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# Liberal Originalism: The Declaration of Independence and Constitutional Interpretation - Symposium: History and Meaning of the Constitution

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# LIBERAL ORIGINALISM: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION

SCOTT D. GERBER\*

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“The American Constitution . . . is founded on a creed. America is the only nation in the world that is founded on a creed. That creed is set forth with dogmatic and even theological lucidity in the Declaration of Independence; perhaps the only piece of practical politics that is also theoretical politics and also great literature.”

— G. K. Chesterton, *What I Saw in America* (1922)

About twenty years ago, when I was a young graduate student like many of the students in this room, I took a wonderful seminar at the University of Virginia about constitutional interpretation taught by Henry Abraham, the first recipient of the lifetime achievement award from the Law and Courts section of the American Political Science Association.<sup>1</sup> In the seminar we read many of the classic works in constitutional interpretation, such as John Hart Ely’s *Democracy and Distrust*, Robert Bork’s *The Tempting of America*, and Ronald Dworkin’s *Law’s Empire*, among others.<sup>2</sup> I enjoyed the reading, but I quickly came to realize that the theory of constitutional interpretation articulated in a particular book or article always seemed to lead to the political results favored by the author of the book or article. Bork’s

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\* Professor of Law, Ohio Northern University Pettit College of Law. This article was prepared for an April 18, 2014, symposium about “History and the Meaning of the Constitution” at Cleveland State University Cleveland-Marshall College of Law. The differences between the written version and the oral version are the addition of footnotes to the former and the condensed format of the latter. I thank Stan Gerber and Peter Martin Jaworski for reading a draft of the article and Brown University’s Political Theory Project for hosting me while I wrote it.

<sup>1</sup> See Law and Courts Section Award Recipients, <http://www.apsanet.org/sections/sectionAwardDetail.cfm?section=Sec02> (last visited June 9, 2014).

<sup>2</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); RONALD DWORIN, *LAW’S EMPIRE* (1986).

theory, for example, determined that *Roe v. Wade* was incorrect; whereas Dworkin's led to a generous use of racial preferences in higher education admissions decisions. Succinctly stated, I concluded that all of the theories of constitutional interpretation appealed, at their essential level, to political values. In the apt words of Felix Frankfurter, constitutional interpretation "is not at all a science, but applied politics."<sup>3</sup>

What I set out to do in my seminar paper for Professor Abraham's class was identify the appropriate political philosophy through which the Constitution should be interpreted.<sup>4</sup> I quickly expanded my seminar paper into my Ph.D. dissertation, which I completed in 1992,<sup>5</sup> and my revised Ph.D. dissertation became my first book, *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation*, which was published in 1995.<sup>6</sup> I have spent the last decade or so writing about colonial American legal history rather than constitutional interpretation,<sup>7</sup> but given the topic of today's symposium—"History and the Meaning of the Constitution"—I would now like to discuss the theory of constitutional interpretation that I first developed as a graduate student two decades ago. It is a theory that also led me to publish the first book about Clarence Thomas's jurisprudence—*First Principles: The Jurisprudence of Clarence Thomas*<sup>8</sup>—and it is a theory about which other scholars have written over the years, including two of the other participants at this symposium. I call the theory "liberal originalism."<sup>9</sup> I even had the privilege in March of 2013 at Ohio Northern University to debate the theory with Pulitzer Prize winning historian Gordon Wood.<sup>10</sup>

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<sup>3</sup> Felix Frankfurter, *The Zeitgeist and the Judiciary*, in *LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913-1938* at 3, 6 (1939).

<sup>4</sup> The seminar paper became my first publication. See Scott D. Gerber, *Original Intent and Its Obligations: Rediscovering the Principles of the American Founding*, 11 *HAM. J. L. & PUB. POL'Y* 1 (1990).

<sup>5</sup> See Scott Douglas Gerber, "To Secure These Rights: The Declaration of Independence and Constitutional Interpretation" (Ph.D. dissertation, Politics, University of Virginia, 1992).

<sup>6</sup> See SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1995).

<sup>7</sup> See, e.g., SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787* (2011); Scott D. Gerber, *Bringing Ideas Back In: A Brief Historiography of American Colonial Law*, 51 *AM. J. LEGAL HIST.* 359 (2011); Scott D. Gerber, *Law and the Lively Experiment in Colonial Rhode Island*, 2 *BRIT. J. AM. LEGAL STUD.* 453 (2013).

<sup>8</sup> See SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (expanded ed. 2002).

<sup>9</sup> I coined the phrase two decades before it became associated with the work of Jack Balkin. Moreover, my approach to constitutional theory is much different than that of Balkin: my liberal originalism is libertarian; Balkin's theory is egalitarian. See, e.g., Michael C. Dorf, *The Undead Constitution*, 125 *HARV. L. REV.* 2011, 2044-45 (2012) (reviewing JACK M. BALKIN, *LIVING ORIGINALISM* (2011) and DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2011)).

<sup>10</sup> See Gordon S. Wood & Scott D. Gerber, *The Supreme Court and the Uses of History*, 39 *OHIO N.U. L. REV.* 435 (2013) (transcript of the debate). I also spoke about liberal originalism on June 2, 2014, at a conference at Brown University about freedom of expression and the living

## I. LIBERAL ORIGINALISM

“Originalism” is a theory of constitutional interpretation that came to prominence during the Reagan Administration as an alternative to the so-called notion of a living constitution embraced by progressive judges and law professors. Robert Bork wrote an influential article about it in the early 1970s,<sup>11</sup> but it was Attorney General Edwin Meese who brought originalism to public consciousness through a series of speeches in the mid-1980s.<sup>12</sup> The Federalist Society, which was founded in the 1980s and which is co-sponsoring today’s symposium, is likewise strongly committed to originalism as the proper method for interpreting the Constitution.<sup>13</sup>

Shortly thereafter, the law reviews exploded with an avalanche of articles both criticizing and defending originalism, and the commentary on the subject has continued unabated ever since.<sup>14</sup> Books and articles about the history of originalism have been published,<sup>15</sup> and the debate over originalism has now shifted from what Meese famously called “a jurisprudence of original intention”<sup>16</sup> to a self-styled “new originalism” that searches—sometimes via highly technical discussions of the philosophy of language<sup>17</sup>—for the original public meaning of the Constitution’s text.<sup>18</sup>

In my work I have labeled the dominant iterations of originalism “conservative originalism.” It is an approach that dictates that judges may legitimately recognize only those rights specifically mentioned in the Constitution, or ascertainably implicit in its structure or history. In all other cases, conservative originalists argue, the majority is entitled to govern—to make moral choices—through the political

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constitution hosted jointly by Brown and Northwestern University School of Law. See [http://www.brown.edu/Departments/Political\\_Theory\\_Project/event/freedom-expression-living-constitution-conference](http://www.brown.edu/Departments/Political_Theory_Project/event/freedom-expression-living-constitution-conference) (last visited June 11, 2014).

<sup>11</sup> See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).

<sup>12</sup> See, e.g., Edwin Meese III, *Address before the American Bar Association, in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 1* (1986).

<sup>13</sup> See, e.g., ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007).

<sup>14</sup> See, e.g., FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* (2013); Peter Martin Jaworski, *Originalism All the Way Down: Or, the Explosion of Progressivism*, 27 CAN. J. L. & JURISP. 313 (2013).

<sup>15</sup> See, e.g., JOHNATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005).

<sup>16</sup> Edwin Meese III, *Toward a Jurisprudence of Original Intention*, 11 HARV. J. L. & PUB. POL’Y 5 (1988), *reprinted in* AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR 584 (Sheldon Goldman & Austin Sarat ed., 2d. ed., 1989).

