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Clarence X?: The Black Nationalist Behind Justice Thomas's Constitutionalism

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CLARENCE X?: THE BLACK NATIONALIST BEHIND JUSTICE THOMAS'S CONSTITUTIONALISM

Stephen F. Smith*

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* Professor of Law, University of Notre Dame. This Essay is based on remarks presented at the symposium held at New York University School of Law on the "Unknown Justice Thomas." I am grateful to the New York University Journal of Law & Liberty for sponsoring this symposium and for allowing me the honor of participating in it. Special thanks to Nicole Garnett, Rick Garnett, Caleb Nelson, and Carl Wasserman for helpful comments on earlier drafts and to Rick Pildes for presenting the paper on my behalf when my flight was canceled due to a winter storm. This just in from the Disclosure Department: I served as a law clerk to Justice Thomas during the 1993 Term.

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INTRODUCTION

Justice Clarence Thomas has been on the nation's highest court for almost twenty years. When he arrived at the Supreme Court, some dismissed him as an intellectual lightweight—someone who simply parroted the views of his jurisprudential master, Justice Antonin Scalia.¹ Court-watchers—intelligent and fair-minded ones, anyway—finally recognize this attack as the unfair caricature that it is. Even scholars who disagree with Justice Thomas now admit that, on important issues ranging from the proper scope of congressional power under the Commerce Clause² to the constitutionality of affirmative action,³ Justice Thomas has written thought-provoking, carefully reasoned opinions.⁴

¹ See generally Stephen F. Smith, *A Tribute to Justice Clarence Thomas: The Truth about Justice Thomas and the Need for New Black Leadership*, 12 REGENT U. L. REV. 513, 514–15 (2000).

² See, e.g., *United States v. Lopez*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

³ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 349–78 (2003) (Thomas, J., concurring in part and dissenting in part).

⁴ Consider, for example, a recent discussion of Justice Thomas's *Grutter* dissent by Tomiko Brown-Nagin. Tomiko Brown-Nagin, *The "Transformative Racial Politics" of Justice Thomas?: The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787 (2005). Although she disagrees with many of his positions, particularly on civil rights, Professor Brown-Nagin finds much to praise about his dissent: "Justice Thomas's discussion of affirmative action has more depth and breadth than the utilitarian justification for race-conscious policies offered by the University [of Michigan] and embraced in the majority opinion. Justice Thomas offers a racial critique of law school admissions criteria and opens the door to an argument that universities' knowing reliance on criteria that systematically favor whites should be understood as a form of discrimination that is cognizable and remediable at law. In this way, Justice Thomas expresses a 'transformative' politics on the issue of access to elite law school education." *Id.* at 792.

The opinions of Justice Thomas reflect a jurisprudence that is uniquely his own. His well-known commitment to textualism and originalism combines with a weak commitment to *stare decisis* on constitutional questions. This often puts Thomas at odds with Justice Scalia and other Justices who are far more willing to defer to precedents with which they disagree.⁵ The most distinctive aspect of Thomas's jurisprudence, however, involves cases of particular concern to black Americans. In these cases, his originalism and textualism are powerfully supplemented by another *-ism*—namely, “black nationalism.”

Throughout his tenure, Justice Thomas has repeatedly explored the implications of controversial rulings for black Americans. This might seem obvious in cases involving issues that are fundamentally about race, such as the constitutionality of affirmative action⁶ or race-based jury strikes.⁷ In fact, however, it is not so obvious. After all, other Justices who vote with him on matters involving race typically eschew claims that their positions advance the interests of blacks. Justice Thomas, by contrast, frequently (if not invariably) seeks to demonstrate that his conservative positions on matters of race are beneficial for black Americans, as well as legally required. Even in cases that are not, strictly speaking, about race—an example is whether allowing school vouchers to be used at religious schools

⁵ As one commentator has explained: “[T]he Justice who urged the overruling of constitutional precedents more than any other was Clarence Thomas, who on average has urged only overruling 2.07 constitutional precedents per Term (from the date of his appointment to the end of the Rehnquist Court). It is plausible that, given Justice Thomas's frequently expressed commitment to original meaning, he is probably at odds with more than two constitutional precedents he is called upon to review per Term; but he does not urge the overruling of every precedent he deems wrongly decided. The other Justices, including Justice Scalia, vote to overrule precedent urging overruling only once per Term. None of these Justices appear to be strongly disposed to overrule many precedents.” Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. Rev. 1279, 1286 (2008) (footnotes omitted). On Thomas's judicial philosophy, see *infra* note 132 and accompanying text.

⁶ See, e.g., *Grutter*, 539 U.S. 306; *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

⁷ See, e.g., *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008); *Georgia v. McCollum*, 505 U.S. 42 (1992).

violates the separation of church and state⁸—he is quick to point out the potential impact on blacks where he perceives it. Thus, it is false to say, as many of Thomas's critics in the black community do, that Justice Thomas "thinks white"⁹ and has forgotten that he is black.

To anyone who cares to listen, Justice Thomas's opinions thunder with the strong black-nationalist voice typically associated with one of Thomas's personal heroes, Malcolm X.¹⁰ Like Malcolm X, Justice Thomas categorically rejects the idea that white racism remains an insurmountable obstacle to meaningful black progress in America. Although racism unquestionably exists, enormous progress has been made in American race relations—progress that was dramatically confirmed last year by the election of Barack Obama as the nation's first black president. In this climate, with legal protections against discrimination finally enshrined into law after generations of struggle and suffering, blacks need not look to race-based remedies or preferential treatment from society in order to succeed. They need only look within, to the genius, creativity, and capacity for hard work that resides in the heart and mind of every black person.

So, if we care to know who the "unknown" Justice Thomas is, the answer is as provocative as it is obvious from his opinions. He is, quite simply, Clarence X—a jurist who is not only a constitutionalist, but a black nationalist as well.

I. BLACK NATIONALISM AND MALCOLM X

Given the negative connotations associated with some understandings of "black nationalism," it is important to be precise about what exactly is, and is not, intended by the phrase here. In the classical sense of the term, black nationalism rests on the intractable racism of whites. Because they believed whites will always be hostile to the

⁸ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

⁹ See, e.g., Brown-Nagin, *supra* note 4, at 787 (noting such attacks against Thomas).

¹⁰ In a 1987 interview with *Reason* magazine, Thomas disclaimed the "antiwhite rhetoric" of Malcolm X but admitted he is "very partial to Malcolm X, particularly his self-help teaching." Bill Kaufman, *Clarence Thomas*, REASON, Nov. 1987, available at <http://www.reason.com/news/show/33217.html>. Thomas added that he "ha[s] virtually all of the recorded speeches of Malcolm X." *Id.*

interests of blacks, Marcus Garvey and other classical black nationalists believed that blacks could survive and prosper only by separating themselves from white society and forming their own nations—nations of black people, by black people, and for black people.¹¹ Today, few American blacks, least of all Justice Thomas, embrace black nationalism in this classical sense.

In recent decades, black nationalism has acquired a broader alternative meaning. Instead of preaching nationhood or physical separation of the races, modern black nationalists recognize that “‘self-help’ and ‘self-determination’” are potent means through which black communities can be empowered within white-dominated societies.¹² Modern black nationalists contend that even in the face of white racism, blacks can succeed by getting a good education, avoiding self-defeating behavior like substance abuse and crime, forming stable family structures, and creating economic opportunities for themselves and other blacks—in short, by self-consciously investing in themselves and their own communities.¹³

Malcolm X, at various times, advanced both conceptions of black nationalism. Toward the end of his association with the Nation of Islam and its controversial founder, Elijah Muhammad, Malcolm X

¹¹ Wilson Jeremiah Moses, noted scholar of black nationalism, defines “[c]lassical black nationalism” as “an ideology whose goal was the creation of an autonomous black nation-state, with definite geographical boundaries—usually in Africa.” WILLIAM JEREMIAH MOSES, *CLASSICAL BLACK NATIONALISM: FROM THE AMERICAN REVOLUTION TO MARCUS GARVEY* 1 (1996). According to Moses, classical black nationalism in the United States arose in the 1700s, peaked in 1850 and again in 1920, and has faded away since the 1920s. *Id.* at 1–6.

¹² *Id.* at 1.

¹³ As one commentator explains:

In the 1960s, black nationalists began to conceive of their project not as geographic separation from whites, but rather as the dismantling of the power relations between white and black communities. Instead of the choices appearing as either integration and assimilation on the one hand, or total geographic separation on the other, 1960s nationalists, led most notably by Malcolm X, developed a “third” way that combined militant engagement with the white power structure with the racial solidarity and anti-assimilationism traditionally associated with nationalism.

gave a fiery speech referring to America as the “last stronghold of white supremacy” — a society destined to be “engulfed by the black flames” of the “black revolution.”¹⁴ The “only permanent solution” to America’s race problem, Malcolm X insisted, “is the complete separation of these twenty-two million ex-slaves from our white slave master, and the return of these ex-slaves to our own land, where we can then live in peace and security among our people.”¹⁵

This Malcolm frequently had harsh words for traditional civil rights leaders. In his “Chickens Come Home to Roost” speech, for example, he referred to them as “modern Negro magicians” who seek to “make our people think that integration into this doomed white society will soon solve our problem.”¹⁶ Malcolm X went on to make his point even more explicit:

Politically the American Negro is nothing but a football and the white liberals control this mentally dead ball through tricks of tokenism: false promises of integration and civil rights. In this profitable game of deceiving and exploiting the politics of the American Negro, those white liberals have the willing cooperation of the Negro civil rights leaders. These “leaders” sell out our people for just a few crumbs of token recognition and token gains. These “leaders” are satisfied with token victories and token progress because they themselves are nothing but token leaders.¹⁷

At other points, particularly after he broke with the Nation of Islam, Malcolm X articulated a distinctly less hostile (but equally revolutionary) version of black nationalism. For example, in 1964, after his life-changing pilgrimage to Mecca, he disclaimed “sweeping indictments of one race,”

Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 831.

