# WRITE SEPARATELY: JUSTICE CLARENCE THOMAS'S "RACE OPINIONS" ON THE SUPREME COURT

BY: Calvin J. TerBeek*

*"Law is something more than merely the preferences of the power elites writ large. The law is a distinct, independent discipline, with certain principles and modes of analysis that yield what we can discern to be correct and incorrect answers to certain problems."*

-Justice Clarence Thomas in a speech at the University of Kansas School of Law (1996)[1]

*"My dad told me way back . . . that there's no difference between a white snake and a black snake. They'll both bite."*

-Justice Thurgood Marshall responding to a reporter's question of concerning whether an African-American candidate should be appointed to his seat on the Court once it became clear Clarence Thomas was the frontrunner.[2]

## I. INTRODUCTION: BUCKING TRENDS

Justice Clarence Thomas is a maverick. No matter what one thinks of him—and he has inspired the strongest of partisan rhetoric from those on both sides of the aisle—less than a decade-and-a-half into his tenure on the Supreme Court, he has staked out some strong positions on controversial areas and called into question law long-thought settled. For example, Justice Thomas's concurring opinion in *United States v. Lopez* expressed his disappointment with the entirety of the Court's modern commerce clause jurisprudence (post-New Deal era) and stated that, given the appropriate case, he would

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* *J.D.*, Tulane University School of Law (2005); B.A. University of Wisconsin-Milwaukee (2001). The author currently clerks for Judge Sam Nuchia on the First Court of Appeals in Houston, TX and plans to clerk for Judge Andrew Austin, United States District Court for the Western District of Texas, in Austin, TX this coming August. The author would like to thank his parents for being a great set of just that, Judge Sam Nuchia—a man I will always admire greatly, and HT, who is the most amazing woman I know.

1. Justice Clarence Thomas, *Judging*, Address at the Univ. of Kansas School of Law, in 45 KAN. L. REV. 1, Nov. 1996, at 6.

2. CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 407 (1993) (alteration in original).

be willing to re-examine the so-called "substantial effects" test, which he regarded as a wrong-headed judicial creation of the Twentieth Century.[3]

Other examples further reinforce his willingness to defy the profession's professed respect for *stare decisis*: his continued call for an end to the Court's classification of commercial speech as worthy of only second-class First Amendment status;[4] his concern voiced in *Saenz v. Roe* that the Court—which in that very case had given the long-thought dead Privileges or Immunities Clause of the Fourteenth Amendment a new lease on life—had created "yet another convenient tool for creating new rights;"[5] and his lengthy *Stenberg v. Carhart* dissent in which he decried the extension of abortion rights originally given in *Roe v. Wade* and called the dilation and extraction[6] (D&X) procedure at issue there "gruesome," describing it in relatively graphic terms.[7] And this is to say nothing of his nearly unbelievable statement in his concurring opinion in *Eastern*

3. 514 U.S. 549, 584 (1995) (Thomas, J., concurring). Justice Thomas, in his distinctive style, wrote: "Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause. We have said that Congress may regulate not only 'Commerce ... among the several States,' U.S. Const., Art. I, § 8, cl. 3, but also anything that has a "substantial effect" on such commerce. This test, if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula." Thomas did state that principles of stare decisis might preclude the Court from "wip[ing] the slate clean." *Id.* at 601 n.8.

4. *See e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001) (Thomas, J., concurring) (stating that he "continue[s] to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as "commercial" and that he "would subject all of the advertising restrictions to strict scrutiny and would hold that they violate the First Amendment."); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring) (rejecting the *Central Hudson* commercial speech balancing test because a government interest to "keep legal users of a product . . . ignorant in order to manipulate their choices in the marketplace" is "*per se* illegitimate and [the government] can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommerical' speech.").

5. 526 U.S. 489, 528 (1999) (Thomas, J., dissenting).

6. Colloquially, partial birth abortion.

7. 530 U.S. 914, 984-988 (Thomas, J., dissenting). Thomas began by writing that "[i]n the years following *Roe*, this Court applied, and, worse, extended, that decision to strike down numerous state statutes that purportedly threatened a woman's ability to obtain an abortion." *Id.* at 980. He then explained the D&X procedure as "[a]fter dilating the cervix, the physician will grab the fetus by its feet and pull the fetal body out of the uterus into the vaginal cavity. At this stage of development, the head is the largest part of the body. Assuming the physician has performed the dilation procedure correctly, the head will be held inside the uterus by the woman's cervix. While the fetus is stuck in this position, dangling partly out of the woman's body, and just a few inches from a completed birth, the physician uses an instrument such as a pair of scissors to tear or perforate the skull. The physician will then either crush the skull or will use a vacuum to remove the brain and other intracranial contents from the fetal skull, collapse the fetus' head, and pull the fetus from the uterus." *Id.* at 987.

*Enterprises v. Apel* in which he stated that, given the chance, he would overrule *Calder v. Bull*, a case decided in 1798.[8]

In addition to his clear willingness to push the judicial envelope, another inescapable fact about Justice Thomas is that he is an African-American. Given this, the next logical question is whether Justice Thomas's maverick jurisprudential attitude translates to those cases where the issue before the Court has an integral racial component. This is a question that has not been examined by scholars since the mid-1990s[9] and Justice Thomas has certainly penned some important "race" opinions since then (the University of Michigan affirmative action cases being glaring examples). A fresh look at this question then is long overdue.

This article is organized as follows: Part II examines the intersection of Justice Thomas and affirmative action; Part III reviews two of his opinions dealing with prison gangs and race; Part IV looks at opinions in the *Batson* area and the First Amendment; and Part V synthesizes these opinions and argues that Justice Thomas's race opinions paint, not surprisingly, a picture of more complex jurisprudence than partisan commentators would lead one to believe, and that this area of his jurisprudence is deeply informed by his own unique brand of thinking as to the role of race, racism, and ameliorative racial policies in contemporary society.

## II. THE COLOR-BLIND CONSTITUTION & AFFIRMATIVE ACTION

Along with abortion, affirmative action is a lightning-rod political issue that inflames the passions.[10] After *Bakke*,[11] and *Fullilove*[12] the Court had been content to let the lower courts struggle with affirmative action until *Richmond v. J.A. Croson Co.*[13] and

8. 524 U.S. 498, 538-39 (1998) (Thomas, J., dissenting). Thomas disagreed with *Calder*'s limitation of the ex post facto clause to only the criminal context, stating that "he had never been convinced of the soundness of this limitation" and that given the right case, he would hold that "retroactive civil law . . . is . . . unconstitutional under the *Ex Post Facto* Clause." *Id.*

9. To my knowledge, the only two articles written in this area are one by a leading Thomas scholar, Scott Douglas Gerber and a 1998 article by Jared A. Levy. *See* Scott D. Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 S.U. L. REV. 43 (1997); Jared A. Levy, *Blinking at Reality: The Implications of Justice Clarence Thomas's Influential Approach to Race and Education*, 78 B.U. L. REV. 575 (1998).

