

Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon

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I. Justice Clarence Thomas at the Rubicon: A Story From an Alternate Reality		

It is 1967, late on a June evening in Washington, with only the slightest hint in the air of the oppressive Potomac summer to

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come. Clarence Thomas, the first and only African-American Supreme Court Justice in United States history, sits alone in his chambers. The moment of decision is at hand in the most important case in which Thomas has yet participated: *Loving v. Virginia*.¹ The rest of the Court, having unanimously voted to strike down the Virginia anti-miscegenation statute at issue in *Loving*, has already signed off on Chief Justice Warren's short opinion. All that remains is for Thomas to cast his vote. Though his position will not change the outcome of the case, he agonizes.

Before him are two drafts. At his left is a draft dissent,² arguing that the Framers of the Fourteenth Amendment neither believed nor intended that their handiwork would invalidate State anti-miscegenation laws. The Court, Thomas argues in his draft dissent, should be faithful to the Framers' original understanding; indeed, for a committed originalist like Thomas, this is the end of the inquiry, whatever any Twentieth Century Justice may think.

Glancing to his right, Thomas sees his other option, a draft concurrence. This draft argues that anti-miscegenation laws employ a racial classification in violation of the color-blindness principle comprising the core of the Fourteenth Amendment.³ This principle is every bit as towering a pillar of his jurisprudence as the originalism contained in his draft dissent. Hence his dilemma: dissent as an originalist, or concur on the basis of color-blindness.

The considerations that have been occupying his thoughts since oral argument vie again for attention. Try as he might, Thomas cannot ignore his personal discomfort with the notion of dissenting in *Loving*. Virginia has discreetly avoided enforcing its law against Ginnie and him since they, undoubtedly the nation's most prominent interracial couple, moved there following his Supreme Court confirmation. He cannot help but wonder how a dissent from someone in his unique position would be used by racists who believe anti-miscegenation laws are not only constitutional, but a good thing.

And he thinks of Ginnie. Their love is as real and as entitled to respect as that of any all-white or all-black couple. With an instinct bordering on moral outrage, Thomas knows it is wrong for anyone to deny them that respect, especially on the basis of the color of their skin. It is worse still for the State to give its official voice and its weight of the criminal law to that disrespect. The

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

2. See *infra* Part II for a draft of Thomas' dissent.

3. See *infra* Part III for a draft of Thomas' concurrence.

Court is doing the "right" thing, Thomas knows, by striking down Virginia's miscegenation statute. How much better it would be, though, if Virginia would do so itself, or if the nation would use the political process to amend the Constitution to compel Virginia to do the right thing.

There are also serious jurisprudential implications to his decision. A dissent inevitably would become a central part of his legacy, something with which he is not entirely comfortable. His discomfort stems not from any shyness. Quite the contrary. He is proud of the analysis he has penned, knowing it is the only stance consistent with his unbending fidelity to the Originalist School of constitutional interpretation.

That is what bothers him. The Court would be forced to uphold the anti-miscegenation statute if it employed the Originalist School's methods—*his* methods. Thomas views it as his mission, perhaps even his destiny, to eventually lead the Court to a committed, consistent originalism.⁴ He also knows his dissent, should he issue it, would be misinterpreted by the mass media and general public as an endorsement of anti-miscegenation laws. Such a linking of originalism with racism would be inimical to the goals of the Originalist School. He wonders how long it would be, if ever, and how many law review articles and speeches it would take before the public would grasp the difference between finding a practice to be constitutional and approving of it. In the meantime, the Originalist cause would have been set back years, maybe decades.

Thomas is growing increasingly irritated with himself. He prides himself on his decisiveness, but on this case he seems unconquerably hesitant; he senses no course that he can confidently

4. One can imagine a lonely Justice Thomas, waiting through the Warren Court years, all the while issuing blistering dissents from non-originalist decisions. Finally, when William Rehnquist joins the Court in 1972, Thomas would gain a fairly reliable ally in his crusade. Then, in 1986, Antonin Scalia would become the first truly constant devotee of Thomas' jurisprudence. The three together would become known as the "Thomas Wing," with Justice Thomas being the unquestioned leader of the group, having spent years sounding a solitary call for change in the Court's approach. Scalia, in fact, would be much criticized as a mere acolyte of Thomas, without a vision or voice of his own. Finally, in 1998, President Patrick Buchanan would appoint Justices Edith Jones and Kenneth Starr to replace Justices John Paul Stevens and Sandra Day O'Connor, giving the Thomas Wing a clear majority. When Jones and Starr join Thomas, Rehnquist and Scalia, Thomas will have gone from lone dissenter to triumphant visionary, and a slew of non-Originalist decisions would shortly fall by the wayside. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Katzbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

follow. "Damn it," he thinks, "this will not do. Tonight, I will decide, and tomorrow I will circulate one of these opinions." He thus resolves to read each opinion one last time, then make his choice. He begins with the dissent.

* * * * *

II. Justice THOMAS, dissenting

The most dangerous tendency for the members of this Court is to manufacture those rights we most fondly wish were contained in the Constitution, but can be found neither in the text nor the understanding of the Framers. For me, this threat has never loomed more prominently than it does today. Any reader familiar with my life as an American citizen will understand my abiding belief that no person should be prevented from marrying the love of his or her life, simply because the individuals are of different races. For me, this is a matter of fundamental principle.

But I write today not to express my views on what policies the Commonwealth of Virginia should adopt regarding interracial marriages. Nor do I intend to express my opinion as to whether our Constitution ought to take this decision out of Virginia's hands by prohibiting the States from adopting bans on such marriages.

Rather, I write as a Justice of the Supreme Court, bound by my oath of office to interpret the Constitution faithfully according to its terms. That oath compels me to conclude, though I wish it were otherwise, that nothing in the Constitution, as written or intended by its Framers, prevents Virginia from enacting the policy it has chosen.⁵ Because "[t]his case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable,"⁶ I must respectfully and sorrowfully dissent.

A.

The question before the Court is whether the Equal Protection Clause⁷ of the Fourteenth Amendment restricts the power of

5. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (observing the problem of the "faint-hearted originalist," who is unable or unwilling to adhere to the original understanding in the most difficult cases). I take some comfort in the knowledge that, after today, few would accuse me of being "faint-hearted" in my application of originalism.

6. *Bennis v. Michigan*, 516 U.S. 442, 454 (1996) (Thomas, J., concurring).

7. The Court also concludes that the Virginia statute violates the Due Process Clause because it interferes with the fundamental right of marriage. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967). I have expressed my disagreement elsewhere with

the States to bar interracial marriages.⁸ Answering this question requires us to determine the original understanding of what the text of the Fourteenth Amendment meant when it was ratified in 1868 by:

[E]xamining various evidence, including not only, of course, the text of the Constitution and its overall structure, but also the contemporaneous understanding of [the Equal Protection Clause] (particularly the understanding of the [Thirty-ninth] Congress and of the leading participants in the [state ratification process])⁹

In determining the original understanding of the Clause, it is tempting to retreat to unacceptably high levels of generality in describing the Framers' intent by saying simply that they intended to create a "color-blind" Constitution, and therefore to bar the States from utilizing any racial classifications. This was the view of Justice John Marshall Harlan¹⁰ in his celebrated dissent in *Plessy v. Ferguson*.¹¹ At times I have invoked color-blindness in describing the original intent of the Equal Protection Clause.¹² As

the premise that the Due Process Clause has any such substantive content, and will not repeat my position here. See *United States v. Carlton*, 512 U.S. 26, 39-42 (1994) (Scalia, J., joined by Thomas, J., concurring in the judgment).

8. On one occasion, I joined an opinion expressing the view that anti-miscegenation laws would violate the Equal Protection Clause as it was originally understood. See *Planned Parenthood v. Casey*, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that the "tradition" supporting anti-miscegenation laws "was contradicted by a text—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value") (emphasis added). Obviously, the question raised here was not at issue in *Casey*. Hence, the view expressed in that opinion cannot substitute for careful analysis of the question, and did not resolve it definitively. For the reasons I explain in this opinion, the view expressed in *Casey* is either insupportable as a matter of the original understanding of the Equal Protection Clause or is accurate only if carefully qualified and substantially limited.

9. Scalia, *supra* note 5, at 852 (discussing Chief Justice Taft's opinion in *Myers v. United States*, 272 U.S. 52 (1926), as an example of originalist jurisprudence).

10. Despite Justice Harlan's almost universal reputation as an unflinching advocate of color-blindness, there is much historical evidence that his views were more complex, to the point that it is arguable that he might have even held segregated public schools to be constitutional. See Garrett Epps, *Of Constitutional Seances and Color-Blind Ghosts*, 72 N.C. L. REV. 401, 421-26 (1994) (discussing ambiguities in Harlan's record, including significant indications that he accepted some racial classifications).

11. 163 U.S. 537, 554 (1898) (Harlan, J., dissenting) ("In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.").

12. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) ("[U]nder our Constitution, the government may not make distinctions on the basis of race.").

I maintained in *Missouri v. Jenkins*,¹³ “[a]t the heart of this interpretation of the Equal Protection Clause lies the principle that the Government must treat citizens as individuals, and not as members of racial, ethnic or religious groups.”¹⁴ Since the Court correctly concludes that the Virginia statute at issue here classifies citizens in terms of their race,¹⁵ the statute violates this understanding of the Equal Protection Clause.

Though it is tempting simply to accept Justice Harlan’s view, both because it produces a more tolerable outcome and because he “was a brilliant and accomplished man,”¹⁶ I cannot do so. What I said in *U.S. Term Limits, Inc. v. Thornton* of Justice Story’s interpretation of the Tenth Amendment is equally valid with respect to Justice Harlan’s view of the Fourteenth Amendment: “he was not a member of the Founding generation, and his [*Plessy* dissent was] written [nearly] a half century after the framing. Rather than representing the original understanding of the [Fourteenth Amendment], [it] represent[s] only his own understanding.”¹⁷

Notwithstanding Justice Harlan’s views, the color-blind Constitution ideal cannot be the basis for decision here. It represents an originalism so diluted as to be unrecognizable.¹⁸ While the ideal is useful as a general guidepost,¹⁹ it cannot be substituted for

13. 515 U.S. 70 (1995).

14. *Id.* at 120-21.

15. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race.”).

16. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting) (referring to Justice Story).

17. *Id.*

18. See ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 8-21 (1992) (arguing that, not only did the Fourteenth Amendment create a color-blindness norm, but that even the antebellum Constitution reflects, to some extent, a commitment to that principle). Kull cites two aspects of the text itself, the rejection of racial language in the Articles of Confederation’s Comity Clause, which was then incorporated into the Constitution, and the care the Framers took not to mention slavery in the Constitution. See *id.* at 8-10. In attempting to find support for our nation’s long commitment to color-blindness in this fashion, Kull overreaches; no Constitution facilitating race-based chattel slavery could dare to profess a devotion to color-blindness. I regard Kull’s notion that “[t]he framers had compromised with slavery but not with racial discrimination” as incoherent. *Id.* at 20. The absence of explicit mention of slavery and race reflects shame, not color-blindness.

19. See, e.g., Stephen L. Carter, *Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice*, 69 TEX. L. REV. 759 (1991) (book review). It goes too far to say of color-blindness, as Professor Stephen Carter does, that “the authors of the Fourteenth Amendment intended nothing of the sort.” *Id.* at 778. While color-blindness has limited utility, and must give way in the face of clearly expressed contrary intentions in particular areas where the Framers did not intend the Equal Protection Clause to apply at all (such as anti-miscegenation laws), it does provide a governing principle for those areas into which the Found-

careful historical analysis of whether the Framers of the Fourteenth Amendment intended to bar racial classifications *in this particular area*.²⁰

For this reason, our mandate is to search for the original understanding at the most specific level for which there exists historical evidence sufficient to support reasonably confident judgments regarding the Framers' views. If, for example, the record did not permit us to draw conclusions about the Framers' intent with respect to anti-miscegenation laws in particular, it would be appropriate to resort to a higher level of generality,²¹ perhaps even the very high level of abstraction represented by the color-blind Constitution ideal.²² That course, however, is foreclosed here by

ers intended the Clause to reach. See *infra* notes 32-45 and accompanying text (describing where the Equal Protection Clause does and does not reach). Color-blindness also provides a "default" principle for use in those cases where no more specific intent can be discerned. As Professor H. Jefferson Powell has observed, historical investigation sometimes yields less than ideal evidence of the intent of the Founders. See H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 688 (1987) ("Often the historical researcher, or the constitutional interpreter seeking enlightenment from history, will find himself considering opposing accounts of the founders' thought that seem of roughly the same plausibility."). That said, to enforce upon the States a color-blindness norm in areas where the Framers of the Fourteenth Amendment clearly did not intend it would "require[] [us] to transcend (or ignore, if one prefers) the framers' intentions." Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 216 (1991). I am unwilling either to transcend or ignore the Framers' intentions.

20. See, e.g., Robert J. Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811, 829 n.67 (1990) (arguing that originalism requires focus on the intent of the Founders, not general values abstracted from the text); David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1380 (1990) (suggesting that originalists who are "hostile to the interpolation of the interpreter's normative values into the interpretive process" must "show that the result is neutrally derivable from the originalist history").

21. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990). In Judge Robert Bork's attempt to provide an originalist justification for *Brown v. Board of Education*, 347 U.S. 483 (1954), he makes a passing attempt at advancing this argument, stating that "[t]he ratifiers probably assumed that [school] segregation was consistent with equality but they were not addressing segregation." *Id.* at 82. In other words, Judge Bork suggests that we can justifiably look to the greater abstraction of equality, because the more specific issue of school segregation was not addressed. As Raoul Berger demonstrates, however, the historical record does convincingly address school segregation, see Raoul Berger, *Robert Bork's Contribution to Original Intention*, 84 NW. U. L. REV. 1167, 1181-83 (1990) (addressing miscegenation with conviction), and it even more convincingly addresses miscegenation. See *infra* notes 37-45 (discussing the historical record on the Fourteenth Amendment and miscegenation).

22. I will focus on the specific question of whether the Framers intended to render anti-miscegenation laws unconstitutional rather than on the less-helpful question of whether they intended to adopt a general principle of color-blindness. Even at the broader level of generality, it is doubtful that the Framers' intent was in keeping with twentieth-century views of equality. See Epps, *supra* note 10, at 408 (arguing that the "flickers" of "color-blind language . . . in the legislative his-

the presence of evidence at a very specific level,²³ evidence I will

tory of the Fourteenth Amendment" are outweighed by the rejection of language that would explicitly have enacted such a requirement); see also *infra* notes 29-36 and accompanying text (discussing the Framers' rejection of more sweeping language in the Fourteenth Amendment).

23. See Richards, *supra* note 20, at 1382 ("[A] contemporary view of equality that condemns the unjust ravages that state-supported racism has worked on racial minorities . . . does not track the Founders' conception."). An originalist, at least one committed to neutrality in deriving the original understanding, cannot "giv[e] supremacy to a more abstract over a more concrete understanding of the Founders' intent." *Id.*

It is for this reason that I do not discern in Judge Bork's argument an originalist basis for the decision today. See BORK, *supra* note 21, at 73-83. In his discussion of *Brown*, Judge Bork acknowledged it is inescapable that "those who ratified the [Fourteenth] [A]mendment did not think it outlawed segregated education or segregation in any aspect of life." *Id.* at 75-76. This should end the matter for a committed originalist. Judge Bork, however, argued that despite being contrary to this original understanding, *Brown* is consistent with a broader principle derivable from the text, which is that "equality under law was the primary goal." *Id.* at 82. In Judge Bork's view, since the Founders were simply wrong in asserting that segregated schools were consistent with the broad equality principle, judges are justified in ignoring the specific intent in favor of enforcing the correct version of the more general principle. See *id.* Indeed, judges are required to do so, because "equality, not separation, was written into the text." *Id.* Judge Bork's argument founders in its choice of this overly high level of generality. See Carter, *supra* note 19, at 786-87 (criticizing Judge Bork for choosing "the abstract goal of achieving black equality" over "the concrete expectation [of the Founders] that schools are to remain segregated"). To put it another way, Judge Bork defends the outcome in *Brown* by relying on the idea that the constitutional concept of "equality," which the Framers adopted in 1868, had changed by 1954 in a way that rendered segregation inconsistent with equality. One might reasonably ask of Judge Bork the same question he posed in his criticism of Professor Ronald Dworkin's view that the Cruel and Unusual Punishment Clause of the Eighth Amendment bars capital punishment. See BORK, *supra* note 21, at 214. Even though the Framers plainly contemplated application of the death penalty, Judge Bork asked, "Why should we think that the ratifiers of 1791 legislated a concept whose content would so dramatically change over time that it would come to outlaw things that the ratifiers had no idea of outlawing?" *Id.* (emphasis added).

Besides erroneously relying on the Framers' intent to enact a general and elastic principle of equality, Judge Bork errs in defining that principle in modern terms. The mission of originalism is to understand what the Founders meant when they wrote "equality" into the text of the Fourteenth Amendment. See Berger, *supra* note 21, at 1178 ("Broadly speaking, the original intention means the draftsman's explanation of what he intended to accomplish by the words he used."). That question cannot be answered by reference to notions of equality influenced by the morality and norms developed in a century of subsequent history. See Powell, *supra* note 19, at 668 ("[T]he thoughts, concerns, motivations, and ideals of other eras were not identical with our own. . . . As a consequence, the actions of past persons often were undertaken or understood in ways we would regard as peculiar or even irrational.").

I agree with Judge Bork that, from our current perspective, the Framers were wrong to believe that equality could be consistent with separation. See Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1899-1900 (1995) (suggesting that although the principles under which segregated schools were seen as consistent with the Fourteenth Amendment "do not resonate for today's generation," this "hardly seems

proceed to review next.

B.

One of the strongest indications that the Framers of the Fourteenth Amendment did not intend the Equal Protection Clause to displace anti-miscegenation laws is that those laws remained undisturbed in the years immediately following ratification.²⁴ In the days and years immediately following passage of the Amendment, virtually all State courts, Northern and Southern, continued to enforce anti-miscegenation statutes.²⁵ It is therefore implausible to believe that the Framers of the Fourteenth Amendment intended to end the States' power to ban interracial marriage. This weighs heavily in favor of Virginia's position.

Nevertheless, the post-ratification status of anti-miscegenation laws is merely one indication, albeit a powerful one, of their constitutionality. Until the issue is definitively resolved by this Court, one cannot be certain that such laws do not violate the original understanding of the Fourteenth Amendment, even if the practice and the provision have co-existed over time. Of course, this Court did come near to resolving the issue shortly after pas-

relevant . . . to the question of whether the distinctions [were seen as valid] from the perspective of 1866-68"). Nevertheless, if that is what the Framers meant, that is perforce what the Constitution means. If it is true of racial segregation in the public schools, it is also true of anti-miscegenation laws. The relevant question is whether the Founders' conception of "equal protection of the law" included the right to interracial marriage, not whether *our* conception of equal protection would include that right.

24. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 866 (1995) (Thomas, J., dissenting) (suggesting that the post-ratification period, in which "five States supplemented the constitutional disqualifications in their very first election laws," is evidence that the Qualifications Clause of Article I does not prescribe exclusive qualifications for members of Congress); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358-69 (1995) (Thomas, J., concurring in the judgment) (explaining that widespread practice of anonymous pamphleteering at the time of the founding of the nation indicates that the Framers viewed the distribution of pamphlets as constitutionally protected free press); see also Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 955-56 (1995). The evidence indicates that the Fourteenth Amendment was not intended to eliminate segregated schools. "[T]he practice of school segregation was widespread in both Southern and Northern states, as well as the District of Columbia, at the time of the proposal and ratification of the Amendment." *Id.* This practice "almost certainly enjoyed the support of a majority of the population even at the height of Reconstruction." *Id.* at 956.