¹⁴ Malcolm X, *God’s Judgment of White America* (Dec. 4, 1963) (emphasis added), available at http://www.blackcommentator.com/42/42_malcolm.html. The speech is popularly known as the “Chickens Come Home to Roost” speech because, in response to a question about the speech, Malcolm X used that phrase in reference to the assassination of President John F. Kennedy.

¹⁵ *Id.*

¹⁶ *Id.*

declaring that "I am not a racist" and that "I wish nothing but freedom, justice and equality: life, liberty and the pursuit of happiness—for all people."¹⁸ Nevertheless, Malcolm X remained convinced that self-reliance was the only path to life, liberty, and happiness for blacks. As he explains in his famous memoirs:

The American black man should be focusing his every effort toward building his *own* businesses, and decent homes for himself. As other ethnic groups have done, let the black people, wherever possible, however possible, patronize their own kind, hire their own kind, and start in those ways to build up the black race's ability to do for itself. That's the only way the American black man is ever going to get respect.¹⁹

The implications of this provocative passage (and others like it) were not lost on a younger Clarence Thomas looking for footing during the turbulence of the Reagan Administration's battles on civil rights. In Malcolm X, Thomas had discovered that black progress was not something to be despaired of in America or conferred by white society in its beneficence. Instead, the proper lesson to be drawn from Malcolm X was that the black community itself has the keys to its own progress: by becoming self-reliant and self-sufficient, blacks can succeed on their own, regardless of how whites might feel about them. As Thomas would later explain in his memoirs: "I never went along with the militant separatism of the Black Muslims, but I admired their determination to 'do for self, brother,' as well as their discipline and dignity. . . . [T]o be truly free and participate fully in American life, poor blacks had to have the

¹⁷ *Id.*

¹⁸ MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 58–59 (George Breitman ed., Grove Press, Inc. 1990) (1965).

¹⁹ MALCOLM X & ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X 275 (2d ed., Ballantine Books 1999) (1964).

tools to do for themselves.”²⁰ Through discoveries such as these, Clarence Thomas was well on his way to becoming Clarence X.²¹

II. CLARENCE THOMAS AS CLARENCE X

It did not take long for Justice Thomas’s black nationalism to appear in the pages of the *United States Reports*. From the very beginning, he staked out a unique position on the Supreme Court. His was more than just another conservative vote, more than a conservative vote cast by a Justice who happened to be black. His was a *black conservative* vote, in the sense that his conservatism was closely linked to, perhaps even an outgrowth of, his blackness. Contrary to the usual accusation that Thomas is uninterested in race, if not hostile to the interests of blacks, Thomas’s record reveals a Justice who, like Malcolm X before him, approaches racial issues from black-nationalist premises and is willing to think far more broadly about issues of racial justice than many in the civil rights community would prefer.

The black nationalism of Justice Thomas—of Clarence X—would influence his judicial record in interesting ways. Sometimes, it would lead him closer to positions favored by traditional civil-rights groups than other conservative Justices. Other times, it would push him to the far right of the Court, farther than even some of his most conservative colleagues would go. Regardless of where Thomas ended up in particular cases, it is clear that Thomas’s brand of

²⁰ CLARENCE THOMAS, MY GRANDFATHER’S SON: A MEMOIR 62 (2007). As Chairman of the Equal Employment Opportunity Commission, Thomas made the following statement in a wide-ranging 1987 interview with *Washington Post* columnist Juan Williams: “The issue is economics—not who likes you. . . . I don’t see how the civil-rights people today can claim Malcolm X as one of their own. Where does he say black people should go begging the Labor Department for jobs? He was hell on integrationists. Where does he say you should sacrifice your institutions to be next to white people?” Juan Williams, *A Question of Fairness*, THE ATLANTIC, Feb. 1987, at 73.

²¹ Of course, the seeds for Thomas’s intellectual development do not lie solely in Malcolm X. They were first sown down on the farm in Pinpoint, Georgia, during the height of Jim Crow, where Thomas and his brother learned the transformative value of hard work and a good education from their grandfather (who famously proclaimed “Old Man Can’t is dead—I helped bury him”). See THOMAS, *supra* note 20, at 12–28.

judicial conservatism, infused as it is with black nationalism, differs considerably from that of even his ideologically closest white colleagues.

A. CLARENCE X CONFRONTS WHITE SUPREMACY AND DEFENDS BLACK INSTITUTIONS

In several cases, Justice Thomas has presented black-nationalist arguments in defense of positions that would resonate with many in the black community. Three are worth special mention here: *Dawson v. Delaware*,²² *Virginia v. Black*,²³ and *United States v. Fordice*.²⁴ The first two cases involved criminal prosecutions of white supremacists; the third, *Fordice*, was a higher-education desegregation case.

1. *White supremacy*

Dawson arose in Thomas's very first Term on the Supreme Court. In that case, a white man charged with capital murder sought to avoid the death penalty by proving good character. His character evidence involved testimony as to his kindheartedness (toward relatives, at least) and his membership in Alcoholics Anonymous and other groups that show good character. The prosecution sought to rebut this evidence by proving the fact, admitted by Dawson himself, that he was a member of the Aryan Brotherhood, a violent white-supremacist prison gang. The jury evidently agreed that persons of good character would not join such a disreputable group and saw no grounds for leniency. The resulting death sentence was upheld through the state system.

With Chief Justice William H. Rehnquist writing for the majority, the Supreme Court reversed Dawson's death sentence. In the Court's view, the state's use of Dawson's membership in a white-supremacist group, even one as notorious and violent as the Aryan

²² 503 U.S. 159 (1992).

²³ 538 U.S. 343 (2003).

²⁴ 505 U.S. 717 (1992).

Brotherhood, as justification for a death sentence violated the First Amendment. As Rehnquist put it, "the evidence proved nothing more than Dawson's abstract beliefs."²⁵

Justice Thomas was the lone dissenter in *Dawson*. With a touch of sarcasm, Thomas argued that "the Aryan Brotherhood does not exist merely to facilitate formulation of abstract racist thoughts, but to 'respon[d]' to gangs of racial minorities."²⁶ The Aryan Brotherhood, he noted, "is 'a singularly vicious prison gang'" that "has a 'hostility to black inmates'" and "originated 'during the prison racial violence of the 1960's.'"²⁷

Given the Aryan Brotherhood's well-known record of racially motivated violence, it struck Thomas as illogical to say that evidence of membership in that group is impermissible at a capital sentencing hearing. He wrote: "Membership in Alcoholics Anonymous might suggest a good character, but membership in the Aryan Brotherhood just as surely suggests a bad one."²⁸ If defendants can seek to avoid a death sentence with proof of membership in church

²⁵ *Dawson*, 503 U.S. at 167. The majority did concede, however, that evidence of constitutionally protected associations could be used to support a death sentence if relevant to an aggravating circumstance (as in a racially motivated crime) or to demonstrate future dangerousness. *Id.* at 166–67. The problem in *Dawson* was that the evidence was irrelevant and thus served no purpose other than to inflame the passions of the jury. *See id.*

²⁶ *Id.* at 173 (Thomas, J., dissenting).

²⁷ *Dawson*, 503 U.S. at 173 n.1 (quoting *United States v. Fountain*, 840 F.2d 509, 516 (7th Cir. 1988); *United States v. Silverstein*, 732 F.2d 1338, 1341 (7th Cir. 1984); *United States v. Mills*, 704 F.2d 1553, 1555 (11th Cir. 1983)). Thomas's assessment was later confirmed by the federal government's path-breaking 110-page indictment and eventual conviction of Aryan Brotherhood leaders in the Central District of California for what the sentencing judge described as the group's "'well over 30 years of murder and organizational murder,'" including the murder and attempted murder of black prisoners. Associated Press, *Prison Aryans Are Sentenced to Life Terms*, N.Y. TIMES, Nov. 22, 2006. Although charges remained pending as to more than a dozen other defendants, with almost two dozen more already having pled guilty, several of the leaders received consecutive life sentences. *Id.* See generally Press Release, U.S. Dep't of Justice, *Leaders of Aryan Brotherhood's Federal Faction Convicted of Racketeering and Murder Offenses 1* (Sept. 15, 2006) (noting that the Aryan Brotherhood leaders in California had "order[ed] a white-on-black race war that led to the death of two inmates in a Pennsylvania penitentiary"), available at <http://www.usdoj.gov/usao/cac/pressroom/pr2006/121.html>.

²⁸ *Id.* at 175.

and other groups suggestive of good character, it is only fair to allow the state to round out the picture for the jury by proving membership in groups, such as violent white-supremacist gangs, that suggest bad character. The majority was able to hold otherwise, Thomas argued, only by "bend[ing] traditional concepts of relevance to exempt the antisocial."²⁹

A decade later, the Court returned to the explosive issue of white supremacy in *Virginia v. Black*.³⁰ The case presented two criminal prosecutions involving the infamous symbol of the Ku Klux Klan: the burning cross. In one, a Klan leader burned a cross at a Klan rally on private property, in full view of neighboring homeowners and a nearby highway; in the other, white teenagers involved in a dispute with the black family next door sought revenge by burning a cross in the black family's yard.³¹ The cross-burners were convicted under a state statute that made it a crime to burn a cross "with intent to intimidate."³² The state supreme court invalidated the statute on free-speech grounds, and the Supreme Court accepted the case for review.

The Virginia chapter of the National Association for the Advancement of Colored People ("NAACP") did not mince words in condemning the state court's decision that cross-burning is protected speech. In a press release denouncing the Virginia court's decision as "reminiscent" of state court decisions that upheld segregation and trampled on the rights of civil rights protestors, the state chapter stated:

²⁹ *Id.* at 174. Thomas astutely saw through the charade of the majority's opinion: if, as the majority contended, the Aryan Brotherhood evidence was irrelevant, then so was the First Amendment issue. If Dawson was sentenced to death based on irrelevant evidence, the appropriate constitutional right would be the due process right to a fair sentencing hearing, not the right to free speech and association. The only value the First Amendment would add in Dawson's case would be to afford a ground for excluding associational evidence that is relevant (and thus admissible), but the majority insisted the evidence was totally irrelevant. *See id.* at 178–80.

³⁰ 538 U.S. 343 (2003).

