decisions, as well as the scope of school districts' efforts to create more integrated schools and classrooms.

In this issue's forum, legal scholars Shep Melnick and James Ryan examine this debate through the lens of the education rulings of the late Supreme Court justice Antonin Scalia. Melnick argues that Scalia's conservative reading of *Brown* has solid roots in the text of the U.S. Constitution and usefully prohibits judges from imposing their policy preferences on the nation's schools. Ryan, meanwhile, contends that Scalia's rulings reveal the extent to which the court's most famous "originalist" was willing to depart from his principles in order to strike down policies he found objectionable. At stake in their debate is nothing less than this question: Is our Constitution colorblind?

EQUAL PROTECTION BARS RACIAL FAVORITISM

by R. SHEP MELNICK



IN HIS 30 YEARS ON THE SUPREME COURT, Justice Antonin Scalia wrote surprisingly few opinions in education cases, and even when he did, he seldom mentioned education. Instead, he focused on issues such as standing, techniques of statutory interpretation, the meaning of the First Amendment, and the importance of judicial restraint. Scalia believed his job in education cases was to read and apply the text of the law, and not (*continued on page 52*)

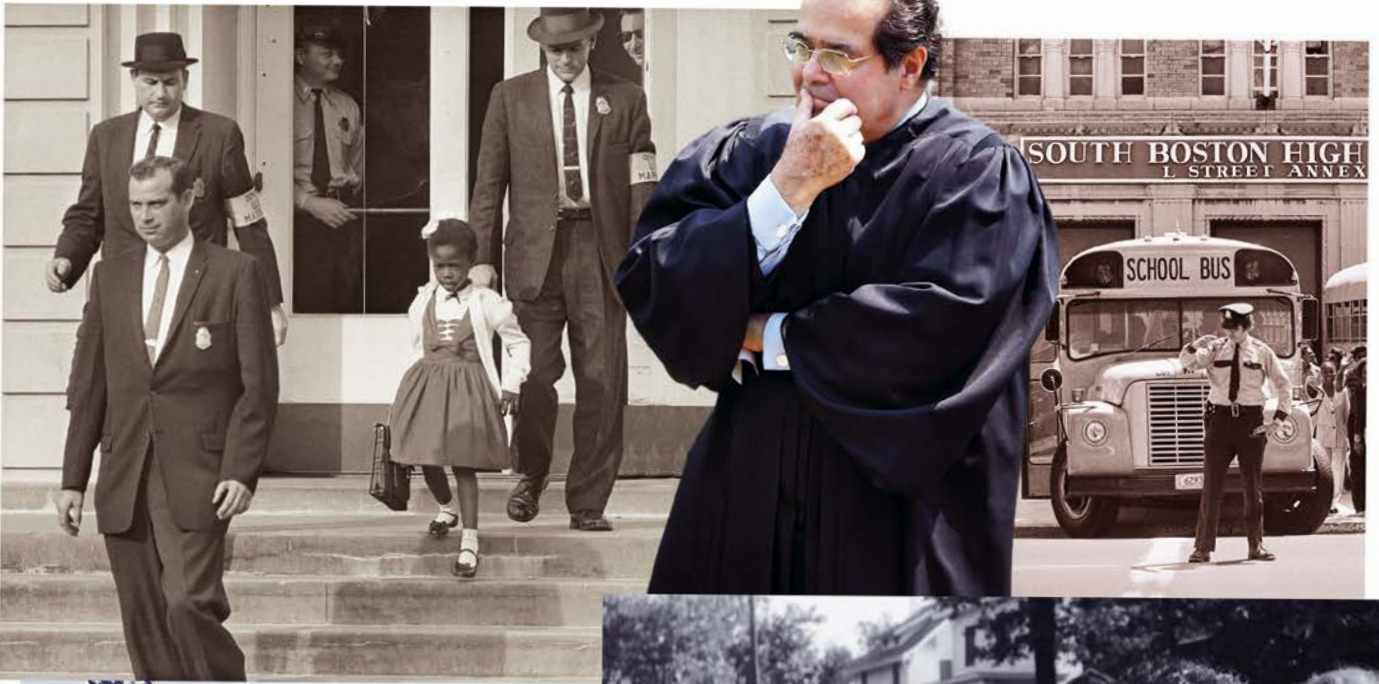
CHOOSING JUDICIAL ACTIVISM OVER ORIGINALISM

