Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity[1]

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ABSTRACT: Justice Clarence Thomas has generated the attention that most justices receive only after they have retired. He has been boycotted by the National Bar Association, caricatured as a lawn jockey in Emerge Magazine, *and protested by professors at an elite law school. As a general matter, Justice Thomas is viewed as a "non-race" man, a justice with a jurisprudence that mirrors the Court's most conservative white member, Justice Antonin Scalia—in other words, Justice Scalia in "blackface."*

This Article argues that, although Justice Thomas's ideology differs from the liberalism that is more widely held by Blacks in the United States, such ideology is deeply grounded in black conservative thought, which has a "raced" history and foundation that are distinct from white conservatism. In so doing, this Article examines the development of black conservative thought in the United States; highlights pivotal experiences in Justice Thomas's life that have shaped his racial identity; and explicates the development of Justice Thomas's jurisprudence from a black, conservative perspective in cases concerning education and desegregation, affirmative action, and crime.

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1. The title of this Article is inspired by the movie JUST ANOTHER GIRL ON THE I.R.T. (Miramax Films 1993). The I.R.T. is a line of the New York City subway system. The movie gives the female perspective of growing up in black urban America. In many ways, it is the female version of John Singleton's BOYZ N' THE HOOD (Columbia Pictures 1991). Thomas's story is, in a sense, a black justice's story.

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INTRODUCTION

Serving as a United States Supreme Court Justice is one of the most coveted and respected jobs in the nation.[2] Nevertheless, as with any job in the public eye, Supreme Court Justices are often subject to criticisms by many people, both within and outside of the legal profession. Justice Clarence Thomas is no exception.

From the day that Thomas was nominated to sit on the Court, he has been a subject of great interest for many and has been critiqued and opposed by individuals from all walks of life.[3] In particular, the Justice's intellectual abilities and competence as a jurist have been repeatedly and continually challenged.[4] For example, Justice Thomas has been rumored to select clerks from the best law schools, to lean "'especially heavily on them,'" and to publish their draft opinions with "'little embellishment.'"[5] Additionally, Justice Thomas has had his independence as a voter on the bench questioned, with the suggestion that he bases his votes on those of a colleague, Justice Antonin Scalia.[6] Indeed, Justice Thomas has been referred to as "Scalia's puppet,"[7] "Scalia's clone,"[8] and even "Scalia's bitch."[9]

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2. *See* WILLIAM D. BADER & ROY M. MERSKY, THE FIRST ONE HUNDRED AND EIGHT JUSTICES 1 (2004) (asserting that the United States Supreme Court "plays such an influential role in shaping legal thought and practice" that it warrants special study).

3. *Cf.* SCOTT GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 3 (1999) (noting that between July of 1991 and December of 1997, "Justice Thomas was mentioned in 32,377 newspaper stories").

4. *See id.* at 25 (asserting that "[t]he conventional wisdom about Justice Thomas's first few years on the court was that his opinions were shallow and poorly reasoned, he did little work, and he was a clone of conservative Justice Antonin Scalia with few ideas of his own").

5. *See* JOHN GREENYA, SILENT JUSTICE: THE CLARENCE THOMAS STORY 167 (2001) (detailing claims by Jane Mayer and Jill Abramson, authors of *Strange Justice: The Selling of Clarence Thomas*).

6. *Id.* at 263 (quoting a commentator as stating, "Putting aside his political philosophy and his conservative credo, Justice Thomas doesn't deserve to be on the Supreme Court. He doesn't have the intellect to be a member of the Court, and that's the reason, in my opinion, that you see Thomas voting with Scalia so often.").

7. *See* Stephen F. Smith, *The Truth About Clarence Thomas and the Need for New Black Leadership*, 12 REGENT U. L. REV. 513, 514 (1999–2000); John Brummett, *Glorifying Private Over Public*, LAS VEGAS REV. J., Feb. 24, 2002, at 4D (stating that "William Rehnquist and Antonin Scalia are right-wing ideologues" but that "Justice Clarence Thomas is Scalia's puppet"); Vincent T. Bugliosi, *None Dare Call It Treason*, NATION, Feb. 5, 2001, at 11, 11 (referring to Justice Scalia as "the Court's right-wing ideologue" and Justice Thomas as "his Pavlovian puppet . . . who doesn't even try to create the impression that he's thinking"); Paul P. DuPlessis, Opinion, *California Letters Desk*, June 1, 2001, at B16 (calling Antonin Scalia "the Supreme Court's puppeteer" and Clarence Thomas "his puppet"). *But see* GREENYA, *supra* note 5, at 13 (referring to an instance in which one trial lawyer asserted, "'[M]y theory is that Clarence Thomas is a ventriloquist, and that the puppet is Scalia").

8. *See, e.g.*, Carl Rowan, *Thomas is Far from "Home,"* CHI. SUN TIMES, July 4, 1993, 41 (stating that there is "no reason even to hope that [Justice Thomas] will ever be anything other than a clone of the most conservative justice, Antonin Scalia"); Ann D. Wilson, Opinion,

As a liberal black womanist,[10] I initially ignored these comments about Justice Thomas. Ironically, a biography of the late Justice Thurgood Marshall[11]—whose jurisprudence could not have been more different from Justice Thomas's—would bring me to commit an act that I once thought was impossible: defend Justice Thomas.[12] The biography included a statement

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Supreme Court Ruling Bad Joke, PALM BEACH POST, Dec. 17, 2000, at 4E (referring to "Justice Antonin Scalia [and] his unqualified clone, Clarence Thomas").

9. GREENYA, *supra* note 5, at 12.

10. The term "womanist" is a synonym for black feminist or feminist of color. The American Heritage Dictionary now includes this new term in its volume, defining "womanist" as "[h]aving or expressing a belief in or respect for women and their talents and abilities beyond the boundaries of race and class." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1978 (4th ed. 2000).

I use the term "liberal" or "liberalism" to refer to political liberalism. By "liberal," I mean a person who actively believes that government should support social reform within the system and favors the protection of civil liberties. A "liberal" may support programs such as affirmative action or welfare, unions, and strong regulation of business.

11. Justice Thurgood Marshall, the great-grandson of a slave, became the first black Supreme Court Justice in 1967. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 47 (1979). At the time of Marshall's appointment, President Lyndon B. Johnson asserted that appointing Marshall on the Supreme Court was "the right thing to do, the right time to do it, the right man and the right place." Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 13 BERKELEY LA RAZA L.J. 1, 3 (2002) (quotations omitted).

Along with his mentor Charles Hamilton Houston, the former Dean of Howard University School of Law (where Marshall graduated first in his class), Marshall developed a strategy for eliminating segregation in educational institutions. In 1954, the efforts of Marshall and Houston resulted in the landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which declared state-mandated segregation of public schools unconstitutional. By the time Marshall was appointed to the Supreme Court, he had won twenty-nine of the thirty-two cases he argued before the Court. *See* Mark Tushnet, *A Tribute to Justice Thurgood Marshall, Lawyer Thurgood Marshall*, 44 STAN. L. REV. 1277, 1277 (1992).

12. In fact, I was reluctant to write this Article because of the reactions I thought it would elicit. Many of my friends think it blasphemous to suggest that something about the late Justice Marshall reminds me of Justice Thomas. The late Justice himself once said scornfully of the nominee with comparably little litigation experience: "Think of them comparing [Justice Thomas] with me. . . . They think he's as good as I am." JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 393–94 (1998). As I worked on this Article, I became more terrified of being called, much like Justice Thomas has been called, a traitor to my race. *See* Randall Kennedy, "Sellout": The Problem of Betrayal in African American History 15 (unpublished manuscript, on file with the Iowa Law Review) (maintaining that "the problem with blacks deploying a rhetoric that accuses other blacks of being enemies engaged in racial betrayal is that such attacks are too powerful, too intimidating, too silencing" and that it "causes black thinkers and policymakers to censor themselves out of fear of suffering racial excommunication"); *see also* Jacquelyn L. Bridgeman, *Defining Ourselves for Ourselves*, 35 SETON HALL L. REV. (forthcoming 2005) (manuscript at 6–10, on file with the Iowa Law Review) (same). Justice Thomas has been heavily criticized by several prominent members of the black community. For example, film director Spike Lee called the Justice a "'handkerchief head, a chicken and biscuit-eating Uncle Tom.'" Elwood Watson, *Guess What Came to American Politics—Contemporary Black Conservatism*, 29 J. BLACK STUD. 73 (1998) (quoting Jeannye Thorton, *The X Factor*, U.S. NEWS & WORLD REP., July 15, 1991, at 17).

made by Archibald Cox,[13] the man whom Marshall had replaced as Solicitor General: "Marshall may not be very bright or hard-working but he deserves credit for picking the best law clerks in town."[14]

As Juan Williams made clear in his book *Thurgood Marshall: American Revolutionary*, like Justice Thomas, many "[w]hite lawyers in the top law firms and law schools had never been convinced that [Marshall] was a strong legal mind,"[15] despite the fact that Marshall had won twenty-nine of the thirty-two cases he argued before the Court.[16]

Indeed, much like Justice Thomas and Justice Scalia, some critics had openly wondered whether Justice Marshall was dependent on Justice Brennan in deciding how to vote in cases before the Supreme Court.[17] In

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13. Archibald Cox, a former law professor at Harvard, was also the first special prosecutor appointed to investigate Watergate. Former President Richard Nixon ordered the solicitor general to fire Cox after he requested access to secret White House tapes as part of his investigation. *See* WOODWARD & ARMSTRONG, *supra* note 11, at 287–88.

14. WILLIAMS, *supra* note 12, at 362 (quoting Richard Smith, *Clerks of the Court*, WASH. POST, Aug. 29, 1976, at 15). At one point, the *National Review* ran an article in which conservative Terry Eastland asked, "[o]f the 15 or so opinions [that] the court assigned to [Marshall] during the term, how many does he, not his clerks, actually write?" *Id.* at 384 (quoting Terry Eastland, *While Justice Sleeps*, NAT'L REV., Apr. 21, 1989, at 24–25).

15. *Id.* As Mark Tushnet of Georgetown University Law Center has noted:

> The April 21, 1989 cover of the conservative journal *National Review* captured a common view of Thurgood Marshall as a Supreme Court Justice: it showed him asleep on the bench. This view, that Marshall was a lazy Justice uninterested in the Court's work, is rarely committed to print. In the journalistic book *The Brethren*, authors Bob Woodward and Scott Armstrong report an incident that presents this view. According to Woodward and Armstrong, Justice Lewis Powell expressed incredulity that, in a brief conversation, Marshall had seemed to indicate that he did not know the details in one part of Marshall's important dissenting opinion in *San Antonio Independent School District v. Rodriguez*. They also report the "joke" told around the Supreme Court building that the only time Justice Marshall saw Justice Potter Stewart was in the hallways as Stewart arrived late and Marshall left early. *This view of Marshall is wrong and perhaps racist.*

Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2109 (1992) (emphasis added).

16. *See supra* note 11 and accompanying text; Tushnet, *supra* note 11, at 1277 (citing Andrew Rosenthal, *Marshall Retires from High Court*, N.Y. TIMES, June 28, 1991, at A1, A13) (asserting that Marshall was a great trial lawyer and appellate advocate). Additionally, in their book *The Brethren*, Robert Woodward and Scott Armstrong depicted Justice Marshall as a man who failed to pay attention to cases during oral arguments, did not do his work, regularly watched television in the middle of the day, heavily depended on his law clerks in preparing for cases and writing opinions, and "was more admired for cracking dirty jokes during obscenity cases than for his legal skills." WILLIAMS, *supra* note 12, at 369 (citing WOODWARD & ARMSTRONG, *supra* note 11, at 197, 258, 429); *see also* Juan Williams, *Thurgood Marshall—American Revolutionary*, 25 U. ARK. LITTLE ROCK L. REV. 443, 444 (2003) (discussing the importance of Marshall's legal contributions).