25. At least 29 states maintained miscegenation laws after the Civil War. See Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 50 (1964) ("The popularity of the statutes continued so that during the nineteenth century thirty-eight states had miscegenation statutes at one time or another. The period surrounding the Civil War found nine of these states repealing their statutes.") (footnotes omitted).

sage of the Fourteenth Amendment, by upholding in *Pace v. Alabama*,²⁶ a statute imposing greater penalties for interracial adultery or fornication than for similar intraracial conduct. While this Court is free to revisit the issue and overrule *Pace*, we must acknowledge that *Pace* was nearly contemporaneous with passage of the Fourteenth Amendment and, therefore, is entitled to considerable deference as we attempt to discern the Fourteenth Amendment's meaning one hundred years later.²⁷

Nevertheless, our judgment today must not rest solely on the views we expressed in *Pace*, nor on the views of the many courts reaching the same conclusion a century ago. A penetrating examination of the original meaning of the Equal Protection Clause is necessary. Such an examination, however, confirms what is strongly suggested by these decisions and by the maintenance of anti-miscegenation laws after 1868: the Fourteenth Amendment was not understood to render those laws unconstitutional. The evidence is compelling that, when ratified, the Fourteenth Amendment was not understood either to provide a general principle of color-blindness or to reflect a specific intent to affect anti-miscegenation laws. As for the general principle, some of the sponsors of the Amendment had earlier proposed language explicitly barring governments from using racial classifications of all kinds.²⁸ "Congress repeatedly rejected such a measure, however,

26. 106 U.S. 583 (1883) (upholding a penalty of two to seven years imprisonment for miscegenous adultery, but only a \$100 fine for intrarace adultery).

27. In this regard, it is also telling that, as Professor R. Carter Pittman explains, "[a]lmost contemporaneously with the adoption of the [Fourteenth A]mendment, federal and state courts upheld anti-miscegenation statutes against [constitutional] attacks." R. Carter Pittman, *The Fourteenth Amendment: Its Intended Effect on Anti-Miscegenation Laws*, 43 N.C. L. REV. 92, 108 (1964). Steven Bank disputes Pittman's claim that "[a]ll court decisions on the question have upheld the constitutionality of anti-miscegenation statutes." Steven A. Bank, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303, 335 (1995). However, the cases Bank cites as counter-examples are of limited force. The case of *Burns v. State*, 48 Ala. 195 (1872), which invalidated an Alabama miscegenation law was quickly overruled in *Green v. State*, 58 Ala. 190 (1877). *Hart v. Ross & Elder*, 26 La. Ann. 90 (1874), was a unique case determining the legitimacy of children born to an interracial couple in a state that had since repealed its anti-miscegenation law. As Bank concedes, "Louisiana's court [in *Hart*] merely followed the lead of its legislature." Bank, *supra*, at 337. The vast majority of courts rejected challenges to state anti-miscegenation laws, leaving Bank to conclude that "the frequent [losing] constitutional challenges to such laws suggest that the position was gaining respect." *Id.* I have never felt that frequent repetition of an unpersuasive argument somehow adds to its strength.

28. See KULL, *supra* note 18, at 3-4 (Congress rejected Wendell Phillips' and Thaddeus Stevens' attempts to promote a constitutional amendment that "would have prohibited state and federal governments from distinguishing between per-

choosing the far more ambiguous language of the present Fourteenth Amendment. . . . [C]olor blindness, then, was explicitly rejected as constitutional text"²⁹ Lest we understate the differences between pure color-blindness and what was actually enacted, we should recall that one of the principal advocates of color-blindness, Wendell Phillips, called the Fourteenth Amendment "a fatal & total surrender," "an infamous breach of the national pledge to negroes . . . [and] a party trick designed only for electioneering purposes."³⁰ Professor Raoul Berger puts it plainly: "When we look to the soil from which the Fourteenth Amendment sprang, attribution to the Framers of the aim of creating uncircumscribed racial equality is like insisting that roses bloom in the Sahara Desert."³¹

The majority is thus quite wrong to suggest that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."³² Instead, the Fourteenth Amendment was designed to provide equal protection of "the 'person and property' of blacks against violence."³³ This protection manifestly was *not* intended to extend to areas that were not at the time considered "civil rights." The Framers of the Fourteenth Amendment drew what Professor David Richards aptly characterizes as "a sharp distinction . . . be-

sons on the basis of race, no more and no less: it would thus have made the Constitution color-blind in so many words."). As Kull notes, Wendell Phillips' 1863 proposal to make the Constitution color-blind was not well received. "Ordinary political opinion, including much of Republican opinion . . . found his proposal for a color-blind Constitution extravagant to the point of absurdity." *Id.* at 60. Kull chronicles the radical Republicans' campaign for adoption of a color-blind constitutional provision until its ultimate rejection in 1866 when the more limited and ambiguous "equal protection of the laws" terminology was sent to the States for ratification. *Id.* at 55-87; see also Epps, *supra* note 10, at 420-21 ("The legislative history of the language clearly suggests that the lawmakers who wrote the Amendment envisioned a remaining power to make racial distinctions.") (citations omitted).

29. Epps, *supra* note 10, at 420-21; see also Berger, *supra* note 21, at 1183 ("Proposals to establish overall equality, to banish all discrimination, were rejected time and time again.").

30. KULL, *supra* note 18, at 64 (quoting a letter from Wendell Phillips to Thaddeus Stevens and a speech by Phillips reprinted in his newspaper, the *National Anti-Slavery Standard*).

31. Berger, *supra* note 21, at 1178; see also KULL, *supra* note 18, at vii ("[T]he evidence I adduce tends strongly to refute" the claim that "the Fourteenth Amendment was intended by its framers to require color blindness.").

32. *Loving v. Virginia*, 388 U.S. 1, 10 (1967).

33. Berger, *supra* note 21, at 1179 (arguing that the "moderate leadership" of the post-war Republicans "had in mind a limited and well-defined meaning . . . a right to equal protection in the literal sense of benefiting from the laws of security of person and property") (citing ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 56 (1962)).

tween equality in basic rights like protection of life, liberty, and property and rights to social and political equality (in marriage, schooling, and voting), applying equal protection to the former *but not the latter*.³⁴ Consistent with the terminology of the time, Professor Michael McConnell calls the protected category "civil rights."³⁵ However it is phrased, the crucial point is that any right that is deemed a matter of "social equality" is not protected by the right to equal protection of the laws.³⁶

The right to marry fits squarely within this class of "social rights."³⁷ As a result, the Fourteenth Amendment simply does not guarantee equal protection with respect to State marriage laws.³⁸ Indeed, the "social rights" formulation was the primary answer given by sponsors of the Amendment to the charge that ratification would result in widespread interracial marriage.³⁹ It therefore

34. Richards, *supra* note 20, at 1380 (citing RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 20-36 (1977) (emphasis added)).

35. McConnell, *supra* note 24, at 1023-25.

36. See *id.* at 992 (discussing the notion of "limited absolute equality"—equality that is limited to certain spheres ('civil rights') but is absolute within those spheres") (citation omitted); see also Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U. L. REV. 791, 792 (1996) ("The Framers of the Fourteenth Amendment said repeatedly that the Amendment was intended to protect civil rights, but not political or social rights."). For this reason, it is possible to reject the "separate but equal" principle of *Plessy* as the meaning of equal protection while nevertheless dissenting in this case. "Equal protection" may not tolerate racial classifications, but it must first be shown that the particular classification falls within the original scope of the Equal Protection Clause. Cf. *Hudson v. McMillian*, 503 U.S. 1, 18 (1992) (Thomas, J., joined by Scalia, J., dissenting) (criticizing the Court's expansion of the scope of the Cruel and Unusual Punishment Clause, which the Framers intended to apply "only to torturous punishment meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration").

37. See Klarman, *supra* note 19, at 286-88; Emily Field Van Tassel, *Anti-miscegenation, The Moral Economy of Dependency, and the Debate Over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 876 n.10 (1995) ("What is clear is that by the time of Reconstruction, 'social equality' would become virtually synonymous with miscegenation.").

38. No one has yet challenged the categorization of marriage (circa 1868) as a "social right," nor attempted to bring it within the sweep of "civil rights," as Professor McConnell has attempted to do with education. See McConnell, *supra* note 24, at 1103-05; see also *id.* at 1104 ("By the turn of the century—and certainly by the time of the *Brown* decision in 1954—there could be little doubt that schools satisfied the criteria even the opponents of the 1875 Act understood for the existence of civil rights."). It may be telling that, in McConnell's reply to Professor Klarman's critique of his position on school segregation, McConnell was silent in the face of Klarman's claim that his analysis of the schools in question would not support the result in this case. See Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1936 (1995).

39. See McConnell, *supra* note 24, at 1016 ("Supporters and opponents of the [1875 Act] agreed that the Fourteenth Amendment had no bearing on 'social rights.'").

most accurately reflects the understanding of the Amendment held by those who decided to include it in our foundational document.⁴⁰ Indeed, anti-miscegenation laws may represent the archetype of the racialism in "social rights" left undisturbed by the Equal Protection Clause.

The inclusion of marriage in the class of unprotected social rights provides compelling, perhaps irrefutable, evidence that anti-miscegenation laws were unaffected by the Fourteenth Amendment. If any more proof is required, it is supplied by the Amendment's sponsors' direct, unequivocal statements on the precise question of anti-miscegenation laws. Even a recent scholarly attempt to use debates regarding the Civil Rights Act of 1875 (1875 Act)⁴¹ to build a case that the Fourteenth Amendment rendered anti-miscegenation laws unconstitutional⁴² concedes that prior to 1868, during debates over the Civil Rights Act of 1866 (1866 Act)⁴³ and the Fourteenth Amendment, Republicans *denied that anti-miscegenation laws would be affected by their proposals*.⁴⁴ In response to Democratic accusations that the 1866 Act would make state anti-miscegenation laws illegal, "[s]upporters . . . immediately sought to allay concerns that the bill would repeal" those laws.⁴⁵ In light of this, I must regard as overwhelming the historical evidence that the Framers and ratifiers of the Fourteenth Amendment neither expected nor intended to nullify state anti-miscegenation laws. For me, that is the end of the matter.

40. I have previously explained the importance of focusing on what the Framers said about their handiwork when discerning the original intent of the Constitution and its many amendments. In *Missouri v. Jenkins*, 515 U.S. 70 (1995) (Thomas, J., concurring), I pointed out that:

[T]he Anti-Federalists criticized the Constitution because it might be read to grant broad equitable powers to the federal courts. In response, the defenders of the Constitution "sold" the new framework of government to the public by espousing a narrower interpretation of the equity power. *When an attack on the Constitution is followed by an open Federalist effort to narrow the provision, the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the more limited construction offered in response.*

Id. at 126-27 (emphasis added).

41. Ch. 114, 18 Stat. 335 (1875) (codified as amended at 42 U.S.C. § 1983 (1994)).

42. See Bank, *supra* note 27, at 305; see also *infra* Part IV.A.1.a (discussing Bank's arguments in detail).

43. Ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981-1982 (1994)).

44. See Bank, *supra* note 27, at 319-23; McConnell, *supra* note 24, at 1020 n.351 (discussing pre-ratification assurances that the 1866 Act would *not* interfere with state anti-miscegenation laws).

45. Bank, *supra* note 27, at 319.

C.

I therefore conclude that the Framers of the Fourteenth Amendment did not intend to create a "color-blind Constitution" insofar as anti-miscegenation laws were concerned. In fact, it was quite the opposite: ratification of the Amendment was based, in significant part, on assurances by its supporters that anti-miscegenation laws would remain unaffected.

The majority takes substantial comfort, I presume, in its confidence that today it reaches the "right" decision—right in terms of the moral rights of free people to live without government interference in their personal lives resulting only from their skin color. I have no doubt this is the "right" decision for our nation. I would take greater comfort, however, knowing the nation had actually done so through the constitutional amendment process, itself the vehicle by which the People are to make such fundamental decisions about the way we govern our affairs.⁴⁶ I agree with Professor Laurence Tribe that we must reject interpretive methods "that would treat the Constitution as amendable by procedures nowhere specified therein."⁴⁷

Because I am convinced that the Fourteenth Amendment, as originally understood by those who supported and ratified it, did not alter Virginia's power to enact and enforce the anti-miscegenation law at issue today, I dissent.

* * * * *

As Thomas finishes and returns the draft dissent to his desk, the foremost reaction running through his head is that the draft is powerful—even undeniable. He can think of no flaw in the analysis, obvious or subtle. He smiles, however briefly, thinking of the law clerk who first drafted this opinion for him. With a purpose most unsubtle, she filled it almost to the point of redundancy with citations to Thomas' own opinions, mostly dissents and a few concurrences, underscoring the consistency between Thomas' constitutional positions and this resolution of *Loving*. He is close to making up his mind, but remains committed to his earlier decision

46. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1241 (1995) (calling the requirements for amending the Constitution "the most fundamental agreement[] . . . among the people and their government").

47. *Id.* at 1233. Professor Tribe proposes that provisions like Article V "be given as fixed and determinate a reading as possible." *Id.* at 1247. In my view, of course, that is true of every part of the Constitution.

to read both drafts before making his choice. Thomas thus turns to the concurrence.

* * * * *

III. Justice THOMAS, concurring in part and concurring in the judgment

The majority today holds that Virginia's anti-miscegenation laws violate the Equal Protection and Due Process Clauses of the Constitution. I agree with the Court's conclusion, and with its reliance on the Equal Protection Clause. I write separately to explain my understanding of the Virginia statute's constitutional infirmity, and to record my disagreement with the Court's reliance on the Due Process Clause.

The Court today gives life to the fundamental principle animating the Equal Protection Clause of our Constitution's Fourteenth Amendment: "government may not make distinctions on the basis of race."⁴⁸ In Virginia, however, the right of residents to have their marriages recognized by the State is conditioned entirely on each individual's race. By maintaining its anti-miscegenation statute, Virginia has refused to "treat citizens as individuals, [rather than] as members of racial, ethnic or religious groups."⁴⁹

Barring interracial marriages is, so far as the Equal Protection Clause is concerned, no different from barring intraracial marriages. A "mandatory miscegenation" law would claim the same right Virginia asserts in this case: the power to deal with people on the basis of a racial classification. A State which compels either separation or unwanted association on the basis of race violates the Constitution.

That is why the proper remedy in this case is to permit the Lovings to live the life they have chosen as husband and wife, in Virginia if they wish, without fear of prosecution or imprisonment. Surely, it would accord with no one's understanding of the Fourteenth Amendment for the district court to attempt to frame a decree requiring a certain number of interracial marriages; merely to state the notion of judicial interference with these private decisions is to immediately see why it is repugnant. Neither racial separation nor interracial contact, so long as either results from

48. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

49. *Missouri v. Jenkins*, 515 U.S. 20, 121 (1995) (Thomas, J., concurring).

private, individual choices rather than government compulsion, is the business of this Court or of the Constitution.⁵⁰

Concluding that the racial separation required by section 20-54 of the Virginia Code, and enforced by the criminal penalties of section 20-59,⁵¹ is deplorable requires no use of "the unnecessary and misleading assistance of the social sciences."⁵² As with school segregation, the harm is in the *de jure* separation. And as with segregated schools, which "additionally harmed black students by relegating them to schools with substandard facilities and resources,"⁵³ so, too, do anti-miscegenation laws inflict additional harm. Anti-miscegenation laws deny legitimacy to the children of interracial couples, resulting not only in societal disapproval but clear and tangible legal detriments.⁵⁴ Anti-miscegenation laws force couples who have committed no greater crime than falling in love either to forsake their commitment to one another or to leave their home and start anew elsewhere, often far from family and friends. All on the basis of their race.

Today's majority correctly rejects the State's claim that it is treating members of both races equally, in that both are limited to marrying within their race and equally are barred from marrying outside it. True or not,⁵⁵ Virginia's argument is beside the point. It is sufficient for our purposes that "Virginia's miscegenation statutes rest solely upon distinctions drawn according to race."⁵⁶ The classification itself, not its content, is the *sine qua non* of the constitutional violation.

Having expressed this much agreement with the majority opinion, I feel compelled to note my concern over language in the Court's opinion that could be read as leaving room for undue departures from the Fourteenth Amendment's bar to governmental uses of ra-

50. See *id.* ("The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race.").

51. See *Loving v. Virginia*, 388 U.S. 1, 4-5 (1967) (discussing State of Virginia's statutes in question).

52. *Jenkins*, 515 U.S. at 121 (Thomas, J., concurring).

53. *Id.*

54. See Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 29 (1984) (discussing criminal penalties, including prison terms, given to persons violating anti-miscegenation laws, and civil disabilities, including illegitimacy of children and inequality of treatment under law regarding property and inheritance).

55. In fact, it is not true. "Virginia prohibits only interracial marriages involving white persons . . ." *Loving*, 388 U.S. at 11. Thus, the different races are not treated equally under Virginia law.

56. *Id.*

cial classifications. The Court speaks not of a complete bar, but instead of "the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."⁵⁷ So long as the permissibility of some racial classifications this language implies is limited to crisis situations in which the classification is closely related to an overriding governmental purpose, and is wholly essential to the achievement of that purpose,⁵⁸ I have no quarrel with the Court's careful caveat.⁵⁹ I could not, however, accept any broader view of acceptable racial classifications.

Finally, I add that, owing to my belief that the Due Process Clause does not contain a "substantive" component,⁶⁰ I do not join Part II of the Court's opinion, which rests on the recognition of a substantive constitutional right to marriage as an aspect of due process of law.⁶¹ Otherwise, I concur.

* * * * *

Having now completed his plan to read both drafts before casting his vote, Thomas sets down the concurrence. His reaction is different. He sees this second opinion as less powerful than the dissent, but perhaps more elegant. The citations to his originalist opinions, so omnipresent in the dissent, are absent from this opinion. On the other hand, the dissent made little mention of his Fourteenth Amendment jurisprudence, the voting rights, affirmative action and school desegregation cases that find their niche in the concurrence. The personal and jurisprudential factors race

57. *Id.* at 9.

58. I have in mind the classic hypothetical of a prison race riot, in which the authorities are forced to separate, and hence classify, the prisoners by race in order to restore order out of the crisis. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (agreeing that "a social emergency rising to the level of imminent danger to life and limb," such as a "prison race riot," would justify exception to the color-blindness principle). Such limited, brief racial classifications drawn to serve a truly compelling governmental purpose would not offend the Fourteenth Amendment. If the Court intends to sanction some broader use of race, there will be time enough to object in a case when it actually applies the test in too sweeping a fashion.

59. For this reason, I do not read the Court's language in the same light as Professor Kull, who believes it retreats from a blanket rejection of racial classifications. See KULL, *supra* note 18, at 171 ("In place of a rule of color blindness, *Loving* announced a pledge of the Court's assiduous oversight of the politics of race.").

60. See *United States v. Carlton*, 512 U.S. 26, 39-40 (1994) (Scalia, J., joined by Thomas, J., concurring in the judgment).

61. See *Loving*, 388 U.S. at 12.

through him,⁶² reminding him that the concurrence will surely be easier on his soul and better serve the cause of originalism.

After a few more moments of reflection, Thomas decides. He opens his desk, pulls out the lighter from the top drawer, picks up the opinion he will not publish, and walks to the trash can with it. One page at a time, he sets it aflame, resolving never to question the decision he has reached nor to allow the world to read the words explaining the course he chose not to take.

IV. Meanwhile, Back in Our Universe . . .

We're back. I hope you were intrigued by our visit to an imaginary reality in which Clarence Thomas ascended to the Supreme Court in 1965 rather than 1991, taking the place actually occupied by Thurgood Marshall. Granted, visiting that imaginary reality requires more than a little suspension of disbelief;⁶³ nevertheless, it is a reality worth imagining. Because in it, Thomas would have helped decide *Loving v. Virginia*,⁶⁴ one of the most important Fourteenth Amendment cases ever decided by the Supreme Court—and one with special resonance for Thomas himself.⁶⁵

62. See *supra* Part I for a discussion of how Thomas' *Loving* decision intersects with his personal life.

63. We know that in reality Clarence Thomas was not even of voting age in 1965, much less old enough to sit on the Supreme Court. In addition, we know that Thurgood Marshall was appointed to the Supreme Court in 1967, not 1965. Most importantly, perhaps, it seems unlikely that President Lyndon Johnson would have appointed Thomas; the very thought is likely to provoke howls of protest from devotees of both men. Imagine, however, that it was part of a deal Johnson made with Republican Senators in order to secure their support and obtain passage of the Civil Rights Act of 1964. He would nominate Thomas rather than Marshall as the first African-American on the Supreme Court. Imagine further that Johnson believed that the deal was worth making because, while Thomas might not march in lock-step with the Warren Court, he would ultimately prove amenable to the persuasion of his Brethren, particularly those who had been on the Court when *Brown v. Board of Education*, 347 U.S. 483 (1954), had been decided. Indeed, Thomas might in time become a solid member of the liberal block that dominated the Court, or so Johnson might have hoped.