by JAMES E. RYAN



JUSTICE ANTONIN SCALIA was a staunch proponent of "originalism" in constitutional jurisprudence, an approach to deciding cases based on constitutional text as it was originally understood by its authors. Although he would occasionally follow precedent instead of the original understanding of constitutional text, Scalia argued that, in general, originalism was the only principled way for judges to avoid enshrining (*continued on page 53*)

PHOTOGRAPHS / CLOCKWISE UPPER LEFT: UNITED STATES DEPARTMENT OF JUSTICE, PUBLIC DOMAIN; AP PHOTO/IRON EDMONDS; AP PHOTO/J.J. WALTER GREEN; WILL COUNTS COLLECTION/INDIANA UNIVERSITY ARCHIVES; COURTESY DANVILLE BEE; AP PHOTO/MANUEL BALCE CENETA



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allow his personal views on education to come in through the backdoor via free-ranging interpretations of vague statutory and constitutional provisions.

This set him apart from his more-liberal colleagues, who viewed *Brown v. Board of Education* (1954) not as a prohibition on the use of racial classifications in education, but rather as a mandate for judges to do whatever they could to promote “equal educational opportunity.” Judges who embrace this understanding of *Brown* and equal protection feel compelled to listen to the “experts” on educational inequality and to use their judicial authority to remedy injustices. Scalia, in contrast, favored a colorblind interpretation of the equal protection clause, that, in his words, “proscribes government discrimination on the basis of race, and state-provided education is no exception.”

Political Jurisprudence?

In his companion essay for this forum, James Ryan maintains that Scalia’s defense of judicial deference is fraudulent. There are many who share this view. Behind Scalia’s “originalism” and “textualism,” they claim, lies a conservative political point of view. In two key respects these critics are right. Scalia’s interpretive method is political in that it rests on an understanding of the proper operation of the political institutions of a liberal democracy. And it is conservative in the sense that he believed our public institutions (including our education system) are basically healthy, and should not be subjected to frequent rounds of reform by unelected judges and self-appointed experts. The key question here is the soundness of these political judgments.

It is fair to say that Scalia was relatively content with the way we have traditionally organized education in this country—or at least less critical of it than his more-liberal brethren. Until relatively recently, most education decisions and funding have been within the purview of local government. Local control of public schools combined with the availability of private schools promotes both choice and experimentation. The major flaw in this system—*de jure* racial segregation—has been ended. Critics rightfully note that this decentralization allows many forms of inequality to persist. But it is difficult to eliminate these inequalities without producing a stultifying uniformity and reducing voters’ control over education.

There are undoubtedly many ways our education system can be improved. Scalia saw such efforts not as the job of judges following the abstract theories of academic experts but of elected officials and the administrators appointed by them. Judges, he believed, should focus on establishing a few simple rules about what is legally permissible and what is forbidden. The rule of law, Scalia emphasized, is the law of rules. Judges should therefore look for rules that curtail the worst abuses rather than try to micromanage public schools.



The primary purpose of originalism, Scalia argued, is to dissuade judges from reading their personal understandings of what is fair, good, and just into the vague phrases of the Constitution.

Critics of Scalia’s originalism claim that this approach to constitutional interpretation exaggerates the extent to which we can understand the intentions of those who wrote the original Constitution or the Fourteenth Amendment. Scalia recognized that “it is often exceedingly difficult to plumb the original understanding of an ancient text” and to apply that understanding to contemporary issues. But for him that difficulty provided yet another argument for judicial restraint.