10. Steve Crabtree, *Gallup Poll Tuesday Briefing*, Confidence in the Court: Politics Yield Split Decision, June 24, 2003.

11. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (invalidating UC-Davis medical school affirmative action program reserving 16 out of 100 seats for minorities).

12. Fullilove v. Klutznick, 448 U.S. 448 (1980). This case did not produce a majority opinion as to the appropriate level of scrutiny to apply to affirmative action programs, but did uphold a program that required local governments to set aside a portion of their federal grants for minority-owned businesses.

13. 488 U.S. 469 (1989).

*Metro Broadcasting Inc. v. FCC*.[14] In those cases, the Court fought a turf-battle over the appropriate level of scrutiny to employ in reviewing affirmative action programs, arriving at a strict scrutiny answer in *Croson*, but retreating to intermediate scrutiny in *Metro Broadcasting*.[15] Enter Justice Clarence Thomas.

## A. THE EARLY INDICATIONS

### 1. *NORTHEASTERN FLORIDA*

In 1993, Justice Thomas was given the responsibility of writing the majority opinion in *Northeastern Florida Chapter v. City of Jacksonville* which combined standing and affirmative action issues.[16] Petitioners challenged a city ordinance "requir[ing] that 10% of the amount spent on city contracts be set aside each fiscal year for so-called 'Minority Business Enterprises' (MBE's)" as an Equal Protection violation.[17] The issue, as Justice Thomas framed it, was "whether, in order to have standing to challenge the ordinance, an association of contractors is required to show that one of its members would have received a contract absent the ordinance."[18]

In reversing the court of appeals and holding that the contractors did not need to make such a showing, Thomas analogized the instant case to *Bakke* where the Court had held that the medical student who challenged the university's affirmative action program had established injury because he was not allowed to compete for a place in the medical school class.[19] That case, along with the rest of the Court's standing jurisprudence, stood for the proposition that "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing."[20] That is, the "injury in fact" there was the "inability to compete on an equal footing in the bidding process, not the loss of a contract."[21]

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14. 497 U.S. 547 (1990).

15. *Supra* note 13, 14.

16. 508 U.S. 656 (1993).

17. *Id.* at 658. Minorities were defined as "blacks . . . Oriental, Indian, Eskimo, Aleut, or handicapped." *Id.*

18. *Id.*

19. *Id.* at 665.

20. *Id.* at 666.

21. *Id.* Justice O'Connor, joined by Justice Blackmun, argued in dissent that because the city had amended the ordinance after the Court granted certiorari, this rendered the case moot because it was now impossible for the Court to grant "any effectual relief whatever to a prevailing party." *Id.* at 669-70 (O'Connor, J., dissenting) (internal quotation omitted). The

### 2. *ADARAND*

*Adarand Constructors, Inc. v. Peña* gave Justice Thomas a second opportunity to expound on affirmative action, this time in a concurring opinion.[22] In *Adarand*, petitioners challenged a federal government policy of providing financial incentives to prime contractors to hire subcontractors controlled by "socially and economically disadvantaged individuals."[23] The petitioners argued that the government's use of race as a proxy for identifying such individuals was a violation of the equal protection component of the Due Process Clause.[24]

The Court, per Justice O'Connor, held that "[a]ll racial classification, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[25] Jettisoning the short-lived *Metro Broadcasting*[26] test in which the Court gave its imprimatur to intermediate scrutiny for federal remedial affirmative action programs, Justice O'Connor reasoned that given *Croson*[27] —which held that state and local government affirmative action programs must be subjected to strict scrutiny—and the fact that there is no legally significant difference between the Fourteenth Amendment's Equal Protection Clause and the equal protection component of the Fifth Amendment's Due Process clause, strict scrutiny was required in *all* programs that used race as a factor in handing out governmental benefits.[28]

Justice Stevens wrote a dissent in which he chided some of the members in the majority for implicitly arguing there is a "moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."[29] He further argued that the judiciary should show deference to congressional decisionmaking.[30] Justice Ginsburg also penned a dissent agreeing with Justice Stevens that there was "no

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dissenters would have let petitioners challenge the new, "more narrowly drawn" city ordinance given what they regarded as the mootness of the ordinance presently before the Court. *Id.* at 678.

22. 515 U.S. 200 (1995).
23. *Id.* at 204.
24. *Id.*
25. *Id.* at 227.
26. *Metro Broad., Inc.*, 497 U.S. 547 (1990).
27. *Croson*, 488 U.S. 469 (1989).
28. *Adarand*, 515 U.S. 200 at 212-225, 227-231.
29. *Id.* at 243 (Stevens, J., dissenting).
30. *Id.* at 253.

compelling cause for the intervention the Court has made in this case."[31]

Justice Thomas, concurring in the result, wrote separately to express his disagreement with what he believed to be the underlying message in Justice Stevens's and Justice Ginsburg's dissents: "there is a racial paternalism exception to the principle of equal protection."[32] It did not matter, he stated, that "these programs may have been motivated . . . by good intentions."[33] The important fact was that the Constitution is color-blind and that "the government may not make distinctions on the basis of race."[34] Justice Thomas sharply attacked the idea of "benign discrimination" arguing that such programs "stamp minorities with a badge of inferiority" and might eventually cause them to believe "they are entitled to preferences."[35] At the end of the day, "it is racial discrimination, plain and simple."[36]

## B. INTRANSIGENCE

The University of Michigan affirmative action cases, each decided on the same day, saw Thomas issue two more opinions on the affirmative action issue—one strident and the other more pacifical.

### *1. GRUTTER & GRATZ*

In *Grutter v. Bollinger*, white applicants who had been denied admission challenged the University of Michigan's law school policy, which sought to enroll a "critical mass" of underrepresented minority students (i.e., those who had been historically discriminated against).[37] The Court, per Justice O'Connor, held that the law school's admission policy passed constitutional muster.[38] After reiterating the *Adarand* standard that "*all* racial classifications" are subject to strict scrutiny, the majority reaffirmed the analysis in Justice Powell's *Bakke* opinion, stating that diversity in higher education could be a compelling governmental interest as long as the admission policy was narrowly tailored.[39] Importantly, Justice O'Connor ended her opinion by stating that "[i]t has been 25 years since Justice Powell first approved the use of race to further an

31. *Id.* at 271 (Ginsburg, J. dissenting).
32. *Id.* at 240 (Thomas, J., concurring).
33. *Id.*
34. *Id.*
35. *Id.* at 241 (Thomas, J., concurring) (internal quotations omitted).
36. *Id.*
37. 539 U.S. 306, 318 (2003).
38. *Id.* at. 306 .
39. *Id.* at 325-326 (emphasis added).

interest in student body diversity in the context of public higher education" and since that time minorities had made significant advances.[40] Given this, Justice O'Connor expected that "25 years from now, the use of racial preferences will no longer be necessary" to obtain a diverse student body.[41]