64. 388 U.S. 1 (1967).

65. Clarence Thomas is, of course, an African-American man living in Virginia. He is also one-half of an interracial marriage. See TIMOTHY M. PHELPS & HELEN WINTERITZ, *CAPITAL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION* 115-16 (1992) (describing Thomas' relationship with his second wife, Virginia Lamp Thomas, and their move to Virginia after their 1987 marriage).

In this alternate reality, these personal implications would certainly have led to much speculation as to whether Thomas would or should recuse himself, and probably much criticism when he did not do so. Imagine attorneys for both sides

The imagined story of Clarence Thomas participating in the Court's decision in *Loving* is worth telling for several reasons. As the preceding draft opinions reflect,⁶⁶ the exercise brings into sharp focus the tension between two aspects of Justice Thomas' jurisprudence: his reliance on original intent as *the* guiding principle for constitutional interpretation,⁶⁷ and his belief that the Fourteenth Amendment requires color-blind decision-making by government.⁶⁸ From our examination of originalism and color-blindness as Justice Thomas might consider them in *Loving*, we can gain insight into the flaws of both doctrines. Furthermore, this examination reveals to us the utterly irreconcilable conflict between *Justice* Thomas and *Clarence* Thomas. In these respects, *Loving* represents a jurisprudential and personal Rubicon for Thomas. Finally, the extent to which this story enlightens us about originalism, color-blindness and Thomas himself also reveals the value and power of legal narratives, and refutes the position of those who reject such narratives as unscholarly.⁶⁹

subsequently revealing that they considered making a motion for Justice Thomas' recusal because of his potential lack of impartiality on the issue, and their candid admissions that neither did so because each thought Thomas might provide a favorable vote for their respective side.

66. It should be noted that, although written in the style of dissenting and concurring Supreme Court opinions, Thomas' imagined *Loving* opinions in some ways read very much like law review articles—particularly the draft dissent. For one thing, the citation form conforms to the rules for a law review article. Citations are in the footnotes rather than in the text, for example. The Bluebook is supreme even in alternate realities. More importantly, the dissent carries heavy citation and extended discussion of the available academic literature on originalism, from Judge Bork to David Richards, of the sort rarely seen in a Supreme Court opinion. This discussion, which I have attributed to Justice Thomas, reflects my view of the demands a truly consistent and neutral originalism places on a Justice dealing with the Fourteenth Amendment. I believe Justice Thomas would try to avoid these demands by writing a concurrence much along the lines I have imagined in Part III, *supra*.

67. See *Bennis v. Michigan*, 516 U.S. 442, 454 (1996); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 852-63 (1995) (Thomas, J., concurring); *Missouri v. Jenkins*, 515 U.S. 70, 114-38 (1995) (Thomas, J., concurring); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 845-926 (1995) (Thomas, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358-370 (1995) (Thomas, J., concurring in the judgment); *Hudson v. McMillian*, 503 U.S. 1, 17-29 (1992) (Thomas, J., joined by Scalia, J., dissenting). For an explanation of "originalism" as a method of constitutional interpretation, see *supra* text accompanying note 9.

68. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) ("[G]ood intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race."); *Jenkins*, 515 U.S. at 114 (Thomas, J., concurring) ("Regardless of the relative quality of the schools, segregation violated the Constitution because the State classified students based on their race.").

69. In addition, imagining Justice Thomas on the *Loving* Court permits us to

In reality, Clarence Thomas has now completed six terms as an Associate Justice on the Supreme Court. During that time, he has marked out a clear constitutional vision and has hewed consistently to it.⁷⁰ His vision, which I believe is fairly represented in the imagined *Loving* dissent, involves divining the Framers' intent behind a particular constitutional provision and interpreting the provision in harmony with that intent. Time and again,⁷¹ Justice Thomas has sounded the call for originalism no matter how distasteful the results,⁷² no matter how antithetical to modern sensibilities,⁷³ and no matter how many non-originalist precedents fall by the wayside.⁷⁴ Indeed, he favorably quotes the view that "[t]he

follow a path in the scholarship of legal history, seeking insight into the thinking of Justice Thomas by examining what he might have considered doing. See, e.g., Michael Stokes Paulsen & Daniel N. Rosen, *Brown, Casey-Style: The Shocking First Draft of the Segregation Opinion*, 69 N.Y.U. L. REV. 1287 (1994) (revealing the discovery of a previously lost draft opinion in *Brown*, which would have reaffirmed *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

70. With the notable exception, as I shall argue presently, of the Fourteenth Amendment cases in which he has advanced the notion of a "color-blind" Constitution despite its lack of support in the original understanding. See *infra* Part IV.A.1.b (reviewing Thomas' occasional invocation of 'higher law' and "natural law" as a basis for color-blind interpretation of the Constitution).

71. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358-59 (1995) (Thomas, J., concurring in the judgment) (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905)).

72. See Jordan Steiker et al., *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237, 246 (1995) ("As Justice Thomas has recently reminded us, the Constitution means what it said when it left the hands of the Framers, and no amount of hand wringing or wishful thinking can change the unalterable meanings of the Founding Document.") (citing *McIntyre*, 515 U.S. at 358 (Thomas, J., concurring)).

73. For example, in *Hudson v. McMillian*, 503 U.S. 1, 17-28 (1992) (Thomas, J., joined by Scalia, J., dissenting), Justice Thomas argued that the Founders "simply did not conceive of the Eighth Amendment as protecting [prison] inmates from harsh treatment," so that "courts had no role in regulating prison life." *Id.* at 19. Thus, he would have found no violation of the Cruel and Unusual Punishment Clause in prison guards' allegedly "malicious and sadistic" beating of a prisoner in a situation where "there was no need for them to use any force at all." *Id.* at 24. Although he did not expressly call for overruling decisions such as *Estelle v. Gamble*, 429 U.S. 97 (1976), which had first established the role of the Eighth Amendment in limiting the conduct of prison officials, he did say that these rulings had "cut the Eighth Amendment loose from its historical moorings," and that this departure from originalism should at least be limited to situations in which the excessive force imposes a "significant injury." *Hudson*, 503 U.S. at 21.

74. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 872 (1995) (Souter, J., dissenting) (asserting that Justice Thomas' view of the Establishment Clause "wage[s] a battle that was lost long ago" because he advances the claim that it "forbids only governmental preference of one religion over another") (quoting *School Dist. of Abington v. Schempp*, 374 U.S. 203, 216 (1963)); *United States v. Lopez*, 514 U.S. 549, 601 (1995) (Thomas, J., concurring) (arguing that the "substantial effects" test of the post-New Deal Commerce Clause jurisprudence "is far removed from our early case law," noting that "I might be willing to return to the original understanding" and "undertake a fundamental reexamination of the

Constitution is a written instrument. As such its meaning does not alter. *That which it meant when adopted, it means now.*"⁷⁵ Given the insights into Thomas' thinking available from his actual opinions, what can we learn from the *Loving* opinions he might have written?

A. *What Justice Thomas Would Have Done in Loving*

In the imagined reality from which we just returned, Justice Thomas weighed two difficult choices in trying to decide how to cast his vote in *Loving*:⁷⁶ either dissent, arguing that the majority's analysis was inconsistent with the original understanding of the Fourteenth Amendment,⁷⁷ or concur on the non-originalist ground that the Equal Protection Clause mandates an end to all governmental classifications based on race.⁷⁸ There is, I believe, only one other option open to him: demonstrate that color-blindness is actually consistent with the original understanding of the Fourteenth Amendment. I will now assess the likelihood that Thomas could persuasively make that case, concluding ultimately that he could not. I will then assess which of the two remaining options he would choose.

1. The Impossibility of Reconciling Color-Blindness With the Original Understanding of the Equal Protection Clause.

One basic premise is crucial to my project: Justice Thomas must dissent in *Loving* to remain true to the original understanding of the Fourteenth Amendment. But in the event color-blindness is *not* an ahistorical Waterloo for originalism, Justice Thomas could avoid the choice I have posited for him.

There are two routes by which Justice Thomas might proceed to accomplish this. First, he could build an originalist historical case for the color-blindness principle. Alternatively, to the extent color-blindness truly is inconsistent with the originalist methods he has employed, he might attempt to modify his approach while

past 60 years").

75. *McIntyre*, 514 U.S. at 358 (Thomas, J., concurring in the judgment) (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905) (emphasis added)).

76. Those not inclined to imagine Justice Thomas either appointed by Lyndon Johnson, or on the Court for the last three decades (or both), might prefer to think about the question in these terms: apart from considerations of *stare decisis*, would he support overruling *Loving* if a proper case arose today?

77. See *supra* Part II (providing a draft of Thomas' dissent).

78. See *supra* Part III (providing a draft of Thomas' concurrence).

not abandoning originalism entirely. This section will evaluate each of these possibilities.

a. The Revisionist Case for a Color-Blind Interpretation of the Equal Protection Clause: Thomas' Salvation?

Recent scholarship has posited an originalist defense of color-blindness, or at least a defense of the principle's most important applications. Specifically, Professor Michael McConnell has argued that the Supreme Court's holding in *Brown v. Board of Education*⁷⁹ is compatible with the original understanding of the Equal Protection Clause,⁸⁰ and Steven Bank has claimed the Framers penned the Fourteenth Amendment fully intending that it render anti-miscegenation statutes such as the one at issue in *Loving* unconstitutional.⁸¹ Despite the extent to which these efforts swim against the scholarly tide,⁸² Justice Thomas might well attempt to invoke them by wrapping his color-blindness principle in the cloak of originalist understanding.

Unfortunately for Thomas, McConnell and Bank's originalist defenses of *Brown* and *Loving* are unavailing. Both scholars' evidence of the Fourteenth Amendment's meaning comes from debates between 1870 and 1874 over the statute eventually enacted as the Civil Rights Act of 1875,⁸³ meaning their evidence actually post-dates enactment of the Fourteenth Amendment in 1868. This time differential might be of little consequence if the explanations proffered from 1866 to 1868 were consistent with those issued later from 1870 to 1874. However, a historical analysis of the earlier period reveals that the interpretation of the Fourteenth

79. 347 U.S. 483 (1954).

80. See McConnell, *supra* note 24, at 952-53 (stating the thesis that the "consensus that *Brown* was inconsistent with the original understanding of the Fourteenth Amendment" is "wrong").

81. See Bank, *supra* note 27, at 304-05 (arguing that during debates over the 1875 Act, its sponsors "embraced a more modern understanding of equality," which "inescapably included anti-miscegenation statutes within the confines of its logic").

82. Professor McConnell concedes the formidable assemblage of legal minds arrayed against him: "This is one point on which Raoul Berger, Ronald Dworkin, Richard Kluger, Earl Maltz, Bernard Schwartz, Laurence Tribe, Thomas Grey, Donald Lively, Richard Posner, and David Richards—not to mention [Alexander] Bickel, [Alfred] Avins, [Michael] Klarman, [Robert] Bork, [Mark] Tushnet, and countless others—can agree." McConnell, *supra* note 24, at 951-52. Even while disagreeing with them, I admire McConnell and Bank's willingness to rush in where angels surely fear to tread.

83. See Bank, *supra* note 27, at 319-20 (discussing arguments directly or implicitly relating to miscegenation during debates leading up to 1875 Act); McConnell, *supra* note 24, at 984-1049 (discussing proponents' and opponents' arguments).

Amendment urged by Republicans in the 1870s was not advanced publicly prior to the Amendment's passage.⁸⁴ Significantly, McConnell and Bank fail to point to any pre-ratification statements giving the slightest hint of the understanding both men now wish to ascribe to the Fourteenth Amendment.⁸⁵ As discussed previously in Justice Thomas' imagined *Loving* dissent, Republican assurances at the time were that anti-miscegenation laws would remain wholly unaffected by the Fourteenth Amendment.⁸⁶ Given these circumstances, reliance on the 1870 to 1874 comments as evidence that the Framers intended the Fourteenth Amendment to render all governmental racial classifications unconstitutional is untenable.⁸⁷

84. See *supra* text accompanying notes 41-45 (discussing the history of the passage of the Fourteenth Amendment).

85. See McConnell, *supra* note 24, at 955 (conceding that the Fourteenth Amendment debates "contain[] almost no evidence that the framers and ratifiers expected the Amendment to affect school segregation and one clear statement by a prominent supporter that it would not"). For his part, Bank concedes that Republicans did not take the position that anti-miscegenation laws would violate the Fourteenth Amendment, but argues that they could remain silent on the miscegenation question because the issue was not squarely implicated until the 1875 Act was proposed. See Bank, *supra* note 29, at 323. This argument is undermined by Bank's concession that Republicans, in fact, addressed the issue in reassuring the public that anti-miscegenation laws would be affected neither by the Fourteenth Amendment nor by the 1866 Act. See *supra* note 44 and accompanying text (discussing pre-ratification assurances that the 1866 Act would not interfere with miscegenation laws). Moreover, Bank's claim that the Republicans could avoid the issue until 1875 contradicts his basic argument that the Fourteenth Amendment was understood to affect the miscegenation question, which, if true, would have required a Republican answer before 1875.

86. See *supra* notes 44-45 and accompanying text (providing historical evidence that neither the Framers nor the ratifiers of the Fourteenth Amendment intended to invalidate states' anti-miscegenation laws).

87. See Earl N. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 226 (1996) ("Republican pronouncements on constitutional issues in the 1870s are a demonstrably unreliable guide to the original understanding in the period from 1866 to 1868, when the Fourteenth Amendment was drafted and ratified."). Extended discussion of the unconquerable difficulty McConnell and Bank confront in trying to employ post-ratification statements as evidence of original intent is beyond the scope of this Article. The key problem associated with such reliance by originalists, that it renders irrelevant the intent of the ratifiers, has been exhaustively discussed elsewhere. See, e.g., Raoul Berger, "Original Intention" in *Historical Perspective*, 54 GEO. WASH. L. REV. 296, 327 (1986) ("One may regard the ratifiers as the more authoritative spokesmen where their views conflict with those of the Framers."); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 939 (1985) (arguing that James Madison believed that the relevant original intent was that of the ratifiers, not of the drafters). It has also been recognized by Justice Thomas. See *supra* note 40 (discussing Thomas' reliance in *Missouri v. Jenkins*, 515 U.S. 70 (1995) (Thomas, J., concurring), upon the way in which a constitutional provision was "sold" to the ratifiers to define its meaning). These difficulties are particularly acute when the issue involved is, like miscege-

Supposing nevertheless that an originalist may legitimately use the 1870 to 1875 debates as McConnell and Bank suggest, the historical evidence both scholars cite as demonstrating the Framers' intent to bar anti-miscegenation laws is simply inadequate.⁸⁸ Bank concedes that during the five years the 1875 Act was proposed and debated, no version of it actually provided for the repeal or nullification of state anti-miscegenation laws.⁸⁹ Moreover, in lieu of statements made about provisions ultimately enacted into

nation, so material to ratification. On such an issue, it is impossible for an originalist to credit as the original understanding of the Fourteenth Amendment an expansive interpretation that was not advanced openly until after its ratification. See Berger, *supra*; Maltz, *supra*; Powell, *supra*. In addition, an expansive interpretation did not command popular support. See Bank, *supra* note 27, at 314 "[T]he lingering public prejudice combined with the declining incidence of interracial marriage to make anti-miscegenation laws a no-win political issue" for the Republicans, *id.*, and that quite probably would have prevented the ratification of the Amendment had it been openly admitted. See Klarman, *supra* note 23, at 1884 ("It is inconceivable that most—indeed even very many—Americans in 1866-68 would have endorsed a constitutional amendment to forbid public school segregation."); see also KULL, *supra* note 18, at 68 (noting that sponsors of the Fourteenth Amendment rejected explicit color-blindness language, in part because of the apparent consequences it would have had on Northern anti-miscegenation laws). Even a century after the ratification of the Equal Protection Clause, the issue of interracial marriage and sexual relations remained perhaps the most emotional, highly-charged question of all. See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 41-42 (1978) ("Many commentators have suggested that the issue of interracial marriage was far more explosive than even the maelstrom involved over integrated education and that it was by design that the Court delayed accepting such cases until 1967."); Choper, *supra* note 54, at 28 (stating that anti-miscegenation laws are "one of the most passionately held barriers to full racial freedom"). At most, McConnell and Bank inform us of the Framers' hidden agenda for the Equal Protection Clause. But the very fact that they kept it hidden until the 1870s undermines it as the original understanding of the Clause.

88. Understandably, since Professor McConnell is addressing school segregation, his evidence has little force outside that context. To the extent McConnell addresses miscegenation, he undermines Bank's claims by strongly implying that the Framers did not view interracial marriage as a covered right. McConnell, *supra* note 24, at 955 (noting that the legislative "treatment of such collateral issues [to school segregation] as voting rights, jury service, and miscegenation suggests that the Amendment was not understood to have the sweeping consequences that advocates of school desegregation typically attribute to it") (emphasis added); see Klarman, *supra* note 23, at 1919-20 ("[E]ven McConnell's originalist defense of *Brown* does not enable him to justify Court decisions such as *Strauder v. West Virginia* and *Loving v. Virginia*. . . . Thus even if McConnell has saved *Brown* for originalists, much else of consequence has eluded his grasp."). McConnell does make a fleeting attempt to take a broader view of the original intent with respect to miscegenation. See McConnell, *supra* note 24, at 1018-19 ("[W]hen forced to take a position, proponents defended the proposition that the . . . [1875 Act] should make no distinction on the basis of race in marriage.").

89. See Bank, *supra* note 27-107, at 314 ("None of the various bills submitted in the House and Senate during the debates over the Civil Rights Act of 1875 explicitly discussed repealing state anti-miscegenation laws. With one notable exception . . . the bills did not even implicitly provide for repeal.").

law, Bank relies on statements interpreting language existing in the bill as originally introduced but later omitted entirely.⁹⁰ Bank's basic argument, then, is that Republican statements about the scope and meaning of the Fourteenth Amendment, made in support of provisions that were not even part of the legislation ultimately enacted in 1875, provide sufficient evidence of the Amendment's original understanding to overcome contradictory statements made at the time of ratification.⁹¹

Given the inherent weakness of this claim, it is unsurprising that Bank retreats to a higher level of generality. He argues that, in explaining their notion of equality, sponsors of the 1875 Act rejected the notion of "symmetrical equality,"⁹² a term referring in modern times to racial classifications that provide separate but theoretically equal rights.⁹³ He then reasons that anti-miscegenation laws are a form of symmetrical equality, and from this concludes that the Framers' position on "symmetrical equality" proves anti-miscegenation laws are inconsistent with the Fourteenth Amendment.⁹⁴

Though seemingly attractive, this argument is fundamentally flawed. Bank's argument fails because it conflicts with statements made prior to the ratification of the Fourteenth Amendment, specifically statements about miscegenation⁹⁵ and espousing the very "symmetrical equality" principle which Bank claims the Republi-

90. See *infra* text accompanying note 105 (discussing Bank's reliance on language the of the original bill introduced by Senator Sumner, which was not included in the final product).

91. See Bank, *supra* note 27, at 319 (positing that in response to Democratic charges that the 1866 Act would nullify state anti-miscegenation laws, "[s]upporters of [the Act] immediately sought to allay concerns that the bill would repeal anti-miscegenation statutes"). Bank himself notes the marked difference between the 1866 to 1868 rhetoric of Republicans and their 1870 to 1875 statements, see *id.* at 318, making it remarkable that he relies so heavily on the later statements, when the earlier ones seem more relevant.

92. *Id.* at 305 (arguing that proponents of the 1875 Act "were unwavering in their rejection of symmetrical equality").

93. See *id.* at 304-05 (noting that accepting the "symmetrical equality" conception of the Fourteenth Amendment would mean that "the Fourteenth Amendment as originally understood was not meant to apply to anti-miscegenation statutes or to segregation," making inevitable the "equal but separate doctrine" of *Plessy*).

94. *Id.* at 323 (stating that, when asked about whether their rejection of "symmetrical equality" would entail the repeal of anti-miscegenation laws, Republicans "argued for the repeal of such laws").