³¹ *Id.* at 348–50.

³² Va. Code Ann. § 18.2-423 (1996).

The NAACP is dismayed at the absurd result reached in *Black*, that the convictions of two men found guilty of entering on the property of another without permission; and burning a cross on his property with the intent to intimidate him were reversed under the guise of protecting the free speech rights secured under the First Amendment. Such decisions desecrate the sanctity of First Amendment protection when purposefully pitted against equally sacred protections such as the safety of the citizenry. . . .³³

The most important condemnation did not come from the state chapter; it came from Susan Jubilee. It was a pregnant Mrs. Jubilee who awoke with her family to find a burned cross in their yard.³⁴ She left no doubt about what she thought of their neighbors' dastardly act: "It's not free speech. It's a form of terrorism. . . . It was done to terrorize us so we would move out. And it did that."³⁵

Justice Thomas's keen interest in the case was evident when the case came up for argument in the Supreme Court. Departing from his usual practice of listening instead of questioning lawyers at oral argument, Thomas surprised colleagues and court-watchers alike by asking a series of provocative questions.³⁶ Speaking with unusual authority derived from his youth in the Deep South under threat of racially motivated violence at the hands of Klansmen and other white supremacists, Thomas chided the Deputy Solicitor General for minimizing the virulence of the burning cross. In Thomas's view, the "reign of terror" by the Klan shows that burning a cross is necessarily a threat "intended to cause fear" of imminent violence,

³³ Press Release, National Association for the Advancement of Colored People (Nov. 9, 2001). The head of the Virginia General Assembly's Black Caucus likewise criticized the state court for extending free speech protection to behavior as "repugnant" as burning a cross. Jon Frank, *Cross-Burning Law Overturned in a 4-3 Ruling, Judges Call Such Acts a Protected Form of Free Speech*, VA. PILOT & LEDGER, Nov. 3, 2001, at A1 (quoting Del. Jerrauld C. Jones (D-Norfolk)).

³⁴ *Id.* (internal quotation marks omitted).

³⁵ *Id.* The Jubilee family moved away within months of the cross-burning. *Id.*

³⁶ See Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES, Dec. 12, 2002, at A1.

not the expression of a viewpoint.³⁷ The consensus seems to be that Thomas's line of questioning changed the course of the argument.³⁸

The Supreme Court eventually held that cross-burning can constitute protected speech. In doing so, however, Justice Sandra Day O'Connor was careful to heed the lessons learned from Justice Thomas. She began her analysis with a lengthy section recounting the history of violence and racial terror associated with the burning cross.³⁹ As she read it, history amply demonstrated that "few if any messages are more powerful" than a burning cross and that "often" — but "not inevitably" — "the cross burner intends that the recipients of the message fear for their lives."⁴⁰ In order for the act of burning a cross to be treated as a "true threat" — one that enjoys no First Amendment protection — the state must prove that the cross-burner acted with intent to intimidate and inspire fear.⁴¹ Absent such proof, cross-burning is protected speech, no different in principle from burning the American flag.

Only one Justice voted to uphold the law in its entirety. That was Justice Thomas, who filed a solo opinion. Vigorously dissenting from the Court's judgment, he would have upheld the statute in its entirety (and the cross-burning convictions) against First Amendment attack. As his comments at oral argument had indicated, he found the history of cross-burnings to be dispositive. In American culture, he

³⁷ Transcript of Oral Argument at 20, *Virginia v. Black*, 538 U.S. 343 (2002) (No. 01-1107).

³⁸ Linda Greenhouse, for example, reported that the Court's "mood appeared to change" after Thomas's vigorous questioning. Greenhouse, *supra* note 36, at A1. See generally Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 146–47 (2005) (demonstrating how Thomas's questioning caused other Justices to ask questions suggesting that the burning cross is a unique symbol of racial violence).

³⁹ *Black*, 538 U.S. at 352–58.

⁴⁰ *Id.* at 357.

⁴¹ *Id.* at 363. In a part of her opinion that garnered only plurality support, Justice O'Connor concluded that the Virginia law unconstitutionally allowed juries to presume the necessary intent to intimidate from the simple act of burning a cross. The presumption threatened to suppress free speech by "mak[ing] it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case." *Id.* at 365 (plurality opinion).

wrote, "cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence."⁴² Thus, for him, burning a cross was simply "a physical threat."⁴³

Justice Thomas did not quote Mrs. Jubilee. He did, however, quote another black mother who had endured a similar attack:

After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: "Nothing good. Murder, hanging, rape, lynching. Just anything bad that . . . could happen to a person."⁴⁴

For Thomas, the virulent effect that witnessing a burning cross has for blacks permits legislatures to proscribe cross-burning without proof of intent to intimidate (which, in any event, Thomas thought could properly be inferred from the act of burning the cross). Thomas concluded: "just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point."⁴⁵

2. Higher-education desegregation and historically black schools

In *United States v. Fordice*,⁴⁶ the Court reviewed the sufficiency of Mississippi's efforts to dismantle its dual system of higher education. During the Jim Crow era, blacks could not attend the University of Mississippi ("Ole Miss") and several other flagship public colleges and universities; blacks could get a college education, at

⁴² *Id.* at 391 (Thomas, J., dissenting). See generally *id.* at 391-94 (discussing history of cross-burnings in Virginia).

⁴³ *Id.* at 400.

⁴⁴ *Id.* at 390-91 (internal quotation marks omitted) (quoting *United States v. Skillman*, 922 F.2d 1370, 1378 (9th Cir. 1991)).

⁴⁵ *Id.* at 394.

⁴⁶ 505 U.S. 717 (1992).

public expense, only at Mississippi Valley State University and several other all-black schools.⁴⁷ Although Ole Miss was integrated in 1962, the *Fordice* litigation, which the federal government supported as intervenor, claimed that Mississippi had race-neutral policies that served to perpetuate the segregative effects of the prior race-based admissions policies.⁴⁸ The lower courts ruled that Mississippi satisfied its constitutional obligation simply by adopting race-neutral policies, deeming it irrelevant that black and white students make choices about which schools to attend that maintain the racially identified character of the previously segregated schools.⁴⁹

The Supreme Court vacated and remanded. It was not enough, in its view, simply to repeal race-based admissions policies. Absent a “sound educational justification” for policies and practices “traceable to its prior *de jure* dual system that continue to foster segregation,” the state’s obligation is to “eradicate” all such policies and practices.⁵⁰ The mere fact of race-neutral admissions criteria and student selection of where to apply and enroll did not justify the state in retaining segregation-producing rules derived from the Jim Crow era concerning admissions, program offerings, and other facets of university life. Out of concern that minimum test score requirements and academic policies traceable to the *de jure* system contributed to the continued segregation of the Mississippi system of higher education, the Court remanded for further inquiry.

Justice Scalia dissented in part. He feared that the Court’s decision might give states incentives to balance the racial composition

⁴⁷ *Id.* at 721–22.

⁴⁸ As the Supreme Court explained: “By the mid-1980s, 30 years after *Brown* [*v. Board of Education*], more than 99 percent of Mississippi’s white students were enrolled at University of Mississippi, Mississippi State, Southern Mississippi, Delta State, and Mississippi University for Women. The student bodies at these universities remained predominantly white, averaging between 80 and 91 percent white students. Seventy-one percent of the State’s black students attended Jackson State, Alcorn State, and Mississippi Valley State, where the racial composition ranged from 92 to 99 percent black.” *Fordice*, 505 U.S. at 724–25.

⁴⁹ *Id.* at 726–27.

⁵⁰ *Id.* at 728; see also *id.* at 731 (ruling that “sound educational justification” is required for rules traceable to *de jure* segregation that continue to have segregative effects).

of their public universities. His larger criticism, however, was that the decision would produce "years of litigation-driven confusion and destabilization in the university systems of all the formerly *de jure* States."⁵¹

Justice Thomas did not join Justice Scalia's opinion but issued his own concurrence. Where Scalia's concern was avoiding unnecessary uncertainty and dislocation for majority-white institutions, Thomas saw a very different imperative: avoiding the potential demise of historically black colleges and universities. Thomas accordingly began his opinion with the clarion call issued by W.E.B. DuBois ninety years earlier: "'We must rally to the defense of our schools.'"⁵²

Thomas worried that states might seek more complete integration of Ole Miss and other previously segregated institutions of higher education by closing historically black colleges and universities. This result was not only unnecessary—everyone in *Fordice* agreed with Justice Thomas that the Constitution "does not compel the elimination of all observed racial imbalance," but only those traceable to discrimination⁵³—but would be most unfortunate as well. In Thomas's view, historically black colleges and universities, though born of white racism, "sustained blacks during segregation."⁵⁴ Even after Jim Crow's demise, Thomas argued, the Court properly left open the possibility that sound educational justifications support the continued availability of historically black colleges and universities. After all, as suggested by their increasing enrollment in the decades following *Brown v. Board of Education*,⁵⁵ these institutions instill "'pride'" in their graduates, train future generations of black leaders, and give "'hope to black families who want the benefits of higher learning for their children.'"⁵⁶ They are, in

⁵¹ *Id.* at 762 (Scalia, J., concurring in the judgment in part and dissenting in part).

⁵² *Id.* at 745 (Thomas, J., concurring).

⁵³ *Id.*

⁵⁴ *Fordice*, 505 U.S. at 749.

⁵⁵ 347 U.S. 483 (1954).