Justice Thomas wrote a fiery dissent. He opened with a long quote from Frederick Douglass that ended with "[a]nd if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . [Y]our interference is doing him positive injury."[42] Justice Thomas then characterized affirmative action as "meddling" by "university administrators" and flatly stated that "[r]acial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy."[43] After reviewing the Court's precedents on what constituted a compelling governmental interest needed to satisfy strict scrutiny, Justice Thomas criticized the majority's, to his mind, lemming-like adherence to the law school's putative justification of a diverse student body, and with a rapier pen wrote that diversity is simply a "fashionable catchphrase" given by the law school because they want to achieve a certain "aesthetic . . . from the shape of the desks and tables in its classrooms to the color of the students sitting in them."[44] Justice Thomas did not stop there. He argued that the "Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation."[45] Justice Thomas criticized the notion that diversity was the compelling governmental interest, claiming that the ends of such policies could only be the "educational benefits" derived from the racially harmonious "aesthetic."[46]

Justice Thomas then turned his poison pen to the majority's unprecedented "deference to the Law School's conclusion that its racial experimentation leads to educational benefits" bolstered by the majority's use of social science.[47] Justice Thomas fought back with sociological studies of his own, claiming "the sky has not fallen at

40. *Id.* at 343.
41. *Id.*
42. *Id.* at 350 (citation omitted). While technically a concurrence in part—he concurred in the part stating that strict scrutiny is the correct standard to apply to racial classifications—Thomas dissented from the application of that standard to the university's admission policy.
43. *Id.*
44. *Id.* at 355, n.3.
45. *Id.*
46. *Id.* at 355.
47. *Id.* at 364.

Boalt Hall."[48] Michigan's admission policy "is not looking for those students who, despite a lower LSAT score or undergraduate grade point average, will succeed in the study of law," Justice Thomas persisted, "[t]he Law School seeks only a facade—it is sufficient that the class looks right, even if it does not perform right."[49] Justice Thomas finished his dissent with a hearty endorsement of the insinuation of O'Connor *dictum* that affirmative action had twenty-five years before the Court would pull the constitutional plug on it.[50]

The undergraduate affirmative action case of *Gratz v. Bollinger* saw a different majority and a less intransigent Justice Thomas.[51] Here the challenge was to the University of Michigan's undergraduate admission policy, which employed a point-based system in which a number of factors were considered in making admissions decisions.[52] Out of 150 total possible points, the policy automatically awarded 20 points (where 100 were needed to guarantee admission) to underrepresented minorities—Blacks, Hispanics, and Native Americans—in the admissions calculus.[53]

The Court, per Chief Justice Rehnquist, disposed of the standing argument raised by Justice Stevens's dissent and held that because the university's use of race in its current freshman admissions policy was not narrowly tailored to achieve respondents' asserted interest in diversity, the policy violated the Equal Protection Clause.[54] The automatic awarding of points did not provide sufficient "individualized consideration" of all the qualities each applicant could contribute to educational diversity.[55] Instead, regardless of their individual circumstances, all minorities were awarded a set number of points, amounting to a de facto quota.[56] Rehnquist rejected the argument that the massive amount of applications made individualized consideration impractical, stating that the "fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."[57]

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48. *Id.* at 367. Justice Thomas noted that when using a policy of affirmative action, the University of California-Berkeley's law school admitted 20 Blacks and 28 Hispanics, and without affirmative action they admitted 14 Blacks and 36 Hispanics. *Id.*

49. *Id.* at 372.

50. *Id.* at 375-76.

51 539 U.S. 244 (2003). Here the majority opinion was written by Chief Justice Rehnquist and joined by Justices O'Connor, Kennedy, Scalia, and Thomas. Justice Breyer wrote a concurring opinion but did join the Court's opinion.

52. *Id.* at 277-78.

53. *Id,*

54. *Id.* at 260-67 and 275-76.

55. *Id.* at 279-80.

56. *Id.* at 271.

57. *Id.* at 275

Justice Thomas wrote a short concurring opinion.[58] He stated that he believed the Court correctly applied its precedents, but he noted that he "would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause."[59] He further stated that the university's undergraduate admissions policy failed "because it does not sufficiently allow for the consideration of nonracial distinctions among underrepresented minority applicants."[60]

## III. WITHIN THE PRISON WALLS: RACE AND PRISON GANGS

While Justice Thomas' prisoners' rights jurisprudence has been explored in detail in other places,[61] what has not been explored is his treatment of racial issues in the penal context, especially concerning prisons gangs. Two cases that bookend Justice Thomas' tenure on the Court, *Dawson v. Delaware* and *Johnson v. California*, provide the fodder for this discussion.[62]

### A. *DAWSON V. DELAWARE*

In *Dawson*, the petitioner escaped from prison, stole a car, and in the course of a subsequent burglary murdered the inhabitant of the home.[63] He was convicted of numerous crimes, including first-degree murder.[64] At the penalty phase of the capital trial, the prosecution gave notice that it would introduce evidence concerning Dawson's membership in the Aryan Brotherhood, a white supremacist prison gang.[65] While Dawson continued to object on the grounds that the introduction of such evidence was unconstitutional, he agreed to a stipulation that somewhat mitigated the Aryan Brotherhood evidence.[66] However, Dawson continued to argue that the evidence was unconstitutional because it was inflammatory and irrelevant.[67]

In any event, the trial court judge allowed the evidence concerning Dawson's membership in a white supremacist prison gang, and the jury sentenced him to death.[68] The Delaware Supreme

58. *Id.* at 281 (Thomas, J., concurring).
59. *Id.*
60. *Id.*
61. *See* SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS at 114-29 (1999); Note, *Lasting Stigma: Affirmative Action and Clarence Thomas's Prisoners' Right Jurisprudence*, 112 HARV. L. REV. 1331 (1995).
62. 503 U.S. 159 (1992); 125 S.Ct. 1141 (2005).
63. *Dawson*, 503 U.S. at 160-62 (the victim was white).
64. *Id.* at 161.
65. *Id.* at 162.
66. *Id.* at 162.
67. *Id.*
68. *Id.* at 162-63.