17. WILLIAMS, *supra* note 12, at 402 (quoting Terry Eastland as saying, "Justice Thurgood Marshall will be lucky to rank somewhere in the middle of the 105 Supreme Court justices who have served the United States. . . . [Justice Marshall consistently voted with Justice Brennan

fact, as several authors have noted, Justice Marshall was privately referred to by law clerks as "Mr. Justice Brennan-Marshall."[18] Later, after Justice Marshall retired from the Court, one writer would assert,

> Marshall worked well with Justice William J. Brennan Jr. . . . But Brennan, a great justice by any standard, was the senior man in this partnership, and when they managed to forge liberal majorities, it was usually due to Brennan's influence within the Supreme Court. It bears noting that Marshall is retiring a year after Brennan did.[19]

That same writer, Terry Eastland, would also declare that Marshall was "not an intellectual force."[20]

Thus, the question arises: What does it mean that the only two black justices to sit on the Supreme Court, two justices who could not be any more different,[21] have routinely had their intellectual abilities and individualism questioned in the same way?[22] Have both of these justices been targets of the

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and] wrote few opinions of major significance, either for the Supreme Court or in dissent").

18. *See* WOODWARD & ARMSTRONG, *supra* note 11, at 48; *see also* WILLIAMS, *supra* note 12, at 402 (quoting Terry Eastland, Editorial, ... *A Mediocre Justice*, BALT. SUN, July 1, 1991, at A9); Smith, *supra* note 7, at 517.

19. Terry Eastland, Editorial, BALT. SUN, July 1, 1991, at A9. Even Chief Justice Rehnquist has challenged Justice Marshall's legal thinking abilities, once stating: "I think [Justice Marshall will] be thought of as a great legal advocate, but I don't think he would have been thought of as a great legal thinker." WILLIAMS, *supra* note 12, at 402.

20. Eastland, *supra* note 19, at A9. Professor Stephen Smith of the University of Virginia School of Law has argued that

> high rates of agreement are commonplace on the Supreme Court. For example, during the same term that Justices Thomas and Scalia agreed 93% of the time, President Clinton's two appointees to the Court, Justices Ruth Bader Ginsburg and Stephen G. Breyer, agreed 86% of the time. Also, in Justice Anthony M. Kennedy's first term on the Court, he voted with Chief Justice William H. Rehnquist 93% of the time.

Smith, *supra* note 7, at 517. As Professor Smith points out, however, Justice Breyer and Justice Kennedy "are not dismissed as mere 'followers' of Justice Ginsburg and the Chief Justice, respectively, despite their similarly high rates of agreement." *Id.* at 517; *see also* Scott P. Johnson & Robert M. Alexander, *The Rehnquist Court and the Devolution of the Right to Privacy*, 105 W. VA. L. REV. 621, 644–46 (2003) (reviewing privacy cases between 1986 and 2000, and finding in cases in which Justices Rehnquist and Scalia sat together, that they (in addition to Thomas) voted together 100% of the time, and that Ginsburg, Breyer, and Stevens also voted together 100% of the time).

21. *See* John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to "The Law School Five,"* 46 HOW. L.J. 175, 222 (2003) (noting that "Justice Thomas represents so stark a contrast to what Marshall did and was about"); Note, *Lasting Stigma: Affirmative Action and Clarence Thomas's Prisoners' Rights Jurisprudence*, 112 HARV. L. REV. 1331, 1334–36 (1999) (concluding that Justice Thomas's conservative jurisprudence is in part due to his attempts to distinguish himself from Justice Marshall).

22. *See* David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924, 1956–57 (1999) (reviewing PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999), and discussing how the presumption of black incompetence worked to hurt Larry Mungin, the book's protagonist, at his law firm); Donna Gill, *Lawyers of Color: Encouraging Diversity*, CHI. LAW.,

age-old stereotype that Blacks[23] are lazy and incompetent and cannot think for themselves?[24] Or, more directly, to what extent is Justice Thomas a victim of this form of racism?[25]

July 1992, at 1 (quoting a black partner as saying that "[m]inorities do not come in with [a] *presumption of competence . . . . They come in having to prove themselves.*").

23. Throughout this Article, I capitalize the word "Black" or "White" when used as a noun to describe a racialized group. I prefer to use the term "Blacks" than to use the term "African Americans," because I find the term "Blacks" to be more inclusive. Additionally, "[i]t is more convenient to invoke the terminological differentiation between black and white than say, between African-American and Northern European-American, which would be necessary to maintain semantic symmetry between the two typologies." Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1073 n.4.

24. *See, e.g.*, PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999) (describing the story of a black Harvard Law School graduate who sued his law firm for racial discrimination and how the majority opinion of the D.C. Circuit contained an underlying message that the young attorney was an unqualified black lawyer carried along by affirmative action); *see also* SHELBY STEELE, A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA 5 (1998) [hereinafter STEELE, A DREAM DEFERRED] (noting that the author "heard a white female professional at a racially mixed dinner table call Clarence Thomas an incompetent beneficiary of affirmative action"); SHELBY STEELE, THE CONTENT OF OUR CHARACTER 133 (1990) [hereinafter STEELE, CONTENT OF OUR CHARACTER] ("The accusation black Americans have always lived with is that they are inferior—inferior simply because they are black. And this accusation has been too uniform, too ingrained in cultural imagery, too enforced by law, custom, and every form of power not to have left a mark.").

25. Justice Thomas has argued the same. *See* Tony Mauro, *Clerks: Minority Ranks Rise*, LEGAL TIMES, Oct. 16, 2000, at 10. As journalist Tony Mauro reported, Justice Thomas proclaimed the following in response to a question concerning

> criticism that he is a "clone" of Justice Antonin Scalia: "*Because I am black, it is said automatically that Justice Scalia has to do my work for me.* That goes with the turf. I understand that deal. It is interesting that I rarely see him, so he must have a chip in my brain and he controls me that way. But the fact is, no such cabal exists."

Id. (emphasis added). Mauro also wrote that Justice Thomas was later "asked if he continues to write his own opinions and deadpanned, 'No, Justice Scalia does.'" *Id.*

Mark Tushnet argues that racism affected perceptions of Marshall as being intellectually unfit for the Court. *See generally* Tushnet, *supra* note 15. For instance, in response to the argument about Marshall's "overuse" of his clerks, Tushnet demonstrates that Marshall's "practices were not wildly out of line with those of others on the Court." *Id.* at 2112. Specifically, Tushnet reported:

> Chief Justice William Rehnquist has written that he has his clerks "do the first draft of almost all cases" in his chambers, and that sometimes he leaves those drafts "relatively unchanged." Laurence Tribe reported that "a number of opinions [he] worked on" as Justice Stewart's law clerk "are really almost exactly as [he] drafted them," including one of Justice Stewart's most celebrated opinions. Indeed, all of the Justices relied heavily on their law clerks, particularly for working out details; as Bernard Schwartz explained in his discussion of the Burger Court's processes, "The Justices normally outline the way they want opinions drafted. But the drafting clerk is left with a great deal of discretion on the details of the opinion, particularly the specific reasoning and research supporting the decision."

Id. (citations omitted); *see also* John B. Oakley, *William W. Schwarzer: A Judge for All Seasons*, 28 U.C. DAVIS L. REV. 1097, 1098 (1995) (describing how much federal judges rely on the help of their law clerks).

A review of Justice Thomas's jurisprudence reveals that there is no basis for the claim that Justice Thomas is a "Scalia clone" or "Scalia puppet" and supports the proposition that Justice Thomas has been unfairly subjected to the stereotype of black incompetence.[26] In fact, Justice Thomas has developed his own jurisprudence as a black conservative, directly and indirectly weaving his own "raced" ideologies into his opinions.[27]

In this Article, I draw on Justice Thomas's opinions on the Supreme Court in areas concerning education and desegregation, affirmative action, and crime, and I argue that Justice Thomas's jurisprudence, while conservative, is, in certain important respects, distinct from that of his white conservative counterparts and is intrinsically linked to his identity as a Southern black man.[28] Part I of this Article examines and describes the development of black conservative thought in the United States and how such ideology is distinct from white conservative rhetoric and theory. Part II provides an overview of Justice Thomas's background, highlighting pivotal experiences during his childhood, education, and career that have shaped his racial identity and his views about how racial equality should be achieved within and through the law. Part III examines and explains the development of Justice Thomas's jurisprudence as participating in America's long history of black conservative thought (described in Part I) as seen in Supreme Court cases concerning education and desegregation, affirmative action, and crime.[29] Finally, this Article concludes by exploring what the most commonly

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26. *See* Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 608 (1998) (describing the stereotype of black incompetence and recounting a story that demonstrates how "[i]f you have dark skin in this society . . . you may be . . . discounted in meetings, or assumed to be less competent than a white person when you walk into a room for a job interview or to give a lecture"). Senate Minority Leader Harry Reid recently expressed his strong opposition to the idea of Justice Thomas being appointed Chief Justice, claiming that the Justice is an "embarrassment," that his "opinions are poorly written," and that he has not "done a good job as a Supreme Court Justice." Zev Chafets, *Slap at Thomas Stinks of Racism*, N.Y. DAILY NEWS, Dec. 8, 2004, at 43. At the same time, however, Senator Reid has asserted that Justice Scalia is suitable for the position because he is "one smart guy." Michael A. Fletcher, *Reid Says He Could Back Scalia for Chief Justice; Comments Anger Liberals and Thomas Supporters*, WASH. POST, Dec. 7, 2004, at A04. The seemingly obvious explanation of the senator's strikingly different opinions of two justices with similar conservative views is the stereotype of black incompetence. *See* Angela Onwuachi-Willig, *Clarence Thomas as Chief Justice*, CHI. TRIB., Jan. 2, 2005, at 9; *see also* Chafets, *supra* at 43.

27. In this Article, I make no claim that Justice Thomas's political views are immune from attack. I challenge only those criticisms contending that Justice Thomas is Justice Scalia's puppet and has no independent voice.

28. *Cf.* Calmore, *supra* note 21, at 176 (noting that "our judiciary . . . is [not] an impartial institution that stands independently against the tide of racial politics and ideology"); Johnson, *supra* note 11, at 7–14 (describing the potential benefits of appointing a Latino/a to the Supreme Court).

29. *See* Calmore, *supra* note 21, at 192 ("[Justice Thomas's] jurisprudence . . . is deeply personal and his black identity and biography stand closely behind his Supreme Court votes and opinions.").

heard criticisms of Justice Thomas teach us about race and the impact of racial identity.