⁵⁶ *Fordice*, 505 U.S. at 748 (quoting CARNEGIE COMM'N ON HIGHER EDUCATION, FROM ISOLATION TO MAINSTREAM: PROBLEMS OF THE COLLEGES FOUNDED FOR

short, “key institutions for enhancing the general quality of the lives of black Americans.”⁵⁷

Although a few commentators have recognized the black nationalism that undergirded Thomas’s defense of historically black colleges and universities in *Fordice*,⁵⁸ commentators have overlooked another important aspect of his opinion in the case. In addition to extolling the value of historically black colleges and universities for students who choose them, Thomas also endorsed a fairly generous standard for challenges to university policies traceable to the *de jure* system. Whereas Justice Scalia argued that “[o]nly one aspect of a historically segregated university system” — “discriminatory admissions standards” — must “be eliminated,”⁵⁹ Justice Thomas adopted a broader view that extended the state’s constitutional obligation to *all* university policies, not just admissions standards, derived from the *de jure* era.⁶⁰

Moreover, Thomas voted to make it easier to prove the discriminatory intent necessary to challenge such policies on equal protection grounds. In his view, proof of “present specific intent to discriminate” is unnecessary because the requisite discriminatory intent can be “assume[d]” from the fact that segregation-producing university policies were derived from

NEGROES 11 (1971) [hereinafter *CARNEGIE COMM’N*]). Justice Thomas quoted with approval an author who contends that historically black colleges and universities symbolize “the highest attainments of black culture.” See *id.* (quoting JEAN L. PREER, *LAWYERS V. EDUCATORS: BLACK COLLEGES AND DESEGREGATION IN PUBLIC HIGHER EDUCATION* 2 (1982)).

⁵⁷ *Id.* (quoting *CARNEGIE COMM’N*, *supra* note 56).

⁵⁸ See, e.g., Alex Johnson, *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1417–18 (1993); Mark Tushnet, *Clarence Thomas’s Black Nationalism*, 47 HOW. L.J. 323 (2004).

⁵⁹ *Fordice*, 505 U.S. at 758 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis added) (dismissing the broader view as “not just unprecedented, but illogical as well”).

⁶⁰ See, e.g., *id.* at 745 (Thomas, J., concurring) (“I agree with the Court that a State does not satisfy its obligation to dismantle a dual system of higher education merely by adopting race-neutral policies for the future administration of that system.”); *id.* at 746 (“A challenged policy does not survive under the standard we announce today if it began during the prior *de jure* era, produces adverse impacts, and persists without sound educational justification.”).

prior periods of state-sponsored discrimination.⁶¹ Unable to defend such policies on the ground that present intent to discriminate is lacking, the only way states can retain those policies, on Thomas's view, is by shouldering the burden of advancing a "sound educational justification" for them.⁶²

Consequently, in *Fordice*, Justice Thomas did far more than simply preserve the option of historically black colleges and universities for interested students. He also made it considerably *easier* for black students to challenge policies that interfere with their ability to attend previously all-white institutions of higher learning. The high value that Thomas attached to historically black colleges and universities, and his much-ballyhooed opposition to integration for its own sake, thus did not in any way detract from his commitment to nondiscrimination by public universities.

* * *

Dawson, *Black*, and *Fordice* are significant given the relentless attacks on Justice Thomas. These cases show him powerfully decrying anti-black racism, voting to protect blacks against discrimination by government actors, and defending the proud heritage of historically black colleges and universities. The outcomes he advocated in these cases set him apart from other Justices, liberal and conservative alike. Perhaps tellingly, in *none* of these cases did any other Justice sign on to Thomas's opinions. To borrow a phrase from Malcolm X, these opinions may have been "too black, too strong" for other Justices to join—and, consequently, Thomas was free to speak his mind.⁶³

⁶¹ *Id.*

⁶² *Id.* at 746.

⁶³ The quoted phrase comes from a November 1963 speech in which Malcolm X used coffee and cream as an analogy to integration and the destruction of autonomous black institutions. He said:

It's just like when you've got some coffee that's too black, which means it's too strong. What do you do? You integrate it with cream, you make it weak. But if you pour too much cream in it, you won't even know you ever had coffee. It used to be hot, it becomes cool. It used to be strong, it becomes weak. It used to wake you up, now it puts you to sleep.

In their zeal to caricature Thomas as a conservative ideologue who is indifferent or hostile to the interests of blacks, Thomas critics ignore opinions in which Thomas strongly *defended* the interest of blacks. The opinions are ignored because they disprove the false impression the critics seek to convey. The black nationalism in these decisions—their evident pride in autonomous black institutions committed to excellence and willingness to confront white supremacy head on—is as undeniable as it is underappreciated. These decisions reveal a Justice who is keenly aware of white racism and sees continuing value for blacks, even after the demise of *de jure* discrimination, in preserving the institutions that nurtured and sustained generations of blacks in the face of white racism. Thomas's reasoning and outcome in these decisions would undoubtedly resonate with Malcolm X and the many other blacks who, whether they accept the label or not, hold black nationalist views.

B. CLARENCE X DEFENDS CIVIL RIGHTS AGAINST TRADITIONAL REMEDIES

As previously shown, Justice Thomas's black-nationalist instincts have pushed him in the direction favored by many blacks and by civil rights groups in several important cases. More often, however, those instincts have pushed him in the opposite direction—and, as one would expect, these are the decisions that Thomas critics (especially within the black community) emphasize. On issues such as affirmative action,⁶⁴ school desegregation,⁶⁵ redistricting,⁶⁶ and the death penalty,⁶⁷ for example, Thomas has reached decidedly conservative results. He has been mercilessly attacked ("demonized" would be a more accurate description) as a result.

Malcolm X, Message to the Grass Roots (Nov. 10, 1963), in *MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS* 3-17, 16 (George Breitman ed., Grove Press 1990) (1965).

⁶⁴ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Thomas, J., dissenting); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (Thomas, J., concurring).

⁶⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768-88 (2007) (Thomas, J., concurring); *Missouri v. Jenkins*, 515 U.S. 70, 114-38 (1995) (Thomas, J., concurring).

⁶⁶ *Holder v. Hall*, 512 U.S. 874, 891-946 (1994) (Thomas, J., dissenting).

The most venomous of these attacks is that Thomas's views mark him as nothing short of a "traitor" to his race. As one recent account puts it:

Because authentic blackness has been socially constructed as including progressive or liberal political ideology, conservative Blacks, such as black Republicans, are often de-blackened in the eyes of the black community by their political ideology. For example, many Blacks and Whites perceive Supreme Court Justice Clarence Thomas, a dark-skinned Black who identifies himself as a black person, as non-black, a sellout, an Uncle Tom, precisely because of his staunch political conservatism. The constructed assumption on which these perceptions are based is that true Blacks are not conservative, do not vote Republican, and do not oppose affirmative action.⁶⁸

Even Justice Thomas, who usually ignores even the most personal of attacks, has admitted that he is saddened by accusations that he is "selling out" or "betraying" his race. In a speech before an openly hostile audience at a National Bar Association conference, he asserted his "right to think for [him]self" and not have views assigned to him based on skin color as if he were "an intellectual slave."⁶⁹ Nevertheless, Thomas offered the following unusually personal comments addressing

⁶⁷ *Graham v. Collins*, 506 U.S. 461, 478–500 (1993) (Thomas, J., concurring).

⁶⁸ Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 888 (2006) (footnotes omitted). Randall Kennedy, a moderate who has had his own run-ins with liberal black orthodoxy, exhaustively treats the idea of racial betrayal in *SELLOUT: THE POLITICS OF RACIAL BETRAYAL* (2008). Professor Kennedy devotes an entire chapter to the attacks on Justice Thomas and ultimately concludes that Thomas's conservative views on racial issues are misguided but cannot fairly be deemed acts of racial treason. *See id.* at 87–143. For a thorough refutation of the idea that conservatism is irreconcilable with blackness – by a self-described "liberal black womanist," no less – see generally Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 939–63 (2005) (describing the long tradition, past and present, of black conservatism).

⁶⁹ Justice Clarence Thomas, Speech to the National Bar Association (July 28, 1998), available at <http://teachingamericanhistory.org/library/index.asp?document=507>.

accusations of racial betrayal: "It pains me deeply, or more deeply than any of you can imagine, to be perceived by so many members of my race as doing them harm. All the sacrifice, all the long hours of preparation were to help [the black community], not to hurt."⁷⁰

Whether one ultimately agrees with his positions or not (and, of course, although many blacks hold similar positions,⁷¹ his views are as contestable as the liberal black orthodoxy that has decreed his excommunication), the opinions Justice Thomas has written on the subject of race bear out his claim that he honestly believes his positions would help, rather than hurt, blacks. Time and again, in rejecting reflexive adherence to traditional civil-rights remedies, Thomas has asserted black nationalist reasons for doing so. His view is that those remedies, though presented as necessary to the best interests of the black community, actually serve to *undermine* those interests. Properly understood, Thomas contends, traditional civil-rights remedies are too limited—and not nearly radical enough—to produce meaningful gains for the black community in the conditions of today.⁷²

⁷⁰ *Id.*

⁷¹ As I have explained elsewhere:

Although only 8% of blacks surveyed consider themselves Republican, . . . conservative views are, as a general matter, commonplace among blacks. . . . "85 percent [of blacks polled] support school choice. Fifty-three percent of the black public disapprove of mandatory busing and 77 percent feel that minorities should not receive preferential treatment to make up for past discrimination (affirmative action)." . . . With regard to the issue that, in reality, drove much of the opposition to Justice Thomas's nomination—abortion—recent polls find that only 36% of blacks are pro-choice, and no less than 48% of blacks are pro-life, flatly opposing abortion under any circumstances.

Smith, *supra* note 1, at 534–35 (footnotes omitted) (citing opinion polling data). More recent polling data focused on moral issues confirm that "there are major gulfs between the attitudes of black Democrats and the attitudes of nonblack Democrats," usually with "blacks com[ing] much closer to the positions of Republicans than to those of Democrats." Frank Newport, *Blacks as Conservative as Republicans on Some Moral Issues*, GALLUP, Dec. 3, 2008, available at <http://www.gallup.com/poll/112807/Blacks-Conservative-Republicans-Some-Moral-Issues.aspx>.

⁷² In viewing certain traditional civil-rights remedies as insufficient to accomplish meaningful racial justice, the connection between Justice Thomas and Malcolm X could

Thomas's most controversial opinions on matters involving race neatly fit into this pattern. For the sake of brevity, I will focus on his key opinions in three areas: public school desegregation, non-educational affirmative action, and affirmative action in higher education.

