# Essay

# Disparate Treatment: Justice Clarence Thomas's Conspicuously Nonoriginalist Affirmative Action Jurisprudence

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## I. INTRODUCTION AND OVERVIEW

In the eagerly anticipated but anticlimactic decision in *Fisher v. University of Texas at Austin*,[1] the United States Supreme Court held that the United States Court of Appeals for the Fifth Circuit did not correctly apply the strict scrutiny standard of judicial review in assessing the constitutionality of the university's race-conscious undergraduate admissions process.[2] By a 7–1 vote, the Court concluded that the Fifth Circuit "did not hold the University to the demanding burden of strict scrutiny"[3] articulated in *Grutter v. Bollinger*[4] and in Justice Lewis F.

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[1] 133 S. Ct. 2411 (2013).

[2] *Id.* at 2421–22.

[3] *Id.* at 2414.

[4] 539 U.S. 306 (2003).

Powell Jr.'s opinion in *Regents of the University of California v. Bakke*.[5] Justice Anthony M. Kennedy's majority opinion determined that the Fifth Circuit "confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications" and instructed the court of appeals to "assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."[6] "The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."[7]

Joining the Court's opinion, a concurring Justice Clarence Thomas, an avowed originalist, agreed that the Fifth Circuit did not properly apply strict scrutiny to the university's "use of racial discrimination in admissions decisions."[8] Moving beyond the Court's holding, and presenting an extensive critique of race-conscious affirmative action, he argued that *Grutter* should be overruled.[9]

Conspicuously absent from Justice Thomas's *Fisher* concurrence is any reference to originalism[10] and an application of that interpretive

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[5] 438 U.S. 265 (1978).

[6] *Fisher*, 133 S. Ct. at 2421.

[7] *Id.* at 2420. The sole dissenter, Justice Ruth Bader Ginsburg, argued that "the University has taken care to follow the model approved by the Court" in *Grutter* and that the Fifth Circuit's "judgment, trained on this Court's *Bakke* and *Grutter* pathmarkers, merits our approbation." *Id.* at 2433, 2434 (Ginsburg, J., dissenting).

[8] *Id.* at 2422 (Thomas, J., concurring).

[9] *Id.*

[10] *See generally* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011); ROBERT BORK, THE TEMPTING OF AMERICA (1990); JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT (1999); JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005); ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 37–48 (Amy Guttman ed., 1997); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006).

"Originalism comes in many flavors; varied distinct theses are fairly described as 'originalist' in tighter or looser senses." Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009). The objects of originalist analysis and the various methodologies of originalism include the original intent of the drafters of the Constitution who met in secret in Philadelphia in 1787; the original understanding of the delegates participating in the ratifying conventions of the thirteen states; and the original public meaning, "a hypothetical meaning that someone reading the Constitution around 1787 to 1789 might have understood the document to mean." Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas*, 4 N.Y.U. J.L. & LIBERTY 484, 498 (2009); *see also* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 927–37 (2009) (discussing original intent, original understanding, original public meaning, and original applications and original methods originalism). Gregory Maggs has noted that Justice Thomas "has not shown a notable preference for" original intent, original understanding, or original public meaning originalism and instead considers several types of originalism and tends to search for a "'general original meaning.'" Maggs, *supra*, at 495. "The principal theoretical difficulty with Thomas's method is the lack of any apparent or articulated rationale for it," and the "practical difficulty with Thomas's approach is understanding how it will apply in the rare, but possible, situations when evidence of the original intent, original understanding, and original objective meaning point in divergent directions." *Id.* at 514, 515.

methodology to the question whether race-conscious affirmative action violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[11] For an originalist, the correct method of interpreting the Constitution is to follow the original intent of the framers of the document, the original understanding of the ratifiers of the Constitution, or the "'original public meaning of the words and phrases as they would have been understood by ordinary English-language interpreters at the time they were adopted in that political and social context.'"[12] Thus, when faced with, say, the question whether the Equal Protection Clause prohibits or permits race-conscious governmental action, the originalist would look to original intent, understanding, or public meaning. Nonoriginalism, on that view, is not a legitimate interpretive methodology.

Justice Thomas has previously declared that "when interpreting the Constitution, judges should seek the original understanding of the provision's text, if that text's meaning is not readily apparent."[13] In his view, originalism promotes judicial impartiality by reducing a judge's resort to discretion-based decision-making.[14] If "judging is simply the exercise of personal discretion by a judge, then cases, legal rules, and, indeed, the law itself, is merely a product of the person and, more importantly, the social structure and class that produced him or her."[15] According to Thomas, originalism reduces judicial discretion by

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[11] *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[12] *Reverse Ideology*, 23 N.Y.U. L. MAG. 92, 92 (2013) (quoting Michael Paulsen).

[13] Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6 (1996).

[14] *Id.* at 6–7. Justice Thomas has stated that judges are "impartial referees" and "impartiality is the very essence of judging and of being a judge." *Id.* at 4. Not looking "to his or her sex or racial, social, or religious background when deciding a case," a judge pushes those factors to the side "in order to render a fair, reasoned judgment on the meaning of the law" and

> must attempt to exorcise himself or herself of the passions, thoughts, and emotions that fill any frail human being. He must become almost pure, in the way that fire purifies metal, before he can decide a case. Otherwise, he is not a judge, but a legislator, for whom it is entirely appropriate to consider personal and group interests.

*Id.*; *see also* Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1202 (1992) (quoting Supreme Court nominee Thomas's testimony that "as a judge, '[y]ou want to be stripped down like a runner,' and 'shed the baggage of ideology'").

During his Supreme Court confirmation hearing, then-Judge John G. Roberts Jr. told the Senate Judiciary Committee that "[j]udges are like umpires. Umpires don't make rules, they apply them. . . . Nobody ever went to a ball game to see the umpire." *Confirmation Hearing on the Nomination of John G. Roberts Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005). Judge Richard A. Posner has rejected Roberts's umpireal analogy: "Neither [Roberts] nor any other knowledgeable person actually believed or believes that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires." RICHARD A. POSNER, HOW JUDGES THINK 78 (2008); *see also* MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT 70, 72 (2013) (Roberts's umpire metaphor "traded on the image of an 'objective' reality, independent of the umpire's values: a ball was either in the strike zone or it wasn't," and "[Roberts] has said that he has some mild regrets about using" the metaphor).

[15] Thomas, *supra* note 13, at 3.

> "plac[ing] the authority for creating legal rules in the hands of the people and their representatives rather than in the hands of the nonelected, unaccountable federal judiciary. Thus, the Constitution means not what the Court says it means, but what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean. . . . We as a nation adopted a written Constitution precisely because it has a fixed meaning that does not change."[16]

In many opinions, consistent with his aforementioned views, Justice Thomas interpreted the Constitution as an originalist, stating that the Court "ought to temper [its] Commerce Clause jurisprudence in a manner that . . . is more faithful to the original understanding of that Clause";[17] that the "history of public education suggests that the First Amendment, as originally understood, does not protect student speech in schools";[18] that the Court should return to the original meaning of the Establishment Clause;[19] that the Court's takings decisions "have strayed from the [Public Use] Clause's original meaning";[20] that he would "look to history to ascertain the original meaning" of the Fourteenth Amendment's Privileges or Immunities Clause;[21] that "the original meaning of the Fourteenth Amendment offers a superior alternative" to the "Court's substantive due process framework";[22] that the Court should return to the original meaning of the Ex Post Facto Clause "under which laws . . . are *ex post facto* only when they retroactively increase the punishment 'annexed to the crime'";[23] and that Supreme Court precedent distinguishing between facts that increase the statutory maximum sentence and those that increase the minimum "is inconsistent with . . . the original meaning of the Sixth Amendment."[24]

As previously noted, Justice Thomas does not employ an originalist analysis when seeking an answer to the question whether certain race-conscious governmental actions violate the Constitution. Could originalism provide an affirmative answer to that question, an answer contrary to his stated position? Consider the following: "[T]he Reconstruction era Congresses produced a vast array of laws treating blacks preferentially, indicating its view that federal affirmative action

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[16] *Id.* at 7; *see also* Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 981 (2012) ("Originalism is attractive precisely because and to the degree that it binds interpretation to a fixed and knowable set of meanings, so as to impede the indeterminacy and opportunity associated with open-textured constitutional construction.").

[17] United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

[18] Morse v. Frederick, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring).

[19] Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring).

[20] Kelo v. City of New London, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting).

[21] Saenz v. Roe, 526 U.S. 489, 522 (1989) (Thomas, J., dissenting).

[22] McDonald v. City of Chi., 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring in part and concurring in the judgment).

[23] Peugh v. United States, 133 S. Ct. 2072, 2093 (2013) (Thomas, J., dissenting).

[24] Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013).

violated no constitutional norms."[25] A race-conscious 39th Congress of the United States, the Congress that proposed the Fourteenth Amendment, "adopted a series of social welfare programs whose benefits were expressly limited to blacks."[26] Moreover, the Fourteenth Amendment's framers "rejected proposals to prohibit all racial classifications by the government" and "recognized that in certain contexts it was permissible to use race—indeed, to classify on account of race—to help ensure that educational opportunities were available to all regardless of race."[27] The Reconstruction framers also created the Freedmen's Bureau "to assist the newly freed slaves in the transition from slavery to freedom"[28] with "clothing, food, fuel, and medicine . . . [and] schools and hospitals . . . [and] rented them land."[29] The Freedman's Savings and Trust Company was established for "persons heretofore held in slavery in the United States or descendants."[30] And the Reconstruction Congress "gave money to destitute blacks, especially women and children, regardless of whether they were newly freed slaves."[31] Given that history, one scholar has concluded:

> It is reasonable to suppose that an originalist would not, then, take issue with contemporary affirmative action plans aimed at inclusion rather than exclusion of racial minorities. But many originalists, including Justice Scalia and Justice

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[25] Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 556 (1998); *see also id.* at 560–61 (noting Congressional enactment of "a mass of express race-conscious preferences for blacks," including "educational opportunities for black, but not white soldiers," the setting of "a fixed schedule of fees for agents collecting bounties for black soldiers," and "charitable payments restricted to black recipients or payments and property transfers to institutions restricted to serving the black community"); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754–84 (1985) (discussing race-conscious laws enacted by the Reconstruction Congress).