I. THE DEVELOPMENT OF BLACK CONSERVATIVE THOUGHT

> [T]here was an appearance within the conservative ranks that blacks were to be tolerated but not necessarily welcomed. There appeared to be a presumption, albeit refutable, that blacks could not be conservative. . . . Hence, in challenging either positions or emphases on policy matters, one had to be careful not to go so far as to lose one's conservative credentials. . . . Certainly, pluralism on these issues was not encouraged or invited—especially from blacks. . . . Dissent bore a price—one I gladly paid.
>
> —Clarence Thomas[30]

A. THE HISTORY OF BLACK CONSERVATISM

Although black conservatives have only recently begun to gain widespread attention—especially since the appointment of Justice Thomas in 1991—Justice Thomas is only one of a long line of black individuals to espouse conservative ideas.[31] Indeed, the development of black conservative

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30. Clarence Thomas, *No Room at the Inn: The Loneliness of the Black Conservative*, *in* BLACK AND RIGHT: THE BOLD NEW VOICE OF BLACK CONSERVATIVES IN AMERICA 8 (Stan Faryna et al. eds., 1997) [hereinafter BLACK AND RIGHT]; *see also* JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 52 (1994) (quoting Thomas as saying "I don't fit in with whites and I don't fit in with blacks"); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 566 (2001) (arguing that it is important for law to address the exclusion of "individuals who seek both to retain cultural membership and to pursue freedom from discrimination and repression within their cultural communities"); Robert C. Smith & Hanes Walton, Jr., *U-Turn: Martin Kilson and Black Conservatism*, 62 TRANSITION, 209 209–10 (1993) (highlighting how "many black traditional Republicans . . . worked hard to have [the Republican Party] deal with the plight of African Americans" and were excluded from conservative administrations).

31. *See* Randall Kennedy, *Justice Thomas and Racial Loyalty*, AM. LAW., Sept. 1998, at 91 (asserting that "Thomas's thinking . . . [has] deep roots in Afro-American history and culture as reflected in the idea of such figures as Booker T. Washington, Kelly Miller, George Schuyler, Zora Neale Hurston, and Thomas Sowell"). As a general matter, conservatives can be divided into three different groups: (1) the anti-statist faction; (2) the organic faction; and (3) the neoconservative faction. The anti-statist faction of conservatism focuses on decreasing the role of the state in American politics. As a general matter, this group places a strong emphasis on the role of the individual in society and, in turn, demands a strict limit on government control and authority. The organic faction of conservatism concentrates more on issues of morality and culture and is strongly influenced by religion. Today, this group is largely controlled by the "Religious Right." The third faction of conservatism is the neoconservative group, into which many black conservatives fit. The neoconservatives, many of whom were once liberals, oppose the expansion of government and social welfare programs (much like their white counterparts). KENNETH M. DOLBEARE & LINDA J. METCALF, AMERICAN IDEOLOGIES TODAY 151–52 (1993); Lewis A. Randolph, *A Historical Analysis and Critique of Contemporary Black Conservatism*, 19 W.J. BLACK STUD. 149, 150–51 (1995).

This Article focuses on the anti-statist and neoconservative factions of conservatives

thought[32] has deep historical roots, reaching all the way back to the late 1700s.[33] The school of thought has developed from an ideology centered around a gradualist approach to achieving equality that required a practical and strategic accommodation of Whites, to today's black empowerment and self-reliance themes.[34]

Although traces of black conservative thought can be found as far back as the 1700s, the most prominent historical figure among black conservatives is Booker T. Washington,[35] who emerged as a leader of the black community

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and does not address the organic faction.

32. Additionally, there are various strands of black conservative thought. *See* Peter Eisenstadt, *Introduction*, *in* BLACK CONSERVATISM: ESSAYS IN INTELLECTUAL AND POLITICAL HISTORY xv (Peter Eisenstadt ed., 1999) (hereinafter BLACK CONSERVATISM]. By discussing black conservative ideology as a whole, I do not mean to suggest that all black conservatives "think alike." In fact, black conservatism is so rich and varied that it is difficult to define one particular ideology as black conservative thought. As one author stated about black conservatism, "[a]ny generalization about black conservatism is subject to the following two limitations: (1) It will not be true of all black conservatives, [and] (2) it will be true of many individuals who are not black conservatives." *Id.* at x.

Common themes and ideas, however, have persisted throughout the history of black conservatism and pervade nearly every faction of black conservatism. For the sake of simplicity, I have drawn together ideas from black conservatives (in particular, black neoconservatives) whose views on the issues of education/desegregation, affirmative action, and crime coincide with those expressed by Justice Thomas and refer to this collection of ideas as "black conservative thought" or "black conservative ideology." I am not, however, making any claims that all conservatives or all black conservatives (or all liberals or all black liberals) adhere to the principles described here. For the purposes of this Article, however, I have made generalizations about conservatives and liberals, both ethnic and non-ethnic.

33. For example, Jupiter Hammon, a Long Island slave, is considered to be one of the first Blacks to express black conservative ideas, in particular ideas related to Blacks' proving their worthiness to Whites as a strategic move in order to gain more rights. According to Hammon, "[f]ree blacks had a special responsibility to uphold moral standards, to avoid stealing and laziness, to prove themselves worthy of freedom, and to dispel the canards about black incapacity for self-directed lives." *Id.* at xv.

34. To many Blacks and Whites, today's black conservative is viewed as an accommodationist, a person who is willing to "sell out his or her race" to gain acceptance from Whites. *See* STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 164. As Steele explains,

> [T]his is the most constant charge against the black conservative—that he does not love his own people—an unpardonable sin that justifies his symbolic annihilation. . . [a]n Uncle Tom . . . whose failure to love his people makes him an accessory to their oppression. . . . Thus black conservatives do not yet comprise a loyal opposition; they are, instead, classic dissenters. . . . [living] a life openly subversive to [their] own group and often impractical for [themselves] . . . ."

STEELE, A DREAM DEFERRED, *supra* note 24, at 7–8; *see also* Sunder, *supra* note 30, at 566 ("[I]ndividuals are increasingly refusing to take their cultures lying down. Rejecting old notions of imposed identity, more and more, individuals want reason, choice, and autonomy within their cultural communities. They want culture on their own terms.").

35. Booker T. Washington was born a slave in Hale's Ford, Virginia in 1858 or 1859. *See* BOOKER T. WASHINGTON, UP FROM SLAVERY 1 (1900). After emancipation, Washington's family was so poor that he was forced to work in salt furnaces and coal mines at the tender age of nine. *See* BOOKER T. WASHINGTON, THE STORY OF MY LIFE AND WORK 48 (1900) [hereinafter

during the post-Reconstruction era.[36] Specifically, Washington's rise to prominence occurred in the late 1800s and early 1900s, a period that was replete with violence against Blacks, including lynching and consistent violations of the rights of Blacks as free persons.[37]

As a response to the repeated attacks against black people during this period, Washington and certain other black men strategically formed coalitions with white conservative elites as a means of ensuring the safety of Blacks in the South.[38] The ideology of Washington and these men was as follows: "If [Blacks] play by [Whites'] rules, and prove [their] worthiness according to [White] standards, [Whites] will have no choice but to accommodate [Blacks]."[39] In other words, acknowledging the strong and often violent resistance by Whites to efforts by Blacks to have their rights recognized, Washington and his followers developed a strategic, gradual approach to achieving racial equality that did not threaten to overturn the status quo too quickly.[40] To Washington and his followers, Blacks had a duty to focus on their own economic and moral advancement through self-help, rather than seek progress through legal and political changes that required the approval and cooperation of Whites. According to these activists, Whites

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WASHINGTON, STORY]; Donald B. Gibson, *Strategies and Revisions of Self-Representation in Booker T. Washington's Autobiographies*, 45 AM. Q. 370, 374 (1993). When he was sixteen, Washington quit work to go to school. To accomplish this task, Washington had to walk over 100 miles to attend the Hampton Institute in Virginia. He paid his tuition and board there by working as the janitor. *See* WASHINGTON, STORY, *supra* at 55–63.

36. *See* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 825 (contending that Washington rejuvenated black nationalism during the post-Reconstruction era); Book Note, *Rethinking Self-Help*, 104 HARV. L. REV. 1711, 1714 (1991) (noting that Booker T. Washington rose to prominence during the post-Reconstruction era by telling Blacks in the rural South to cast down their buckets).

37. *See* Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1785 (1989) (reviewing ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM (1990)); John Hope Franklin, *Booker T. Washington, Revisited*, N.Y. TIMES, Aug. 1, 1991, at A1.

38. Randolph, *supra* note 31, at 153 (citing C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1974)) (explaining the emergence of black conservatism as the result of a white power structure that was unwilling to tolerate demands made by black leaders who did not accommodate white interests).

39. Eisenstadt, *supra* note 32, at xi; *see also* Randolph, *supra* note 31, at 151.

40. *See* Dickson D. Bruce, Jr., *Booker T. Washington's "The Man Farthest Down" and the Transformation of Race*, 48 MISS. Q. 239, 241 (1995) (noting also that Paul Laurence Dunbar described Washington as "[w]earing 'the mask'"). According to Dickson Bruce, Jr.,

> Washington was a man who knew how to survive in a hostile white world, saying what he knew that white world wanted to hear, trying, like the trickster John, to prevent that world from closing off what few possibilities there were for effective action and achievement. . . . [Washington] . . . was a master at saying one thing and meaning another, using techniques of indirection to subvert white American racism even as he appeared to accommodate himself to the institutions of a racist society.

Id.

would never accept Blacks until Blacks proved themselves worthy of such acceptance or, perhaps more to the point, Whites may never accept Blacks at all.[41]

Indeed, for Washington and other "representative men of the race,"[42] this philosophy of accommodation, coupled with self-help, proved extremely successful in certain, selected instances. Many southern Whites, who were extremely resistant to any radical change in the status of Blacks, found Washington's views more palatable than those of other black leaders such as W.E.B. Du Bois. Some even provided Washington with the social and financial support to institute the programs he saw as being most beneficial to Blacks.[43] For example, with the assistance of white philanthropists, in 1881 Washington founded the Tuskegee Normal and Industrial Institute, which was created to train Blacks to work in agriculture and, in part, education.[44]

Washington's beliefs were viewed as too conciliatory by many Blacks, including W.E.B. Du Bois,[45] who lambasted Washington for not forcing the

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41. *See* August Meier, *Negro Class Structure and Ideology in the Age of Booker T. Washington*, 23 PHYLON 258, 258 (1962) (describing Washington's philosophy as being that "[o]nce Negroes had proven their ability to help themselves, to acquire wealth and respectability, it was believed, prejudice and discrimination would wither away"). Some have argued that Washington was not an accommodationist but a realist who used trickery to help further progress among black people. *See generally* Gibson, *supra* note 35 (describing Washington's autobiography, *Up From Slavery*, as deliberately addressing white desire regarding racial matters and "assuag[ing] guilt in assuring its white audience that blacks, in slavery and out, were utterly and entirely without 'bitterness'").

42. Randolph, *supra* note 31, at 152. These men tended to be members of the black upper-class, some of whom "felt that their education and cultural upbringing, and not race, would secure for them first class citizenship rights" and some of whom felt that an accommodationist approach to resolving severe prejudices against Blacks "was far better than no approach" at all. *Id.* at 152–53; *see also* GEORGE S. SCHUYLER, BLACK AND CONSERVATIVE 3–4 (1966) ("My folks boasted of having been free as far back as any of them could or wanted to remember, and they haughtily looked down upon those who had been in servitude. They neither cherished nor sang slave songs."); *cf.* WILLARD B. GATEWOOD, ARISTOCRATS OF COLOR 302 (1993); Meier, *supra* note 41, at 260 (stating that it was among the "upward mobile middle class [of Blacks during the 1920s] that the philosophy of racial progress through economic solidarity . . . and the philosophy of Booker T. Washington found their greatest support"). Although many of Washington's followers were from the black upper class, Washington's philosophies, as opposed to W.E.B. Du Bois's, are often viewed as designed to help the average black man, and not just the Talented Tenth, as the most privileged Blacks were referred to by Du Bois, who believed that it would be this tenth that would help to raise the race.