95. See *supra* notes 27-28 and accompanying text (discussing Republicans' arguments that anti-miscegenation laws would be unaffected by the 1866 Act and the Fourteenth Amendment). For an originalist, these specific discussions are more persuasive evidence of the original understanding than vague statements about general principles. See *supra* notes 21-24 and accompanying text (discussing the need for originalism to be based on the most specific level of generality).

cans later eschewed.⁹⁶ His argument further fails because it assumes the Equal Protection Clause is consistent with anti-miscegenation laws only if one accepts the idea of symmetrical equality. Bank ignores one obvious manner in which the rejection of "symmetrical equality" would not render anti-miscegenation laws unconstitutional: if such laws were outside the scope of the equality guarantee altogether.⁹⁷ The answer to Bank's argument that "Republicans needed to reject symmetrical equality in order to argue for the desegregation of public areas,"⁹⁸ is that they did not need to, nor did they, argue that the rejection of symmetrical equality would apply to or implicate anti-miscegenation laws.⁹⁹ That is because anti-miscegenation laws were, as Bank repeatedly acknowledges, at the core of the "social equality" to which the Fourteenth Amendment's equal protection guarantee did *not* apply.¹⁰⁰ Bank may well be correct that Republicans did not, in the face of Democratic attacks, retreat from their rejection of symmetrical equality *where the Equal Protection Clause applied*.¹⁰¹ That steadfastness, however, tells us nothing about the legitimacy of symmetrical equality in contexts where the Clause was understood not to apply.

Bank's best argument on this issue is that Republicans did not, for the most part, deny Democratic charges that the 1875 Act would provide a legal right to interracial marriage.¹⁰² Such reasoning from silence, however, is fraught with peril for an original-

96. See Bank, *supra* note 27, at 319 (arguing that the 1866 Act would not repeal anti-miscegenation laws: "supporters based their views on the symmetrical equality" argument); see also McConnell, *supra* note 24, at 1020 n.351 (stating that during debates over 1866 Act, "several Republican supporters of the bill disavowed any intention to prohibit anti-miscegenation laws, and relied on the symmetrical equality argument in explanation of their position").

97. See *supra* text accompanying notes 37-47 (discussing the limited scope of the Equal Protection clause to "civil rights," which did not include marriage).

98. Bank, *supra* note 27, at 317.

99. See *id.* at 323.

100. See *id.* at 312 ("[T]he social equality classification became a code phrase for miscegenation and any other evil Democrats could conjure up to arouse public opposition against the bill.").

101. While Republicans rejected symmetrical equality in the 1870s, Bank admits that in responding to Democratic concerns regarding miscegenation in 1866, some of the most important Republicans in Congress, including Senators William Pitt Fessenden and Lyman Trumbull, "reassured the Democrats that anti-miscegenation laws would not be made illegal by the Act." *Id.* at 319-20. Again, the explanation of "equal protection" *prior to ratification* does not square with the stance the Republicans took later.

102. See *id.* at 323 (finding it "noteworthy that not a single supporter of the 1875 Act sought to rebut the miscegenation charge by invoking the principle of symmetrical equality").

ist.¹⁰³ The Republicans' failure to rebut opposition charges concerning miscegenation can be attributed as much to a desire not to focus attention on a controversial issue, which could only hurt the bill's prospects, as to anything else.¹⁰⁴ The only statements Bank identifies as affirmatively demonstrating a Republican view that anti-miscegenation laws were unconstitutional relate to section five of Senator Charles Sumner's original bill,¹⁰⁵ which provided that "every law, statute, ordinance, regulation, or custom inconsistent with this act, or making any discriminations against any person on account of color, by use of the word 'white,' is hereby repealed and annulled."¹⁰⁶

Bank acknowledges the language in Sumner's bill "died in committee thereafter,"¹⁰⁷ undoubtedly lessening the force of any statements made in defense of section five. Professor McConnell similarly relies on arguments made in defense of language never enacted by Congress,¹⁰⁸ a dubious basis for determining what Congress believed it could enact pursuant to the Fourteenth Amendment. It may be that Congress believed it had the power and simply chose not to explicitly exercise it. In fact, McConnell adduces some evidence to support this view as to school segregation.¹⁰⁹

103. See Powell, *supra* note 19, at 671-72 (discussing "Rule 4" for originalists: "Arguments from silence are unreliable and often completely ahistorical").

104. See Bank, *supra* note 27, at 331 ("[M]ost of the bill's sponsors did not want to become deeply involved in this discussion given the enormous prejudice against miscegenation and the minimal value in advocating the repeal of prohibitions against such action.").

105. See CONG. GLOBE, 42nd Cong., 2d Sess. 819 (1872).

106. *Id.*

107. Bank, *supra* note 27, at 324 n.147.

108. Professor McConnell explicitly places the principal focus of his argument on "the effort from 1870 to 1875 . . . to enact legislation pursuant to the Fourteenth Amendment to abolish de jure desegregation in public schools." McConnell, *supra* note 24, at 984-85. After exhaustively chronicling this effort, see *id.* at 987-1078, McConnell concedes that, "at the end . . . Republicans no longer had the votes to enact a school desegregation bill," and the effort therefore failed in the House. *Id.* at 1084-85.

109. McConnell admits that, even in the 1870s debates, "the Reconstruction Congress considered, debated, and ultimately rejected measures to prohibit school segregation under its power to enforce the Fourteenth Amendment." *Id.* at 956 (emphasis added). McConnell's argument is that Congress' rejection of these measures does not necessarily mean that the Framers believed that constitutional support was lacking; this argument has some strength. See *id.* at 1086 (quoting sponsors of the 1875 Act who had agreed to remove the school desegregation provision because they had concluded that litigation under the Constitution "would be a more promising avenue for achieving those principles," not that the provisions lacked constitutional support). Nevertheless, the best evidence of what Congress believed it could enact within the bounds of the Constitution is what Congress in fact enacted, not what it debated but then decided not to enact. See *id.* at 985-86 (conceding that "the case for *Brown* would be stronger if school desegregation leg-

Bank, however, provides no evidence to explain away the failure to enact section five of Sumner's bill. It is therefore equally plausible that the view that the Fourteenth Amendment authorized such congressional action lacked support. Even if the 1875 Congress had asserted the power, it would not automatically follow that its assertion was legitimate. That depends on the original intent indicated by the constitutional language from almost a decade earlier.¹¹⁰

Bank's second attempt to disarm the Democrats' social equality argument is even less convincing than his reliance on the statutory language that failed in Congress. He argues that the Republicans responded to the Democrats' social equality argument by emphasizing a contradiction in the Democrats' claim. On one hand, Democrats recommended that "social relationships" not be the subject of legislation; but on the other hand, they supported *state* laws that barred miscegenation and hence regulated "social relationships."¹¹¹ The Democrats could have easily diffused this argument by maintaining that social equality was not a fit subject for *federal* regulation, which was a position shared even by many Republicans.¹¹² This would not render social equality an inappropriate matter for state regulation.¹¹³

islation had actually passed").

110. See *supra* note 109.

111. Bank, *supra* note 27, at 327 (Republican "statements were offered in order to throw the miscegenation question back in the Democrats' faces. If social rights are not a proper subject of regulation, then anti-miscegenation laws . . . should be the target of the bill's opponents."). A similar charge of hypocrisy was made almost a century later by supporters of the Civil Rights Act of 1964, regarding their opponents' support of state and local laws requiring separate facilities. See Samuel A. Marcossan, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 137, 153 n.44 (1995) (discussing the inconsistent positions of Southern opponents of the 1964 Act).

112. For example, President Andrew Johnson's veto message concerning the 1866 Act criticized the law on federalism grounds. He wondered rhetorically "whether, if Congress can abrogate all State laws of discrimination between the two races in the matter of real estate, of suits, and of contracts generally, Congress may not also repeal the State laws as to the contract of marriage between the two races?" Bank, *supra* note 27, at 319 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1680 (1866)); see also KULL, *supra* note 18, at 60 (reciting an early editorial opposing a constitutional amendment requiring color-blindness because "every State, loyal and disloyal, is to be deprived of all power to regulate its own most vital concerns") (quoting N.Y. TIMES, Feb. 18, 1864, at 4). Kull also argued that moderate Republicans who dominated the Thirty-ninth Congress were "unwilling[] to abandon a constitutional view in which the regulation of civil society was the proper concern of state, not federal, government." *Id.* at 68.

113. McConnell also attempts briefly to make some of the same arguments Bank advances in defense of a broad original understanding of the effect of the Fourteenth Amendment on anti-miscegenation laws. See McConnell, *supra* note 24, at 1018-19 (discussing the Republicans' refusal to make the symmetrical equality argument, and the relative silence of supporters of the 1875 Act in re-

For these reasons, Justice Thomas could not, on the basis of McConnell's or Bank's efforts, buttress a concurrence in *Loving* with persuasive evidence that it would be consistent with the original understanding of the Fourteenth Amendment. While both scholars' work combines to form the strongest challenge yet to the consensus that originalism and color-blindness are irreconcilable, their challenge ultimately fails.

b. Invocation of the Declaration of Independence: Natural Law to the Rescue?

Because the historical record alone will not support an interpretation of the Fourteenth Amendment as creating a regime of color-blind governmental decision-making, Justice Thomas would be compelled to invoke other legal sources to support his interpretation. Prior to becoming a Supreme Court Justice, Thomas suggested that when deciphering the original meaning of constitutional language, we should consult the "higher law" foundations of the Constitution, particularly the values embodied in the Declaration of Independence.¹¹⁴

Could such a broadened view of the original understanding justify a color-blind interpretation of the Fourteenth Amendment? In answering that question, it is helpful that Thomas' writings on the subject focus on Fourteenth Amendment interpretation and rely heavily on Justice Harlan's dissent in *Plessy v. Ferguson*.¹¹⁵ The Civil War Amendments, Thomas argues, must be "understood as *extensions of the founding principles of equality and liberty*."¹¹⁶

Of greatest relevance, Thomas finds in the Declaration of In-

sponse to charges that it would nullify anti-miscegenation laws). I have already discussed what I perceive to be the ruinous flaws in these arguments. See *supra* text accompanying notes 95-110 (concluding that Republicans were silent about miscegenation laws because they viewed these laws to be outside the scope of the Equal Protection Clause and federal regulation).

114. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 63 (1989) [hereinafter Thomas, *The Higher Law*]; Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 993 (1987) [hereinafter Thomas, *Toward a Plain Reading*].

115. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). In Thomas' view, Justice Harlan "understood . . . that his task was to bring out the best of the Founders' arguments regarding the universal principles of equality and liberty." Thomas, *Toward a Plain Reading*, *supra* note 114, at 993 (emphasis added). Thomas believes those arguments were best represented in the Declaration of Independence, that the founding documents themselves—in particular the link between the Constitution and the Declaration of Independence—give us those principles." *Id.* at 983.

116. *Id.* at 984 (emphasis added).

dependence the "promise of equality of rights"¹¹⁷ which he contends should have but did not inform the decision in *Dred Scott v. Sandford*.¹¹⁸ Thomas posits that this "promise of equality of rights" should have established that slavery was inconsistent with the Declaration, and hence, with the Constitution.¹¹⁹ Given his critique of *Dred Scott*, it appears clear that Thomas could employ this methodology in *Loving* to discover which interpretation of the Constitution achieves "the fulfillment of the ideals of the Declaration of Independence,"¹²⁰ in particular the ideal of equality.¹²¹ Thus, it is useful to consider whether Justice Thomas may credibly employ such a strategy of resort to the Declaration of Independence, and whether that strategy would provide the "higher law" support necessary for the proposition that color-blindness was the original understanding of the Fourteenth Amendment.

The difficulties with resorting to the Declaration of Independence are many, and ultimately insurmountable. First, it would be inconsistent with the assurance Thomas gave during his confirmation hearings that, notwithstanding his prior scholarly musings, he "didn't see a role for natural law in constitutional ad-

117. *Id.*

118. 60 U.S. (19 How.) 393 (1857).

119. Thomas, *Toward a Plain Reading*, *supra* note 114, at 985 ("But the jurisprudence of original intention cannot be understood as sympathetic with the *Dred Scott* reasoning, if we regard the 'original intention of the Constitution to be the fulfillment of the ideals of the Declaration of Independence.'") (citations omitted).

120. *Id.*; see also *id.* at 991-92 (arguing that *Brown v. Board of Education* should have been decided not by emotions, but by "resting on reason and moral and political principles, as established in the Constitution and the Declaration of Independence").

121. Indeed, it is significant that Justice Thomas has relied on the principles of the Declaration of Independence to guide his constitutional interpretation in only one case since he joined the Court. In the affirmative action case of *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring in part and concurring in the judgment), Thomas wrote:

There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.")

Id. at 240 (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)) (citation omitted). It is instructive that, in his unique invocation of the Declaration of Independence—as in other ways—Justice Thomas' Equal Protection Clause jurisprudence departs from the techniques he employs in all other cases. See *infra* notes 127-137, 178 and accompanying text (discussing inconsistencies in Thomas' jurisprudence). In my view, it represents his groping for a basis for color-blindness while implicitly recognizing that the traditional originalism he employs elsewhere does not supply such a basis.

judication.”¹²² Since this assurance was taken as a repudiation of the ideas expressed in Thomas’ earlier writings,¹²³ consulting the Declaration of Independence as a source for higher law would place Justice Thomas in the awkward position of reversing to a position that was already the subject of a confirmation conversion.

More importantly, Thomas’ arguments regarding what principles the Declaration of Independence actually supplies are unpersuasive, ahistorical and largely baffling. The only principle identified in his writings and in the *Adarand* citation to the Declaration of Independence is that of equality.¹²⁴ Such an amorphous principle, however, provides no more guidance as to the *meaning* of equality than does the language of the Fourteenth Amendment itself. We need not consult the Declaration of Independence to discern a fundamental principle of equal treatment; that much is obvious from the Equal Protection Clause alone.

The problem lies in choosing from among the many different ways to apply the equality principle in practice. The Declaration of Independence is of no use to us in identifying the correct, originalist theory of equality animating the Fourteenth Amendment.¹²⁵ Thomas’ invocation of the Declaration of Independence simply shifts the problem of defining “equality” back a century, from the time of the ratification of the Fourteenth Amendment in 1868 to the drafting of the Declaration of Independence in 1776. Moreover, even if we could discern support from the Declaration of Independence for a color-blind conception of equality, discovering the original understanding of the Fourteenth Amendment at so general a level is anathema to an originalist when a contrary meaning, itself specific to miscegenation, is discernible from the histori-

122. JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 216 (1994) (quoting Thomas’ confirmation testimony).

123. See *id.* (concluding that “Thomas fully retreated from his past embrace of natural law theory”).

124. See *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment) (citing the Declaration of Independence to support the claim that the affirmative action plan at issue was “at war with the principle of inherent equality”); see also Thomas, *Toward a Plain Reading*, *supra* note 114, at 984 (identifying the “promise of equality of rights” as the principle to be found in the Declaration of Independence).

125. Thomas concedes this difficulty by acknowledging that Lincoln’s understanding of the founding, as based on the equality principle of the Declaration of Independence, “does not provide instant wisdom on the whole range of issues concerning Civil Rights, equal opportunity, and race relations.” Thomas, *Toward a Plain Reading*, *supra* note 114, at 986. But Thomas understates the flaw. The Declaration of Independence is of no assistance in giving life or understanding to the original meaning of the Fourteenth Amendment ideal of equal protection.

cal record.¹²⁶

The futility of looking to the Declaration of Independence for the animating principle of the Fourteenth Amendment is underscored by Thomas' own assertions about the Declaration's impotence. Thomas argues that the maintenance of slavery was inconsistent with the principle of fundamental equality underlying the Declaration of Independence.¹²⁷ From that, and from the Constitution's subsequent accommodations of slavery,¹²⁸ it appears obvious that the Constitution fundamentally departs from the lofty principles of the Declaration of Independence. Thomas, however, draws the peculiar conclusion that we have been wrong all along—that the Constitution as originally written did not accommodate slavery, and that *the Founders' original intent* was anti-slavery.¹²⁹ If I understand it correctly, Thomas' argument is that an originalist jurist in 1800, reading the Constitution in light of the Declaration of Independence, should have declared slavery to be unconstitutional. To say the least, Thomas' argument would have come as a great surprise to ratifiers in the slave states.¹³⁰

This ahistorical interpretation of both the Declaration of Independence and the Constitution in turn reveals a related problem. Even if we agree that on a general level the drafters of the Constitution intended it to reflect the ideals of the Declaration of Independence,¹³¹ we cannot assume they succeeded in every re-

126. See *supra* notes 18-23 and accompanying text (discussing the need for originalists to seek original understanding at the most specific level of generality, rather than identifying a principle so broad as to be meaningless).

127. See *supra* note 119 and accompanying text (recounting Thomas' statements).

128. See *infra* notes 158-162 and accompanying text (discussing the Constitution's accommodation of slavery as constituting the "founders' pact with evil").

129. See Thomas, *Toward a Plain Reading*, *supra* note 114, at 984-86 (arguing that "[e]ven a brief examination of the founding . . . provides ample evidence for Lincoln's interpretation," which was based on the Declaration of Independence and claimed that slavery was unconstitutional).

130. That result would, for example, be difficult to reconcile with that clause of the Constitution that forbade restrictions on the slave trade prior to 1808. See U.S. CONST. art. I, § 9, cl.1. ("The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand one hundred and eight . . ."); U.S. CONST. art. V ("Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article . . ."). Whether enacted by Congress or by Constitutional amendment, what would have been the purpose of constitutional protection for the slave trade if slavery itself were unconstitutional?

131. See SCOTT D. GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 2-3 (1995) (arguing that "the natural-rights principles embodied in the Declaration . . . are at the heart of the Constitution" and thus are "the most obvious choice for interpreting the Con-

spect. Indeed, if there is any specific matter on which the Constitution departs from, even betrays the ideals of the Declaration, it is the accommodation of the most profound inequality: slavery. It is simply inadequate for an originalist to invoke a general connection between the Declaration of Independence and the Constitution in support of a principle which severs that connection.

Justice Thomas might concede the point, admitting that the antebellum Constitution was inconsistent with the ideals of the Declaration of Independence on questions of race and equality, but arguing nonetheless that the 1868 amendments brought both documents into harmony, legitimating an originalist's use of the Declaration of Independence. This assertion, however, simply returns us to the problem of what content to pour into the equality mold, a question answered no more specifically by the Declaration of Independence than by the Fourteenth Amendment standing alone.

Nor can we ignore the methodological difficulties barring an originalist's consultation of "higher law" to determine the meaning of a source of positive law.¹³² The lack of consensus on what natural law requires, and what results it produces, is vividly illustrated by the district court's *Loving* opinion.¹³³ Without question, those notions significantly differed from the color-blind equality principle Justice Thomas envisions today. Even if there were consensus

stitution").

132. Many originalists have rejected judicial use of natural law because it permits the unelected judge to supply his or her own version of what is right and just rather than being bound by the language of the positive law. See BORK, *supra* note 21, at 66 (rejecting judicial invocation of natural law as undemocratic and risking arbitrary decision-making). Charles Cooper commented that "natural justice" can be invoked to produce quite different results in the hands of a conservative such as Harry Jaffa and a liberal such as William Brennan. See Symposium, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 AZ. ST. L.J. 17, 63-64 (1996).

133. See *Loving v. Virginia*, 388 U.S. 1 (1967). The Supreme Court quoted the district court's *Loving* opinion to the effect that:

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.

Id. at 3.

It would not suffice for Justice Thomas to stake a greater claim to legitimacy because he would be invoking the Founders' own views of natural law as expressed in the Declaration of Independence rather than God's law, since the Declaration of Independence itself asserts that the rights and principles it states are those which are "endowed by [our] creator" a phrase Thomas himself quoted in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

on the source and mandate of "natural law," by what authority or mechanism is the Supreme Court vested to enforce it?¹³⁴

Finally, resort by Thomas to a natural law approach would tighten to a crushing level the "dead hand" grip of generations long gone. Thomas would read not only the original Constitution in light of the natural law impulses of the original Founders, but also amendments adopted much later, such as the Fourteenth Amendment.¹³⁵ But even if that assumption is valid as to the original Constitution, and even if it remained valid through the Bill of Rights, surely it must have become invalid at some point. The Constitution is not a single, unitary document; just counting formal amendments, it has been amended over two dozen times.¹³⁶ Can we suppose the Framers in 1868 understood natural law in the same way as the Framers in 1789? Would it not be more justifiable and more consistent with originalism to consult the body of natural law as it was understood when the Fourteenth Amendment was ratified? When does the dead hand finally lose its grip on every generation that follows?