<sup>17</sup> See, e.g., Lawrence B. Solum, “Semantic Originalism,” Illinois Public Law and Legal Theory Research Papers Series No. 07-24, *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244) (last visited June 11, 2014).

<sup>18</sup> See, e.g., CROSS, *supra* note 14, at ch. 2 (providing a concise history of the meaning of originalism).

process.<sup>19</sup> “Liberal originalism,” by contrast, maintains that the Constitution should be interpreted in light of the political philosophy of the Declaration of Independence. Liberal originalism rejects both conservative originalism and the notion of a living constitution on the ground that they are merely post-hoc rationalizations for pre-conceived political results. The conservatives’ initial call for a jurisprudence of original intention was a response to the liberal jurisprudence of the Warren and early Burger Courts, whereas the progressives’ notion of a living constitution was a reaction to conservative originalism. The “new” conservative originalists endeavor to guide the decisions of the conservative Rehnquist and Roberts Courts,<sup>20</sup> while many on the Left—“judicial minimalists” and “popular constitutionalists”—are presently trying to limit or eliminate judicial review itself so that the now-conservative federal judiciary cannot rollback existing precedents involving hot button social issues such as affirmative action and abortion. These newer theories, like the older ones, are too often merely partisan arguments masquerading as constitutional theory.<sup>21</sup>

Liberal originalism insists that conservative originalists mischaracterize the Constitution as establishing a majority-rule democracy, a mischaracterization that is also made by many constitutional theorists of progressive political views. Because of the Framers’ desire to avoid what Elbridge Gerry called the “excess of democracy,”<sup>22</sup> they created a republican form of government, not a majority-rule democracy. And in that republican form of government, the Court is to play a central role: chief guardian of the natural rights of the American people, especially of individuals and minorities. Briefly put, I employ a conservative methodology, but arrive at liberal results, as “liberal” is understood in the classic sense of seventeenth- and eighteenth-century Lockean political philosophy.

Part I of *To Secure These Rights* documents how the United States of America was founded to secure the natural rights of the American people.<sup>23</sup> “To secure these rights,” Thomas Jefferson proclaims in the Declaration of Independence, is the

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<sup>19</sup> With the notable exception of Randy Barnett, the vast majority of “new originalists” share the Bork/Meese preference for deferring as much as possible to the political process. See, e.g., Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Barnett*, 103 MICH. L. REV. 1081 (2005). See generally Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7 (2006); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

<sup>20</sup> See, e.g., Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL’Y 599 (2004).

<sup>21</sup> See, e.g., Scott D. Gerber, *The Court, the Constitution, and the History of Ideas*, 61 VAND. L. REV. 1067 (2008). See also Scott D. Gerber, *Book Review*, 92 J. AM. HIST. 1532 (2006) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)); Scott D. Gerber, *The Judicial Brezhnev Doctrine*, 24 HARV. J. L. & PUB. POL’Y 309 (2000) (reviewing CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) and MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)).

<sup>22</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 48 (Max Farrand ed., 1911) (remarks of Elbridge Gerry). See generally GEORGE ATHAN BILLIAS, *ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN* (1976).

<sup>23</sup> See GERBER, *TO SECURE THESE RIGHTS*, *supra* note 6, at pt. I.

reason that “governments are instituted among men.”<sup>24</sup> To secure natural rights is, therefore, why the Constitution was enacted, and to secure natural rights is how the Constitution should be interpreted. That is the “original intent” of the Founders.

Here, it is necessary to explain the connection between the Founders’ background attitudes on the purpose of government and the interpretation of the particular provisions of the Constitution. The most important point to recognize is that, as just mentioned, the Constitution was written for a reason: to establish a form of government that would provide better security for natural rights than was provided under the Articles of Confederation. To make the point somewhat differently, the particular provisions of the Constitution were written with the Founders’ background attitudes in mind. The Constitution is not an end in itself; it is the means by which the American political community’s ideals—its ends—are ordered. It is therefore necessary to interpret the Constitution in light of those ideals; ideals expressed with unparalleled eloquence by Thomas Jefferson in the Declaration of Independence.

The necessity of keeping the Founders’ background attitudes in mind when interpreting the particular provisions of the Constitution becomes even more apparent when one realizes that many of the most significant provisions of the Constitution are phrased in general terms, especially those concerning individual rights. For example, the First Amendment’s directive that Congress shall make no law “abridging the freedom of speech” is not unambiguous, nor is the Eighth Amendment’s prohibition against “cruel and unusual punishments.” Moving beyond the original ten amendments, what does it mean to say, as the Fourteenth Amendment does, that no state shall deny to any person “the equal protection of the laws”? Provisions as general as these—and there are many others in the Constitution—are not self-interpreting. They can be given meaning and life only when they are construed in light of the moral and political principles upon which they are based. As political scientist David O’Brien aptly observed long ago, “Interpreting the Constitution . . . presupposes a judicial and political philosophy and poses inescapable questions of substantive value choices.”<sup>25</sup> Although I reject the argument advanced by many proponents of the application of literary analysis to legal texts—that meaning cannot be extracted from legal texts but can only be put into them; that, in other words, the Constitution means nothing and means anything—it is difficult to deny the more modest claim that “texts can be interpreted only in some ‘context.’”<sup>26</sup> And that “context,” as *To Secure These Rights* describes, is the Lockean political philosophy of the Declaration of Independence.

Of course, it is possible to construe the provisions of the Constitution in light of philosophical principles other than those embodied in the Declaration. One need only peruse the plethora of provocative theories of constitutional interpretation advanced over the years to appreciate this fact. However, those advancing non-originalist approaches to constitutional interpretation have failed to show that the particular approach they favor is based on anything other than their own moral and political preferences. Indeed, the late Ronald Dworkin, a forceful critic of

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<sup>24</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>25</sup> I DAVID M. O’BRIEN, CONSTITUTIONAL LAW AND POLITICS 89 (1991).

<sup>26</sup> Sanford Levinson & Steven Mailloux, *Preface* to INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER xi, xii (Sanford Levinson & Steven Mailloux eds., 1988).

originalism, maintained that we should abandon the search—hopeless, in his view—for the Framers’ intent in favor of the “best argument” about political morality.<sup>27</sup>

The problem with Dworkin’s interpretive position, and a problem repeated by most lawyers attempting to articulate theories of constitutional interpretation—including, with all due respect, Jack Balkin, who now claims to be an originalist<sup>28</sup>—is that under his theory substantive values are inevitably established by those with the best argumentation skills—by clever lawyers such as Dworkin himself. If the rule of law means anything, it surely means that the Constitution should not be interpreted in such a subjective fashion, especially by unelected and life-tenured judges. Moreover, if the American people do wish to depart from the natural rights principles of the Declaration of Independence and adopt, for instance, the progressive agenda preferred by most American law professors or the majoritarianism of the vast majority of conservative originalists, they should employ the Article V amendment process and so specify. To date, this has not occurred—and it is not likely to occur.

## II. THE REACTION TO LIBERAL ORIGINALISM

Space constraints permit me to discuss only a couple of the reactions to liberal originalism. A number of scholars have praised it,<sup>29</sup> and at least one has embraced it as his own.<sup>30</sup> I will not discuss that reaction here, other than to say that it was nice to

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<sup>27</sup> RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 145 (1993).

<sup>28</sup> See JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

<sup>29</sup> *To Secure These Rights* was reviewed in a lot of different outlets, including the *American Historical Review*, *American Journal of Legal History*, *American Political Science Review*, *Choice*, *Constitutional Commentary*, *FreedomAndCapitalism.com*, *Harvard Law Review*, *Journal of Law and Politics*, *Journal of the Early Republic*, *Journal of Politics*, *Laissez Faire*, *Law and History Review*, *Law and Politics Book Review*, *Legal Studies Forum*, *Political Science Quarterly*, *Second Renaissance Books*, and *Yale Law Journal*.