43. *See* Franklin, *supra* note 37; *see also* W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 36 (Vintage Books 1986) ("It startled the Nation to hear a Negro advocating such a programme after many decades of bitter complaint; it startled and won the applause of the South . . . .").

44. *See* WASHINGTON, STORY, *supra* note 35, at 79–82. This institution is now known as Tuskegee University.

45. W.E.B. Du Bois, a native of Massachusetts, received his many degrees from Fisk University in Nashville, Tennessee, the University of Berlin in Germany, and Harvard University. He was the first Black ever to receive his Ph.D. in history from Harvard. *See* Richard Delgado, *Explaining the Rise and Fall of African-American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 379 (2002) (reviewing MARY L. DUDZIAK, COLD

white South to correct its wrongs through "candid and honest criticism."[46] By 1911 and 1912, Washington's power in the black community had waned, and black resistance to his "conservative" ideas had grown stronger.[47]

Despite this resistance, black conservatism endured past the post-Reconstruction period and into the very beginnings of the Civil Rights Movement. The most dominant black conservative in between these two eras (i.e., during the 1920s, 1930s, and 1940s) was George Schuyler,[48] a journalist who asserted that the "American Negro . . . has been the outstanding example of American conservatism: adjustable, resourceful, adaptable, patient, restrained, and not given to gambling what advantages he has in quixotic adventures."[49] As Schuyler described in his book *Black and Conservative*, conservatism continued to thrive among many of the black elite, who "regarded [black Southern migrants] as illiterate, ignorant, ill-bred, and amoral" and unlike the "old Northern Negro families [who] had the habits, traits, and outlook of the whites for whom they worked and whose prejudices they shared."[50]

By the 1950s, however, black conservatism began to change. Instead of trying to maintain a gradual approach to seeking equality that was designed

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WAR CIVIL RIGHTS (2000)). Du Bois, a founder of the NAACP, is famous for his prophetic statement, "The problem of the twentieth century is the problem of the color-line," which continues to prove true in the twenty-first century. DU BOIS, *supra* note 43, at 16; Delgado, *supra* at 379; David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 1999 (1993) (describing how, even today, society cannot escape the problem of the color line); *see also* GLENN LOURY, ONE BY ONE FROM THE INSIDE OUT 65 (1995) (describing the parallels between the debates of followers of Washington and Du Bois to that of Justices Thomas and Marshall).

46. *See* DU BOIS, *supra* note 43, at 47.

47. *See* Bruce, *supra* note 40, at 245. Some Blacks had criticized Washington prior to this time. For example, in 1904, Jesse Max Barber, a former editor of the *Voice of the Negro*, satirized Washington when he wrote an article entitled "What Is A Good Negro?" In response to this question, Barber wrote,

> "A good Negro" is one who says that his race does not need the higher learning; that what they need is industrial education, pure and simple. He stands up before his people and murders the truth and the Kings English in trying to enforce upon them the evils of a College Education and the beauties of the plow.

Louis R. Harlan, *Booker T. Washington and the Voice of the Negro, 1904–1907*, 45 J.S. HIST. 45, 50 (1979).

48. *See* Ann Rayson, *George Schuyler: Paradox Among "Assimilationist" Writers*, 12 BLACK AM. LITERATURE F. 102, 104 (1978) ("In his autobiography Schuyler expresses the attitude of Booker T. Washington: 'My feeling was then, and it is stronger now . . . that Negroes have the best chance here in the United States if they will avail themselves of the numerous opportunities they have.'"). George Schuyler was born on February 25, 1895 and was raised in Syracuse, New York. Schuyler's family was considered middle class within the class system among Blacks. According to Schuyler, his "folks [were] free black citizens of New York State" since the early 1800s. Oscar R. Williams, *From Black Liberal to Black Conservative: George S. Schuyler, 1923–1935*, 21 AFRO-AM. N.Y. LIFE & HIST. 59, 60 (1997).

49. SCHUYLER, *supra* note 42, at 2.

50. *Id.* at 4.

to decrease white resistance to black equality, black conservatives, like Schuyler, began to focus solely on principles of self-help and self-reliance, not necessarily because they would least irritate or upset Whites, but instead because they believed that Whites would not act in the best interests of Blacks. As Schuyler explained in his autobiography: "Once we accept the fact that there is, and will always be a color caste system in the United States, and stop crying about it, we can concentrate on how best to survive and prosper within that system. This is not defeatism but realism."[51]

In the 1960s, the voice of black conservatives, as we traditionally conceive of them, became weaker in light of the strength and pervasiveness of the Black Power Movement.[52] A few of these traditional black conservatives, like Schuyler, however, continued to express their views. These conservatives denounced liberal black leaders for their "civil rights agitation," which, to them, simply created more enemies of the race and resulted in no true gains for the people.[53] Additionally, Schuyler rejected the philosophies of black nationalists,[54] such as Malcolm X, who "opposed an integrationist understanding of racial progress."[55]

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51. *Id.* at 121–22.

52. Lewis A. Randolph, *Black Neoconservatives in the United States*, *in* RACE & POLITICS 149, 150–51 (James Jennings ed., 1997).

53. SCHUYLER, *supra* note 42, at 342; *see also* Williams, *supra* note 48, at 67 (noting that "Schuyler openly professed his beliefs during a time when conservative ideology among African Americans did not have a widespread audience in mainstream America" and that he"was a pioneer of 20th century black conservative ideology"); *cf.* Mark Gauvreau Judge, *Justice To George S. Schuyler*, POL'Y REV., Aug./Sept. 2000, at 41, 42 ("Schuyler's dogmatic conservatism ran in absolute contrast to the philosophies expressed by virtually every major spokesperson of the civil rights movement."). Schuyler even went as far as to defend police tactics that were utilized in response to marches and sit-ins, noting that the "use of firehoses, tear gas, and dogs was cited with horror, as if these were not true and tried methods of mob control the world over." SCHUYLER, *supra* note 42, at 346. He also stated that he had "observed the police handling of the most recent Harlem rioting and [thought] the police restraint was admirable in the face of harsh provocation." *Id.* at 346–47. Schuyler believed that the Civil Rights Movement was communist-inspired and that Communists were merely using Blacks to further their agenda. *See* Williams, *supra* note 48, at 66. Schuyler also opposed the selection of Martin Luther King, Jr. for the Nobel Peace Prize. *See* Rayson, *supra* note 48, at 102 (also noting that Schuyler's "conservative views were so insistent that in 1964 he supported Barry Goldwater for President despite what most blacks regarded as a racist Republican Party platform").

54. *See* Spencer Overton, *The Threat Diversity Poses to African Americans: A Black Nationalist Critique of Outsider Ideology*, 37 HOW. L.J. 465, 478–85 (1994) (discussing the tenets of black nationalism).

55. Peller, *supra* note 36, at 761; Juan Williams, *A Question of Fairness*, ATLANTIC MONTHLY, Feb. 1987, at 73. Many black conservatives have adopted Malcolm X as a conservative today because his philosophies were rooted in the principles of black self-reliance. Clarence Thomas was quoted as saying,

> "I don't see how the civil-rights people today can claim Malcolm X as one of their own. Where does he say black people should go begging to the Labor Department for jobs? He was hell on integrationists. Where does he say you should sacrifice your institutions to be next to white people?"

Interestingly, despite Schuyler's rejection of black nationalism, some black nationalists, including those belonging to the Nation of Islam, actually constituted a strong voice for black conservatism.[56] Like Washington and Schuyler, the Nation of Islam promoted the ideals of self-reliance and self-determination, and founded small black businesses and schools as a means toward developing a separate society for Blacks.[57] Indeed, it is no surprise that Malcolm X, an adopted black conservative today, was once a member of the Nation of Islam.[58]

In fact, to black conservatives during this time period, such as Robert Woodson, who later worked at the National Urban League; the now-accepted Malcolm X, a black nationalist; and the Nation of Islam, the welfare of Blacks rested in the hands of Blacks.[59] As Malcolm X once expressed during a speech that is a favorite of Justice Thomas's:

> The American black man should be focusing his every effort toward building his *own* businesses and decent homes for himself. As other ethnic groups have done, let the black people, wherever possible, however possible, patronize their own kind, and start in those ways to build up the black race's ability to do for itself. That's the only way the American black man is ever going to get respect.[60]

In sum, to this new black conservative, it was Blacks alone, even in the face of enormous discrimination and without the assistance of Whites, who would control their own destiny.[61] The paramount issue for these conservatives was black empowerment and black self-reliance.[62]

Williams, supra at 73

56. *See* Hayward Farrar, *Radical Rhetoric, Conservative Reality: The Nation of Islam as an American Conservative Formation*, *in* BLACK CONSERVATISM, supra note 32, at 109, 109 (arguing that although the Nation of Islam is largely perceived as radical, it "has actually been a conservative force in the black community"). Farrar also argues that the Universal Negro Improvement Association, an organization led by Marcus Garvey, who initiated the Back-to-Africa Movement, was a precursor to the Nation. *See id.* at 110 (asserting that Garvey preached that, by creating black-controlled social, economic, and political structures, Blacks could free themselves from white domination). Like the Nation, Garvey was also heavily criticized by Schuyler. SCHUYLER, *supra* note 42, at 122–24.

57. *See* Farrar, *supra* note 56, at 113–14, 127 (citing the Million Man March as an example of the Nation's conservatism with its focus on self-help). Of course, black liberals often adopt these principles, but liberals also recognize how institutionalized barriers make strict self-reliance difficult. *See* Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547, 1551–53 (1991) (book review) (noting that both black leftists and conservatives rely on principles of individual agency and volition but that black conservatives emphasize such principles more and that black liberals focus more on issues concerning social power and relations).

58. *See* Farrar, *supra* note 56, at 115.

59. SCHUYLER, *supra* note 42, at 344. George Schuyler continued to express black conservative ideas until he passed away in 1977. *See* Williams, *supra* note 48, at 66.

60. Williams, *supra* note 55, at 73.

61. *See* SCHUYLER, *supra* note 42, at 352. Schuyler further noted:

B. TODAY'S BLACK CONSERVATIVES

Like their predecessors, today's black conservatives—such as Justice Thomas, John McWhorter,[63] Shelby Steele,[64] Thomas Sowell,[65] and J.C. Watts[66]—emphasize the principles of black empowerment through self-reliance and self-help.[67] Unlike their predecessors, however, today's black

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> There are forces in the world that want us to fail and conspire toward that failure, which means disunity and destruction. We are here blessed with the right of mobility, the right of ownership, the privilege of privacy and development of personality, and the precious machinery of peaceful change. These gifts and gains it is the purpose of the conservative to defend and extend, lest we perish in the fell clutch of collectivism. These gifts and gains I have been trying in my small way to preserve.

Id.

62. Symposium, *Black America Under the Reagan Administration*, POL'Y REV. Fall 1985, at 27, 34.

63. John McWhorter, an associate professor of linguistics at the University of California-Berkeley, is a Manhattan Institute Senior Fellow in Public Policy. He first gained national prominence four years ago with the publication of *Losing the Race: Self-Sabotage in Black America*, in which he argued that black people's attachment to victimhood was a much greater hindrance to black advancement than white racism. *See* John McWhorter, Biography, *at* http://www.manhattan-institute.org/html/mcwhorter.htm (last visited Jan. 12, 2005) (on file with the Iowa Law Review).