In short, Thomas explicitly abandoned reliance on natural law in his confirmation hearings; he has almost completely ignored natural law in his opinions as a Justice. The natural law approach is irredeemably weak as a means of bolstering the originalist case for a color-blind interpretation of the Fourteenth Amendment. Justice Thomas' invocation of the Declaration of Independence in support of a concurrence in *Loving* is thus unlikely and would be doomed to failure.

In tandem with the failed historical case raised by Michael McConnell and Stephen Bank, this leaves Justice Thomas with two remaining options for crossing his Rubicon: dissent as an originalist or concur with the majority by employing a modernist, color-blind analysis.

134. See generally Powell, *supra* note, 19, at 684-85 (asking the question of originalism in general: "What evidence exists that the Founders themselves intended this approach?") If there is room to doubt whether the "original understanding" was intended to guide future interpretation, there is vast doubt whether the Founders intended future generations to read the Constitution in light of the natural law discussed in the Founders' political writings.

135. See *supra* notes 67-75 and accompanying text (providing examples of Thomas' originalist jurisprudence).

136. See generally Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 13, 25 (Sanford Levinson ed., 1995) [hereinafter *RESPONDING TO IMPERFECTION*] (reviewing instances of amendments to the Constitution).

2. Which Bridge Across the Rubicon?

Originalism or color-blindness? The evidence is overwhelming about which path Justice Thomas would take if given the opportunity to decide *Loving*. His Fourteenth Amendment opinions point the way: Thomas has chosen color-blindness while providing no originalist foundation for his choice.¹³⁷ Based on this record, I believe he would write a concurrence much like the one envisioned earlier.¹³⁸ Thomas would retreat to the empty vessel of the color-blind Constitution and recite the ahistorical mantra that the racist America of 1868¹³⁹ produced a legacy of non-racialism. As for the imagined, originalist *Loving* dissent, Thomas would have set it aflame.

Comparing Justice Thomas' assertions of color-blindness as the intent underlying the Fourteenth Amendment with his opinions employing originalist analysis in other areas produces striking results.¹⁴⁰ For example, his concurrences in *Missouri v. Jenkins*¹⁴¹ and *Adarand Constructors, Inc. v. Peña*¹⁴² assert color-blindness as the primary principle animating the Fourteenth Amendment¹⁴³ with no constitutional history to suggest that was

137. See *supra* note 67 (citing cases which provide the foundation for Thomas' color-blind jurisprudence).

138. See *supra* Part III for a draft of Thomas' concurrence.

139. See Berger, *supra* note 21, at 1179-80 (describing the overt racism of Republican supporters of the post-Civil War amendments and civil rights statutes).

140. I have intentionally omitted discussion of the Court's recent voting rights cases, *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), even though they also assert color-blindness as the constitutional mandate without an originalist justification. See James B. Zouras, *Shaw v. Reno: A Color-Blind Court in a Race-Conscious Society*, 44 DEPAUL L. REV. 917 (1995). The reason for the omission is that Justice Thomas did not write his own opinion. Rather, he simply joined the majority opinions. One exception was *Holder v. Hall*, 512 U.S. 874 (1994) (Thomas, J., concurring), in which Thomas argued that the "assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution." *Id.* at 905-06. Thomas' position in *Holder* did not directly involve constitutional interpretation; rather he urged a change in the Court's statutory interpretation of an act of Congress. See *id.* at 892. For this reason *Holder* is somewhat tangential to my purpose, although it does reaffirm Thomas' commitment to color-blindness.

141. 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

142. 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

143. See *Jenkins*, 515 U.S. at 121 ("Regardless of the relative quality of the schools, segregation violated the Constitution because the State classified students based on their race.") (Thomas, J., concurring); *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment) ("[G]ood intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.").

the Framers' intent.¹⁴⁴ By contrast, his opinions in cases such as *U. S. Term Limits, Inc. v. Thornton*¹⁴⁵ and *Rosenberger v. Rector & Visitors of University of Virginia*¹⁴⁶ fairly bristle with historical detail supporting his vision of the Qualifications Clause¹⁴⁷ and the Establishment Clause.¹⁴⁸

The explanation for this conspicuous contrast is simple. The originalist argument for color-blindness appears nowhere in *Adarand* or *Jenkins* because there is no argument to make. If Thomas would adhere to color-blindness as the constitutional mandate when confronted with *Loving*, as I suspect, he would do so with an abundant lack of evidence that any but the most radical of Republicans intended any such thing, and that even they conveniently neglected to tell the rest of the country such was their intention until after the Fourteenth Amendment was safely ratified.¹⁴⁹ Justice Thomas would, in short, reinvent the Fourteenth Amend-

144. See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 92 n.465 (1996) ("The constitutional attack on affirmative action programs by Justices Scalia and Thomas, without any investigation of history on their part, is one of the most disturbing features of their purported originalism."). In *Jenkins*, Thomas does make one oblique reference to Professor McConnell's attempted originalist defense of *Brown*. See *Jenkins*, 515 U.S. at 120. McConnell did not argue that the Framers of the Fourteenth Amendment intended that the Government discriminate among its citizens on the basis of race. See *supra* note 38 (presenting McConnell's view of public education as a "civil right" as that term was understood in 1875). McConnell argued that, by the time of *Brown*, school segregation was no longer permissible under the Framers' vision. See *id.*

145. 514 U.S. 779, 846 (1995) (Thomas, J., dissenting).

146. 515 U.S. 819, 852 (1995) (Thomas, J., concurring).

147. See *Thornton*, 514 U.S. at 869 n.11 (Thomas, J., dissenting); see also *id.* at 877-904 (discussing the original understanding of the Qualifications Clause).

148. See *Rosenberger*, 515 U.S. at 852-63 (Thomas, J., dissenting) (discussing James Madison's view of the separation of church and state, and the early practices of federal involvement with churches after the ratification of the First Amendment). This contrast also shows up within Justice Thomas' opinion in *Jenkins*, 515 U.S. at 114, where his bald assertion of color-blindness differs starkly from his detailed historical defense of the claim, also relevant to the decision but *not* involving the Fourteenth Amendment that "the Framers did not intend federal equitable powers to reach as broadly as we have permitted." *Id.* at 126. Jeffrey Rosen has labeled the opinions of Justices Thomas, Scalia, Rehnquist and Kennedy the "remarkable race cases of 1995." Rosen, *supra* note 36, at 791. Rosen writes:

In cases where they found it politically convenient, the conservative Justices were obsessively attentive to constitutional history. . . . But in the race cases, there is a conspicuous silence. Discussions of the original meaning of the Reconstruction amendments . . . are nowhere to be found. And no wonder. An examination of the historical evidence suggests that the original intentions of the radical Republicans in 1865 are flamboyantly inconsistent with the color-blind jurisprudence of the conservative Justices in 1995.

Id. at 791.

149. See *supra* text accompanying notes 41-45 (discussing the interpretation of the Fourteenth Amendment urged by the Republicans in the 1870s).

ment's "original understanding" to meet current ideals and more importantly, to preserve Clarence Thomas' identity as an American citizen, an African-American man who emerged from the cradle of American apartheid, rose from poverty, achieved the pinnacle of power and success in his chosen profession, and married a white woman with whom he lives today in the Commonwealth of Virginia.

B. What Justice Thomas' Dilemma Means for Color-Blindness and Originalism

If Justice Thomas wrote a *Loving* concurrence resting on color-blindness without also addressing whether the original intent of the drafters and ratifiers of the Fourteenth Amendment supports the result, the problem would be not just that his argument would be unconvincing. The greater problem occurs in reducing originalism from a rigorous interpretive method to a misleading label; Justice Thomas would be imagining history to suit a desired outcome, with results hardly more credible than the history I imagined placing him amid as a Supreme Court Justice in 1967.¹⁵⁰

The incoherence of an originalist championing color-blindness reaches beyond *Loving*, and even beyond the Equal Protection Clause. It is originalism itself that creates the dilemma; Justice Thomas' original intent includes *no consideration of the intent, interests, or even personhood* of Clarence Thomas,¹⁵¹ or any other African-American. It is racist,¹⁵² corrupted intent unworthy of being

150. Some might say that I have created my own Justice Thomas, placing my ideas in his head in a way that is unfair to the real person. Perhaps so; perhaps imagining a different history by taking an individual out of his own time and place is not a legitimate method of critiquing his jurisprudence. But if so, then imagining a false history of the Fourteenth Amendment, and attributing to its ratifiers the values of another century, is an even less legitimate method of constitutional analysis—at least for a committed originalist. If she criticizes my method, the originalist implicitly admits the flaw in Justice Thomas' performance.

151. For now, I limit my discussion to the doctrinal implications of the conflict between originalism and color-blindness. Shortly, I shall narrow the focus considerably, addressing the implications of the conflict between the originalist jurisprudence of Justice Thomas and the racial identity of Clarence Thomas. See *infra* Part IV.C (arguing that Justice Thomas could not maintain his originalist jurisprudence without denying his own equality under the Constitution).

152. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 121 (1991) Patricia Williams writes:

Blacks and women are the objects of a constitutional omission that has been incorporated into a theory of neutrality. It is thus that omission becomes a form of expression, as oxymoronic as that sounds: *racial omission is a literal part of original intent*; it is the fixed, reiterated prophecy of the Founding Fathers.

given sway over contemporary constitutional analysis. This is particularly true as to the original Founders, whose intent as to matters of equal protection must be deemed nothing less than malevolent.¹⁵³ It is also true, however, of the Framers of the Fourteenth Amendment. The best evidence of their intent reveals only the most limited consideration of the interests of the newly-freed slaves,¹⁵⁴ and a similarly crabbed conception of the scope of the Equal Protection Clause.¹⁵⁵

It is therefore remarkable that the most ardent originalists of our time, Justices Thomas and Scalia, cling to a color-blind interpretation of the Equal Protection Clause. Professor Kull, who strongly defends the color-blindness principle, reveals how profoundly it *departs* from originalism when he points out that for nineteenth century attorneys appearing:

Before judges who assumed they should interpret the Fourteenth Amendment according to the plain meaning of its words and their best understanding of the intent of its framers, the argument that the amendment forbade school segregation was already a difficult one to make; to contend that it *prohibited racial classifications altogether would have seemed merely quixotic*.¹⁵⁶

Genuine originalism, as distinguished from the diluted version offered by champions of ahistorical color-blindness, is a device

Id. (emphasis added).

153. See Thurgood Marshall, *Racial Justice and the Constitution: A View From the Bench*, in *AFRICAN-AMERICANS AND THE LIVING CONSTITUTION* 314, 315-16 (John Hope Franklin & Genna Rae McNeil eds., 1995) [hereinafter *THE LIVING CONSTITUTION*] (stating that the Founders and their immediate successors "trade[d] moral principles for self-interest" by "devis[ing] [a government that] was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today").

154. See *supra* text accompanying notes 41-45 (discussing rejection of radical Republican proposals for a more sweeping Fourteenth Amendment).

155. See *supra* text accompanying notes 33-36 (relating the limited scope of equal protection to "civil rights").

156. KULL, *supra* note 18, at 111 (emphasis added). In light of this, one must doubt the reliability of textualism and originalism as jurisprudential methods. The strict constructionists of the last century found the color-blind interpretation of the Fourteenth Amendment "merely quixotic." *Id.* But the originalists of our time find this interpretation so compelling that it overcomes a long tradition of permitting racial classifications. See *Planned Parenthood v. Casey*, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (criticizing the majority's argument that "adherence to tradition would require us to uphold laws against interracial marriage" because "[a]ny tradition in that case was contradicted by a text—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value"). This is compelling evidence that the original understanding exists more in the eyes of the interpreter than in objective historical reality.

for perpetuating America's history of repression and racism.¹⁵⁷ This effect is most jarring when it comes to interpreting the Equal Protection Clause, the very Constitutional provision which assumes equality before the law but which, when subjected to a rigidly original interpretation, falls cruelly short of fulfilling that goal. That is, in part, why the *Loving* story is so powerful.

But even beyond the Fourteenth Amendment, racism permeated the original understanding of countless Constitutional provisions, including those directly accommodating slavery¹⁵⁸ and numerous others that did the same thing less directly.¹⁵⁹ Perhaps most significant is that the very concept of federalism, or its more pejorative formulation, "States' rights," was largely devised to permit Southern states to prevent the federal government from in-

157. See Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L. REV. 39 (arguing that color-blindness as constitutional principle ignores discrimination against African-Americans); Neil Gotanda, *A Critique of Our Constitution is Color-Blind*, 44 STAN. L. REV. 1, 39 n.153 (1991) (observing that Justice Harlan assumed, while advocating the color-blind principle in *Plessy*, that "a color-blind constitutional posture would result in the continuation of white superiority because whites were the 'dominant race' in the country"). Professor Klarman puts it this way:

The best 'scientific' evidence of the mid-nineteenth century held that racial differences were natural, the supremacy of the white race was self-evident, and racial segregation an imperative for the survival of both races. . . . One cannot 'cleanse' the original understanding of its less seemingly aspects by labeling them prejudices rather than principles and still claim to be an originalist.

Klarman, *supra* note 23, at 1895 (citations omitted); see also Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1986) (stating that the presence of unconscious racism renders color-blindness inadequate to achieve genuine equality).

158. See WILLIAM WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA: 1760-1848*, 62-63 (1977) (identifying 10 separate examples of how the Constitution protects slaveowners' property interests).

159. See Mary Frances Berry, *Slavery, The Constitution, and the Founding Father*, in *THE LIVING CONSTITUTION*, *supra* note 153, at 11, 11-12 (arguing that the electoral college, the requirement that three-fourths of the States agree to a constitutional amendment and the limitation of diversity jurisdiction to "citizens" all were or may have been intended to indirectly be "helpful to the institution of slavery"); Epps, *supra* note 10, at 414-15 ("Slavery—an organized, state-supported system of racial domination and exploitation—permeates the Constitution."); John Hope Franklin & Genna Rae McNeil, *Introduction*, in *THE LIVING CONSTITUTION*, *supra* note 153, at 1, 2. Franklin and McNeil write:

An originally excluded race found itself often embroiled in battles over whether veneration of the Bill of Rights justified assaultive, racist speech or the imposition of disproportionate sanctions against African Americans. Clearly, the time had arrived to address the adjudication of interests and the assumption of values inherent in the tradition of constitutionalism inclusive of the Bill of Rights.

Id.

terfering with the institution of slavery.¹⁶⁰ Viewed in this light, such federalist-inspired provisions as the Senate, whose structure permitted the Southern states to block civil rights initiatives for nearly a century prior to the Civil Rights Act of 1964,¹⁶¹ are partially the product of our constitutional Founders' pact with evil.¹⁶²

It is worth pausing to note that this flaw in originalism, that it perpetuates an original understanding that was the product of race-based exclusion, is also true, to a lesser degree, of other forms of traditionalist interpretation. Professor Tribe's recent emphasis on fidelity to constitutional "text" and "structure" as the hallmark of legitimate constitutional interpretation¹⁶³ suffers from the same

160. See Darlene Clark Hine, *Black Lawyers and the Twentieth-Century Struggle for Constitutional Change*, in *THE LIVING CONSTITUTION*, *supra* note 153, at 33, 33. Hine argues that:

[T]he controversy over state versus federal rights and the contradiction inherent in the coexistence of democracy and . . . slavery, and later, racial inequality were so closely intertwined that it would require two reconstructions—one in the aftermath of the Civil War and another several generations later—to restore the primacy of federal authority over state power and equality of rights over racial subordination.

Id. (quotations omitted).

161. See Gary Orfield, *Congress and Civil Rights*, in *THE LIVING CONSTITUTION*, *supra* note 153, at 144, 145 (arguing that "no civil rights law [was] enacted for more than three-fourths of a century" from 1875 to 1964, and that Congress was an obstacle primarily because of the ability of Southern Senators to block bills using the filibuster and seniority-based committee chairmanships).

162. It is impossible to imagine from our vantage point more than 200 years later how different the Constitution would have been without accommodations for slavery, and if unrepresented groups such as blacks, women and the poor had had a voice in the founding. Professor Culp agrees that "it is difficult to discern how black Americans would have impacted the Constitution," but contends that "it is no more difficult than determining the assumptions that underlie the original intent of the Framers' writings." Culp, *supra* note 157, at 71. I disagree with this point. Professor Culp, I think, underestimates the extent to which the Constitution, the records of the Constitutional Convention and the ratification debates give us significant evidence of the Framers' intent. This evidence is lacking as to the countless ways in which unrepresented peoples might have changed our Constitution from the outset. To the extent Culp believes we can reconstruct their views, he understates the profoundly destructive force of the silence imposed upon them when the Constitution was written and ratified. A genuinely democratic Constitution might not have had a Senate, or one constituted to be so protective of sectional interests. Or, as I discuss shortly, the Constitution might have been made far easier to amend. See *infra* text accompanying notes 165-174 (discussing implications of the racist origins of the Article V amendment process). Professor Culp surely is right, however, that the difficulty of imagining the Constitution we might have had illustrates that a jurisprudence of original intent *maximizes* the harm done by the original exclusion. See Culp, *supra* note 157, at 71-72. It is disturbing enough that, even if we utilize a flexible approach to constitutional interpretation, we continue to be governed by a document that—whatever its estimable strengths—to this day contains many of the original racist accommodations, and which still reflects the choices made by an exclusive elite.

163. Tribe, *supra* note 46, at 1233. Professor Tribe states:

difficulty. This implies acceptance of somewhat more flexibility than the pure originalism expounded by Justice Thomas, but still ties interpretation to a structure and text rife with the racist compromises made in the Founding, and to value choices made by Founders who were grossly unrepresentative of the population for whom they established a government.¹⁶⁴

For example, Professor Tribe defends the amendment process on textualist grounds,¹⁶⁵ arguing that Professor Ackerman's suggestions that the enumerated process is not the exclusive means of amending the Constitution interfere with the "most fundamental agreement[] . . . among the people and their government."¹⁶⁶ Professor Tribe bases this opinion on the existence and purpose of Article V,¹⁶⁷ yet appears unconcerned that Article V's significant barriers to amendment can be seen as the Framers' insurance policy against the possibility that then-excluded groups, including women, slaves and free blacks, could one day change the power structure the Founders had erected without regard to the needs, views, or priorities of the members of those groups.¹⁶⁸ Simply put, Article V locks in place the advantages the Founders wrote for themselves and their successors to power. Tribe's sanguine advo-

It seems axiomatic that, to be worthy of the label, any 'interpretation' of a constitutional term or provision must at least seriously address the *entire* text out of which a particular fragment has been selected for interpretation, and must at least take seriously the *architecture* of the institutions that the text defines.

Id.

164. See Culp, *supra* note 157, at 75 (arguing that "[a]lmost all notions of originalism are subject to the criticism that they ask black concerns to defer to white concerns").

165. See Tribe, *supra* note 46, at 1233 (criticizing Professor Ackerman's "willingness to embrace a public discourse that would treat the Constitution as amenable by procedures nowhere specified therein").

166. *Id.* at 1241.

167. See *id.* (characterizing Article V as "among the provisions that establish the basic framework of our system of governance" and advancing this as a reason to reject Professor Ackerman's interpretation).

168. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 316 (1991) (acknowledging the difficulty of responding "to today's black or female American who wants to know why she should give any respect at all to old-time politicians who thought they could speak for 'the People' without even making an effort to consult people like her"). Ackerman's answer, that "these old-timers provided a constitutional language and institutions through which later generations of women and blacks have won fuller citizenship." *Id.* This answer of course has force, but must be understood in light of Ackerman's own vision of the nature of those institutions, which is very different from Tribe's. Were the process of constitutional transformation as completely limited by Article V as Tribe believes it should be, the progress cited by Ackerman would never have been achieved. See *supra* note 165 (describing Tribe's criticism of Ackerman's position that there are alternative methods of amending the Constitution).

cacy of these anti-democratic elements of the Constitution¹⁶⁹ thus comes at the price of paying insufficient attention to the connection between those elements and fundamental inequality.

