

**GRUTTER V. BOLLINGER,  
CLARENCE THOMAS, AFFIRMATIVE  
ACTION AND THE TREACHERY OF  
ORIGINALISM: “THE SUN DON’T SHINE  
HERE IN THIS PART OF TOWN”<sup>†</sup>**

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*andré douglas pond cummings\**

I. INTRODUCTION

In the landmark 2003 affirmative action case *Grutter v. Bollinger*,<sup>1</sup> United States Supreme Court Justice Clarence Thomas authored a startling dissenting opinion.<sup>2</sup> *Grutter*, for all intents and purposes, upheld the use of race as a plus factor in state university admissions decisions.<sup>3</sup> Specifically, *Grutter* held that the University of Michigan Law School’s goal of creating a diverse student body was a compelling interest, and that the Law School’s affirmative action program was narrowly tailored enough to survive pro-

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<sup>†</sup> JADAKISS, *Welcome to D-Block, on KISS OF DEATH* (Ruff Ryder/Interscope 2004) (featuring Sheek, Styles P, and Eminem). See *infra* notes 452 and 453 and accompanying text.

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1. 539 U.S. 306 (2003).

2. *Grutter*, 539 U.S. at 349. While it is unlikely that any lawyers or individuals acquainted with U.S. Supreme Court jurisprudence were startled by Thomas’s dissent, many outsiders may have been surprised by his opposition to affirmative action. Some lawyers were likely startled by the audacity of the dissent.

3. *Id.* at 343 (“[T]he Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admission decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”).

hibition by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because the program furthered “a compelling interest in obtaining the educational benefits that flow from a diverse student body.”<sup>4</sup> This decision was hailed by civil rights organizations nationwide as a surprising and important victory in the fight for social justice and equal access to higher education.<sup>5</sup>

To the uninitiated, the fact that Thomas, the only sitting African American Justice on the U.S. Supreme Court, dissented may have appeared bewildering. Thomas’s disagreement with the majority is fascinating and bizarre. Therefore, I intend to unwind<sup>6</sup> Thomas’s *Grutter* dissent in this Article.

It is important to carefully examine Thomas’s dissenting opinion in *Grutter*. First, as the youngest member of the U.S. Supreme Court, Thomas stands the only reasonable chance of still being a member of the Court in twenty-five years,<sup>7</sup> the self-imposed implosion date of the *Grutter* hold-

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4. *Id.*; see also Gerald Torres, *On Grutter and Gratz Examining “Diversity” in Education: Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1597 (2003).

5. See generally David G. Savage, *Affirmative Action Survives: The Supreme Court Upheld Race as a Factor in University Admissions but Struck Down Quota-Type Systems in Another Ruling*, ORLANDO SENTINEL, June 24, 2003, at A1 (“Higher-education officials and civil-rights leaders hailed the outcome as a historic victory, one that preserves integration at the most selective colleges.”); Tony Mauro, *Court Affirms Continued Need for Preferences*, N.Y. L.J., June 24, 2003, at 1. Mauro described the elation of affirmative action supporters as follows:

[T]he decisions left supporters of affirmative action far more elated than disheartened—mainly because of Justice O’Connor’s unequivocal endorsement of affirmative action. Theodore Shaw, associate director of the NAACP Legal Defense and Educational Fund . . . was smiling as he emerged from the courtroom yesterday. “This was the best we could hope for from this Court,” Mr. Shaw said. “I am happy.”

*Id.*

6. I intentionally use the term “unwind” here to describe the process by which I intend to break down Thomas’s dissenting opinion in *Grutter v. Bollinger*. The term “unwind” brings to mind the brain numbing process I undertook occasionally in private practice at Kirkland & Ellis in Chicago prior to my embarking on an academic career. I worked within the corporate department, concentrating on securities work and mergers and acquisitions. Occasionally, when we represented a target company in an M&A deal, it would be necessary to unwind or disentangle the many varied credit agreements between the target and its creditors, often managed by an “intercreditor agreement,” prior to effectuation of the acquisition. I was primarily responsible, a few times, to disentangle or unwind the complex and distasteful credit arrangements, ensuring that the target presented as an unencumbered company, with all debt paid, or at least all debt worked comfortably into the acquisition price. Hence, I intend to unwind Thomas’s *Grutter* dissent, one argument (or one debt) at a time.

7. See ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 470 (2001). Peyton Thomas writes that Clarence Thomas, following his Supreme Court confirmation, stated: “I’m going to be here for 40 years. For those who don’t like it, get over it.” *Id.*; see also Ken Foskett, *Refusing to Court Favor: Youngest Justice Accepts Being “A Thorn in the Side of Those Who Vilify Him,”* ATLANTA J. CONST., July 3, 2001, at A1 [*hereinafter* Foskett, *A Thorn in the Side*]:

In 1998 a college student in New York asked Thomas to rate his impact on the court so far. “Not much,” was the reply, according to Alfred University professor Robert Heineman. But Heineman also recalled a caveat: “[Thomas] said ‘I’m a

ing.<sup>8</sup> No doubt, Thomas relishes the idea of writing the majority opinion that kills affirmative action and racial preferences for good.<sup>9</sup> Second, much as Justice Harlan’s dissenting opinion in *Plessy v. Ferguson*<sup>10</sup> was used as a guide for the majority opinion in *Brown v. Board of Education*,<sup>11</sup> Thomas’s dissenting opinion in *Grutter* may be looked to when the eventual majority opinion is written that ends affirmative action programs once and for all. Third, in *Grutter*, Thomas was presented with yet another opportunity to return to the compassion he championed during his Senate confirmation hearings.<sup>12</sup> Thomas refused this opportunity. Finally, evaluating Thomas’s *Grutter* dissent will serve to cement his race jurisprudence,

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young guy. I’m going to be on the court another two decades or so. I think by the time I leave, I’ll have some impact.”

*Id.*

8. See *Grutter v. Bollinger*, 539 U.S. 306, 342–43 (2003) (“[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”). This so-called “sunset provision” was clearly spelled out by Justice O’Connor in the majority opinion, unmistakably calling for a termination date on affirmative action. *Id.*
9. See *Grutter*, 539 U.S. at 375 (“While I agree that in 25 years the practice of the Law School will be illegal, they are, for the reasons I have given, illegal now.”).
10. 163 U.S. 537 (1896).
11. 347 U.S. 483 (1954).
12. See John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to the “Law School Five,”* 46 *How. L.J.* 175, 208 (2003). Calmore reports that during Thomas’s Senate confirmation hearing the following information was revealed:

Justice Thomas rose from poverty and discrimination in Pinpoint, Ga., and his nomination [to the U.S. Supreme Court] won support from prominent people sure he would bring to the Court the understanding bred of hardship. Indeed he testified poignantly about watching busloads of prisoners from his window. “I would say to myself almost every day, there but for the grace of God go I,” he told senators eager to believe him. As a Justice, Clarence Thomas doesn’t talk that way anymore.

*Id.* (citing Editorial, *The Youngest, Cruellest Justice*, N.Y. TIMES, Feb. 27, 1992, at A24). In the *N.Y. Times* editorial, the editors opine that Thomas’s dissent in a prisoner abuse case is not only “alarming,” but “disappointing”:

The Eighth Amendment forbids cruel and unusual punishments. Only Justices Thomas and Antonin Scalia refused to apply it to the case of Keith Hudson, a Louisiana prisoner who was shackled and beaten by two guards while their supervisor watched, warning them only against having “too much fun.”

The two dissenters likened the case to prisoner gripes about inconveniences behind bars. They contended that since the prisoner suffered only a split lip, loosened teeth and a broken dental plate, he had no constitutional complaint . . . .

The Thomas dissent would be alarming coming from any justice. Coming from him, it rings also with crashing disappointment. He is, for one thing, the youngest Justice. He might well serve until the year 2030 or beyond . . . . A second disappointment concerns hope. Justice Thomas rose from poverty and discrimination in Pin Point, Ga., and his nomination won support from prominent people sure he would bring to the Court the understanding bred of hardship.

*Id.*

as *Grutter* likely represents one of the most important race cases that will come before the Supreme Court during Thomas's tenure.<sup>13</sup>

In order to properly unwind Thomas's dissent, this Article will proceed as follows: In Part II, I open with narratives which I believe place the issues faced by the *Grutter* Court, and by Thomas individually, in perspective. In order to provide context to Thomas's *Grutter* dissent, Part III will briefly examine Thomas's personal history, specifically life events that have led to the development of his jurisprudence. Part IV will describe the evolution of Thomas's jurisprudence, particularly his race jurisprudence. Part V examines the jurisprudential philosophies of natural law and originalism—two theoretical foundations Thomas has merged and adopted as his own judicial philosophy. Part VI will then evaluate Thomas's *Grutter* dissent in light of his philosophical approaches and will critique his arguments and rationale in dissenting in *Grutter*. Finally, Part VII will trace the failings of Thomas's dissent and expand the argument to posit that such failings extend to portions of the originalist philosophy as exercised by Thomas, developing what I call the "treachery of originalism." The Article will conclude with thoughts and approaches for more honest consideration of future race issues that will undoubtedly come before the "least dangerous branch."<sup>14</sup>

Simply stated, this Article maintains that Clarence Thomas abandons his originalist jurisprudential philosophy whenever it fits his political and

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13. Thomas has weighed in on the following important race cases that have come before the Court since his appointment in 1991: *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (Thomas, J., concurring):

It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior . . . . [T]he court has read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority.

*Id.* at 114; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (Thomas, J., concurring):

As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.

*Id.* at 240–41. See also Declaration of Independence ("We hold these truths to be self evident, that all men are created equal . . . ."); *United States v. Fordice*, 505 U.S. 717, 745 (1992) (Thomas, J., concurring) ("We must rally to the defense of our schools. We must repudiate this unbearable assumption of the right to kill institutions unless they conform to one narrow standard.") (quoting W. E. B. Du Bois, *Schools*, 13 THE CRISIS 111, 112 (1917)).

14. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1 (2d. ed. 1986) ("The least dangerous branch of the American government is the most extraordinary powerful court of law the world has ever known.").

emotional agenda.<sup>15</sup> He does this in his race jurisprudence and he does it again in *Grutter*. Further, this Article contends that the U.S. Supreme Court justices that adhere religiously to originalism should honestly admit that their own life experiences significantly impact their jurisprudence, and that they abandon their originalist roots when faced with political or emotional outcomes that are unsettling to them.<sup>16</sup> Furthermore, this Article posits that if the originalist wing of the Supreme Court would admit this reality, a much more diverse set of life experiences could genuinely affect the judicial decisions rendered by them.

## II. REAL LIFE

The following are two recent life experiences that strike me as extremely relevant to the *Grutter* analysis herein and the “real life” experience that seems to be badly missing in the jurisprudence of the sitting originalist judges on the U.S. Supreme Court:

*Minding my own business one recent afternoon, I was troubled to hear the following question from an individual on the other end of the telephone line: “Professor cummings, as a white male, do I have any chance whatsoever of being admitted to a law school, any law school, here in the U.S.? You know, seeing that I am not a woman or a minority.” Did the white male on the other end of the telephone line not know that a majority of all law students in the United States are white males?<sup>17</sup> Did he not know that a vast majority of all political players, corporate executives, educators, etc. are white males?<sup>18</sup> Where did that question come from?*

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15. See SAMUEL A. MARCOSSON, ORIGINAL SIN: CLARENCE THOMAS AND THE FAILURE OF THE CONSTITUTIONAL CONSERVATIVES 15–31 (N.Y.U. Press 2002).

16. See *id.* at 32–50.

17. See ABA & LSAC, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (Wendy Margolis et al. eds., 2005). The official enrollment figures for all ABA-approved law schools in the United States show that first-year law school enrollment in 2003 was 48,867 total students. See *id.* at Appendix A. Of the 48,867 admitted students, 23,369 were female. *Id.* Thus, well over 50% (.5217) of all students beginning law study in 2003 were men (25,498). See *id.* The LSAC statistics further indicate that of the 48,867 students that began law school in 2003, 10,468 were minority enrollees. *Id.* Therefore, a little over 20% (.2142) of new first-year law students in 2003 were minorities. See *id.* Thus, it can be safely assumed that of the 48,867 first-year students enrolled in law school in 2003, 20,037 were white males. See *id.*

18. See andré douglas pond cummings, “Never Let Me Slip, ‘Cause if I Slip, Then I’m Slip-pin’”: California’s Paranoid Slide from Bakke to Proposition 209, 8 B.U. PUB. INT. L.J. 59, 63 n.27 (1998) [hereinafter cummings, *Never Let Me Slip*]. cummings states that:

Reverend [Jesse] Jackson respond[ed] to the White male charge of reverse discrimination in this keynote address given to the Howard Law School student body: “Thus, our rights are under attack. Some of them are under attack because white males are frightened that they are losing . . . . After all, white males are a minority as 33% of the American population—they have been so for a long time, and we had nothing to do with making them a minority. I repeat, demographically, white males are a minority. But they are 80% of tenured professors, 80% of the U.S. Congress, 90% of the U.S. Senate, 97% of school superintendents, 92% of top executives of all Forbes 400 industries, and 100% of all U.S. Presidents.”

*Id.* (citing Jesse L. Jackson, 1995 Symposium Statement by Reverend Jesse L. Jackson, 38 How. L.J. 449 (1995)).

*I did not know this self-described "white male" very well. Certainly, he did not know me. I barely knew where to start. Yet his question was sincere. I first asked why he even imagined that he would not be admitted to any law school in the country. The caller responded that a friend (white male) had told him that he (the friend) had not been admitted to any law school to which he applied because he was not female or black. The account of this rejected white male friend was that he had been denied admittance to law school, not because of a poor record, but because he was not a minority or a woman.*

*Tired, and increasingly impatient with this "reverse discrimination" excuse for numbingly average white men, I proceeded to describe to the caller the admissions process undertaken at most law schools, including mine—West Virginia University College of Law. I detailed the typical accumulation of undergraduate grade point average, Law School Admissions Test ("LSAT") scores, predictor indices, personal essay, resume, letters of recommendation, background, race, unusual life experience, etc. I described the importance of securing good grades and landing a solid to excellent score on the LSAT. I then described the categorization process employed by most law school admissions offices of which I am aware—of presumptive admit; the "hold" or "pool" category; and the presumptive deny.*

*Then I carefully explained that the caller's friend had very likely earned below average grades in college and had likely scored below the fortieth percentile on the LSAT, thus finding no takers in the law school admissions process. I honestly suggested to the caller that with over 200 law school alternatives, he would need to sandbag the rest of his undergraduate studies and score miserably on the LSAT to disqualify himself from consideration or admittance to any law school in the United States.*

*We discussed a variety of other issues, including the whole tier concept of law school rankings (to which I do not particularly subscribe) and concluded by deciding to circle back in a year or so when it was time for him to begin studying for the LSAT and deciding where to apply. The caller thanked me for my time and apologized for the "white male" question, I suspect noting my distaste for his query.*

Now, several months after that telephone conversation, I reflect again on this pervasive "reverse discrimination" idea that seems to grip some white males generally and whip many into a frothy frenzy.<sup>19</sup> When the con-

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19. See Hugh Dellios, *Anti-Affirmative Action "Wildfire" Smolders in California Measure; Proposal Would Ban Preference for Race, Gender*, CHI. TRIB., Dec. 4, 1994, at C7 ("called 'California Civil Rights Initiative,' it is the latest salvo in a rising backlash against equal opportunity programs, mostly from white males and conservatives who contend that affirmative action results in unfair quota systems and reverse discrimination against non-minorities."); Dick Foster, *AWAITING word from ON HIGH: Builder's '89 Lawsuit Before U.S. Supreme Court Cries Reverse Discrimination in Federal Contracts*, ROCKY MOUNTAIN NEWS (Denver, Colo.), May 21, 1995, at 26A:

Federal officials explained that under affirmative-action guidelines for encouraging minority and female-owned enterprises, the federal government awards general contractors a 1.5% bonus for subcontracting at least 10% of their work to 'disadvantaged' business enterprises, otherwise defined as companies owned by minorities or women. [The *Adarand* plaintiff] says that policy excludes him from jobs and thus discriminates against him as a white male.

*Id.*; *Most Callers Dislike Affirmative Action*, ORLANDO SENTINEL (Fla.), Nov. 11, 1997, at A15 ("Affirmative action is nothing more than reverse discrimination, according to the majority of Sound Off callers.").

cept of “reverse discrimination” was directly before the U.S. Supreme Court in *Grutter*, the Court rejected that characterization of the argument and instead described “a compelling interest in obtaining the educational benefits that flow from a diverse student body.”<sup>20</sup> Thomas, in his dissent, leads the charge of those that continue to roar about “reverse discrimination”<sup>21</sup> and he makes arguments that cannot withstand criticism if they are stripped from his staid world of plain meaning, natural law and originalism,<sup>22</sup> particularly if evaluated against the backdrop of the real world context of U.S. history. One may ask why Thomas stands as a leader or hero of the conservative agenda that promulgates as its principal tenets the following:

a rugged American individualism, translating . . . into black personal responsibility and self help; viewing race as abstracted and disconnected from group identity; limiting rights holders to individuals rather than groups; endorsing race neutral laws and public policies; dissenting from “civil rights professionals”; preaching “compassionate conservatism” or “tough love”; favoring market-oriented reform (free markets and entrepreneurship) with little state regulation; discounting the operational significance of race and the importance of racism as one of black America’s most fundamental problems; emphasizing the need to reverse black moral decline, crime, poverty, and family dysfunction (welfare dependency); and opposing abortion.<sup>23</sup>

In adhering so doggedly to this approach, Thomas ignores the experiences of racial discrimination that are still so often visited upon African Americans every day:

*While practicing corporate law at Kirkland and Ellis in Chicago, once a week (or sometimes twice) I quietly left the firm at 7 P.M. or so, to participate in a formal inner city youth mentoring project. I drove due west from downtown Chicago, 200 W. Randolph Street, to the “west side” near Grand Avenue and Monticello, one of the many “west side” neighborhoods in Chicago, where I met up with several young men and women, typically between the ages of fourteen and eighteen, and drove them to a local church where we did homework together for two hours or so. I engaged in this mentoring program all three years that I lived and worked in Chicago, prior to entering the legal academy. Up close and personal, I witnessed a variety of astonishing incidences:*

*As a reward for homework well done and high marks received, I planned to meet several of my mentees on a Friday night at 9 P.M. for dinner and a movie downtown in “the Loop.” On this particular Friday night, I could not break away from K & E to make my 9 P.M. appointment with the mentees. By the time I was able to finish my work it was 10:30 P.M. or so. I immediately retrieved my car and drove out west to see if the disappointed youngsters would at least like to grab a late*

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20. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

21. See *supra* note 19.

22. See *infra* Part V.

23. Calmore, *supra* note 12, at 193 (referencing BLACK AND RIGHT: THE BOLD NEW VOICE OF BLACK CONSERVATIVES IN AMERICA (Stan Faryna et al. eds., 1997)).

dinner in downtown Chicago. After picking up two young men, the three of us were accosted by two members of the Chicago Police Department ("CPD").<sup>24</sup> The two officers quickly turned into six and before we knew what was going on we had been cuffed, searched, my vehicle had been tossed and we had been tussled and menaced by the officers. Constitutional search and seizure violations were plentiful. Apparently, I had trespassed into a "well known" drug area, and that my interaction with two young black males indicated a "clear" drug transaction.

Once I was able to force the officers to realize that I was a practicing attorney, the four "extra" officers disappeared quickly, and we were left standing at the rear of my car, the contents of our pockets strewn across the trunk, my vehicle car doors open and contents of my glove box strewn about, and having heard enough threats to "stay out of this well known drug area" to last a good long time. This experience, where I was personally bullied and where attempts to physically intimidate all three of us had been exercised, was one that I could not let pass. I wrote a letter to the supervising lieutenant in that police precinct and clearly delineated the experience and made demands on the police department as to how I thought they should appropriately respond to the clear constitutional violation of our Fourth Amendment rights.<sup>25</sup> The initial officers on the scene had an internal affairs investigation opened into their behavior on that evening and both were required to hire attorneys to represent their interests. Some of my demands were met by the CPD while the eventual conclusion to the investigation was a finding of "no cause." Apparently, we needed more witnesses than the three of us involved in the police malfeasance, in order to effectuate suspensions of these officers.<sup>26</sup>

As we continued on our way toward downtown Chicago, one of the high school students remarked that he was unfazed by this incident. "Happens every day," he stated nonchalantly.

### III. BRIEF THOMAS BACKGROUND

Famous for his humble and rural upbringing, Clarence Thomas was born on June 23, 1948, in Pin Point, Georgia.<sup>27</sup> Thomas and his brother grew up with their grandparents as primary caretakers, Myers Anderson "Daddy" and Christina Anderson "Aunt Tina." Thomas's grandfather became "the greatest single influence on [Thomas's] life."<sup>28</sup> His grandfather's house "revolved around work, education, and faith, and a household immersed with rules."<sup>29</sup> Although times were not easy for Thomas's grandfather, he disagreed with welfare, and once told Thomas "I never took a penny from the government because it takes your manhood away."<sup>30</sup> Thomas's grandfather battled Jim Crow to "become a self-made businessman in an era when most black Americans were tied to sharecropping or low-wage jobs."<sup>31</sup>

Thomas left Georgia for Missouri in 1967 to attend the Immaculate Conception Seminary.<sup>32</sup> When the news was announced that Martin Lu-

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24. See Appendix A.

25. See Appendix A.

26. See Appendix B.

27. See PEYTON THOMAS, *supra* note 7, at 51.

28. *Id.* at 65.

29. *Id.*

30. *Id.* at 73.

31. KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* 3 (2004)

32. See PEYTON THOMAS, *supra* note 7, at 95.

ther King, Jr. had been shot, Thomas recalls one of his seminary classmates proclaiming “that’s good, I hope the s.o.b. dies.”<sup>33</sup> For Thomas, this was the primary reason why he reconsidered his decision to be a priest.<sup>34</sup> Thomas left the seminary in May of 1968 and began looking at other options.<sup>35</sup> Directly thereafter, the College of the Holy Cross began actively recruiting black students.<sup>36</sup> Thomas was accepted to Holy Cross in the summer of 1968 and matriculated that fall.<sup>37</sup> At Holy Cross, Thomas was one of twenty-eight new African American students in his entering class.<sup>38</sup> That year, a Black Student Union was formed and Thomas was elected secretary-treasurer.<sup>39</sup> When referencing his college years, Thomas describes them as his “rebellious stage,”<sup>40</sup> and also his “years of rage.”<sup>41</sup> During college, Thomas admired aspects of the Black Panthers and admits that Malcolm X’s call for independence and self-reliance had an impact on him.<sup>42</sup>

Thomas was determined to continue his education and was accepted to the Yale, Harvard, and University of Pennsylvania Law Schools, whereupon Thomas chose Yale.<sup>43</sup> Thomas was one of twelve African American students in his class.<sup>44</sup> Thomas’s first job out of law school was with John Danforth, the Republican attorney general in Missouri.<sup>45</sup> In November 1976, Danforth was elected to the U.S. Senate, and two years later Thomas moved to Washington to work for the newly elected senator.<sup>46</sup> Thomas was a legislative assistant and advised Danforth on matters concerning the environment, public works, energy, and the Department of the Interior.<sup>47</sup>

In early 1981, Thomas was offered the position of assistant secretary for civil rights at the Department of Education in the Reagan administration, but initially declined because wished to avoid being “pigeonholed” as a token black.<sup>48</sup> Thomas later relented and decided to take the job. Around that time Gil Hardy, a mutual friend of Thomas and Anita Hill, introduced the two.<sup>49</sup> Thomas joined the Office of Civil Rights in May of 1981 and began serving as assistant secretary of civil rights on July 3, 1981.<sup>50</sup>

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33. *Id.* at 105.

34. See PEYTON THOMAS, *supra* note 7, at 95.

35. See *id.* at 108.

36. *Id.* at 109.

37. *Id.*

38. PEYTON THOMAS, *supra* note 7, at 115.

39. *Id.* at 117.

40. *Id.* at 126; see also FOSKETT, *supra* note 31, at 3 (“In college [Thomas] joined the black power movement of the late 1960s, protesting the war in Vietnam and staging campus protests to demand equal treatment for black Americans.”).

41. See PEYTON THOMAS, *supra* note 7, at 129.

42. See *id.* at 127–28.

43. *Id.* at 133; see also FOSKETT, *supra* note 31, at 118.

44. See PEYTON THOMAS, *supra* note 7, at 136.

45. *Id.* at 148–49.

46. *Id.* at 175; see also FOSKETT, *supra* note 31, at 3 (“In 1979, Thomas followed his mentor to the United States Senate, but race would again change the course of his life. President Reagan, wanting a black civil rights attorney in his administration, settled on the thirty-two-year-old Thomas, even though Thomas never wanted to be a civil rights lawyer.”).

47. See PEYTON THOMAS, *supra* note 7, at 177.

48. *Id.* at 186.

49. *Id.* at 187.

50. *Id.* at 194.