1. Public school desegregation

In *Missouri v. Jenkins*,⁷³ the Court faced a challenge by the State of Missouri to certain desegregation orders designed to render Kansas City public schools more attractive to whites in the surrounding suburbs. Kansas City schools had been under federal court supervision since 1977, having been segregated by race under state law prior to *Brown v. Board of Education*. Eighteen years later, efforts to achieve racial integration within city schools were frustrated by so-called "white flight," which left Kansas City schools 68.3% black.⁷⁴ Lacking the authority to reassign students between the majority-black city schools and those of neighboring, majority-white school districts, the district court sought to make the facilities and offerings in Kansas City schools so attractive that white parents in the suburbs would elect to send their children to school in the city. The State, however, balked at the requirement that it provide the necessary \$200 million per year for salary increases and improvements in the city school system.⁷⁵

not be more obvious. Malcolm X dismissed integration itself as a "sellout" — "token progress" that black leaders (and, of course, he would place mocking quotation marks around the word "leaders") accept because "they themselves are nothing but token leaders." Malcolm X, *supra* note 14. Rather than settle for a "few crumbs of token recognition and token progress" in the form of integration, *id.*, Malcolm X urged blacks to implement more radical solutions: "The first thing that the black man has got to do is straighten out the evil conditions in New York City's Harlem and the other ghettos. Not only materially, but morally and spiritually. We've got to get rid of drunkenness, drug addiction, prostitution and all that. We need a program to educate the people of Harlem to a better sense of values." *Now It's a Negro Drive for Segregation*, U.S. NEWS & WORLD REP., Mar. 30, 1964 (interview with Malcolm X), available at <http://www.usnews.com/articles/news/2008/05/16/now-its-a-negro-drive-for-segregation.html?PageNr=1>.

⁷³ 515 U.S. 70 (1995).

⁷⁴ *Id.* at 76.

⁷⁵ *Id.* at 78–80.

The Supreme Court agreed that the district court had exceeded its proper remedial authority. The district court could not seek to balance the racial composition of city and suburban schools because the only constitutional violation found was segregation *within* Kansas City schools.⁷⁶ The fact that city schools remained majority-black, despite racially neutral assignment policies, was not unconstitutional and did not justify efforts to attract more whites from neighboring jurisdictions into city schools.

Justice Thomas joined the majority's opinion and filed a solo concurrence. He began with a note of exasperation: "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."⁷⁷ As "despicable" as segregation was, there was no basis for believing that discrimination prior to *Brown* had anything to do with the racial composition of Kansas City schools decades later.⁷⁸ Consequently, the lengths to which the district court went to bring whites into city schools implied that black schoolchildren are harmed by the absence of white classmates—in other words, "that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites."⁷⁹

Thomas categorically rejected the idea that racial isolation itself (as opposed to racial discrimination) is a source of harm to blacks. Although *Brown* referred to the psychological injury that segregation caused black schoolchildren, the reference did not, in his view, supply the ground for the decision. The decision rested on the "simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race."⁸⁰ Moreover, it is empirically false, Thomas argued, to posit that blacks cannot learn

⁷⁶ *Id.* at 90.

⁷⁷ *Id.* at 114 (Thomas, J., concurring).

⁷⁸ *Id.* at 118.

⁷⁹ *Id.* at 119.

⁸⁰ *Id.* at 120. Thomas added: "Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. . . . [S]egregation violated the Constitution because the State classified students based on their race... [and] relegat[ed] [black children] to schools with substandard facilities and resources." *Id.* at 121.

as well without whites and that blacks learn better with whites. Desegregation “has not produced the predicted leaps forward in black educational achievement” and, as with historically black colleges and universities, “black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement.”⁸¹ Convinced that only de jure segregation is unconstitutional, Thomas implored that we “forever put aside the notion that simply because a school district today is black, it must be educationally inferior.”⁸²

The issue of school desegregation returned to the Court in *Parents Involved in Community Schools v. Seattle School District No. 1*.⁸³ Unlike *Jenkins*, the integration efforts in *Parents Involved* were voluntary in nature, not aimed at remedying prior de jure segregation: Seattle never had segregated schools, and the Louisville-area schools had already eliminated the vestiges of their prior segregation. The school districts sought to achieve greater racial balance in their schools by taking into account the impact on the racial makeup of schools when making transfer and certain other student-assignment decisions. A group of white parents sued the school districts, arguing that the school system had unconstitutionally denied their children placements because of their race.

The Supreme Court ruled that the school districts’ use of race was unconstitutional. Although racial diversity serves a valid educational purpose in higher education, that rationale does not apply to elementary and secondary schools.⁸⁴ Moreover, even if there were educational or social benefits from racial integration at the K-12 level that might justify non-remedial, race-conscious assignment policies, the school districts’ policies were not narrowly tailored to the achievement of those benefits. Rather, those policies amounted to racial balancing for its own sake, an impermissible goal.⁸⁵

⁸¹ *Id.* at 121-22.

⁸² *Id.* at 138.

⁸³ 551 U.S. 701 (2007).

⁸⁴ *See id.* at 724-25.

⁸⁵ *Id.* at 729-33.

Justice Thomas filed yet another solo concurrence. He agreed with the majority opinion in full but wrote separately to dispute the dissent's claim that voluntary integration is an appropriate response to the growing lack of racial diversity in public schools. Thomas argued that the dissent's claim rested on a misunderstanding of what constitutes segregation. Racial imbalance resulting entirely from voluntary private choices about where to live or work "is not segregation" (or, for that matter, necessarily cause for concern), and only governmental discrimination is properly remedied through desegregation orders.⁸⁶ The dissent's contrary view, Thomas contended, "would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown*."⁸⁷

2. Non-educational affirmative action

Justice Thomas first confronted affirmative action in *Adarand Constructors, Inc. v. Peña*,⁸⁸ a case involving preferences for historically disadvantaged minorities in federal highway projects. A prior case, *City of Richmond v. J.A. Croson Co.*,⁸⁹ had ruled that all racial classifications by government, even affirmative action programs benefiting minorities, are subject to strict scrutiny. *Croson*, however, involved local governmental preferences and thus did not address whether federal affirmative action programs are also subject to strict scrutiny. A later ruling, *Metro Broadcasting, Inc. v. Federal Communications Commission*,⁹⁰ concluded that "benign" uses of race by the federal government are subject to a more lenient standard (intermediate scrutiny) than similar state and local action under *Croson*. The basic question in *Adarand* was

⁸⁶ *Id.* at 750 (Thomas, J., concurring). Thomas added that black children can excel academically in majority-black schools and do not necessarily show academic gains in racially integrated schools. *See id.* at 761–66 (citing studies of black achievement in integrated and non-integrated settings).

⁸⁷ *Id.*

⁸⁸ 515 U.S. 200 (1995).

⁸⁹ 488 U.S. 469 (1989).

⁹⁰ 497 U.S. 547 (1990).

whether *Metro Broadcasting* should be overruled and the holding of *Croson* extended to federal affirmative action programs.

Convinced that strict scrutiny should apply to all governmental racial distinctions, the Supreme Court overruled *Metro Broadcasting*. *Metro Broadcasting* was a sharp break from forty years of precedent establishing that the federal government has no greater license to discriminate among citizens on racial grounds than state and local governments.⁹¹ Moreover, by distinguishing between "benign" and "malign" uses of race, *Metro Broadcasting* undermined the established principle that all persons, not just members of minority groups, have the right to equal protection.⁹² Thus, "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."⁹³

Justice Thomas concurred separately. He agreed that "there is [no] racial paternalism exception to the principle of equal protection," adding that "racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination."⁹⁴ Harkening back to the "stigma" rationale of *Brown v. Board of Education*,⁹⁵ he wrote that racial preferences "stamp minorities with a badge of inferiority."⁹⁶ Such preferences also "engender attitudes of superiority or, alternatively, provoke resentment among those who believe they have been wronged by the government's use of race."⁹⁷ Ultimately, in his view, whether racial distinctions are intended to help or hurt minorities, "it is race discrimination, plain and simple."⁹⁸

Thomas added that, despite their stated purpose of benefiting minorities, race-based affirmative action rests on two fundamentally

⁹¹ *Adarand*, 515 U.S. at 226-27.

⁹² *Id.* at 227-30.

⁹³ *Id.* at 235.

⁹⁴ *Id.* at 240-41 (Thomas, J., concurring in part and concurring in the judgment).

⁹⁵ 347 U.S. 483 (1954).

⁹⁶ *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment).

⁹⁷ *Id.* at 241.

misguided premises. One premise of affirmative action programs is that “minorities cannot compete with [whites] without their patronizing indulgence.”⁹⁹ The other premise of such programs, when implemented by government, is that government can and should compensate for the supposed inability of minorities to compete with whites. Thomas emphatically disagreed with both premises: “Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law” – which it does not do by having programs that treat minorities as unable to compete with whites on equal terms.¹⁰⁰

3. Affirmative action in higher education

Eight years later, the Court returned to the issue that had deeply divided it in *Regents of the University of California v. Bakke*.¹⁰¹ the constitutionality of affirmative action in university admissions. This time, the University of Michigan was the target. White applicants who had been denied admission to the undergraduate and law schools filed class actions challenging the schools’ affirmative action plans, which allowed minorities to be admitted with considerably lower grades and standardized test scores than whites. The lower courts, relying on Justice Lewis F. Powell’s opinion in *Bakke*, upheld Michigan’s affirmative action plans as permissible means of achieving educational diversity. The cases came to the Court in *Gratz v. Bollinger*¹⁰² and *Grutter v. Bollinger*.¹⁰³

Gratz involved the undergraduate affirmative action plan, which used a points system to determine who would and would not be admitted. All applicants would receive a certain number of points for academic factors, standardized test scores, extracurricular activities, and other neutral factors (including in-state residence and

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 240.

¹⁰¹ 438 U.S. 265 (1978) (striking down racial quotas and set-asides in public university admissions).

¹⁰² 539 U.S. 244 (2003).