64. Shelby Steele—a graduate of Coe College in Cedar Rapids, Iowa, Southern Illinois University, and the University of Utah—is a research fellow at the Hoover Institution in Stanford, California. At the Institute, Steele specializes in the study of race relations, multiculturalism, and affirmative action. In 1990, he received the National Book Critic's Circle Award for his book *The Content of Our Character: A New Vision of Race in America*. *See* Shelby Steele, Research Fellow, Biography, *at* http://www-hoover.stanford.edu/bios/steele.html (last visited Jan. 12, 2005) (on file with the Iowa Law Review).

65. Thomas Sowell, a graduate of Harvard University, Columbia University, and the University of Chicago, is a senior fellow at the Hoover Institution. Prior to joining the Hoover Institution, Sowell was a professor at several institutions, including Brandeis University and Cornell University. *See* Thomas Sowell, Rose and Milton Friedman Senior Fellow on Public Policy, Biography, *at* http://www-hoover.stanford.edu/bios/sowell.html (last visited Jan. 12, 2005) (on file with the Iowa Law Review).

66. A former quarterback for the Oklahoma Sooners, Big Eight Champions in 1980 and 1981, J.C. Watts was elected to the United States Congress from the Fourth District of Oklahoma in 1994. In 1998, he became the first Black to serve in the House Republican leadership when he was elected by his peers to serve as chairman of the Republican Conference, which was the fourth-ranking leadership position in the majority party in the United States House of Representatives and a position once held by Dick Cheney, Jack Kemp, and Gerald Ford. *See* The Honorable J.C. Watts, Jr., Biography, *at* http://www.gopac.com/gopac_about_bios.htm (last visited Jan. 12, 2005) (on file with the Iowa Law Review). *See generally* J.C. WATTS, JR., WHAT COLOR IS A CONSERVATIVE? (2002).

67. *See, e.g.*, STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 161 ("But, while civil rights bills can be won [collectively], only the individual can achieve in school, master a salable skill, open a business, become an accountant or an engineer. Despite our collective oppression, opportunities for development can finally be exploited only by individuals."). Again, black liberals also emphasize these principles as well; however, recognizing that racism is institutionalized, they contend that such institutional factors may also prevent people who have

conservatives hold an even more prominent presence in the media and among non-minority American voters.[68] During the 1980s, although Blacks remained overwhelmingly loyal to the "liberal" Democratic Party and to progressive ideologies,[69] the voice of the black conservative grew. Due to a variety of factors, including matters such as the emergence of the black middle and upper-middle class, more Blacks openly began to identify with conservative values and joined the Republican Party.[70]

Still, many individuals in the black community remained and continue to remain skeptical about the politics of black conservatives.[71] In contrast to liberal ideology, which is centered on the belief that government should play an active role in addressing the imbalances in power, wealth, and privilege between Whites and minorities, anti-statist conservative ideology involves a strong resistance to governmental interference in domestic policy, interference which, to many Blacks, is what facilitated minority advancement in society.[72] Thus, as one author has noted, "a black critic speaking with the backing of the political and intellectual right bears a difficult burden of showing that he is not a tool of forces hostile to his own people."[73]

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worked hard and persevered through hard times from achieving traditional success. *See* Delgado, *supra* note 57, at 1553 (describing how critiques of black liberals and conservatives converge on civil rights issues by "all finding serious fault with (a) the racial status quo; and (b) the current system of civil rights laws and policies by which that status quo is maintained and (sometimes) permitted to evolve").

68. Willie Richardson & Gwen Richardson, *Black Conservatives: The Undercounted, in, supra* note 30, at 43, 43–45 (asserting that a larger portion of Blacks no longer align themselves with liberal politicians and policies, and that the black conservative voice is becoming more prominent).

69. *See* Edward Ashbee, *The Republican Party and the African-American Vote Since 1964, in* BLACK CONSERVATISM, *supra* note 32, at 233, 233 (noting that the "black electorate has proved the Democratic Party's most loyal constituency"). Although many Blacks hold conservative positions on issues such as abortion, Blacks have generally voted with the "liberal" political party, which today is the Democratic Party. *See, e.g.*, Kennedy, *supra* note 31, at 91 (acknowledging that many Blacks are socially conservative on issues of abortion and crime).

70. *See* Randolph, *supra* note 52, at 152–53. Some authors have asserted that more than thirty percent of Blacks identify themselves as "conservative." *See, e.g.*, EARL OFARI HUTCHINSON, THE CRISIS IN BLACK AND BLACK 10 (1997); *see also* Richardson & Richardson, *supra* note 68, at 43; Catharine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L. REV. 117, 140 (1993) (asserting that "Thomas's conservatism is a familiar theme as millions of African Americans have adopted hard work and high moral standards as their response to racism").

71. *See* Bridgeman, *supra* note 12 (manuscript at 8) (asserting that "'authentic blackness' has an anti-conservative political bent").

72. *See* Joan Biskupic, *Thomas Caught Up in Conflict; Jurist's Court Rulings, Life Experience Are at Odds, Many Blacks Say*, WASH. POST, June 7, 1996, at A20 (noting that Professor Stephen Carter of Yale Law School has described the Supreme Court as "the ultimate place that black people had been able to go to to vindicate their rights").

73. Symposium, *supra* note 62, at 28 (quotations omitted); *see also* Peter Beinart, *Wedded*, NEW REPUBLIC, Apr. 5, 2004, at 8 (noting "black suspicion of the Republican Party"); Smith & Walton, *supra* note 30, at 215 (arguing that black conservatives are clients of the Republican Party).

This task is daunting, given widely held perceptions among black, and other, liberals that black conservatives are mere pawns of the Republican Party.[74] A review of literature authored by many of today's black conservatives, however, lays some foundation for addressing this challenge. In particular, books and articles from self-identified black conservatives, such as McWhorter and Steele, expose several significant differences between the most dominant themes of "black conservative ideology" and "white conservative ideology," which in turn helps to disprove the idea that black conservatives are the "tools" of their white counterparts.

1. Core Principles of Black Conservative Thought

Although both black and white conservatives share many basic philosophies of conservatism—such as the belief in less involvement by the federal government in economic and social-welfare matters, a greater emphasis on individual responsibility, and more authority and control within local and state governments—they diverge in important respects on the basis and reasoning for their positions on particular issues, such as affirmative action.[75] The core principles of black conservative thought consist of two key concepts: (1) an emphasis on the departure from black "victimology";[76] and (2) the promotion of self-reliance and the elimination of dependency on Whites or the government, both of which go to the heart of what black conservatives view as the problems underlying unemployment, crime, and poverty in the black community.[77]

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74. *See* Kennedy, *supra* note 12, at 28 (describing how Justice Thomas has been viewed as a pawn because of his substantive positions on issues of race).

75. DOLBEARE & METCALF, *supra* note 31, at 151–61. One commentator noted:

> The liberal-conservative axis is a bit different for blacks than for Americans generally. Under his American identity a black Republican is conservative, but under his racial identity he may be quite liberal .... But the "new" black conservatives—the ones who have recently become so controversial—may even be liberal by their American identity but are definitely conservative by the terms of their group identity. It is their dissent from the *explanation* of black group authority that brings them the "black conservative" imprimatur. Without this dissent we may have a black Republican but not a "black conservative," as the term has come to be used.

STEELE, A DREAM DEFERRED, *supra* note 24, at 8.

76. *See* JOHN H. MCWHORTER, LOSING THE RACE xi (2000) (defining the cult of victimology as "a keystone of cultural blackness to treat victimhood not as a problem to be solved but as an identity to be nurtured"); STEELE, A DREAM DEFERRED, *supra* note 24, at 10 ("[A] black conservative is a black who dissents from the victimization explanation of black fate *when it is offered as a totalism*—when it is made the main theme of group politics."); WATTS, *supra* note 66, at 35 (asserting that Jesse Jackson's phrase "'I am somebody' has become 'I am somebody's *victim*'" and that Watts "reject[s] this fashionable 'cult of victimology'"); *see also* STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at ix (noting that Blacks have been taught to be "seen primarily as racial victims").

77. *See* Symposium, *supra* note 62, at 30 (quoting Clarence Thomas as saying "the key to

To many black conservatives, such as Shelby Steele, the low status of Blacks in the United States is the result of black dependency on the white establishment and a lack of self-reliance and empowerment. According to today's black conservatives, these two factors, combined with black victimology (meaning the perception of Blacks as victims), keep Blacks in a subordinate position, because they leave Blacks in "the odd and self-defeating position in which taking responsibility for bettering [themselves] feels like a surrender to white power."[78]

Additionally, black conservatives do not deny the existence of racism and its effects on Blacks, but instead refuse to focus their energies on past and current injustices to the race. In their minds, they are not accommodationists or sellouts, but realists. For example, as George Schuyler explained in his biography,

> A black person learns very early that his color is a disadvantage in a world of white folk. . . . I learned very early in life that I was colored but from the beginning this fact of life did not distress, restrain, or overburden me. One takes things as they are, lives with them, and tries to turn them to one's advantage or seeks another locale where the opportunities are more favorable. This was the conservative viewpoint of my parents and family. It has been mine through life . . . .[79]

In support of this view that realism, self-help, and self-reliance are the best means for resolving any number of problems in the black community,[80] black conservatives often point to the long history of Blacks who overcame obstacles to achieve their goals, even during the post-Reconstruction and Jim Crow eras.[81]

The final theme throughout black conservative thought is the belief that "the most effective [and] lasting changes" in society occur slowly, or its

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black progress must come from within the black community"). *But see* Randolph, *supra* note 52, at 154 (arguing that the "Black neoconservative call for self-reliance is inconsistent with their extensive dependency on funding from White conservative sources").

78. *See* STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 15 (arguing that racial victimization cannot be the real problem if "[r]esidents feel less safe, drug trafficking is far worse, crimes by blacks against blacks are more frequent, housing remains substandard, and teenage pregnancy has skyrocketed" since the 1960s).

79. SCHUYLER, *supra* note 42, at 1–2.

80. *See* Sherri Beth Smith, Contemporary Black Conservative Rhetoric: An Analysis of Strategies and Themes 3 (1997) (unpublished Ph.D. dissertation, Pennsylvania State University) (on file with the Pennsylvania State University Library).

81. Eisenstadt, *supra* note 32, at xi; *see, e.g.*, JOHN MCWHORTER, AUTHENTICALLY BLACK 141 (2003) (describing several black public schools that regularly produced Ph.D.s and other prominent figures between the late 1800s and 1950s); Telly Lovelace, *No Need For A Government Handout, in* BLACK AND RIGHT, *supra* note 30, at 46, 47 (noting the successes of Blacks during the antebellum period and thereafter); Thomas Sowell, *Black Excellence: The Case of Dunbar High School*, 35 PUB. INT. 3, 4 (1974).

corollary, the belief that "quick fixes," which black conservatives contend are too often supported by black and white liberals, serve as a temporary Band-Aid to the real problems ailing Blacks.[82] Indeed, what is most interesting about black conservative thought is that its central tenets are premised on a belief that white America has addicted Blacks to victimology and dependency without any real concern for addressing the problems underlying black oppression.[83] In other words, a key component to black conservative ideology is a certain "distrust" of Whites—even the conservative Whites with whom black conservatives work.