When Thomas took the job as assistant secretary, he subsequently offered Hill a job as an attorney assistant.<sup>51</sup> Thomas often reportedly hedged on controversial issues, likely as a form of self-preservation.<sup>52</sup>

In February 1982, President Reagan nominated Thomas for the position of Chairperson of Equal Employment Opportunity Commission (EEOC).<sup>53</sup> The EEOC "was the chief entity in the federal government responsible for the enforcement of civil rights."<sup>54</sup> In 1987, Thomas took an active role in George H. W. Bush's presidential election campaign.<sup>55</sup> Following his victory, President George H. W. Bush nominated Thomas to the U.S. Court of Appeals for the D.C. Circuit with the intent of one day naming him to the Supreme Court.<sup>56</sup> Thomas's nomination was met by strong opposition from many groups, including the National Abortion Rights Action League, the National Organization for Women, People for the American Way, and the American Federation of State, County and Municipal Employees.<sup>57</sup> However, the Judiciary Committee recommended Thomas by a vote of twelve to one, and the full Senate confirmed him on March 6, 1989.<sup>58</sup> "At forty-two, Thomas became the youngest judge on the D.C. Circuit."<sup>59</sup>

On June 27, 1991, Thurgood Marshall announced that he was retiring from the Supreme Court.<sup>60</sup> On July 1, 1991, President George H. W. Bush announced Thomas's nomination to the Supreme Court.<sup>61</sup> As soon as Thomas's nomination was announced the media began asking questions regarding the impact Thomas's race had on the nomination decision.<sup>62</sup> The national NAACP opposed Thomas's nomination.<sup>63</sup> The ABA voted Thomas qualified; however, "[i]t was the lowest rating received by a Supreme Court nominee since 1955."<sup>64</sup>

Three weeks after Thomas's nomination was announced, Anita Hill confided to one of her friends, Gary Liman Phillips, that "she had left EEOC and Washington because Thomas had sexually harassed her."<sup>65</sup> "Hill's furtive allegations of sexual harassment bubbled through the Washington social circuit over the summer."<sup>66</sup> On September 10, Thomas's nomination hearings began.<sup>67</sup> Thomas was questioned vigorously regarding his views on natural law, abortion, the death penalty, victims' rights, and other controversial issues.<sup>68</sup> On September 11, Thomas's hearing contin-

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51. *Id.* at 189.

52. See PEYTON THOMAS, *supra* note 7, at 202.

53. *Id.* at 210.

54. *Id.* at 211.

55. *Id.* at 313.

56. *Id.* at 319.

57. See PEYTON THOMAS, *supra* note 7, at 319.

58. *Id.* at 325.

59. *Id.* at 328.

60. FOSKETT, *supra* note 31, at 210.

61. PEYTON THOMAS, *supra* note 7, at 345.

62. *Id.* at 347.

63. *Id.* at 358.

64. *Id.* at 362.

65. *Id.* at 365.

66. *Id.* at 366.

67. FOSKETT, *supra* note 31, at 225-26.

68. *Id.* at 227-28.

ued with more questions regarding Thomas’s position on abortion.<sup>69</sup> Anita Hill contacted the Judiciary Committee regarding her allegations and requested that she be able to anonymously offer her allegations.<sup>70</sup> This request for anonymity was denied, but Hill was urged to go forward with the allegations anyway.<sup>71</sup> On September 19, the confirmation hearings came to a close.<sup>72</sup>

That same day, Hill contacted the Judiciary Committee and informed it “that she was willing to relinquish her demand for anonymity.”<sup>73</sup> Hill’s allegations were then reported to the FBI.<sup>74</sup> Hill typed a factual summary of her allegations and faxed the document to the Judiciary Committee. That same day the FBI interviewed Hill and the following Wednesday, September 25, two agents interviewed Thomas.<sup>75</sup>

Both parties agreed to a delay in the confirmation vote and hearings until hearings on the allegations were scheduled.<sup>76</sup> The sexual harassment claims and the attendant hearing created a firestorm of media attention and a national frenzy.<sup>77</sup> Following Hill’s half day of testimony, Thomas, in his opening statements to the committee compared what he was going through to “a high-tech lynching.”<sup>78</sup> Thomas was confirmed by “the narrowest margin of victory for a Supreme Court nominee in the twentieth century”—a vote of 52-48.<sup>79</sup>

#### IV. EVOLUTION OF THOMAS’S JURISPRUDENCE

Thomas’s “conversion” from college radical to leading conservative jurist likely emerged from seeds planted when he was young. As a child, Thomas enjoyed reading and began to be influenced by black writers, specifically Richard Wright, the author of *Native Son* and *Black Boy*.<sup>80</sup>

Following his time at Holy Cross, where Thomas claims he was influenced by the Black Panthers and Malcolm X, he entered Yale Law School,

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69. PEYTON THOMAS, *supra* note 7, at 376.

70. *Id.* at 377.

71. *Id.* at 377.

72. *Id.* at 377–78.

73. *Id.* at 378.

74. *Id.* at 378–79.

75. PEYTON THOMAS, *supra* note 7, at 380.

76. *Id.* at 394.

77. See JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 1–2 (1994) [hereinafter MAYER & ABRAMSON, STRANGE JUSTICE] (“Remarkably, given the legendary role she had assumed in the national consciousness, Hill testified for only part of one day—October 11, 1991.”).

78. *Id.* at 428.

79. *Id.* at 452; see also FOSKETT, *supra* note 31, at 3. Foskett notes that:

Thomas’s confirmation, made famous by Anita Hill’s allegations of sexual harassment, was the most racially and sexually charged Supreme Court drama in American history. The 52 to 48 vote remains the closest confirmation victory ever. He is the last conservative named to the Court and will likely remain its only black member because of mounting pressure to diversify the bench with Americans of Hispanic or Asian descent.

*Id.*

80. See PEYTON THOMAS, *supra* note 7, at 92.

and he began cutting his ties with the left.<sup>81</sup> Thomas began to feel the effects of Yale's affirmative action program and he perceived an implied inferiority.<sup>82</sup> White students at Yale Law School told Thomas that he was admitted based on racial quotas; he was interrogated and challenged about his accomplishments.<sup>83</sup> Thomas did not like the "stigma" that seemed to accompany Yale's affirmative action program.<sup>84</sup> Further, Thomas always rejected the notion that "but for affirmative action he would not have been admitted to Yale Law School."<sup>85</sup> Thomas began to turn from his left-leaning ideas toward the right and to the more self-help ideas of Booker T. Washington, and his own grandfather, Myers Anderson.<sup>86</sup> According to Thomas, "I never gave up my grandfather's ideals and when my left-wing opinions began to clash with those ideals, I began to move away from the left."<sup>87</sup>

While working for John Danforth, a friend told Thomas about the book *Race and Economics*, by Thomas Sowell, an African American economist.<sup>88</sup> This "book would become one of the intellectual cornerstones of Thomas's philosophy."<sup>89</sup> Sowell began *Race and Economics* by arguing, "Race makes a difference, in economic transactions as in other areas of life. There has been a tendency to pass over this unpleasant fact, or else to deal with it in purely moral terms."<sup>90</sup> Sowell wrote that blacks in the South were denied opportunities to develop their own abilities.<sup>91</sup> Sowell stressed "less government and more self-reliance by its citizens"—a view that Thomas heartily embraced.<sup>92</sup>

Thomas's views, as the years passed, became more and more conservative.<sup>93</sup> He disagreed, for example, with the traditional civil rights agenda of busing and affirmative action.<sup>94</sup> Thomas condemned busing, stating that "it sent the wrong message to young blacks—that they had to sit next to whites in class in order to learn."<sup>95</sup>

Later in Thomas's career, while he was at the EEOC, Ken Masugi became his special assistant.<sup>96</sup> Masugi was a former student of political theorist Harry V. Jaffa, and became a "scholar in residence" as well as a general philosophical tutor to Thomas.<sup>97</sup> Thomas read literature provided by Ma-

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81. *Id.* at 140.

82. *See id.*

83. *Id.* at 141.

84. *Id.* at 141.

85. PEYTON THOMAS, *supra* note 7, at 142.

86. *Id.* at 143.

87. *Id.* at 146.

88. *See id.* at 162.

89. PEYTON THOMAS, *supra* note 7, at 162.

90. *Id.*

91. *Id.*

92. *Id.* at 164.

93. *See* PEYTON THOMAS, *supra* note 7, at 164.

94. *Id.* at 165.

95. *Id.* at 165.

96. *Id.* at 287.

97. *See* SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 43–44 (1999). Masugi, writing about Clarence Thomas and the evolution of his political philosophy, noted:

Although he regarded some conservatives (as well as some liberals) as racist, he saw their political and economic programs as ultimately to the advantage of

sugi. The notions gleaned from those readings later “became the building blocks of his personal philosophy.”<sup>98</sup> That personal philosophy has evolved into Thomas’s current jurisprudential philosophy.

## V. ORIGINALISM, NATURAL LAW, AND NATURAL RIGHTS

The widely accepted view is that, as a Supreme Court Justice, Clarence Thomas has adopted an originalist judicial philosophy as interpreted against the backdrop of his natural rights perspective.<sup>99</sup> Like the stalwart conservative justices that he votes with in near lock step, William Rehnquist and Antonin Scalia,<sup>100</sup> Thomas adheres to a philosophy of originalism.<sup>101</sup>

### A. Originalism

Originalism embodies the view that “judges deciding constitutional issues should confine themselves to enforcing norms that are stated or

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Black Americans in particular. He wanted a positive, principled civil rights policy that was also consistent with a political and social agenda that respected individual liberty. He sought a political philosophy that would reflect the man who altered and formed his life—his grandfather. Although focused on race, he was not overwhelmed by it.

Ken Masugi, *Natural Rights and Oversight: The Use and Abuse of “Natural Law” in the Clarence Thomas Hearings*, POLITICAL COMM. & PERSUASION 9, Oct.–Dec. 1992, at 232–33.

98. See PEYTON THOMAS, *supra* note 7, at 291.

99. See GERBER, *supra* note 97, at 36–65. Gerber summarized Thomas’s judicial philosophy, at least in part, as follows:

Indeed, when all is said and done, Thomas’s interest in natural law was shown during the [confirmation] hearings to stem from a belief that the United States of America was founded to secure individual rights and that public policy should be made, and assessed, with this in mind. This also was Thomas’s position before he was nominated to the Supreme Court, and it continues to be the position he articulates in his speeches and articles since joining the Court. Certainly, several eminent historians have worked long and hard in recent decades to prove that the American regime was founded to cultivate civic virtue (at the expense of individual rights, if need be), but the American people remain convinced that the primary purpose of government is to protect individual rights.

*Id.* at 64 (citations omitted); see also Calmore, *supra* note 12, at 195–96. Calmore suggests that Thomas has adopted originalism in part because in assuming that philosophy he is able to find support in Antonin Scalia’s “psychological and jurisprudential security blanket.” *Id.* at 195. Calmore opines:

Generally, Scalia’s opinions “evinced the consistent confidence and self-righteousness of a ‘prophet’ who possesses a clear, fixed vision of how cases should be decided.” His [Scalia’s] “confident style and relatively consistent voting record appear to make him one of the justices least likely to have doubts about his initial views on an issue or change his mind on an issue.” Thus, for instance, Christopher Smith concludes that Scalia’s strong, visible advocacy of originalism, has provided Thomas with a judicial philosophy to support his conclusion that prisoners have very little actual protection under the Eighth Amendment.

*Id.* at 195–96 (citations omitted).

100. See GERBER, *supra* note 97, at 209.

101. See *id.* at 36–65.

clearly implicit in the written Constitution.<sup>102</sup> Originalists attempt to interpret the Constitution as closely as possible to the textual meaning of the language of the document as intended by the Framers of the Constitution.<sup>103</sup> “Originalists believe that the Court should find a right to exist in the Constitution only if it is expressly stated in the text or was clearly intended by its Framers.”<sup>104</sup> To Thomas, Rehnquist, and Scalia, there is a clear and manifest reading of the law and a particular interpretation of the Constitution. They feel it is their responsibility to interpret the Constitution as the Framers would.<sup>105</sup> While there are clear problems associated with an originalist interpretation of the Constitution,<sup>106</sup> Thomas faithfully follows this judicial philosophy, as informed by his views on natural law.<sup>107</sup>

Originalism, particularly the originalism practiced by Thomas, Rehnquist, and Scalia, requires that the interpreting judge determine, devoid of passion or life experience,<sup>108</sup> the intention and vision of the Framers of the Constitution at the time those Founding Fathers scripted that storied document.<sup>109</sup>

As discussed at some length below, while there are dangers and treacheries inherent in the originalist philosophy,<sup>110</sup> Thomas, Rehnquist, and Scalia are able to rationalize their originalism despite the inconsistency that seems attendant to those who adjudicate from that judicial perspective.<sup>111</sup> While the originalist judicial philosophy requires that the interpreting judge divorce herself or himself from life experience, passion, and background,<sup>112</sup> and look starkly at constitutional language in order to determine textual meaning and the intent of the Framers, it is clear that the Supreme Court’s leading originalists do not, in fact, divorce themselves

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102. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 17 (2002) (Chemerinsky, chronicling in his classic constitutional law treatise, the historical roots of originalism) (citing JOHN HART ELY, DEMOCRACY AND DISTRUST (1980)).

103. *See id.*

104. *Id.*

105. *See id.* at 17–19.

106. *See infra* Part V.B.

107. *See GERBER, supra* note 97, at n.47 (arguing that Thomas, throughout his Supreme Court tenure has shifted in his judicial opinions between “liberal originalism” and “conservative originalism.”) *Id.* Gerber maintains that:

[Thomas] has alternated between what I have elsewhere called “liberal originalism” and conservative originalism in the opinions he has written on the Court. “Liberal originalism” maintains that the Constitution should be interpreted in light of the political philosophy of the Declaration of Independence. “Conservative originalism,” in contrast maintains that the Constitution should be interpreted as the Framers themselves would have interpreted it.

*Id.*; *see also infra* Part V.A. To use Gerber’s definitions then, Thomas would adhere more often to “liberal originalism” while presumably Scalia and Rehnquist would adhere more often to “conservative originalism,” although the three criss-cross those lines regularly. Still, all three remain the most ardent adherents to the originalist philosophy on the Rehnquist Court. *See generally infra* Part V.A.

108. *See infra* note 424 and accompanying text.

109. *See supra* notes 100–107 and accompanying text.

110. *See infra* Part VII.

111. *See infra* note 113; *see also* Part VII.A–B.

112. *See infra* note 424 and accompanying text (citing a 1995 Thomas speech where Thomas claims that impartiality, particularly for him, is the ultimate hallmark of a good judge); *see also* Part VII.A.

from their life experience, passion, and background.<sup>113</sup> Therein lies the treachery—claiming dispassion and then adjudicating with emotion and agenda.<sup>114</sup>

In truth, despite Thomas protestations to the contrary, he is still steadfastly “criticized for his ideologically driven partisan jurisprudence that masquerades as judicial impartiality.”<sup>115</sup>

Those judges that interpret a “Living Constitution”<sup>116</sup> and give life and color to constitutional interpretation are called non-originalists.<sup>117</sup> Non-originalists believe that “courts should go beyond that set of references

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113. See Mary Kate Kearney, *Justice Thomas in Grutter v. Bollinger: Can Passion Play a Role in a Jurist’s Reasoning?*, 78 ST. JOHN’S L. REV. 15, 26–28 (2004). Professor Kearney observes that Thomas has been widely criticized based on his dissent in *Grutter* because he infused the opinion with “passion and a personal element.” *Id.* at 28. Kearney reports:

Justice Thomas’s dissent has received widespread attention and criticism. Commentators have questioned his opposition to affirmative action on different grounds. Many of those critics assume that he has been the beneficiary of affirmative action policies, and they are offended that he is opposing those very policies that they believe have led him to his current position on the Supreme Court. In their estimation, Justice Thomas does not have the moral authority to make the case against affirmative action because he “is himself one of the most notorious affirmative action hires in history.” . . .

Another observation about Justice Thomas’s opinion relates to its tone and rhetoric. Justice Thomas criticized the Law School’s affirmative action policies forcefully, and some of those criticisms appeared to be infused by personal experiences.

Justice Thomas is certainly not the first Justice to inject passion and a personal element into an opinion. In his famous lecture to honor Judge Cardozo, entitled Reason, Passion and “The Progress of the Law,” Justice William Brennan stated that the “internal dialogue of reason and passion . . . does not taint the judicial process, but is in fact central to its vitality.”

*Id.* at 26–28 (quoting Sheryl McCarthy, *How Dare Justice Thomas Dissent on This One*, NEWSDAY (New York), June 26, 2003, at A40, wherein McCarthy claims that affirmative action was the single reason that Justice Thomas was appointed to the Supreme Court because his credentials were meager and his preceding years as a bureaucrat and federal judge were also unremarkable). While Kearney acknowledges the criticism and notes that Thomas “inject[s]” passion and personal experience into his opinion, she defends Thomas by noting that many other Supreme Court Judges have also injected passion and life experience into their appellate opinions. *Id.* at 28. Kearney fails to note, however, that Justice Brennan had been a leading nonoriginalist on the Supreme Court and that Thomas, as a staunch originalist is departing, in a significant way, from his adopted judicial philosophy by interjecting passion, emotion and life experience. See *infra* Part VII.A. This departure represents a fatal inconsistency in Thomas and his core originalist/natural law philosophy. See *id.*

Further, Rehnquist has recently written with “heartfelt sensitivity” about the burdens that women face in the workplace in a recent case involving the Family Medical Leave Act. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 735–38 (2003); see also Linda Greenhouse, *Evolving Opinions: Heartfelt Words by the Rehnquist Court*, N.Y. TIMES, July 6, 2003, at 3.

114. See *infra* Part VII.A.

115. Calmore, *supra* note 12, at 180.

116. See *infra* note 414 (citing Thurgood Marshall’s speech and law review article entitled “We the People: A Celebration of the Bicentennial of the United States Constitution: The Constitution: A Living Document”).

117. See CHEMERINSKY, *supra* note 102, at 17–24.

and enforce norms that cannot be discovered within the four corners of the document."<sup>118</sup> Further, non-originalists "think that it is permissible for the Court to interpret the Constitution to protect rights that are not expressly stated or clearly intended"<sup>119</sup> by the Framers. "Non-originalists believe that the Constitution's meaning is not limited to what the Framers intended; rather, the meaning and application of constitutional provisions should evolve by interpretation."<sup>120</sup> This philosophy is informed through the idea that the Framers could not possibly have conceptualized the modern issues faced by the U.S. Courts in the twenty-first century, nor are historical materials available to support authoritative "intent" conclusions.<sup>121</sup> Supreme Court Justice Robert Jackson once opined: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."<sup>122</sup>

Thus, originalists like Thomas reject the approach of non-originalists and seek to "divine [the Framer's intent] from materials almost as enigmatic as the dreams Joseph . . . interpret[ed] for Pharaoh."<sup>123</sup>

### B. *Natural Law*

Thomas's natural law philosophy informs his originalist interpretation of the U.S. Constitution. That natural law, or more frequently, natural rights, has become a framework against which Thomas interprets most constitutional issues is now fairly well settled.<sup>124</sup> However, providing a brief and coherent explanation of natural law is a difficult task.<sup>125</sup> One view is that at its most basic form, natural rights can be defined, as John Locke and the U.S. Founding Fathers likely meant it, as those rights men (and now women) are endowed with by virtue of existence as a human

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118. *Id.* at 17.

119. *Id.*

120. *Id.* at 18.

121. *Id.* at 24.

122. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

123. *Id.*; see also *supra* notes 120–122 and accompanying text.

124. See GERBER, *supra* note 97, at 43–65 (detailing the influence of natural law principles on Thomas's Supreme Court jurisprudence).

125. See John S. Baker, Jr., *A Tribute to Justice Clarence Thomas: Natural Law and Justice Thomas*, 12 REGENT U. L. REV. 471 (2000):

Mention of the term "natural law" can create confusion and concern, as was evident in the early stages of the United States Senate's confirmation proceedings for Supreme Court Justice Clarence Thomas in 1991 . . . . [T]he anxious questions asked by the Senators about natural law and [Thomas's] disavowal that natural law would have any role in his decision of actual cases evidence a pervasive lack of understanding or acceptance of natural law.

*Id.* at 471–72; see also GERBER, *supra* note 97, at 36–37 ("Defining natural law is no easy task however, because it has meant, and continues to mean, different things to different people."); Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2395 (1992) ("For the purposes of this article, I shall not attempt a precise definition of natural law but shall only try to show how some misunderstandings about the theory may themselves result from various implicit assumptions about what a natural law theory must be.").

being.<sup>126</sup> Evidence that the Founding Fathers subscribed to some form of natural law can be found in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>127</sup>

Natural law has yawning roots reaching back to Plato and Aristotle and passing historically through Cicero and St. Thomas Aquinas, as well as informing modern Western philosophers Sir John Fortescue and John Locke.<sup>128</sup> Classical and medieval consideration of natural law focused on reason, moral law, and the common good; later, natural law dialogue, as that engaged in by Locke, Hobbes, and Rousseau, focused on the view of law as will.<sup>129</sup>

Thomas’s adopted judicial philosophy includes his natural law (most frequently expressed as natural rights) ideology and originalist stance, causing him to read and interpret the U.S. Constitution in light of the political philosophy of the Declaration of Independence.<sup>130</sup> Thomas himself, prior to his elevation to the Supreme Court, stated in a law review article that a “‘plain reading’ of the Constitution . . . puts the fitly spoken words of the Declaration of Independence in the center of the frame formed by the Constitution.”<sup>131</sup> Thus, Thomas interprets Constitutional questions, by taking into consideration the pronouncements of the Declaration of Independence, under the influence of the natural law rights embodied in that document.<sup>132</sup>

During his Senate confirmation hearings, Thomas tried to distance himself from characterizations that he would not follow long established Supreme Court precedent, *stare decisis*, but would try to re-interpret long recognized constitutional law in light of his natural law and originalist views.<sup>133</sup> Thomas promised that he would not ignore precedent; that he

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126. See GERBER, *supra* note 97, at 37 (referencing LEO STRAUSS, NATURAL RIGHT AND HISTORY (1953)).

127. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

128. See Baker, *supra* note 125, at 476–77; see also GERBER, *supra* note 97, at 37–38. Gerber writes that “[f]or Plato . . . natural law concerned man’s place in the proper order of the universe. For St. Thomas Aquinas, it represented nothing more—nor less—than God’s will.” *Id.* at 37.

129. See Baker, *supra* note 125, at 477.

130. See GERBER, *supra* note 97, at 37 (“Thomas attempted, successfully, to distance himself from his previously articulated theory that the Constitution should be read in light of the political philosophy of the Declaration of Independence.”). *Id.* at 38.

131. Clarence Thomas, *Toward a “Plain Reading” of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 691, 703 (1987).

132. See GERBER, *supra* note 97, at 43–65 (analyzing Thomas’s natural law views in lights of various constitutional issues that have come before the Supreme Court).

133. See GERBER, *supra* note 97, at 42. During a confirmation hearing, answering questions in connection with natural law and whether he would radically interpret the Constitution in light of his adherence thereto, Thomas responded:

But recognizing that natural rights is a philosophical, historical context of the Constitution is not to say that I have abandoned the methodology of constitutional interpretation used by the Supreme Court. *In applying the Constitution, I think I would have to resort to the approaches that the Supreme Court has used. I would have to look at the texture of the Constitution, the structure. I would have to look at the prior Supreme Court precedents.*

would adhere to *stare decisis*—yet he has broken that promise as he ignores precedent, and continues to do so.<sup>134</sup>

Indeed, Scalia, “whom critics have suggested is Thomas’ ideological guide on the high court” has stated that Thomas “doesn’t believe in *stare decisis*, period.”<sup>135</sup> Scalia stated that Thomas personally believes that “[i]f a constitutional line of authority is wrong, he would say let’s get it right. . . . I wouldn’t do that.”<sup>136</sup> Thomas, in fact, often refuses to respect *stare decisis* in his judicial opinions.<sup>137</sup> From a fundamental place, Thomas refuses to honor his confirmation pledge of interpreting the Constitution in light of the “approaches the Supreme Court has used” historically and in “looking at the prior Supreme Court precedents.”<sup>138</sup> Many academics argue that this Thomas position, as with his originalist interpretation adoption, stands as judicial hypocrisy.<sup>139</sup>

Thomas’s adoption of “liberal originalism”<sup>140</sup> may appear innocuous at first blush. Indeed, his mantra that the Constitution be interpreted in a “color blind” fashion,<sup>141</sup> and that the Constitution protects every individ-

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*Id.* (emphasis added).

134. See Baker, *supra* note 125, at 504–05. (Baker allows that “traditional natural law thinking is evident in Justice Thomas’s reasoning.” *Id.* at 504–05).

135. Jonathan Ringel, *The Bombshell in the Clarence Thomas Biography*, LAW.COM, available at <http://www.law.com/jsp/article.jsp?id=1090180289132> (last visited Apr. 25, 2005).

136. *Id.* Ringel reports that in Ken Foskett’s biography “Judging Thomas” a “bombshell is buried deep” within its pages:

*Thomas, says Scalia, “doesn’t believe in stare decisis, period . . . .”* Scalia’s remark—that his fellow justice does not believe in the key principle of our society’s rule of law—deserves more attention.

*Id.* (emphasis added).

137. One example of Thomas’s refusal to adhere to *stare decisis* (and also supporting Scalia’s contention that Thomas does not believe in *stare decisis* at all), can be found in Thomas’s concurring opinion in *Holder v. Hall*, 512 U.S. 874 (1994):

In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day. The disastrous implications of the policies we have adopted under the Act are too grave; the dissembling in our approach to the Act too damaging to the credibility of the Federal Judiciary . . . . I cannot subscribe to the view that in our decisions under the Voting Rights Act it is more important that we have a settled rule than that we have the right rule.