It is particularly extraordinary Professor Tribe would accord such primacy to the Article V amendment process as a fundamental agreement between the American people and their government, given his own critique of that so-called agreement on these very grounds. He acknowledges:

[T]he ratification of the Constitution—given the exclusion of women, slaves, Native Americans, and the propertyless—never was a genuine exercise of truly popular sovereignty Because particular groups were excluded from political participation in the ratification and amendment of the Constitution, “consent is an ultimately illusory source of legitimacy for the enterprise of constitutional interpretation.”¹⁷⁰

If *any* provision of the Constitution is illegitimate on these grounds, it is Article V, which perpetuates the exclusion by making it more difficult for excluded groups *ever* to be heard.¹⁷¹

169. See Tribe, *supra* note 46, at 1229 (arguing that “departure[s] from a more purely majoritarian democracy” are “the whole point of the system the Constitution put[s] in place”).

170. *Id.* at 1292 n.229 (quoting Laurence H. Tribe, *Federal Judicial Power and the “Consent” of the Governed*, in *THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS, AND RESPONSIBILITIES* 207, 209 (A.E. Dick Howard ed., 1992)). Professor Culp argues that:

Contract analysis requires some consent that is voluntarily produced and freely joined by the people. Yet black Americans never experienced such a choice with respect to the American Constitution. They were not active participants either in Philadelphia in 1787 or in Washington in the 1860s when the constitutional framework was created.

Culp, *supra* note 157, at 74.

171. In defense of his near-originalism, Tribe distinguishes between constitutional provisions “that are manifestly *instrumental* and *means-oriented* and that frame the architecture of the government,” which he argues should “be given as fixed and determinate a reading as possible,” Tribe, *supra* note 46, at 1247, and those that “appear designed more directly to embody *ends* as such in their proclamations about how governments are to treat persons,” which “ought perhaps to be read through lenses refined by each succeeding generation’s vision of how those ends are best understood and realized.” *Id.* This distinction is spectacularly unconvincing. Professor Tribe’s “architectural” provisions differ from his “treatment” provisions only in their indirection. The power given to Whites by the institution of slavery was maintained both by “treatment” provisions such as Article I, section 9, clause 1 of the Constitution, which barred ending the slave trade prior to 1808, and by architectural provisions such as Article I, section 3, which directed that slaves be treated as three-fifths of a person for apportionment purposes. Most importantly, the same is true of Tribe’s most cherished “architectural” provision, the Article V amendment process. Had it not been for the Civil War, the power of a minority of states to block constitutional change would surely have precluded adoption of anything resembling the Thirteenth, Fourteenth, and Fifteenth Amendments. See Berry, *supra* note 159, at 12 (“Slave states could refuse to ratify any constitutional amendment that curtailed or adversely affected the institution

Professor Tribe may be correct in his criticisms of Professors Ackerman and Amar's attempt to find a textual basis for permitting constitutional amendment outside the formal Article V process.¹⁷² Perhaps there is no way around Article V's obstacles to constitutional change. If so, we should at least recognize this has pernicious consequences for those excluded at the Founding. Accordingly, it is telling that Professor Tribe urges us to treat as unique and non-precedent setting every instance in which the interpretation and text of the Constitution has been altered by means outside of or arguably in violation of Article V.¹⁷³ In effect, he excludes the *stories* these events tell.¹⁷⁴

This, in turn, provides us an insight into originalism perhaps more significant than the racism of original understanding. We should view originalism as Professor Culp has: as little more than a mandate for courts to ignore those voices the Framers refused to hear.¹⁷⁵ It is the extreme case in which "the legal system 'silences' certain stories."¹⁷⁶ If the law generally reduces the stories of minorities to a whisper, originalism does more: it mandates their silence.¹⁷⁷

of slavery."). Doing as Tribe suggests, giving the amendment process and similar "architectural" provisions "as fixed and determinate a reading as possible," would produce much the same result as strict adherence to the Constitution of originalism. Tribe, *supra* note 46, at 1247. It would reflect and perpetuate the racism of the founding. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 367-68 (1996) (challenging the notion that "claims of equality should be held captive to the extraordinary obstacles of Article V").

172. See Tribe, *supra* note 46, at 1239-49 (discussing flaws Tribe perceives in Ackerman and Amar's work, including mistaken reliance on the absence of the word "only" in Article V).

173. See *id.* at 1286-1301 (dismissing ratification of the Constitution itself, and of the Fourteenth Amendment, as well as the events of the 1860s, 1937 and 1945 as not establishing a tradition of a non-Article V amendment process).

174. See *infra* text accompanying notes 256-260 (discussing Tribe's deafness to stories).

175. See Culp, *supra* note 157, at 69 ("The most important example of the tendency to remove the black experience and perspective from the law is found in the arguments of those who advocate a return to original intent. To rely on original intent is to hitch our interpretational scheme to a vision that excluded blacks.").

176. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 827 (1993) (citing David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2155-56 (1989)). Although Farber and Sherry regard the claim that "the legal system itself filters out" the stories of outsiders as "perhaps exaggerated," they acknowledge that the charge has "some substance." *Id.*

177. Cf. CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW* 39 (1987) ("[W]hen you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. Eliminated, gone."); see also *infra* text accompanying notes 241-260 (discussing the exclusion of certain voices from the framing of the Constitution, and its implication

The deafness of originalism becomes most apparent when comparing Justice Thomas' rigidly originalist dissent in *Hudson* with his non-originalist concurrence in *Jenkins*.¹⁷⁸ *Hudson* raised the issue of whether the beating of an inmate in a state prison constituted cruel and unusual punishment under the Eighth Amendment.¹⁷⁹ In his dissent, Thomas barely mentioned the particular story of the beaten prisoner,¹⁸⁰ rejecting that story and inserting instead an originalist narrative he believes governs the Cruel and Unusual Punishment Clause.¹⁸¹ When juxtaposed with the originalism Justice Thomas deployed in *Hudson*,¹⁸² his personalized approach in *Jenkins*¹⁸³ is jarring. He argued in *Jenkins* that school children have been ill-served by judicial efforts to integrate public schools, criticizing the district court for "tak[ing] upon itself to experiment with the education of [Kansas City's] black youth,"¹⁸⁴ attributing to it "the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites."¹⁸⁵ Thomas then lauded all-black schools, provided they are not produced by State action, because they "function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement."¹⁸⁶

The contrast between Thomas' rhetorical approach in *Jenkins* and *Hudson* is clear. Shielded by originalism in *Hudson*, Thomas refused to hear Keith Hudson's story, rendering this prisoner's

for narrative scholarship).

178. See *supra* text accompanying notes 141-142 (arguing that the originalist voice is absent in Justice Thomas' concurrence in *Jenkins* and *Adarand*).

179. See *supra* note 73 (discussing Thomas' dissent in *Hudson*).

180. Compare *Hudson v. MacMillian*, 503 U.S. 1, 17-18 (1992) (Thomas, J., joined by Scalia, J., dissenting) (saying of the particulars of Hudson's beating "[t]he magistrate who found the facts in this case emphasized that petitioner's injuries were minor") (citation omitted), with *id.* at 4 (Justice O'Connor's opinion for the Court, describing details of how guards "placed Hudson in handcuffs and shackles," and "punched Hudson in the mouth, eyes, chest, and stomach . . . held [him] in place and kicked and punched him from behind," resulting in a "cracked partial . . . dental plate").

181. See *id.* at 17-18; see also Charles Lawrence III, *Listening to the Lessons of Our History*, in THE LIVING CONSTITUTION, *supra* note 153, at 194, 195-96 (critiquing Justice Scalia's originalist First Amendment opinion in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which held that cross-burning on an African-American family's lawn is speech protected by the First Amendment). For the purposes of this Article, *R.A.V.* is noteworthy for ignoring the story of the victimized African-American family.

182. *Hudson*, 503 U.S. at 17-28 (Thomas, J., joined by Scalia, J., dissenting).

183. *Missouri v. Jenkins*, 515 U.S. 70, 114-38 (1995) (Thomas, J., concurring).

184. *Id.* at 114 (1995) (Thomas, J., concurring).

185. *Id.* at 119.

186. *Id.* at 122.

personal narrative of abusive prison treatment irrelevant. Later discarding his originalist shield, Thomas heard and passionately related the personal stories of the school children he expressed such concern for in *Jenkins*.¹⁸⁷

In short, Thomas' Fourteenth Amendment decisions on race and equal protection radically depart from his otherwise uncompromising originalist bent to account for contemporary policy concerns. How else should we characterize his views of the effects of desegregation efforts and the value of all-black schools? Because in his Fourteenth Amendment decisions Thomas has consistently abandoned originalism and resorted to policy arguments like those in the *Jenkins* decisions, he cannot credibly argue that policy considerations are counterfeit constitutional currency in other contexts.¹⁸⁸

C. What Justice Thomas' Dilemma Means for Clarence Thomas and Legal Narratives

The previous analysis prompts and legitimates the question of whether a "real" Justice Thomas exists. If Thomas has a coherent judicial identity, it is integrally tied to the proposition that the Constitution must be interpreted according to its specific language as understood by those who ratified it.¹⁸⁹ Had such a figure been on the Supreme Court in 1967, he *must* have dissented in *Loving*; a concurrence would have demolished his identity as a Justice.

Sadly, a dissent by Thomas in *Loving* would demolish any coherence in his personal identity.¹⁹⁰ Upholding anti-miscegenation

187. I discuss the substance of Justice Thomas' story *infra* note 197 (criticizing the description of the facts giving rise to *Jenkins* and the trial court's reasoning).

188. Professor Fleming is correct when he argues that decisions accepting such policy claims to find unenumerated fundamental rights in the Constitution are, to an originalist, "the junk pile of the constitutional culture." James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 8 (1995). The originalist in Justice Thomas should see color-blindness as just another example of "the hubris and futility of judges episodically succumbing to the temptation to impose their personal versions of utopia upon the polity in the guise of interpreting the Constitution." *Id.*

189. See Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495, 501 (1996) (noting that Thomas "has written perhaps the most uncompromising originalist opinions in decades"). Interestingly, in making the argument that there are virtually no totally faithful originalists, Professor Levinson points to the same lapse on Thomas' part as I have identified in this article: Thomas' failure to provide an originalist basis for his views on the Equal Protection Clause. See *id.* (referring to Thomas' non-originalist opinion in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995)) (Thomas, J., concurring in part and concurring in the judgment).

190. Professor Wells asks the interesting question, "Who . . . is Clarence Thomas if he is not understood in terms of his commitment to conservative politics?"

laws fundamentally denies the equal citizenship of Clarence Thomas, the man.¹⁹¹ Stated succinctly, Thomas' judicial identity is fundamentally at war with his personal identity.¹⁹² As the *Loving* narrative reveals, if *Justice* Thomas does not deny *Clarence* Thomas, then there is no Justice Thomas.¹⁹³

The story of Justice Thomas deciding *Loving* against the backdrop of Clarence Thomas' life powerfully validates the use of narratives in understanding, explaining and criticizing the law.¹⁹⁴

Catharine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S.C. L. REV. 117, 147 (1993). In Wells' view, the answer is no one. "Clarence Thomas is his principles; he lacks the flesh and blood of concrete connection to individual context." *Id.* On this issue, I differ with Wells to this extent: Thomas has, in my view, an individual identity beyond his jurisprudential principles. He merely fails to recognize the conflict between the identity reflected in his personal narrative and the principles he espouses on the Court. One of my purposes in this Article is to use *Loving* to make that conflict undeniably clear.

191. This denial resonates all the more powerfully because Thomas is an African-American man in an interracial marriage. The racist norm against interracial sexual contact is based primarily on the White taboo against Black men having access to White women. See HIGGINBOTHAM, *supra* note 87, at 40-41 (stating that during the colonial period, "[t]he legal process was tolerant of white male illicit 'escapades' involving either White females or Black females, but it was . . . brutally harsh on infractions between Black males and White females."). Andrew Koppelman states that:

[W]hite men took access to black women for granted, before and after emancipation, while the barest hint (or even the projected fantasy) of a black man's desire for a white woman often sufficed to bring out the lynch mob. . . . The taboo connoted a narrative in which black men represented a dangerous, predatory, uncontrollable sexuality, and white women represented a fragile, asexual purity, the protection of which was the special duty of white men.

Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 225 (1995). This concentration on the preservation of the "purity" of White women continues today. See Epps, *supra* note 10, at 443 (noting similarities between "American attitudes towards race" and "Indian views on caste," including "a desire to bar men of the subordinated group from access to women of the superior group") (citation omitted).

192. In a different context, Professor Wells has noted that Thomas' confirmation hearings were a dichotomy between the controversial personal views he expressed during his years as a Reagan Administration official, and the role he would play as a Supreme Court Justice. See Wells, *supra* note 190, at 125-26. It is thus hardly unfair to ask Thomas whether his judicial identity is not only distinct from but actually at war with his personal identity.

193. The only resolution open to Clarence Thomas would be to abandon his judicial identity, to resign from the bench because he would be unable to reach the result his oath of office demands of him. In this sense, his dilemma would assume the conflict of antebellum, abolitionist judges forced to enforce the fugitive slave laws one step further. See generally ROBERT COVER, *JUSTICE ACCUSED* (1975) 119-58 (discussing pre-Civil War anti-slavery judges who faced the moral dilemma of enforcing slavery laws as required by their judicial duty even though they believed doing so was immoral). They faced an irreconcilable conflict between their beliefs and their judicial duty. See *id.* Forced to decide *Loving*, Thomas would face such a conflict between his *identity* and his *judicial* duty.

194. See Katharine T. Bartlett, *Storytelling*, 1987 DUKE L.J. 760, 763 (book re-

The challenge posed by *Loving* to Thomas' originalist jurisprudence results not from any particular doctrinal or analytic difficulty; rather the challenge is that when deciding *Loving* Thomas could not ignore his own story. He would be unable to imagine a Constitution that does not protect his right to equality, humanity and his freedom from state interference in the most fundamental part of his personal life: his marriage. The impact on Clarence Thomas of having to give voice to such a Constitution would be . . . well, tragic.¹⁹⁵

From that tragedy and from the conclusion that Justice Thomas could not cross the Rubicon and enforce the Constitution of originalism when doing so would intimately affect *him*, we learn the crucial lesson that stories matter. When Clarence Thomas hears the one story he cannot ignore—the story of _____—he departs from originalism without explanation¹⁹⁶ as he did in *Adarand* and *Jenkins*.¹⁹⁷ For Thomas, the interaction between narrative and Justice ultimately dictates the jurisprudential outcome.¹⁹⁸

view) (describing the narrative technique as "meant to capture the reader's imagination and show through some particular context how things really are or how they could be, thus inspiring new ways of looking at an issue and, ultimately, new solutions to the problem").

195. I confess mixed feelings about how to view this tragedy. There is a strong temptation to regard it as little more than Justice Thomas' chickens coming home to roost. I share the views that Judge Higginbotham, Carl Rowan and others have expressed over Thomas' dissent in *Hudson*. See, e.g., A. Leon Higginbotham, *Justice Clarence Thomas in Retrospect*, 45 HAST. L.J. 1405, 1425-26 (1994) (describing reactions to *Hudson* and calling Thomas' opinion an example of his "wretchedly reactionary positions"). I am hardly less disturbed by Thomas' votes in *Romer v. Evans*, 517 U.S. 620 (1996) (Scalia, J., dissenting, joined by Rehnquist, J., and Thomas, J.); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (Thomas, J., concurring); *Shaw v. Reno*, 509 U.S. 630 (1993), and other cases. His refusal to listen to the oppressed voices straining to be heard in those cases makes it difficult to sympathize with his plight if he were forced by the same principles to ignore his own voice in *Loving*.

On the other hand, the reality that Thomas is deaf to those voices does not change the fact that he would be a victim of the injustice of Virginia's anti-miscegenation law, and I do not aspire to being indifferent to that voice, regardless of the identity of the speaker. I know Thomas (albeit slightly), having been an attorney at the Equal Employment Opportunity Commission during part of his Commission Chairmanship. For me, that makes Clarence Thomas a real human being, not merely a distant figure churning out disagreeable judicial opinions.

196. See *infra* text accompanying notes 243-260 (arguing that listening to the stories told by minority group narrative scholars requires abandonment of originalism).

197. See *supra* text accompanying notes 141-142 (discussing the absence of originalism in Thomas' concurrence in *Adarand* and *Jenkins*).

198. The fact that Thomas' usual originalist methods are absent in *Adarand* and *Jenkins* does not detract from my thesis that the *Loving* context has unique demonstrative power. First, the abandonment of originalism Thomas would face

As a result, history will portray Thomas as both a dismal narrator and a tragic story. His failure as a narrator lies in his wavering voice—the impersonal originalist suddenly falls silent, giving way to the personalized modernist.¹⁹⁹ Put another way, the non-originalist enclave the Justice has carved out to protect the man from the Fourteenth Amendment's original understanding ultimately fails the test for good judging proposed by Mark Tushnet: Thomas cannot "successfully mediate the general and the particular."²⁰⁰ Professor Tushnet argues that "we know that a judge has good judgment when her opinions have a narrative style that appropriately links the general and the particular."²⁰¹ Where they exist, Thomas' linkages are stilted and self-serving. In *Hudson*, Thomas ignored the individual's story of prison abuse, on the ground that it was irrelevant in the Framers' vision of the Cruel and Unusual Punishment Clause.²⁰² His mediating technique in *Hudson* was to silence the particular. But in Fourteenth Amend-

in *Loving* is the end-product of his latent struggles with the meaning of the Fourteenth Amendment. Though with less clarity than the Virginia anti-miscegenation statute would present, Thomas knows his story is implicated by the racial issues presented in *Adarand* and *Jenkins*. Because that voice is *not* in the story told by the originalists, Thomas is forced to choose. By exploring what would happen in *Loving*, in short, we gain insight into what lies beneath the surface of Thomas' opinions in *Adarand* and *Jenkins*.

Second, neither *Adarand* nor *Jenkins* put before Thomas a case of true first impression. Both involved applications of an extensive body of judicial opinions in the areas of affirmative action and school desegregation, on which he could rely to deflect the need to set forth the originalist basis for his views. *Loving* provides the necessary crucible to fully appreciate what Justice Thomas is actually saying in his Fourteenth Amendment jurisprudence, and how it differs from what he is saying in other areas of constitutional law.

199. I am interested in Thomas' voice in his typical role as originalist-narrator, the voice heard in *U.S. Term Limits*, for example, only as a contrast to the very different voice of his Equal Protection Clause opinions. His originalist story is told in the voice, and with the language, of the dominant legal discourse and hence is neither distinctive nor interesting. Cf. Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 103-04 (1990) (explaining critical race theorists' rejection of the "dominant discourse" and their turn to narratives encompassing minority voices). The substance of Thomas' originalism is unusual in its extremism relative to mainstream constitutional doctrines, but the voice he employs to tell his tales is quite pedestrian.

200. Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 256 (1992); see also Farber & Sherry, *supra* note 176, at 822 ("Pragmatism accommodates storytelling by stressing that 'reason' can include informal and nonalgorithmic forms of thought, and by viewing concrete situations as useful for understanding more general rules or principles."); Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 28 (1986) (asserting that judgment "mediates between the general standard and the specific case").

201. Tushnet, *supra* note 200, at 257.

202. See *supra* notes 175-176 and accompanying text (discussing how ignoring individuals' stories removes Black experiences from legal discourse).

ment cases such as *Adarand* and *Jenkins*, Thomas' originalist story gives way to a modern equality principle he seeks to superimpose on history.²⁰³

Whatever one thinks of Thomas' arguments,²⁰⁴ they fail as narrative and as convincing jurisprudence because they are completely inconsistent with the originalist story Thomas has championed elsewhere.²⁰⁵ We are thus left to wonder: what happened to the originalist narrative defining Thomas' approach to judging? If, as Tushnet argues, "[i]n narrative jurisprudence, the determination of the general problem depends . . . on the integrity of the story, or, perhaps, of the narrator,"²⁰⁶ then Thomas' Fourteenth Amendment jurisprudence must be judged a failure.