[26] Schnapper, *supra* note 25, at 754; *see also* Greene, *supra* note 16, at 988 ("The Congress that enacted the Fourteenth Amendment also enacted race-conscious measures designed to ameliorate the condition of former slaves"); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 431 (1997) (identifying that Congress, around the time of the 14th amendment's ratification, enacted statutes that "expressly refer[red] to color in the allotment of federal benefits").

[27] Brief for Constitutional Law Scholars and Constitutional Accountability Ctr. as Amici Curiae Supporting Respondents, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2012) (No. 11-345), at 3–4.

[28] *Id.* at 9 (internal quotation marks omitted).

[29] Siegel, *supra* note 25, at 559. Noting the objection that the Freedmen's Bureau was not a race-conscious program, Siegel responds that "contemporaries viewed and debated the Bureau as a program for blacks, particularly after the first year when only loose interpretations of the term 'refugee' funneled any assistance to whites," and that the law creating the Bureau "is a major piece of legislation in which Congress, in enacting a benign law, used a classificatory schema that a state could not use in enacting an invidious law." *Id.*; *see also* JACK M. BALKIN, LIVING ORIGINALISM 417 n.20 (2011) (noting that the legislation's reference to "freedmen and refugees" "was a fig leaf to appease conservatives who did not want benefits to go exclusively to blacks").

Presaging contemporary arguments made by opponents of affirmative action, opponents of the establishment of the Freedmen's Bureau urged that efforts to aid freedmen were "unduly paternalistic and stigmatic." Christopher A. Bracey, *The Cul de Sac of Race Preference Discourse*, 79 S. CAL. L. REV. 1231, 1279 (2006).

[30] Act of March 3, 1865, § 5, 13 Stat. 510, 511 (1865).

[31] BALKIN, *supra* note 29, at 223.

> Thomas, object to such plans on the ground that the Equal Protection Clause requires both states and the federal government to be colorblind.[32]

As discussed herein, Justice Thomas's *Fisher* concurrence, like his other opinions in the Court's race-conscious affirmative action jurisprudence, is not an originalist opinion seeking and discerning the original intent, understanding, or public meaning of the Constitution. Not employing and therefore not meeting his stated standard of originalist and non-discretionary judging, Thomas's opinion tells us, not what the relevant framers thought, but what he thinks regarding the constitutionality of race-conscious affirmative action programs. While his views on this important subject warrant careful study and comment, it must be asked whether the Justice is "engaging in and committing the very act of judicial partiality . . . [he has] denounced."[33]

This Essay, addressing and answering in the affirmative the foregoing question, focuses on and critiques three nonoriginalist aspects of the originalist Justice Thomas's affirmative action jurisprudence: his argument that there is a moral and constitutional equivalence between laws designed to subjugate a race and laws that seek to provide benefits on the basis of race (discussed in Part II); his view that "unprepared" and "overmatched" beneficiaries of affirmative action are stigmatized and stamped with "a badge of inferiority" (discussed in Part III); and his invocation of Frederick Douglass and the first John Marshall Harlan as rhetorical support for Thomas's colorblind constitutionalism and anti-affirmative-action position (discussed in Part IV). The Essay concludes with the observations that the personal and nonoriginalist views of Justice Thomas on the subjects discussed herein are, in all material respects, the same as Justice Thomas's opinions on those subjects. Moreover, the Justice's conspicuously nonoriginalist approach does not even attempt to discern the original intent, understanding, or public meaning of the Constitution as applied to governmental race-conscious affirmative action measures.

## II. THE "MORAL AND CONSTITUTIONAL EQUIVALANCE" ARGUMENT

In *Adarand Constructors, Inc. v. Pena*,[34] a case arising under the Due Process Clause of the Fifth Amendment,[35] the Supreme Court held

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[32] Greene, *supra* note 16, at 988.

[33] Ronald Turner, Grutter *and the Passion of Justice Thomas: A Response to Professor Kearney*, 13 WM. & MARY BILL RTS. J. 821, 824 (2005).

[34] 515 U.S. 200 (1995).

[35] *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."). The *Adarand* Court noted that while the Court "has always understood that

that reviewing courts must apply the strict scrutiny standard of review to all racial classifications imposed by federal, state, or local governmental actors.[36]

A concurring Justice Thomas agreed with the Court's conclusion that strict scrutiny judicial review applies all governmental classifications on the basis of race, but wrote separately "to express [his] disagreement with the premise . . . that there is a racial paternalism exception to the principle of equal protection."[37]

> I believe that there is a "moral [and] constitutional equivalence," . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.[38]

Articulating "the principle that under our Constitution, the government may not make distinctions on the basis of race," Thomas opined that "it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged."[39]

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Clause to provide some measure of protection against *arbitrary* treatment by the Federal Government, it is not as explicit a guarantee of *equal* treatment as the Fourteenth Amendment . . ." *Adarand*, 515 U.S. at 213; *see also* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("In view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.'"). Noting that Court precedent has established three general propositions with respect to governmental racial classifications—(1) skepticism of any "racial preference," (2) consistency with the standard of review not dependent on the race of those burdened or benefited by the classification, and (3) congruence between equal protection analysis under the Fifth and Fourteenth Amendments—the Court determined that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224.

[36] *Adarand*, 515 U.S. at 227 ("[W]e hold today that all racial classifications, 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.").

[37] *Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment).

[38] *Id.*

[39] *Id.*; *see also id.* ("There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution." (citing THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

It should be noted that in the Court's infamous and originalist *Dred Scott v. Sanford* decision, Chief Justice Roger Taney, concluding that African slaves and their descendants were not and could not be citizens of the United States, relied in part on the Declaration of Independence. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *see also* B. Jessie Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the "Pragmatic Moment*, 91 TEXAS L. REV. 1815, 1833 (2013) ("*Dred Scott*, of course, is the original sin of originalism . . ."); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 472 (2011) (noting *Dred Scott*'s "devotion to racism or to originalism"). According to Taney, while the words "all men are created equal" in the Declaration of Independence "would seem to embrace the whole human family . . . . it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration." *Dred Scott*, 60 U.S. at 410.

"In my mind," he wrote, "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple."[40]

Justice John Paul Stevens rejected Justice Thomas's moral and constitutional equivalence stance and the assumption "that there is no significant difference" between a majority's actions to harm members of a minority race and a majority's actions to benefit some members of a minority race.[41]

> There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to govern impartially . . . should ignore this distinction.[42]

Justice Stevens refused to

> disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.[43]

Noting the "differences between laws designed to benefit a historically disfavored group and laws designed to burden such a group,"[44] Justice Ginsburg's dissent quoted Stephen L. Carter:

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[40] 515 U.S. at 241 (Thomas, J., concurring).

[41] *Id.* at 243 (Stevens, J., dissenting).

[42] *Id.* (internal quotation marks omitted) (citation omitted).

[43] *Id.* at 245; *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 316 (1986) (Stevens, J., dissenting) (discussing the "critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason"; exclusion "rests on the false premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society" while inclusion "tends to dispel that illusion" that there is a significant difference between persons of different races).

[44] *Adarand*, 515 U.S. at 274 n.8 (Ginsburg, J., dissenting).

> [W]hatever the source of racism, to count it the same as racialism, to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in *Bakke* was the same as the issue in *Brown* [*v. Board of Education*][45] is to pretend that history never happened and that the present doesn't exist.[46]

One does not find in Justice Thomas's equivalency argument (which Randall Kennedy has called "one of the silliest, albeit influential, formulations in all of American law")[47] any indication of an understanding that all "discrimination" and differential treatment are not the same—"that it is often desirable and sometimes necessary to treat people differently."[48] What is critical, and what is missing from Thomas's approach, are the reasons and the justifications for the differential treatment. History, culture, social context, economics, and other background factors and dynamics are crucial to separating wrongful discrimination violating an equality principle from lawful differential treatment employed in pursuit of that principle.[49] Blindness to the criteria of and the need for this separation, as well as the effort to embed a symmetry premise[50] into constitutional doctrine and construction, fails to recognize the constitutionally cognizable difference between racial segregation, which is exclusionary and subordinates individuals, and racial integration, which is inclusionary and potentially elevates individuals.[51]

The logic of Justice Thomas's moral and constitutional equivalency position equates "racial distinctions intended to impose white supremacy with racial distinctions intended to undo white supremacy."[52] While there

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[45] 347 U.S. 483 (1954).

[46] *Adarand*, 515 U.S. at 274 n.8 (Ginsburg, J., dissenting) (quoting Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 433–34 (1988)).

[47] RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 165 (2013).

[48] DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 2, 4 (2008). "[T]he point of prohibiting discrimination is not to forbid distinguishing between people—differentiation is important and even necessary in some instances." *Id.* at 172.

[49] *See* Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1294–95 (2011) (providing the example of Justice Blackmun's dissent in Shaw v. Reno, 509 U.S. 630, 676 (Blackmun, J., dissenting) in which he stated that "the conscious use of race in redistricting does not violate the Equal Protection Clause unless the effect of the redistricting plan is to deny a particular group equal access to the political process or to minimize its voting strength unduly.").