*Id.* at 944–45.

138. Baker, *supra* note 125, at 497.

139. See MARCOSSON, *supra* note 15, at 5 (“It is not simply that Justice Thomas is a hypocrite; something much more important is at work here. Much as Justice Thomas may be devoted to recognizing only what the founders saw, that devotion is swept away by something he *hears* when it come to the Fourteenth Amendment: the voice of Clarence Thomas, relating the awful significance of the originalist answer to the questions raised in cases of race and equality.”).

140. See *supra* note 107.

141. See Clarence Thomas, *Colorblindness*, WALL ST. J., Feb. 20, 1987, at 21:

I firmly insist that the Constitution be interpreted in a colorblind fashion. It is futile to talk of a colorblind society unless this constitutional principle is first established. Hence, I emphasize black self-help, as opposed to racial quotas and other race-conscious legal devices that only further and deepen the original problem.

*Id.*

ual’s rights equally, regardless of skin color,<sup>142</sup> appears laudable,<sup>143</sup> even impressive. However, watching Thomas apply these impressive ideals to real life cases shows clearly the havoc that such application wreaks on constitutional issues of race and prisoner’s rights. In connection with race issues that come before the Supreme Court, specifically racial discrimination, Thomas is on record as follows:

[I]t is an error to focus on groups rather than individuals, “for it is above all the protection of individual rights that America, in its best moments, has in its heart and mind.” And it is because of this “error” in constitutional politics . . . that “civil rights [has] become entrenched as an interest-group issue rather than an issue of principle and universal significance for all individuals.”<sup>144</sup>

Thus, Thomas’s civil rights philosophy centers on the individual right rather than on a group concern.<sup>145</sup> This individual versus group philosophy has

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142. See Clarence Thomas, *No Room at the Inn: The Loneliness of the Black Conservative*, POLICY REVIEW, Fall 1991, at 72–78.

143. See Judge Pasco M. Bowman II, *A Tribute to Clarence Thomas: Justice Clarence Thomas: A Brief Tribute*, 12 REGENT U. L. REV. 329 (2000):

Integrity, warmth, gentleness, charisma, unwavering adherence to principle, and a disarming smile—these qualities epitomize Clarence Thomas, just as they characterize Ronald Reagan. The similarities between the two men do not end there. Both Reagan and Thomas are the product of small towns. Both grew up in less than affluent circumstances. Both understand the importance of family and community. The President and the Associate Justice share strong religious beliefs and an optimistic view of life, knowing that the key to overcoming social ills, as well as to individual achievement, lies in self-discipline, personally responsibility, and hard work. Both men recognize that the great promise of America is to foster liberty, to eliminate all artificial barriers and unnecessary restraints so that the constructive energies of every person may be set free.

*Id.*; see also Stephen F. Smith, *The Truth About Clarence Thomas and the Need for New Black Leadership*, 12 REGENT U. L. REV. 513, 514 (2000):

As any impartial review of his record reveals, Justice Thomas is an influential justice of great ability who, by his cogent writings and consistent vision of the Constitution, has carved out an important place for himself on the Court and in American history. The Justice, therefore, should be a source of great pride to black Americans and also a source of hope that the failed policies of the past will be replaced by a future in which black Americans, freed from the restraints of victimology and poverty, will be able to realize their full potential in America.

*Id.*; Nancie G. Marzulla, *Symposia: Clarence Thomas after Ten Years: The Textualism of Clarence Thomas: Anchoring The Supreme Court’s Property Rights Jurisprudence to The Constitution*, 10 AM. U. J. GENDER SOC. POL’Y & L. 351, 351–52 (2002):

Justice Clarence Thomas has played an essential role in the Supreme Court’s willingness to enforce the plain text of the Constitution, which has, in turn, directly led to the reinvigoration of property rights protection over the last decade. Since his appointment to the Supreme Court in 1991, Justice Thomas’ judicial fidelity to textualism has served, like a lighthouse on the shore, as a powerful beacon to the Rehnquist Court, constantly returning it safely to the original intent of the Framers.

*Id.*

144. Clarence Thomas, *Civil Rights as a Principle versus Civil Rights as an Interest*, in *ASSESSING THE REAGAN YEARS* 391, 393 (David Boaz ed., 1988).

145. See GERBER, *supra* note 97, at 51.

proven instrumental in Thomas's Supreme Court votes against affirmative action, against voting rights, against electoral districting, and against prisoner's rights.<sup>146</sup>

Thomas's fixation on individual rights versus group concern has the groups most impacted (and injured) by his decisions and votes screaming: What is to be done about 225 years of racism, oppression, and continued racial discord and discrimination? What efforts are being made to level the playing field, so that the protection of individual rights is truly meaningful? What attempts are being made to repair or devise reparations for state and government sponsored discrimination and racism? What efforts are being made toward repairing broken inner cities?<sup>147</sup> How does a nation repair and ameliorate, without considering groups and the injustice visited upon an entire race?

*On the Chicago west side, one evening, when homework mentoring eventually turned into hoops and the drop-off time was much later than usual, I walked three teenagers to their row home. We walked up the stairs and opened the front door. What I saw shocked me. Having grown up in Los Angeles, specifically Carson and Long Beach, I had seen poverty, and ghetto living—so I am not easily shocked, yet what I saw I had never seen before. At around midnight, there were over twenty people lying around the dining room and living room floors, asleep for the night. Most were sleeping on the hardwood floor, covered by thin blankets. A few of the older women slept on the worn couch and love seat. The three teenage boys gingerly, but routinely, stepped over the maze of sleeping bodies, heading to a room where presumably they kept sleeping clothes. I recognized several of the individuals sleeping, but I had always assumed when I saw them over at this Monticello Avenue home that they all lived somewhere else. It occurred to me that Tim, Tamar and Yo-Yo would soon be joining their family members and friends on the hardwood floor.*

*Later while at work at Kirkland & Ellis, I was attending to a securities offering when my pager began vibrating repeatedly. For work purposes I carried a pager on me with an (800) number and voice mail for ease of clients, family or friends reaching me. I dialed the number to retrieve my voice mail message and heard this: "dré, it's me Ill Will. Listen, I am at the police station. I got scooped up with about 10 or 11 other guys, and they are holding us all here and won't tell us what is going on. Please come get me out of here." I looked at the time and saw that it was late afternoon, around 4:30 P.M. I knew the location of the police station in Will's neighborhood. So I headed over as soon as I could get away.*

*Once at the police station, I identified myself to the desk officer as an attorney and told the officer that I needed to speak with someone about a minor male that they had in custody and repeated Will's name. Literally sneering, the desk officer told me that I would have to wait for the arresting officer who was still dealing with the boys he had picked up. And wait I did. Close to an hour later, the white arresting police officer approached the white desk officer, who pointed at me, and then the arresting officer walked up to the desk. "Can I help you?" I approached and stated that I was an attorney and that I was here to pick up Will, and that I needed to know what he was being charged with. Now, I am no criminal lawyer,*

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146. See *id.*

147. See *infra* Part VII.D.1–5.

so I was a bit out of my element here. The arresting officer, clearly disdainful of me as an attorney, told me “we are processing him. Until he is processed, he will not be released, nor will we indicate to you, or anyone, what we are holding him for.” I asked how long it would take to process Will. “Could be up to twenty-four hours.” I was stunned. Completely unsure as to what I could demand or could not, I left the police station. I did not hear from Will until the next day. The Chicago Police Department held him overnight. The “processing” took more than nineteen hours and when he was released, Will was told nothing other than, “you can go now.” When I asked what had happened, Will told me that he had been walking down the street with AB, and that they were talking about thirty feet away from a group of boys that were shooting dice. Two police cars screeched up, and grabbed up all of the boys shooting dice and then grabbed up Will and AB, presumably for being “in the vicinity” of the gambling youth.

I eventually figured out that this common inner city police tactic involves the police swooping in and grabbing up several young people at a time, dragging them into the police station, and then identifying each kid by checking for outstanding arrest warrants. Clearly, the officers hoped to get lucky and scoop up a kid that had an outstanding warrant. Will had no outstanding arrest warrants, so nineteen hours after being snatched up he was released. However, the grabbing up of the ghetto youth was not fruitless for these arresting officers, since, as Will later related, at least two of the boys shooting dice were not released because they had violated warrants. The constitutional violations that occurred herein are obvious. And, again, I was appalled at this common inner city police practice. I had already challenged the CPD previously, and I just did not have the energy, nor the time, to write yet another letter, and go through yet another investigation.<sup>148</sup>

The narratives above make clear that racial discrimination still characterizes the lives of far too many people of color in the U.S. Leading African American academics argue that the adoption of “liberal originalism” by Thomas injures people of color and perpetuates the societal injustices suffered by minority citizens of this country.<sup>149</sup> And for these views and judicial opinions informed thereby, Thomas has been brutalized.

### C. Excoriation of Thomas and His Adopted Judicial Philosophy

Clarence Thomas, perhaps in understatement, has been excoriated from the time he was nominated by President George H. W. Bush to replace the retiring Thurgood Marshall to the present day. Thomas has borne the brunt of vicious personal attacks, incisive jurisprudential attacks, and media attacks<sup>150</sup> rarely before witnessed by a Justice of the U.S. Supreme

148. See Appendices A and B.

149. See *supra* Part V.A; see also *infra* Part V.C. Thomas often casts the fifth and deciding Supreme Court vote on race cases that effectively curtail and peel back gains and advances made by African Americans since the Civil Rights Movement in the 1960s. See generally *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Holder v. Hall*, 512 U.S. 874 (1994); *Shaw v. Reno*, 590 U.S. 630 (1993).

150. See Courtland Milloy, *Twisting Words In an Effort to Rewrite History*, WASH. POST, June 29, 2003, at C01. Milloy reports, on the heels of the *Grutter* decision, that:

Efforts by right-wingers to hijack the legacy of Martin Luther King Jr. are bad enough. By conveniently forgetting every word King ever said except “color-

Court.<sup>151</sup> Some of the strongest venom directed at Thomas has come from African American academics who view Thomas as an individual working

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blind," they pretend not to see white privilege and accuse blacks of "reverse racism" for daring to point it out. Now here they go again. The words of Frederick Douglass, the great abolitionist who came to symbolize the necessity of activism and agitation in the quest for justice, are being emptied of all-empowering content and refilled with a watered-down mix of black self-help and fermented self-loathing by U.S. Supreme Court Justice Clarence Thomas. How low can those bootleggers go?

*Id.*; see also Maureen Dowd, *Could Thomas Be Right?*, N.Y. TIMES, June 25, 2003, at A25. Dowd, criticizing Thomas for his dissenting opinion in *Grutter* writes:

What a cunning man Clarence Thomas is. He knew that he could not make a powerful legal argument against racial preferences, given the fact that he got into Yale Law School and got picked for the Supreme Court thanks to his race. So he made a powerful psychological arguments against what the British call "positive discrimination," known here as affirmative action. Justice Thomas's dissent in the 5-4 decision preserving affirmative action in university admissions has persuaded me that affirmative action is not the way to go. The dissent is a clinical study of a man who has been driven barking mad by the beneficial treatment he has received. It's poignant, really. It makes him crazy that people think he is where he is because of his race, but he is where he is because of his race. Other justices rely on clerks and legal footnotes to help with their opinions; Justice Thomas relies on his id, turning his opinion on race into a therapeutic outburst.

*Id.* Further attacks on Thomas by the media include charges that he "mugs" or "high-jacks" the quotes of famed and esteemed African American leaders by taking comments made by these historical figures shamelessly out of context. See Derrick Z. Jackson, *Mugging Frederick Douglass*, BOSTON GLOBE, July 4, 2003, at A15:

In his drive-by shootings of black progress, Clarence Thomas speeds away, spitting at his victims and spewing quotations that stun the onlookers as much as the original attack. No other thug commits black-on-black crime in the name of Frederick Douglass. Last year, Thomas, the Supreme Court justice, voted to uphold the Cleveland school voucher program, even though predominately white suburban systems refused to take them and the \$2,250 voucher barely covered one class at wealthy, predominately white private schools. Despite that, Thomas quoted Douglass, the slavery abolitionist, as saying, "Education . . . means emancipation."

*Id.*

151. To be sure, one can look at the extent to which other U.S. Supreme Court justices have been harshly criticized. See John W. Finney, *The Mood Is Ugly, The Target Is Douglas*, N.Y. TIMES, Apr. 19, 1970, at 166:

Last week, Gerald R. Ford, the Republican leader of the House, set off a new cry of indignation against the Supreme Court: "Impeach William O. Douglas." It must have sounded a little repetitious to the 71-year-old Justice Douglas, who has been annoying the more conservative members of Congress by his liberal judicial views and his unorthodox personal life ever since he was appointed to the Supreme Court in 1939.

*Id.* at 166; Marjorie Hunter, *Critics of Douglas Call Inquiry a "Whitewash" and "Travesty"*, N.Y. TIMES, Aug. 4, 1970, at 23 ("Among the prime movers for an impeachment study was the House Republican leader Gerald R. Ford of Michigan, who accused Justice Douglas of espousing 'hippie-yippie style revolution,' of writing for pornographic magazines, of links to 'left-wing organizations' and of possible connections with gamblers and underworld figures."); *House Republicans Set Serious Bid to Impeach Top Court's Douglas*, WALL ST. J., Apr. 10, 1970, at 22 ("After months of talk about the possibility, a group of House Republicans is trying to organize a serious effort to impeach Supreme Court Justice Douglas."); Vermont Royster, *Thoughts on Our "Flawed"*

hard to roll back the victories earned by people of color through the civil rights movement of the 1960s. By in large, Thomas’s most vituperative detractors criticize him for his opinions and judgments that he makes in light of his originalist philosophy as influenced by his natural law adoptions.

When Clarence Thomas was invited to appear at the University of North Carolina School of Law in 2002 he came under intense academic criticism for his judicial philosophy and judicial opinion writing.<sup>152</sup> As chronicled in Professor John Calmore’s essay *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to the “Law School Five,”*<sup>153</sup> all five African American professors of the UNC School of Law faculty “boycotted” Thomas’s visit and refused to acknowledge Thomas during his appearance.<sup>154</sup>

In their own words, “The Law School Five” or the “Five Petulant Profs” (as they were dubbed by local media)<sup>155</sup> refused participation in, or acknowledgment of, Thomas’s visit as stated below:

On Wednesday, March 6, 2002, Clarence Thomas, Associate Justice of the Supreme Court of the United States, will visit the University of North Carolina School of Law. . . . And while many law students, faculty, staff, and alumni are expected to participate in the day’s events, we the Law School’s five African-American faculty members will not join them. Although it has been reported in the local press that the Law School is “delighted” to have Justice Thomas visit, we emphatically do not share that delight.

For many people who hold legitimate expectations for racial equality and social justice, Justice Thomas personifies the cruel irony of the fireboat burning and sinking. For some—certainly, for us—his visit adds insult to injury. . . .

Accordingly, Justice Thomas is not just another Supreme Court justice with whom we disagree. Rather, as a justice, he not only engages in acts that harm other African Americans like himself, but also gives aid, comfort, and racial legitimacy to acts and doctrines of others that harm African American unlike himself—that is, those who have not yet reaped the benefits of civil rights laws, including affirmative action, and who have not yet received the benefits of the white-conservative sponsorships that now empower him.<sup>156</sup>

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*Constitution*, WALL ST. J., May 21, 1987, at 28 (criticizing Justice Thurgood Marshall for saying that the “original Constitution of 1787” was “flawed” and that the “credit for its two centuries of endurance ‘does not belong to the creators’” but to the amending, changing, malleable American society). Still, with the possible exception of Justice William Douglas, it seems that the outright passion attached to the critical attacks on Clarence Thomas is unparalleled in U.S. history.

152. See Calmore, *supra* note 12, at Appendix.

153. See Calmore, *supra* note 12.

154. See *id.* at 181.

155. See *id.*

156. See Calmore, *supra* note 12, at 225–26 (emphasis added). At the conclusion of his “Airing Dirty Laundry” essay, Calmore included, as an appendix, the formal state-

Further underscoring their strong opposition to Thomas's visit, his jurisprudence, as well as his politics, the boycotting UNC professors continued:

Thus, since Justice Thomas's appointment to the Court, replacing Justice Thurgood Marshall, he has provided the critical fifth vote in a number of decisions that have set back the quest for racial equality and social justice in this country. While these five justices [Rehnquist, Scalia, O'Connor, Kennedy and Thomas] attempt to mask their entrenched partisanship, we know better than to see their expressions as mere judicial philosophy. They articulate a conservative politics that drives a conservative jurisprudence to obstruct the quest for long-delayed racial equality and the increasingly urgent need for broad-based social justice.

For these reasons, we want to be clear that we reject not only the jurisprudence of Clarence Thomas, but also the politics of Clarence Thomas. . . .

*While the political right does not need Justice Thomas to push its agenda against social justice and equality, it does need him to put a black face on that agenda. . . . For all its talk of colorblindness, the political right realizes that Justice Thomas will not be an effective icon of racial conservatism until African Americans ourselves accept and embrace him. We cannot.*<sup>157</sup>

The five boycotting professors touched off a local and regional firestorm that inspired debates in local media outlets, on the UNC School of Law campus, and across the nation.<sup>158</sup> Some of the criticism levied against "The Law School Five" was decidedly racist in underlying tone.<sup>159</sup>

Despite the criticism, five highly distinguished African American law professors refused to acknowledge Thomas as he visited the University of North Carolina. Not only did these "highly esteemed members of the le-

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ment made by "The Law School Five" given in explanation for their boycott of Thomas's visit to UNC School of Law. *See id.* at 225.

157. *See id.* at 226-27 (emphasis added) ("We will not participate in any institutional gesture that honors or endorses what Justice Thomas does. We cannot delight in such a day."). *See id.* at 186 (citing *Thomas Discounts Protests of UNC Visit*, HERALD-SUN (Durham, N.C.) Mar. 7, 2002, at A3).

158. *See id.* at 181-91. While the boycott touched off a media maelstrom, it has been clearly asserted that the intention of the five boycotting professors was not to publicly humiliate Thomas, nor was it to draw attention to themselves; rather the "Letter" from the "Law School Five" was to be an internal memo seeking to explain to faculty colleagues at UNC School of Law, just exactly why the five African American law professors could not join in the "celebration" of Thomas's visit to the Law School. Comments of Professor Al Loewy, University of North Carolina School of Law, SEALS Conference, Aug. 4, 2004 (comments given during feedback portion of "Work in Progress" presentation of this Article at the annual Southeastern Association of Law School Scholarship Conference).

159. *See Calmore, supra* note 12, at 186-89 ("[One editorial] cartoon, especially when read with the editorial that appeared next to it and characterized us as 'petulant,' represents an echo of language, customs, and habits that date from the Jim Crow era. It reminds one particularly of the era's themes of putting 'uppity blacks' in their place and addressing adults as children.").

gal profession and the law professoriate”<sup>160</sup> boycott Thomas’s visit, but they also wrote a strong academic letter censuring Thomas, his jurisprudence and his politics, and they also joined together with the UNC Black Law Student Association to discuss Thomas, and the path to social justice and equality that must be forged, in spite of the obstacles and roadblocks Thomas consistently presents.<sup>161</sup>

One of the local citizens that wrote to the editor of a local newspaper to support the five law professors, who had come under media fire for boycotting Thomas, stated in her letter:

[L]ike other newspapers, your paper has succumbed to pressures by owners and management to print views so wrapped in your own political dogma that readers are getting a warped view of reality. . . . [N]ext to Saddam Hussein, the worst legacy left behind for our country to bear by George Bush the senior was Justice Clarence Thomas. It took a search far and wide to find a replacement for Justice Thurgood Marshall with the same outward identity but such a small and bigoted desire to help the minorities of this country.<sup>162</sup>

Professor Michael DeHaven Newsom recently published an exhaustive critique of Clarence Thomas’s jurisprudence wherein he describes and details Thomas’s racial alienation from African Americans.<sup>163</sup> In a searching exploration of Thomas’s jurisprudence and judicial philosophy, Newsom seeks to rupture Thomas’s connection to, or relation with, any reasonable African American historical experience or shared familiarity.<sup>164</sup> Professor Newsom begins his excoriation by admitting that “[t]he nomination of Clarence Thomas as an Associate Justice of the United States Supreme Court unhinged many African-Americans, including this writer.”<sup>165</sup>

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160. *See id.* at 190–91 (quoting a letter to the editor written by the co-presidents of the Society of American Law Teachers).

161. *See Calmore, supra* note 12, at 212 (“On March 5th, the day before Justice Thomas’s visit, the Black Law Students Association sponsored a teach-in and the five black law professors spoke, along with Daniel Pollitt, one black among our faculty emeriti.”).

162. Montana Dedman, Letter to the Editor, *Bush’s Worst Legacy*, HERALD-SUN (Durham, N.C.), Mar. 8, 2002, at A16.

163. Michael DeHaven Newsom, *Clarence Thomas, Victim? Perhaps, and Victimizer? Yes—A Study in Social and Racial Alienation From African Americans*, 48 ST. LOUIS L.J. 327 (2004).

164. *See id.*

165. *Id.* at 327. Professor Newsom writes that:

Many simply had no idea what to make of a situation that involved the combustible mixture of gender, race, class, political duplicity, political ideology, and alleged sexual harassment, nor of the African-American man who sat at the center of the maelstrom. Valiant attempts, however, were made to sort out the issues raised by President Bush’s cynical decision to offer up Clarence Thomas as “the best person for [the] position” vacated by retirement of Thurgood Marshall. But sorting out and settling are two rather different things. *Clarence Thomas continues to be a thorn in the side of many African-Americans and the storm has not subsided.*

*Id.* (emphasis added).

D. *Rejection of Thomas by an Overwhelming African American Majority*

Clarence Thomas, “within significant segments of black America, has been written off.”<sup>166</sup> In truth, “African-American contempt for Justice Thomas can be exceptionally harsh.”<sup>167</sup> Thomas’s identity as a black man is repeatedly challenged by African American critics, and comparisons of Thomas to the literary character Uncle Tom are commonplace.<sup>168</sup> Further, Ebony Magazine has refused to list Clarence Thomas among its 100 most influential African Americans for the past six years,<sup>169</sup> while other critics call into question Thomas’s social affiliations and close friendships with prominent white conservative ideologues.<sup>170</sup> Professor Calmore muses, “I think whites generally have no idea of the intensity of black negative feelings toward Justice Thomas.”<sup>171</sup>

To wit, in a prime time televised *tour de force*, Reverend Al Sharpton severely criticized Clarence Thomas during the 2004 Democratic National Convention held in Boston, Massachusetts.<sup>172</sup> Sharpton asserted that Thomas was a miserable choice as a Supreme Court Justice, that Thomas had hurt African Americans repeatedly with his judicial decisions, and that President George W. Bush would appoint similar ideologues to the Supreme Court like Thomas if he were given four additional years as President.<sup>173</sup>

Further criticism of Thomas, while less daunting now than in the years directly following his confirmation, focuses on the allegations of sexual misconduct levied against him by Professor Anita Hill during Thomas’s Supreme Court confirmation process.<sup>174</sup> Still controversial, many believe that Thomas escaped the confirmation process and landed his seat on the U.S. High Court through misrepresentation and outright perjury while discrediting African American women in general and Anita Hill specifically.<sup>175</sup> Much has been written in connection with Thomas’s alleged sexual mis-

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166. See Calmore, *supra* note 12, at 180.

167. *Id.*

168. See Barry Saunders, *No Need to Protest Thomas*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 8, 2002, at B1 (describing Justice Thomas as a “Negrophobic, self-loathing blip” and advising readers to “pray that one day the dreaded Unca Thomas Reptilious will be extinct.”); see also George E. Curry & Trevor W. Coleman, *Uncle Thomas: Lawn Jockey of the Far Right*, EMERGE, Nov. 1996, at 38.

169. See Kevin Merida & Michael A. Fletcher, *Supreme Discomfort*, WASH. POST., Aug. 4, 2002, at W8, W11.

170. See MAYER & ABRAMSON, *supra* note 77, at 357 (“Thomas surprised even friends . . . by officiating at the wedding of Rush Limbaugh, which took place at Thomas’s home.”).

171. See Calmore, *supra* note 12, at 181.

172. CNN Live: *Democratic National Convention* (CNN television broadcast, July 28, 2004).

173. *Id.*

174. See GERBER, *supra* note 97, at 13 (“Clarence Thomas’s Supreme Court confirmation process was arguably the most dramatic and divisive ever conducted.”). Gerber describes in detail the academic fallout of the Anita Hill allegations by noting that more than fifteen books and over nineteen law review articles have been published, most of them “vitriolic” in their treatment of Thomas. *Id.* at 13–15.