Furthermore, this "distrust" is only fueled by the isolation and exclusion that black conservatives can and do encounter in white conservative circles. As a general matter, many black conservatives acknowledge that the larger conservative community does not have the best interests of the black community in mind. As Justice Thomas explained in an article he wrote regarding the loneliness of a black conservative:

> It often seemed that to be accepted within the conservative ranks and to be treated with some degree of acceptance, a black was required to become a caricature of sorts, providing sideshows of anti-black quips and attacks. But there was more—much more—to our concerns than merely attacking previous policies and so-called black leaders. The future, not the past, was to be influenced. It is not surprising, with these attitudes, that there was a general refusal to listen to the opinions of black conservatives. In fact, it often appeared that our white counterparts actually hid from our advice. There was a general sense that we were being avoided and

82. Henry Lewis Suggs, *The Washingtonian Legacy: A History of Black Political Conservatism in America, 1915–1944*, *in* BLACK CONSERVATISM, *supra* note 32, at 81, 83. One author described the principal tenets of black conservatism as including

> touting a rugged American individualism, translating it 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.

Calmore, *supra* note 21, at 193.

83. Angela Katrina Lewis, African-American Conservatism: A Longitudinal and Comparative Study 4 (2000) (unpublished Ph.D. dissertation, University of Tennessee) (on file with the University of Tennessee Library) (noting that black conservatives believe that government programs have caused the "deterioration of Black families" and have created "a sense of dependency among African-Americans").

> circumvented. It seemed that those of us who had been identified as black conservatives were in a rather odd position.[84]

Additionally, Justice Thomas proclaimed the following about the "well-meaning" of white liberals, stating:

> [I]t doesn't matter that black and white Americans are unlikely to ever see each other as anything other but blacks and whites. It doesn't matter that a black man in America is only rarely judged on the basis of character rather than his color. . . . For when you get right down to it . . . successful blacks don't particularly like the kind of integration that whites have crafted for them in the past thirty years. Increasing numbers of middle-class blacks see integration simply as window dressing; blacks may be present and visible, but only a few have any real power.[85]

In essence, unlike their white conservative counterparts, many black conservatives do not believe that a colorblind society is, practically speaking, attainable.[86] Rather, they believe that Blacks must learn to do for and rely on themselves alone, not only because they are black, but also because Blacks cannot and should not expect Whites to act in their best interests.[87]

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84. Thomas, *supra* note 30, at 9. In fact, Thomas has expressed frustration with certain decisions made during his tenure in the Reagan administration. For example, in describing the administration's decision to support a tax exemption for Bob Jones University in 1982, Thomas explained,

> I expressed grave concerns in a previously scheduled meeting that this would be the undoing of those of us in the administration who had hoped for an opportunity to expand the thinking of, and about, black Americans. A fellow member of the administration said rather glibly that, in two days, the furor over *Bob Jones* would end. I responded that we had sounded our death knell with that decision. Unfortunately, I was more right than he was.

Id. at 7–8; *see also* Wells, *supra* note 70, at 140–41 (discussing negative treatment of black Republicans within the party).

85. Williams, *supra* note 55, at 72. Stuart DeVeaux argued that

> the social problems that are destroying the black community (breakdown of the family, crime, education, lack of economic initiative, poverty, and welfare) grew out of thirty years of a well-meaning Democrat-controlled Congress. Despite these failures, Democrats have not given up their poor solutions. . . . Of course, those Democrats do not live with the consequences. They don't live in inner cities. Their neighbors are not drug lords and trigger-happy gangsters.

Stuart DeVeaux, *Young, Black, and Republican*, *in* BLACK AND RIGHT, *supra* note 30, at 23, 24 .

86. Williams, *supra* note 55, at 72 (quoting Thomas as stating "I don't care how educated you are, how good you are at what you do—you'll never have the same contacts or opportunities, you'll never be seen as equal to whites"); *cf.* Symposium, *supra* note 62, at 34 (quoting Clarence Thomas, who asserted, "I don't think this society has ever been color-blind").

87. *See* LOURY, *supra* note 45, at 35 (asserting that Blacks are mistaken in placing responsibility "on the shoulders of those who do not have an abiding interest in such matters"). Eisenstadt indicated:

All of the tenets of black conservatism discussed above are found in the positions they take on any number of political and social issues. The remainder of this Part details how these core principles reveal themselves in black conservative thought regarding issues of education and desegregation, affirmative action, and crime—subjects I address later in my analysis of Justice Thomas's jurisprudence.

2. Black Conservative Thought on Education and Desegregation

Clearly, education is an incredibly important issue for black liberals and conservatives alike. A focal point of black conservative thought on education is the failure of the public school system to educate black youth in a manner that allows them to compete, based on traditional criteria, with their white peers. All around the country, black conservatives have expressed intense criticisms of the educational agenda and goals that have been set for black children in public schools, and have argued for alternatives to resolving the disparities between the performances of black and white students in schools and on standardized tests.[88]

Chief among these criticisms is a denouncement of the integrationist ideal that was advanced by the NAACP and civil rights activists during the late 1950s and 1960s.[89] For today's black conservatives, this ideal was damaging to the advancement of Blacks in education, not because integration itself was a harmful goal, but because too much emphasis was placed on that goal as opposed to the objective of actually improving the learning conditions of black children and the quality of their education.[90]

Indeed, in the midst of the Civil Rights Movement, some black conservatives broke with the Movement on the issue of desegregation and forced busing, including Robert Woodson who asserted that "[t]he issue was

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> Most black conservatives are anti-Utopian, less interested in constructing an ideal society, than in getting by in the society in which they find themselves. . . . Black conservatives have recognized the truth in this proposition, and they have often rejected the abstract plans to 'remake the world' on behalf of blacks. One accepts the present with the conviction and hope that things will get better.

Eisenstadt, *supra* note 32, at xi.

88. *See, e.g.*, Thomas Sowell, *Dems, GOPers, and Blacks II*, JEWISH WORLD REV., Oct. 2, 2000 (arguing that Blacks are "more likely to gain from vouchers that would enable them to pull their children out of failing public schools"), *at* http://www.jewishworldreview.com/cols/sowell100200.asp (on file with the Iowa Law Review).

89. Some liberals have made similar criticisms, including Derrick Bell, whose new book *Silent Covenants* critiques civil rights leaders for their misguided approach in believing that integration alone would solve the problems caused by the lack of equal education for black children. *See* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004); *see also* Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for* Brown*?*, 103 MICH. L. REV. (forthcoming 2005) (reviewing *Silent Covenants*).

90. *See* WATTS, *supra* note 66, at 208 (declaring that "[a]ffirmative action isn't the problem . . . . Lousy education for black kids is the problem").

black empowerment, not integration, which should be an individual matter, not one of public policy."[91] Furthermore, to black conservatives like Woodson, the focus on integration not only withdrew attention from the poor quality of education that was available to individual black students, but it also taught Blacks that they should not want to live near each other or attend school together.[92]

As Malcolm X once expressed:

> I just can't see where if white people can go to a white classroom and there are no Negroes present and it doesn't affect the academic diet they're receiving, then I don't see where an all-black classroom can be affected by the absence of white children. . . . So, what the integrationists, in my opinion, are saying, when they say that whites and blacks must go to school together, is that the whites are so much superior that just their presence in a black classroom balances it out.[93]

In sum, for many black conservatives then and now, the fight was not for integration or against segregation that was by choice[94] but against segregation that was state-mandated. [95]

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91. Symposium, *supra* note 63, at 30.

92. *See id.* Du Bois also made this point in W.E. B. Du Bois, *Does the Negro Need Separate Schools*, 4 J. NEGRO EDUC. 328, 330 (1935) ("As it is today, American Negroes almost universally disparage their own schools. They look down upon them; they often treat the Negro teachers in them with contempt; they refuse to work for their adequate support; and they refuse to join public movements to increase their efficiency.").

93. MALCOLM X, BY ANY MEANS NECESSARY: SPEECHES, INTERVIEWS AND A LETTER 16–17 (George Breitman ed., 1970).

94. As several authors have noted, however, such ideology neglects the realities of residential segregation, much of which is influenced by discriminatory real estate practices. *See, e.g.*, Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 19 (1997). Furthermore, even when people, especially minorities, have chosen to live in a particular area for racial reasons, such decisions may have been based primarily on a desire to escape the reality of racism within one's own neighborhood, as opposed to a rejection of integration. One author noted:

> The pain of [black] professionals . . . is more often than not rooted in feelings of exclusion. In attempting to escape that pain, some blacks end up, in effect, inviting increased isolation. When the successful black lawyer declares that he will "go to my own people for acceptance" because he no longer expects approbation from whites, he is not only expressing solidarity with other members of his race, he is also conceding defeat. He is saying that he is giving up hope of ever being anything but a talented "nigger" to many of his white colleagues, that he refuses to invest emotionally in those who will never quite see him as one of them, whatever his personal and professional attributes.

ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 188 (1993).

95. In response to a question regarding how Proposition 54, a 2003 initiative to ban the collection of race data by the state, could negatively affect integration efforts in the public schools in California, black conservative Ward Connerly once answered, "I don't care whether they are segregated or not . . . kids need to be learning, and I place more value on these kids

Indeed, some black conservatives viewed the decision in *Brown v. Board of Education*,[96] which ordered the end of all state-mandated segregation, as insulting. For example, Zora Neale Hurston[97] once exclaimed:

> The whole matter revolves around the self-respect of my people. How much satisfaction can I get from a court order for somebody to associate with me who does not wish me near them? I regard the ruling of the United States Supreme Court as insulting, rather than honoring my race.[98]

Others such as Ward Connerly have gone farther, once stating in response to a question about his opinion of Senator Trent Lott, "Supporting segregation need not be racist. One can believe in segregation and believe in equality of the races . . . ."[99] For the most part, however, black conservatives simply believe that, when the emphasis is placed on diversity in schools as opposed to strengthening the schools in predominantly black neighborhoods, it is black children who always lose out and gain nothing.

3. Black Conservative Thought on Affirmative Action

Of all pressing social issues today, black conservatives have received the most attention from the media and public on the debate regarding race-based affirmative action.[100] For example, in 1996, Ward Connerly, a member

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getting educated than I do on whether we have some racial balancing or not." Editorial, *Initiative Could Hurt Integration Efforts*, S.F. CHRON., Sept. 2, 2003, at A16. The initiative, which Connerly drafted, was defeated by voters in a near 2-to-1 margin (with 5,071,565 votes (63.9%) against the initiative and 2,868,976 (36.1%) for the initiative) in the October 2003 gubernatorial recall election that resulted in Arnold Schwarzenegger becoming governor of California. *See* Steve Miller, *Affirmative Action Backers Push for Connerly's Ouster*, WASH. TIMES, Nov. 30, 2003, at A2.

96. 347 U.S. 483 (1954).

97. Hurston is most famous for her book *Their Eyes Were Watching God*. *See* Pierre A. Walker, *Zora Neale Hurston and the Post Modern Self in* Dust Tracks on the Road, 32 AFR.-AM. REV. 387, 387 (1998).

98. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY xxvii (2001). Steele wrote:

> There is no magic that will make development happen. We [Blacks] simply have to want more for ourselves, be willing to work for it, and not use our enemy—old or new—as an excuse not to pursue it. It doesn't really matter that Southern accents in Southern airports make me remember. What's important is that I can travel.

STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 165.

99. Interview by Wolf Blitzer with Ward Connerly (CNN broadcast, Dec. 13, 2002), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0212/13/wbr.00.html (on file with the Iowa Law Review).