<sup>30</sup> See, e.g., Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J. L. & PUB. POL’Y 489 (2004) (reviewing *THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT* (Scott Douglas Gerber ed., 2002)). Sandefur’s citations to authority are sometimes misleading as to who coined the phrase “liberal originalism” (I did). I brought my concern to his attention, he sort of apologized for it, and he has since apparently stopped citing my work altogether when discussing the Declaration of Independence in constitutional interpretation. See Emails from Scott Gerber to Timothy M. Sandefur, May 8 and May 10, 2010, and Email from Timothy M. Sandefur to Scott Gerber, May 9, 2010 (on file with Gerber). See generally TIMOTHY SANDEFUR, *THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY* (2014) (failing to cite either *To Secure These Rights* or *First Principles*). Sandefur had invited me in 2007 to present a talk about “The Declaration of Independence in Constitutional Interpretation” to the Sacramento, California lawyers’ chapter of the Federalist Society. Fortunately for me, at least some other scholars realize that Sandefur’s work borrows heavily from mine. See, e.g., Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 260 n.104 (2009) (pointing out that Sandefur’s theory of constitutional interpretation “that relies on the Declaration of Independence as part of the nation’s organic law” is “based in substantial part on the work of Scott Gerber”). It is, of course, problematic when others do not realize it. See, e.g., Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 354 n.5 (2007) (“Although I can’t spell out the differences in this context, what I’m calling ‘lefty’ originalism is rather different from what Timothy Sandefur has recently called ‘liberal

read. Instead, I will concentrate on the criticisms of two of the other participants at this symposium, Patrick Charles and Lee Strang. I then will discuss Justice Clarence Thomas's use of liberal originalism and the reactions to his use of it.

*A. Patrick Charles on Liberal Originalism*

Historian Patrick Charles discussed my work on liberal originalism in a 2011 article in the *William and Mary Bill of Rights Journal* entitled "Restoring 'Life, Liberty, and the Pursuit of Happiness' in Our Constitutional Jurisprudence: An Exercise in Legal History."<sup>31</sup> He disagrees with my work. For example, he writes:

As a matter of eighteenth-century constitutional thought, Gerber's claims falter, like [Randy] Barnett's, in that they misconstrue the concepts of the *public* or *common good* and the true importance of virtue in republican constitutionalism. Perhaps Gerber's greatest shortfall is his mischaracterization of the "first principle" of government. Gerber reads it as embodying "the institutional means to secure the natural-rights philosophical ends [in] the Declaration." However, as will be shown below, this ignores that the first principle of government is the consent of the governed, or what the founding generation referred to as the *good of the whole*.<sup>32</sup>

The above quotation makes clear that Charles disagrees with liberal originalism because he is a utilitarian, not a libertarian. As he concisely put it in a ConSource Blog post summarizing his 2011 *William and Mary Bill of Rights Journal* article, "American independence and the Declaration [of Independence] rested on one simple governmental principle—the greatest happiness of the greatest number through an equal government."<sup>33</sup> Unfortunately for Charles, as I describe at length in *To Secure These Rights*, the political theorist who most influenced America's founders was John Locke,<sup>34</sup> the father of libertarian political philosophy, not Jeremy Bentham, the leading utilitarian of his day.<sup>35</sup> In short, Charles fails to understand *why* the United States of America is a nation: its origins, purposes, and ideals. To invoke the "celebrated" Montesquieu,<sup>36</sup> America's "animating principle"<sup>37</sup> is liberty, not

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originalism." See Timothy Sandefur, *Liberal Originalism: A Past for Our Future*, 27 HARV. J.L. & PUB. POL'Y 489 (2004)."

<sup>31</sup> See Patrick J. Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457 (2011).

<sup>32</sup> *Id.* at 480.

<sup>33</sup> Patrick J. Charles, *Placing the Declaration of Independence in Historical Context: Thoughts on Educating Current and Future Generations about America's Founding Document*, <http://blog.consource.org/post/27415739804/placing-the-declaration-of-independence-in-historical> (last visited June 13, 2014).

<sup>34</sup> See GERBER, *TO SECURE THESE RIGHTS*, *supra* note 6, at pt. I.

<sup>35</sup> Bentham famously referred to the American idea that there were natural rights as "nonsense upon stilts." *Human Rights*, <http://www.britannica.com/EBchecked/topic/275840/human-rights/219322/Nonsense-upon-stilts-the-critics-of-natural-rights> (quoting Bentham).

<sup>36</sup> THE FEDERALIST No. 47 at 302 (James Madison) (Clinton Rossiter ed., 1961).



utility. After all, utilitarians are willing to sacrifice private rights for the greater public good. The Founders of the United States decreed precisely the opposite.

*B. Lee Strang on Liberal Originalism*

Lee Strang has discussed my work in a number of places. I will focus on his article “Originalism, the Declaration of Independence, and the Constitution: A Constitutional Right to Life,”<sup>38</sup> an article that borrows from a much longer article about the Declaration of Independence that he published previously.<sup>39</sup> Strang kindly refers to me as “the best exponent of the Declarationist view.”<sup>40</sup> He also kindly states that “[l]ikely the strongest scholarly work on the interpretive impact of the Declaration on constitutional interpretation was written by Professor Scott Gerber, *To Secure These Rights*”<sup>41</sup> and that “Professor Gerber has put forth what is likely the strongest scholarly argument that the original meaning of the Constitution (or at least some of its provisions) incorporated the Declaration.”<sup>42</sup>

Of course, Strang says all of these wonderful things only to conclude that I am wrong. He writes:

Gerber fails to tie the general belief in natural rights during the founding and ratification period to the Constitution except in the most general way and therefore fails to support his specific contention that the Declaration should play an explicit, privileged role in constitutional interpretation. Further, even if one accepted Gerber’s argument that the Constitution was originally understood as the means to effectuate protection of the rights listed in the rights phrase, it does not necessarily follow—and Gerber fails to show that it did follow historically—that the meaning of the text of the Constitution is something other than its original meaning, a meaning somehow closer to the Declaration.<sup>43</sup>

With all due respect to the talented Professor Strang, he does not understand how I view the Declaration’s interpretive function. In a new book entitled *Universal Rights and the Constitution*, Stephen Simon does understand it. Here is what Simon says:

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<sup>37</sup> M. DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748) 21, 30 (Anne M. Cohler et al. ed. & trans., 1989).

<sup>38</sup> See Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Constitutional Right to Life*, in *LIFE & LEARNING: PROCEEDINGS OF THE SIXTEENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE AT VILLANOVA UNIVERSITY, 2006* at 43 (Joseph W. Koterski ed., 2007), available at <http://www.ufl.org/vol16/strang06.pdf>.

<sup>39</sup> See generally Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN. ST. L. REV. 413 (2006).

<sup>40</sup> Strang, *Originalism, the Declaration of Independence, and the Constitution: A Constitutional Right to Life*, *supra* note 38, at 47.

<sup>41</sup> *Id.* at 48.

<sup>42</sup> *Id.* at 54.

<sup>43</sup> *Id.* at 54-55.