175. See Erwin Chemerinsky, *October Tragedy*, 65 S. CAL. L. REV. 1497, 1498 (1992) (“[T]he tragedy of October 1991 was that a man was confirmed for the Supreme Court with quite dubious credentials, with extremely conservative views about crucial issues, and with, at minimum, a serious doubt that he committed perjury before a national audience.”); see also ANITA HILL, *SPEAKING TRUTH TO POWER* (1997); MAYER & ABRAMSON, *supra* note 77.

conduct, moral turpitude, and lack of fitness for a seat on the Supreme Court of the United States.<sup>176</sup>

Perhaps the harshest criticism of Thomas, his appointment to the Supreme Court, and his jurisprudence, was leveled by the late Federal Appeals Court Judge A. Leon Higginbotham.<sup>177</sup> In a widely read and stunning public introduction to both Thomas’s jurisprudence and the disdain in which he was held by black academics, Judge Higginbotham authored *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*.<sup>178</sup> Throughout his letter, Higginbotham reminded Thomas of the civil rights legacy created by Thomas’s predecessor on the Court, Thurgood Marshall, and directed Thomas to remember the struggle of African Americans to secure the right to vote, to assemble, and to be treated fairly.<sup>179</sup> Judge Higginbotham reminded Thomas that inequities and inequalities amongst the races continued, and that a voice of compassion and reality would be needed in the days ahead, particularly as Thomas took his seat on the Supreme Court.<sup>180</sup>

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176. See generally HILL, *supra* note 175; MAYER & ABRAMSON, *STRANGE JUSTICE*, *supra* note 77. In a brusque repudiation of Thomas and his elevation to the Supreme Court, Mayer and Abramson:

portrayed Thomas as an extremely ambitious man who was willing to ingratiate himself with the conservative establishment in order to one day obtain a seat on the Supreme Court. More importantly, they also portrayed him as a liar and a sexual harasser with a strong yen for pornography. The sources for the details of Thomas’s personal life were several witnesses who were not heard from at the confirmation hearings. These witnesses were apparently ready to testify that Thomas had sexually harassed them too.

GERBER, *supra* note 97, at 23–24 (referencing *STRANGE JUSTICE*).

177. See A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 PENN. L. REV. 1005 (1992) [hereinafter Higginbotham, *An Open Letter*]; see also A. Leon Higginbotham, Jr., *Justice Thomas in Retrospect*, 45 HASTINGS L.J. 1405 (1994) [hereinafter Higginbotham, *Thomas in Retrospect*].

178. See Higginbotham, *An Open Letter*, *supra* note 177.

179. See *id.* at 1007:

By elevating you to the Supreme Court, President Bush has suddenly vested in you the option to preserve or dilute the gains this country has made in the struggle for equality. This is a grave responsibility indeed. In order to discharge it you will need to recognize what James Baldwin called the “force of history” within you. You will need to recognize that both your public life and your private life reflect this country’s history in the area of racial discrimination and civil rights. And, while much has been said about your admirable determination to overcome terrible obstacles, it is also important to remember how you arrived where you are now, because you did not get there by yourself.

*Id.* (internal citations omitted). Judge Higginbotham prodded Thomas: “You, however, must try to remember that the fundamental problems of the disadvantaged, women, minorities, and the powerless have not all been solved simply because you have ‘moved on up’ from Pin Point, Georgia, to the Supreme Court.” *Id.* at 1026.

180. See *id.* at 1027–28:

You were born into injustice, tempered by the hard reality of what it means to be poor and black in America, and especially to be poor because you are black. You have found a door newly cracked open and you have escaped. I trust you shall not forget that many who preceded you and many who follow you have found, and will find, the door of equal opportunity slammed in their faces through no fault of their own. And I also know that time and the tides of history often call

Two years after publishing *An Open Letter*, Judge Higginbotham undertook to review the record of Thomas as a sitting Associate Justice on the High Court.<sup>181</sup> Judge Higginbotham's assessment of Thomas's performance was severe.<sup>182</sup> Higginbotham wrote that:

Justice Thomas's . . . views are for the 1990s at times the moral equivalent of the views of the shameful majorities in the nineteenth century Supreme Court cases of Plessy and Dred Scott. . . . I can think of only one Supreme Court Justice during this century who was worse than Justice Clarence Thomas—James McReynolds, a white supremacist who referred to Blacks as “niggers.”<sup>183</sup>

Higginbotham concluded that Thomas's first two years on the Court, and the jurisprudence that he produced during that time, was “immoral” and “shameful.”<sup>184</sup>

Judge A. Leon Higginbotham, widely viewed along with Judges Damon Keith, Joseph Hatchett, Harry Edwards, and Nathaniel Jones, as a rightful heir to the seat occupied for so many years by Justice Marshall,<sup>185</sup> was one of Thomas's most vociferous critics.<sup>186</sup> With a lifetime of civil rights leadership and social justice jurisprudence under his belt, Judge Higginbotham is a very credible critic.<sup>187</sup>

Thomas is viewed by many, indeed most African Americans, from the layperson to the professional to the academic, as a man, “a black man”

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out of men and women qualities that even they did not know lay within them. And so, with hope to balance my apprehensions, I wish you well as a thoughtful and worthy successor to Justice Marshall in the ever ongoing struggle to assure equal justice under law for all persons.

*Id.* Higginbotham continued by reminding Thomas of those that preceded him, by name, thereby making his Supreme Court appointment a possibility:

I have written to tell you that your life today, however, should be not far removed from the visions and struggles of Frederick Douglass, Sojourner Truth, Harriet Tubman, Charles Hamilton Houston, A. Philip Randolph, Mary McLeod Bethune, W. E. B. Dubois, Roy Wilkins, Whitney Young, Martin Luther King, Judge William Henry Hastie, Justices Thurgood Marshall, Earl Warren, and William Brennan, as well as the thousands of others who dedicated much of their lives to create the America that made your opportunities possible. I hope you have the strength of character to exemplify those values so that the sacrifice of all these men and women will not have been in vain.

*Id.* at 1026.

181. See Higginbotham, *Thomas in Retrospect*, *supra* note 177.

182. See *id.*

183. *Id.* at 1426.

184. See *id.* at 1427.

185. Judge Higginbotham (U.S. Court of Appeals for the Third Circuit), Judge Keith (U.S. Court of Appeals for the Seventh Circuit), Judge Hatchett (U.S. Court of Appeals for the Eleventh Circuit), Judge Edwards (U.S. Court of Appeals for the D.C. Circuit) and Judge Jones (U.S. Court of Appeals for the Sixth Circuit) all, in varying respects, held strongly to the civil rights legacy of Thurgood Marshall, and exercised, to varying degrees, a non-originalist judicial philosophy.

186. See Higginbotham, *Thomas in Retrospect*, *supra* note 177; see also Higginbotham, *An Open Letter*, *supra* note 177.

187. See Calmore, *supra* note 12, at 175 n.1.

who does harm to his race and perpetuates inequality and injustice.<sup>188</sup> Thomas himself, in defending his record and his jurisprudence, has proclaimed publicly, “I refuse to have my ideas assigned to me because I am black . . . I am a man, a black man, an American . . . and it pains me deeply, more deeply than any of you can imagine, to be perceived by so many members of my race as doing them harm.”<sup>189</sup> Despite this entreaty, delivered “defiantly,” his words fall on deaf ears, particularly within the African American community.<sup>190</sup>

I absolutely recognize that Thomas is the most written about, dogged, and covered Supreme Court Justice of any on this current Rehnquist court, and perhaps the most followed and/or excoriated justice ever.<sup>191</sup>

Nevertheless, I add my voice to those commentators, both journalists and academics, that have undertaken to evaluate and give meaning to Thomas and his jurisprudence.

## VI. THOMAS’S JURISPRUDENCE IN *GRUTTER V. BOLLINGER*

True to his originalist/natural law philosophy, at least in some respects, in his *Grutter* dissent, Thomas characterized the affirmative action issue as whether the University of Michigan Law School’s “racial tinkering” or its attempt to effectuate proper “racial aesthetics” amounted to impermissible state-sponsored racial discrimination.<sup>192</sup> Thomas, in dissent, repudiated the majority holding and concluded that the Law School had indeed engaged in Constitutionally forbidden racial discrimination.<sup>193</sup>

### A. *Grutter Facts*

In 1996, Barbara Grutter, a white female Michigan resident, applied to the University of Michigan Law School with a 3.8 grade point average

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188. See *id.* at 178.

189. Clarence Thomas, *I am a Man, a Black Man, an American: Searching for Real Solutions to Racial Hatred*, 64 VITAL SPEECHES 708 (1998).

190. See Calmore, *supra* note 12, at 225–27 (Statement by the African American Faculty of the UNC School of Law Regarding the Visit of Justice Clarence Thomas).

191. See GERBER, *supra* note 98, at 3–4. Gerber reports that:

Justice Thomas has fascinated the American people like no other Supreme Court justice ever has. A Lexis-Nexis computer search of the newspaper database reveals that Justice Thomas was mentioned in 32,377 newspaper stories between July 1991 and December 1997. The next closest member of the Rehnquist Court in terms of newspaper references is Chief Justice William H. Rehnquist with 19,487, and that was for a much longer period of time—July 1972 to December 1997. The intense public interest in Justice Thomas also is reflected by the fact that there already have been over a dozen books written about him, although . . . all of those books have focused on his confirmation battle with Anita Hill.

*Id.* Based on an updated Lexis-Nexis computer search, Clarence Thomas was mentioned in 8990 newspaper articles during January 1998 to July 2004. William Rehnquist was mentioned 6444 times during the same period. Thus, Thomas was mentioned in a total of 41,367 newspaper stories between July 1991 and July 2004, while Rehnquist was mentioned in 25,931 newspaper reports from July 1972 to July 2004. The fascination with Thomas continues, albeit, with intensity that has slowed somewhat in recent years.

192. See *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003).

193. See *id.*

("GPA") and a score of 161 on the Law School Admission Test ("LSAT").<sup>194</sup> Grutter was initially "wait listed," but eventually rejected; as a result, she filed suit against the Law School in the United States District Court for the Eastern District of Michigan alleging that the Law School engaged in discriminatory admissions practices.<sup>195</sup> Grutter accused the Law School of using "race as a 'predominant' factor, giving applicants who belong to certain minority groups 'a significantly greater chance of admission than students with similar credentials from disfavored racial groups.'"<sup>196</sup> Grutter also alleged that the Law School "possessed no compelling interest to justify their use of race in its admissions process."<sup>197</sup> Grutter sought remedies in the form of monetary damages, "a judicial order requiring the Law School to offer her admission," and an injunction against the Law School.<sup>198</sup>

The University of Michigan Law School "receives more than 3,500 applications each year for a class of around 350 students."<sup>199</sup> Following a faculty committee investigation in 1992, the Law School adopted a new admissions policy,<sup>200</sup> containing such criteria as LSAT score, GPA, quality of personal statements, letters of recommendation, and personal essays describing an applicant's potential contribution to the diversity of the Law School.<sup>201</sup> The goal of the policy was "to look beyond grades and test scores to other criteria that [were] important to the Law School's educational objectives," and to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."<sup>202</sup> While the type of diversity the Law School considered in making its admission decisions was not limited to racial diversity, the policy specifically mentioned those groups that it considered to have been "historically discriminated against, like African-American, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers."<sup>203</sup>

Responding to Grutter's lawsuit, the District Court began proceedings by first defining the suspect class subject to examination as:

all persons who (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 . . . ; and (B) were members of those racial or ethnic groups, including Caucasian, that [the Law School] treated less favorably in considering their applications for admission to the Law School.<sup>204</sup>

Citing *Regents of Univ. of Cal. v. Bakke*, the District Court determined, as a matter of law, that the Law School's asserted interest of "obtaining the education benefits that flow from a diverse student body . . ." was not

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194. *Id.* at 316.

195. *Id.*

196. *Id.* at 317.

197. *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003).

198. *Id.*

199. *Grutter*, 539 U.S. at 312-13.

200. *Id.* at 314-15.

201. *Id.* at 315.

202. *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003).

203. *Id.* at 316.

204. *Id.* at 317.

compelling in this case.<sup>205</sup> The District Court further held that even if diversity were in fact compelling, the University of Michigan Law School failed to narrowly tailor its use of race to further that interest.<sup>206</sup>

Following an *en banc* hearing, a fractured and deeply divided United States Court of Appeals for the Sixth Circuit reversed the District Court’s judgment and vacated the injunction, stating that *Bakke* established as a firm principle that diversity was a compelling state interest.<sup>207</sup> The Sixth Circuit further held that “the Law School’s use of race was narrowly tailored because race was merely a ‘potential plus factor’ and because the Law School’s program was ‘virtually identical’ to the Harvard admissions program described [in *Bakke*] . . .”<sup>208</sup> The U.S. Supreme Court granted *certiorari*.<sup>209</sup>

### B. Majority Holding in *Grutter*

Justice O’Connor, the author of the majority opinion in *Grutter*, initially frames the issue as follows: “This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School . . . is unlawful.”<sup>210</sup> The Supreme Court answers that question with an emphatic no.<sup>211</sup> Further narrowing the question before the Supreme Court, Justice O’Connor notes that *certiorari* was granted in *Grutter* “to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.”<sup>212</sup> The Supreme Court answers that question with an emphatic yes.<sup>213</sup>

In her majority opinion, O’Connor affirmatively adopts the analysis and reasoning advocated by Justice Lewis Powell in *Bakke*, where Powell opined that ensuring a diverse student body is valid justification for allowing racial classifications.<sup>214</sup> Because the *Bakke* opinion was essentially a plurality, critics of affirmative action, including in some instances lower court judges, believed that Powell’s opinion was not precedential and

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205. *Id.* at 321, citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

206. *Grutter*, 539 U.S. at 321.

207. *Id.*

208. *Id.*

209. 537 U.S. 1043 (2002).

210. *Grutter*, 539 U.S. at 311.

211. *See id.* at 343 (“In summary, the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admission decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”).

212. *Id.* at 322.

213. *See id.* at 328 (“Today we hold that the Law School has a compelling interest in attaining a diverse student body.”).

214. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978). Referring to the plurality holding in *Bakke*, O’Connor notes in the *Grutter* majority that:

Since this Court’s splintered decision in *Bakke*, Justice Powell’s opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell’s views on permissible race-conscious policies.

*Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

should not be respected nor shown adherence.<sup>215</sup> The *Grutter* Court silences those critics by expressly adopting Justice Powell's reasoning and analysis in *Bakke*.<sup>216</sup>

In *Bakke*, the Supreme Court considered a "racial set-aside" program that reserved seats for minorities in a University of California, Davis medical school class.<sup>217</sup> The University of California proposed four compelling interests for its use of race in its admissions policy: (1) reducing historic discrimination against minorities by medical schools and the medical profession; (2) remedying societal discrimination; (3) increasing the number of physicians practicing in "underserved communities"; and (4) attaining a diverse student body.<sup>218</sup> Concluding that only the attainment of a diverse student body was compelling, Justice Powell stated that "'the nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."<sup>219</sup> However, Powell was quick to point out that the type of diversity considered should in no way be limited to racial diversity.<sup>220</sup>

In light of *Bakke*, and in conducting its own analysis, the *Grutter* Court first analyzes whether the University of Michigan Law School's purpose in adopting a race-conscious admissions policy was a compelling state interest.<sup>221</sup> The Court notes that when the government imposes "racial classifications," such governmental action "must be analyzed by a reviewing court under strict scrutiny."<sup>222</sup> A strict scrutiny examination requires a reviewing court to determine that "such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."<sup>223</sup> Thus, the strict scrutiny test requires the Court to find, first, that a compelling government interest exists for the racial classification, and second, that the classification plan is "specifically and narrowly framed to accomplish that purpose."<sup>224</sup>

The Court opens its discussion cautioning that even though it had decided some affirmative action cases since *Bakke*, it had *not* held that "the only governmental use of race that can survive strict scrutiny is remedying past discrimination."<sup>225</sup> Next, the Court grants deference to the Law School's decision that "diversity is essential to its educational mission."<sup>226</sup> The Court emphasizes that education has always enjoyed a "special niche

215. See *Grutter*, 539 U.S. at 325 ("In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent . . .").

216. *Id.* ("More important, for the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

217. *Bakke*, 438 U.S. 265.

218. *Id.* at 306–07, 310–11.

219. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978).

220. *Id.* at 314–15.

221. See *Grutter v. Bollinger*, 539 U.S. 306, 327–28 (2003).

222. *Id.* at 326.

223. *Id.*

224. *Grutter*, 539 U.S. at 328 (quoting *Shaw v. Hunt*, 517 U.S. 899 (1996)).

225. *Grutter*, 539 U.S. at 328 (citing *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) for the proposition that the Court had not decided that "remedying past discrimination is the only permissible justification for race-based governmental action.").

226. *Grutter*, 539 U.S. at 328.

in our constitutional tradition.”<sup>227</sup> Therefore, the Court presumes that the Law School was acting in good faith when it included diversity in its admissions policy.<sup>228</sup> The Law School argued that it believes, and the Court agreed, that only a “critical mass” of students with diverse backgrounds will help the Law School achieve its overall educational mission.<sup>229</sup> The benefits of a critical mass of students with diverse backgrounds are substantial.<sup>230</sup> Some of the benefits of a diverse student body including a critical mass include “cross-racial understanding,” the “break[ing] down [of] racial stereotypes,” and the “enabl[ing of] students to better understand persons of different races.”<sup>231</sup> Finally, the Supreme Court opines that “universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders.”<sup>232</sup> The Court firmly holds that the Law School did indeed have a compelling governmental interest in a diverse student body.<sup>233</sup>

O’Connor then turns her attention to the requisite next step of the strict scrutiny analysis: the determination of whether the Law School’s admissions policy was narrowly tailored.<sup>234</sup> For the Law School to justify the use of race in its admissions policy, it must prove that the use is narrowly tai-

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227. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

228. *Id.*

229. *Grutter*, 539 U.S. at 330.

The Law School and its *amici* assert a multitude of reasons for its need for a “critical mass” including: (1) the promotion of “cross-racial understanding,” (2) to stimulate classroom discussion, (3) to prepare students for an “increasingly diverse workforce and society,” and (4) to ensure that “public institutions are open and available to all segments of American society.”

*Id.* at 330.

230. *Id.*

231. *Id.* (“These benefits are ‘important and laudable,’ because ‘classroom discussion is livelier, more spirited and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’”). The Supreme Court continued its analysis of the benefits that flow from a diverse student body supporting a compelling governmental interest:

The Law School’s claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”

*Id.* (citing *amici* Brief for American Educational Research Association). O’Connor continues extrapolating benefits in support of a compelling governmental interest by citing to *amici* briefs from major American businesses: “These benefits are not theoretical but real, as major American Businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Id.* at 331 (citing *amici* briefs of 3M and General Motors Corp.). *But see* Richard Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004) (arguing that affirmative action programs actually injure African American students more than they help them).

232. *Grutter*, 539 U.S. at 332.

233. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

234. *Id.* at 333.

lored to meet its asserted diversity objective.<sup>235</sup> As stated by the Court, “[t]he purpose of the narrow tailoring requirement is to ensure that ‘the means chosen “fit” . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.’”<sup>236</sup>

The majority clearly articulates that race-conscious admissions policies could not abide strict scrutiny if such policies were equivalent to a “quota system,”<sup>237</sup> but could survive strict scrutiny if an applicant’s race or ethnicity was used as a “plus factor.”<sup>238</sup> O’Connor writes that “an admission program must be ‘flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.’”<sup>239</sup> The Court found that the University of Michigan Law School’s admissions program bore “the hallmarks of a narrowly tailored plan.”<sup>240</sup> Comparing the Law School’s policy to that of the Harvard Medical School policy discussed at length in Powell’s *Bakke* opinion, the *Grutter* Court held that the Law School’s policy was not a quota system and therefore constitutionally permissible.<sup>241</sup>

The Court goes on to observe that the absence of a quota system does not necessarily ensure that a race-conscious admissions policy is narrowly tailored.<sup>242</sup> The majority finds specifically that the Law School’s admissions policy is narrowly tailored because (1) “[it] awards no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity,”<sup>243</sup> (2) it is “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight,”<sup>244</sup> and (3) “the Law School’s race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.”<sup>245</sup> The Court also found that “the Law School actually gives substantial weight to diversity factors besides race.”<sup>246</sup>

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235. *Id.*

236. *Id.* at 333 (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989)).

237. *Grutter*, 539 U.S. at 332 (defining quota system as “a program in which a certain fixed number or proportion of opportunities are ‘reserved exclusively for certain minority groups.’”) (citing *Croson*, 488 U.S. at 496).

238. *Bakke*, 438 U.S. at 315.

239. *Grutter*, 539 U.S. at 333 (quoting *Bakke*, 438 U.S. at 317).

240. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

241. *Id.*

242. *Grutter*, 539 U.S. at 336–37. The majority holds that “[w]hen using race as a plus factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.” *Id.*

243. *Id.* at 337; cf. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

244. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

245. *Id.* at 337.

246. *Grutter*, 539 U.S. at 337–38. Speaking specifically of the University of Michigan Law School’s admissions program, the Court finds that:

the Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might

In response to Grutter’s argument that the Law School’s admissions policy is not narrowly tailored because race-neutral alternatives exist to accomplish the same objective, the Court responds: “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”<sup>247</sup> The majority concedes that narrow tailoring does require “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”<sup>248</sup> The Supreme Court, agreeing with the Court of Appeals for the Sixth Circuit, found that the Law School did sufficiently consider race-neutral alternatives, and that bowing to the ruling of the District Court (and the Thomas dissent) that alternative race-neutral methods of admission (such as a “percentage plan,” a “lottery system” or “decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores”) would require the Law School to “dramatic[ally] sacrifice . . . diversity [and] the academic quality of all admitted students.”<sup>249</sup> Further, the majority stresses that neither the Bush Administration, the District Court nor Justice Thomas in his dissent explains how any of these alternatives are genuinely workable in real life scenarios.<sup>250</sup>

Finally, the majority, acknowledging that the ultimate purpose of the Fourteenth Amendment is “to do away with all governmentally imposed discrimination based on race,” finds that race-conscious admissions policies must be limited in time.<sup>251</sup> O’Connor suggests that “[t]his requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than

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contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single “soft” variable.

*Id.* at 338.

247. *Id.* at 339.

248. *Id.*

249. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003). The majority goes on to criticize the Bush Administration’s assertion that adopting a “percentage plan” is a legitimate race-neutral alternative by stating:

The United States advocates “percentage plans,” recently adopted by public undergraduate institutions in Texas, Florida, and California to guarantee admission to all students above certain class-rank threshold in every high school in the State . . . . The United States does not, however, explain how such plans could work for graduate and professional schools. More-over, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.

*Id.*; see also Torres, *supra* note 4, at 1597 (criticizing the Texas state percentage plan as inaccessible and unavailing in graduate school and professional school contexts).

250. See *supra* note 249; see also *infra* Part VI.D.

251. *Grutter v. Bollinger*, 539 U.S. 306, 341–42 (2003).

the interest demands.”<sup>252</sup> Therefore, the majority introduces a “sunset provision” stating that:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased . . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.<sup>253</sup>

The *Grutter* majority, therefore, affirms the judgment of the Court of Appeals for the Sixth Circuit, and upholds the affirmative action program employed by the University of Michigan Law School.

### C. *The Thomas Dissent*

Often sarcastic<sup>254</sup> and occasionally bombastic,<sup>255</sup> Thomas’s dissenting opinion in *Grutter* denounces the majority opinion, asserting that Justices O’Connor, Stevens, Souter, Ginsburg and Breyer allowed the University of Michigan Law School to engage in unconstitutional “racial discrimination.”<sup>256</sup>

#### 1. Introduction—Quoting Frederick Douglass

Thomas begins his dissent by liberally quoting Frederick Douglass. Critics have since asserted that Thomas quotes Douglass entirely out of context, warping Douglass’s words in order to bend them to support his own politics and personal conclusions.<sup>257</sup> Thomas cites Douglass as stating the following:

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252. *Id.* at 342 (“Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.”).

253. *Id.* at 343. The *Grutter* majority concludes:

The requirement that all race-conscious admissions programs have a termination point “assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.” . . . We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable.

*Id.* (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 510 (1989); Brief for Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

254. See *Grutter v. Bollinger*, 539 U.S. 306, 349–53 (2003).

255. See *infra* notes 359–361 and accompanying text.

256. *Grutter*, 539 U.S. at 351.

257. See DeWayne Wickham, *Thomas Distorts Douglass’ Speech*, USATODAY.COM, available at [http://www.usatoday.com/news/opinion/editorial/2003-06-30-opcom\\_x.htm](http://www.usatoday.com/news/opinion/editorial/2003-06-30-opcom_x.htm) (last visited Aug. 10, 2004); see also Cass R. Sunstein, *Affirmative Action in Higher Education: Why Grutter was Correctly Decided*, *The Journal of Blacks in Higher Education*, available at [http://www.jbhe.com/features/41\\_affirmative\\_action\\_highered.html](http://www.jbhe.com/features/41_affirmative_action_highered.html) (last visited Aug. 10, 2004); Christopher Brauchli, *Thomas Darn Sensitive About Affirmative Action*, *The Daily Camera*, available at [http://www.dailycamera.com/bdc/opinion\\_columnists/article/0,1713,BDC\\_2490\\_2087153,00.html](http://www.dailycamera.com/bdc/opinion_columnists/article/0,1713,BDC_2490_2087153,00.html) (last visited Aug. 11, 2004); *infra* Part VII.B.

In regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the Negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the Negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . Your interference is doing him positive injury.<sup>258</sup>

After quoting Douglass, Thomas states that he believes that minorities can survive and achieve without the interference of university administrators or the majority race in the U.S.<sup>259</sup> Thomas claims that “[b]ecause I wish to see all students succeed whatever their color, I share in some respect, the sympathies of those who sponsor the type of discrimination advanced by the [Law School].”<sup>260</sup> Nevertheless, this professed sympathy is short-lived as Thomas directly states thereafter that “[t]he Constitution does not . . . tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination.”<sup>261</sup> Thomas asserts that the majority interprets the Constitution too liberally<sup>262</sup> and posits that: “No one would argue that a university could set up a lower general admission standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admissions standard and grant exemptions to favored races.”<sup>263</sup>

## 2. *Constitutional Strict Scrutiny Test*

As discussed above, when the government imposes “racial classifications” then such governmental action “must be analyzed by a reviewing court under strict scrutiny.”<sup>264</sup> A strict scrutiny examination requires a reviewing court to determine that “such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.”<sup>265</sup>

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258. *Grutter v. Bollinger*, 539 U.S. 306, 349–50 (2003) (citing 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (J. Blassingame & J. McKivigan eds., 1991)). *But see infra* notes 351–358 and accompanying text.