203. See *supra* Part IV.A.1.b (reviewing Thomas' invocation of the Declaration of Independence in support of color-blind originalism).

204. In my view, Thomas grossly mischaracterized the basis for the district court's actions in *Jenkins* when he attributed to it "the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites." *Missouri v. Jenkins*, 515 U.S. 70, 119 (1995) (Thomas, J., concurring). The actual idea behind the massive magnet school program implemented by the district court in *Jenkins* was that drastically improving the quality of Kansas City's schools would both improve the education received by the predominantly Black students, and would attract White students from suburban and private schools to integrate the public schools and to remedy the violation that had produced the segregated schools in the first place. See *id.* at 77 (quoting the district court's description of the purpose as to "draw non-minority students from the private schools . . . and draw in additional non-minority students from the suburbs"); *id.* at 74 (quoting the district court as to its ordered qualitative improvements in schools in part because "[s]egregation ha[d] caused a systemwide reduction in student achievement in the schools"). It was not the presence of the White children that would make the schools better; it was making the schools better that would bring back the White children. Almost as disturbing for its one-sidedness was Justice Thomas' paean to all-Black schools that, as he said, "function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement." *Id.* at 122. I do not dispute the accuracy of this portrayal as far as it goes, but fairness requires a fuller and more realistic description of the "function" in our society of virtually all-Black inner city public schools, often with inadequate facilities, surrounded by better-equipped, and nearly all-White, suburban schools. An extended discussion of this political dimension of Thomas' approach to integration would, however, be out of place in this Article.

205. This discordance explains why Justice Marshall's invocation of stories in his passionate dissent in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 525-62 (1989) (Marshall, J., dissenting), is much more convincing and powerful. As Professor Ross describes, Marshall told "the story of Richmond's 'disgraceful history' of race relations," which consisted of "the deliberate diminution of black residents' voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination." Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 406 (1989) (quoting *Croson*, 488 U.S. at 528 (Marshall, J., dissenting)). In their opinions in *Croson* and *Jenkins*, Marshall and Thomas, respectively, utilized similar particularized rhetoric, but only Thomas was burdened by the obvious inconsistency with most of the rest of his jurisprudence.

206. Tushnet, *supra* note 200, at 296.

Whatever we think of Thomas as narrator, we have still more to learn from the story he *is* than from the stories he tells. His story is the story of the law's impact on a real-life level. High-blown academic debates about the limitations and implications of originalism are interesting enough, but must ultimately give way to a richer understanding that legal texts interact with people's lives.²⁰⁷

The narrative of Clarence Thomas confronting *Loving* has a clarity and force that is undeniable.²⁰⁸ Our perception of originalism is dramatically altered by the story of a person whose unstinting application of that principle compels him to deny his own equality under the law. Acknowledging the dramatic tension of Clarence Thomas deciding *Loving* also deepens our understanding of the inescapable flaw in the color-blindness principle itself.²⁰⁹ What if we were "blind" to Clarence Thomas' race as a factor in his reaction to *Loving*?²¹⁰ Far less would be revealed by this exercise

207. See Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 CAL. L. REV. 377, 435 n.153 (1996) ("Implicit in the recognition by legal decisionmakers that they are telling stories is the possibility for greater appreciation of the human lives their decisions affect.").

208. See Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 903-04 (1989) ("There are some things that just cannot be said by using the legal voice. Its terms depoliticize, discharge, and dampen. Rage, pain, elation, the aching, thirsting, hungering for freedom on one's own terms . . . all are diffused by legal language.").

209. Using Thomas' story to further our understanding of color-blindness (and its flaws) separates this endeavor from those stories Mark Tushnet has branded the "improper invocation of particulars." Tushnet, *supra* note 200, at 301 (discussing Justice Blackmun's dissenting opinion in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 213 (1989)); see also Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1030 (1991) ("[I]t seems reasonable to ask of narrators who are, in fact, legal scholars that their stories be framed in such a way as to shed light on legal questions."). Here, the particulars change our perception of the legal principle, and have, I hope, considerable force in persuading us to reject it. I should add that I disagree with Tushnet's criticism that Justice Blackmun's description of Joshua's story in *DeShaney* lacked persuasive power in legal terms. Tushnet misses the point of the narrative. The most important value of telling a story is to alter the way in which we perceive facts and context. See Hayman & Levit, *supra* note 207, at 438 ("[S]torytelling encourages the reimagination of law."). Once we make the effort to see the problems of originalism, color-blindness and miscegenation through the eyes of Justice Clarence Thomas, or the problems of due process and negative rights through the eyes of Joshua DeShaney, we will always see those problems differently—and find the legal analysis inevitably altered.

210. This would operate in much the same way the editors of the University of Miami Law Review attempted to render readers "blind" to the racial implications of an experience related by Professor Patricia Williams in her law review article, Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987), by excising

had I placed Antonin Scalia, rather than Clarence Thomas, on the *Loving* Court, though Scalia is nearly as sturdy an originalist.²¹¹ The difference is that Scalia, being white and not in an interracial marriage, would face a mere dilemma,²¹² not the calamitous personal conflict that would confront Thomas.²¹³

Would it truly be that different for the two men? There is evidence that it would; Justice Thomas' inability to speak in the originalist's voice in his Fourteenth Amendment opinions,²¹⁴ and his striking shift to a particularized voice in *Jenkins*,²¹⁵ contrast

her racial self-identification from the piece. See WILLIAMS, *supra* note 152, at 44-51 (discussing her frustration and anger caused by editorial policies which attempted to rob the story of emotion, context and meaning, and pointing out that "mention of my race was central to the whole sense of the subsequent text."). This would have rendered "the point of the story . . . unintelligible." Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 5 n.8 (1989). One cannot "suppress the existence of race from a narrative in which race was the center of the incident." Gotanda, *supra* note 157, at 20 (discussing the Williams episode).

211. One can distinguish between Justices Scalia and Thomas on the ground that Scalia, who leans more towards *textualism* than originalism, is willing to flout the drafter's intent if it is inconsistent with the plain language. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions."). Thomas, on the other hand, seems to put more emphasis on *discerning* what the text means by consulting the original intent as demonstrated by the Framers' words and actions. In the end, however, the difference is of little consequence here because the meaning of the constitutional text at issue is not self-evident. Even Scalia's strong textualism would permit—indeed, would favor—examination of the Framers' intent to resolve the ambiguity. Thus, although Scalia may not be quite the originalist Thomas is, he is one to such a degree that we may consider them together for present purposes.

212. Scalia avoided even this less wrenching dilemma by positing a far more improbable scenario when discussing the problem of the "faint-hearted originalist" in his Taft Lecture at the University of Cincinnati. Scalia, *supra* note 5, at 864 ("I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging. *But then I cannot imagine such a case's arising either.*") (emphasis added). Flogging? Confession may be good for the soul, but it is less cleansing when it pertains to a circumstance the confessor admits he "cannot imagine" arising. Assuming that Scalia could imagine a miscegenation case—it has, after all, been only 30 years since *Loving*—one might fairly ask whether that, too, would constitute an occasion for faint-heartedness (and confession) on his part. Given the non-originalist analysis he has utilized in affirmative action cases, see *infra* notes 216-218 and accompanying text (discussing Justice Scalia's opinions in *Croson* and *Johnson*), we must conclude that the answer is yes.

213. The difference between what Justices Thomas and Scalia would face in *Loving* typifies Professor Matsuda's explanation of the importance of racial distinctiveness: for Thomas, it is "concrete and personal," and carries the "harsh edge of realism." Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 8-9 (1988).

214. See *supra* Part IV.A.2 (discussing the absence of originalist arguments in Justice Thomas' opinions in *Adarand* and *Jenkins*).

215. See *supra* text accompanying notes 178-188 (discussing Justice Thomas'

sharply with Justice Scalia's approach. Although both Justices have failed to provide an originalist defense of a "color-blind" Constitution,²¹⁶ Scalia does not offer in its place the sort of rhetoric used by Justice Thomas in *Jenkins*.²¹⁷ Instead, he has reached for the support of decidedly modern authority while retaining a detached voice.²¹⁸

Further evidence of the difference between Thomas and Scalia is found in Justice Thomas' anguished response to the charges of sexual harassment leveled against him by Professor Anita Hill during his Supreme Court confirmation hearings, particularly in his highly-charged racial rhetoric.²¹⁹ Given the demonstrated passion Thomas brings to disputes that implicate his own equal treatment, it is difficult to imagine him donning the cloak of judicial aloofness when deciding *Loving*.

I cannot, of course, "prove" that Justices Thomas and Scalia

concurrence in *Jenkins*).

216. See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (asserting, without originalist discussion or evidence, that "the principle embodied in the Fourteenth Amendment [is] that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens'" (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

217. But see Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"*, 1979 WASH. U. L.Q. 147, 152-54 (criticizing affirmative action by invoking his own father's story as an immigrant who "had never profited from the sweat of any black man's brow," and thus owes no remedial obligation to anyone). In this article, then-Professor Scalia not only adopted a particularized voice, but an intensely personal one. It is interesting, therefore, that Justice Scalia, while not shifting the substance of his position at all, used a far more detached, abstract voice in *Croson*, as well as in his dissent in *Johnson v. Transportation Agency*, 480 U.S. 616, 664 (1987) (Scalia, J., dissenting) (arguing against the majority's approval of considering gender in hiring decisions "when it is intended to overcome the effect not of the employer's own discrimination, but of societal attitudes"). It seems that Justices Scalia and Thomas have made different decisions about whether to invoke particulars in judicial discourse.

218. See Ross, *supra* note 205, at 390 (describing Justice Scalia's "opinion as narrative [that] is on the surface an impoverished and abstract story").

219. See *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. 9-10 (1991) ("I am a victim of this process . . . my family has been harmed, my friends have been harmed . . . I will not provide the rope for my own lynching or for further humiliation.") (emphasis added). This intensely racialized rhetoric reached its apex later the same day, when Thomas returned to testify:

This is not an opportunity to talk about difficult matters privately or in a closed environment. This is a circus. It is a national disgrace. And from my standpoint, as a black American, as far as I am concerned, it is a high-tech lynching for uppity-blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that, unless you kow-tow to an older order, this is what will happen to you, you will be lynched, destroyed, caricatured by a committee of the U.S. Senate, rather than hung from a tree.

Id. at 157.

would face a dramatically different quandary because only Thomas is African-American and involved in an interracial marriage. Perhaps, on this basis, this aspect of my narrative fails the test of proof demanded by some critics of storytelling.²²⁰ I do not find this to be the case, however, because I have explained with "some degree of analysis or reasoned argument"²²¹ that each man would bring a disparate story to the business of deciding *Loving*, and that this difference is linked to the central issues of originalism and color-blindness raised by the case. For any who find that analysis wanting, I suppose I must, in the words of Robin West, fall back on most readers' "unequivocal shock of recognition"²²² of the difference race makes in this instance.²²³

Assuming this difference exists, it constitutes evidence of a distinctive "voice of color," proof which Professors Farber and Sherry argue has been missing in critical race literature.²²⁴ If, like me, most readers would perceive Justices Scalia and Thomas dealing with *Loving* quite differently, then *something* in the Justices' voices is distinct,²²⁵ and that divergence is ultimately trace-

220. See Farber & Sherry, *supra* note 176, at 851 (arguing that narratives cannot be justified merely because they "resonate" with or are "recognized" by some readers; "for those readers who neither resonate nor recognize, and for those who passionately disagree, there is no way to enter the dialogue"); Randall Kennedy, *Racial Critiques of Legal Academia*, 101 HARV. L. REV. 1745, 1774 (1989) (criticizing the rigor and nature of proof in Richard Delgado's argument about racism in the scholarship of "certain well-known white scholars writing in the race-relations field").

221. Farber & Sherry, *supra* note 176, at 849 (proposing this as a legitimate expectation even for narrative scholarship because "[r]eason and analysis are the traditional hallmarks not only of legal scholarship, but of scholarship in general").

222. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 55 (1986).

223. Perhaps a different approach would be useful, such as Professor Williams' effort to probe beneath the surface of color-blindness to discern the way it operates. See WILLIAMS, *supra* note 152, at 69-70 (discussing Mayor Ed Koch's making an analogy implying that an interracial protest march through the streets of Howard Beach, New York was *all-black*). She observes that it can cause us to ignore racial difference when it is, in fact, present. See *id.* I would suggest that not seeing the relevance of the racial difference between Justices Thomas and Scalia is equally distorting.

224. Farber & Sherry, *supra* note 176, at 814-15 ("Thus far . . . there has been no demonstration of how those new perspectives [of minority groups] differ from the various perspectives underlying traditional scholarship."); see also Kennedy, *supra* note 209, at 1749 (arguing that Derrick Bell, Richard Delgado and Mari Matsuda "fail to support persuasively their claims . . . that legal academic scholars of color produce a racially distinctive brand of valuable scholarship").

225. It is equally plausible that the difference lies not only in their voices, but in what they each can hear. I have posited that Justice Thomas can hear the voices ignored or silenced by the Framers only when they tell his own story. Since those voices do *not* tell Justice Scalia's story, he cannot (or refuses to) hear them. If so, the most important racial difference between Thomas and Scalia lies in the fact that Thomas, as an African-American and a miscegenist, happens to be able to

able to their respective skin color.²²⁶

Just as color would make a difference for Thomas and Scalia as Justices, it makes a difference for us as listeners.²²⁷ The issues become real when posed to Thomas, an African-American, an originalist and a miscegenist. And we hear those issues differently when discussed in his voice.²²⁸ Hence, a deep irony: the very act of Justice Thomas proclaiming the color-blindness ideal demonstrates the flaw in the principle, itself. In his capacity as a Supreme Court Justice, Thomas constitutes the ultimate representation of the law he urges must be color-blind. Yet, the vastly different voice with which he speaks about the Fourteenth Amendment²²⁹ demonstrates conclusively that, at some level, he is *not* blind to color.²³⁰ I am amazed Thomas can be deaf to the difference race produces in his own judicial voice.²³¹ Thomas' color-

hear in Fourteenth Amendment cases voices the Framers would have excluded.

226. See *infra* notes 250-255 and accompanying text (claiming that originalism's exclusion of minority voices makes them distinctive).

227. See Delgado, *supra* note 199, at 107 (criticizing the notion that "[a] story is just a story—if the content is the same, the storyteller's identity and voice are immaterial").

228. See WILLIAMS, *supra* note 152, at 110-15. Professor Williams tells the story of a student, Fred, who refused to believe that Beethoven was a Mulatto. See *id.* Williams describes that Fred "was assigned to do some reading on the subject and found that indeed Beethoven was a mulatto." *Id.* at 112. "This discovery upset him, so deeply in fact that his entire relation to the music changed: *he said he heard it differently.*" *Id.* (emphasis added). This analogy aptly applies here. Scalia represents Fred's pre-existing belief that Beethoven was White; Thomas, his corrected understanding. Just as Fred's "entire relation to the music changed," *id.*, so too does our conception of *Loving*.

229. See *supra* text accompanying notes 129-136 (discussing unique non-originalism of Thomas' equal protection jurisprudence).

230. See *supra* note 219 and accompanying text (discussing Thomas' invocation of racial imagery in his defense at the crucial moment of his confirmation hearing). Professor Williams' description of her experience of being treated by a colleague as "nonblack for purposes of inclusion and black for purposes of exclusion" is useful here. WILLIAMS, *supra* note 152, at 10. Thomas presents a mirror-image of Williams' idea: he is color-conscious for purposes of (his) inclusion, but "color-blind" for purposes of exclusion. See *infra* notes 246-260 and accompanying text (discussing originalism as having the effect of excluding the voices of certain groups).

231. In this regard, Thomas resembles the group of minority mothers who "denied the real significance of color in their lives, yet were morbidly sensitive to matters of race." Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 138 (1982) (citing Ari Kiev, *Psychiatric Disorders in Minority Groups*, in *PSYCHOLOGY AND RACE* 416, 420-21 (Peter Watson ed., 1973)). The cynical explanation, of course, is that Thomas hears the difference quite acutely, but simply does not care that he has never provided an originalist basis for the color-blindness principle he advances. This reasoning sees his originalism as a tool of convenience that he employs to reach the result he favors or to criticize allegedly non-originalist outcomes he dislikes, but leaves to gather dust in the toolbox when it does not reach the "right" result. I am not yet prepared to accept this explanation. It seems more

blindness, it appears, must be accompanied by an equally potent color-deafness.

But if we remain oblivious to the difference Clarence Thomas' color makes, we impoverish our understanding of the issue.²³² In the same way, any law professing to be "blind" to the reality of color²³³—Clarence Thomas' law—is also impoverished.²³⁴ The impoverishment of the law, however, is only part of the harm of color-blindness; color-blindness also reinforces the foundational premises of assumed white supremacy.²³⁵ As discussed, originalism

likely to me that Thomas believes so strongly in the moral rightness of the color-blindness principle—it echoes so loudly for him—that it drowns out his normally originalist voice. Eventually, he must either provide a convincing originalist defense of color-blindness, or concede the irreconcilable conflict in his jurisprudence.

232. If our perception of originalism, color-blindness and *Loving* differs depending on whether we put Justice Scalia or Justice Thomas into our imagined reality and onto the *Loving* Court, then I suppose the reader's perception of my arguments might also differ based on one's knowledge of the context from which I speak. For the record, I am a white, male, gay, native-born American citizen in my mid-30s.

233. In another context, Professor Nancy Levit has criticized the Supreme Court for "favor[ing] a hypothetical ideal . . . over the reality of the facts," because "[i]mposing ideal norms and values on situations that do not resemble the abstraction is more than unscientific, it is unjust." Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 *FORDHAM L. REV.* 263, 298-99 (1989) (criticizing the decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1991)). The same may be said of adherence to the "hypothetical ideal" that the law should be color-blind in an acutely color-conscious society.

234. Others have made the observation that color-blindness in a color-conscious world perpetuates racism. See, e.g., T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 *COLUM. L. REV.* 1060, 1062 (1991) (claiming that because "we are not currently a colorblind society, and . . . race has a deep social significance that continues to disadvantage blacks and other Americans of color," the "legal strategy of colorblindness . . . has now become an impediment in the struggle to end racial inequality"); Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 *MICH. L. REV.* 953, 954-56 (1993) (arguing that "the pursuit of colorblindness progressively reveals itself to be an inadequate social policy if the ultimate goal is substantive racial justice," because "Blacks continue to inhabit a very different America than do whites"); Gotanda, *supra* note 157, at 2-3 ("A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans."); see also *infra* notes 235-237 and accompanying text (discussing the differences in the ways in which originalism and color-blindness perpetuate racism).

235. Professor Bell's "Chronicle of the Slave Scrolls" powerfully makes this connection. DERRICK BELL, *AND WE ARE NOT SAVED* 215-35 (1987) (asserting that school segregation was actually not an end in itself but a convenient means of perpetuating Whites' primary aim: the dominance over Blacks in every important aspect of life). Bell's Chronicle suggests that the systematic disadvantaging of African-Americans could be overcome if they listened to and heeded the lessons of survival told by their slave forebears. See *id.* at 217-19. When "black people discovered this proud survival," *id.* at 217, it produced in them "a determination to achieve in ways that would forever justify the faith of the slaves who hoped when there was no reason for hope," ultimately leading to an end to black educational, economic and occupational disadvantages. *Id.* Bell argues, however, that the law

perpetuates racism by taking race into account in the wrong way: it actually reflects and places primary emphasis on the Framers' white supremacist racism.²³⁶ Though non-originalist, color-blindness also perpetuates racism but in a different way: by failing to account for race in a race-conscious society.²³⁷

The racist effects of color-blindness are in some ways subtly pernicious. Professor Williams quotes the following statement, made in defense of the notion that "[o]ur society will impose no rules grounded in preference according to race."²³⁸ In other words, in defense of color-blindness: "How can you force equality down the throats of people who don't want it? You just end up depriving people of their freedom, and creating new categories of oppressed, such as white men."²³⁹ To whom is the speaker referring, those who do not want equality? It must be those who would be harmed by equality; specifically, those who are privileged by the status quo.²⁴⁰ Furthermore, the speaker implicitly equates "freedom" with racial and gender²⁴¹ privilege; it is the freedom to benefit from inequality that is being "deprived" by the sort of color-

would suppress those voices in the interest of maintaining White supremacy, see *id.* at 219-20, and that courts would likely permit it. See *id.* at 224-32.