[Gerber] stresses that the meaning of the Constitution's provisions only can be understood properly when recognized as driven by the "natural-rights political philosophy of the Declaration of Independence" and the American Revolution. Gerber looks to the meaning that the words had for those who gave them legal force while emphasizing that this meaning must be understood within its intellectual context. Although Gerber would construe the principles embedded in the Constitution at a higher level of generality than would many exclusivists, he nevertheless views constitutional understandings as fixed to the document's original meaning. The appropriate vehicle of constitutional change is Article V, and the original meaning cannot be "trumped by evolving precedent, values, or needs." When Gerber speaks of natural rights, he is referring to the beliefs of those who produced the Constitution, beliefs with specific, substantive content. His method of interpretation does not invite judges to rely on any universal arguments they might happen to consider sound. The Framers' natural law approach allows judges to rely only on natural law ideas with the appropriate historical pedigree. An approach like Gerber's is understood best as an exclusivist position instilled with proper appreciation for the character of the beliefs that informed the Constitution's enactment.<sup>44</sup>

In short, Professor Simon, who is himself a political theorist, understands that my approach to constitutional interpretation is grounded in *political theory*, rather than history. Admittedly, mine is a theory that identifies the relevant political theory by appealing to history, but I do not use history in the same narrow sense that a conservative originalist such as Professor Strang would prefer. As I mentioned during a public debate with historian Gordon Wood about "The Supreme Court and the Uses of History": "My answer to the question whether Supreme Court justices should use history to decide cases is a qualified yes. This is what I mean by that: they should use history to identify the political philosophy of the American Founding and then decide cases in light of that political philosophy."<sup>45</sup>

Strang's discussion of slavery likewise reveals that, as a conservative originalist, he does not understand liberal originalism. He writes:

The Constitution's accommodation of slavery and the denial of equality that it entailed makes it very difficult—if not impossible—to coherently interpret the Constitution through the lens of the Declaration. Even were one to assume that one *could* interpret the Constitution in light of the Declaration, one would still have to explain how the practice of slavery with its gross denial of equality existed—indeed, flourished—under the Constitution, a practice that was not ended except through the Civil War.<sup>46</sup>

Abraham Lincoln, the person most responsible for ending slavery, by contrast, understood liberal originalism. Indeed, as I describe in *To Secure These Rights*, like

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<sup>44</sup> STEPHEN A. SIMON, UNIVERSAL RIGHTS AND THE CONSTITUTION 87-88 (2014).

<sup>45</sup> Wood & Gerber, *The Supreme Court and the Uses of History*, *supra* note 10, at 437 (remarks of Gerber).

<sup>46</sup> Strang, *Originalism, the Declaration of Independence, and the Constitution: A Constitutional Right to Life*, *supra* note 38, at 56.

Thomas Jefferson before him, and Martin Luther King Jr. and Clarence Thomas after him, Lincoln embraced liberal originalism.<sup>47</sup> Lincoln proclaimed as follows in his famous speech criticizing the U.S. Supreme Court's decision in the infamous case *Dred Scott v. Sandford* (1857):

Chief Justice Taney, in his opinion in the *Dred Scott* case, admits that the language of the Declaration is broad enough to include the whole of the human family, but he and Judge Douglas argue that the authors of that instrument did not intend to include negroes, by the fact that they did not at once, actually place them on an equality with the whites. Now this grave argument comes to just nothing at all, by the other fact, that they did not at once, *or ever afterwards*, actually place all white people on an equality with one another . . . . They did not mean to assert the obvious untruth, that all men were then actually enjoying equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. **They meant simply to declare the right, so that the enforcement of it might follow as circumstances should permit.** They meant to set up a standard maxim for free society, which could be familiar to all, and revered by all, constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people of all colors everywhere.<sup>48</sup>

As Lincoln's remarks intimate, omitting Jefferson's objection to slavery in the Declaration of Independence—Jefferson wanted to condemn it<sup>49</sup>—and including guarantees to slavery in the original Constitution were unfortunate political compromises that had to be made if the United States of America was to come into being in 1776 and create a strong central government in 1787—both of which were necessary if slavery was one day to be abolished. The necessity of political compromise aside, the inhumane treatment of slaves and the long and bloody Civil War that resulted from slavery are indelible proof of the pain that departing from the Declaration's natural-rights principles has engendered in the United States.

Revealingly, what unites Strang and Charles in their opposition to liberal originalism is a shared distrust of a vigorous role for the judiciary in American constitutionalism. Charles is a traditional majoritarian, albeit a thoughtful one, who wishes to defer as much as possible to the electoral process, even at the expense of private rights. Strang is one of the most prolific of the "new" originalists and he wants judges to enforce the determinate original meaning of the Constitution's text. In what he terms the "construction zone"—in other words, when the original public

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<sup>47</sup> See also Scott D. Gerber, *Justice Thomas and Mr. Jefferson*, LEGAL TIMES, May 5, 2003, at 60-61.

<sup>48</sup> Abraham Lincoln, *Speech on the Dred Scott Decision*, June 26, 1857, reprinted in 1 ABRAHAM LINCOLN: SPEECHES AND WRITINGS 398 (Don E. Fehrenbacher ed., 1989) (emphasis supplied in bold face).

<sup>49</sup> See, e.g., Gerard W. Gawalt, *Drafting the Declaration*, in THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT ch. 1 (Scott Douglas Gerber ed., 2002).

meaning is under-determined—he insists that judges should defer to contrary constructions by elected officials.

As I explain in Part II of *To Secure These Rights*,<sup>50</sup> and as I detail at great length in my recent Oxford University Press book about the origins of judicial independence in America,<sup>51</sup> the judiciary needs to play a vigorous role in American life in order to check and balance the elected legislature and executive so as to ensure the people’s personal freedoms. Summarily stated, neither Charles nor Strang appreciates that in the political theory of American constitutional government there is what John Adams referred to as “a distinct judicial power” whose principal charge is to protect individual rights from overreaching by the elected branches of the government.<sup>52</sup> In fact, the Massachusetts Constitution of 1780 written by Adams, and which served as one of the prototypes of the U.S. Constitution, listed a strong and independent judiciary as a fundamental right of the people:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well, and that they should have honorable salaries ascertained and established by standing laws.<sup>53</sup>

### III. JUSTICE THOMAS’S LIBERAL ORIGINALISM

I was writing my Ph.D. dissertation about the relationship between the Declaration of Independence and the Constitution of the United States when Clarence Thomas was nominated to the U.S. Supreme Court. The media was reporting at the time that Thomas was likewise interested in that relationship. I do not recall whether it was my idea or somebody else’s, but given who Thomas was—a judge on the second most significant court in the United States—and who he was likely to become—a justice on the most powerful court in the world—I put aside my dissertation for a couple of weeks and wrote an article to assess the degree to which the views on constitutional interpretation espoused in Thomas’s speeches and writings, and in his decisions on the U.S. Court of Appeals for the D.C. Circuit, manifested the Lockean liberal commitment to individual rights that I believed the Declaration demanded.<sup>54</sup> About five years later, after *To Secure These Rights* had

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<sup>50</sup> See GERBER, *TO SECURE THESE RIGHTS*, *supra* note 6, at pt. II.

<sup>51</sup> See GERBER, *A DISTINCT JUDICIAL POWER*, *supra* note 7.

<sup>52</sup> See GERBER, *A DISTINCT JUDICIAL POWER*, *supra* note 7. See also Scott D. Gerber, *The Political Theory of an Independent Judiciary*, 116 *YALE L.J. POCKET PART* 223 (2007), <http://thepocketpart.org/2007/01/09/gerber.html> (last visited June 14, 2014).

<sup>53</sup> MASS. CONST. art. XXIX (1780).