259. *See Grutter*, 539 U.S. at 350.

260. *Id.*

261. *Id.*

262. *Id.* (“The majority upholds the Law School’s racial discrimination not by interpreting the people’s Constitution, but by responding to a faddish slogan of the cognoscenti.”).

263. *Id.*

264. *Grutter v. Bollinger*, 539 U.S. 306, 327–28 (2003).

265. *Id.*

*a. Compelling Governmental Interest*

Following his assertions that affirmative action invites “positive injury” onto minority college students, Thomas sets out to discredit the majority opinion that finds that the Law School’s affirmative action program meets and survives the strict scrutiny test applied to governmental racial classifications.<sup>266</sup>

First, Thomas examines the Supreme Court’s prior application of the strict scrutiny test and determines that “racial discrimination”<sup>267</sup> (deemed “racial classifications” in the majority opinion) by the government is only permissible when the Court can find a “pressing public necessity”<sup>268</sup> or in other words, a compelling governmental interest.<sup>269</sup> Thomas asserts that only two historical circumstances exist in Supreme Court precedent that justify “racial discrimination,” or that can be categorized as a pressing public necessity: national security and remedying past governmental discrimination.<sup>270</sup> Thomas rejects affirmative action as a matter of national security or a program that remedies past governmental discrimination in Michigan.<sup>271</sup>

Thomas goes on to cite a line of Supreme Court cases in which the Court rejects the use of racial classifications in order to narrow the scope of what he sees as permissible uses of “racial discrimination.”<sup>272</sup> Thomas cites *Wygant v. Jackson Bd. of Educ.*,<sup>273</sup> a case that held impermissible the use of racial classifications to provide more minority teachers for secondary school students and declares that *Wygant* is “virtually indistinguishable from” *Grutter*.<sup>274</sup> Citing to further Supreme Court precedent, Thomas argues that the Court has held that the race of a parent’s new spouse cannot be considered when deciding custody disputes<sup>275</sup> and that the Court has even rejected the use of “racial discrimination” to remedy general societal discrimination.<sup>276</sup> Thomas declares: “I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a ‘pressing public necessity,’” thereby justifying the use of racial discrimination.<sup>277</sup>

Continuing in his “compelling governmental interest” analysis, Thomas then interrogates the Law School’s specific interest in obtaining the “educational benefits that flow from the student body diversity,” before deciding whether such “interest is so compelling as to justify racial discrimination.”<sup>278</sup> Thomas believes that the Law School’s benefits assertion must be separated

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266. *Id.* at 351.

267. *Id.* at 351.

268. See *Korematsu v. United States*, 323 U.S. 214 (1944).

269. *Grutter*, 539 U.S. at 351 (Thomas admits that he uses the terms “pressing public necessity” and “compelling governmental interest” interchangeably throughout his dissent).

270. *Id.* at 352.

271. See *id.* at 351–52.

272. *Id.* at 352.

273. 476 U.S. 267 (1986).

274. *Grutter*, 539 U.S. at 352.

275. *Id.* at 352–53 (citing *Palmore v. Sidoti*, 466 U.S. 429 (1984)).

276. *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (citing *Wygant*, 476 U.S. at 276; *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 496–98 (1989)).

277. *Grutter*, 539 U.S. at 353.

278. *Id.* at 354.

into two elements: (1) educational benefits and (2) diversity.<sup>279</sup> Thomas concludes that the educational benefits the school seeks to achieve are possible through the mechanism of diversity, and that the Law School “apparently believes that only a racially mixed student body can lead to the educational benefits it seeks.”<sup>280</sup> Thereupon, Thomas describes the Law School’s interest as merely “aesthetic” and says, “the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.”<sup>281</sup> Thomas thinks that the real interest the Court upholds is the “educational benefits” and not the “diversity” interest on which the majority opinion dwells, thereby failing to help those who are underprivileged but merely giving the appearance of diversity.<sup>282</sup>

Thomas further characterizes the Law School as elitist because, in his opinion, it fails to examine race-neutral alternative methods for obtaining the educational benefits it desires from a diverse student body.<sup>283</sup> Thomas argues that the Law School refuses to use alternative race neutral admissions programs, such as lowering its admissions standards, which could conceivably “produce the same educational benefits,” because that would lead to a diminution in the Law School’s elite status.<sup>284</sup> Thomas states, “the Court upholds the use of racial discrimination as a tool to advance the Law School’s interest in offering a marginally superior education while maintaining an elite institution.”<sup>285</sup> Thomas thus frames the issue as whether each constituent part of the state interest is of pressing public necessity or a compelling governmental interest.<sup>286</sup> Thomas finds that the Law School’s interest in educational benefits and diversity “fall far short of this” pressing public necessity standard.<sup>287</sup> He asserts that the majority offers no explanation showing how the University of Michigan Law School’s “interest in securing the educational benefits of a diverse student body”<sup>288</sup> is a compelling interest. And, Thomas further criticizes the majority for its failure

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279. *Id.*

280. *Id.* at 355.

281. *Id.* at 354–55 n.3.

282. *Id.* at 355.

The Law School’s argument, as facile as it is, can only be understood in one way: Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits. It is the *educational benefits* that are the end, or allegedly compelling state interest, not “diversity.”

*Id.*

283. *Grutter v. Bollinger*, 539 U.S. 306, 355 (2003).

284. *Id.* at 355–56. Thomas claims that:

If the Law School is correct that the education benefits of “diversity” are so great, then achieving them by altering the admissions standards should not compromise its elite status. The Law School’s reluctance to do this suggests that the educational benefits it alleges are not significant or do not exist at all.

*Id.* at 356 n.4.

285. *Id.* at 355–56.

286. *See id.* at 356.

287. *Id.* at 356–57.

288. *Id.* at 356.

to “fall back on the judicial policy of *stare decisis*”<sup>289</sup>—a curious critique coming from Thomas.<sup>290</sup> After criticizing the majority for “unfounded wholesale adoption” of Justice Powell’s opinion in *Bakke*,<sup>291</sup> Thomas declares “I can only presume that the majority’s failure to justify its decision by reference to any principle arises from the absence of any such principle.”<sup>292</sup>

To support his claim that the Law School’s interest in garnering the educational benefits that flow from a diverse student body falls far short of the compelling governmental interest standard, Thomas strongly urges that the state of Michigan has “no pressing public necessity in maintaining a public law school . . . [and] certainly not an elite law school.”<sup>293</sup> Thomas maintains that not all states within the U.S. support public law schools, which for him provides all of the necessary evidence that supporting a public law school is not truly a compelling state interest for Michigan.<sup>294</sup> According to Thomas, even if under certain circumstances it were found that a state has a compelling interest to operate an elite law school, Michigan has not shown any such interest.<sup>295</sup>

Based on an examination of *Missouri ex. rel. Gaines v. Canada*,<sup>296</sup> Thomas contends that the “Court has limited the scope of equal protection review to interests and activities that occur within that State’s jurisdiction.”<sup>297</sup> Thomas concludes then that “[t]he only cognizable state interest vindicated by operating a public Law School are . . . the education of that State’s citizens and the training of that State’s lawyers.”<sup>298</sup> According to Thomas, few of the students educated at the University of Michigan Law School go on to serve the citizens of that state.<sup>299</sup> Thomas cites to a variety of fairly obvious and understandable statistics to support his claim that the Law School is not training lawyers that will live and practice in the state of Michigan.<sup>300</sup> Thomas writes that:

[i]n 2002, graduates of [the Law School] made up less than 6% of applicants to the Michigan bar, even though the Law School’s graduates constitute nearly 30% of all law students graduating in Michigan. Less than 16% of the Law School’s graduating class elects to stay in Michigan after law school. Thus, while a mere 27% of

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289. *Grutter*, 539 U.S. at 356.

290. *See supra* notes 133–138 and accompanying text; *see also infra* notes 375–381 and accompanying text.

291. *See Grutter*, 539 U.S. at 357. *But see infra* notes 382–388 and accompanying text.

292. *Grutter*, 539 U.S. at 357. *But see infra* notes 382–388 and accompanying text.

293. *Grutter*, 539 U.S. at 358.

294. *Id.* at 358 (citing ABA-LSAC OFFICIAL GUIDE TO ABA APPROVED LAW SCHOOLS (W. Margolis, B. Gordon, J. Puskarz & D. Rosenlieb eds., 2004)). Thomas argues that because Alaska, Delaware, Massachusetts, New Hampshire, and Rhode Island do not support public law schools then any state supporting a public law school cannot be satisfying a compelling state interest.

295. *Grutter v. Bollinger*, 539 U.S. 306, 358 (2003).

296. *Id.* at 358 (citing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)).

297. *Grutter*, 539 U.S. at 358.

298. *Id.* at 359.

299. *See id.* at 359 (Thomas looks at the percentages of the graduates that go on to take the Michigan Bar as well as the number of in-state students).

300. *Id.* at 359–60.

the Law School’s 2002 entering class are from Michigan, only half of these, it appears, will stay in Michigan. In sum, the Law School trains few Michigan residents and overwhelmingly serves students who as lawyers, leave the State of Michigan.<sup>301</sup>

Thus, in Thomas’s estimation, the elite status of the Law School does little to help the people of Michigan.<sup>302</sup> Therefore, Thomas contends, even if there are marginal improvements in the legal education obtained by “racial tinkering” it does not “justify racial discrimination where the Law School has no compelling interest in either its existence or in its current educational and admissions policies.”<sup>303</sup>

*b. Narrowly Tailored Program*

Having, presumably in his mind, sufficiently demolished the compelling governmental interest prong of the strict scrutiny test, Thomas then criticizes the “narrowly tailored” element of the majority’s strict scrutiny analysis.<sup>304</sup> Thomas simply cannot abide the majority assertion that the implementation of alternative race-neutral admissions policies would necessitate “a dramatic sacrifice of . . . the academic quality of all admitted students.”<sup>305</sup> Because he had argued so vociferously that Michigan had no compelling state interest to support an elite public law school, Thomas hotly contends here that the majority erred “because race-neutral alternatives must only be ‘workable’ and do ‘about as well’ in vindicating the compelling state interest.”<sup>306</sup> Thomas argues that “the Law School should be forced to choose between its classroom aesthetics and its exclusionary admissions system—it cannot have it both ways.”<sup>307</sup>

Thomas continues by arguing that the Law School could achieve its vision of a diverse student body without racial discrimination.<sup>308</sup> Notwithstanding this naked assertion, Thomas complains that the “Court holds, implicitly and under the guise of narrow tailoring, that the Law School has a compelling state interest in doing what it wants to do.”<sup>309</sup> Thomas disagrees that the Law School’s affirmative action program is narrowly tailored for two reasons:

[U]nder strict scrutiny, the Law School’s assessment of the benefits of racial discrimination and devotion to the admissions status quo

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301. *Grutter v. Bollinger*, 539 U.S. 306, 359–60 (2003) (citations omitted). Thomas contrasts the University of Michigan Law School with law schools at the University of Texas, the University of California, Berkeley, and the University of Virginia suggesting that all of these schools far exceed the University of Michigan Law School in their assertion of a compelling state interest.

302. *Id.* at 360.

303. *Grutter*, 539 U.S. at 361.

304. *Id.* (citing *ante*, at 539 U.S. at 339).

305. *Id.* (citing *ante*, at 539 U.S. at 340).

306. *Grutter v. Bollinger*, 539 U.S. 306, 361 (2003) (internal citations omitted).

307. *Id.* at 361.

308. *See id.* at 362. As is often the case with opponents of affirmative action, Thomas’s assertion here is devoid of any cognizable workable alternatives. Lowering admissions standards, Thomas’s pet alternative, is decidedly not a “workable” alternative. *See infra* Part VI.D.

309. *Grutter*, 539 U.S. at 362.

are not entitled to any sort of deference. . . . Second, even if its “academic selectivity” must be maintained at all costs along with racial discrimination, the Court ignores the fact that other top law schools have succeeded in meeting their aesthetic demands without racial discrimination.<sup>310</sup>

Thomas strongly disagrees with the majority in its affording “educational autonomy” and significant deference to the Law School’s admissions policy.<sup>311</sup> Thomas rejects the respect and deference the majority gives to the University of Michigan Law School’s administrators, and to the free speech autonomy promised thereunto in the First Amendment, by flatly stating “there is no basis for a right of public universities to do what would otherwise violate the Equal Protection Clause.”<sup>312</sup> Thomas continues by recognizing that the “constitutionalization” of “academic freedom” was acknowledged in *Sweezy v. New Hampshire*,<sup>313</sup> particularly in Justice Felix Frankfurter’s concurring opinion.<sup>314</sup> *Sweezy* established the four essential freedoms of a university: “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>315</sup> While the *Grutter* majority grants deference to the Law School’s admissions program, based on the concept that a university is free to determine “who may be admitted to study,” Thomas alleges that the Court grants “unprecedented deference” and, in his mind, inappropriate deference.<sup>316</sup> Thus, according to Thomas, writing here as an originalist—practiced at divining the intent of authors and drafters—“I doubt that when Justice Frankfurter spoke of governmental intrusions into the independence of universities, he was thinking of the Constitution’s ban on racial discrimination.”<sup>317</sup>

Thomas next argues, predictably, that the Court’s deference to the Law School’s admissions policy will “have serious collateral consequences”

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310. *Id.* at 362. Thomas here again, makes a wildly disingenuous statement, essentially claiming, in light of clear evidence to the contrary, “that other top law schools have succeeded in meeting their aesthetic demands without racial discrimination.” *Id.* But see Suzanne E. Eckes, *Race Conscious Admissions Programs: Where do Universities Go From Gratz and Grutter?*, 33 J.L. & EDUC. 21, 58–62 (2004); John P. Cronan, *The Diversity Justification in Higher Education: Evaluating the Disadvantaged Status in School Admissions*, 34 SUFFOLK U. L. REV. 305, 322–23 (2001); Torres, *supra* note 4, at 1596–98 (reporting on the success of the Texas Top 10% Plan as effectively keeping the undergraduate school integrated but casting serious doubt on that plan effectively being attributed to professional schools). Professor Torres claims that,

[w]hat had come to be called the Texas Top 10% Plan . . . had effectively kept the undergraduate college (University of Texas) integrated, but it did not and probably could not be made to apply in any sensible way to the Law School or to any other graduate or professional schools.

*Id.* at 1596.

311. See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003); see also *supra* notes 226–233 and accompanying text.

312. *Grutter*, 539 U.S. at 362.

313. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

314. See *Grutter*, 539 U.S. at 362.

315. *Sweezy*, 354 U.S. at 263.

316. See *Grutter*, 539 U.S. at 362.

317. *Id.* at 364.

for minority students.<sup>318</sup> To support this controversial and decidedly minority position, Thomas refers to a few studies that tend to indicate that “racial (and other sorts) of heterogeneity actually impairs learning among black students.”<sup>319</sup> Thomas concludes that “[t]he Court is willfully blind to the very real experience[s] . . . elsewhere, which raises the inference that institutions with ‘reputation[s] for excellence’ rivaling the Law School’s have satisfied their sense of mission without resorting to prohibited racial discrimination.”<sup>320</sup>

### 3. *Legacy and Other Non-merit Based Admissions Policies*

Thomas, following his efforts to repudiate the strict scrutiny analysis of the majority, goes on to make a few “editorial” arguments in opposition to the Law School’s affirmative action program. First, Thomas recognizes the myriad considerations that are taken into account in admission policies that are not “merit” based.<sup>321</sup> Thereupon, Thomas rejects legacy preferences in typical law school admissions processes.<sup>322</sup> Thomas claims that legacy preferences, or those preference programs where “applicants are given an advantage if their parents or grandparents attended the school”<sup>323</sup> or made large monetary contributions to the school, are distasteful and unfair.<sup>324</sup> However, despite his claimed distaste for legacy preferences, Thomas states that such preferences are not forbidden by the Equal Protection Clause of the Constitution, while racial preferences are forbidden.<sup>325</sup> Coming from Thomas, a lifetime beneficiary of racial preferences,<sup>326</sup> this repudiation of legacy preferences rings thunderously hollow.<sup>327</sup>

318. *Id.*; see also Sander, *supra* note 231. *But see infra* note 335 (detailing a study that repudiates Sander and the basic assertion that affirmative action harms African Americans).

319. See *Grutter*, 539 U.S. at 364.

320. *Id.* at 367 (pointing to Boalt Hall at the University of California, Berkeley, as an example that “[t]he sky has not fallen at Boalt Hall”). *But see Torres, supra* note 4, at 1596–1608 (contradicting Thomas’s claim that other alternative measures could successfully diversify a graduate school by recounting the inability to put any “Percentage Plan” into place at the University of Texas Law School).

321. See *Grutter*, 539 U.S. at 368; see also cummings, *Never Let Me Slip, supra* note 18, at 68–70 (describing dozens of admissions criteria that are taken into account, aside from race, styled “affirmative action for the affluent” and arguing that each of the non-merit based criteria develop inequality or unfairness in the admissions process). cummings concludes that “[t]he ‘wave’ of anti-affirmative action sentiment is a tenuous wave indeed.” *Id.* at 80.

322. See *Grutter*, 539 U.S. at 368.

323. See *Bush Opposes “Legacy” College Admissions*, CNN.COM, available at <http://www.cnn.com/2004/allpolitics/08/06/bush.legacy/index.html> (last visited Dec. 5, 2004). CNN reports that President Bush announced, while campaigning for reelection in 2004, that he was opposed to “legacy” preferences, although he acknowledged, tongue in cheek, that he was a clear recipient of them. *Id.*

324. See *Grutter v. Bollinger*, 539 U.S. 306, 368 (2003).

325. See *id.*

326. See FOSKETT, *supra* note 31.

327. In a similarly hollow repudiation, President Bush asserted that he was opposed to “legacy” admissions preferences, despite his having benefited from them throughout his life. See *Bush Opposes “Legacy” College Admissions, supra* note 323; see also cummings, *Never Let Me Slip, supra* note 18, at 68–69. CNN reported that:

Thomas posits that, even without racial discrimination, the University of Michigan Law School's admissions process would not be a true meritocracy, as the "entire process is poisoned by numerous exceptions to 'merit.'"<sup>328</sup> Thomas goes on to discuss other methods of admissions, such as certificate systems or percent plans.<sup>329</sup> Thomas states that the Law School's use of the LSAT as a performance measure is unfair because blacks traditionally score lower on that and other standardized tests.<sup>330</sup> However, he finds nothing constitutionally wrong with the use of the LSAT, but he does find unconstitutional the Law School's use of "racial discrimination" to remedy this wrong.<sup>331</sup> Thomas believes that "[t]he Law School may freely continue to employ the LSAT and other allegedly merit-based standards in whatever fashion it likes. What the Equal Protection Clause forbids, but the Court today allows, is the use of these standards hand-in-hand with racial discrimination."<sup>332</sup> With flourish, Thomas concludes:

The Court will not even deign to make the Law School try other methods, however, preferring instead to grant a 25-year license to violate the Constitution. And the same Court that had the courage to order the desegregation of all public schools in the South now fears, on the basis of platitudes rather than principle, to force the Law School to abandon a decidedly imperfect admissions regime that provides the basis for racial discrimination.<sup>333</sup>

#### 4. *Racial Classifications Per Se Harmful*

Passionately, Thomas makes his final argument:

I believe what lies beneath the Court's decision today are the be-nighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups, and that racial discrimination

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President Bush said Friday [August 6, 2004] he opposes the use of a family history at colleges or universities as a factor in determining admission. Bush stated his position to what's known as "legacy" in response to a questions during a Washington forum for minority journalists called Unity 2004. He was asked, "Colleges should get rid of legacy?"

Bush responded, "Well, I think so, yes. I think it ought to be based upon merit . . . . Well, in my case, I had to knock on a lot of doors to follow the old man's footsteps," he said to laughter.

Bush's remarks came as he was being grilled about his opposition to affirmative action programs that consider race as a factor for admission, particularly through quota systems.

*Bush Opposes "Legacy" College Admissions, supra* note 323. *But see* FAHRENHEIT 9/11 (Lion's Gate 2004) (detailing George W. Bush's suspect business history following college, as heavily influenced by his father, former President George H. W. Bush, and seriously underwritten by Saudi Arabian royalty).

328. *Grutter*, 539 U.S. at 368.

329. *Id.* at 369.

330. *Id.* at 369.

331. *Id.* at 369–70.

332. *Grutter v. Bollinger*, 539 U.S. 306, 370 (2003).

333. *Id.* at 370–71.

is necessary to remedy general societal ills. This Court’s precedents supposedly settled both issues, but clearly the majority still cannot commit to the principle that racial classifications are *per se* harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications.<sup>334</sup>

With intensity, Thomas contends that he is certain that the applicants admitted as a result of the Law School’s affirmative action program are not truly benefited.<sup>335</sup> “Nowhere in any of the filings in this Court is any evidence that the purported ‘beneficiaries’ of this racial discrimination prove themselves by performing at (or even near) the same level as those students who receive no preferences.”<sup>336</sup> Thomas guesses that the Law School does not look for successful students in its admissions process, only students who will make the school look diverse.<sup>337</sup> This argument is inexcusable, particularly for a man who has likely never sat on a law school’s admission committee nor has ever participated in reasonably similar decision-making.<sup>338</sup> Thomas here, once again, just simply speaks out of turn, referencing with great passion something he knows little or nothing about.

Thomas argues further that minority students who are admitted to elite institutions are likely to be worse off, as they are not sufficiently prepared and are unlikely able to keep up.<sup>339</sup> Therefore, “[w]hile 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.”<sup>340</sup> Once again, this argument represents an egregious logical leap by Thomas, unsupported and tinged with institutional racism.<sup>341</sup>

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334. *Id.* at 371 (citations omitted).

335. *Id.*; see also Sander, *supra* note 231. Thomas’s assertion has been buttressed by Professor Richard Sander. Sander argues in his recent law review article that first, in the law school admissions process, academic preferences for African American students are substantial and that these students usually do not outperform their academic predictors; second, that because of this academic boost, African American students often end up at schools where they struggle academically and overwhelmingly end up in the bottom of their law school classes; and third, that although affirmative action, or the academic preferences, allow these students to end up at higher prestige schools, their academic struggles at these prestigious schools ultimately harms their performance on the bar exam and hurts them in the job market. Sander concludes from these proposed factors that affirmative action ultimately ends up producing fewer African American lawyers each year that would be produced through a race-blind law school admissions process. *But see* David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Stanford Law Review Study*, available at <http://www.lsacnet.org/response/Sander-public-version-3.pdf> (last visited Nov. 29, 2004) (forcefully disputing every conclusion offered by Sander’s “empirical” analysis of the hurtful impact of affirmative action on African American students). Professors David Chambers, Rick Lempert, Tim Clydesdale and William Kidder authored the critique of Sander’s piece because they felt that Sander’s study resulted in insupportable predictions: “[t]he four of us drafted this response because we believe that Sander’s forecasts are irresponsible.” *Id.* at 3.

336. *Grutter*, 539 U.S. at 371.

337. *Id.* at 372.

338. See MAYER & ABRAMSON, *supra* note 77.

339. *Grutter*, 539 U.S. at 372.

340. *Id.* at 372.

341. See *infra* notes 393–400 and accompanying text.

Thomas continues by arguing that social science has not disproved the idea that this discrimination “engenders attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government’s use of race.”<sup>342</sup> Thomas opines, “[t]hese programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”<sup>343</sup> Thus, Thomas concludes, a badge of inferiority is stamped on all minorities admitted to elite institutions, even all institutions of higher education that practice affirmative action.<sup>344</sup>

Thomas next notes that the Law School admits some minority students every year that would be admitted regardless of its race-conscious admissions policy, and suggests that “[t]he majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving.”<sup>345</sup> Thomas then bitterly guesses that although some blacks “would be admitted in the absence of racial discrimination,” one cannot determine those admitted on merit and those who are not, so all are “tarred as undeserving.”<sup>346</sup>

Thomas’s arguments on the “badges of inferiority” and “tarred as undeserving” are jarring.<sup>347</sup>

#### D. Countering Thomas’s Dissent

Clarence Thomas, in authoring his colorful affirmative action dissent, falters badly on many of the points he posits, garnering only the support of Justice Scalia. Perhaps the fundamental shortcoming in Thomas’s dissent is his argument that the Constitution forbids consideration of race specificity, particularly in the affirmative action context, despite historical evidence that the “Framers” of the Fourteenth Amendment<sup>348</sup> clearly and unquestionably intended that the Fourteenth Amendment would empower, assist or directly benefit black Americans.<sup>349</sup> Thomas fails to examine the “original meaning” of the Fourteenth Amendment language, abandoning his “originalism” outright. This argument is taken up forcefully below as

342. *Grutter*, 539 U.S. at 373 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment)).

343. *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (referencing *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment)).

344. *Id.* at 373.

345. *Grutter*, 539 U.S. at 373.