[50] Pamela S. Karlan, *What Can Brown Do For You: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1052 (2009) (describing the symmetry premise as the idea that any and all race-conscious government actions, whether they serve to segregate or integrate institutions, are symmetrical and "equally suspect").

[51] *See id.* at 1058 (discussing the principle of racial nonsubordination that is embodied in the 14th amendment).

[52] KENNEDY, *supra* note 47, at 165.

"are many responsible arguments against [affirmative-action programs] . . . . [i]t is another thing altogether to equate the many well-meaning and intelligent lawmakers and their constituents—whether members of majority or minority races—who have supported affirmative action over the years, to segregationists and bigots."[53]

The segregation/pro-affirmative-action equivalence argument was again made by Justice Thomas in his concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*.[54] According to Justice Thomas, Justice Stephen G. Breyer's pro-affirmative-action dissent in that case "appears to pin its interpretation of the Equal Protection Clause to current societal practices and expectations, deference to local officials, likely practical consequences, and reliance on previous statements from this and other courts."[55] That view, embraced by the segregationists in *Brown*, "first appeared in *Plessy* [*v. Ferguson*]"[56] and "was ascendant in this Court's jurisprudence for several decades," Justice Thomas opined.[57] Accusing Breyer of replicating "to a distressing extent" the arguments endorsed by the *Plessy* Court,[58] Justice Thomas argued that Justice Breyer and the segregationists both appealed to societal practices and expectations, deferred to local authorities, expressed concerns about the likely and harmful consequences of the *Parents Involved* and *Plessy* decisions, relied on judicial precedent, "cautioned the Court to consider practicalities and not to embrace too theoretical a view of the Fourteenth Amendment," and argued that the need for and reliance on the challenged practices would lessen over time before ultimately ending.[59] "What was wrong in 1954 cannot be right today,"[60] and "no contextual detail . . . can 'provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of

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[53] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 247 n.5 (1995) (Stevens, J., dissenting).

[54] 551 U.S. 701 (2007).

[55] *Id.* at 773 (Thomas, J., concurring).

[56] 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[57] *Parents Involved*, 551 U.S. at 773 (Thomas, J., concurring); *see also id.* (*Plessy* "deferred to local authorities" and "paid heed to societal practices, local expectations, and practical consequences by looking to 'the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order'").

[58] *Id.* at 774.

[59] *See id.* at 773–78 (comparing the dissent's argument that the need for these programs will lessen over time, to historical segregationist claims that reliance on segregation would lessen and might eventually end). Responding to Justice Thomas, Justice Breyer noted that "segregation policies did not simply tell schoolchildren where they could and could not go to school based on the color of their skin[;] . . . they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination." *Id.* at 867 (Breyer, J., dissenting) (internal quotation marks omitted) (citation omitted). Justice Breyer rejected the proposition that attempts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. "[I]t is a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined)." *Id.*

[60] *Id.* at 778 (Thomas, J., concurring).

race.'"[61]

Most recently, Justice Thomas's concurring opinion in *Fisher* reiterated his view that the Equal Protection Clause "guarantees every person the right to be treated equally by the State, without regard to race."[62] Linking and likening the 1950s support of racial segregation to today's diversity programs,[63] the Justice opined that "in our desegregation cases, we rejected arguments that are virtually identical to those advanced by the University today."[64] The university contended that the diversity pursued in its race-conscious admissions program "prepares its students to become leaders in a diverse society," and Justice Thomas argued that the "segregationists likewise defended segregation on the ground that it provided more leadership opportunities for blacks."[65] The university argued that "student body diversity improves interracial relations"; Justice Thomas contended that, in doing so, the university "repeats arguments once marshaled in support of segregation. . . . It is . . . entirely irrelevant whether the University's racial discrimination increases or decreases tolerance."[66] And the university asserted that its admissions program "is a temporary necessity because of the enduring race consciousness of our society"; Justice Thomas maintained that the university's argument "echoes the hollow justifications advanced by the segregationists. . . . The Fourteenth Amendment views racial bigotry as an evil to be stamped out, not as an excuse for perpetual racial tinkering by the State."[67] Not persuaded by the university's arguments, Justice Thomas concluded: "There is no principled distinction between the University's assertion that diversity yields educational benefits and the segregationists' assertion that segregation yielded those same benefits."[68]

Lest there be any doubt as to the breadth and scope of his all–discrimination–is–the–same stance, Justice Thomas places the University of Texas in the same category in which one finds slaveholders and segregationists. "Slaveholders argued that slavery was a 'positive good'

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[61] *Id.* at 779 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment)). *But see* Grutter v. Bollinger, 539 U.S. 306, 327 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."); Gomillion v. Lightfoot, 364 U.S. 339, 343–44 (1960) ("in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that give rise to them, must not be applied out of context in disregard of variant controlling facts").

[62] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring).

[63] *Id.* at 2428 n.3.

[64] *Id.* at 2426.

[65] *Id.* For Justice Thomas, it is constitutionally irrelevant "whether segregated or mixed schools produce better leaders. Indeed, no court today would accept the suggestion that segregation is permissible because historically black colleges produced Booker T. Washington, Thurgood Marshall, Martin Luther King Jr., and other prominent leaders. Likewise, the University's racial discrimination cannot be justified on the ground that it will produce better leaders." *Id.*

[66] *Id.* at 2427.

[67] *Id.* at 2427–28.

[68] *Id.* at 2428.

that civilized blacks and elevated them in every dimension of life."[69] "A century later, segregationists similarly asserted that segregation was not only benign, but good for black students. . . . And . . . even appealed to the fact that many blacks agreed that separate schools were in the 'best interests' of both races."[70] According to Justice Thomas, the University of Texas followed in the "inauspicious footsteps" of slaveholders and segregationists and "would have us believe that its discrimination is likewise benign."[71]

> I think the lesson of history is clear enough: Racial discrimination is never benign. Benign carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable. . . . It is for this reason that the Court has repeatedly held that strict scrutiny applies to *all* racial classifications, regardless of whether the government has benevolent motives. . . . The University's professed good intentions cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists.[72]

Justice Thomas has forcefully and repeatedly made clear his view that all discrimination is morally and constitutionally equivalent. On what foundation does the equivalence of, say, Jim and Jane Crow racial segregation of the 1950s and race-conscious affirmative action policies of the late 20th and early 21st centuries rest? Are the moral and constitutional equivalences the same or different, and what are the foundations and sources for each? Is Justice Thomas's moral and constitutional equivalence position found in and grounded in an originalist, fixed, and unchanging meaning of the Constitution? Or does his view reflect an exercise of the personal discretion of a member of "the nonelected, unaccountable federal judiciary," rather than that of "the people and their representatives"?[73]

Justice Thomas's equivalence principle is not presented as, and I do not understand it to be, the result of an original intent, original understanding, original public meaning, or other originalist inquiry and analysis. To reiterate, he argues that there is a moral and constitutional equivalence between laws that subjugate on the basis of race and seek to maintain a caste system, and laws that seek to eradicate such subordination and foster racial equality; between exclusion and inclusion; between benign prejudice and malicious prejudice; and

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[69] *Id.* at 2429.
[70] *Id.* at 2430.
[71] *Id.*
[72] *Id.* (internal quotation marks omitted) (citations omitted).
[73] Thomas, *supra* note 13, at 7.

between the actions of slaveholders and the racist, apartheidist, and white-supremacist segregationists of the 1950s and today's proponents of race-conscious diversity initiatives and programs.

Justice Thomas's reference to morality introduces a significant definitional issue: what is (what does he mean when he uses the word) "moral"? This issue is noteworthy because "it is often obscure what we citizens of the legal academy, and others, are talking about—and often clear that we are not all talking about the same thing—when we talk (argue) about 'morality.'"[74] Definitions of morality vary, including "particular moral principles or rules of conduct," "a set of commitments or ideas about how people ought to act or are obliged to act," and "the set of duties to others (not necessarily just other people—the duties could run to animals as well, or, importantly, to God) that are supposed to check our merely self-interested, emotional, or sentimental reactions to serious questions of human conduct."[75] Although many would agree with these definitions and descriptions at a high level of abstraction, "as the moral questions become more specific . . . they begin to disagree."[76]

Additionally, the term "moral," however defined, involves a determination of the line between the moral and the immoral, between the labeling of "one act [as] abhorrent and another praiseworthy."[77] Locating and drawing that line can be a source of contestation and dissent, and battles can be waged between proponents of conventional or consensus morality and opponents who instead champion critical morality.[78] Critical morality challenges conventional and consensus views and obligations;[79] the abolition of slavery and women's suffrage are examples of the questioning of and disagreement with at one time entrenched manifestations of consensus views.[80] Such questioning and disagreement form the basis of moral combat,[81] and that "fight [is] often waged in the battle fields of law and politics."[82]

Justice Thomas has decided what is and is not "moral" in the context of the Constitution and the question of discrimination. Segregative and exclusionary laws are the moral equivalents of

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[74] Michael J. Perry, *What is "Morality" Anyway?*, 45 VILL L. REV. 69, 72 (2000); *see also* Ronald Turner, *Traditionalism, Majoritarian Morality, and the Homosexual Sodomy Issue: The Journey from* Bowers *to* Lawrence, 53 U. KAN. L. REV. 1, 38 n.246 (2004).

[75] Turner, *supra* note 74, at 38–39 (citing MERRIAM-WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 771 (1989); William Joseph Wagner, *Christianity and the Civil Law: Secularity, Privacy, and the Status of Objective Moral Norms*, 71 ST. JOHN'S L. REV. 515, 519 (1997); RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 4 (1999) (internal quotation marks omitted)).