<sup>54</sup> See Scott D. Gerber, *Introductory Address: Justice for Clarence Thomas: An Intellectual History of Justice Thomas’s Twenty Years on the Supreme Court*, 88 *U. DET. MERCY L. REV.* 667, 667-68 (2011). See generally Scott D. Gerber, *The Jurisprudence of Clarence Thomas*, 8 *J. L. & POL.* 107 (1991).

been published and reviewed, my editor encouraged me to write what became the first book-length exegesis on Justice Thomas's jurisprudence, *First Principles: The Jurisprudence of Clarence Thomas*.<sup>55</sup>

One of my conclusions in *First Principles* was that Justice Thomas is a liberal originalist in civil rights cases and a conservative originalist in other areas of constitutional law.<sup>56</sup> As I have pointed out elsewhere, Thomas's liberal originalism traces to Thomas Jefferson, Abraham Lincoln, and Martin Luther King Jr., and it is an originalism that places the Declaration of Independence at the heart of the American conception of civil rights.<sup>57</sup>

When Jefferson wrote the Declaration during the summer of 1776, he was inspired by the prevailing individual rights political theory of the day (most notably, the political theory of seventeenth-century British theorist John Locke). When Lincoln condemned slavery in the 1850s and 1860s, he was doing so on individual rights grounds (slaves were people, Lincoln insisted, who were entitled to enjoy the rights of individuals—especially the right to be free). And when King delivered his famous “I Have a Dream” speech in 1963, his “dream” was that his children would one day live in a nation “where they will not be judged by the color of their skin but by the content of their character.”<sup>58</sup> Clarence Thomas shares this vision of the American regime. He has for most of his public life.

For example, Thomas wrote in a 1987 article in the *Howard Law Journal* that the “founding principles of equality and liberty” set forth in the Declaration of Independence “dictate the policy of action towards Black Americans.”<sup>59</sup> Thomas, then-chairman of the U.S. Equal Employment Opportunity Commission (“EEOC”), credited the first Justice John Marshall Harlan with being the initial member of the Supreme Court to appreciate the connection between the Declaration and the enforcement of the nation's civil rights laws. In particular, Thomas applauded Harlan's solitary dissent in the infamous 1896 case of *Plessy v. Ferguson*, the case in which the Court constitutionalized the practice of racial segregation. It was in that stinging dissent that Harlan coined the phrase that would later become so closely associated with Thomas himself: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>60</sup>

Similarly, in a 1985 article in the *Stetson Law Review*, Thomas discussed his daily responsibilities of enforcing the nation's civil rights laws as chairman of the EEOC. His rejection of the agency's group-based emphasis was clear. He wrote:

I intend to take EEO enforcement back to where it started by defending the rights of individuals who are hurt by discriminatory practices. To do

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<sup>55</sup> See GERBER, *FIRST PRINCIPLES*, *supra* note 8.

<sup>56</sup> *See id.*

<sup>57</sup> *See, e.g.*, Gerber, *Justice Thomas and Mr. Jefferson*, *supra* note 47. The analysis that follows in this section borrows from several of my earlier works. *See, e.g., id.*

<sup>58</sup> Martin Luther King Jr., *I Have a Dream*, Address Delivered at the Lincoln Memorial in Washington, D.C. (Aug. 28, 1963), *reprinted in* Gerber, ed., *THE DECLARATION OF INDEPENDENCE*, *supra* note 49, at 317, 319.

<sup>59</sup> Clarence Thomas, *Toward a “Plain Reading” of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 *HOW. L.J.* 983, 984 (1987).

<sup>60</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

this, we intend to pursue individual cases as well as pattern and practice cases . . . . Those who insist on arguing that the principle of equal opportunity, the cornerstone of civil rights, means preferences for certain groups have relinquished their roles as moral and ethical leaders in this area. I bristle at the thought, for example, that it is morally proper to protest against minority racial preferences in South Africa while arguing for such preferences here.<sup>61</sup>

Thomas's critics strived during his 1991 Supreme Court confirmation process to mischaracterize his views about the Declaration of Independence. For example, Harvard Law School Professor Laurence Tribe wrote in a scathing *New York Times* op-ed that Thomas would use the Declaration to turn back the clock to the darkest days of the nation's history:

Most conservatives criticize the judiciary for expanding its powers, "creating" rights rather than "interpreting" the Constitution . . . . Clarence Thomas, judging from his speeches and scholarly writings, seems instead to believe judges should enforce the Founders' natural law philosophy—the inalienable rights "given man by his Creator"—which he maintains is revealed most completely in the Declaration of Independence. He is the first Supreme Court nominee in 50 years to maintain that natural law should be readily consulted in constitutional interpretation.<sup>62</sup>

What critics such as Tribe failed to mention was that Thomas was articulating the standard individual rights interpretation of the Declaration: the same interpretation shared by Jefferson, Lincoln, and King. Indeed, Thomas made this point repeatedly during his confirmation battle. For instance, when asked by then-Senator Howard Metzenbaum, D-Ohio, arguably his most unwavering opponent on the Judiciary Committee, about a speech he had previously given, Thomas responded:

[T]he point I think throughout these speeches is a notion that we should be careful about the relationship between the government and the individual and should be careful that the government itself does not at some point displace or infringe on the rights of the individual. That is a concern, as I have noted here, that runs throughout my speeches.<sup>63</sup>

Justice Thomas has continued to speak publicly about the Declaration of Independence since being confirmed to the Supreme Court. He reminded the faculty and students of James Madison University that Madison, the chief architect of the Constitution, built the Constitution on "universal principles, [which] we find . . . most succinctly and, indeed, elegantly stated by Madison's close friend, Thomas

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<sup>61</sup> Clarence Thomas, *The Equal Opportunity Commission: Reflections on a New Philosophy*, 15 STETSON L. REV. 29, 35 (1985). Of course, apartheid is no longer the law in South Africa.

<sup>62</sup> Laurence H. Tribe, "Natural Law" and the Nominee, N.Y. TIMES, July 15, 1991, at A15.

<sup>63</sup> *The Thomas Hearings*, 102d Cong. (1991) (statement of Clarence Thomas, then-United States Supreme Court Justice nominee, to the Senate Judiciary Committee), available at <http://www.people.virginia.edu/~govdoe/thomas/hearings.html>.

Jefferson, in our Declaration of Independence.”<sup>64</sup> Thomas went on in his speech to describe how the Constitution secures the rights promised to all Americans by the Declaration. Thomas’s critics would be well served by reading this speech.

His critics also should read his February 9, 1999, Lincoln Day address to the Claremont Institute. There, Justice Thomas urges the American people “to be ever vigilant in reminding us—me and everyone else who has the privilege of serving our nation through public office—of the principles of our founding and how they apply to the controversies of our time.”<sup>65</sup> That speech, in my judgment, is the most significant speech about the Declaration of Independence since Reverend King’s “I Have a Dream.”

Thomas is, of course, not alone in his commitment to the Declaration of Independence. However, what makes Thomas the most important voice today on the Declaration is the official position he occupies in the American regime: one of nine members of the nation’s highest court. Thomas, in short, has the power to do something about effectuating the individual rights principles of the Declaration. His civil rights opinions and votes demonstrate that he has been more than willing to act on them during his tenure on the Court.