The primary purpose of originalism, Scalia argued, is to dissuade judges from reading their personal understandings of what is fair, good, and just into the vague phrases of the Constitution. When the Constitution is clear—for example, when it says that a state can deprive a person of “life” so long as it provides “due process,” or when it gives those accused of crimes the right to “confront” their accusers—judges need to follow those commands. Where the Constitution is ambiguous, “this Court has no business imposing upon all Americans the resolution favored by the elite class from

which the Members of this institution are selected.”

Scalia did not maintain, though, that the court should simply overturn decisions that have become embedded in our law and practices, however mistaken those decisions may have been. He usually adhered to the doctrine of *stare decisis*—respect for precedent. His approach looked not just to “text,” but to “tradition” as well. Regarding race and the equal protection clause, Scalia’s combination of text and tradition culminates in a simple rule: no governmental use of racial classifications except in extraordinary circumstances.

Brown, Green, and Colorblindness

For an originalist, *Brown* presents a serious problem. On the one hand, it has become a *(continued on page 54)*

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their own policy preferences into the law. He chastised those who instead believed in a “living” Constitution, which Scalia argued was simply a rationalization for “results-oriented”

judges to decide cases however they chose.

In some high-profile cases, Scalia followed originalism even when it led to results that he almost certainly did not favor as a matter of policy. In *Texas v. Johnson* (1989), for example, Scalia joined the majority in striking down laws prohibiting the desecration of the American flag, an act he despised but that he nevertheless concluded was protected by the First Amendment.

But his education cases—particularly those relating to the use of race in student-assignment and admissions policies in K–12 and higher education—paint a different picture. In these cases, Scalia was faithful neither to originalism nor to precedent. Indeed, these cases show a justice who seemed just as results-oriented as the judges and justices he scolded.

Three cases in particular illustrate this point. The first two are *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003), companion cases out of Michigan, in which the court struck down the University of Michigan’s affirmative-action plan for undergraduate admissions but upheld the law school’s admissions plan. The undergraduate plan used a numerical formula for considering race in admissions decisions, while the law school policy considered race as an undefined factor among many criteria. Scalia wrote a separate opinion in both cases, agreeing with the decision to strike down the university’s undergraduate-admissions plan and disagreeing with the decision to uphold the law school’s plan. The third case is *Parents Involved v. Seattle School District* (2007), in which the court limited the ability of school districts to explicitly consider race when attempting to integrate schools. Scalia did not write separately but joined in full the plurality opinion authored by Chief Justice John Roberts.

“Faint-Hearted Originalist”

I will start with *Gratz* and *Grutter*. Scalia’s view of affirmative action, generally, was that it was impermissible except to remedy a specific, identifiable harm. As many commentators have

convincingly explained, it is difficult to square this position with the original understanding of the Fourteenth Amendment’s equal protection clause (see Eric Schnapper’s “Affirmative Action and the Legislative History of the Fourteenth Amendment”; Michael Klarman’s “Brown, Originalism, and Constitutional Theory”; and Jed Rubenfeld’s “Affirmative Action”). The conventional view among historians appears to be that the equal protection clause, as originally understood, would not have prevented states from helping African Americans as opposed to hurting them.

There are historians who would disagree, undoubtedly, which makes Scalia’s failure even to engage in the historical debate genuinely puzzling. Remarkably, in some of the most high-profile cases the court ever heard—namely, cases involving race-based affirmative action—Scalia never offered an originalist defense of his views.

Scalia instead made simple, bare assertions about the meaning of the Constitution. A good example comes in his last line in *Grutter*, where he asserts that “the Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.” But this statement is oversimplified and inaccurate, and it fails to acknowledge that what counts as unconstitutional “discrimination” is a complicated question. There is no provision in the Constitution that explicitly prohibits any and all consideration of race; there is simply the equal protection clause in section one of the Fourteenth Amendment, which does not say a word about race. That clause vaguely says that no state shall deny to any person “the equal protection of the laws.” This principle is not self-enforcing but requires choices about the kinds of “discrimination” that are allowed and the kinds that

are not. For instance, people who violate speeding laws are fined or arrested, while law-abiding drivers are not. The two groups are treated differently, but no one would ever think this sort of “discrimination” is prohibited, because it is obviously justified.