¹⁰³ 539 U.S. 306 (2003).

legacy status).¹⁰⁴ Members of underrepresented racial or ethnic groups, however, were automatically assigned twenty additional points—one-fifth of the points necessary to guarantee admission—and, consequently, virtually every qualified minority applicant was admitted.¹⁰⁵

In *Gratz*, the Supreme Court struck down the undergraduate plan. Applying strict scrutiny, the majority held that the undergraduate plan was not narrowly tailored to achieve educational diversity. Although race can serve as a “plus factor” in admissions under *Bakke*, the large number of points associated with minority status “has the effect of making ‘the factor of race . . . decisive’ for virtually every minimally qualified underrepresented minority applicant.”¹⁰⁶ This, wrote Chief Justice Rehnquist, is the antithesis of the “individualized consideration” that *Bakke* requires.¹⁰⁷ To be constitutional, admissions officers must “consider[] each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual’s ability to contribute to the unique setting of higher education.”¹⁰⁸

Justice Thomas concurred to identify two further defects in the undergraduate affirmative action plan. First, the plan treated all members of underrepresented minority groups as essentially fungible—that is, as equally able to contribute to the University’s diversity. This treatment was unjustified because it “does not sufficiently allow for the consideration of nonracial distinctions among underrepresented minority applicants.”¹⁰⁹ Second, in denying persons outside of those groups the twenty points that minorities receive on diversity grounds, the plan ignored the possibility that persons other than underrepresented minorities could contribute to Michigan’s diversity on grounds other than race. In Thomas’s view, an admissions policy “must allow

¹⁰⁴ *Gratz*, 539 U.S. at 255.

¹⁰⁵ *See id.* at 255–57.

¹⁰⁶ *Gratz*, 539 U.S. at 272.

¹⁰⁷ *Id.* at 271.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 281 (Thomas, J., concurring).

for consideration of these nonracial distinctions among applicants on both sides of the single permitted racial classification.”¹¹⁰

The law school’s affirmative action plan, at issue in *Grutter*, was less rigid than the undergraduate school’s. It, too, was intended to produce diversity, but did not define diversity solely in terms of race or ethnicity. Although the plan sought to guarantee that a “critical mass” of underrepresented minorities would be admitted, members of other groups had the opportunity to demonstrate that they would contribute to the law school’s diversity.¹¹¹ All aspects of every applicant’s file (including the Law School Admissions Test, or LSAT, score) were reviewed in an effort to assemble a highly qualified, diverse class of students with substantial promise in the field of law.¹¹²

In an opinion written by Justice O’Connor, the Supreme Court held that the law school’s affirmative action plan satisfied strict scrutiny. In the context of higher education, diversity is a compelling interest, and Michigan’s view that diversity is vital to its academic mission (because diversity enriches the classroom experience and promotes cross-racial understanding) was entitled to deference.¹¹³ The law school’s plan was narrowly tailored to the goal of achieving the educational benefits associated with diversity. Without affirmative action, few underrepresented minorities would be admitted, and the educational benefits associated with having a “critical mass” of underrepresented minorities would be lost. Unlike the undergraduate plan invalidated in *Gratz*, the law school’s plan was not equivalent to a quota or set-aside: every applicant could attempt to demonstrate that he would contribute to the diversity of the entering class, and every applicant’s file received “highly individualized, holistic review.”¹¹⁴

Justice Thomas dissented. After a striking quotation from Frederick Douglas that what blacks want from whites “is not benevolence,

¹¹⁰ *Id.*

¹¹¹ *Grutter*, 539 U.S. at 315–16.

¹¹² *Id.* at 337–39.

¹¹³ *Id.* at 328–29.

¹¹⁴ *Id.* at 337.

not pity, not sympathy, but simply *justice*,” Thomas asserted his belief that “blacks can achieve in every avenue of American life without the meddling of university administrators.”¹¹⁵ That would be true at Michigan’s law school as well, except for the fact that, in order to maintain its reputation as an elite school, the law school “maintains an exclusionary admissions system that it knows produces racially disproportionate results.”¹¹⁶ The lack of diversity that would result at the law school in the absence of racial preferences is merely a “self-inflicted wound[] of this elitist admissions policy,” not a justification for racial double standards in admissions.¹¹⁷

Although Thomas reiterated his familiar arguments from *Adarand* about the stigma and other harms that racial preferences inflict on their “beneficiaries,” he offered at least three broader, more radical critiques of race-based affirmative action.

First, the definition of “merit” at elite law schools is unduly narrow. Elite law schools use the LSAT and other quantitative measures to predict academic performance in law school, when, in fact, they should employ more flexible standards that “give[] every applicant a chance to prove he can succeed in the study of law.”¹¹⁸ It is only because the standards that determine qualification for admission to elite law schools are so rigid that elite schools require exceptions to merit-based admission for minorities, legacies, and others.

Second, racial preferences in admissions benefit those least in need of assistance – namely, the socioeconomically and educationally advantaged. Such preferences “do[] nothing for those too poor or uneducated to participate in elite higher education,” groups Thomas viewed as having more compelling claims for government assistance

¹¹⁵ *Id.* at 349–50 (Thomas, J., concurring in part and dissenting in part).

¹¹⁶ *Id.* at 350.

¹¹⁷ *Id.* For Thomas, the fact that Michigan could obtain diversity without racial preferences by decreasing reliance on the LSAT, a test on which minorities are known to underperform relative to whites, meant that Michigan’s true interest was not diversity. Rather, the interest was, at best, for Michigan to maintain its status as an elite law school; at worst, the interest was racial balancing. The first is a legitimate interest but not a compelling one, *id.* at 358–61; the second is flatly impermissible. *Id.* at 355.

¹¹⁸ *Id.* at 367–68.

to improve their station in life.¹¹⁹ To promote justice in a meaningful way, preferential admissions policies should not use race as a proxy for disadvantage but rather focus directly on “helping those who are truly underprivileged.”¹²⁰ Furthermore, despite preferential admissions, black men were significantly underrepresented at Michigan, and Michigan seemed entirely content with that lamentable situation. A defensible affirmative action plan would address “real problems like the crisis of black male underperformance.”¹²¹

Third, race-based admissions policies are exploitative. Those policies allow elite, majority-white schools to achieve a desired racial mix for their own self-serving purposes—purposes he derided as “classroom aesthetics.”¹²² Those purposes are achieved at the

¹¹⁹ *Id.* at 354 n.3.

¹²⁰ *Id.*

¹²¹ *Id.* at 372 n.11. Some of these “real problems” are documented in a recent report by the National Urban League: “Ironically, even as an African-American man holds the highest office in the country, African Americans remain twice as likely as whites to be unemployed, three times more likely to live in poverty[,] and more than six times as likely to be incarcerated. These statistics represent persistent inequalities that have existed in American society for years. . . .” Valerie Rawlston Wilson, *Introduction to the 2009 Equality Index*, in NAT’L URBAN LEAGUE, *THE STATE OF BLACK AMERICA 2009: MESSAGE TO THE PRESIDENT 15* (2009); see also, Marc H. Morial, *From the President’s Desk*, in *id.* at 11-12 (noting that “wide academic achievement gaps” exist between blacks and whites and that “[f]ewer than 50 percent of African Americans graduate from high school in many major American cities”). The problems are even more pronounced when family structures are taken into account. The marriage-based family structure is rapidly becoming a thing of the past in the black community, with disastrous results for adults and especially children. As the Institute for American Values notes in a recent report: “Between 1950 and 1996, the percentage of Black families headed by married couples declined from 78 percent to 34 percent. Between 1940 and 1990, the percentage of Black children living with both parents dropped from 75.8 percent to 33.2 percent, largely because of increases in never-married Black mothers. . . . Research shows that compared with children in single-parent families, African American children living with their own married parents are less likely to live in poverty, typically benefit from greater parental involvement, are less delinquent, have higher self-esteem, are more likely to delay sexual activity, have lower rates of teen pregnancy, and have better educational outcomes.” Linda Malone-Colon, Institute for American Values, *Responding to the Black Marriage Crisis: A New Vision for Change* at 1-2 (Research Brief No.6, June 2007) (footnote omitted), available at http://www.fatherhood.org/downloadable_files/IAV_Brief6.pdf.

¹²² *Grutter*, 539 U.S. at 355 (Thomas, J., concurring in part and dissenting in part).

expense of the very minority students they purportedly benefit. He explained:

The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite institutions. Indeed, to cover the tracks of the aestheticians, this cruel farce of racial discrimination must continue—in selection for the *Michigan Law Review*, and in hiring at law firms and for judicial clerkships—until the “beneficiaries” are no longer tolerated. While these students may graduate with law degrees, there is no evidence that they have received a qualitatively better legal education (or become better lawyers) than if they had gone to a less “elite” law school for which they were better prepared.¹²³

In light of this “cruel farce,” Thomas concluded that the law school “seeks only a facade—it is sufficient that the class looks right, even if it does not perform right.”¹²⁴

* * *

Although Justice Thomas’s opinions in the desegregation and affirmative-action cases are used as Exhibit A in the case that he is a “traitor” to his race, even cursory examination of those opinions tells a very different story. The opinions reach outcomes that are fairly described as “conservative,” but they do so for *black-nationalist* reasons—the sort of reasons that ought to resonate with many blacks and black activists even if they ultimately disagree with the conclusions Thomas reaches. Thomas asserts, as an article of faith, unshakeable confidence in the ability of blacks and black institutions to succeed on their own initiative, without

¹²³ *Id.* at 372 (citations omitted).

¹²⁴ *Id.*

what he regards as “racial paternalism” from whites.¹²⁵ Because blacks and black schools are not intrinsically inferior to whites and white schools, there is simply no cause for alarm when, for a variety of reasons unrelated to discrimination, many blacks attend majority-black schools or do not attend elite, majority white institutions of higher learning. Indeed, Thomas—in keeping with the movement for “Afro-centric” schools¹²⁶—stresses the substantial benefits that black students can realize, in the form of role models, self-confidence, and even test scores, in majority-black schools—where black students succeed or fail on their own, and their successes cannot be dismissed as the result of preferential treatment.