346. *Id.* at 373.

347. See *infra* Part VI.D.4.

348. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

349. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985); Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 478, 499 (1998); Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 11 (1997); see also *infra* note 444 and accompanying text.

this Article turns to an examination of the treacherous originalism that Thomas practices.<sup>350</sup>

### 1. Quoting Frederick Douglass

Thomas has elevated to art form the ability to quote historical leaders wholly out of context, all in an effort to force support for his race jurisprudence, through fabricating the illusion that great civil rights leaders agree with his particular brand of far right racial politicking.<sup>351</sup> Indeed, in his dissent in *Grutter*, Thomas “hijacks” a Frederick Douglass quote and includes language that initially seems to support Thomas’s dissenting position until the entire context of Douglass’s speech is examined and the very nature of Thomas’s stark disingenuousness is revealed.<sup>352</sup> Douglass is quoted as saying “Let us alone,” thereupon Thomas argues that Douglass is essentially saying “Let us stand on our own,” and if we fail or fall, then we were not strong enough or prepared enough to move forward.<sup>353</sup> However, Douglass was not saying what Thomas intimates at all. The complete context of Douglass’s speech urges:

And if the Negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! *Let him alone. If you see him on his way to school, let him alone, don’t disturb him! If you see him going to the dinner table at a hotel, let him go! If you see him going to the ballot box, let him alone, don’t disturb him! If you see him going into a work-shop, just let him alone,—your interference is doing him positive injury.*<sup>354</sup>

Douglass, in stating “your interference is doing him positive injury,” is unmistakably arguing that white America’s discriminatory and racist interference is doing African Americans positive injury.<sup>355</sup> Douglass, in boldly proclaiming “your interference is doing [us] positive injury,” is in no way referring to U.S. Government programs that are intended to benefit or uplift African Americans.<sup>356</sup> Douglass is simply demanding that the United States discontinue the racist practices it visits upon minority Americans.

And Thomas has to know this.

Yet, to further his own political agenda, Thomas seems delighted to wrench the words of the “great abolitionist” and force them into a meaning much different than intended—one that matches the Clarence Thomas

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350. See *infra* Part VII.A.

351. See Milloy, *supra* note 150; see also Wickham *supra* note 257.

352. See Milloy, *supra* note 150; see also Wickham *supra* note 257.

353. See *Grutter v. Bollinger*, 539 U.S. 306, 349–50 (2003).

354. See Wickham *supra* note 257 (emphasis added). In this passage quote above, the portion that Thomas omits from his Douglass quotation is italicized—Thomas deliberately refuses to print what Douglass meant when he said “Let [the Negro] alone.” Douglass was pleading with white America to discontinue racism, discrimination and outright race hatred. Thomas portrays Douglass’s speech as if Douglass was asking the government *not* to instigate any programs that attempted to rectify past wrongs visited upon African Americans by the U.S. Government and U.S. citizens. This particular Thomas mischaracterization is awful, deliberate and bush league.

355. See 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (J. Blassingame & J. McKivigan eds., 1991).

356. See *id.*

agenda.<sup>357</sup> Unfortunately, this is not the first time that Thomas has stooped to such a low.<sup>358</sup> While this quotation only fills the first few paragraphs of Thomas's dissent in *Grutter*, it clearly sets the stage for the remainder of his dissenting opinion.

## 2. *Strict Scrutiny Test*

Perhaps Thomas's greatest error in his strict scrutiny constitutional analysis is that he constructs his premises with gross mischaracterizations and confluences. When constitutional "racial classifications" are at issue, Thomas refers to such classifications as "racial discrimination."<sup>359</sup> When the issue is "critical mass," and the importance of achieving diversity in the law school classroom, Thomas refers to such diversity as "racial aesthetics."<sup>360</sup> When constitutional principles are mentioned, such as appropriate racial classification scenarios and appropriate tailoring of racially classified programs, Thomas dismisses them as if the precedents had never existed, even though these principles have been recognized by the Supreme Court for decades.<sup>361</sup> Despite Thomas's "language games"<sup>362</sup> and utter disrespect

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357. See Dowd, *supra* note 150 ("What a cunning man Clarence Thomas is . . . In his dissent, he snidely dismisses the University of Michigan Law School's desire to see minority faces in the mix as 'racial aesthetics,' giving the effort to balance bigotry in society the moral weight of a Benetton ad."). The *New York Times* article continued:

[Thomas] is at the pinnacle, an African-American who succeeded in getting past the Anita Hill sexual harassment scandal by playing the race card, calling the hearing "a high tech lynching," and who got a \$1.5 million advance to write his African-American Horatio Alger story, "From Pin Point to Points After."

So why, despite his racial blessings, does he come across as an angry, bitter, self pitying victim?

It's impossible not to be disgusted at someone who could benefit so much from affirmative action and then pull up the ladder after himself. So maybe he is disgusted with his own great historic ingratitude.

When he switched from a Democrat to a conservative as a young man, he knew that he would be a hotter commodity in politics. But he also knew that it would bring him the scorn of blacks who deemed him a pawn of the white establishment—people like Justice Thurgood Marshall, who ridiculed Clarence Thomas and others as "goddamn black sellouts" for benefiting from affirmative action and then denigrating it.

*Id.*

358. See *supra* note 150 (describing several instances where Thomas has quoted Frederick Douglass out of context to prove a political point).

359. See *Grutter v. Bollinger*, 539 U.S. 306, 356 (2003).

360. See *id.*; see also *supra* notes 280–281 and accompanying text.

361. See *Grutter*, 539 U.S. at 356; see also *supra* notes 289–292.

362. See Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 *How. L.J.* 1, 49 (1996) ("During the mid to late 1800s, traditional legal scholarship failed as an explanatory methodology because the legal discourse in which it was engaged offered little rebuke to those oppressive words, categories, and language-games of racism and white supremacy. By and large, this legal scholarship reaffirmed dominant views . . .") (emphasis added and internal citations omitted). Professor Robinson suggests that white supremacy and its proponents relied for years upon "language games" in their discourse as a means of prevailing upon and continuing racist designs. See *id.* at 49–50. Thomas too, utilizes "language games" in perpetuating his own queered race jurisprudence. See Christopher E. Smith, *Clarence Thomas: A Dis-*

for *stare decisis*,<sup>363</sup> he still attempts to ground his dissent in constitutionally recognized philosophies and principles. In so doing, he is extremely critical of the *Grutter* majority’s strict scrutiny analysis.

*a. Compelling Governmental Interest*

Thomas’s initial railing against the majority and its characterization and finding of the University of Michigan Law School’s compelling governmental interest is peculiar.<sup>364</sup> Joined only by Scalia, Thomas erroneously argues that the Supreme Court has only ever recognized permissible governmental racial classifying in circumstances of disrupted national security and in circumstances remedying past discrimination for which the government was responsible.<sup>365</sup> This assertion is simply not true. The Supreme Court has, in fact, recognized and certified governmental racial classifications in a number of scenarios where national security was not impugned and where the government was not just remedying past discrimination for which it was responsible.<sup>366</sup> Certainly, in the recent past, the Supreme Court has narrowed the permissible use of governmental racial classifications under the Rehnquist Court’s conservative majority,<sup>367</sup> but for Thomas to assert that the Supreme Court had only ever recognized permissible racial classifications in the context of national security and remedying past governmental discrimination is misleading.

Next, Thomas addresses the fact that the Law School claimed that its interest in using racial classifications was to “obtain the educational benefits that flow from the student body diversity,” which Thomas then re-characterizes as a desire to obtain appropriate “racial aesthetics.”<sup>368</sup> In fact, Thomas directly challenges the admissions program at the Law School by asserting that its affirmative action program is not genuinely helping those who are underprivileged, but is merely giving the appearance of diversity.<sup>369</sup> Thomas’s gross generalization as to whom the Law School’s affirmative action program provides assistance is entirely unacceptable. Certainly, some of the minority students admitted under the affirmative action program are likely not “underprivileged” and most have successfully navigated the world of undergraduate schooling and LSAT test taking. But Thomas has most assuredly *not* examined the personal lives of all the

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*tinctive Justice*, 28 SETON HALL L. REV. 1, 9–13. (“In acknowledging Thomas’s adoption of originalism and his blinder-focused devotion to a colorblind Constitution, ‘Thomas is trapped, in short, between his moral commitment to a color-blind Constitution and an interpretive methodology that compels him to reject it.’”). *Id.* at 11 (quoting Jeffrey Rosen, *Moving On*, NEW YORKER MAG., Apr. 29–May 6, 1966, at 66).

363. See *supra* notes 135–136 and accompanying text; see also *infra* notes 376–381.

364. See *supra* notes 267–277 and accompanying text.

365. See *Grutter v. Bollinger*, 539 U.S. 306, 351–52 (2003).

366. See generally *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990).

367. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 241 (1995).

368. *Grutter*, 539 U.S. at 354–55.

369. See *Grutter*, 539 U.S. at 355 (“It must be remembered that the Law School’s racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation.”).

admitted minority students, and thus speaks to something he knows little or nothing about: the background of the minority students admitted into the Law School, and whether their particular life experience was “underprivileged.”<sup>370</sup> For Thomas to assume that the University of Michigan Law School admits no minority students who have risen from “underprivileged” backgrounds is absurd, particularly in light of his own personal narrative about his rise from Pin Point, Georgia.<sup>371</sup>

Thomas also finds problematic the Law School’s desire to diversify its student body while maintaining its elite status as an educational institution.<sup>372</sup> In fact, Thomas argues that Michigan has no pressing public necessity to support an elite public law school.<sup>373</sup> Beyond that, a further unreasonable and irresponsible argument advanced by Thomas in dissent is his suggestion that the Law School substantially lower its admissions standards in order to fully realize its diversity goals.<sup>374</sup> This argument, while convenient to Thomas’s grandstanding, is shortsighted and unworkable: it would be difficult to conceive that Thomas would posit such a “solution” if he had actually ever sat on, or administered, a law school admissions committee. Thomas fails to explain or identify in any recognizable fashion how lowering admissions standards would effectively eliminate racial classifications. Even if standards were lowered, Thomas does not describe how a university would go about selecting its student body without considering race. Any time a white student was not admitted, whatever his or her credentials, and a minority student was admitted with similar credentials, a lawsuit would likely be brought claiming racial preference. Lowering standards would not disrupt this litigious campaign.

Further, Thomas takes a swipe at the *Grutter* majority by arguing that they refused to follow Supreme Court precedent.<sup>375</sup> Thomas, in criticizing the majority for its failure to “fall back on the judicial policy of *stare decisis*”<sup>376</sup> shows a stark hypocrisy for a jurist who “does not believe in *stare decisis*, period.”<sup>377</sup> For a judge who gives little respect to *stare decisis*,<sup>378</sup> despite confirmation hearing promises to the contrary,<sup>379</sup> and who believes so unfailingly that his own personal constitutional interpretation is correct, and who so regularly writes opinions seeking to overturn Supreme Court constitutional interpretations that have stood for decades,<sup>380</sup> Tho-

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370. See *infra* Part VI.D.4 (describing the miraculous rise of several “underprivileged” youth to quality undergraduate university programs).

371. See *supra* Part III.

372. See *Grutter v. Bollinger*, 539 U.S. 306, 355–56 (2003).

373. See *id.* at 357.

374. See *id.* at 361–62.

375. See *id.* at 356–57.

376. *Id.* at 356.

377. See Ringel, *supra* note 135, quoting Scalia, who references Thomas’s refusal to respect *stare decisis*; see also *Holder v. Hall*, 512 U.S. 874, 944–45 (1994) (Thomas, J., concurring); *Missouri v. Jenkins*, 515 U.S. 70, 114–38 (1995) (Thomas, J., concurring); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring).

378. See *supra* notes 133–138 and accompanying text.

379. See *supra* note 133 and accompanying text.

380. See GERBER, *supra* note 97, at 69–112 (describing decisions where Thomas concurs or dissents, indicating he would go further than the majority and reject Supreme Court precedent as “wrong”).

mas’s weak assertion that the majority fails by not seeking *stare decisis* guidance is just flat unseemly.<sup>381</sup>

Additionally, Thomas mischaracterizes the majority opinion through his assertion that it does not follow Supreme Court precedent.<sup>382</sup> Thomas distorts the majority opinion when he inappropriately declares that the majority holding “arises from the absence of any” guiding principle of law.<sup>383</sup> This assertion is based almost solely on his belief that Powell’s *Bakke* opinion carried no precedential value as a plurality opinion, and that the *Grutter* majority’s adoption of it was a misguided exercise lacking in principle. Nevertheless, the *Grutter* majority adopted Justice Powell’s *Bakke* plurality opinion and reasoning, which has stood, for better or worse, as the appropriate constitutional affirmative action principle for over twenty-five years.<sup>384</sup> While reasonable minds have differed over the appropriate precedential deference to afford Powell’s *Bakke* opinion, leading constitutional scholars acknowledge that:

[f]or decades, then, the law was reasonably clear. Quota systems would be struck down, but colleges and universities could consider race as a plus. The hard questions arose only when a program did not clearly fall within one of Justice Powell’s two categories . . . .

Thus, the stage was set for *Grutter* and *Gratz*, the Court’s first real encounter with affirmative action in higher education since *Bakke*. Essentially, the Court reaffirmed the line drawn by Justice Powell: flexible affirmative action programs are permissible, but rigid ones are not.<sup>385</sup>

In *Grutter*, the Supreme Court answered the Powell *Bakke* plurality question once and for all—Powell’s opinion and analysis is the law.<sup>386</sup> Clarence Thomas, undoubtedly well aware that constitutional scholars and university administrators routinely considered Powell’s plurality opinion as the affirmative action law of the United States, is egregiously disingenuous

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381. See *Grutter v. Bollinger*, 539 U.S. 306, 356 (2003).

382. See *id.* at 356–57.

383. *Id.* at 357.

384. See Sunstein, *supra* note 257. Professor Sunstein, in tracing the roots of affirmative action and the law as established in *Bakke* writes:

In higher education, the basic constitutional framework was established in the famous *Bakke* case, decided in 1978. The Court’s ruling was set out by Justice Lewis Powell, who broke a tie between four justices who wanted to require colorblindness and four justices who would have permitted colleges and universities a great deal of room to maneuver in their affirmative action programs. Justice Powell acknowledged that racial diversity was a legitimate and even compelling interest for school of higher education to pursue. He pointed to the need for courts to respect reasonable choices by educators. But he insisted that diversity could, and must, be achieved through methods that were flexible and avoided racial rigidity. In his view, a quota system was constitutionally unacceptable. On the other hand, a university could consider race “as a factor” alongside other factors. Hence, colleges and universities could give a boost to African-American candidates—so long as every applicant received individual consideration.

*Id.*

385. See *id.*

386. *Grutter*, 539 U.S. at 325.

when he attempts to characterize the majority opinion as a failure to recognize *stare decisis* or is an opinion that is bereft of any constitutional principle.<sup>387</sup> No matter how desperately Thomas tries to discredit the majority for its reliance on *Bakke* and Powell, five of his Supreme Court colleagues decidedly declared that Powell's *Bakke* opinion was, and is, the law of the land.<sup>388</sup>

*b. Narrowly Tailored Program*

In arguing that the *Grutter* majority failed to establish that the Law School's affirmative action program was tailored narrowly enough to survive strict scrutiny, Thomas argues that the Law School could achieve its vision of a diverse student body without "racial discrimination."<sup>389</sup> As mentioned above, Thomas argues continuously that the Law School must lower its admissions standards, rather than resort to racial classifying, in order to achieve its desired diversity. Thomas provides no standards for such a program, but instead claims that other schools that have been forced to abandon racial classifications in admissions have done just fine since.<sup>390</sup> In fact, graduate schools that have been forced by legislation or popular vote to discontinue affirmative action programs have not done just fine since.<sup>391</sup> Almost every professional school has suffered in minority enrollment, so that a "critical mass" of minority students is still lacking at most professional schools that have been forced to abandon racial classifying in admissions.<sup>392</sup>

Thomas further argues in dissent that the Court's deference to the Law School's admissions policy will "have serious collateral consequences" for minority students.<sup>393</sup> However, Thomas absolutely ignores the reality of the benefits that minority graduates of the University of Michigan Law School receive upon graduation.<sup>394</sup> Rather, Thomas argues that minority

387. See *supra* Part VI.C.2.a.

388. See *Grutter v. Bollinger*, 539 U.S. 306, 356–57 (2003).

389. See *id.*

390. See *id.* But see Torres, *supra* note 4, at 1596–1607 (describing the implausibility of making alternative programs work for admitting minority students at professional and graduate schools, such as the Texas Percentage Plan, and offering that alternative means together with affirmative action will be the most effective manner of ensuring racial diversity in the law school classroom).

391. See *supra* note 310.

392. See *id.*

393. *Id.*; see also Sander, *supra* note 231, at 482 (arguing that "blacks as a whole would be unambiguously better off" without affirmative action). But see Chambers et al., *supra* note 335:

[W]e reject Sanders proposal to end affirmative action . . . . Indeed, because Sander's conclusion—that "blacks as a whole would be unambiguously better off" without affirmative action—is based upon such a weak chain of untenable estimates and assumptions, we are concerned that if left unchallenged in the legal academy and elsewhere, Sander's article may improperly discourage many African Americans from applying to law school, thus irresponsibly contributing to the very problem Sander purports to remedy.

*Id.* at 6 (emphasis added).

394. The University of Michigan Law School lists extensive career services programs on its website, assisting students in a multitude of ways. See University of Michigan Law

graduates are disserved or harmed by their attendance at the Law School.<sup>395</sup> Thomas makes the old, predictable argument, unsupported by evidence or any study of the University of Michigan Law School’s minority students or graduates, that because affirmative action enrollees are admitted with “lower credentials,” they are unable to keep up with the students admitted with “higher credentials.”<sup>396</sup> Once again, Thomas attempts to argue that minority students admitted to the Law School under its affirmative action program are injured in some way based on their matriculation at the institution.

Thomas fails to take into consideration the reality of the Law School’s elite status, and the enormous benefits available to all graduates of the University of Michigan Law School—minority and otherwise. The University of Michigan Law School is nationally renowned, respected as an institution for educating bright, talented lawyers.<sup>397</sup> Minority graduates from the Law School have a myriad of opportunities before them,<sup>398</sup> hardly the

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School, *Career Services*, at <http://www.law.umich.edu/currentstudents/careerservices/index.htm> (Feb. 22, 2005) (“Our 2004 graduates (the most recent information available) enjoyed a 99% employment rate, while our first- and second-year students found employment in over 35 states and abroad.”); see also Stephanie Francis Ward, *Affirmative Action No Boon for Blacks, Prof. Says*, 3 No. 46 A.B.A. J. E-REPORT 1 (Nov. 19, 2004), available at [http://www.equaljusticesociety.org/press\\_2004\\_nov\\_19\\_abanet.html](http://www.equaljusticesociety.org/press_2004_nov_19_abanet.html) (reporting that the African American lawyers who attended top tier law schools that were interviewed for their reactions to the Sander article “dispute Sander’s assertion that grades matter more than the school’s pedigree. Some observe that it’s not uncommon for some white male lawyers at big firms to have gone to less prestigious schools, but most if not all of the minority lawyers at the same firms went to top-tier schools.”). One black respondent, when told of Sander’s assertion that affirmative action hurt African Americans in the job market by placing them in schools they were unprepared for proclaimed: “The reality . . . is that the opportunities are still greater [when you graduate from a top law school]. All things being equal . . . you would want to go to the best possible school you can.” *Id.*

395. See *Grutter*, 539 U.S. at 372. But see *Chambers et al.*, *supra* note 335.

396. See *Grutter*, 539 U.S. at 371 (“Nowhere in any of the filings in this Court is any evidence that the purported ‘beneficiaries’ of this racial discrimination prove themselves by performing at (or even near) the same level as those students who received no preferences.”). This argument by Thomas is so racially ignorant, it bears comment: First, Thomas assumes that students who were admitted with “no preferences” are the ones excelling in law school performance, when Thomas has no idea what “preferences” the top white students at the University of Michigan Law School receive for admission. While he decries legacy preferences in other portions of his opinion, he flat out assumes that the top performing students at the Law School are those who did not benefit from any preferences in the admissions process. Further, he claims that the Law School presented no evidence that affirmative action admittees performed at (or even near) the same level as those students admitted absent affirmative action. Here, his argument fails in its stilted characterization. Thomas should have pointed to studies that purport to show that affirmative action admittees perform “worse” than those students he assumes were admitted without preference. Instead, he assails the Law School’s attorneys for failing to provide evidence that the affirmative action admittees performed “at (or even near) the same level as those students who received no preferences.” *Id.*

397. U.S. News and World Report recently ranked the University of Michigan Law School as the seventh most elite law school in the nation. Only Yale, Harvard, Stanford, Columbia, NYU and Chicago rank higher. See *Top 100 Law Schools*, USNews.com, available at [http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank\\_brief.php](http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php) (last visited Sept. 2, 2004).

398. See *supra* note 394.

bleak and damaged future advanced by Thomas. Truthfully, Thomas knows the benefits of attending an elite law school,<sup>399</sup> particularly for students of color. Yet he purposely ignores this reality in his analysis of the case, instead proclaiming that minority law students admitted under affirmative action programs are disadvantaged, tainted, hurt and assigned inferiority badges.<sup>400</sup> This is simply untrue, deceitful, and an example of Thomas's failure to responsibly acknowledge the reality of the case.

### 3. *Legacy and Other Non-Merit-Based Admissions Policies*

Thomas's most persuasive argument forwarded in the *Grutter* dissent is his position that even without racial discrimination the Law School's admissions process would not be a true meritocracy, as the "entire process is poisoned by numerous exceptions to merit."<sup>401</sup> Thomas recognizes the inequity of legacy and other forms of preferences, but concludes that "other" types of preferences, aside from race, are not prohibited by the U.S. Constitution.<sup>402</sup> For Thomas, legacy preferences, while unseemly, are legal. And for him, the affirmative action question is simply one of illegality.

Thomas recognizes that African Americans score lower historically on the LSAT, but allows that law schools may continue to use that standard, despite its apparent racial bias.<sup>403</sup>

### 4. *Racial Classifications Per Se Harmful*

Perhaps the most offensive portion of Thomas's *Grutter* dissent is the section on how racial classifying hurts or offends minority students. Thomas argues forcefully that minority students that attend an institution that practices affirmative action receive a badge of inferiority and are tarred as undeserving, even if they "truly" belong at that affirmative action practicing institution.<sup>404</sup>

Those individuals that attach badges of inferiority to minorities at institutions that observe affirmative action programs and those individuals that tar minorities as undeserving because others were admitted with lower test scores, are simply engaging in bigoted stereotyping and bald-faced racism themselves. Racism and belief in black inferiority underlie any attachment of badges or tar upon minority students; thus attaching a badge of inferiority onto minority students admitted under affirmative action programs, Thomas is himself engaging in the worst kind of racism.<sup>405</sup>

For example, two of the young men that I worked with in Chicago—Ismael Laboy and Lawyer "Boo Boo" Foster—are currently enrolled in four-year university programs. I am immensely proud of each youngster, as I witnessed first hand the enormous life challenges that each had to overcome to actually enroll in college. Ismael attends Fairmont State University, located in Fairmont, West Virginia, and hopes to play for the school's

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399. See *supra* Part III.

400. See *supra* Part VI.C.4.

401. *Grutter v. Bollinger*, 539 U.S. 306, 367 (2003).

402. *Id.*; see also *cummings*, *Never Let Me Slip*, *supra* note 18, at 67–71.

403. *Grutter*, 539 U.S. at 370.

404. See *id.* at 371–73.

405. See *Newsom*, *supra* note 163.

basketball team in 2006. Boo Boo is enrolled at BYU-Idaho, located in Rexburg, Idaho, and has been early-admitted into the Social Work program, where he will work toward a Masters degree. Both have traveled very far from their homes on the west side and south side of Chicago, and both have entered worlds startlingly different from that to which they had grown accustomed, specifically majority white colleges.<sup>406</sup>

I reflect on the hundreds, perhaps thousands of hours of work that Boo Boo, Ismael and I have put into their studies and athletics in order for each to have this opportunity that few—alarmingly few—that come from their Chicago neighborhoods have had. Coincidentally, Boo Boo and Ismael were the two young men that accompanied me the evening that we were accosted and harassed by the Chicago Police Department<sup>407</sup>—rare for me, but common for them.

I cringe to think what advice Clarence Thomas might share with Boo Boo and Ismael were he to get a hold of these two young, bright, rising African American males prior to their departures to their respective university experiences. Would that advice be the same as that he shared with Cedric Jennings, another young African American male, prior to his departure to Brown University? Thomas told a young Cedric:

No doubt one thing you’ll find when you get to a school like Brown is a lot of classes and orientation on race relations. Try to avoid them . . . Try to say to yourself, “I’m not a black person, I’m just a person.” You’ll find a lot of so-called multicultural combat, a lot of struggle between ethnic and racial groups wanting you to sign on, to narrow yourself into some group identity or other. You have to resist that Cedric.<sup>408</sup>

John Calmore commented, after recently ruminating on this advice, “[t]his is frightening advice, horrifying, really.”<sup>409</sup> I agree with Professor Calmore. Absolutely horrifying. And baffling.<sup>410</sup> Cedric Jennings is encouraged, by the only sitting African American Justice on the U.S. Supreme Court, to abandon, or at least ignore, his racial identity.<sup>411</sup> Young Cedric was, unbelievably, discouraged from studying about and learning of his history and his roots—of those individuals who could become historical heroes and role models to him.<sup>412</sup> Distressing advice from a man who claims to hold

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406. See, e.g., Student Demographics: Office of Admissions and Scholarships, BYU Idaho, available at <http://www.byui.edu/admissions/enrollment/demographics.html> (last visited Aug. 10, 2004) (statistics showing that BYU-Idaho’s student population is 7.2% Multi-Cultural).