One would expect an originalist like Scalia to abide by the choices contemplated and understood in 1868, when the Fourteenth Amendment was ratified. In other words, an originalist would proscribe the sort of discrimination that was originally understood to be prohibited by the equal protection clause and tolerate the rest. As mentioned above, most historians appear to believe that the original, common understanding of the clause is that it permitted various (*continued on page 55*)



The equal protection clause says that no state shall deny to any person the equal protection of the laws, which requires choices about the kinds of “discrimination” that are allowed and the kinds that are not.

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fundamental element of our legal and political culture. The authority of its central argument, that “separate is inherently unequal,” is now firmly established. On the other hand, it is far from clear that the original supporters of the Fourteenth Amendment believed that it prohibited school segregation. To advocates of a “living Constitution,” this lack of clarity is liberating: it frees them to do anything they think appropriate for promoting equal educational opportunity. For Scalia, in contrast, the challenge was to provide a solid constitutional foundation for *Brown* without empowering judges to wield it as a mandate to remake our schools.

Scalia claimed that the Fourteenth Amendment does provide support for school desegregation. In *Rutan v. Republican Party* (1990), he wrote that “the Fourteenth Amendment’s requirement of ‘equal protection of the laws,’ combined with the Thirteenth Amendment’s abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid.” Scalia focused on the general understanding of the terms “equal protection of the laws,” “due process of law,” and “privileges and immunities” in the late 1860s and thereafter. Although he could not prove there was broad support for prohibiting de jure segregation in 1868, he did show that there was a clear and vibrant tradition in case law that viewed the use of racial classifications by government as pernicious, particularly because such a practice is so susceptible to the tyranny of majority faction. This position was presented most forcefully in Justice John Marshall Harlan’s well-known dissent in *Plessy v. Ferguson* (1896). And Congress, through its voting patterns during the 1860s and 1870s, expressed a similar opposition to racial classifications, as the constitutional scholar Michael McConnell has demonstrated.

That “colorblind” interpretation of the Fourteenth Amendment was endorsed by the NAACP lawyers who brought the long string of cases culminating in *Brown*. “That the Constitution is color blind is our dedicated belief,” they wrote in their 1953 brief. And in his arguments before the court, chief counsel Thurgood Marshall maintained that the Fourteenth Amendment denies states the authority “to make any racial classification in any government field.”

This was also the understanding of the presidents who

proposed the Civil Rights Act of 1964 and the members of Congress who voted for it. That seminal law explicitly states that “desegregation” means the assignment of students to schools “without regard to their race, color, religion, or national origin,” and shall not be interpreted to mean “the assignment of students to public schools in order to overcome racial imbalance.” As President John F. Kennedy put it a few months before his death, “I think it would be a mistake to begin to assign quotas on the basis of religion, or race, or color, or nationality. I think we’d get into a good deal of trouble.”



Given the dangers inherent in the use of racial classifications, Scalia maintained, we should take this tool out of the hands of public officials, even if they claim to use it for “benign” purposes.

In an important sense, Ryan is right to claim that Scalia’s embrace of Harlan’s colorblind interpretation of the equal protection clause is “results-oriented.” Scalia was above all concerned with the political consequences of allowing public officials to use racial classifications. Indeed, it would be hard to avoid addressing a question of this magnitude without thinking about the long-term consequences of competing interpretations. Here, Scalia quotes from the constitutional scholar Alexander Bickel, who argued that a “racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice.” A quota, Bickel charged, is a “divider of society” and a “creator of castes” that “can easily be turned against those it purports to help.” Given the dangers inherent in the use of racial classifications, Scalia maintained, we should take this tool out of the hands of public officials, even if they claim to use it for “benign” purposes.