[76] Turner, *supra* note 74, at 39 (citing LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 12 (2001) (internal quotation marks omitted)).

[77] *Id.* at 40 (citing STANLEY FISH, THE TROUBLE WITH PRINCIPLE 27 (1999)).

[78] *Id.*

[79] *See* Robert Cooter, *Normative Failure of Law*, 82 CORNELL L. REV., 947, 967–968 (noting the oppositional relationship between critical morality and consensus or conventional views).

[80] Turner, *supra* note 74, at 40 (citing FISH, *supra* note 77, at 967–68).

[81] HEIDI M. HURD, MORAL COMBAT 58–59 (1999).

[82] Turner, *supra* note 74, at 41.

integrative and inclusionary laws. On that view, the latter set of laws are not just unconstitutional, but immoral. This equivalency argument is based on his personal view of his moral principle, which he applies to all governmental race-conscious policies, operationalizing and constitutionalizing his conception of morality over all other conceptions. While one can agree or disagree with Thomas's position, it cannot be denied that this aspect of his affirmative action jurisprudence is in no way originalist; it is, in fact, the judicial work product of a jurist whose strong personal feelings and views have informed and guided his approach as he considers the constitutionality of affirmative action.

The conclusion that any and all differential treatment involving race is morally and constitutionally equivalent also evinces an ordinary or aggressive ignorance or a willful suspension of belief in the significance of history, facts, and context. As Justice Stevens has noted, there is a difference between a "No Trespassing" sign and a welcome mat.[83] Another analyst adds to this point, stating: "A sign declaring 'Blacks Welcome!' means something altogether different from a sign declaring 'Blacks Unwelcome!'—though both contain a racial distinction."[84] There is also an obvious distinction between a racist vote against the confirmation of Supreme Court nominee Thurgood Marshall and the consideration of race as one factor in the decision to appoint the first African American to the Supreme Court; between invidious and oppressive racial discrimination and remedial race-based preferences designed to promote racial equality;[85] and between a university's exclusion of "*all* blacks categorically because they were black" and a university's inclusion of black persons in an effort "to undo past racial wrongs or to foster integration or to facilitate diversity."[86]

Distinctions are drawn and made on the basis of facts and information. Viewed generally and abstractly, an antidiscrimination norm that prohibits the consideration of race by government in any and all decision-making may be appealing. Treating A differently from a similarly situated B on the basis of race would, on that account, constitute unlawful discrimination.[87] That understanding and application of the antidiscrimination norm loses its appeal, however, when the antidiscrimination norm is applied with full knowledge and consideration of specifics, and of real-world facts and history. Treating A differently from what is now a non-similarly situated B may not constitute unlawful discrimination. Differential treatment may not violate the

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[83] *See supra* note 43 and accompanying text.

[84] KENNEDY, *supra* note 47, at 166. Query whether Justice Thomas would see any moral or constitutional equivalence between a "sundown" town in which "African Americans were expelled and told not to let the sun set on them in a particular town," JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING 14 (2013), and a former sundown town's policy of insuring that African Americans were informed that the sundown practice had ended and that they were welcome to live and stay in that community.

[85] *See supra* text accompanying notes 41–46.

[86] KENNEDY, *supra* note 47, at 166.

[87] *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (surveying cases).

antidiscrimination norm, and treating A differently from B in pursuit of the goal of racial equality may be reasonable and justified.[88] Facts and information, and not hypothetical and philosophical worlds and worldviews, can make all the difference.

Attention to facts brings much-needed focus, not to a bleached version of history, but to this nation's actual history forming the backdrop for a contextual understanding of and approach to the affirmative action question. That aspect of African-American and therefore American history (ignored or denied by Justice Thomas)[89] includes, but is certainly not limited to, the problem of the color line;[90] the "peculiar institution" of American chattel slavery;[91] the provisions of the United States Constitution not expressly recognizing but protecting slavery;[92] the Court's originalist decision in *Dred Scott v. Sandford*;[93] the

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[88] *See, e.g.*, United Steelworkers of Am. v. Weber, 443 U.S. 193, 205–206 (1979) (noting that Congress chose not to forbid all voluntary race-conscious affirmative action).

[89] *See* andre 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, 56 (2005) ("He does not fully consider antecedent racism, discrimination, or slavery (including its vestiges) in his jurisprudential interpretation of the law. In current race cases, as well as other controversial constitutional issues, Thomas exists and opines in a context of 'perfect world' fallacy.").

[90] *See generally* W.E.B. DU BOIS, THE SOULS OF BLACK FOLKS (Gramercy Books 1994) (1903) (stating that the problem of the twentieth century is the problem of the color line); RANDALL KENNEDY, THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY (2011) (discussing the problem of the color line in the Obama administration).

[91] *See generally* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH (Knopf 1978) (1956) (arguing against the notion that slavery was a benign, paternalistic institution that created racial harmony in the pre-Civil War southern states).

[92] *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3 (stating that the three-fifths clause would apportion Representatives and direct taxes according to the respective numbers of each state, "which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons"); U.S. CONST. art. I, § 9, cl. 1 (an unamendable clause providing: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."); U.S. CONST. art. IV, § 2, cl. 3 (mandating that slaves escaping to a free state must be "delivered up" and returned to the slave state from which they fled).

For more on slavery and the Constitution, *see* RON CHERNOW, ALEXANDER HAMILTON 239 (2004) (noting that the three-fifths clause "richly rewarded the southern states, artificially inflating their House seats and electoral votes and helping to explain why four of the first five presidents hailed from Virginia"); ROBERT A. GOLDWIN, WHY BLACKS, WOMEN, AND JEWS ARE NOT MENTIONED IN THE CONSTITUTION, AND OTHER UNORTHODOX VIEWS 10–15 (1990) (discussing slavery, the Constitution's founders, and emancipation); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA: 1760–1848, 62–63 (1977) (discussing several pro-slavery provisions within the Constitution); GARRY WILLS, "NEGRO PRESIDENT": JEFFERSON AND THE SLAVE POWER 1–13 (2003) (discussing the three-fifths clause, the so-called "federal ratio," which was instrumental in Jefferson winning electoral votes from southern states); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, 532 (2009) (discussing the three-fifths clause); Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 519 (2011) (discussing the three-fifths clause and noting that "[i]t is no coincidence that all but two elected Presidents before Lincoln—the exceptions being one-termers John Adams and John Quincy Adams—were slaveholders or expressed deep and open sympathy with slaveholding interests").

[93] 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (declaring, among other things, that African slaves and their descendants were "beings of an inferior order" who "had no rights which the white man was bound to respect"). Chief Justice Roger

Civil War amendments;[94] the new slavery of "formally and facially asymmetric" Black Codes[95] "legislat[ing] the freed slaves into a condition as close to their former one as it was possible to get without actually reinstituting slavery,"[96] Reconstruction[97] and Redemption,[98] and the rise of the Ku Klux Klan;[99] *Plessy v. Ferguson* and the Court's validation of Louisiana's Separate Car Law and the doctrine of separate-but-equal;[100] *Brown v. Board of Education* and the backlash and massive resistance the Court's interment of the separate-but-equal doctrine "in the field of public education";[101] bombings, beatings, and other violent and repressive conduct;[102] the life and murder of Emmett Till;[103] Rosa Parks's arrest for refusing to give up her seat and move to the back of a bus;[104] the lives and assassinations of Medgar Evers[105] and Martin Luther King Jr.;[106] white flight and white avoidance,[107] residential

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Brooke Taney's opinion for the Court stated that the opinion of black inferiority was "fixed and universal in the civilized portion of the white race" and was "regarded as an axiom in morals as well as in politics." *Id.*; *see also* Hill, *supra* note 39, at 1833 ("*Dred Scott* . . . is the original sin of originalism").

[94] *See* U.S. CONST. amend. XIII (formally prohibiting slavery); U.S. CONST. amend. XIV (making citizens of "[a]ll persons born or naturalized in the United States," prohibiting state abridgement of the "privileges or immunities of citizens of the United States," outlawing state deprivation of any person's right to "life, liberty, or property, without due process of law," and prohibiting state denial to any person "within its jurisdiction the equal protection of the laws"); U.S. CONST. amend. XV (prohibiting a state's denial or abridgment of a citizen's right to vote "on account of race, color, or previous condition of servitude").

[95] AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 149 (2012) (noting that segregationists argued that the formally symmetric Jim Crow and post-Civil War segregation laws were formally different from asymmetric Black Codes).

[96] NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 34 (2006). *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (arguing that racial segregation laws introduced a new form of slavery following the Civil War).

[97] *See generally* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA (Meridian 1964) (1935); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988).

[98] *See generally* LEMANN, *supra* note 96.

[99] *See* STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION 267, 276–80 (2003) (noting that "[t]he politically symbolic and practical elements of Klan vigilantism were . . . evident in attacks on black churches and, especially, schoolhouses").

[100] 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[101] 347 U.S. at 495. On the massive resistance to *Brown*, *see* ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 785–86 (2002) (discussing the "Southern Manifesto" issued by United States Senators and Representatives from southern states and pledging "to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution"); DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS 86 (2d ed. 2000) (discussing the "Southern Manifesto").

[102] *See generally* DIANE MCWHORTER, CARRY ME HOME (2001).

[103] *See generally* MAMIE TILL-MOBLEY & CHRISTOPHER BENSON, DEATH OF INNOCENCE: THE STORY OF THE HATE CRIME THAT CHANGED AMERICA (2004); Ronald Turner, *Remembering Emmett Till*, 38 HOW. L.J. 411 (1995).

[104] *See generally* JEANNE THEOHARIS, THE REBELLIOUS LIFE OF MRS. ROSA PARKS (2013).