407. See Appendix A.

408. David G. Savage, *Justice Thomas Defined by his Roots, and Distance From Them—Though Jurist Hails from a Humble Background, He Refuses to Let His Experiences Influence His Court Decisions*, L.A. TIMES, June 22, 1998, at A5.

409. Calmore, *supra* note 12, at 213.

410. Thomas continued in his advice to Cedric Jennings by stating “[w]hat I really look for in hiring my clerks—the cream of the crop—I look for the math and sciences, real classes, none of that Afro American study stuff. If they’d taken that stuff as an undergraduate, I don’t want them.” Savage, *supra* note 408, at A5.

411. See *supra* note 408 and accompanying text.

412. See *id.*; see also West Virginia University 2003–2005 Undergraduate Catalog, WVU.EDU, available at <http://www.ia.wvu.edu.8888.catalog.pdf> (last visited Aug. 30, 2004) (showing the Africana Studies Program at WVU to include a variety of classes, par-

various historical people of color as role models.<sup>413</sup> Advice that I am certain Boo Boo and Ismael would recognize as disgraceful and would ignore.

## VII. THE TREACHERY OF ORIGINALISM

The most significant problem that Thomas faces in his judicial philosophy in race cases is that he denies the past. He does not fully consider antecedent racism, discrimination, or slavery (including its vestiges) in his jurisprudential interpretation of the law. In current race cases, as well as other controversial constitutional issues, Thomas exists and opines in a context of “perfect world” fallacy. Certainly, the ideal represented in the Declaration of Independence and the U.S. Constitution is the standard we as citizens of the United States aspire to, and rightly so.<sup>414</sup> Unfortunately,

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ticularly Introduction to African and African-American Studies and a Seminar in Africana Studies).

413. See generally GERBER, *supra* note 97 (describing several individuals that Thomas holds in high esteem including Booker T. Washington and his own grandfather); see also Calmore, *supra* note 12, at 197 (“Clarence Thomas, a man of Horatio Alger-like ascendancy, has chosen to grace the wall of his chambers with portraits of Booker T. Washington. And for good reason. Washington, a contemporary of [W. E. B.] Du Bois, believed that economic empowerment and self-reliance were the sine qua non of civic progress.”).

414. See Clarence Thomas, *Civility and Discourse*, 31 NEW ENG. L. REV. 515, 515–21 (1997). Thomas, in a 1996 speech to the New England School of Law stated:

Our democracy is founded on the idea that each individual is an equal, autonomous actor in our political system—each individual has an equal vote and each individual has an equal (though perhaps somewhat attenuated) voice in the decisions of the government. As the declaration of independence established so eloquently, our government is founded on the idea that “all men are created equal, and that they are endowed by their creator with certain unalienable rights—that among these are life, liberty and the pursuit of happiness.” For the collective self-governance that our democracy relies upon to work, each individual must be given equal respect and must receive equal recognition of his or her rights and responsibilities in society.

*Id.* I agree with Thomas’s statement here concerning inherent individual rights. However, the disconnect, in my mind, occurs when Thomas applies these natural law principles as if the last 225 years of U.S. history had passed uneventfully, with all people enjoying these inalienable rights, and that no groups or individuals had their inalienable rights denied them. See generally *id.* But see Thurgood Marshall, *We the People: A Celebration of the Bicentennial of the United States Constitution: The Constitution: A Living Document*, 30 HOW. L.J. 623, 623–27 (1987) (describing clearly that the “Framers” of the Constitution did not intend for the inalienable rights bestowed by the Constitution and Declaration of Independence to apply to all people, just free (white) men). Justice Marshall wrote:

When contemporary Americans cite “The Constitution,” they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.

For a sense of the evolving nature of the Constitution, we need look no further than the first three words of the document’s preamble: *We the People*. When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America’s citizens. *We the People* included, in the words of the Framers, “the whole Number of free Persons.” On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for rep-

applying originalism and natural law philosophy to modern constitutional interpretation, without regard to this nation’s past, essentially ignores the inherent inequality and oppression visited upon people of color and women in this country historically, with vestiges of inequality and oppression still existing today.<sup>415</sup> Thomas ignores this reality in his constitutional philosophy. He continues to visit oppression and suffering upon people of color and women as a result of his stubborn refusal to interpret the Constitution from a realistic, rather than from an ideological or fanciful, point of view. Thomas interprets the law in a way that denies the necessity of “resolving past injustice,” “repatriating those whose rights were denied,” and “leveling the playing field” that has been slanted (and still slants) for so long in favor of the typical white male.<sup>416</sup> Thomas ignores

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resentational purposes—at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years.

These omissions were intentional. The record of the Framers’ debates on the slave question is especially clear: The Southern States acceded to the demands of the New England States for giving Congress broad power to regulate commerce, in exchange for the right to continue the slave trade.

*Id.* at 624 (emphasis in original) (citations omitted). Because rights have been, and continue to be, denied, see *infra* note 415, Thomas betrays those whose rights have been violated by not seeking to correct past inequities and inequalities in his jurisprudence. This is Thomas’s fundamental flaw, in my mind, and presumably in the minds of all of his numerous opponents, many of whom are minorities. See generally Parts V.A–B.

415. Karin Chenoweth, *50 Years After Desegregation Ruling, Equality Still Elusive*, WASH. POST, May 20, 2004, at T06 (“[T]he fact is that African Americans, Latinos and American Indians are still, for the most part, separated into unequal schools. When they are in the same schools, they often are separated into very unequal classrooms.”). The *Washington Post* further reports:

The national Healthcare Disparities Report was intended by HHS [Department of Health and Human Services] to be a comprehensive look at the scope and reasons for inequalities in health care. A number of studies have shown that even among people with identical diseases and the same income level, minorities are less likely to be diagnosed promptly and more likely to receive sub-optimal care . . . . An IOM [Institute of Medicine] report suggested last year that widespread racial differences in health care “are rooted in historic and contemporary inequities” and asserted that stereotyping and bias by doctors, hospitals and other care providers may be at fault . . . .

Vedantam at A17; see also Kevin Outterson, *Tragedy and Remedy: Black Reparations for Racial Disparities in Health* (forthcoming 2006) (on file with author) (“The tragedy of American Health Care is that while racial disparities in health are not new, they remain newsworthy, stubbornly persisting for centuries right up to the present day.”).

416. See andré douglas pond cummings, “*Lions and Tigers and Bears, Oh My*” or “*Redskins and Braves and Indians, Oh Why?*”: *Ruminations on McBride v. Utah State Tax Commission, Political Correctness, and the Reasonable Person*, 36 CAL. W. L. REV. 11, 26–27:

For years the objective reasonable person standard has done nothing more than perpetuate the viewpoints and biases of the white male judges applying that standard. Historically, reliance on the objective, reasonable person standard has been a tool used by United States’ courts to aggressively guard the status quo and maintain positions of power and influence crafted by and protected by the white male dominant voice.

*Id.*

the vestiges of inequality and oppression, doggedly holding to his natural law and originalist philosophy, and therefore, perhaps inadvertently, continues to perpetuate them.

While Thomas clings to originalist constitutional interpretation in many contexts, he simply abandons the practice in other contexts, particularly when confronted with race cases and those issues dealing with affirmative action and the Fourteenth Amendment. This exemplifies another treachery that attends the originalists on the Supreme Court, particularly Thomas. The hypocrisy here is twofold: First, originalism requires a passionless impartiality from its judicial officers, mandating that its practitioners discard life experience, race, gender, religion, and sociology at the door of the judicial chambers prior to rendering a fair, reasoned judgment on the meaning of the law.<sup>417</sup> Second, originalism compels its adherents to examine and discover the textual meaning of the Constitution when that document was originally ratified.<sup>418</sup> The intention of the Framers is sacrosanct to originalists.<sup>419</sup> For originalists, it would be anathema to determine important constitutional questions without first carefully analyzing the language of the Constitution and painstakingly examining the Framers' intentions when they drafted and ratified that language.<sup>420</sup>

Yet, as is clearly discernable in *Grutter*, Thomas writes a dissenting opinion that first is passionately inflamed with personal experience, consideration and racial familiarity.<sup>421</sup> Secondly, the dissenting opinion abjectly refuses to examine and analyze the Framers intent and historical underpinning of the Fourteenth Amendment.<sup>422</sup> In both instances, the duplicity engaged in by Thomas (and joined in by Scalia)<sup>423</sup> turns their revered originalism on

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417. See *infra* note 424 and accompanying text.

418. See CHEMERINSKY, *supra* note 102, at 17–19.

419. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–58 (1989).

420. See *id.* at 856. Scalia, in describing the importance of gleaning the original meaning of the text and evaluating the Framers intent when applying the originalist interpretation, opines:

[W]hat is true is that it is often difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.

*Id.* at 856–57.

421. See *infra* Part VII.A.

422. See Sunstein, *supra* note 257 (“For originalists, the meaning of the Constitution is settled by asking what the document meant when it was originally ratified. And to their credit, Justices Scalia and Thomas do usually practice the method that they preach. *But in the context of affirmative action, originalism apparently goes down the drain.*”) (emphasis added).

423. See generally Caprice Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. (forthcoming 2005) (on file with author) (detailing other curious behavior and decisions by Scalia in a different context, that of Judicial Recusal).

its head and leaves Supreme Court observers wondering when exactly their philosophical principles genuinely apply to important issues before the Supreme Court.

A. *Clarence Thomas’s First Originalist Betrayal*

In a 1996 speech delivered to students at the University of Kansas School of Law, Thomas boldly proclaimed:

If we are to be a nation of laws and not of men, judges must be impartial referees who are willing at times to defend constitutional principles from attempts by different groups, parties or the people as a whole, to overwhelm them in the name of expediency. . . . Life tenure and an irreducible salary are not good policies in their own right. They exist only to help judges maintain their independence and, hence, their impartiality. . . . [I]n my mind, impartiality is the very essence of judging and of being a judge. *A judge does not look to his or her sex or racial, social, or religious background when deciding a case. It is exactly these factors that a judge must push to one side in order to render a fair, reasoned judgment on the meaning of law.* In order to be a judge, a person must attempt to exorcise himself or herself of the passions, thoughts, and emotions that fill any frail human being. *He must become pure, in the way that fire purifies metal, before he can decide a case.* Otherwise, he is not a judge . . . .<sup>424</sup>

Looking at Thomas’s *Grutter* dissent particularly, and at his jurisprudence generally, one must suspend belief to imagine that Thomas “purified” himself and rendered a passionless judgment in *Grutter*. Thomas’s *Grutter* dissent was clearly and entirely informed by his racial and social background.<sup>425</sup> Clarence Thomas has committed the great originalist betrayal—claiming dispassion and “purity” while employing the exact same judicial activism that originalists condemn.<sup>426</sup>

To wit, Thomas disparages the *Grutter* majority for placing a “badge of inferiority” squarely upon the chests of all African American students that attend and graduate from the University of Michigan Law School<sup>427</sup> including those who were admitted without the help of affirmative action programs.<sup>428</sup> Thomas’s fixation on his own “badges of inferiority” is well

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424. Clarence Thomas, *Judging*, 45 KAN. L. REV. 1, 4 (1996) (emphasis removed from original and added here). See also GERBER, *supra* note 97, at 39–40.

425. See generally Calmore, *supra* note 12, at 200–02.

426. See Scalia, *supra* note 419, at 852–56 (describing his view of the defects of nonoriginalism including “[t]he principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality. Nothing in the text of the Constitution confers upon the courts the power to inquire into, rather than passively assume, the constitutionality of federal statutes.”).

427. *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (“These programs stamp minorities with a *badge of inferiority* and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”). (emphasis added).

428. See *id.* Thomas further asserts that this “badge of inferiority” attaches even to those students admitted regardless of the Law School’s race conscious admissions policy: “[t]he majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving.” *Id.*

chronicled.<sup>429</sup> He has repeatedly complained of the “taint” affirmative action has placed on his career<sup>430</sup> and grouses still about the national conceptualization of him as an “affirmative action baby”<sup>431</sup> rather than a meritorious, accomplished black man, who earned his positions of prominence through rugged American individualism.<sup>432</sup>

While he repeatedly complains of his “discount[ed]” degree<sup>433</sup> from Yale Law School or expresses dissatisfaction at being appointed assistant secretary for civil rights at the Department of Education by Ronald Reagan because he was black,<sup>434</sup> Thomas still publicly maintains that his judicial de-

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429. See PEYTON THOMAS, *supra* note 7, at 140. Biographer Andrew Peyton Thomas chronicles Clarence Thomas’s reorientation to the law while a law student at Yale Law School where “he began decisively cutting his ties to the left. What radicalized him was the school’s affirmative action system—and more precisely, the implied inferiority that came with it.” *Id.*

430. See Foskett, *A Thorn in the Side*, *supra* note 7, at A1 (“[Thomas] said, ‘[i]magine how it feels if you are a black who feels you deserve to be there, you carried your load—maybe more than your load—and then you leave with a . . . degree that the world then discounts.’”).

431. In May 1999, Chief Judge Joseph W. Hatchett of the United States Court of Appeals for the Eleventh Circuit delivered a retirement speech upon his announcement that he was leaving the federal bench. Judge Hatchett memorably proclaimed during his speech: “I am an affirmative action baby, and I am proud of that fact, and always will be.” Contextually, Judge Hatchett could not have been referring to affirmative action programs employed by his educational institutions, as both were historical black colleges—Florida A&M University and Howard University School of Law. Clearly, Judge Hatchett was referencing his appointment to the Florida Supreme Court by a forward-thinking 1970s Florida governor, Ruben Askew, and his later appointment by President Jimmy Carter to the United States Court of Appeals. Judge Hatchett explained that his pride in being an “affirmative action baby” was based on the pioneering and groundbreaking efforts that allowed the doors of opportunity to swing open for him, and those that followed him, despite the racism of Southern society that would likely have foreclosed such opportunities in the absence of such affirmative efforts.

432. See Ken Foskett, *The Clarence Thomas You Don’t Know—He’s a Generous Mentor, A Talkative Friend, Amicable with Strangers, Proud, Complex, and an Enthusiastic Bus Driver*, ATLANTA J. CONST., July 1, 2001, at A1. Further, “Ken Foskett reports, to this day, [Thomas] complains bitterly that the Reagan Administration singled him out for advancement because he was black.” Calmore, *supra* note 12, at 201. Most telling are Thomas’s comments prior to succeeding Thurgood Marshall on the United States Supreme Court:

Later, while contemplating his replacing Thurgood Marshall on the Supreme Court, Clarence Thomas again described the monkey-on-back predicament of black success that worried him: In private conversations, Thomas acknowledged the discomfort attendant to being Marshall’s heir. Not only was he being asked to replace a living legend, but the subtext of race in his appointment was manifest. One friend recalled that Thomas would have preferred that the seat he took not be Marshall’s. Thomas “didn’t want there to be an appearance—you know, did George [H. W.] Bush pick him because he’s black?”

Calmore, *supra* note 12, at 201.

433. See Foskett, *supra* note 430.

434. See Foskett, *The Clarence Thomas You Don’t Know*, *supra* note 432. Prior to accepting the position of chairperson of the Equal Employment Opportunity Commission, Thomas observed:

[i]f ever I went to work for the EEOC or did anything directly connected with blacks, my career would be irreparably ruined. The monkey would be on my back

cisions are uninformed by his own personal life experiences.<sup>435</sup> And make no mistake, labeling success that comes from affirmative action as “stigmatized” or marked by a “badge of inferiority” is a very personalized evaluation and conclusion, and a conclusion clearly not shared by all individuals who have benefited historically from affirmative action.<sup>436</sup> This is a Thomas-specific life experience, which leaks, waterfall like, into his race jurisprudence, despite his protestations of “impartiality.”<sup>437</sup>

Professor John Calmore clearly delineates this decision that “privileged” blacks must make—whether to be proud of or stigmatized by affirmative action, as follows:

My experience with affirmative action has been more psychologically positive than Justice Thomas’s. Benefiting from affirmative action does not mean that either of us has reached levels of high achievement simply because of affirmative action, but, rather, institutional doors have opened because of affirmative action and without it both of us, like many others, would be outside looking in regardless of how well we could perform if admitted. I attended an elite white college, starting as a freshman in the fall of 1963, prior to affirmative action. But certainly my admission to a prestigious law school, like Justice Thomas’s admission to Yale Law School, was enabled by affirmative action. . . . Indeed, during my college matriculation at Stanford, the small number of black students were, I recall, quite stigmatized even though affirmative action had not become a policy. *How one deals with the perceived stigma is important.* For . . . [J]ustice [Thomas], it explains his aversion to social group identity that incorporates black consciousness beyond strictly individual[ized] terms. *While I am subject to psychological insecurity and other harms that result from being stigmatized, I know that the stigmatization stems from racism, not affirmative action. Thus I oppose the former, but not the latter.*<sup>438</sup>

Calmore—recognizing that affirmative action stigma and the attendant “badge of inferiority” is the product of racism—rejects the racism that generates the stigma and embraces affirmative action as important for purposes of social justice and equality.<sup>439</sup> Thomas, recognizing that his own career has been stigmatized, blames affirmative action for his personal stigma and dismisses the reality of the racism at the heart of his badge of inferiority—thereby rejecting affirmative action and further enabling the racism. And the true deceit is that Thomas claims that he does not allow “his . . . sex or racial, social, or religious background” to influence him “when deciding a case.”<sup>440</sup> Therein lies Thomas’s first originalist betrayal.

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again to prove that I didn’t have the job because I’m black. People meeting me for the first time would automatically dismiss my thinking as second rate.

*Id.* See also PEYTON THOMAS, *supra* note 7, at 183.

435. See Thomas, *supra* note 424.

436. See, e.g., Hatchett, *supra* note 431.

437. See Thomas, *supra* note 424.

438. Calmore, *supra* note 12, at 202 (emphasis added).

439. See *id.*

440. See Thomas, *supra* note 424, at 4.

Thomas wrote his *Grutter* dissenting opinion while decidedly under the influence of his racial and social background. While Calmore celebrates his emergence into a position of privilege, recognizing the hands that lifted him up along the way, Thomas resents those hands that assisted his own rise.<sup>441</sup> Thomas's jurisprudence soundly reflects his resentment.

The originalist treachery surfaces in claims by Thomas and Scalia, amongst many other federal judges, that they are able to place "the law" within a sterile, plain meaning context, and that they are able to divine the intent of the "Framers" of the Constitution and then ascribe the proper characterization of the law to the case before them, all while "push[ing] to one side" life experiences, understanding and familiarity with society garnered through living. Originalists do not really do this; at least Thomas and Scalia do not. Neither "push[es] to one side" their life experiences—they just claim to do so and therefore perpetuate a kind of subtle but wild disingenuous quality in their legal opinions.

#### B. Clarence Thomas's Second Originalist Betrayal

When an originalist abandons his or her professed jurisprudential philosophy, ignoring its strictures when it most offends the hoped for outcome, that jurist has engaged in a stark hypocrisy. In *Grutter*, rather than examine the textual meaning together with the Framer's intent of the Fourteenth Amendment, and its Equal Protection Clause, as a devoted originalist should,<sup>442</sup> Thomas (joined by Scalia) leaps directly into an attack on the majority's interpretation of the strict scrutiny test, rather than return to his adopted jurisprudential roots by conducting a serious examination of the Framers intent of the Fourteenth Amendment.<sup>443</sup> This is likely because most historical legal scholars agree that the Framers of the Fourteenth Amendment *intended* that Amendment to *affirmatively* assist African American citizens of the United States that had been severely injured, damaged and scarred by U.S. policies and practices toward them.<sup>444</sup>

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441. See *supra* notes 424–440 and accompanying text.

442. See Scalia, *supra* note 419, at 856–58.

443. See *Grutter v. Bollinger*, 539 U.S. 306, 349–62 (2003).

444. See Schnapper, *supra* note 349, at 753–54. Schnapper carefully details the Reconstruction Era legislation passed by the Reconstruction Congresses and legislative history of the Fourteenth Amendment:

From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks. These programs were generally open to all blacks, not only to recently freed slaves, and were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites. The race-conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection. This history strongly suggests that the Framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups.

*Id.* at 754. Schnapper is supported in his conclusion by Professor Stephen Siegel:

Benign Color Conscious Laws—Beyond the few instances of discriminatory color-conscious legislation, the Reconstruction era Congresses produced a vast array of laws treating blacks preferentially, indicating its view that federal affirmative

Yet this fact is conveniently ignored by Thomas and the Supreme Court’s avowed originalists. If textualism, Framer’s intent and judicial restraint are hallmarks of practicing originalists,<sup>445</sup> then Justice Thomas (joined by Scalia) should be criticized for failing to conduct a textually driven, painstaking review<sup>446</sup> of the legislative history of the drafters (Congress) and ratifiers (Congress and the states) of the Fourteenth Amendment to the United States Constitution.

Because originalism, particularly that brand practiced by Thomas, and the Framer’s intentions in drafting and ratifying the Fourteenth Amendment are at odds, or because the two “lie in uneasy tension,”<sup>447</sup> *Grutter* observers are only left to conclude that Thomas “forgets” his originalism when his passions and emotions direct him to conclude in accordance with his preferred outcome.<sup>448</sup>

### C. “The Sun Don’t Shine Here in This Part of Town”

Originalist philosophy and textualism subsist in a staid, lifeless, and colorblind existence.<sup>449</sup> The sun does not illuminate or color the world of those that adhere to the originalist philosophy. In a colorless, colorblind legal world, where the reality of individual plight is never in play, those that are most seriously injured and offended by the law are those that are powerless and voiceless.<sup>450</sup> Often, those individuals are minority and poor.<sup>451</sup>

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action violated no constitutional norms . . . . In addition to countenancing antebellum benign color-conscious laws, the post-bellum Congresses promulgated new ones. Among the most important were the laws establishing the Freedmen’s Bureau. Officially charged to provide a wide variety of relief, work, education, and legal assistance to “loyal refugees and freedmen” in the South, the Freedmen’s Bureau administered a massive and highly controversial federal assistance program.

Siegel, *supra* note 349, at 556–58 (footnotes omitted).

445. See Siegel, *supra* note 349, at 482–83 (stating that, “Although originalism is a complex project, it may usefully be said to center on the maxim that: ‘a judge is to apply the Constitution according to the principles intended by those who ratified the document.’”).

446. See Scalia, *supra* note 419, at 856.

447. See Siegel, *supra* note 349, at 478.

448. See *supra* Part VII.A.

449. See *supra* Part V. See also Koteles Alexander, *Adarand: Brute Political Force Concealed as a Constitutional Colorblind Principle*, 39 *How. L.J.* 367 (1995); David Breshears, *One Step Forward, Two Steps Back: The Meaning of Equality and the Cultural Politics of Memory in Regents of the University of California v. Bakke*, 3 *J.L. Soc’y* 67 (2002); Jeffrey Rosen, *Essay: The Color-Blind Court*, 45 *Am. U. L. Rev.* 791 (1996).

450. See Marshall, *supra* note 414.

451. See generally Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 *N.Y.U. L. Rev.* 162, 167 (1994) (“[T]he argument for colorblindness ultimately argues in favor of a racialized status quo that leaves black people and other racial minorities in an unequal position.”); A’lelia Robinson Henry, *Perpetuating Inequality: Plessy v. Ferguson and the Dilemma of Black Access to Public and Higher Education*, 27 *J.L. & Educ.* 47, 48 (1998) (“[C]olorblind interpretations allow the distribution of public benefits to remain largely skewed in the favor of white Americans, and the continued subversion of African American’s quest for equal education.”); R. Richard Banks, “Nondiscriminatory” *Perpetuation of Racial Subordination*, 76 *B.U. L. Rev.* 669, 672 (1996) (“[B]ecause gross degrees of racial inequality can persist even in the complete absence of contemporary racial discrimi-

In contrast, Jadakiss, a current hip hop star and the artist cited in this Article title, chronicles the plight of the underrepresented and voiceless in *Welcome to D-Block*. With the help of fellow rappers Sheek, Styles P. and Eminem, Jadakiss explains why the sun does not shine on the D-Block:

Welcome to D-Block, the city of broke down dreams / where things ain't always peachy keen as they seem / City of dope dealers, killers, pimps, pushers, pan handlers, hustlers and doped out fiends / The Sun don't shine here in this part of town / But we all got a town that is similar to this too / Cause every city's got a ghetto, every ghetto's got a hood / Take a good look around you 'cause there's a D-Block near you.<sup>452</sup>

Modern hip hop lyricists and philosophers narrate the real life circumstances that exist for the urban poor, and often these artists relate their narration to the law, punishment and legal conceptualizations.<sup>453</sup>

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nation, a colorblind state will, ironically, reinforce the social conditions that impede the attainment of a colorblind society.”). Banks concludes by asserting that race blind policies are harmful to people of color because:

Consequently, race-blind policies are likely to entrench racial inequality by failing to redress racial differences in wealth and the myriad social, educational, occupational, and economic disparities that flow from them. The persistence of racial inequality, in turn, promotes the very race consciousness that a colorblind state is intended to negate.