In 1995’s *Missouri v. Jenkins*, for example, Thomas became the first Supreme Court justice to directly criticize *Brown v. Board of Education* (1954). Although he called state-mandated segregation “despicable,” he said that the Court was wrong in 1954 to rely on disputable social evidence to declare segregation unconstitutional rather than invoking the “constitutional principle” that “the government must treat citizens as individuals, and not as members of racial, ethnic or religious groups.”<sup>66</sup>

Justice Thomas’s conception of civil rights as an individual, not a group, concern also explains his approach to voting rights. In 1994, in *Holder v. Hall*, Thomas wrote in a concurring opinion that racial groups should not “be conceived of largely as political interest groups,” that blacks do not all think alike, and that existing case law should be overturned to eliminate claims for “proportional allocation of political power according to race.”<sup>67</sup> Thomas echoed these views in several more recent Voting Rights Act cases, including *Northwest Austin Municipal Utility District Number One v. Holder* (2009) and *Shelby County v. Holder* (2013).<sup>68</sup> He again wrote separately in those cases.<sup>69</sup>

With respect to racial preferences, Justice Thomas has issued four separate opinions on the subject. In *Adarand Constructors v. Peña*, the 1995 government

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<sup>64</sup> Clarence Thomas, James Madison Day Lecture, Remarks Delivered at James Madison University (March 15, 2001), available at [http://www.jmu.edu/jmuweb/general/news2/general\\_200132382450.shtml](http://www.jmu.edu/jmuweb/general/news2/general_200132382450.shtml).

<sup>65</sup> Clarence Thomas, *The Virtue of Practical Wisdom*, Remarks Delivered at the Third Annual Claremont Institute Lincoln Day Colloquium (Feb. 9, 1999), reprinted in Gerber, ed., THE DECLARATION OF INDEPENDENCE, *supra* note 49, at 243, 247.

<sup>66</sup> *Missouri v. Jenkins*, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring).

<sup>67</sup> *Holder v. Hall*, 512 U.S. 874, 905, 912 (1995) (Thomas, J., concurring in the judgment).

<sup>68</sup> See *Northwest Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

<sup>69</sup> See *Northwest Austin*, 557 U.S. at 212 (Thomas, J., concurring in part and dissenting in part); *Shelby County*, 133 S. Ct. at 2631 (Thomas, J., concurring).

contracting case that seemingly called the constitutionality of racial preferences into serious question, Thomas invoked the Declaration of Independence as the rule of decision.<sup>70</sup> He wrote:

There can be no doubt that the paternalism that appears to lie at the heart of this [affirmative action] program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence (“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.”).<sup>71</sup>

Justice Thomas again invoked the Declaration in his thirty-one-page separate opinion in the 2003 University of Michigan affirmative action case, *Grutter v. Bollinger*. After criticizing the *Grutter* majority for “fail[ing] to justify its decision by reference to any principle,”<sup>72</sup> Thomas closed his opinion by reminding his colleagues that the controlling principle—that articulated in the Declaration—required the case to come out the other way. He wrote:

[T]he majority has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause . . . . It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to “[d]o nothing with us!” and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated. I therefore respectfully dissent.<sup>73</sup>

In 2007’s *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Thomas continued with this theme:

The dissent attempts to marginalize the notion of a colorblind Constitution by consigning it to me and Members of today’s plurality . . . . But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan’s view in *Plessy*: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>74</sup>

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<sup>70</sup> It is possible to find racial preferences unconstitutional without invoking the Declaration of Independence. For example, some conservative civil rights lawyers and scholars focus on the text and history of the Fourteenth Amendment. See, e.g., Roger Clegg, *Originalism and Affirmative Action*, NATIONAL REVIEW ONLINE, April 10, 2013, <http://www.nationalreview.com/bench-memos/345181/originalism-and-affirmative-action-roger-clegg> (last visited June 16, 2014) (citing his own work and that of Michael Rappaport).

<sup>71</sup> *Adarand Constructors v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

<sup>72</sup> *Grutter v. Bollinger*, 539 U.S. 306, 357 (2003) (Thomas, J., concurring in part and dissenting in part).

<sup>73</sup> *Id.* at 378.

<sup>74</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748, 772 (2007) (Thomas, J., concurring).



Most recently, in a twenty-page concurring opinion in the 2013 case of *Fisher v. University of Texas*,<sup>75</sup> Justice Thomas equated the racial classifications embraced by the University of Texas with two of the Supreme Court's most reviled decisions, *Korematsu v. United States* (1944),<sup>76</sup> in which the Court permitted the internment of people with Japanese ancestry during World War II, and *Plessy v. Ferguson* (1896),<sup>77</sup> wherein the Court endorsed the "separate-but-equal" doctrine eventually rejected unanimously in *Brown v. Board of Education* (1954).<sup>78</sup> Thomas's liberal originalist approach to civil rights law was in full sail when the Court's lone African American justice reminded the state of Texas's flagship institution of higher education that the "Equal Protection Clause guarantees every person the right to be treated equally by the State, without regard to race. At the heart of this [guarantee] lies the principle that the government must treat citizens as individuals and not as members of racial, ethnic, or religious groups."<sup>79</sup> And it is because the Equal Protection Clause guarantees every American's constitutional right to be treated as an *individual* that, Justice Thomas insisted, the nation's highest Court "must subject all racial classifications to the strictest of scrutiny. Under strict scrutiny, all racial classifications are categorically prohibited unless they are 'necessary to further a compelling government interest.'"<sup>80</sup> Unfortunately for the University of Texas, Thomas continued,

the educational benefits flowing from student body diversity—assuming they exist—hardly qualify as a compelling state interest. Indeed, the argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950's, but emphatically rejected by this Court. And just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then, see *Brown v. Board of Education*, 347 U.S. 483 (1954), the alleged educational benefits of diversity cannot justify racial discrimination today.<sup>81</sup>

#### IV. THE REACTION TO JUSTICE THOMAS'S LIBERAL ORIGINALISM

The Left criticizes Justice Thomas heavily for his civil rights opinions and votes. For example, Eric Segall, a progressive constitutional law professor at Georgia State University College of Law, accused Thomas of "hypocrisy" and "bad faith" in a blistering article about Thomas's affirmative action jurisprudence published shortly

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<sup>75</sup> See *Fisher v. University of Texas*, 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring). For more on Thomas's opinion in *Fisher*, see Scott D. Gerber, *Clarence Thomas, Fisher v. University of Texas, and the Future of Affirmative Action in Higher Education*, *MIDWEST J. L. & PUB. POL'Y* (forthcoming in 2014).

<sup>76</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>77</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>78</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>79</sup> *Fisher*, 133 S. Ct. at 2422 (Thomas, J., concurring).

<sup>80</sup> *Id.* at 2423 (Thomas, J., concurring).

<sup>81</sup> *Id.* at 2425 (Thomas, J., concurring).

after the Supreme Court had granted certiorari in *Fisher v. University of Texas*.<sup>82</sup> To his credit, Segall subsequently invited me to give a talk about Thomas at Georgia State so that his colleagues could hear the other side of the story: a rare display of commitment to intellectual diversity in a law professorate that is too often hell-bent on suppressing conservative and libertarian perspectives.<sup>83</sup> The gist of Segall's article is that, as an originalist, Thomas must support affirmative action rather than insist it is unconstitutional. Segall concludes his article as follows:

The constitutional question raised by *Fisher*, and by all affirmative action cases, is whether the Equal Protection Clause of the Fourteenth Amendment prevents governmental officials from using racial classifications to increase diversity, redress prior discrimination, and foster a more racially tolerant society. A Justice sincerely concerned with the text and history of the Fourteenth Amendment would have to concede that there is little constitutional basis for foreclosing majority groups from assisting minority groups in this manner. Justice Thomas claims to be a Justice concerned only with text and history (not the Justices' personal views on difficult policy questions), yet also suggests the Constitution absolutely prohibits all racial preferences. In light of the constitutional text, and its history, he simply cannot have it both ways.<sup>84</sup>

As I mentioned during my talk at Georgia State, my friend Professor Segall does not understand Justice Thomas's originalism. He is far from alone in this regard. Segall was writing in anticipation of *Fisher* in the hopes, it seems, of somehow "shaming" Thomas into ruling for the University of Texas. Scott Lemieux was writing after *Fisher* had been decided: a decision in which, as I discussed above, Thomas not only ruled against the University of Texas but also reiterated his longstanding belief that the Equal Protection Clause outlaws racial preferences in higher education admissions decisions. Lemieux opined in the liberal *American Prospect* magazine that "The original understanding of the 14<sup>th</sup> Amendment can be interpreted as forbidding all state affirmative action only if the principles of equal protection are defined at such a high level of abstraction that there's no meaningful distinction between 'originalism' and any other form of constitutional interpretation."<sup>85</sup> Of course, Lemieux fails to appreciate that (1) liberal originalism is a form of originalism that differs markedly from both conservative originalism and

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<sup>82</sup> See Eric J. Segall, *Justice Thomas and Affirmative Action: Bad Faith, Confusion or Both?*, 3 WAKE FOREST L. REV. ONLINE 111 (2013), available at <http://wakeforestlawreview.com/justice-thomas-and-affirmative-action-bad-faith-confusion-or-both> (last visited June 18, 2014).