Court affirmed the conviction holding that "the jury was 'required to make an *individualized* determination of whether Dawson should be executed or incarcerated for life' . . . and that it was desirable for the jury to have as much information before it as possible."[69]

The United States Supreme Court, in an 8-1 decision, reversed the state supreme court. Chief Justice Rehnquist, writing for the majority, stated that the Aryan Brotherhood evidence only proved the abstract beliefs held by that organization and Dawson himself and did not relate to the crime in a direct fashion (the murder victim was white).[70] That is, because the "prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, [that] evidence was also not relevant to help prove any aggravating circumstance."[71]

Justice Thomas was the lone dissenter, arguing that not only did the Aryan Brotherhood evidence support an inference that Dawson was "engaged in unlawful activity" while in prison, but such evidence also provided "additional information about Dawson's character."[72] Moreover, Justice Thomas argued, "I see no way to hold that [Dawson's mitigating evidence] has relevance but that Dawson's gang membership does not."[73] After reviewing the Court's cases concerning the admission of character evidence in sentencing hearings and reading them to mean that evidence concerning First Amendment-protected activities was not necessarily precluded, Justice Thomas stated that "[i]f the Court means that no First Amendment protected activity 'can be viewed as relevant 'bad' character evidence in its own right,' then today's decision represents a dramatic shift in our sentencing jurisprudence."[74] Thomas argued that once the Court decided that the evidence was not relevant, "the First Amendment adds [little] to the analysis."[75] If the evidence was truly irrelevant, the Due Process Clause of the Fourteenth Amendment would be the relevant constitutional provision, not the First Amendment.[76]

## B. *JOHNSON V. CALIFORNIA*

In *Johnson v. California*, decided last term, the Court confronted the issue whether strict scrutiny was the proper standard of review for an equal protection challenge to the California

69. *Id.* at 163 (citation omitted).
70. *Id.* at 166-67.
71. *Id.* at 166.
72. *Id.* at 172-73 (Thomas, J., dissenting).
73. *Id.* at 175.
74. *Id.* at 178 (citation omitted).
75. *Id.*
76. *Id.*

Department of Correction's (CDC) "unwritten policy of racially segregating prisoners" immediately upon entering the prison system.[77] The CDC contended that the policy was necessary to combat prison gang violence among the inmates.[78]

The Court, reversing the Ninth Circuit and citing its affirmative action precedent, held that "*all* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny."[79] The Ninth Circuit, the Court felt, had mistakenly applied the deferential standard articulated in *Turner v. Safley* that a plaintiff had the burden of "refuting the common-sense connection between the policy and prison violence."[80] Justice O'Connor, writing for the Court, stated that this ignored the Court's pronouncements that the government's motivation behind the racial classification was immaterial; strict scrutiny was needed to "smoke out" illegitimate classifications.[81]

The majority reasoned that segregating inmates based on race might only exacerbate already existing racial tensions and accelerate the violence that the policy was meant to counteract.[82] Justice O'Connor flatly denied that *Turner* applied to the instant case because the prison regulations there did not involve racial classifications.[83] Moreover, in *Lee v. Washington*, the Court had implicitly held that the "necessities of prison security and discipline [were] a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities."[84] Finally, the Court noted that it was not passing on the question of whether the CDC's policy violated the Equal Protection Clause but was remanding to the lower courts to answer the question.[85]

Justice Ginsburg, joined by Justices Souter and Breyer, concurred in the judgment subject to her reservation expressed in *Gratz* that "[a]ctions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination . . . [has] been

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77. 125 S.Ct. 1141, 1144 (2005). When a prisoner entered the prison system or was moved to a new prison, the CDC would segregate the prisoners on the basis of race.

78. *Id.* at 1145. The prevalence of such prison gangs as the Mexican Mafia, Nuestra Familia, Black Guerilla Family, Aryan Brotherhood, and Nazi Low Riders, who engaged in murder and other serious crime was enough, in the CDC's opinion, to support a racial classification by the government.

79. *Id.* at 1146 (quoting *Adarand*, 515 U.S. at 227).

80 *Id.* (internal quotation omitted). *Turner* involved a class action brought by the inmates in the Missouri prison system challenging regulations limiting inmate correspondence and mail privileges and the ability of an inmate to marry. *Turner*, 482 U.S. 78 (1987).

81. *Johnson*, 125 S.Ct. at 1146.

82 *Id.* at 1147.

83. *Id.* at 1149.

84. *Id.* at 1150.

85. *Id.* at 1152 (stating that strict scrutiny is *not* "strict in theory, fatal in fact"). *Id.* at 1151.

extirpated."[86] Justice Stevens dissented on the ground that he would hold the CDC's policy unconstitutional based on the record before the Court.[87] Stevens argued that "[u]nder the policy's logic, an inmate's race is a proxy for gang membership, and gang membership is a proxy for violence."[88] However, the lack of evidence presented by CDC would not let it, in Stevens' estimation, pass even a "minimal level of constitutional scrutiny."[89]

Justice Thomas, joined by Justice Scalia, dissented.[90] Thomas argued that *Johnson* compelled the Court to reconcile two conflicting lines of precedent. The conflicting lines were of course the *Adarand* and *Gratz* precedents calling for strict scrutiny in all racial classifications and the Court's pronouncement in *Washington v. Harper* that "the [relaxed] standard of review we adopted in *Turner* . . . *applies to* all *circumstances in which the needs of prison administration implicate constitutional rights.*"[91]

Strict scrutiny "within the prison walls," Thomas argued, was not constitutionally mandated.[92] "Time and again," he continued, "we have deferred to the reasonable judgments of officials experienced in running this Nation's prisons."[93] In stark terms he spelled out his basic point of departure from the majority: "[t]he majority is concerned with sparing inmates the indignity and stigma of racial discrimination. California is concerned with their safety and saving their lives. I respectfully dissent."[94]

Using the record to bolster his argument, Justice Thomas gave a thorough factual recounting that was largely missing from O'Connor's majority opinion. He explicated the exact process of how California processed new inmates and transferred ones already in the system and noted that race was not the only factor in cell assignments.[95] He then chastised the majority for ignoring the *Turner* line of cases where the Court had held that that standard of review "appl[ies] in all cases in which a prisoner asserts that a prison regulation violates the Constitution, not just those in which the prisoner invokes the First Amendment."[96] To Thomas, this clearly

86. *Id.* at 1152-53 (quoting *Gratz*, 539 U.S. at 301).
87. *Id.* at 1153.
88. *Id.*
89. *Id.*
90. Justice Rehnquist did not take part in the decision.
91. *Id.* at 1157 (quoting *Washington v. Harper*, 494 U.S. 210, 224 (1990)) (Thomas, J., dissenting).
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 1159. For example, "Hispanics from Northern and Southern California are not housed together in reception centers because they belong to rival gangs." *Id.*
96. *Id.* at 1161 (emphasis omitted) (quoting *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987)).

meant that regardless of the level of scrutiny that would apply "outside prison walls," the penal system presented circumstances that called for a more deferential review.

Justice Thomas did concede that in *Lee*—the only time the Court had taken up racial classification in the prison context—the Court had applied "a heightened standard of review."[97] However, Thomas noted that the Court never explained exactly how this standard of review fit into the equal protection hierarchy of review. Furthermore, he noted that *Lee* was a short per curiam opinion that was accompanied by a concurrence by Justice Black—joined by Justices Harlan and Stewart—stating that they wanted:

> [t]o make explicit something that is left to be gathered only by implication from the Court's opinion. This is that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails.[98]

Given this, and the clear distinction between *Adarand* and the instant case, Thomas stated that the CDC's policy passed constitutional muster because its "policy [was] reasonably related to a legitimate penological interest" (protecting inmates' and prison officials' safety) and that "alternative means of exercising the right remain open to inmates."[99]

## IV. A DEEP RICH BARITONE, JURIES, AND BURNING CROSSES

The following two opinions show why it is difficult to make blanket statements about Thomas and race. One is an aberration—at least an aberration from the received wisdom[100]—and the other seems to epitomize the criticism of Justice Thomas as the "youngest, cruelest, justice."[101]

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97. *Id.* at 1166.