In his opinion for the court in *Parents Involved v. Seattle School District* (2007), Chief Justice John Roberts illustrated Bickel’s point. Roberts noted that according to the rules the Seattle School Board had established to promote “diversity” in its schools, “a school that is 50 percent white and 50 percent Asian-American . . . would qualify as diverse,” but “a school that is 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white . . . under Seattle’s definition would be racially concentrated.” Especially at exam schools, boosting admissions for some groups comes at the expense of other groups—usually Asian Americans, who have also faced harsh discrimination over the course of American history. In Kansas City in the late 1980s and early ’90s, African American parents were justifiably irate when the federal court’s integration plan denied their children (continued on page 56)

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kinds of discrimination on the basis of race, including “discrimination” *in favor* of African Americans. One might therefore suppose that Scalia would have no problem with affirmative action, even if he personally considered it bad policy. This makes it even more surprising, and disappointing, that Scalia never attempted to defend his decision from an originalist perspective. And it raises the obvious question: why abandon originalism in this context?

Scalia once famously remarked that he was a “faint-hearted originalist,” meaning in part that he would sometimes forsake originalism in order to obey the command of *stare decisis*, that is, he would follow established precedent. In *Grutter*, however, Scalia ignored the original understanding of the equal protection clause not to follow precedent but to break from it. Rather than abide by the precedent of *Regents v. Bakke* (1978), which allowed for affirmative action within certain constraints, Scalia expressed categorical opposition to race-based affirmative action. In *Grutter* then, Scalia appears to have abandoned both originalism *and* precedent to arrive at his position.

That position, moreover, was entirely consistent with his stated “policy” views about affirmative action. Scalia was not a fan of race-based affirmative action, as he had spelled out publicly (and sharply) before becoming a justice. One can agree or disagree with that policy position, of course. But to ignore originalism and break from precedent to reach a result that is consistent with a personal policy preference is difficult to defend as legally principled. This is not to say, of course, that Scalia’s view of affirmative action policy was itself unprincipled; reasonable people can and do disagree on the legal, moral, and practical merits of affirmative action. But in cases like *Texas v. Johnson*, Scalia remained true to his legal principles and struck down an anti-flag-burning law that, as a matter of policy, he obviously favored. Why he seems to have abandoned those principles when it came to affirmative action remains a mystery.

Voluntary Integration

One sees a similar approach in *Parents Involved*, which presented the question of whether K–12 schools could take voluntary steps toward integration, that is, whether and when schools could

consider race in student assignments. In *Parents Involved*, Scalia joined the plurality opinion of Roberts, who took the categorical view that race can never be taken into account, even when districts are trying to integrate schools rather than segregate them. (“The way to stop discriminating on the basis of race,” Chief Justice Roberts wrote, “is to stop discriminating on the basis of race.”) Roberts argued that this position was commanded by the Constitution and was consistent with *Brown v. Board of Education* (1954), which in Roberts’s view was not about school integration but about prohibiting any use of race in school assignments, regardless of the purpose.

Here again, one finds Scalia willing to abandon originalism not to follow precedent but to break from it (or at least to make new law). Critics of originalism such as Michael Klarman have pointed out that *Brown* is difficult to justify on originalist grounds, as there is little evidence that the equal protection clause was originally understood to outlaw school segregation. If *Brown* cannot be justified on originalist grounds, some scholars contend, then originalism should be rejected, because *Brown* is a seminal case whose outcome has overwhelming support in our society—both legally and morally. Over time, Scalia responded in different ways to this contention, sometimes suggesting that critics were right about *Brown* but wrong in concluding that it discredited originalism, at other times suggesting that Justice John Marshall Harlan’s dis-

sent in *Plessy v. Ferguson* (1896)—arguing for a colorblind constitution—captured the correct original understanding. Neither of his responses, however, justifies his position on voluntary integration.