100. By "affirmative action," I refer to the act of considering the race of underrepresented racial minorities as a plus factor in hiring and recruitment. *See* Anupam Chander, *Minorities, Shareholders, and Otherwise*, 113 YALE L.J. 119, 120 n.3 (2003) (defining affirmative action "as minority-mindfulness in decisionmaking resulting in . . . a preference"); West, *supra* note 26, at 614 (describing affirmative action as a "program or policy where race, national origin, or

of the University of California Board of Regents and President of the American Civil Rights Institute, drew national attention to black conservative thought when he successfully headed the California Civil Rights Initiative. This initiative, also known as Proposition 209, banned the consideration of race in education, employment, and contracting for all state institutions.[101]

Although many black conservatives today agree that the discrimination that Blacks have faced and still face should be included in the discussion of inequities in education, they disagree as to whether the short-term solution of race-based affirmative action is an appropriate way to address these inequities.[102] To them, much like the focus on an integrative ideal, affirmative action does not ultimately help Blacks, but works only as a hindrance.[103] The dominant black conservative view is that "racial preferences allow society to leapfrog over the difficult problem of developing blacks to parity with whites and into a cosmetic diversity that

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gender is taken into account").

101. The University of California-Berkeley Office of Student Research reports that Proposition 209 has resulted in severe drops in black, Chicano, Latino, and Native American enrollment in the University of California's top undergraduate and graduate schools. According to the office, in the fall 2003 first-year undergraduate class, only 211 (4.2%) black, 430 (8.5%) Chicano, 161 (3.2%) Latino, and 25 (0.5%) Native American students registered as first-years at the University of California-Berkeley (out of 8,796 applicants). *See* UC Berkeley Undergraduate Fact Sheet—Fall 2003, *available at* http://osr4.berkeley.edu/Public/STUDENT.DATA/PUBLICATIONS/UG/ugf03.html#table%207 (on file with the Iowa Law Review). In the fall of 1996, before the end of affirmative action, 324 (6.5%) black, 517 (10.3%) Chicano, 218 (4.3%) Latino, and 68 (1.4%) Native American students registered as first years at the University of California-Berkeley. *See* Berkeley Undergraduate Fact Sheet—Fall 1996, *available at* http://osr4.berkeley.edu/Public/STUDENT.DATA/PUBLICATIONS/FACT.SHEET/fact96.pdf (on file with the Iowa Law Review); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multicultural Society*, 81 CAL. L. REV. 863, 896 (1993) (noting that there has been a backlash against affirmative action since the 1980s); *see also* Adrien Katherine Wing, *Race-Based Affirmative Action in American Legal Education*, 51 J. LEGAL EDUC. 443, 446 (2001) (reporting that, after the passage of Proposition 209, "[b]lack enrollment [at UC-Berkeley] dropped 95 percent, with just one black in the law class entering in 1997[,] Hispanic enrollment dropped 50 percent, and Native American 100 percent").

102. *See, e.g.*, STEELE, A DREAM DEFERRED, *supra* note 24, at 18–19 ("Certainly no explanation of black difficulties would be remotely accurate were it to ignore racial victimization. On the other hand, victimization does not in fact explain the entire fate of blacks in America, nor does it entirely explain their difficulties today.").

103. *See* STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 115. Steele further elaborated:

> But the essential problem with this form of affirmative action is the way it leaps over the hard business of developing a formerly oppressed people to the point where they can achieve proportionate representation on their own (given equal opportunity) and goes straight for the proportionate representation. This may satisfy some whites of their innocence and some blacks of their power, but it does very little to truly uplift blacks.

Id.

covers the blemish of disparity,"[104] but the real focus should be on a demand for parity between Blacks and Whites.[105] In other words, according to black conservative ideology, racial diversity is not tantamount to racial development for black people in education[106] because it simply allows Whites to create a picture of the ideal of diversity on campus by recruiting black and brown faces without regard to their actual learning and progress.[107] To the black conservative, affirmative action only sets up "unprepared" minority students for failure.[108]

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104. *Id.* at 116; *see also* Symposium, *supra* note 62, at 31 (quoting Glenn Loury as stating that "[i]t will sound paradoxical to many people that affirmative action is not in the interests of blacks," but "in the longer term, preferential treatment is inconsistent with the attainment of fully equal status in society as independent contributors respected for their contribution by their fellow citizens").

105. *See* STEELE, A DREAM DEFERRED, *supra* note 24, at 20–21. Steele specifically noted:

> To have more college-educated minorities [people readily accept the idea that] we don't need to work at instilling the principle of intellectual excellence, or at raising the standards in inner-city schools, or at making minority neighborhoods safe for children . . . . (In fact, we allow license and lowered standards to prevail in these areas.) A group preference in college admissions is a simple and impersonal intervention by which we can manufacture a wonderfully "diverse" campus—even when black students average three hundred SAT points below whites and Asians, as has been the case at the University of California at Berkeley.

Id.; STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 121–25 (arguing that "preferential treatment does not teach skills, or educate, or instill motivation").

106. STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 116.

107. *See* STEELE, A DREAM DEFERRED, *supra* note 24, at 32–33. Steele wrote:

> Black students have not sufficiently helped themselves, and universities, despite all their concessions, have not really done much for blacks. If both faced their anxieties, I think they would see the same things: academic parity with all other groups should be the overriding mission of black students, and it should also be the first goal that universities have for their black students. Blacks can only *know* they are as good as others when they are, in fact, as good—when their grades are higher and their dropout rate lower. Nothing under the sun will substitute for this, and no amount of concessions will bring it about.

STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 147.

108. *See* MCWHORTER, *supra* note 81, at 141 ("The *Bakke* decision has taught a generation of young Americans that black students are more important for their presence in promotional brochure photographs than for their scholastic qualifications . . . . This ultimately perpetuates the very underperformance that has made the fig-leaf 'diversity' notion necessary."); THOMAS SOWELL, A PERSONAL ODYSSEY 182–88 (2000) (describing his experiences as an economics professor at Cornell University where he witnessed black students with lower test scores struggle with their academic work). Of course, such arguments lose their force if one challenges the legitimacy of traditional standards of merit, such as standardized tests that correlate with wealth, and not necessarily with performance. *See* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 148, 214–24 (2003) (detailing upper-middle-class bias in admissions and asserting that "[q]uantative measures often reflect family resources and influence rather than a student's resourcefulness or intelligence"); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 969 (1996) (indicating that standardized tests do not identify qualities

In contending with affirmative action, black conservatives also focus on what they refer to as the demoralizing effect of the policy on Blacks—the feeling of inferiority by black students about their ability to compete with their white peers.[109] According to black conservatives, this effect, combined with the cultural myth of black inferiority, is devastating to black students[110] because it encourages reliance on Whites.

Additionally, black conservatives believe that affirmative action creates a perverse incentive to remain a victim. According to black conservatives, this is especially true for middle-class and upper-middle-class Blacks, who are presented with a motivation either to underperform or to not push themselves because of the fear of losing their "advantage" in the admissions game.[111] Furthermore, they contend that affirmative action unfairly helps the black middle class,[112] whom they view as not experiencing any serious disadvantage,[113] and does not help poor Blacks, who have a stronger need for affirmative action.[114] In sum, for the black conservative, the real focus should be on economic disadvantage.[115]

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important for the education the test takers seek); *see also* Richard Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 401–02, 459–63, 492–503 (2000) (same).

109. STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 116. Many beneficiaries of affirmative action, however, do not suffer the same stigma as Thomas did. As several scholars have argued, any benefit outweighs the negatives. *See* Laura M. Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 FORDHAM L. REV. 843, 881 (1997) ("Furthermore, any stigma-attached downside to affirmative action does not outweigh the upside of providing opportunities for women of color that would not otherwise exist."). Moreover, many supporters of affirmative action note that Blacks have been stigmatized since the founding of this country. *See* Eva Jefferson Patterson, *Affirmative Action and the California Civil Wrongs Initiative*, 27 GOLDEN GATE U. L. REV. 327, 334 (1997) ("'Stigmatize [us], give [us] that degree.' [It's not] [a]s though if you don't have the Berkeley degree you're not stigmatized as a black person.") (citation omitted).

110. *See* STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 134 ("So when a black student enters college, the myth of inferiority compounds the normal anxiousness over whether he or she will be good enough.").

111. *See id.* at 118–19 (discussing the victim mentality and its effect on middle-class black students).

112. *See* STEELE, A DREAM DEFERRED, *supra* note 24, at 126–27 (noting that "[w]hen the University of California was forced to drop race-based affirmative action, a study was done to see if a needs-based policy would bring in a similar number of blacks" and discovered that "the top quartile of black American students—often from two-parent families with six-figure incomes and private school educations—is frequently not competitive with whites and Asians even from lower quartiles").

113. STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 142 (noting that "[t]he real challenge is not simply to include a certain number of blacks, but to end discrimination against all blacks and to offer special help to those with talent who have also been economically deprived"); WATTS, *supra* note 66, at 206 (arguing for class-based affirmative action).

114. *See* STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 139 ("Of course poor and working-class blacks do not get preferences . . . because preferences go almost exclusively to the wealthiest and best-educated blacks.").

115. Armstrong Williams claims:

Finally, black conservatives oppose affirmative action because they believe that it stigmatizes Blacks in the eyes of Whites by reinforcing stereotypes of Blacks as inferior and less intelligent than Whites.[116] To them, the program simply feeds the flame as opposed to extinguishing it.[117]

Underlying all of these views on affirmative action is the black conservative's belief that white liberals support affirmative action while believing Blacks to be truly incompetent, then "sneer at the idea that affirmative action stigmatize[s] women and minorities as incompetent."[118] In the eyes of black conservatives, the liberal bias in favor of racial preferences is based on and continues to exist only because of an inference of black inferiority. In essence, in black conservative thought, the hypocrisy of white liberals is in the idea that they would not ask their own child to accept the benefits of affirmative action in place of concrete improvement in test scores

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> These are the people affirmative action needs to be helping—those poor minority students who are conditioned to believe that they have no chance at achieving the American dream. By the time these kids reach high school it is too late for them to take advantage of affirmative action because they have already given up.

Armstrong Williams, *Supreme Court Hands Down Affirmative Action Decision*, June 23, 2003, *at* http://www.townhall.com/columnists/Armstrongwilliams/aw20030623.shtml (on file with the Iowa Law Review). Such a position, however, ignores the fact that, when wealth is defined in terms broader than just income alone—including assets, prestige of the job and the education level required for the job, savings, retirement, and so on—Blacks and Latinos are far from being in the same position as Whites. *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY 100–10 (1995) (asserting that when factors other than income are included, black families are significantly worse off than white families with similar incomes); *see also* R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029, 1067–68 (2001) (pointing out that "middle-class blacks hold dramatically less wealth than whites with comparable education and income" and that "[l]ow socioeconomic status whites, as measured by education and income, have a wealth-holding comparable to many middle-class blacks").

116. STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 120.

117. As Professor Shelby Steele has argued, "Much of the 'subtle' discrimination that blacks talk about is often (not always) discrimination against the stigma of questionable competence that affirmative action delivers to blacks." STEELE, CONTENT OF OUR CHARACTER, *supra* note 24, at 120. George Schuyler once expressed a similar argument in relation to his opposition to the NAACP's boycott of white-owned stores in Harlem in 1934. The boycott was based on the slogan "Don't buy where you can't work." In attacking the boycott, Schuyler asserted the following:

> The Negro, characteristically enough, is unprepared for it. . . . An insistence upon employment on a racial basis alone will be re-echoed with avidity by jobless whites and professional Anglo-Saxons. The color bar in industry hits the Negro hard enough without him laboring to make worse his lot. . . . [T]he boycott ballyhooers are clearly asking us to cut off our heads to cure a cold.