236. See *supra* notes 153-171 and accompanying text (arguing that it was in the Framers' best interest to form a government that perpetuates their superior position in government and society).

237. See WILLIAMS, *supra* note 152, at 120 ("The rules may be colorblind, but the people are not. The question remains, therefore, whether the law can truly exist apart from the color-conscious society in which it exists, as a skeleton devoid of flesh . . ."). As Garrett Epps puts the point:

Had Justice Harlan's color blindness been the holding in *Plessy*, America today might be a more just and happy place. But we live today . . . in a society shaped and created in countless ways by governmental decisions taking account, explicitly or silently, of race. . . . [W]e find ourselves in today's America, where racial relations remain a nightmare from which we are trying to awaken. Though, as with all nightmares, the temptation to do so is great, we cannot awaken by closing our eyes.

Epps, *supra* note 10, at 450 (citation omitted); see also Gotanda, *supra* note 157, at 62-63 ("[M]odern color-blind constitutionalism supports the supremacy of white interests and must therefore be regarded as racist."); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 210 (1997) ("[T]he myth of colorblindness is an analytical instrument of subjugation.").

238. WILLIAMS, *supra* note 152, at 100.

239. *Id.* at 101 (quoting from discussion that took place at a continuing legal education session on equal employment opportunity).

240. The group of people who do not want "equality" is different from the set of people who might not want "sameness." Preferring, even celebrating, racial (and other) differences is separate from preferring inequality and privilege.

241. Since the speaker identified "white men" as the group being newly "oppressed," there are elements both of race and gender at work in his statement, an interesting departure from the starting premise of the discussion, which involved the legitimacy only of racial preference. I will, for present purposes, ignore the gender aspects of his comment.

consciousness the speaker is decrying.²⁴²

The deprivation of privilege, then, is said to constitute a loss of "freedom." Since the loss of freedom creates "oppression," the circle is completed: to force "equality" on someone who enjoys privilege is to "oppress" him.²⁴³ By this rhetorical move and by the operation of color-blindness, race-consciousness to benefit the oppressed is equated to the "oppression" that created their condition in the first place. Their history and their current condition have been co-opted²⁴⁴ in the service of permitting those who benefit from inequality (from the speaker's own assumption, white men) to maintain the freedom of their privilege.²⁴⁵

Finally, consider the implications for narrative scholarship of the point that originalism is little more than a mandate for courts to ignore those voices that the Framers did not hear.²⁴⁶ Stories told by members of groups excluded from the Framers' design are, by virtue of their exclusion, qualitatively different from other narrative work.²⁴⁷ Professors Farber and Sherry ask us to "identify

242. The perception that race-conscious remedies and policies harm Whites, and perhaps the failure of the supporters of such measures to develop a coherent story of how they benefit Whites, helps to explain the Supreme Court's retreat from affirmative action in *Croson* and *Adarand*. See BELL, *supra* note 235, at 62 (arguing that "vindication of even the most basic rights for blacks actually requires a perceived benefit to whites").

243. See Ross, *supra* note 205, at 401 (arguing that Justice Scalia's opinion in *Croson* relies on an abstract "extended metaphor" of "affirmative action as a cancer" which "can become vivid for the white reader by imagining the oppression that white people might suffer at the hands of black people").

244. See WILLIAMS, *supra* note 152, at 103 ("If . . . racism is artificially relegated to a time when it was written into code, the continuing black experience of prejudice becomes a temporal shell game manipulated by whites. Such a refusal to talk about the past disguises a refusal to talk about the present.").

245. See BELL, *supra* note 235, at 133-34 (arguing "against the judicial tendency to use—in order to forestall effective remediation of discrimination already suffered—standards established by blacks to end discrimination").

246. See *supra* notes 163-177 and accompanying text (critiquing the arguments concerning whether originalism perpetuates race-based exclusion).

247. To say that stories related by minority group members in their scholarly work are distinct from non-minority scholarship is *not* to say, as Randall Kennedy apparently believes, that there is one universal minority voice. See Kennedy, *supra* note 220, at 1779-82 (criticizing Mari Matsuda for "her tendency to homogenize the experience of persons of color and her tendency to minimize the heterogeneity of opinions held and articulated by persons of color"). There are obviously differences between the stories distinct individuals tell based on their unique experiences with exclusion and oppression, a truth Professor Williams hauntingly captured in describing a dream involving, and the false assumptions of Whites about the homogeneity of African-American forms of expression. See Patricia Williams, *Response to Mari Matsuda*, 11 WOMEN'S RTS. L. REP. 11, 12-13 (1989). These differences, however, should not obscure the quality these narratives share in common: they are all responses to exclusion and oppression. See Robin D. Barnes, *Politics and Passion: Theoretically a Dangerous Liaison*, 101 YALE L.J. 1631,

the distinctiveness of stories told in the voice of color;²⁴⁸ their exclusion from the Constitution of originalism is, I suggest, part of the answer to their challenge.²⁴⁹

The deaf ear that originalism turns to voices other than those represented at the founding both distinguishes and fully justifies minority narratives employed by minority scholars.²⁵⁰ The establishment of America's most fundamental laws, as embodied in the Constitution, occurred without recognition of the stories of excluded groups.²⁵¹ While some believe storytelling is illegitimate

1656 (1992) (arguing that while "a shared skin color can[not] make us all the same," the "shared experience that accompanies that skin color has great significance"). Kennedy acknowledges this possibility. See Kennedy, *supra* note 220, at 1784 (conceding that "there might remain an irreducible link of commonality in the experience of people of color . . . [who are] to some degree 'outsiders' in a society that is intensely color-conscious"). However, Kennedy then utterly fails to respond to this possibility; he simply reasserts his position that people of color have heterogeneous responses to their experiences. See *id.* Nothing could demonstrate my point better than this Article: it relates a narrative involving the interaction of *Loving* and Clarence Thomas in a way that shows the racially distinct part of that interaction. For present purposes, it is important to acknowledge that Thomas' voice is not the same as Antonin Scalia's. That does not mean we must, or ever could, confuse Thomas' voice with that of Patricia Williams or Mari Matsuda.

248. Farber & Sherry, *supra* note 176, at 816.

249. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989) (identifying the "subver[sion]" of the status quo as a goal of narrative scholarship); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2016 (1991) (explaining that the purpose of "voice of color" is to identify and explain "the plight of people of color"); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, A Talk Presented at the Yale Law School Conference on Women of Color and the Law, April 16, 1988, 11 WOMEN'S RTS. L. REP. 7, 10 (1989) [hereinafter Matsuda, *First Quail*] (arguing that ending the record "that this has always been a nation of dominant and dominated" is the mission of minority scholarship); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) [hereinafter Matsuda, *Looking to the Bottom*] (distinctiveness of minority voices attributable to their "hav[ing] experienced discrimination," the result of which is that they "speak with a special voice to which we should listen").

250. That is not to say non-minority scholars should refrain from using the technique. Cf. Bartlett, *supra* note 194, at 764 (arguing that the narrative form is "likely to have appeal and utility beyond any particular agenda"). I mean only that, because minority stories were historically excluded from shaping the development of our laws, there is a unique merit in paying attention to them now. Ironically, the originalist judge or scholar may be uniquely limited in her ability to utilize narrative voice as a rhetorical device; only the voice of the Framers is available to her.

251. See Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 547 (1991) ("[B]y ignoring the experiences of black people we are limiting our vision of law to one that reflects a white male perspective."); Culp, *supra* note 157, at 70 (asserting that originalism "argues that only the views and perspectives of the white participants in the creation of the Constitution should be heard"). The effect of this exclusion was felt not only in what was and was not included in the Constitution itself, but also in the ensuing development of constitutional doctrine by the Supreme

scholarship,²⁵² few doubt that law-making is greatly influenced by particularized stories.²⁵³ The stories of minorities did not influence the law written by the Framers of the Constitution²⁵⁴ because the Framers refused to hear those stories.²⁵⁵

It is no coincidence, then, that originalist judicial opinions consistently ignore such stories.²⁵⁶ Nor is it surprising that Professor Tribe's position that the Constitution must not be amended by procedures other than those set forth in Article V²⁵⁷ also treats as irrelevant certain stories, in his case those of the adoption of the Constitution and of the post-Founding moments of constitutional change.²⁵⁸ It is inherent in originalism and pseudo-originalism²⁵⁹ that both forms of constitutional interpretation must ignore stories.²⁶⁰

Those excluded from influencing our law have a greater need to relate narratives in order to be fully understood. Originalist judges can rely on dominant-group readers to supply crucial narratives to make ideas real; such a reader will take the abstractions of typical judicial discourse and "embellish [them] with his narratives and imaginings."²⁶¹ Those works which, today, call for previously

Court.

252. See Culp, *supra* note 251, at 545 (noting that Professor Patricia Williams' "approach to legal scholarship is different for the very reason that some legal teachers do not appreciate it as scholarship").

253. See Tushnet, *supra* note 200, at 252-53 ("Particular events play an important part in our lawmaking processes. Members of Congress find it useful to hear of how a failure of legal regulation caused a human tragedy, or how cuts in a benefit program affected a family's life.").

254. See BELL, *supra* note 235, at 43 ("The Chronicle's message is that no one could have prevented the Framers from drafting a constitution including provisions protecting property in slaves.").

255. Cf. WILLIAMS, *supra* note 152, at 71-72 (discussing how Whites, empowered by African-Americans' lack of complaint, believed that "no one existed for them who could not be governed by their intentions").

256. See *supra* notes 180-187 and accompanying text (discussing Justice Thomas' dissenting opinion in *Hudson* and Justice Scalia's majority opinion in *R.A.V.*).

257. See *supra* text accompanying notes 163-173 (discussing Professor Tribe's "textual" and "structural" interpretation of the Constitution).

258. See Tribe, *supra* note 46, at 1280-92 (arguing against reliance on instances of constitutional change outside textually defined processes, such as the post-1945 practice regarding ratification of international agreements and the adoption of the Constitution itself).

259. See *supra* text accompanying notes 167-171 (describing similarities between Professor Tribe's stress on "text," "structure" and originalism, in that each excludes stories not heard by the Founders).

260. See Ross, *supra* note 205, at 406 (discussing Justice Scalia's unwillingness in *Croson* to engage the stories told by Justice Marshall regarding Richmond's history of discrimination, and Justice O'Connor's dismissal of their relevance).

261. *Id.* (discussing Justice Scalia's ability in *Croson* to allow the White reader to fill in the narrative, a luxury not available to Justice Marshall, who must "tell

ignored stories to be heard²⁶² fill this void in our legal heritage,²⁶³ supplying the voices needed to sound the call for genuine equality.²⁶⁴ It is illegitimate for the law to demand before listening to long-suppressed voices that they conform to pre-existing and white-defined notions of how to speak.²⁶⁵

this story and other stories like it" because without it, "the white reader is unlikely to tell this narrative on his own").

262. Professors Ackerman's and Amar's alternatives to the Article V formal amendment process should be viewed in this light as attempting to amplify previously unheard voices, to change the structure and policies that resulted from their exclusion. See, e.g., Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION*, *supra* note 136, at 63, 72 (describing that the Constitution has been effectively and legitimately amended through non-Article V means); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 459 (1994) (arguing that Article V provides the exclusive amendment process only for the government, not for the sovereign People).

263. See Matsuda, *First Quail*, *supra* note 249, at 10. Professor Matsuda writes: I can claim for my own the Constitution my father fought for at Anzio, the Constitution that I swore to uphold and defend when I was admitted to the bar. It was not written for me, but I can make it my own, using my chosen consciousness as a woman and person of color to give substance to those tantalizing words "equality" and "liberty."

Id.

264. See BELL, *supra* note 235, at 80-83 (relating a tale of a segregationist politician changing his positions only when he begins to hear voices he is unable to silence or ignore). In his later work, Professor Bell is even more doubtful that giving Whites full understanding of the effects of racism on the oppressed would produce real change. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 150-57 (1992) (discussing the "secret bonding" that racism provides Whites, and reciting Toni Morrison's assessment of "how the presence of blacks enables a bonding by whites across a vast socioeconomic divide") (citing Toni Morrison, *The Pain of Being Black*, TIME, May 22, 1989 at 120, 120). I find this too pessimistic. I share Bell's skepticism that understanding—even *feeling*—what oppression does to the oppressed will create enough empathy to convince the privileged class to give up the privileges it has enjoyed. I think that, to a large extent, members of this class define "freedom" as the freedom to enjoy continued privilege and see loss of their privilege as oppression. See *supra* text accompanying notes 235-240. Nevertheless, I disagree with Bell that "we fool ourselves when we argue that whites do not know what racial subordination does to its victims." BELL, *supra*, note 235, at 151. He argues that Whites "know" because they understand "racism's . . . value to individual whites and . . . their interest in maintaining the racial status quo." *Id.* These are not, I think, the same thing. Whites knowing the benefits of racism does not entail appreciation of its costs to Blacks. Thus, making Whites more aware of the costs changes their consciousness of the overall impact of racism. Bell may be right that it would be insufficient to make a real difference, but it is difficult to conceive a better strategy. The deeper problem is finding a way, absent the allegorical "Racial Data Storms" he creates, to give Whites the necessary empathy. *Id.* at 147-50.

265. See Jerome McCristal Culp, *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095, 1098 (1992) ("White scholars often ask black scholars to jump through some appropriate hoop before they will be listened to as 'real' scholars."); Johnson, *supra* note 249, at 2052 (arguing that current standards of merit are a "gate built by a white male hegemony that requires a password in the white man's voice for passage"); Gerald Torres & Kathryn Milun, *Translating Yonnondio By Precedent and Evidence: The Mash-*

V. Conclusion

Our perception of Clarence Thomas should be influenced by his inability to see the implications of his originalist principles when they are applied in cases that affect only faceless, impersonal others. As a member of a group whose claim for equal treatment under the Due Process Clause was denied by a Supreme Court decision²⁶⁶ which utilized originalism²⁶⁷ to silence my voice,²⁶⁸ I am infuriated by the hypocrisy of an originalist who does not impose the same rules on himself, regardless of how painful the outcome might be.²⁶⁹ If my rights against the State are limited

pee Indian Case, 1990 DUKE L.J. 625, 629 ("To require a particular way of telling a story not only strips away nuances of meaning but also elevates a particular version of events to a non-contingent status."). Professor Bell brings this phenomenon of rewarding Blacks only when they speak in the voice of Whites, or disparage other Blacks, full circle back to Justice Thomas when he cites Thomas as an example of the "enhanced standing" of a "black person who publicly disparages or criticizes other blacks who are speaking or acting in ways that upset whites." BELL, *supra* note 264, at 114-15.

266. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (citing a long tradition of laws against homosexual sodomy to conclude that the Framers did not intend to create a constitutional right protecting it). I say *Hardwick* involved a claim for "equal treatment" under the Due Process Clause because I regard the Court's refusal to address the claim using the same analytic framework used in prior privacy cases—a claim for the right to privacy rather than for the right to engage in any particular activity, whether it be abortion, contraception or sodomy—as the central failure in that decision. See Samuel A. Marcossion, *Who is "Us" and Who is "Them"—Common Threads and the Discriminatory Cut-Off of Health Benefits for AIDS Under ERISA and the Americans With Disabilities Act*, 44 AM. U. L. REV. 361, 402 (1994) (noting that in *Bowers*, "a majority of the Supreme Court simply refused to focus on the fact that a right to *privacy* was being asserted, not a 'right' to homosexual sodomy or any other particular type of behavior"). For those who wish to engage in private homosexual sodomy without interference from the State, due process of law is defined in an entirely different way than for those who seek to obtain a contraceptive or an abortion. It would be far less objectionable if the Court had framed the claim in *Hardwick* as it had framed the claims in *Roe* and *Griswold*, and simply found a way to reach a different result—although I doubt the Court could have managed to do so. Changing the entire analytic inquiry for one case is lawless.

267. See *Commonwealth v. Wasson*, 842 S.W.2d 487, 497 (Ky. 1992) (referring to *Hardwick* as a "misdirected application of the theory of original intent").

268. Since Justice Thomas was not on the Court at the time, it is somewhat speculative to assume that he would have voted with the majority in *Hardwick*. However, given his devotion to originalism (excepting only the Equal Protection Clause), and the fact that he joined Justice Scalia's dissent in *Romer v. Evans*, 517 U.S. 620, 1629 (1996), which said that *Hardwick* "is unassailable, except by those who think that the Constitution changes to suit current fashions," it is reasonable to conclude that, whatever Clarence Thomas may personally think of sodomy laws, Justice Thomas would not regard them as unconstitutional. *Id.* at 1631.

269. See Sunstein, *supra* note 144, at 91 n.461 ("It would be refreshing if some

by the morality and vision of 1789 or 1868, then the person who imposes that limitation is not free to resort to the morality of our century when his own rights are at stake. I deeply resent the privilege of modernity Justice Thomas asserts for himself and denies to me.²⁷⁰

It is undeniable that the ratifiers of the Equal Protection Clause would not have thought that Virginia was compelled to recognize Clarence Thomas' marriage. Under his oft-stated constitutional vision, Thomas' claim to legal recognition of his marriage is no more constitutionally valid than Keith Hudson's claim not to be brutalized in Louisiana's prisons,²⁷¹ or Jane Roe's claim that Texas should not dictate her decision whether to take her pregnancy to term,²⁷² or Tom Foley's claim not to be subject to term limits imposed by the state of Washington,²⁷³ or Michael Hardwick's claim

of the originalist Justices on the Court, who tend to oppose affirmative action on constitutional grounds, would either invoke some historical support for their views or acknowledge that although they do not approve of affirmative action in principle, they find no constitutional judgment that prohibits it.").

270. On the other hand, Thomas is hardly alone in being unable to hear effectively or to empathize with the stories that relate to experiences he does not share. See Joseph William Singer, *Persuasion*, 87 MICH. L. REV. 2442, 2455-57 (1989) (describing his law students' inability to sympathize with stories of the plight of workers until these stories were connected to unfair treatment of students); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2277-79 (1989) (relating an episode of the television show *Taxi* involving communication failure between a male supervisor and his female subordinate). I hope that putting Thomas into the position of having "his" voice go unheard because of silencing effect of originalism will help him to hear better the stories of others who have suffered from the silencing effect of originalism. In this connection, I am reminded of the experience of Captain Jean-Luc Picard in "The Inner Light" episode of the television series, *Star Trek: The Next Generation: The Inner Light* (Paramount television broadcast, Jun. 1, 1992). Captain Picard's consciousness is temporarily commandeered by an alien probe, whose sophisticated technology enables him to experience an entire lifetime on the probe's home world—to walk and live among its people and discover what they were like. During this virtual reality life, Picard falls in love, marries, has children and grandchildren and ultimately experiences the death of this world—which has become his—due to the explosion of its sun. Picard finds that living this other life, so different from his real one, alters him and gives him an awareness of aspects of himself he never knew. Perhaps living a life that included having to decide *Loving*—as he did in the alternate reality I have imagined—would be a cause for similar self-examination for Justice Thomas.

271. See *Hudson v. McMillian*, 503 U.S. 1 (1992) (holding that a beating of a prisoner by state correctional officers was not cruel and unusual punishment even though the prisoner suffered serious injuries).

272. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the constitutional right to privacy encompasses the fundamental right to abortion).

273. See *U.S. Term Limits v. Thornton*, 514 U.S. 779, 846-50 (1995) (Thomas, J., dissenting) (arguing that original intent of Founders did not bar states from imposing term limits on members of Congress).

to be left alone in the privacy of his Georgia bedroom.²⁷⁴ The Justice Thomas who would deny their claims would have to deny the Lovings' claim as well,²⁷⁵ and in so doing admit Clarence Thomas' own subordinate status in the colorized Constitution of original intention. Justice Thomas and Clarence Thomas cannot cross the Rubicon together.

274. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that Georgia's anti-sodomy statute does not violate the fundamental right to privacy).

275. See Scalia, *supra* note 5, at 862 ("[I]f the faint-hearted originalist is willing simply to posit such an intent [of an evolving content] for the 'cruel and unusual punishment' clause, why not for the due process clause, the equal protection clause, the privileges and immunity [sic] clause, etc.?").