To begin, many legal historians and constitutional scholars seem to agree that the equal protection clause, as originally understood, did not prohibit segregation, because integration—including integrated schools—involved a “social” right, not a civil right, and therefore fell outside the ambit of that clause. Scalia, as mentioned above, sometimes seemed to accept this argument and agreed that the original understanding of the equal protection clause could not justify the outcome in *Brown*. But in his view, it did not follow that originalism should be rejected out of hand. Yet if the equal protection clause does not apply to school segregation, it obviously would not prohibit the voluntary *integration* of schools, either. Under this view, states would be free either (*continued on page 57*)



In affirmative action cases, Scalia ignored originalism and broke from precedent to reach a result that was consistent with his personal policy preference.

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of students on the basis of race reinforces racial thinking without providing countervailing benefits. Assertions of “benign” intent hardly ensure that public policies will not have perverse consequences.

Until the early 1970s, no one other than segregationists challenged the colorblind interpretation of the equal protection clause and *Brown*. This changed in a flurry of Supreme Court decisions on school desegregation, most importantly, *Green v. New Kent County* (1968) and *Swann v. Charlotte-Mecklenburg Board of Education* (1971). Justice William Brennan’s opinion for a unanimous court in *Green* set the stage for large-scale busing. It required school districts that had previously maintained a “dual” school system to take all steps necessary to convert to a “unitary” school system, one in which no schools are “racially identifiable,” because the enrollment of each school reflects the racial balance of the school district as a whole. District court judges took this to mean that desegregation orders must be revised on a regular basis to ensure racial balance. This practice continued for decades.

In two 1992 cases, *Freeman v. Pitts* and *U.S. v. Fordice*, Scalia addressed the question of how long such efforts at racial balancing must last. His principal purpose was to distinguish the extraordinary measures necessary for dismantling Jim Crow in the 1960s and 1970s from the “ordinary principles of our law, of our democratic heritage, and of our educational tradition.” He maintained that “plaintiffs alleging equal protection violations must prove intent and causation and not merely the existence of racial disparity,” and that “public schooling, even in the South, should be controlled by locally elected authorities acting in conjunction with parents, and that it is desirable to permit pupils to attend schools nearest their homes.” For Scalia, the proper response to a mistaken or outmoded precedent was not necessarily to overturn it but to stop expanding it, narrow it whenever possible, and thus “revert to the ordinary principles of our law.”

Ryan and other defenders of “benign” racial sorting, in contrast, insist that the use of remedies originally available only to judges charged with dismantling an entrenched racial

access to the magnet schools of their choice because so many seats had been set aside for white children—who did not show up in sufficient numbers to fill them. This shuffling

caste system in the South should also be available to public officials presiding over school systems that have not violated the Fourteenth Amendment. The fullest presentation of this point of view is Justice Stephen Breyer’s impassioned dissent in *Parents Involved*. It is notable that Breyer never quoted from *Brown*, but only referred to its “hope and promise.” The main

support for his position came from academic studies and Chief Justice Warren Burger’s opinion in *Swann*. Ryan, too, places much weight on the *Swann* opinion. That is a strange choice, given that it is among the Supreme Court’s most poorly constructed and internally contradictory opinions. *Swann* was the product of a complicated effort to extract a unanimous ruling from a deeply divided court.

In the end, the argument of Breyer and Ryan boils down to the claim that by using potentially dangerous racial classifications we can produce racially integrated schools that improve the educational opportunity of minority students. How do we know this? The experts tell us so, or, as Justice Clarence Thomas pointed out, not all the experts, just those Breyer chose to cite. Breyer “unquestioningly” relied upon “certain social science research to support propositions that are hotly disputed among social scientists.”