[105] *See generally* THE AUTOBIOGRAPHY OF MEDGAR EVERS: A HERO'S LIFE AND LEGACY REVEALED THROUGH HIS WRITINGS, LETTERS, AND SPEECHES (Myrlie Evers-Williams and Manning Marable eds., 2005).

[106] *See generally* TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS, 1965–68, 723–771 (2006); HAMPTON SIDES, HELLHOUND ON HIS TRAIL: THE ELECTRIFYING ACCOUNT OF THE LARGEST MANHUNT IN AMERICAN HISTORY (2011).

segregation and hypersegregation,[108] and redlining;[109] the Court's "resegregation trilogy"[110] of the early and mid-1990s;[111] and mass incarceration policies.[112]

This sketch of events in this nation's history reveals the fundamental flaw in the contention that remedial and diversity-based integrative policies are morally and constitutionally equivalent to segregative and subordinating policies and practices. Justice Thomas has set forth what *he* believes concerning the morality, legality, and equivalency of laws subjugating and laws benefiting the races. His personal and nonoriginalist view flies in the face of history and privileges abstraction and theory over reality and the "living memory of institutionalized racism, segregation, and denial of civil rights" and the "living experience . . . of shameful patterns of discrimination and racial disadvantage."[113] That which is posited by Justice Thomas is not a conclusion reached following an originalist analysis purporting to tell us what *they*, the relevant community of the mid-1860s, intended or understood regarding the meaning of the Equal Protection Clause as applied to race-conscious governmental actions. Whether one is or is not persuaded by his arguments and ultimately agrees or disagrees with his position, it cannot be denied that this aspect of his affirmative action jurisprudence is unquestionably nonoriginalist.

## III. THE STIGMA ARGUMENT

In *Adarand Constructors, Inc. v. Pena*, Justice Thomas addressed what he termed the "moral basis of the equal protection principle," a

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[107] On white flight, *see* Erica Frankenberg & Genevieve Siegel-Hawley, *Public Decisions and Private Choices: Reassessing the School-Housing Segregation Link in the Post-*Parents Involved *Era*, 48 WAKE FOREST L. REV. 397, 412–415 (2013) (discussing how governmental programs contributed to white flight); Robert S. Chang & Catherine E. Smith, *John Calmore's America*, 86 N.C. L. REV. 739, 747 (2008) (discussing how the building of infrastructure was a factor leading to white flight). On white avoidance, *see* CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 91–92 (2004) (discussing the notion that whites prefer to avoid racially mixed schools).

[108] *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 74 (1993) (describing geographic traits of segregation and defining hypersegregation). *See generally* BERYL SATTER, FAMILY PROPERTIES: HOW THE STRUGGLE OVER RACE AND REAL ESTATE TRANSFORMED CHICAGO AND URBAN AMERICA (2009).

[109] *See* Robert E. Suggs, *Poisoning the Well: Law & Economics and Racial Inequality*, 57 HASTINGS L.J. 255, 287 (2005) (discussing the economics of redlining).

[110] Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 63 (2002).

[111] *See generally* Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237 (1991).

[112] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 47–50 (2011).

[113] Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1634 (2010).

principle "reflect[ing] our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society."[114] Not questioning that "invidious racial discrimination is an engine of oppression"[115] or that "'remedial' racial preferences may reflect a desire to foster equality in society,"[116] Justice Thomas believes that "there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination."[117] "Benign" discrimination teaches others that "minorities cannot compete with them without their patronizing indulgence," and affirmative action programs "engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race."[118] Stamped with a "badge of inferiority" (a phrase found in the Court's opinion in *Plessy*), [119] minorities may "develop dependencies or . . . adopt an attitude that they are 'entitled' to preferences."[120]

Adding to his list of concerns in *Grutter v. Bollinger*, Justice Thomas contested the notion that those admitted under the University of Michigan Law School's affirmative action program benefited from the school's "discrimination" because they could not compete with the other students.[121] He saw no "evidence that the purported 'beneficiaries' of this racial discrimination prove themselves by performing at (or even near) the same level as those students who receive no preferences."[122] In his view, the law school was not searching for students who would "succeed in the study of law. The law school seeks only a facade—it is sufficient that the class looks right, even if it does not perform right."[123] "Unprepared" and "overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition," and the "aestheticists" cover their tracks in law review memberships, law firm hiring, and judicial clerkships.[124] Not addressing "the real problems facing 'underrepresented minorities," the aestheticists "continu[e] their social experiments on other people's children."[125]

Furthermore, Justice Thomas continued, the notion that the law

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[114] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

[115] *Id.* at 240–41 (brackets and internal quotation marks omitted).

[116] *Id.* at 241 (brackets and internal quotation marks omitted).

[117] *Id.*

[118] *Id.*

[119] 163 U.S. 537, 551 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[120] *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment).

[121] Grutter v. Bollinger, 539 U.S. 306, 371 (2003) (Thomas, J., dissenting).

[122] *Id.*

[123] *Id.* at 372.

[124] *Id.*

[125] *Id.*; *see also* KENNEDY, *supra* note 47, at 220 (noting that Thomas uses "a classic tactic of reaction: deploying against modest reform inflated aims and the disappointment that accompanies them. No one claims that affirmative action, much less affirmative action in higher education, is a panacea for all of 'the challenges facing our Nation.' Thomas was just creating a straw man to knock down.").

school's racial discrimination engendered superiority or provoked resentment among those who believed that they had been wronged by the government's use of race has not been disproved by social science.[126] Contending that a "handful of blacks" who would be admitted in the absence of racial discrimination are admitted to the law school each year, Justice Thomas asked, "Who can differentiate between those who belong and those who do not?" [127]

> The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.[128]

Focusing on undergraduate admissions at the University of Texas, Justice Thomas expressed his suspicion that the university's race-conscious program "is instead based on the benighted notion that it is possible to tell when discrimination helps, rather than hurts, racial minorities. . . . The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities."[129]

In Justice Thomas's view, the university's "racial engineering does in fact have insidious consequences" for white and Asian applicants who are denied admission as well as those injured and harmed by admission.[130] "Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their

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[126] *Grutter*, 539 U.S. at 373 (Thomas, J., dissenting).

[127] *Id.*

[128] *Id.* One may argue that those posing this stigma question "apparently see and reflexively react to phenotype (so much for colorblindness)." Ronald Turner, *The Too-Many-Minorities and Racegoating Dynamics of the Anti-Affirmative-Action Position: From* Bakke *to* Grutter *and Beyond*, 30 HASTINGS CONST. L.Q. 445, 487 (2003). Those posing the stigma question "are engaging in their own brand of racism and judgmental discrimination." andre douglas pond cummings, *The Associated Dangers of "Brilliant Disguises," Color-Blind Constitutionalism, and the Postracial Rhetoric*, 85 IND. L.J. 1277, 1282 (2010). For those interrogators, it remains unknown whether the skin color of Colin Powell, Condoleezza Rice, and others played a role in their advancement, notwithstanding the demonstrated abilities and accomplishments of these and other persons of color. Turner, *supra*, at 487. Interestingly, while a member of the Reagan administration, Thomas drew up a list of minority candidates for senior positions; that list included Colin Powell and Condoleezza Rice. CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 193 (2007).

[129] Fisher v. Univ. of Tex. at Austin, 133 S.Ct. 2411, 2429 (2013) (Thomas, J., concurring).

[130] *Id.* at 2431.

white and Asian classmates."[131] He argued, in addition, that the university's program "has a pervasive shifting effect" and did not increase access to a college education for black and Latino students who would have "attended less selective colleges where they would have been more evenly matched."[132]

> But, as a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete. Setting aside the damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared. Indeed, they may learn less.[133]

In addition, Thomas continued, there "is some evidence" that this mismatch may result in the clustering of black and Latino students in certain academic programs (for example, social work and education) and the abandonment of their aspirations to become scientists and engineers.[134]

Returning to the "badge of inferiority" theme found in his earlier opinions, Justice Thomas opined that the university's discrimination "taints the accomplishments of all those who are admitted as a result of racial discrimination" and "taints the accomplishments of all those who are the same race as those admitted as a result of racial discrimination."[135] As students admitted under the Texas Top Ten Percent Plan[136] are indistinguishable from those admitted under the

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[131] *Id.*

[132] *Id.*

[133] *Id.* The Justice's reference to "other schools" apparently includes historically black colleges in which "black students . . . achieve better academic results than those attending predominantly white colleges," and African-American and Latino students attending high schools with predominantly black and Latino enrollments. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 763 (Thomas, J., concurring). He notes that "[b]efore *Brown*, the most prominent example of an exemplary black school was Dunbar High School." *Id.* For more on Washington, D.C.'s Dunbar High School, *see generally* ALISON STEWART, FIRST CLASS: THE LEGACY OF DUNBAR, AMERICA'S FIRST BLACK PUBLIC HIGH SCHOOL (2013).

[134] *Fisher*, 133 S.Ct. at 2431–32 (Thomas, J., concurring). For more on the mismatch theory by proponents thereof, *see generally* RICHARD SANDER & STUART TAYLOR JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012); Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004). For criticisms of the mismatch theory, *see generally* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005).

[135] *Fisher*, 133 S.Ct. at 2432 (Thomas, J., concurring).