<sup>83</sup> See, e.g., Scott D. Gerber, *The Radicalization of American Legal Education: Why the Left's Dominance Is Bad for Law Schools and the Law*, FINDLAW.COM, May 30, 2005, [http://writ.news.findlaw.com/commentary/20050530\\_gerber.html](http://writ.news.findlaw.com/commentary/20050530_gerber.html); Scott D. Gerber, *The Radicalization of American Legal Education, Revisited: Why the Right's Efforts Are Good for Law Schools and the Law*, FINDLAW.COM, March 15, 2006, [http://writ.news.findlaw.com/commentary/20060315\\_gerber.html](http://writ.news.findlaw.com/commentary/20060315_gerber.html).

<sup>84</sup> Segall, *supra* note 82, at 119.

<sup>85</sup> Scott Lemieux, *Yes, Justice Thomas, Affirmative Action is Constitutional*, AMERICAN PROSPECT BLOGS, June 25, 2013, available at 2013 WLNR 15485827.

the notion of a living constitution<sup>86</sup> and (2) Justice Thomas is a liberal originalist in civil rights cases.<sup>87</sup>

Even some staunch supporters of Justice Thomas's decisions do not understand that Thomas is consistent within categories of constitutional law but inconsistent across them. To mention one recent example, Ralph Rossum unsuccessfully attempts to distinguish his book about Thomas from my book about Thomas by claiming that *all* of Thomas's constitutional decisions fit neatly under the umbrella of "original general meaning" originalism.<sup>88</sup> That is untrue. As I explained at length in *First Principles*, Thomas approaches questions involving race differently than he does other types of constitutional law cases, and he does so because of the profound impact that race has had on his own life, including with respect to witnessing how his grandfather—the man after whom Thomas titled his memoir, *My Grandfather's Son*<sup>89</sup>—was treated when Thomas was a child.<sup>90</sup> Ralph Waldo Emerson famously remarked that "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines."<sup>91</sup> Clarence Thomas has taken Emerson's adage to heart, which makes Thomas a wise man rather than a foolish one who needs his jurisprudence characterized by conservative scholars as a square peg to be pounded into a round hole.

Mark Tushnet, by contrast—almost certainly the most prolific Left-wing constitutional law professor of the present day—understands the distinction in Justice Thomas's jurisprudence between liberal originalism and conservative originalism. Tushnet stated in his book about the Rehnquist Court:

The law professor Scott Gerber suggests that positions like this reflect a division within Thomas, between what Gerber calls liberal originalism, which tells judges to interpret the Constitution in light of the Declaration of Independence, and conservative or Borkean originalism, which tells them to regard the compromises embedded in the Constitution as

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<sup>86</sup> See GERBER, TO SECURE THESE RIGHTS, *supra* note 6.

<sup>87</sup> See GERBER, FIRST PRINCIPLES, *supra* note 8.

<sup>88</sup> See RALPH A. ROSSUM, UNDERSTANDING CLARENCE THOMAS: A JURISPRUDENCE OF RESTORATION vii (2013). Rossum argues that "original general meaning" originalism endeavors to ascertain the meaning of the particular constitutional text in question at the time of its adoption. Lee Strang has correctly pointed out that that is "true of all conceptions of originalism because of originalism's fixation thesis." Lee J. Strang, *The Jurisprudence of Constitutional Restoration Is Originalism, but Not All Conceptions of Originalism*, <http://www.libertylawsite.org/liberty-forum/the-jurisprudence-of-constitutional-restoration-is-originalism-but-not-all-conceptions-of-originalism/> (last visited June 19, 2014). Rossum commends my book about Justice Thomas in a couple of places, but he is strangely silent about it when he is discussing Thomas's use of the Declaration of Independence in constitutional interpretation. See ROSSUM, *supra*, at ch. 6. See also Strang, *The Jurisprudence of Constitutional Restoration Is Originalism, but Not All Conceptions of Originalism, supra*.

<sup>89</sup> CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007).

<sup>90</sup> See Scott D. Gerber, *Justice Thomas and the Burning Cross*, FIRST AMENDMENT CENTER ONLINE (Oct. 8, 2007), <http://www.firstamendmentcenter.org/justice-thomas-and-the-burning-cross>; see generally GERBER, FIRST PRINCIPLES, *supra* note 8.

<sup>91</sup> Ralph Waldo Emerson, *Self-Reliance* (1841), available at <http://www.emersoncentral.com/selfreliance.htm> (last visited June 19, 2014).

expressing the framers' underlying principles . . . . There's surely something to Gerber's position.<sup>92</sup>

The student editors of the *Harvard Law Review* likewise understood the difference between Justice Thomas's liberal originalism in civil rights cases and his conservative originalism in other categories of constitutional law, although they were not as polite about it as Tushnet was. They wrote in a Book Note entitled *Justice Thomas's Inconsistent Originalism* assessing Thomas's memoir:

Professor Scott Gerber has aptly observed a dichotomy in Justice Thomas's jurisprudence. He notes that Justice Thomas takes a "liberal originalist" approach to civil rights issues, particularly affirmative action, and a "conservative originalist" approach to civil liberties issues, such as abortion . . . . Justice Thomas's failure to address the tensions in his judicial philosophy directly in *My Grandfather's Son* leaves one to conclude that his divergent approaches to constitutional questions are built on the Justice's personal policy preferences.<sup>93</sup>

The Critical Race Theorist andré douglas pond cummings—his capitalization style, not mine—also understood the distinction in Justice Thomas's jurisprudence between liberal originalism and conservative originalism.<sup>94</sup> cummings was even more critical of it than the editors of the *Harvard Law Review* were. cummings was writing in response to Thomas's "startling dissenting opinion" in *Grutter v. Bollinger*, in which Thomas maintained, as he later did in *Fisher v. University of Texas*, that the admissions program at the University of Michigan Law School was unconstitutional because it was not color-blind.<sup>95</sup> cummings wrote:

Thomas's adoption of "liberal originalism" may appear innocuous at first blush. Indeed, his mantra that the Constitution be interpreted in a "color blind" fashion, and that the Constitution protects every individual's rights equally, regardless of skin color, appears laudable, even impressive.

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<sup>92</sup> MARK V. TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 96 (2005). See also Mark Tushnet, *Understanding the Rehnquist Court*, 31 OHIO N.U. L. REV. 197, 208 (2005).