Just as Malcolm X faulted the civil rights community for accepting “token progress” in the form of integration in place of deeper social justice,¹²⁷ Justice Thomas’s controversial opinions on race urge more radical solutions to the problems facing black America today. The problem with de facto black public schools, for example, is not that they lack sufficient numbers of white faces in the classroom; the problem is that poor black children are trapped in failing public schools, unable by virtue of their poverty either to move to areas with better schools or to pay tuition to attend higher-quality private schools. Instead of reassigning students within a failing public school system to achieve better racial balances, a better approach—one that might actually *help* blacks by breaking the “vicious cycle of poverty, dependence, criminality, and alienation” that too many poor black children face—would be to give poor black families the same ability that wealthy families have to send their children to private schools instead of failing public schools.¹²⁸ Nevertheless, the civil-rights

¹²⁵ *Adarand Constructors v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

¹²⁶ See, e.g., Eleanor Brown, *Black Like Me? “Gangsta” Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. REV. 308 (2000).

¹²⁷ See *supra* note 72.

¹²⁸ *Zelman v. Simmons-Harris*, 536 U.S. 639, 683 (2002) (Thomas, J., concurring). As Thomas explained in *Zelman*:

[F]ailing urban public schools disproportionately affect minority children most in need of educational opportunity. At the time of Reconstruction,

community opposes school vouchers even though school choice disproportionately benefits blacks and the vast majority of blacks support school choice.

Race-based preferences for blacks in elite, majority-white colleges and universities, in Thomas's view, are a poor substitute for society fulfilling its fundamental obligation of providing *all* children, not just the wealthiest (and the whitest), with an excellent education. Even if racial preferences in admissions "benefit" minorities in some sense (and Thomas, of course, believes they stigmatize minorities as inferior to whites and put minorities in educational settings where they are unlikely to succeed),¹²⁹ the resulting benefit is typically available only to wealthier, educationally advantaged minorities who are bound for college and post-graduate study (and therefore success) in any event. Preferential admissions policies do nothing at all for the multitude of

blacks considered public education "a matter of personal liberation and a necessary function of a free society." Today, however, the promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts. Just as blacks supported public education during Reconstruction, many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities.

Id. at 681-82 (citation omitted).

¹²⁹ The stigmatization Thomas finds inherent in race-based admissions policies results from such policies' reaffirmation of racially biased standards of "merit." As Professor Brown-Nagin has explained:

Justice Scalia uncritically accepted the plaintiffs' simplistic views of merit and their corresponding narrative of entitlement to admission [in *Grutter*]. . . . Far from following Justice Scalia's lead, Justice Thomas aligned himself with the most radical voice in the litigation, the *Grutter* intervenors (albeit without explicitly acknowledging them). Justice Thomas's stance also mirrored the criticism of the [University of Michigan] Law School's admissions standards leveled by several of the University's amicus curiae supporters, including the Yale, Harvard, and Stanford Black Law Students' Associations, the National Center for Fair and Open Testing, and the Society of American Law Teachers. Moreover, Justice Thomas's rhetoric resembled elements of the critique that scholars on the political left have made against traditional notions of merit for years.

Brown-Nagin, *supra* note 4, at 803-04 (emphasis added) (footnotes omitted).

blacks whose situation most desperately cries out for relief—namely, blacks who are too poor or undereducated to be in a position to pursue education beyond high school. Here, too, Thomas's argument is that the remedy the traditional civil-rights community prefers is far too limited in scope, and far too tame in its demands, to address the real problems facing the black community today.

The arguments of Justice Thomas in the affirmative action and desegregation cases are by no means the arguments of a "traitor" to his race or of someone who "thinks white." They are black-nationalist arguments for deep, meaningful social change from someone who is not willing to let white society off the hook as easily as many traditional civil-rights groups are.¹³⁰ In his race opinions, Thomas rejects "band-aid solutions," such as racial balancing and racial preferences in admissions, in support of more fundamental reforms that treat the underlying wound—reforms such as school choice, admissions preferences based on socioeconomic disadvantage instead of race, and neutral admissions standards that do not systematically disadvantage minorities and thus require no racial preferences to counteract their racially exclusionary effects. Thomas, like his critics, may be wrong on these matters, but his arguments, like theirs, are based on a good-faith assessment of the best interests of the black community—just as Malcolm X's rejection of the integration agenda of the civil rights movement in the 1960s was.

III. CAN A CONSTITUTIONALIST JUDGE BE A BLACK NATIONALIST?

In light of his opinions, we need to change our perception of Justice Thomas. He is not simply a judicial conservative on the far right of the Court. Behind his well-known constitutionalism lies, ironically enough, a black nationalist. That black nationalist—whom

¹³⁰ As Mark Tushnet has explained: "Justice Thomas's opinions on education and African Americans contain several themes. First, they are concerned with ensuring that public policy address real problems in education for African Americans: failing inner-city schools, the relative underperformance of black males, and the like. Second, they are infused with scorn for policies supported by elites that assuage their consciences by seeming to address those problems without doing so and that allow elites to maintain essentially undisturbed the institutions with which they are familiar and from which they benefit." Tushnet, *supra* note 58, at 330.

I have termed “Clarence X” – pays careful attention to whether or not his decisions on matters involving race advance the interests of the black community and does not hesitate to speak out when litigants urge positions that would undermine those interests as he sees them. On such matters, as Justice Thomas himself said in a 1998 speech, all of his efforts and energies “were to help [the black community], not to hurt.”¹³¹

That is all well and good, but it gives rise to a question: can a constitutionalist, such as Justice Thomas, be a black nationalist? As a constitutionalist, Thomas is committed to the idea of judicial restraint – the idea that judges should not “make” the law but rather enforce the law as declared in written texts and as understood by the drafters of the relevant text and in tradition.¹³² One might therefore argue that, to the extent Thomas’s opinions are driven by black nationalism, a commitment to colorblindness, or, for that matter, any other principle not fairly derived from his method of constitutional interpretation, he is a judicial activist, not the constitutionalist and proponent of judicial restraint that he portrays himself to be.¹³³

The critique is clever because it allows Thomas critics essentially to have their cake and eat it too. On this view, it is acceptable –

¹³¹ Thomas, *supra* note 69.

¹³² See, e.g., *Baze v. Rees*, 128 S. Ct. 1520, 1556 (2008) (Thomas, J., concurring in the judgment) (declining to join the majority opinion because it “finds no support in the original understanding of the Cruel and Unusual Punishments Clause”). In his recent autobiography, Thomas reiterated his commitment to judicial restraint, which he described as “central to my approach to judging”: “In the legislative and executive branches, it’s acceptable (if not necessarily right) to make decisions based on your personal opinions or interests. The role of a judge, by contrast, is to interpret and apply the choices made in those branches, not to make policy choices of his own.” THOMAS, *supra* note 20, at 204.

¹³³ Jeffrey Rosen presented one of the first such criticisms of Thomas in a wide-ranging *New Yorker* article published in 1996. See Jeffrey Rosen, *Moving On: In His Latest Incarnation, Justice Clarence Thomas Takes His Text From Booker T. Washington*, *NEW YORKER*, Apr. 29, 1996, at 66–73. Professor Rosen faulted Thomas for “impos[ing] his moral objections to racial classifications on the entire country by judicial fiat” despite the lack of evidence that the Equal Protection Clause was intended to embody a colorblindness principle. *Id.* at 72. These arguments appear to be catching on among Thomas critics. See, e.g., R. Kennedy, *supra* note 68, at 103–07. See generally Book Note, *Justice Thomas’s Inconsistent Originalism*, 121 HARV. L. REV. 1431 (2008).

indeed, *laudable*—for liberal Justices to impose *their* policy preferences on the country through constitutional fiat; the only sin is for conservative Justices to do so. That is so despite the fact that liberal judicial activism is no more democratically legitimate than its conservative cousin. So, for example, Justice Thurgood Marshall is praised for using the Constitution to advance his vision of racial justice, but Justice Thomas is condemned as an “activist” for supposedly doing the same thing.¹³⁴

Nevertheless, the Gordian Knot of the activism charge is not difficult to cut. The cogency of the charge rests on the assumption that the colorblindness principle lacks any arguable basis in the text, history, and original intent of the Fourteenth Amendment. If that assumption is incorrect (and it is worth noting that support for the colorblindness principle dates back more than a century),¹³⁵ then

¹³⁴ Ironically enough, the colorblindness principle that Professor Rosen and others criticize Justice Thomas for adopting was advocated by none other than Justice Marshall himself:

In their briefs before the Supreme Court in *Brown*, Marshall and his colleagues argued the “distinctions imposed . . . based upon race and color alone . . . [are] patently [arbitrary and capricious].” That was so, they argued, because skin color “is a constitutional irrelevance”—or, as the [Legal Defense Fund] attorneys consistently maintained, “[o]ur Constitution is colorblind.” Marshall and his colleagues concluded that “all governmentally imposed race distinctions” are “odious” and that governments, which are “bound to afford equal protection of the laws, must not impose them.”

Smith, *supra* note 1, at 533 (footnotes omitted).

¹³⁵ As the first Justice John Marshall Harlan wrote in his oft-quoted dissent from the doctrine of “separate but equal:

[I]n 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 guaranteed by the supreme law of the land are involved.

Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (emphasis added). See also *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) (citing civil rights briefs urging colorblindness as an accepted constitutional principle). Even

there is no support for the view that only activism could lead an originalist to endorse a colorblind interpretation of equal protection.

Moreover, the activism charge overlooks the familiar issues of indeterminacy and precedent in constitutional adjudication. Textualists and originalists do not subscribe to the fatal conceit that their interpretive methods will provide definitive answers to all questions of interpretation.¹³⁶ In situations where the meaning of the Constitution remains unclear after close textual and historical analysis, judicial doctrine serves a vital role of helping “concretize the Constitution” without “amend[ing] or eclips[ing] it.”¹³⁷

To the extent the intended meaning of the Equal Protection Clause is uncertain, a colorblindness principle designed to prevent government actors from engaging in racial discrimination seems to be an appropriate doctrinal gap-filling rule. The Reconstruction Amendments were aimed at abolishing slavery based on race and guaranteeing newly freed slaves, their descendants, and all other citizens of the United States the “equal protection of the laws.”¹³⁸ A presumptive ban on race-based government action would certainly serve

without taking a definitive position on the historical support for colorblindness (and I do not), it is worth noting just how weak some of the historical arguments against the colorblindness interpretation of equal protection are. Critics of colorblindness present evidence of race-conscious action by the federal government during the Civil War era designed to benefit blacks as clear proof that equal protection was not intended to require colorblindness. See generally Book Note, *supra* note 133, at 1437 n.26 (citing sources). The obvious problem with these arguments is that the measures in question were undertaken at a time when equal protection had no application to the federal government. It was not until 1954 that the Supreme Court recognized an equal protection principle applicable to the federal government. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). Race-conscious action by the federal government during the Civil War and Reconstruction thus can have no bearing on the original meaning of the concept of equal protection, which applied only to the states.