98. *Id.* (quoting *Lee*, 390 U.S. at 334 (Black, J., concurring).

99. *Id.* at 1163 (noting that not all facets of prison life for the first 60 days of confinement were racially segregated). *Id.* at 1164.

100. That received wisdom being of course that (1) Justice Thomas cannot think for himself and simply parrots Justice Scalia's conservatism; (2) Justice Thomas is tone-deaf and possibly even hostile to the traditional civil rights movement; and (3) Justice Thomas is "stupid" because he does not talk during oral argument. *See generally* FIRST PRINCIPLES, *supra* note 57. As we will see in Part V, none of these are true.

101. *See The Youngest, Cruelest Justice*, N.Y. TIMES, FEB. 27, 1992, at A24.

### A. *CAMPBELL V. LOUISIANA*

Terry Campbell, a white man accused of killing another white man, challenged his indictment in an Evangeline Parish (Louisiana) court as a violation of the Fourteenth Amendment's Equal Protection and Due Process Clauses and the "Sixth Amendment's fair-cross-section requirement." He based his claim on the fact that "between January 1976 and August 1993, no black person served as a grand jury foreperson in the parish, even though more than 20 percent of the registered voters were black persons."[102]

The Court, per Justice Kennedy, held that Campbell had standing to raise an equal protection challenge to racial discrimination against blacks in the selection of his grand jury pool.[103] The Court noted that *Powers v. Ohio* held that a white defendant had standing to challenge the racially discriminatory use of preemptory challenges against black persons.[104] There, Kennedy noted, the Court, though usually reluctant to grant third-party standing, found that the white criminal defendant satisfied three requirements to raise the Equal Protection rights of excluded blacks: (1) the defendant had suffered an injury in fact; (2) the defendant had a sufficiently close relationship to the excluded black jurors; and (3) the black jurors were hindered in bringing their own challenge.[105]

Kennedy stated that *Powers*' reasoning applied equally to petit and grand jurors.[106] Here, Campbell was only asserting the "well-established equal protection rights of black persons not to be excluded from grand jury service on the basis of their race."[107] Racial discrimination in the selection of grand jury members was especially pernicious because of that institution's function as a "central component of the criminal justice process" and because such a practice "strikes at the fundamental values of our judicial system."[108]

Justice Thomas, joined by Justice Scalia, dissented as to the equal protection challenge holding. Thomas opened his opinion in his familiar provocative language: "I fail to understand how the rights of blacks excluded from jury service can be vindicated by letting a white murderer go free."[109] Moreover, Thomas quickly

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102. Campbell v. Louisiana, 523 U.S. 392, 395 (1998).

103. *Id.* at 394. As to the Due Process claim, the Court stated that the Louisiana Supreme Court erred in holding that *Hobby v. United States*, 468 U.S. 339 (1984), controlled. *Id.* at 401. Instead, a white defendant clearly had standing to litigate whether his conviction violated Due Process. *Id.* at 401-402. The Court declined to address the Sixth Amendment claim. *Id.* at 403.

104. *Id.* at 397 (citing to *Powers v. Ohio*, 499 U.S. 400 (1991)).

105. *Powers*, 499 U.S. at 411.

106. *Campbell*, 523 U.S. at 398.

107. *Id.*

108. *Id.*

109. *Id.* at 403 (Thomas, J., dissenting).

criticized *Powers* as "incorrect as an initial matter."[110] Justice Thomas noted that *Powers* broke new ground by holding for the first time that a criminal defendant may raise an equal protection challenge to the use of peremptory strikes to exclude jurors of a different race."[111] Thomas flatly stated that *Powers* "should be overruled."[112] Thomas then went even further, wreaking havoc on *Batson v. Kentucky*'s progeny, arguing that they were a "misguided effort to remedy a general societal wrong by using the Constitution to regulate the traditionally discretionary exercise of peremptory challenges."[113] Moreover, Justice Thomas went on to boldly state that the *Batson* doctrine "undercut[s]" the fairness of criminal trials because it focuses on excluded jurors "at the expense of the traditional protections accorded criminal defendants of all races."[114]

After criticizing the rest of the *Powers*' test, Justice Thomas decided that that case was "wholly inapplicable to this case."[115] To Thomas, given Louisiana grand jury process procedure—where the judge selects the grand jury foreman—there was (1) no racial exclusion and (2) even if the selection was discriminatory, it "could hardly constitute an 'overt' wrong that would affect the remainder of the grand jury proceedings, much less the subsequent trial."[116] Thomas concluded by mocking the Court's finding of "a close relationship" between Campbell and the "black veniremen whose rights he seeks to vindicate."[117] The correct remedy, Justice Thomas argued, would be for the black people who were excluded to form a class and sue for injunctive relief.[118]

## B. *VIRGINIA V. BLACK*

In 1998, Barry Black led a Ku Klux Klan rally in Virginia at which about thirty people attended. At the conclusion of this rally, the group burned a twenty-five foot cross on the property, which was about three hundred yards away from a state highway.[119] A sheriff was alerted and arrested Black under a Virginia statute that prohibited cross-burning with "the intent to intimidate any person or

110. *Id.* at 404.
111. *Id.*
112. *Id.*
113. *Id.* at 405, n.1.
114. *Id.*
115. *Id.* at 406.
116. *Id.*
117. *Id.* at 408.
118. *Id.* at 408-09.
119. Virginia v. Black, 538 U.S. 343, 349 (2003). The other respondents were charged under the same statute for burning a cross on the front yard of an African-American neighbor who had complained about gunfire coming from the respondents' property. *Id.* at 350.

group of persons."[120] The statute further provided that the cross-burning itself was prima facie evidence of the intent needed to satisfy the mental culpability element of the crime.[121] The issue was whether the Virginia statute "banning cross burning with an intent to intimidate a person or group of persons violate[d] the First Amendment."[122]

In an 8-1 decision, the Court, per Justice O'Connor, held that "[w]hile a State, consistent with the First Amendment, may ban cross burning carried out with an intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form."[123]

O'Connor's plurality opinion reasoned that the prima facie provision would allow a jury to convict defendants in every case in which they "exercis[ed] their constitutional right not to put on a defense."[124] And even where a defendant did put on a defense, the provision allowed Virginia "to arrest, prosecute, and convict a person based solely on the fact of [the] cross burning itself."[125] The statute raised a constitutional question since it did not allow a jury to distinguish between a cross burning that constituted political speech and that which was merely meant to intimidate.[126]

Justice Thomas was again the lone dissenter. However, before discussing his dissent it is important to backtrack a moment and remember that during oral argument Thomas broke his customary sphinx-like silence and took to task Deputy Solicitor General Michael Dreeben. It is worth repeating the exchange because it indicates the depth of Thomas' feelings on the issue:

> JUSTICE THOMAS: Mr. Dreeben, aren't you understating the—the effects of—of the burning cross? This statute was passed in what year?
>
> MR. DREEBEN: 1952 originally.
>
> JUSTICE THOMAS: Now, it's my understanding that we had almost 100 years of lynching and activity in the South by the Knights of Camellia and—and the Ku Klux Klan, and this reign of terror and the cross was a

120. *Id.* at 348.
121. *Id.* at 348.
122. *Id.* at 347 (internal citation omitted).
123. *Id.*
124. *Id.* at 365.
125. *Id.*
126. *Id.* at 365-67.