<sup>93</sup> Book Note, *Justice Thomas's Inconsistent Originalism*, 121 HARV. L. REV. 1431, 1434-35 (reviewing CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007)). Several other scholars likewise understand the difference between Justice Thomas's liberal originalism and his conservative originalism. See, e.g., Timothy Sandefur, *Clarence Thomas's Jurisprudence Unexplained*, 4 N.Y.U. J. L. & LIBERTY 535, 536 (2009) (reviewing HENRY MARK HOLZER, THE SUPREME COURT OPINIONS OF CLARENCE THOMAS, 1991-2006: A CONSERVATIVE'S PERSPECTIVE (2007)) (Thomas's "jurisprudence is probably best described in Scott Douglas Gerber's term, as 'liberal originalism': a version of originalism closer to the Jeffersonian principles of individual liberty articulated in the Declaration of Independence than the 'conservative originalism' associated with Robert Bork and others who deprecate Jeffersonian principles and cling to the 'civic republicanism' interpretation of the American Revolution.").

<sup>94</sup> See andré douglas pond cummings, *Grutter v. Bollinger, Clarence Thomas, Affirmative Action and the Treachery of Originalism: "The Sun Don't Shine Here in This Part of Town,"* 21 HARV. BLACKLETTER L.J. 1, 14 (2005).

<sup>95</sup> *Id.* at 1.

However, watching Thomas apply these impressive ideals to real life cases shows clearly the havoc that such application wreaks on constitutional issues of race[.] . . . Thomas's fixation on individual rights versus group concern has the group most impacted (and injured) by his decisions and votes screaming: What is to be done about 225 years of racism, oppression, and continued racial discord and discrimination? What efforts are being made to level the playing field, so that the protection of individual rights is truly meaningful? What attempts are being made to repair or devise reparations for state and government sponsored discrimination and racism? What efforts are being made toward repairing broken inner cities? How does a nation repair and ameliorate, without considering groups and the injustice visited upon an entire race?<sup>96</sup>

cummings's passion is certainly admirable. Unfortunately, he completely overlooked a fundamental point: Clarence Thomas is a *judge*, not a legislator. It is *Justice* Thomas's job to interpret the Constitution, not to rewrite it. Although it has not won me many friends in the law professorate,<sup>97</sup> my research has convinced me that Thomas is correct to view the Constitution as *requiring* color-blindness in civil rights cases.<sup>98</sup> As I described above, Thomas Jefferson, Abraham Lincoln, and Martin Luther King Jr. would agree.

#### V. CONCLUSION: THE FUTURE OF LIBERAL ORIGINALISM

It is a bit awkward to write an article about constitutional interpretation that frequently reads, at least to me, like Walt Whitman's *Song of Myself* sans the lyrical genius.<sup>99</sup> But the future of liberal originalism is too important to do anything except address the subject head on. In fact, in another symposium in which I had the pleasure of participating with Lee Strang—a retrospective on Clarence Thomas's twenty years on the Supreme Court<sup>100</sup>—the subtitle to Strang's article was “Justice Thomas, Justice Scalia, and the Future of Originalism” and he concluded “that, of the two, Justice Scalia has, as a practical matter, done more to move American legal practice toward originalism than Justice Thomas.”<sup>101</sup> (Justice Scalia is a conservative originalist.) Moreover, in a recent book entitled *The Failed Promise of Originalism*, Frank Cross is likewise skeptical about the “promise” of liberal originalism. I will conclude this article about liberal originalism with a few thoughts about Cross's critique of it.

<sup>96</sup> *Id.* at 18-19 (citing *First Principles*).

<sup>97</sup> See Gerber, *Introductory Address*, *supra* note 54, at 689-90.

<sup>98</sup> See, e.g., GERBER, *FIRST PRINCIPLES*, *supra* note 8, at ch. 3. Thomas also believes that color-blindness is the best policy. *Id.* at ch. 2.

<sup>99</sup> See Walt Whitman, *Song of Myself* (1892), available at <http://www.poetryfoundation.org/poem/174745> (last visited June 18, 2014).

<sup>100</sup> See Symposium, *Celebrating an Anniversary: A Twenty-Year Review of Justice Clarence Thomas' Jurisprudence and Contributions as an Associate Justice on the U.S. Supreme Court*, 88 U. DET. MERCY L. REV. 663, 666 (2011).

<sup>101</sup> Lee J. Strang, *The Most Faithful Originalist? Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 U. DET. MERCY L. REV. 873, 882 (2011) (citing both *First Principles* and *To Secure These Rights*).

Cross discusses liberal originalism in a chapter about the sources that originalists consult.<sup>102</sup> After expressing concern about the unreliability of *The Federalist*, the ratification records, Founding-era dictionaries, and the records of the constitutional convention, he turns to the Declaration of Independence. He cites my work for the claim that some scholars insist that the Declaration is at the “heart of the Constitution,”<sup>103</sup> and he concedes that the Declaration was a “corporate statement, not the opinions of one or a few individuals.”<sup>104</sup> He nevertheless suggests that its meaning is too indeterminate to serve as a viable constraint on judicial decision-making. Cross writes:

When originalism was gaining credence as a theory, Raoul Berger argued that it was the antidote to living constitutionalists trying to fulfill their “libertarian hopes” (Berger 1977). Yet, to some leading modern-day originalists, the theory is central to the fulfillment of their own “libertarian hopes.” These modern-day libertarian originalists rely in part on the natural rights expressed in the Declaration of Independence, with the Ninth Amendment as central evidence of this philosophy. Thus, originalism has been conceived as both strongly antilibertarian and extremely prolibertarian, which might cause some to question its determinacy.<sup>105</sup>

Cross also insists that the fact that leading contemporary originalists such as Steven Calabresi have “challenged the modern libertarian originalists” on textual and historical grounds “illustrates the great difficulty of any authentic descriptivist original understanding.”<sup>106</sup> I disagree. With respect to the always insightful Professor Calabresi, as I pointed out in the above discussion of the work of Patrick Charles and Lee Strang, liberal originalism is grounded in *political theory*, rather than textualism or history. With respect to Cross’s larger point about judicial decisionmaking—his book is primarily an empirical study about how Supreme Court justices have employed originalism when deciding actual cases—simply because most Supreme Court justices seem to be result-oriented does not mean that the originalist materials they claim to be employing are indeterminate. Rather, it means we need better judges. Bluntly put, the President and the Senate need to appoint justices who are “thinkers, and more particularly, legal philosophers”<sup>107</sup> who can exercise the self-restraint necessary to interpret the Constitution in light of the political philosophy of the Declaration of Independence on which it is based. We also need to impeach judges who either cannot do so or refuse to do so. Although Thomas Jefferson may have been correct in arguing that *in practice* impeachment has “not even [been] a

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<sup>102</sup> See CROSS, *supra* note 14, at ch. 3.

<sup>103</sup> *Id.* at 61 (quoting *To Secure These Rights*).

<sup>104</sup> *Id.* at 62.

<sup>105</sup> *Id.* at 71.

<sup>106</sup> *Id.* at 71-72.

<sup>107</sup> Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 795 (1957).

scare-crow,”<sup>108</sup> that does not mean it should remain so. The *theory* of the Constitution requires that Congress exercise the political courage necessary to perform its constitutional duty of impeaching those justices who seek to “rewrite” the Constitution rather than “interpret” it.<sup>109</sup>

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<sup>108</sup> Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 15 THE WRITINGS OF THOMAS JEFFERSON 213 (Andrew A. Lipscomb & Albert E. Bergh eds., 1905).

<sup>109</sup> Unpublished Opinion of Hugo Black (1966), in BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 274-75 (1985). *See also* THE FEDERALIST, *supra* note 36, at No. 81 (Alexander Hamilton) (stating that impeachment is a “complete security” against the “deliberate usurpations” of the Court). *See generally* GERBER, TO SECURE THESE RIGHTS, *supra* note 6, at ch. 4.