[136] "[T]he Top Ten Percent Law grants automatic admission to any public state college, including the University [of Texas at Austin], to all students in the top 10% of their class at high schools in Texas

affirmative action program, the question of the role that race played—the "question itself is the stigma"—is an open one.[137] "Although cloaked in good intentions, the University's racial tinkering harms the very people it claims to be helping."[138]

The existence and extent of affirmative-action related stigma is an important and interesting subject. Justice Thomas's constitutional assessment of the matter warrants respectful and serious scrutiny,[139] as does research finding that law students at institutions employing race-conscious affirmative action measures experience minimal, if any, internal stigma (the doubting of one's own qualifications) and no significant impact from external stigma (being burdened by other persons' doubts about one's qualifications).[140] But Justice Thomas's approach and conclusion, grounded in his personal views and observations, again tell us what *he* thinks. Conspicuously missing is any originalist analysis of the issue which would support the proposition that the pertinent *they* at the time of the framing of the Fourteenth Amendment viewed the possibility or reality of stigma as a ground for determining whether the Equal Protection Clause permits or outlaws race-conscious governmental actions. As with his moral and constitutional equivalence argument discussed in the preceding part, Thomas has committed a nonoriginalist act of judging.

In considering the posited existence and impact of stigma, it should be noted that, although whites have historically benefited from race-conscious affirmative action, "'white stigma,' as a by-product of the unfair advantages of white privilege, has not really surfaced in affirmative action discourse."[141] White privilege and the racialization of minorities were operationalized in exclusionary policies and practices removing persons of color from fields of competition. "Slavery and legal segregation created preferences for whites in access to jobs, education, politics, and housing. The long-term impact of such preferences for ordinary whites accounts for a substantial proportion of the income and wealth differentials between black and white Americans today."[142]

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that comply with certain standards." *Id.* at 2416 (majority opinion).

[137] *Id.* at 2432 (Thomas, J., concurring) (internal quotation marks omitted).

[138] *Id.*

[139] *See* Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The* Grutter v. Bollinger *Opinion*, 7 U. PA. J. CONST. L. 787, 792 (2005) (stating that there "is little reason to believe that the stigma of racist stereotypes is unreal or an examination of it unwarranted within constitutional jurisprudence").

[140] *See* Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action*, 96 CALIF. L. REV. 1299, 1299 (2008) (presenting data that "minimal, if any, internal stigma felt by minority law students, regardless of whether their schools practiced race-based affirmative action"); *see also* Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1223–25 (2010) (hypothesizing that "students attending school in affirmative action states would encounter higher rates of stigma, both internally and externally" and finding that "students attending schools in states that ban affirmative action may be experiencing higher rates" of internal and external stigma).

[141] Onwuachi-Willig, *supra* note 140, at 1344.

[142] JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS 180 (2001).

Policy decisions made during the 1930s and 1940s favored whites and disadvantaged racial minorities. For instance, the New Deal, the Fair Deal, and the G.I. Bill were administered in a discriminatory fashion as a result of the maneuvering and edicts of legislators in the southern wing of the Democratic Party who sought to protect "the southern way of life."[143] Southern Democrats supported the passage of the National Labor Relations Act of 1935[144] and the Fair Labor Standards Act of 1938,[145] so long as that legislation excluded "farmworkers and maids, the most widespread black categories of employment, from the protections offered by these statutes."[146] The G.I. Bill, provided a "bounty" of social benefits offered by the federal government in a single, comprehensive initiative, and "create[d] a more middle-class society, but almost exclusively for whites. Written under southern auspices, the law was deliberately designed to accommodate Jim Crow. Its administration widened the country's racial gap. The prevailing experience for blacks was starkly differential treatment."[147]

Are white persons who "prevailed in any competition from which racial minorities were excluded"[148] or who were the beneficiaries of preferential (white-favoring) laws and policies stigmatized? Or does the stigma concern only arise and is only recognized when the beneficiaries are racial minorities? If the answer to that question is yes, additional questions regarding such a stigma differential must be posed and answered.

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[143] IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 114, 118 (2005).

[144] *See generally* 29 U.S.C. §§ 151–169 (2006) (providing and protecting the right of workers to collectively bargain with employers and prohibiting employer and union unfair labor practices).

[145] *See generally* 29 U.S.C. § 206 (2006 & Supp. 2007) (establishing a minimum wage and the right to overtime pay).

[146] KATZNELSON, *supra* note 143, at 55.

[147] *Id.* at 114; *see also* EDWARD HUMES, OVER HERE: HOW THE G.I. BILL TRANSFORMED THE AMERICAN DREAM 225 (2006) (Rep. John Elliot Rankin (D., Miss.) and chair of the House Committee on Veterans Legislation, demanded "that locally appointed [Veterans Administration] officials control the dispensation of benefits, rather than the centralized federal system the Roosevelt Administration sought, thereby ensuring that the G.I. Bill would leave the Jim Crow South undisturbed and fully segregated"); *id.* at 227 (noting significant increase in the college enrollment of black veterans in northern states under the G.I. Bill, while in the south, "where upward of 90 percent of black veterans who went to college ended up earning their degrees, segregation left them no option but to enroll in one of the hundred or so historically black colleges and universities in the country[,]" schools "set up under the separate-but-equal doctrine"); Melissa Murray, *When War Is Over: The G.I. Bill, Citizenship, and the Civic Generation*, 96 CALIF. L. REV. 967, 980, 985 (2008) (local control over the G.I. Bill's unemployment assistance and loan assistance programs "was included in the Bill as a sop to Southern legislators who feared that the Bill's provisions would re-tool the Southern economy and society by extending to African American and women veterans unprecedented opportunities for occupational mobility"; Latino veterans were "[r]outinely subjected to racial and ethnic discrimination prior to the war" and, "like African Americans . . . experienced difficulty accessing these benefits, particularly in the Southwest and the West"). *See generally* HUMES, *supra*, at 215–54.

[148] KENNEDY, *supra* note 47, at 10.

## IV. INVOKING ICONS

Justice Thomas's opinion in *Grutter* opened with the following quotation from an 1865 speech to a group of abolitionists delivered by Frederick Douglass:

> [I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us. . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And 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.[149]

"Like Douglass," Justice Thomas wrote, "I believe blacks can achieve in every avenue of American life without the meddling of university administrators."[150]

Justice Thomas's partial quotation of the Douglass address gives the appearance of "the plea of a man at one with Justice Thomas in his distrust of remedial schemes. Douglass, however, was no foe [of] social redistribution. On the contrary, he was an avid proponent of the need for reconstruction after the Civil War."[151] With that observation in mind, consider the full quotation of that portion of the Douglass address, with the passages of the speech not quoted by the Justice in italics:

> *I think the American people are disposed to be generous rather than just. I look over this country at the present time, and I see Educational Societies, Sanitary Commissions, Freedmen's Association, and the like—all very good; but* in regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us. *Gen. Banks was*

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[149] Grutter v. Bollinger, 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts on January 26, 1865*, *in* 4 THE FREDERICK DOUGLASS PAPERS 68 (John W. Blasingame & John R. McKivigan eds., 1991)).

[150] *Id.* at 350.

[151] Charles J. Ogletree Jr., *From* Brown *to Tulsa: Defining Our Own Future*, 47 HOW. L.J. 499, 548 (2004).

> *distressed with solicitude as to what he should do with the negro. Everybody has asked the question, and they learned to ask it early of the abolitionists: 'What shall we do with the negro?"* I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us! Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! *I am not for tying and fastening them on the tree in any way, except by nature's plan, and if they will not stay there, let them fall.* And 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! *If you see him on his way to school, let him alone,—don't disturb him! If you see him going to the dinner table at a hotel, let him go! If you see him going to the ballot box, let him alone!—don't disturb him! If you see him going into a workshop, just let him alone,*—your interference is doing him positive injury. *Gen. Banks's 'preparation' is of a piece with this attempt to prop up the negro. Let him fall if he cannot stand alone!*[152]

And in his closing remarks, not quoted by Justice Thomas, Douglass stated:

> If you will only untie his hands, and give him a chance, I think he will live. He will work as readily for himself as the white man. A great many delusions have been swept away by this war. One was, that the negro would not work; he has proved his ability to work. Another was, that the negro would not fight; that he possessed only the most sheepish attributes of humanity; was a perfect lamb, or an "Uncle Tom;" disposed to take off his coat whenever required, fold his hands, and be whipped by any body who wanted to whip him;—but the war has proved that there is a great deal of human nature in the negro, and that "he will fight," as Mr. Quincy, our President, said, in earlier days than these, "when there is a reasonable probability of his whipping anybody."[153]

As I have remarked elsewhere, the full quotation of Douglass's remarks reveal his admiration for "the work of the Freedmen's Association and other 'religious, secular, and quasi-governmental agencies created during the Civil War to meet the spiritual, intellectual, and medical needs of both freedmen and Union soldiers.'"[154] Indeed, for Douglass the Freedmen's Bureau represented a "commitment by the

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[152] Douglass, *supra* note 149, at 67–68.

[153] *Id.* at 69.

[154] Turner, *supra* note 33, at 833 (quoting Douglass, *supra* note 149, at 68 n.12).

government to attend to the interests of his people," and "[t]here was no job, short of president or pope, that . . . Douglass would have liked better" than serving as the head of the Freedmen's Bureau.[155] Douglass criticized General Nathaniel Banks, a Louisiana general who sought to force freed slaves to return to and work on plantations.[156] And his plea to others to "let him alone" was specifically directed at those who inflicted "positive injury" on negroes as they attempted to go to school or dinner or to work or were headed to the ballot box.[157] It is clear from the language omitted in Thomas's opinion that Douglass was referring to discrimination against, and not differential treatment in favor of, African Americans.[158]

Douglass, speaking in 1865, was not expressing views that unquestionably support Justice Thomas's opposition to race-conscious affirmative action circa 2003. The Justice's channeling of Douglass only tells us what Thomas believes that Douglass "would say today about the need for and the desirability of the specific type of affirmative action" before the *Grutter* Court.[159] What Douglass, "a former slave and consummate realist,"[160] would say today about race-conscious affirmative action in general or as applied to the specific context of college and university admissions is not a profitable avenue for inquiry. Given the one hundred and thirty eight years between the Douglass speech and the decision in *Grutter*, we can only guess Douglass's reaction to affirmative action when that practice is considered with full knowledge of the stubborn legacies of slavery, Jim and Jane Crow, *de facto* racial discrimination, etc.[161] In any event, such an exercise, whether fruitful or not, is not an originalist endeavor.