> symbol of that reign of terror. Was—isn't that significantly greater than intimidation or a threat?
>
> MR. DREEBEN: Well, I think they're coextensive, Justice Thomas, because it is—
>
> JUSTICE THOMAS: Well, my fear is Mr. Dreeben, that you're actually understating the symbolism on—of and the effect of the cross, the burning cross. I—I indicated, I think, in the Ohio case that the cross was not religious symbol and that it has—it was intended to have a virulent effect. And I—I think that what you're attempting to do is to fit this into our jurisprudence rather than stating more clearly what the cross was intended to accomplish and, indeed, that it is unlike any symbol in our society.
>
> MR. DREEBEN: Well, I don't mean to understate it, and I entirely agree with Your Honor's description of how the cross has been used as an instrument of intimidation against minorities in this country. That has justified 14 States in treating it as a distinctive—
>
> JUSTICE THOMAS: Well, it's—it's actually more than minorities. There's certain groups. And I—I just—my fear is that the—there was no other purpose to the cross. There was no communication of a particular message. It was intended to cause fear—
>
> MR. DREEBEN: It—
>
> JUSTICE THOMAS: —and to terrorize a population.[127]

Thomas continued with this theme in his lengthy dissent. Whatever speech value cross-burning had (if any), Thomas believed that the Virginia legislature had effectively written expressive activity out of the statute by proscribing only cross-burning meant to intimidate.[128] After canvassing a large number of lower court opinions and scholarship to bolster his argument that the connection between cross-burning and violence is well-established, Thomas reiterated his belief the First Amendment was not implicated here

127. Oral Argument for *Virginia v. Black*, No. 01-1107, Dec. 11, 2002, pp. 22-24 available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-1107.pdf (last visited April 1, 2005).

128. *Black*, 538 U.S. at 388 (Thomas, J., dissenting).

because the statute "prohibit[ed] only conduct, not expression."[129] Drawing an analogy to arson, Thomas forcefully stated "just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point."[130]

Thomas told the story of an African-American woman who upon seeing a burning cross, dropped to her knees and began crying, with "feelings of frustration and intimidation and feared for her husband's life."[131] He cited Virginia newspapers detailing the terror of cross-burning near the time when the statute was passed and canvassed the legislative history of the statute.[132] "It strains credulity," he wrote, "to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message."[133] And even if the statute somehow did implicate free speech, he continued, there is no constitutional problem with allowing a jury to draw an inference about cross burning.[134] That is, "[c]onsidering the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself."[135] Thomas ended his dissent by further chiding the plurality for being concerned with the plight of the "innocent cross-burner who burns a cross" with no intent to intimidate.[136] In a passage worth quoting in full, he criticized the plurality's position:

> Yet, here, the plurality strikes down the statute because one day an individual might wish to burn a cross, but might do so without an intent to intimidate anyone. That cross burning subjects its targets, and, sometimes, an unintended audience to extreme emotional distress, and is virtually never viewed merely as "unwanted communication," but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality's view, physical safety will be valued less than the right to be free from unwanted communications.[137]

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129. *Id.* at 394.
130. *Id.*
131. *Id.* at 390.
132. *Id.* at 392-93.
133. *Id.* at 394.
134. *Id.* at 395.
135. *Id.* at 397.
136. *Id.* at 398.
137. *Id.* at 399-400 (internal citation omitted).

## V. PARSING THOMAS'S RACE OPINIONS

In 1996, *Emerge*—a magazine designed to provide an African-American perspective on the news—ran a cover story on Justice Clarence Thomas. An illustration accompanying the story depicted Thomas polishing Justice Scalia's shoes.[138] George Curry, the editor of the magazine, argued that the magazine's portrayal was actually pulling its punches and Thomas—the man "who has done so much to turn back the clock on civil rights, all the way back to the pre-Civil War lawn jockey days"—deserved worse.[139]

If the reader takes away anything from the analysis of the eight cases above, at the very least I hope it is that Justice Clarence Thomas presents a more complex figure than the facile, ideological caricature found in *Emerge* would have one believe.[140] We have a justice who in one case expresses his deep concern over the Court's decision to accord First Amendment protection to cross-burning, but is also capable of arguing that Supreme Court precedent giving constitutional protection against those who would attempt to create a jury using racially discriminatory means "undercuts that fairness of criminal trials."[141] This is not indicative of a justice whose views on race can always be painted with broad brush strokes.

What is clear is that Justice Thomas is an adamant opponent of affirmative action. He regards it as "racial discrimination, plain and simple,"[142] a policy that does nothing for the "poor and uneducated," and "presents only an illusory solution to the challenges facing our

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138. *Emerge*, Nov. 1996, p. 31.

139. *Id.* at Editor's Note.

140. Furthermore, let me briefly disabuse the reader of the notion that Thomas is Justice Scalia's "shoe-shine boy" and simply mimicking the Court's other conservative member. First, two of the eight cases we looked at saw Justice Thomas as the lone dissenter (which of course meant Scalia necessarily disagreed with him). While it is true that Thomas and Scalia vote together 92% of the time, Justices Brennan and Marshall voted together 94% of the time. *See* Michael A. Fletcher & Kevin Merida, *Jurist Embraces Image As a Hard-Line Holdout*, WASH. POST, Oct. 11, 2004, A1.

This leads to two points: first, the Thomas-as-parroting-Scalia line of thought is based on an ideological thought process—one would be hard pressed to find a commentator (especially a liberal one) stating that Marshall, who voted with Brennan more often than Scalia and Thomas vote together, was Brennan's shoe-shine boy or lawn jockey for the left. Second, a strong case can be made that Thomas is *more* conservative than Scalia. For example, Thomas's willingness to overrule prior precedent that is out of line with his conservative judicial ideology is well known, even among his colleagues. Justice Scalia recently told Justice Thomas's biographer Ken Foskett that "[Thomas] does not believe in *stare decisis*, period." Jeffrey Rosen, *Rehnquist The Great?*, THE ATLANTIC MONTHLY, April 2005, p. 86. Explicating further, Scalia also added, "If a constitutional line of authority is wrong, [Thomas] would say let's get it right, I wouldn't do that." *Id.* There is, in fact, empirical evidence that Justice Thomas was the *most* conservative member of the Rehnquist Court. Harold J. Spaeth, *Chief Justice Rehnquist: "Poster Child" for the Attitudinal Model*, 89 Judicature 108, 113 (Nov.-Dec. 2005).

141. *See infra* note 114 and accompanying text.