¹³⁶ For example, Justice Scalia’s famous defense of originalism did not claim that it is a foolproof method of interpreting the Constitution. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). His claim was merely that it is superior to other interpretive methods in rooting constitutional decisions in democratically legitimate sources—sources, that is, other than the whims and policy preferences of politically unaccountable judges. See *id.* at 862–64.

¹³⁷ Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 78 (2000).

¹³⁸ See U.S. CONST. amends. XIII & XIV.

to protect blacks against discrimination based on race—which, of course, is why the NAACP Legal Defense Fund argued over and over again, in *Brown* and prior cases, that the operative constitutional principle was that government must be strictly colorblind.¹³⁹

Theoretically, a more limited doctrine would provide the same protection. The goal of promoting black equality might also be served by an anti-subordination doctrine invalidating racial discrimination *against* blacks but allowing race-based preferences *for* blacks.¹⁴⁰ This doctrine, however, would be difficult to square with the constitutional text, which gives all persons (minorities and nonminorities alike) the same right to equal protection of the laws. Moreover, the essential predicate of the anti-subordination view of equal protection would be confidence in the ability of judges to distinguish between “good” and “bad” uses of race by government. At the very least, the Supreme Court’s record on this score fails to inspire the necessary confidence. Throughout its history, the Court has endorsed uses of race that were later understood to be patently illegitimate.¹⁴¹ This fact alone suggests the utility of a colorblindness principle which is not only consistently

¹³⁹ See *supra* note 134. As Justice Thomas has recognized, “the color-blind 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.” *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 n.19 (2007) (emphasis added).

¹⁴⁰ The argument would be, as Justice Harry A. Blackmun famously put it, that “[i]n order to get beyond racism, we must first take account of race.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (separate opinion of Blackmun, J.).

¹⁴¹ In *Plessy*, for example, the Court believed segregation to be a valid use of race by government. See *Plessy v. Ferguson*, 163 U.S. 537, 548–52 (1896). Indeed, even Justice Harlan’s famous defense of the colorblindness principle in *Plessy* did not prevent him from endorsing the notion that the “white race” will “continue to be for all time” “the dominant race in this country,” and that discrimination against “the Chinaman” is justified because the Chinese “race” is “so different from our own that we do not permit those belonging to it to become citizens of the United States.” *Id.* at 559, 561 (Harlan, J., dissenting). Similarly, in *Korematsu v. United States*, 323 U.S. 214, 216 (1944), the Court readily deferred to claims by military authorities that the national security required the detention of an entire race of Americans during World War II based on Japanese ancestry, without any individualized proof of disloyalty or wrongdoing. See generally Smith, *supra* note 1, at 532–34 (summarizing the mischief caused by prior judicial departures from the colorblindness principle).

adhered to but also backed up by strict judicial scrutiny designed to “‘smoke out’ illegitimate uses of race.”¹⁴²

There is one final point to be made about precedent in relation to the charge that Justice Thomas’s colorblindness opinions are activist. In many areas, Justices encounter decisions they believe to be wrong, yet Justices need not (and, in any case, do not) deny *stare decisis* effect to all precedents they deem legally erroneous.¹⁴³ Other than the comparatively few areas that are significant enough to warrant overrulings or perpetual dissents, justices work within the confines of existing precedent. This is true even of originalist Justices who confront prior decisions that strayed from original meaning.¹⁴⁴ Indeed, respect for precedent has long served as a key component of judicial restraint.¹⁴⁵

After almost a century and a half, it is unrealistic to fault originalist Justices for accepting colorblindness as a guiding constitutional principle, instead of wiping the slate clean and starting from scratch. As Akhil Amar has noted, “even the best documentarian reading must sometimes yield in court to brute facts born of earlier judicial and political deviations.”¹⁴⁶ Given the present state of knowledge about the Equal Protection Clause, we can perhaps demand no more

¹⁴² City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

¹⁴³ See Gerhardt, *supra* note 5, at 1286. Indeed, existing *stare decisis* rules are clear that, in constitutional and nonconstitutional cases alike, mere error is not a sufficient basis for overruling prior precedent. In either context, “any departure from the doctrine of *stare decisis* demands special justification.” *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (constitutional issues); see also, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (same for statutory issues).

¹⁴⁴ See, e.g., Scalia, *supra* note 136, at 861 (noting that “almost every originalist would adulterate [originalism] with the doctrine of *stare decisis*”). Contrary to Justice Scalia’s suggestion, belief in *stare decisis* need not be viewed as an “adulteration” of originalism. After all, the Framers were well aware of the idea of precedent and regarded precedent as an important safeguard against judicial tyranny. As Alexander Hamilton declared in *Federalist* No. 78: “To avoid an arbitrary discretion in the courts, it is *indispensable* that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.” *THE FEDERALIST* NO. 78 (Alexander Hamilton) (emphasis added).

¹⁴⁵ See generally Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1087, 1087 n.126 (2002).

¹⁴⁶ Amar, *supra* note 137, at 28.

of the Justices than that they articulate and apply an understanding of "equality" that makes sense in light of the evils against which the Clause took aim.

By the time Justice Thomas joined the Court, it was already firmly committed to colorblindness as the core idea behind equal protection. As early as World War II, the Court could assert that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."¹⁴⁷ Then came *Brown v. Board of Education* in 1954, which declared the "fundamental principle" that "racial discrimination in public education is unconstitutional."¹⁴⁸ Decades later, in cases like *Regents of the University of California v. Bakke*¹⁴⁹ and *City of Richmond v. J.A. Croson Co.*,¹⁵⁰ the Court applied the nondiscrimination principle to certain remedies designed to benefit racial minorities. *Croson* was a particularly significant development, because there the Court flatly declared that *all* racial classifications, even so-called "benign" ones such as affirmative action, are disfavored and thus subject to strict scrutiny, at least at the state and local level.¹⁵¹

Justice Thomas joined the Court two years after *Croson*. When the issue of affirmative action returned to the Court in *Adarand Constructors, Inc. v. Peña*,¹⁵² he could have urged a fundamental rethinking of the Court's approach to racial classifications. Nevertheless, he took the prior decisions defining equal protection in colorblindness terms at face value and accepted the idea that, as he put it, there is no "racial

¹⁴⁷ *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

¹⁴⁸ *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955) (describing holding in original *Brown* decision).

¹⁴⁹ 438 U.S. 265 (1978) (striking down racial quotas or set-asides in public university admissions).

¹⁵⁰ 488 U.S. 469 (1989) (striking down racial preference in state government contracting); see also, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion) (invalidating race-based preferences for teachers facing layoffs and reasoning that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination").

¹⁵¹ *Croson*, 488 U.S. at 493.

¹⁵² 515 U.S. 200 (1995).

paternalism exception to the principle of equal protection.”¹⁵³ That conclusion might or might not be wrong, but it was hardly “activist” for Thomas, in the absence of compelling evidence to the contrary, to give precedential effect to prior cases adopting the colorblindness understanding of equal protection and to follow those cases to their logical conclusion.

CONCLUSION

If, as the title of this Symposium suggests, important aspects of the jurisprudence of Justice Thomas remain “unknown” after almost two decades, it is only because his most vocal critics choose to mischaracterize his votes and to stifle debate on matters of importance to the black community. Far from manifesting indifference or hostility to the interests of black Americans, Thomas’s opinions reveal a Justice who is intensely concerned with the plight and progress of black America. To be sure, he has criticized affirmative action and other race-conscious remedies favored by traditional civil rights groups and voted against them where he believed the law required him to do so. His criticisms, however, were based on his concern that those measures are not responsive to the needs of the black community and may actually be counterproductive. Now that nondiscrimination is the supreme law of the land, Thomas believes the path to progress for black Americans lies in self-reliance and self-improvement. This emphasis on blacks improving their own plight through education and economic empowerment instead of relying on the beneficence of others places Thomas squarely in a long line of black nationalists that includes the now-beloved icon of Malcolm X, who had his own heated disagreements with the civil rights leadership during the 1960s and was once regarded as a dangerous radical.

¹⁵³ *Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment). Although *Adarand* adhered to a line of prior colorblindness cases, it did overrule *Metro Broadcasting*. See *id.*, at 227. It did so, however, on the ground that *Metro Broadcasting* had unjustifiably departed from a line of precedent holding the federal government to the same standards of nondiscrimination as state and local governments. See *id.*

Like his critics (and his supporters), Thomas may or may not be right on the merits. Indeed, there may not be any one “right” answer on an issue as complex as how best to advance the interests of a race comprised of tens of millions of people, from all different walks of life, spread out across an entire continent. It is clear, however, that, right or wrong, Justice Thomas has spoken as eloquently and passionately as anyone about the issues of racial justice that have come before the Supreme Court during his tenure. This has made for a distinctive brand of conservative jurisprudence that is infused with black nationalism—interesting reading for Court-watchers and those interested in honest debate on pressing issues of racial justice.

With any luck, Thomas’s most strident critics will stop hurling accusations and epithets about his opinions and join more thoughtful commentators in reading them with an open mind. If they do, maybe we can finally have an honest, respectful debate, both within the black community and the nation at large, about uncomfortable but vitally important issues of racial justice. What is more, maybe, after twenty years, they will finally recognize Justice Thomas for what and who he really is. He is neither knave nor fool—least of all any sort of racial Benedict Arnold (whatever that might mean). He is, quite simply, Clarence X, a proud black man who has a surprising amount in common with another famous black man who went by the initial X.