Justice Thomas has also invoked the first Justice John Marshall Harlan as authoritative support for his colorblind constitutionalism. In his concurring opinion in *Parents Involved*, Justice Thomas, arguing for and

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[155] WILLIAM S. MCFEELY, FREDERICK DOUGLASS 241, 260 (1991).

[156] Douglass, *supra* note 149, at 68; *see also* JOHN STAUFFER, THE BLACK HEARTS OF MEN: RADICAL ABOLITIONISTS AND THE TRANSFORMATION OF RACE 277 (2002) (describing Gen. Banks's plan).

[157] *See supra* text accompanying notes 149, 152.

[158] KENNEDY, *supra* note 47, at 179 n.*. Kennedy notes that Douglass did make statements consistent with Justice Thomas's approach; for example, Douglass once stated, "'we utterly repudiate all invidious distinctions, whether in our favor or against us, and only ask for a fair field and no favor.'" *Id.* (citing WALDO E. MARTIN JR., THE MIND OF FREDERICK DOUGLASS 69–72 (1984); Eric J. Segall, *Justice Thomas and Affirmative Action: Bad Faith, Confusion, or Both*, WAKE FOREST REV. ONLINE (Feb. 13, 2013)). But, in 1871, Douglass stated, "'Whenever the black man and the white man [are] equally eligible, equally available, equally qualified for an office . . . the black man at this juncture of our affairs should be preferred.'" *Id.* And, in 1984: "'It is not fair play to start the Negro out in life, from nothing and with nothing, while others start with the advantage of a thousand years behind them.'" *Id.*

[159] Turner, *supra* note 33, at 834.

[160] Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 4 (2002)

[161] Turner, *supra* note 33, at *834*; *see also* Schuck, *supra* note 160, at 4 (stating that the "cruel legacy . . . of slavery . . . has proved more stubborn than even Frederick Douglass . . . imagined).

defending the notion of a colorblind Constitution,[162] wrote: "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.'"[163]

Justice Thomas's comfort level with the first Justice John Marshall Harlan's conception of a colorblind Constitution should not blind us to certain significant aspects of Harlan's understanding of the meaning and scope of the Equal Protection Clause. Dissenting from the *Plessy* Court's validation of Louisiana's Separate Car Law, and rejecting the Court's assertion that members of the colored race chose to construe that law as placing upon them a "badge of inferiority,"[164] Harlan focused on the actual social meaning of the nominally separate–but–equal law, one grounded in fact and history[165]: "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."[166] Harlan the legal realist[167] knew that the real meaning of the Louisiana

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[162] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 (2007) (Thomas, J., concurring). Justice Thomas made clear that he did not "quarrel with the proposition that the Fourteenth Amendment sought to bring former slaves into American society as full members." *Id.* at 771 n.19. "[T]he colorblind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination—indeed, it requires that such measures be taken in certain circumstances. . . . Race-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were therefore not inconsistent with the colorblind Constitution." *Id.*

[163] *Id.* at 772 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Ed., 347 U.S. 483 (1954)). Justice Thomas also noted a significant part of Justice Harlan's *Plessy* dissent that is all too often ignored. Thomas quotes a passage preceding Harlan's colorblind Constitution metaphor in which Harlan wrote:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time . . . . But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens.

*Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

Justice Thomas also wrote that his "view was the rallying cry for the lawyers who litigated *Brown*." *Parents Involved*, 551 U.S. at 772–73 (Thomas, J., concurring); *see also* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2428 (2013) (Thomas, J., concurring) ("My view of the Constitution is the one advanced by the plaintiffs in *Brown*: '[N]o State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.'"). For a discussion and critique of this aspect of Thomas's opinion, *see* Ronald Turner, *Plessy 2.0*, 13 LEWIS & CLARK L. REV. 861, 912–13 (2009).

[164] *Plessy*, 163 U.S. at 551.

[165] Booker T. Washington stated that

> "separate" never was and never would be "equal." If the Supreme Court allowed whites and blacks to be separated, [Washington] wrote, then why not "put all yellow people in one car and all white people, whose skin is sun burnt, in another car . . . [or] all men with bald heads must ride in one car and all with red hair still in another"?

ROBERT J. NORRELL, UP FROM HISTORY: THE LIFE OF BOOKER T. WASHINGTON 143 (2009).

[166] *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

[167] *See* Akhil Reed Amar, Plessy v. Ferguson *and the Anti-Canon*, 39 PEPP. L. REV. 75, 84 (2011) (Harlan "takes a legal realist tack: He knows it when he sees it, and he knows what this is all about—degrading black people").

statute was not found in the words of the challenged provision or in some abstract philosophical musing about "discrimination"; the real meaning was found in the state-mandated classification and subordination of African Americans deemed to be "so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."[168]

In considering Justice Harlan's metaphoric conception of the colorblind Constitution, reading the entire quotation of the relevant passage of his *Plessy* opinion is helpful if not essential:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied [sic] by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.[169]

As can be seen, Justice Harlan was acutely conscious of race and racial hierarchy.[170] He recognized "white superiority in the very paragraph in which he proclaimed fealty to colorblindness,"[171] revealing

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[168] *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

[169] *Id.* at 559. Justice Harlan also noted that "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." *Id.* at 561. Under the Separate Car Law:

> a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the state and nation . . . are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race."

*Id.*

[170] *See* TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN 160–62 (1995) (commenting on Justice Harlan's racial views); Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 157–58 (1996) (noting Harlan's "animosity towards Chinese" persons in the U.S.).

[171] Ian Haney Lopez, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59

that he, "like most of his contemporaries . . . believed in the centrality of race and in the legitimacy of racial thinking. . . . Although Harlan was highly unusual in the courage, integrity, and decency he showed in racial matters, he nonetheless also remained a person of his time."[172] Justice Harlan's race-conscious colorblindness is on display in *Pace v. Alabama*,[173] wherein he joined the Court's decision upholding a state criminal law's penalty enhancement for fornication and adultery engaged in by black–white couples,[174] and in *Cumming v. Richmond County Board of Education*,[175] the Court's post-*Plessy* decision written by Harlan holding that a county school board did not violate the Equal Protection Clause when it closed an all-black high school while continuing to operate a high school for whites.[176]

Furthermore, and significantly, Justice Harlan's *Plessy* dissent specifically focused on civil (and not other) rights.[177] The Reconstruction-era "tripartite theory of citizenship"[178] and taxonomy of "rights"[179] recognized three separate and distinct categories of rights: civil,[180] political,[181] and social.[182] Justice Henry Billings Brown's opinion for the *Plessy* majority evidences this understanding: "If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."[183] Applying and not criticizing the tripartite theory, Justice Harlan placed Homer Plessy's asserted right to ride in a railway car with white passengers in the civil rights category.[184] The Civil Rights Act of 1866, constitutionalized by the Fourteenth Amendment to the

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STAN. L. REV. 985, 993 (2007).

[172] Edward A. Purcell Jr., *The Particularly Dubious Case of* Hans v. Louisiana*: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 2021 (2003).

[173] 106 U.S. (16 Otto) 583 (1883), *overruled in part by* McLaughlin v. Florida, 379 U.S. 184 (1964).

[174] *Id.* at 585.

[175] 175 U.S. 528 (1899).

[176] *Id.* at 545. The Court thus determined that the school board's "separate-and-*un*equal scheme" was reasonable and constitutional. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 45 (2004).

[177] *See supra* text accompanying note 169.

[178] Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1690, 1694 (2005); *see also* BALKIN, *supra* note 29, at 222–28 (discussing equal protection and the tripartite theory of citizenship).

[179] *See generally* Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the* Plessy *Challenge*, 106 MICH. L. REV. 777 (2007) (discussing the concept of "public rights" and "social equality" from Reconstruction through *Plessy*).

[180] Civil rights include "freedom of contract, property ownership, and court access." KLARMAN, *supra* note 176, at 19.

[181] Examples of political rights include the right to vote and to serve on juries. *Id.*

[182] Social rights include the right to marry and the right to attend integrated schools. *Id.* Social equality was "a code word for miscegenation and racial intermarriage" leading to "mixed race children" or "blacks and whites regard[ing] themselves as members of the same family. Thus, states could continue to prohibit interracial sex or interracial marriage consistent with the Fourteenth Amendment." Balkin, *supra* note 178, at 1694–95.

[183] Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896), *overruled by* Brown v. Bd. of Ed., 347 U.S. 483 (1954).

[184] *Plessy*, 163 U.S. at 554–55 (Harlan, J., dissenting).

Constitution,[185] provided that "all persons born in the United States and not subject to any foreign power . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[186] Plessy purchased a first class ticket for passage from New Orleans to Covington, Louisiana on the East Louisiana Railway.[187] The railroad's discriminatory conduct thus "prevented Homer Plessy from having an equal right to contract for the carriage in which he wanted to sit."[188] In denying Plessy that civil right, the Court participated in and ratified a denial of his constitutional rights.