142. *See supra* p. 190.

nation."[143] This is not a new position, or an example of him simply parroting Justice Scalia's conservatism. In 1987, while still chairman of the Equal Employment Opportunity Commission (EEOC), Thomas wrote a short article in the *Yale Law and Policy Review* arguing that "preferential hiring on the basis of race or gender will increase racial divisiveness, disempower women and minorities by fostering the notion that they are permanently disabled and in need of handouts, and delay the day when skin color and gender are truly the least important things about a person."[144]

Views like this have clearly opened up Thomas to the charge of hypocrisy and venomous attacks from those on the left. A stunning example is Angela Davis's speech at an American University Law Review Symposium. She pontificated that:

> Justice Thomas is ashamed, embarrassed, and stigmatized by a legal remedy—a legal remedy that seeks to correct illegal, unconstitutional forms of discrimination . . . So Justice Thomas, don't be ashamed that race was a factor in your admission to college and to Yale Law School and your appointment to the EEOC and to the federal court and to the Supreme Court—don't be ashamed . . . I'm not saying that you shouldn't be ashamed, because you certainly have reason to be ashamed, but not because of affirmative action.[145]

Besides the fact that this comes perilously close to simply substituting patronizing *ad hominem* attacks for relevant thought or debate, Ms. Davis—and many others from the liberal intelligentsia—are asking the wrong question when they take Thomas to task for his opinions in *Adarand* or *Grutter*. They are, in effect, throwing themselves a softball question—didn't you benefit from affirmative action, Justice Thomas?—and then simply hitting their own sophomoric question out of the park (answer: you did, so you're a hypocrite, Justice Thomas).

But Davis, I believe, misses Thomas's point about affirmative action. Justice Thomas, speaking about his days at Yale Law School, made a comment that might give us some idea why he harbors such

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143. *Grutter*, 539 U.S. at 355, n.3 (Thomas, J., dissenting).

144. Clarence Thomas, *Affirmative Action Goals and Time Tables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL. REV. 403, n.3 (1987).

145. Angela Davis, *Keynote Address*, 45 AMER. L.R. 636, 642 (1996). *See also* Judge A. Leon Higginbotham's *An Open Letter to Justice Clarence Thomas*, which sharply criticized Thomas for being hypocritical on the issue of affirmative action. 140 U. PENN. L. REV. 1005 (1992) (arguing that Thomas might still be a laborer in Pin Point, GA had it not been for Thurgood Marshall, Charles Houston, et al).

antipathy toward affirmative action: "You had to prove yourself every day because the presumption was that you were dumb and didn't deserve to be there on merit."[146] Another revealing comment came in the desegregation context—in the third part of the *Missouri v. Jenkins* trilogy—when he wrote that "[i]t never ceases to amaze me that the courts are so willing to assume that anything that is predominately black must be inferior."[147] Further, in 1998, Justice Thomas, speaking to the National Bar Association (NBA) (a predominately black organization which opposed his nomination to the Court in 1991), stated that "I for one have been singled out for particularly bilious and venomous assaults. I have no right to think the way I do because I'm black."[148] He further rejected the critics whom he felt regarded him as an "intellectual slave" who must follow in the footsteps of Justice Marshall because they share the same skin color.[149] In that same speech, he further revealed that, "[a]ny policy or program that has as a prerequisite acceptance of the notion that blacks are inferior is a non-starter. I do not believe that kneeling is a position of strength nor do I believe that begging is an effective tactic."[150]

Whether or not Justice Thomas's reactions are justified is, for present purposes, beside the point. Thomas feels that others think him to be presumptively inferior because he is black. However, Justice Thomas is actually fiercely proud of what he has accomplished[151] and deeply resents that *because of* affirmative action (or *but for* affirmative action) he has (or would not have) had to combat such stereotypes. Further, Thomas sees affirmative action as a form of "liberal racism" that turns him into a shoe-shine boy for the white liberal elites who will accept his blackness as long as he toes the liberal line. I theorize that Thomas does not think of himself as a hypocrite because he believes he *has* accomplished everything on

146. Clare Cushman, *Clarence Thomas*, in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995, 528 (1995).

147. Missouri v. Jenkins (*Jenkins III*), 515 U.S. 70, 114 (1995). Thomas also wrote that "[u]nder this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority." *Id.* at 122.

Further, it should not escape our attention that in this case Thomas became *the first* Supreme Court justice to subject *Brown v. Board* to direct criticism. *Id.* at 120-21. It must be noted however, that Thomas *did not* call into question the "separate but equal is inherently unequal" holding. Instead, Thomas was concerned about the Court's basis for that holding. He criticized the Court's use of (now discredited) social science and argued that the Court should have relied on equal protection jurisprudence. *Id.* at 120-21.

148. Frank J. Murray, *Thomas Uses Speech To Answer His Critics*, WASH. TIMES, July 30, 1998, A1.

149. *Id.*

150. *Id.*

151. The growing up poor in Pin Point, GA story is too well-known to need retelling here. However, if the reader would like to know more about it, I recommend, GERBER, *supra* note 61.

merit all along and affirmative action probably held him back if anything because of the inferiority complex he associates with that policy.

Further, saliently missing from Davis's, Higginbotham's, and many other reflexive liberals' remarks is a substantive contribution to the debate on affirmative action—the fact is that some of Thomas's arguments concerning the policy are valid and need to be discussed. There is the issue that affirmative action benefits mostly middle-class and upper-middle class blacks, while the policy does close to nothing for the "one third or so of black America that seems to be permanently alienated from the structures of opportunity in this society."[152] Moreover, Richard H. Sander recently wrote a provocative article in which he argued that the empirical evidence strongly suggested that affirmative action in legal education actually hurts black law students.[153] In any event, the point here is not to debate the merits of affirmative action, but to simply point out that those who accept a policy choice because "it's what right thinking people subscribe to" contribute nothing. Affirmative action can be improved at the least, and no matter if I agree or disagree with Justice Thomas's views, I refuse to castigate him for them simply because some believe that his skin color dictates a particular political view.

However, an interesting question can now be posed: can Thomas's views on affirmative action be reconciled with his dissenting opinion in *Johnson v. California*, which argued that racial classifications within the prison system do not call for the heightened scrutiny they might receive otherwise?[154] To flesh this out, Thomas seems to be arguing for deference to the government when they make a racial classification in the penal context, but then essentially calling for a "strict in theory, fatal in fact" level of review in the higher education context?

I think Justice Thomas would attempt to distinguish the cases in this way: there is a line of cases giving deference to the government in the penal context because there is a "body of specialized knowledge" in the prison context. In contrast, what body of specialized knowledge, Thomas might ask, do university administrators (or federal or state and local government civil service workers) have in deciding who receives the benefits of an elite education or the set asides from a governmental program?

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152. Glenn C. Loury, *The Conservative Line on Race*, THE ATLANTIC, Nov. 1997, book review.

153. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

154. Discussion with Tulane University School of Law Professor Ray Diamond, April 5, 2005.

So if the reader will grant some authorial leeway here and concede that is how Justice Thomas would respond, the question begged is whether Thomas's "response" is satisfying or is he guilty of Angela Davis's trick of framing the question in such a way that his answer is the only obvious response. I believe the answer turns on two issues: (1) whether we want the government to ever have anything less than a compelling governmental interest whenever and wherever it is involved in racial classifications; and (2) whether we believe that diversity in higher education (to use the *Grutter* example) or remedial federal set asides are compelling governmental interests.

If diversity is more than mere "aesthetic" and it achieves its putative goal of allowing entré into the elite institutions (and therefore presumably into the economic elite) is this not compelling? And even if it is not compelling, is a return to *Metro Broadcasting*—employing intermediate scrutiny for remedial affirmative action programs—in order, as such an interest is surely a substantial one? To come full circle, even if one believes that prison officials are much better at running prisons than are federal judges, are any racial classifications so pernicious that any time the government chooses to engage in such behavior it is imperative that the independent judiciary act as a check and allow such classifications only if indeed compelling? These, we should remind ourselves, are the hard questions that deserve debate and not Ms. Davis's "shaming" softballs.

Another interesting question these opinions pose is: how do we, as Court watchers, square the conservative Justice Thomas (as seen in *Adarand*, *Johnson*, and *Grutter*) with the decidedly more racially sensitive portrait he paints in *Virginia v. Black* and *Dawson v. Delaware*?[155] The answer, I believe, is informed again by Thomas's various remarks delineated above. Thomas quite obviously regards cross-burning as nothing more than symbolic racial violence that has no expressive content—this much is evident from oral argument and the concomitant opinion. *Dawson* also makes clear that Thomas believes that it is quite relevant for a jury to hear about a criminal defendant's membership in a white supremacist prison gang and that a defendant should not be allowed to wrap himself in one of the country's most cherished civil liberties in order to protect himself from the implications of his racial views. [156]

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155. In fact, there was widespread speculation (incorrect of course) that Thomas's remarks at oral argument in *Black* might tip the balance of the Court to finding the Virginia statute constitutional. Linda Greenhouse, *An Intense Attack By Justice Thomas On Cross-Burning*, N.Y. TIMES, Dec. 12, 2002, A1.

156. Interestingly, both of these dissents involved a free speech issue, and Thomas has been regarded, even by his liberal critics, as one of the staunchest defenders of the First Amendment on the present Court. *See* Nat Hentoff, *First Friend: Justice Clarence Thomas Has*

The reason why Thomas wears his racial identity on his sleeve here, while, as some would argue, repudiating it in the affirmative action context (or at least dismissing the policy as a backhanded compliment), is that he regards cross-burning and the Aryan Brotherhood as tangible examples of *real* racism. These harken back to heart-wrenching images of a latter-day version of the Ku Klux Klan, lynchings, and the real fear a gang of white racists might put into the mind of a young black child. Contrast this with Justice Thomas's reported comments as EEOC Chairman in the 1980s that civil rights leaders of the present day had devolved into a "bitch, bitch, bitch, moan and moan, whine and whine" group presumably because they had lost the moral simplicity of the early days of the Civil Rights movement.[157] That is, if the reader will oblige me to read Thomas's mind again, since the *real* racism is largely gone—but if it does rear its head, Thomas will thoroughly denounce it—we are left with bitching and moaning civil rights leaders that are "kneeling" and "begging" before the white establishment for "benefits" like affirmative action to correct some phantom wrongs that Thomas just does not recognize as existing, or at least not to the extent that those on the left believe. *Black* and *Dawson* are Justice Thomas asserting his "blackness," but they are more than that. These opinions, when read in conjunction with *Adarand, Grutter*, and his other comments, reveal Justice Thomas asserting his own particular vision of "blackness" that is defiantly proud and independent and, some might say, hypocritical.

Those people who would characterize Thomas as hypocritical are likely in the same group as those who wince when reading an opinion like *Campbell v. Louisiana*. Thomas opens his dissenting opinion with the telling sentence: "I fail to understand how the rights of blacks excluded from jury service can be vindicated by letting a white murderer go free."[158] Thomas then states his belief that *Batson*—holding that it is an Equal Protection violation for a prosecutor to use peremptory challenges in a racially discriminatory manner—and its progeny constitute "a misguided effort to remedy a general societal wrong by using the Constitution" and should be overruled.[159]

While we have been looking at Justice Thomas's treatment of race, we should not become myopic and forget the overarching "theme" so far of Thomas's tenure on the Court: he is an extremely

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*Written As Ardently in Defense of Free Speech as Liberal Icon William Brennan Jr. Ever Did*, LEGAL TIMES, July 3, 2000, p. 62.

157. *See* Higginbotham, *infra* note 145.

158. *Campbell*, 523 U.S. at 403 (Thomas, J., dissenting).

159. *Id.* at 405, n.1.

conservative justice who "doesn't believe in *stare decisis*, period."[160] That is to say, I do not believe this is Justice Thomas simply being hostile to other African-Americans (the defendant was white after all). This opinion can be largely catalogued as a spectacular example of Thomas's breathtaking ability to sweep aside an entire area of the Court's jurisprudence because he believes it was wrongly decided.

But even if this is the better explanation, it cannot be ignored that *Campbell* also shows a racially tone-deaf Thomas when he calls for the overruling of *Batson*. It is astonishing that Justice Thomas would call the prosecutors' racially discriminatory use of peremptory challenges which are used to form the very jury pools that might deprive a man of his liberty or life "a general societal wrong" that does not run afoul of the Constitution.[161] Thomas's rejoinder is that the *Batson* line of cases "emphasiz[e] the rights of excluded jurors at the expense of the traditional protections afforded criminal defendants."[162]

Justice Thomas is surely entitled to pursue his maverick line of thinking; such is the life of a life-tenured United States Supreme Court Justice. While I do not condone partisan attacks—even as much as I disagree with his reasoning in *Campbell*—Thomas should not be surprised when those on the left attack him when he writes opinions like those previously discussed. Extreme reasoning will always be answered in kind.

## VI. CONCLUSION

Whether the issue deals with race or the Commerce Clause, Justice Thomas is and will continue to be a maverick. It is likely we will see an opinion authored by Thomas at some point calling for the precedental head of *Bakke* and *Grutter*, in the same way he has called for *Batson* to be overruled. And of course conservatives will continue to delight in his opinions, and liberals will continue to blanch. But whether one wants to praise or criticize Thomas for his "race" opinions, the salient point is that he will continue to decide such cases through his own lens of what racism means and how the world *should* be. And if there's any Supreme Court precedent in the way, watch out.

160. *See infra* Rosen, note 140.

161. Although one possible solution, which seems sensible, has been advocated by Justice Breyer: simply getting rid of peremptory challenges altogether. *See* Rice v. Collins, 126 S.Ct. 969 (2006).

162. *Id.* Presumably, Thomas means the Confrontation Clause based on his citation to Georgia v. McCollum, 505 U.S. 42 (1992).