Can *Brown* be reconciled with a full-throated, doctrinaire understanding of originalism? Probably not. For that reason, no one endorsing that form of

originalism has sat on the Supreme Court since 1954, and none are likely to be appointed in the future. But Antonin Scalia considered himself a “faint-hearted originalist” who saw *Brown* as part of a long and noble tradition that had been explicitly endorsed by Congress and the president in 1964 and that had since become deeply embedded in our political culture. At its heart lies a simple rule—no use of racial classifications except to remedy specific constitutional violations—that does as much to constrain as to empower judges. This rule might not lead us to the best possible education outcomes, but it prevents the worst type of abuses. Having unwisely expanded exceptions to the colorblind rule, Scalia argued, the court should now return to the original understanding of *Brown*.

This essay is abridged from a chapter in the forthcoming volume Scalia’s Constitution: Essays on Law and Education, edited by Paul E. Peterson and Michael W. McConnell, Palgrave Macmillan, 2018.



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to segregate or integrate.

On the other hand, if school segregation was indeed incompatible with the original understanding of the equal protection clause, there

are only two possible rationales for this view. The first is that the equal protection clause was actually intended to prohibit the perpetuation of a caste system, and that school segregation was obviously attempting to perpetuate a racial caste system. Attempts to break down that system—whether through courts or legislatures—would then be consistent with the original understanding. School segregation would be prohibited, but school integration would be tolerated—indeed, encouraged.

The second possible rationale is the notion that the equal protection clause requires colorblindness and prohibits any and all uses of race. The argument for colorblindness in this context, however, is no different from the argument used against race-based affirmative action. As mentioned, most historians seem to believe that argument is false and, again, Scalia never tried to make the originalist case that race cannot be taken into account even when the government seeks to help, not hurt, African Americans. Harlan's dissent in *Plessy*, despite his rhetoric about a colorblind Constitution, hardly settles the issue; indeed, Harlan himself indicated in another opinion and in his extrajudicial writings that he believed school segregation was constitutional.

No matter how you approach it, then, when it came to voluntary integration, Scalia abandoned what a commitment to originalism would appear to require. He did not do so, moreover, in order to follow the clear command of precedent. First, the idea that voluntary integration is inconsistent with *Brown*, which Roberts suggested in the plurality opinion Scalia joined, is implausible. *Brown* dismantled state-enforced segregation with the expectation that doing so would lead to integrated schools. The whole thrust of *Brown* was that segregation was actually harmful to students, not that the use of race itself was always and everywhere to be rejected. In addition, the idea that legislatures would take voluntary efforts to integrate schools would have seemed far-fetched at the time of *Brown*. The related idea that the justices who voted in *Brown*, or the lawyers who argued against segregation, would have had objections to voluntary efforts to integrate seems equally implausible.

Just how implausible is demonstrated in *Swann v.*

Charlotte-Mecklenburg (1971), the second precedent rejected by Roberts and Scalia. In that case, the court approved the use of busing to desegregate schools under court order. Writing for a unanimous court, Chief Justice Warren Burger explained that the case involved the limits of judicial authority, and he sought to distinguish the scope of judicial authority from the authority of school officials. In a telling passage, he wrote:

School authorities are traditionally charged with broad power to formulate and implement educational policy, and might well conclude, for example, that, in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities*; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Roberts did not have a convincing explanation as to why the court would have made this plain statement in a unanimous opinion if it were not obvious to the court in 1971 that this was the proper

understanding of *Brown*. And it was this statement, as much as anything, that was behind Justice John Paul Stevens's observation in his dissenting opinion in *Parents Involved* that no member of the court he joined in 1975 would have agreed with Roberts—and Scalia—that explicitly race-based voluntary integration is categorically prohibited.

It remains a puzzle why Scalia was willing to abandon originalism in some cases but not in others, even when, as in the flag-burning case, the originalist approach led to outcomes that he almost certainly disfavored personally. It also necessarily raises the question of whether Scalia's commitment to originalism was principled, strategic, or a bit of both. At the very least, these three politically charged education cases complicate the picture of a jurist best known for a methodology—originalism—that was strikingly absent in these contexts.

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