*Id.* at 694.

452. JADAKISS, *Welcome to D-Block*, on *KISS OF DEATH* (Ruff Ryder/Interscope 2004).

453. See andré douglas pond cummings, *You Are Now About to Witness the Strength of Street Knowledge: Hip Hop, Critical Race Theory and Desperate Responses* (unpublished manuscript on file with author) (carefully describing the impact that hip hop culture, critical race theory, and the hip hop generation will have on the legal academy and the practice of law); see also Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 *STAN. L. REV.* 983 (2004) (reporting that hip hop can be used to inform a theory of criminal punishment that is coherent, that enhances public safety, and that treats lawbreakers with respect). Recently, Jadakiss has come under fire for his political pronouncements in his music. See *Rapper Blames Bush for 9/11 in New Song*, *USATODAY.COM*, available at [http://www.usatoday.com/life/music/news/2004-07-16-jadakiss-bush\\_x.htm?POE=LIFISVA](http://www.usatoday.com/life/music/news/2004-07-16-jadakiss-bush_x.htm?POE=LIFISVA) (last visited Apr. 25, 2005). The Associated Press reports:

Over the years, the rapper Jadakiss has depicted a world of drug dealing, murder and other assorted mayhem without raising many eyebrows. But seven words in his new song “Why”—“Why did Bush knock down the towers?”—has gotten Jadakiss the most mainstream attention, and criticism, of his career. “It caught the ear of white America,” he said proudly during a phone interview with The Associated Press. “It’s a good thing. No matter what you do, somebody’s not going to like it, but for the most part, most people love the song.” Not everyone loves it. Bill O’Reilly called Jadakiss a “smear merchant” this week, and some radio stations have edited out the line in the song, in which Jadakiss talks about perceived injustices, conspiracies and problems affecting the world . . . . Jadakiss doesn’t really believe Bush ordered the towers destroyed—he says the line is a metaphor, and that Bush should take the blame for the terrorist attacks because his administration didn’t do enough to stop it. “They didn’t follow up on a lot of things properly,” says Jadakiss. “It’s the President of the United States. The buck stops with him.”

*Id.*; see also JADAKISS, *Why*, on *KISS OF DEATH* (Ruff Ryder/Interscope 2004) (featuring Anthony Hamilton).

One cannot help but wonder if originalist judges—particularly the poster children of originalism, Thomas, Scalia and Rehnquist—spent just a few hours in the “real” world, the world of the D-block or the world so carefully chronicled by other hip hop artists today, perhaps the staid philosophy and judicial opinions promoting rugged American individualism would change in some recognizable way.<sup>454</sup> Calmore suggests that “[i]t is sometimes difficult to associate racism with black perpetrators, but Justice Thomas’s jurisprudence and value orientation fail to incorporate the human touch that connects humanity.”<sup>455</sup> Presumably, Calmore would agree with me, that Thomas and Scalia could use vastly more experience with human suffering in the United States, particularly the suffering that occurs through no particular fault of the powerless individual.

If what I posit is true, that Thomas, Scalia, and Rehnquist do in fact allow their life experience to heavily impact their judicial decision-making,<sup>456</sup> then it would follow that allowing Thomas, Scalia, and Rehnquist a much different and more diverse set of life experiences to draw upon may cause each to adjust their judicial philosophy in more compassionate ways. If Thomas, Rehnquist, or Scalia could only experience the following real world scenarios:

A.

*Over a three-year period in Chicago, I drove to the west side neighborhood of Grand and Monticello, at least once a week, often twice; I was in that neighborhood at least 156 times, but probably more like 200 over a three-year period. At least half of those times, I was approached, face-to-face, by individuals who offered to sell me drugs. Whatever any person could have wanted—marijuana, crack, cocaine, ecstasy, pills, etc. Driving through the neighborhood, I was often flashed hand signs, typically by a young man placing his fingers to his lips and pantomiming smoking a joint, alerting me to the fact that I could buy marijuana from him, as he stood on the corner with his boys. This did not shock me, nor did it scare me, even as I was occasionally aggressively approached the moment I stepped out of my car, often by two or three older teenaged boys. What did alarm me was when I began to notice that the street dealers were using the “shorties” to run their drugs for them.<sup>457</sup> When I began to be approached by eight- and nine-year-olds, I was taken aback.*

*Occasionally I would discuss the neighborhood drug trade with the youngsters I was doing homework with, and they would matter-of-factly represent that*

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454. See Jack B. Weinstein, *Symposium: Association of American Law Schools: Private Parties as Defendants in Civil Rights Litigation: Brown v. Board of Education After Fifty Years*, 26 *CARDOZO L. REV.* 289, 291–92 (2004) (acknowledging the impact of Dr. Kenneth Clark’s experiments in teaching the U.S. Supreme Court Justices about the reality of injuries faced by segregated black children during the *Brown v. Board* arguments). Judge Weinstein states clearly: “I did not realize then (as I do now after years of practice) that judges must be taught to understand the conditions of the real world, and must have a factual hook on which to hang important decisions.” *Id.* at 291 (emphasis added). Further, Judge Weinstein writes “[j]udges must have a window to life, to the hearts and minds of the people we serve, if we are to rule justly.” *Id.* at 292.

455. Calmore, *supra* note 12, at 201.

456. See *supra* Part VII.A.

457. “Shorties” refer to young boys in the neighborhood, mostly between the ages of eight and thirteen years old.

*the shorties could make \$200 per day, if they would just deliver the drugs and return the cash payment to the street dealers. I always queried whether they, my small cadre of homework students, were running drugs and of course the report was that they were not and that they never would. I wondered though.<sup>458</sup> Clearly the street dealers believed that the Chicago Police Department would not suspect, or at least not harangue, eight- or nine-year-old children.*

B.

*Interacting regularly with at least two dozen African American and Latino youth during my three years in Chicago, led to yet another startling revelation for me. Whenever I began to steer our conversation toward the future and what these youngsters wanted to do when they grew older, the boys would state plainly that they were either going to play in the National Basketball Association ("NBA") or were going to become famous hip hop artists. Allen Iverson<sup>459</sup> and DMX<sup>460</sup> were most often cited as role models, or at least examples of individuals who were just like these Chicago youth—from the 'hood, "made it," and "kept it real."<sup>461</sup> I remember thinking when I was a young boy that I wanted to play in the National Football League, so I was not surprised when I heard basketball or rap aspirations from the twelve- or thirteen-year-old boys. But when I heard the NBA or rap star from the seventeen-, eighteen- and nineteen-year-old youth, who were not even playing basketball in high school nor had ever recorded any music whatsoever, I was astounded again.*

In light of each of the above true life narratives conveyed throughout this Article, Clarence Thomas's espousal of rugged individualism and pulling oneself up by one's bootstraps, seems not just misplaced, but also exceedingly naïve.<sup>462</sup> Structurally, these young children in Chicago are nowhere near being in a place to know how to pull themselves up by their bootstraps. These youth are beaten down by their schools, their neighborhoods, their police forces and their circumstances; Thomas cannot possibly believe that his pronouncements are valid, once context is assigned to

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458. I also wondered what would happen to me, and my vehicle, if the police ever stopped me and one of the homework students was found to have marijuana or crack in their pockets. I began taking precautions when picking up the students.

459. Allen Iverson, currently a professional basketball player in the National Basketball Association. During the 1996 NBA draft Iverson was selected by the Philadelphia 76ers. Since 1996 Iverson has continued to showcase his skills and was named the NBA's Most Valuable Player for the 2000–01 Season. See Allen Iverson Biography, ALLEN IVERSON LIVE, available at <http://www.alleniversonlive.com/biography/background.html> (last visited Aug. 28, 2004).

460. DMX, born Earl Simmons, grew up in Yonkers, New York, in difficult familial circumstances. Following a slow start and a switch to Def Jam Records, DMX began recording and releasing multi-platinum-selling albums, popular for the sheer force of DMX's distinctive voice and his raw lyrics that describe life in the inner city. Since 1998, DMX has established himself as a premier hip hop artist and has managed to have two number one albums in the same year. See VH1, DMX Biography, available at <http://www.vh1.com/artists/az/dmx/bio.jhtml> (last visited Mar. 1, 2005).

461. See Cory Moss, *Misunderstood Allen Iverson Skips Hip-Hop For Hoops*, MTV.COM, available at [http://www.mtv.com/news/articles/1449517/10022001/iverson\\_allen.jhtml](http://www.mtv.com/news/articles/1449517/10022001/iverson_allen.jhtml) (last visited Aug. 28, 2004) (describing Iverson's brief flirtation with a hip hop career in 2002).

462. See Calmore, *supra* note 12.

such pronouncements. And does Thomas just not know of these circumstances that the Chicago youth live in and battle against? Thomas would have society ignore the racism and racial hatred that exists so prominently in our country and in the inner cities.<sup>463</sup> Bill Cosby blames the urban poor for failing to “live up to their end of the bargain?”<sup>464</sup> I believe strongly that Thomas should spend three years mentoring youth on the west side and south side of Chicago. I am nearly certain that this prominent, privileged African American man would use his position for much different purposes if he would just add context to his politics.

### VIII. CONCLUSION

It is not entirely out of the question that Ismael LaBoy or Lawyer “Boo Boo” Foster will apply to law school four or five years hence. It is not out of the question that, with appropriate LSAT preparation courses, both of these young men would score exceedingly well and could send in competitive admissions applications to the University of Michigan Law School. While Thomas would bar their admission if they did not score “exactly” as the average admitted non-minority student, O’Connor and the *Grutter* majority would recognize the depth and breadth of experience and diversity that these two young men would bring to the table. While I suspect that both Boo Boo and Ismael might prefer to attend law school at Northwestern, the University of Chicago, Chicago-Kent, or John Marshall to the University of Michigan, based on their affection for all things Chicago, it seems altogether appropriate to me that the University of Michigan would be able to admit either youngster, using race as a “plus” factor in determining who gets to grasp the golden ring that is the University of Michigan Law School.

For me, this conclusion is based on the reality and the real world tragedies and difficulties that both young men have endured—a reality that Clarence Thomas has ignored, and continues to ignore.

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463. See *supra* notes 404–416 and accompanying text.

464. Dr. Bill Cosby Speaks at the 50th Anniversary Commemoration of the *Brown v. Topeka Board of Education* Supreme Court Decision, available at <http://www.eightcitiesmap.com> (last visited Aug. 8, 2004):

Ladies and gentlemen, the lower economic and lower middle economic people are [not] holding their end in this deal. In the neighborhood that most of us grew up in, parenting is not going on. . . . I’m talking about these people who cry when their son is standing there in an orange suit. Where were you when he was two? Where were you when he was twelve? Where were you when he was eighteen, and how come you don’t know he had a pistol?

*Id.* (transcript on file with author).

APPENDIX A

December 15, 2000

Chicago Police Department  
11th District  
3151 W. Harrison Street  
Chicago, IL 60612

Dear Lt. Banaszkievicz:

I am writing today to formally notify the Chicago Police Department and the 11th District, located in the west Chicago area of an incident of lawless policing and to bring to your attention the despicable behavior of Officer McGovern and his nameless partner. My rights as a United States Citizen were seriously violated by Officer McGovern and his nameless partner, as were the rights of two of my colleagues, on the evening of November 17, 2000, at approximately 11:30 p.m. at the intersection of Central Park Avenue and Grand. As I look back at the events of November 17, 2000, I become amazed at the egregious nature of the actions of Officer McGovern.

I work as an attorney at Kirkland & Ellis in the Chicago, Illinois office. I also serve as a youth group leader and youth mentor in my attending church congregation. I derive great satisfaction from my work as a "Big Brother" type of mentor as I interact regularly with young men and young women in the west Chicago area, particularly in the neighborhoods of Monticello and Augusta, Ridgeway and Augusta and surrounding blocks.

On the evening of November 17, 2000, I prepared to carry out a planned activity with several of the young men that I regularly mentor. I planned to pick up two or three young men at 9:00 p.m. or thereabout, bring them downtown for a night out including dinner and movies at the 600 N. Michigan theater. Unfortunately my work at Kirkland & Ellis kept me overtime and I wasn't able to break free until 11:00 p.m. or so. After calling the young men, we decided to make a late dinner downtown and I proceeded from the Amoco Building to a home on Monticello Drive near Augusta and Monticello, to meet the young men.

At approximately 11:30 p.m., I sat in front of one of the young men's houses, honked and waited for them to come outside. One young man walked out and climbed into the back seat of my car. In this particular neighborhood, six or seven teenage boys and girls attend our local church congregation. While I sat in my car waiting on the other young men, several of my attending church friends and youth walked up to my car and exchanged greetings. A couple of those young men asked if they could still come for the activity downtown and I responded that they needed to get permission from their parents to be out this late.

After waiting approximately five minutes, two young men had entered my car with permission to have a late dinner while two other young men returned to my car to relate that their mothers would not let them go out so late. After making plans with the two young men who could not go to return two days later to pick them up for church services Sunday,

November 19, 2000, at 10:00 a.m., we left and drove north on Monticello toward Division. After turning right and then left onto Central Park, I drove slowly up to the red traffic light at the intersection of Central Park and Grand. At this point, I was calmly driving my car at a safe speed.

As I waited patiently at the traffic light, I noticed a Chicago police department squad car pull up behind me very quickly. Both Officer McGovern, who was driving, and the nameless partner, who was the passenger, jumped out of the squad car and rapidly approached both sides of my car, Officer McGovern on the driver's side and the nameless officer on the passenger's side, shining their flashlights into my car. I told the two young men to remain calm and one of the two young men responded "these cops look thirsty." I rolled down the window of my car, preparing to talk with the officer and pass him my driver's license when Officer McGovern loudly ordered "get out of the car." I was surprised by this request, in light of the fact that Officer McGovern did not articulate any reason for this request, and I responded "what."

At this point Officer McGovern grabbed the door handle of my car, flung it open and said "get out of the car, asshole." I quickly complied. Officer McGovern held his flashlight approximately four to six inches from my face and ordered "open your mouth, asshole." I opened my mouth. Officer McGovern told me to lift my tongue, which I did. Still, with no explanation, Officer McGovern ordered me to walk to the rear of my car whereupon he told me "you are fucked, we are seizing your car, your car is mine." Because Officer McGovern was so needlessly aggressive and obviously full of adrenalin, I did not respond or ask any questions at this point. I had the very strong feeling that if I protested at all, the consequences could be dire, including a genuine fear that I might be beaten or shot. This strong feeling was based on the ultra aggressive approach and barely controlled rage exhibited by Officer McGovern.

As I walked to the rear of my vehicle, Officer McGovern next ordered the young man in the back seat to get out of the car. As the young man was getting out of the car, I turned to face Officer McGovern and placed my hands on my hips. Thereupon Officer McGovern shouted at me to not put my hands on my hips, and to place them "on the trunk, asshole." At this point Officer McGovern walked the young man to the rear of my car, grasped my left hand and firmly clasped one side of his handcuff onto my left wrist. Then, Officer McGovern seized the right hand of my youth mentee and cuffed his right wrist leaving us handcuffed together.

Meanwhile, the nameless officer had pulled the other youth mentee out of the passenger seat in my car and was engaging him in some type of conversation. Also, at this time while we were stopped, at least two additional law enforcement vehicles stopped at the intersection with lights flashing and proceeded to get out of their cars and circle around the scene with their flashlights shining on us and into my car. This unusual display of force, at least three squad cars and at least six officers, seemed sadly inappropriate.

At this point Officer McGovern addressed me again and stated, "We know that you just bought, and we are taking your asses in and taking your car away from you as soon as we find it." At last, a full five to ten minutes after we were stopped, we were alerted to what the officers suspected us of and why we were being held. I turned my head toward Officer McGovern

and stated, "You guys are making a mistake." Officer McGovern loudly responded, "Shut up." He then asked, "Where is it?"

Neither the youth mentee I was handcuffed to nor I responded to Officer McGovern. Thereupon, Officer McGovern proceeded to frisk me in a "pat down" fashion. Fully aware of my "Terry frisk" rights, I wondered what reasonable articulable suspicion Officer McGovern thought he had to first pull me out of the car or to pull my colleagues out of the car, and I also wondered what reasonable articulable suspicion he then had to pat me down for weapons. Neither the young men nor I acted threateningly toward the police in any way or fashion and clearly none of us had ingested drugs nor was there any type of sign that we had used drugs. Imagine my surprise when Officer McGovern, after feeling nothing in the pat down, proceeded to then place his hands directly and fully into each one of my pockets. Officer McGovern placed his hands squarely into the side pockets of my winter overcoat, going so far as to pull the pockets completely out, and then reached into both of my back pants pockets and both of my pants front pockets. Upon finding nothing in my pockets but my wallet and a chap-stick, which he pulled out and placed on my trunk, Officer McGovern turned to my fifteen-year-old youth mentee, who was visibly upset, and asked, "Where is the stuff, asshole?"

The youth mentee handcuffed to me did not answer the officer. I noticed the young man's obvious fear and with my left handcuffed hand placed it on the young man's cuffed right hand and said, "It's gonna be all right." Thereupon Officer McGovern snapped, "I told you to shut up." Officer McGovern then completely ignored the "Terry frisk" with the young man and proceeded to search him by placing his hand squarely inside the pockets of the young man's coat and pants. Upon finding nothing again, Officer McGovern for a third time threatened to haul us in and seize my car.

At this point, Officer McGovern left us standing at the rear of my car and proceeded to enter the front seat of my car and began searching my car. Officer McGovern pulled my sun dashboard protector from under my front seat and also opened the ashtray, glove compartment and generally searched my vehicle for what seemed to be several minutes.

While Officer McGovern was searching my car, the nameless partner approached me and without asking, opened my wallet and removed my drivers' license and left the three of us standing at the rear of my car. I assumed that the nameless officer was returning to the squad car to run my license for warrants. Finally Officer McGovern reemerged from the search of my car, obviously finding nothing, and approached us again. Tired of the bullying, the attempts at intimidation and the menacing and threats, and finally feeling safe from physical harm (Officer McGovern's demeanor had calmed somewhat, as his searches turned up no drugs), I told Officer McGovern to look in my wallet where he would find my active Illinois attorney "bar card." Officer McGovern told me not to "lie" to him, and I then firmly told him to look inside my wallet and retrieve my attorney license. Officer McGovern then retrieved my bar card, looked at it very closely for several seconds and then changed his manner and tone very noticeably.

After inspecting my attorney card closely, Officer McGovern immediately uncuffed me and uncuffed the youth mentee that had been handcuffed

to me. Officer McGovern then started asking what I thought I was doing in that neighborhood which he repeatedly called a “well known dope area.” I immediately responded to Officer McGovern that I thought he should have asked me that question from the beginning before he pulled me out of my car, cursed me, tried to menace me, and repeatedly threatened me. I then carefully explained that I was a youth mentor, that these two young men attended my church and were part of the group that I mentored. Officer McGovern seemed incredulous and stated that we were in a dangerous well-known drug area and that we didn’t belong there. I again repeated that I was a youth mentor, that I was picking up these young men from their homes and that we were heading downtown for an activity. Again, incredulous, Officer McGovern told me I had no business being in that neighborhood, that it was a well-known drug area and that somebody had been shot in that area recently.

Tiring of this sudden incredulousness, I told Officer McGovern I had every right to be in that neighborhood, that I knew it was a dangerous drug area, and that was exactly why I was trying to mentor these young men from this area.

By this time all of the other officers and cars somewhat suddenly dispersed. I then told Officer McGovern that I knew that he did not have probable cause to search me, my colleagues or my car, that I knew he did not have reasonable, articulable suspicion to hold us and that he had no reason to seize us by handcuffing us. At that point I looked squarely at Officer McGovern’s name plate and said, “Officer McGovern, I am going to need your badge number and your supervising officer’s name.” Officer McGovern hotly responded, “Don’t concern yourself with that, just go on about your business.” I replied that I was in fact going to concern myself with this gross violation of my constitutional rights and the constitutional rights of my friends.

After asking for, and being denied the information regarding Officer McGovern’s badge number and supervising officers’ name, I turned to face the nameless partner of Officer McGovern. I stated clearly, “Officer, I am going to need your name and badge number.” The nameless officer turned away from me shielding his name tag from my view and walked briskly to the squad car. I followed the nameless officer to the door of the squad car and three additional times I requested this nameless partner’s name and each time I was flatly ignored. Because of this refusal to give me his name, I have referred to Officer McGovern’s partner as the nameless officer in this letter. Four times I requested the nameless officer’s name, and four times I was ignored.

Finally, Officer McGovern and the nameless partner drove away leaving the three of us standing outside my car, our pants contents strewn across the trunk of my car, both of my car doors open, the pockets of my coat pulled out and with no apologies or explanations.

Unfortunately for these two offending officers this illegal stop and search did not occur in a vacuum and I was not alone which would allow the two officers to lie and cover up for one another placing me in a situation where it would be my word versus the word of two Chicago police officers. Rather, I have two witnesses that will back up every word in this letter and a church full of parishioners that will testify to the honesty, truthfulness, veracity and goodness of these two young men.

In sum, I view this unfortunate scene as follows: Officer McGovern and his nameless partner violated our constitutional rights blatantly and with gross disregard. We were, without doubt, illegally searched and seized in violation of our Fourth Amendment right to privacy. I can think of no probable cause argument that can be forwarded in good faith. Also, it is very questionable as to whether sitting in my car in a well-known dope area, conversing with several young men can even give rise to a basic reasonable suspicion. At most, a stop with a couple of questions could possibly pass muster, but a full blown stop, search and seizure, together with blatant attempts to bully, intimidate, and threaten is so clearly egregious and beyond the scope of authority that it seems ridiculous now. Only it is not ridiculous. Officer McGovern and the nameless officer not only illegally seized us and searched us, but they blatantly tried to menace us, intimidate us and bully us. I can only be grateful that these two offending officers did not plant drugs or weapons on us at the scene of the illegal search.

I am also sad and ashamed to report that as we drove away from the scene, both of the youth mentees described a genuine fear of and disdain for the Chicago police department and a feeling that such police officers as Officer McGovern and the nameless officer make their lives even more dangerous on a day to day basis, not safer. Finally one of the young men responded, "This kind of thing happens all of the time. I told you they were thirsty."

In light of all of the foregoing, I request that the following take place:

A. I want to receive a telephone call from the watch command officer or the supervising officer on duty November 17, 2000 at 11:30 p.m. I can be reached at the direct dial number above at Kirkland & Ellis.

B. I want to see a formal complaint placed into the file of both Officer McGovern and the nameless officer (obviously I want the name of the other offending officer).

C. I want to see an investigation opened into this constitutional violation and to hear the explanations of Officer McGovern and the nameless officer.

D. I want to see that written apologies are forwarded from the offending officers to the two young men that were bullied, threatened and menaced by them. The letters of apology can be forwarded to me here at Kirkland & Ellis. I will deliver the letters to the boys.

E. If the investigation bears my record out, I would request that both Officer McGovern and the nameless officer be suspended for several days to remind them and the officers in your district that rogue policing and the menacing of innocent citizens is not tolerated.

Thank you very much for your time and attention. I will expect to hear from you in short order.

Sincerely,

andré douglas pond cummings

cc: Alderman Michael Chandler

## APPENDIX B

Upon receipt of my letter of complaint, the supervising Lieutenant turned it over to the Chicago Police Department’s Internal Affairs Unit. I was called immediately thereafter at my Kirkland & Ellis contact number and was invited to come down to Internal Affairs for an interview. Internal Affairs requested that both teenagers accompany me to the Police Station for the interview.

When I forwarded the interview request from Internal Affairs to each of the young men, they both responded, separately and unaware of the other’s response, that they were certain if they reported on the police officers that had harassed and menaced us, they would both be sought out and retaliated against by those same officers or by other of the officers that patrolled their neighborhoods. Only one of the two agreed to accompany me to the Chicago Police Department headquarters for the interview.

Once there, we were divided and interviewed. We were both placed in front of a database of police officer photographs and we both identified the two offending officers. Following our account of the details of that evening, we were thanked and dismissed. I was told, upon intense questioning by me, that Internal Affairs would open an investigation into the account, that both identified officers would be required to retain counsel and answer for the allegations of constitutional abuse.

For months I heard nothing. I called the officer that interviewed us every couple of weeks, trying to ascertain the outcome of the investigation. Months later, after the initial investigating officer was transferred, I received a simple, one paragraph letter in the mail from the Chicago Police Department. Our complaint had been assigned an “insufficient proof” type of disposition. It was later explained to me that the “insufficient proof” disposition was the intermediate level of finding by Internal Affairs in connection with complaints made against officers. The lowest level finding, a “no proof” type of disposition, would have essentially exonerated Officer McGovern and his nameless partner based on a lack of credibility and proof. A “guilty” type of finding, the highest level, would have found the officer’s responsible for the constitutional violations and suspensions would have followed. I was told that “insufficient proof” did not exonerate the officers, but that essentially, without “third-party” witnesses to corroborate our story, it was our word against the officers’ (who obviously denied all circumstances) and that the Internal Affairs Board could come to no agreement as to the lower or higher level of reliability.

Therefore, the offending officer’s underwent an Internal Affairs investigation, were required to retain counsel to defend themselves, and had our complaint placed into their permanent files. Otherwise, no other actions were taken against these two rogue police officers. After momentary contemplation, Ismael, Boo Boo and I decided not to file a civil lawsuit against the officers and the Chicago Police Department. As I was reminded then by the teenagers (and am still reminded today) instances like that occur “every day.”