While he viewed railway car racial segregation as a denial of a civil right, Justice Harlan did not recognize or endorse the social equality of African Americans:

> [S]ocial equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.[189]

"In other words," Jack Balkin argues, under Harlan's approach "it doesn't matter how much you integrate the institutions of American political and civil society. Blacks and whites are not social equals and they are not going to be."[190]

As he keeps company with Justice Harlan, Justice Thomas elides problematic aspects of Harlan's race-conscious colorblindness. That Justice Harlan was aware of but did not express disagreement with a white-supremacist racial hierarchy, and believed in the civil but not in the social equality of African Americans, complicates the turn to Harlan as an iconic foundation for Thomas's colorblindness position. Justice Harlan

> did not actually believe in color blindness in the modern

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[185] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 382 (2012) (describing the Civil Rights Act as the Fourteenth Amendment's "companion"). *But see* GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 165 (2006) (rejecting the view that § 1 of the Fourteenth Amendment was intended to constitutionalize the Civil Rights Act of 1866).

[186] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. § 1981(a) (2006)).

[187] *Plessy*, *163* U.S. at 538.

[188] John O. McGinnis & Michael B. Rappaport, *David Souter's Bad Constitutional Theory*, WALL ST. J., June 14, 2010.

[189] *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting).

[190] Balkin, *supra* note 178, at 1700; *see also* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 23 (2002) (arguing that the framers of the Fourteenth Amendment "never expected blacks to become social equals with whites.").

> sense. Our modern conception of "color blindness" rejects the tripartite model; it is the product of the success of the civil rights movement and the struggle over the legacy of *Brown v. Board of Education* between racial liberals and conservatives.[191]

To explain (or explain away) Justice Harlan's colorblindness and racial views requires a nuanced examination sensitive to context and the times in which Harlan lived. As Justice Kennedy has noted, the

> statement by Justice Harlan that "[o]ur Constitution is color-blind" was most certainly justified in the context of his dissent in *Plessy* . . . . And, as an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.[192]

Accordingly, the rhetorical force of and nonoriginalist appeal to Justice Harlan, the iconic Justice and *Plessy* dissenter, is undercut by a more complete understanding of, not just a phrase, but the totality of that dissent and what Harlan actually believed and said therein. "Iconography has its limits."[193]

## V. CONCLUSION: CLARENCE THOMAS AND JUSTICE CLARENCE THOMAS

In his memoir *My Grandfather's Son*, Clarence Thomas provides a narrative of his life replete with instances of racial references, race-consciousness, and racism.[194] Of particular interest here is Justice

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[191] BALKIN, *supra* note 29, at 226.

[192] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

[193] Ronald Turner, *On* Parents Involved *and the Problematic Praise of Justice Clarence Thomas*, 37 HASTINGS CONST. L.Q. 225, 242 (2010).

[194] *See* THOMAS, *supra* note 128, at 35 (a student in Thomas's high school "passed me a folded note during history class. 'I like Martin Luther King . . . ' it said on the outside. I unfolded the piece of paper. Inside was a single word: '. . . dead.'"); *id.* at 41 (when the seminary Thomas attended did not give out a trophy "traditionally given to the outstanding athlete . . . . I couldn't help thinking that I'd been passed over because I was black"); *id.* at 43 (hearing that Martin Luther King Jr. had been shot, Thomas heard a fellow seminary student say "'That's good . . . I hope the son of a bitch dies.'"); *id.* at 178 (at a meeting with Reagan Administration officials then-Equal Employment Opportunity Commission chair Thomas, who "thought that the administration's in-your-face approach to race relations was counterproductive," an individual told Thomas "certain things [he] had to do at EEOC. I stopped him cold. 'As far as I'm concerned,' I said, 'there are only two things I *have* to do: stay black and die.'"); *id.* at 209–10 (following the announcement of the retirement of Justice Thurgood Marshall Thomas met with and was asked questions by Department of Justice officials, including the question whether anyone would be bothered by his interracial marriage. [H]e replied, "'Only bigots and liberals!'"); *id.* at 235 (on Senate Judiciary Committee members considering Thomas's nomination to the Supreme Court: "What gave these rich white men the right to question my commitment to racial justice?"); *id.* at 250 (on the media's view of Thomas's "controversial" leadership of the EEOC: "What made it controversial, of course, was that I refused to bow to the superior wisdom of the white liberals who thought they knew what was better for blacks; since I

Thomas's decision to not seek admission to Morehouse College and Fisk University, two of the nation's prestigious historically black colleges and universities, because "both schools required applicants to send a photo" and Thomas had heard that those institutions "admitted only light-skinned blacks."[195] Discussing black students during his time at the College of the Holy Cross, Justice Thomas wrote:

> Some black students gave up and stopped going to class, while others started using drugs or dabbling in cultlike Eastern religions. Their problem was that they lacked the social experience that would have made it easier for them to leave the comfort zone of segregation and move into the white world. Many of them, I suspected, might have done better had they gone to schools closer to home or to predominantly black colleges, which would have allowed them to grapple with the ordinary challenges of young adulthood without having to simultaneously face the additional challenge of learning how to live among whites. Yet Holy Cross, like other colleges across the country, continued to admit them in fast-growing numbers.[196]

Thomas also expressed his view that some of his black classmates at Holy Cross "thought that the mere existence of racial oppression entitled them to a free pass through college. . . . I foresaw a time when it would no longer be fashionable to give blacks a helping hand, especially after the generation of whites who remembered segregation was gone . . ."[197] Believing that "many light-skinned blacks" considered "themselves to be superior to their darker brethren," Thomas "thought that preferential policies should be reserved for the poorer blacks whose plight was used to justify them, not the comfortable middle-class blacks who were better prepared to take advantage of them—and . . . [that] the same policies should be applied to similarly disadvantaged whites."[198] However, he did not "think it was a good idea to make poor blacks, or anyone else, more dependent on government" as that would "amount to a new kind of enslavement" that would "prove as diabolical as segregation . . ."[199]

Successfully applying for admission to Yale Law School,[200] Justice

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didn't know my place, I had to be put down."); *id.* at 269 (discussing Anita Hill's charges against Thomas in his Court confirmation hearing and referring to Tom Robinson, the defendant in *To Kill a Mockingbird*: "I had lived my whole life knowing that Tom's fate might be mine. As a child I had been warned . . . that I could be picked up off the streets of Savannah and hauled off to jail or the chain gang for no reason other than that I was black.").

[195] *Id.* at 42–43.

[196] *Id.* at 54.

[197] *Id.* at 55–56.

[198] *Id.* at 56.

[199] *Id.*

[200] Thomas recalls that he asked Yale to take into account that he was disadvantaged and "took it for granted that Yale was giving me a break because I was poor (and especially since that poverty was in

Thomas stated that he later realized that black beneficiaries of affirmative action "were being judged by a double standard."[201]

> I sought to vanquish the perception that I was somehow inferior to my white classmates . . . . But it was futile for me to suppose that I could escape the stigmatizing effects of racial preference, and I began to fear that it would be used forever after to discount my achievements.[202]

When Justice Thomas did not have a job offer at the end of the fall semester of the third year of law school, he concluded: "Now I knew what a law degree from Yale was worth when it bore the taint of racial preference. I was humiliated—and desperate. The snake had struck."[203] He "learned the hard way that a law degree from Yale meant one thing for white graduates and another for blacks, no matter how much anyone denied it . . ."[204]

During the Senate Judiciary Committee's hearings on his nomination to the Supreme Court, Justice Thomas told the Senators that the proceedings were

> a circus. It is a national disgrace. And from my standpoint, as a black American, as far as I am concerned, it is a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that, unless you kowtow to an old order, this is what will happen to you, you will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree.[205]

Subsequently, and five years after he had assumed the seat on the Court vacated by Justice Thurgood Marshall's retirement, Justice Thomas asked C. Boyden Gray, President George H. W. Bush's counsel at the time of Thomas's appointment to the Court, "was I picked because I was black?"[206] According to Justice Thomas, Gray replied that Thomas's race had worked against him as it had been planned to have Thomas replace Justice William J. Brennan Jr. "in order to avoid appointing [Thomas] to what was widely perceived as the court's 'black' seat, thus making the confirmation even more contentious."[207]

Clarence Thomas's personal views on issues of race and racism include, among other things, concerns about and opposition to race-conscious affirmative action; a belief that African-American

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part due to racial discrimination) . . ." *Id.* at 74.

[201] *Id.* at 74–75.

[202] *Id.* at 75.

[203] *Id.* at 87.

[204] *Id.* at 99.

[205] *Id.* at 271.

[206] *Id.* at 216.

[207] *Id.*

beneficiaries of affirmative action are stigmatized by racial preferences and his perception that others viewed him as inferior to his white classmates; a likening of affirmative action to "enslavement" and racial segregation; his understanding that his Yale law degree was tainted by racial preference; and his supposition that black students would have done better had they gone to college closer to their homes or to predominantly black colleges and universities.

Justice Clarence Thomas's affirmative action jurisprudence is the same, in all material respects, as the personal views of Clarence Thomas. Consequently, Justice Thomas's jurisprudence in this important area of constitutional law can fairly be described as an example of that which he has criticized as legislative and not judicial conduct[208]: "the product of the person"[209] unable or unwilling to exorcise "the passions, thoughts, and emotions that fill any frail human being."[210] What it cannot fairly be called is an originalist interpretation of the Constitution. "An originalist," like Justice Thomas, "who believes the Constitution is 'colorblind' should seek justification for that view not in general considerations of policy or fairness, but in the original understanding [or meaning] of the Equal Protection Clause."[211] The Justice's nonoriginalist colorblindness and anti-affirmative-action jurisprudence conspicuously fails to meet that standard.

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[208] Thomas, *supra* note 13, at 4.
[209] *Id.* at 3.
[210] *Id.* at 4.
[211] Greene, *supra* note 16, at 979.