Williams, *supra* note 48, at 64 (quoting George Schuyler, *To Boycott or Not to Boycott: A Deadly Boomerang*, 41 CRISIS 259).

118. STEELE, A DREAM DEFERRED, *supra* note 24, at 5; *see also* Maureen Dowd, *Could Thomas Be Right?*, N.Y. TIMES, June 25, 2003, at A25 ("[Justice Thomas's dissent in *Grutter*] 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 drives him crazy that people think he is where he is because of his race, but he is where he is because of his race.").

and grades.[119] As former Professor Shelby Steele once mocked, "the liberal who has high expectations for his or her own children often feels that he or she cannot 'push the issue' with blacks."[120] Moreover, black conservatives contend that such "preferences . . . give up on black excellence in order to preserve white excellence."[121] After all, "[i]f black equality were truly the goal, wouldn't policy focus on educational development before college?"[122] In sum, black conservatives view affirmative action as not truly helping to resolve the problems that cause black underperformance in schools and on standardized tests. Instead, it only assuages the guilt of liberal Whites.[123]

4. Black Conservative Thought on Crime

Like their white counterparts, black conservatives strongly advocate toughness on criminals and strict law abidance, without significant regard to mitigating factors.[124] Unlike their white counterparts, however, whose focus is on accountability and recognizing the harm to victims, black conservatives place a strong emphasis on punishing criminals not just because it protects victims, but also because black conservatives believe it protects black victims.[125] Moreover, for black conservatives, harsh punishment of criminals is critical to the advancement of Blacks not only because it would better protect Blacks, (who remain especially vulnerable to criminal wrongdoing and corruption because of a lack of financial resources and weak police protections),[126] but also because it would serve as a method for distancing "good" Blacks from the negative stereotypes that are used to support police brutality, racial discrimination in law enforcement, and racial profiling.[127]

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119. *See* STEELE, A DREAM DEFERRED, *supra* note 24, at 19–20 ("Would [a white journalist] have encouraged his own children to overcome a deficit by looking for a preference? Did he *think* a preference built esteem or undermined it?").

120. *Id.* at 34.

121. *Id.* at 159–60; *see also* Symposium, *supra* note 62, at 41 (quoting Thomas as asserting that "[w]hite parents tell their kids to study hard and get into college, and black kids are told they don't have to worry about their SAT scores").

122. STEELE, A DREAM DEFERRED, *supra* note 24, at 33.

123. *See* Delgado, *supra* note 57, at 1548–49 (describing Steele's description of racial programs, such as affirmative action, as programs that enable Whites to feel good about themselves while actually doing little for Blacks).

124. *See* Eleanor Brown, *Black Like Me? "Gangsta" Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. REV. 308, 327 (2000) (discussing the response of some black conservatives to crime and policies on crime).

125. Although not a self-identified conservative, Randall Kennedy has expressed views on criminal matters that are more in line with black conservatism. *See, e.g.*, Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1256 (1994) (arguing that there has been a failure to protect black communities).

126. *See id.*

127. Randall Kennedy, *A Response To Professor Cole's "Paradox of Race and Crime,"* 83 GEO. L.J. 2573, 2574–75 (1995) (describing support of some black members of Congress for harsh sentences to deter crack usage); Glenn C. Loury, *Listen to the Black Community*, PUB. INT., Fall 1994, at 35–36 (encouraging Blacks to promote punishment of lawbreakers).

This central tenet of black conservative thought on crime first began to emerge during the antebellum period when free Blacks, who tended to be more conservative,[128] viewed their survival and the maintenance of their status (however low it was) as dependent upon distinguishing themselves from enslaved Blacks.[129] This attitude extended into the post-bellum period when there was no need for such distinctions to be made between free Blacks and slaves. For example, these "politics of distinction"[130] played out in the Davis Bend Court, an old slave court in Mississippi.[131] This slave court was created by Joseph Davis, a slave master who owned and ran a plantation on the banks of the Mississippi and later helped to found the Mississippi Bar Association. Called the "Hall of Justice," Davis held the slave court every Saturday, with a jury of slaves issuing judgments after hearing and receiving evidence at trial.[132] In one session on the court after the emancipation of Blacks, a "judge" of the Davis Bend Court of Freedom[133] emphasized the "politics of distinction" while chastising another former slave who had been charged with stealing a bag of corn:

> Now you listen, you. You and your mother are a couple of low-down darkies, trying to get a living without work. You are the cause that respectable colored people are slandered, and called thieving and lazy niggers.[134]

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128. Randolph, *supra* note 31, at 151.

129. *See generally* MICHAEL B. CHESSON, RICHMOND AFTER THE WAR (1981); PETER J. RACHLEFF, BLACK LABOR IN THE SOUTH: RICHMOND, VIRGINIA 1865–1890 (1984); Hanes Walton, Jr., *Blacks and Conservative Political Movements*, 37 Q. REV. HIGHER EDUC. AMONG NEGROES (1969).

130. This phrase was coined by Professor Regina Austin, who defined the phrase as highlighting "the difference that exists between the 'better' elements of 'the community' and the stereotypical 'lowlifes' who richly merit the bad reputations the dominant society accords them." Regina Austin, *The Black Community, Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1772 (1992). Professor Austin opposed such distinctions in the black community.

131. *See* Katherine Franke, Subjects of Freedom 72–73 (unpublished manuscript, on file with the Iowa Law Review) (citing Freedmen's Court, Davis Bend, Record Court of Freedmen, Davis Bend, Miss., RG 105, Entry 2153, NA); *see also* JANET SHARP HERMANN, THE PURSUIT OF A DREAM 6, 62–64 (1981).

132. *See* Franke, *supra* note 131, at 60–62 (citing VARINA HOWELL DAVIS, JEFFERSON DAVIS: EX-PRESIDENT OF THE CONFEDERATE STATES OF AMERICA, A MEMOIR 1, 49–50, 174 (1890)). Davis intervened "only to grant a pardon if he regarded the sentence as too severe." *Id.*

133. *See id.* at 72. On July 4, 1863, Admiral David Porter, commander of the Union fleet on the Mississippi, ordered that Davis Bend be made an independent colony for freed Blacks. The former slaves who resided at Davis Bend when Davis was the slave master continued the court system. The court system was formally established in January of 1865 and consisted of three judges, who were elected every three months, and who tried all the cases that were brought before them. *See id.* (citing Freedmen's Court, Davis Bend, Record Court of Freedmen, Davis Bend, Miss., RG 105, Entry 2153, NA).

134. *Id.* (citing JOHN T. TROWBRIDGE, THE SOUTH: A TOUR OF ITS BATTLE-FIELDS AND RUINED CITIES, A JOURNEY THROUGH THE DESOLATED STATES, AND TALKS WITH THE PEOPLE 383

Such views have continued today, as noted above, with black conservatives urging an emphasis on distinguishing law-breaking Blacks with those who are law-abiding.[135]

In addition to viewing a hard stance against crime as a means of distinguishing law-abiding Blacks from black criminals, black conservatives also regard such a stance as necessary for ensuring the protection of the people who are often left out of debates concerning race and the criminal justice system: black victims of crime.[136] As opposed to analyzing how some Blacks may turn to crime as a reaction to poverty and institutionalized racism, black conservative ideology focuses on the black victim, noting how Blacks are much more vulnerable to violent and non-violent crimes than Whites.[137] To the black conservative, the fact that most poor Blacks never turn to crime and that Blacks are significantly more likely to be murdered, raped, robbed, and assaulted than Whites dictates that Blacks should be harsh on criminals.[138] According to black conservative thought, the effects of

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(1866)).

135. Randolph, *supra* note 31, at 153. Basically, like Washington's philosophy during the post-Reconstruction period, during the antebellum and post-bellum period, some of the black elite, who were primarily "conservative," believed that "if it were not for the behavior of the masses, the better class of whites would extend to the black elite the full privileges of citizenship." *See id.*

136. *See* Thomas Sowell, Easy Justice (Aug. 12, 2003) (arguing that "[innocent victims of crime seem to disappear from the lofty vision and ringing rhetoric of those who worry that the punishment of criminals is 'too severe'"), *at* http://www.townhall.com/columnists/thomassowell/ts20030812.shtml (on file with the Iowa Law Review).

137. *See* Brian W. Jones, *Two Visions of Black Leadership*, *in* BLACK AND RIGHT, *supra* note 30, at 35, 40–41 (criticizing liberal black leaders for concentrating on procedural protections for the accused and rationalizing the "victimizer's behavior with arguments about racism and economic determination").

138. *See* Thomas Sowell, *"Friends" of Blacks: Part II*, JEWISH WORLD REV. (Sept. 6, 2002), *at* http://www.jewishworldreview.com/cols/sowell090602.asp (on file with the Iowa Law Review). At the same time, the fact that Blacks are more likely to be victims of crime than Whites does not necessarily mean that harsher punishment will benefit the community. In fact, it could exacerbate the problem. As Professor Davis Cole has argued:

> Even if one were willing, in the name of the "politics of distinction," to write off the black lawbreakers, the impact extends to the black community at large. Incarceration of so many young black men contributes to the very problems that are so often pointed to as the source of higher crime rates in the black community. More than 30% of black families have incomes below the poverty level, as compared with 9% of white families. Minorities' median net worth is less than 7% that of whites. Unemployment among African-Americans is about twice that among whites. More than half of all African-American children are living only with their mothers, as compared with 14% of white children. By removing so many black men from the community and stigmatizing them forever with a criminal conviction, criminal law enforcement is likely to mean more single-parent families, less adult supervision of children, more unemployed and unemployable members of the community, more poverty, and in turn, more drugs, more crime, and more violence. This is not to minimize the burden that criminals themselves present to the community. It is simply to suggest that incarceration—especially on such a

such crime on these communities are incredibly devastating, often leaving innocent, law-abiding black citizens as prisoners in their own homes. This crime also results in severe economic consequences, such as higher insurance rates, higher prices for goods in black communities with costly security devices, and the dearth of stores, banks, and other financial institutions in black communities.[139] As black conservatives see it, Blacks must demand that their communities be made safe and secure through the strict enforcement of laws that penalize criminals instead of coddling them.

Indeed, black conservatives have linked this concept with their support of the death penalty, again emphasizing the "politics of distinction" by claiming that the "real victims" in capital cases are law-abiding members of the black community, who are denied equal protection under the law of the death penalty because people who kill Whites are significantly more likely than those who kill Blacks to receive the death penalty.[140] Furthermore, in capital cases, black conservatives advocate not allowing jurors discretion in deciding the fate of such defendants on the ground that this discretion only allows racism to determine who receives a life sentence and who receives a death sentence. To black conservatives, the only way to protect individual black defendants charged with murder, as well as their victims, is by eliminating such discretion so that all criminals are treated and judged the same.[141] In essence, they oppose placing too much authority in the hands of

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> massive scale in a well-defined community—is far from an adequate solution, and may well exacerbate the problems associated with crack and crime.

Davis Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547, 2558 (1995) (internal citations omitted) (noting also that "[b]lack citizens living in the inner city are disproportionately victimized by crime, but they are also disproportionately victimized by law enforcement").

139. *See* Sowell, *supra* note 136 (criticizing Justice Kennedy for his condemnation of mandatory sentencing laws and noting that "[i]f a day in prison can be pretty long, so can every day living in a high-crime neighborhood, where you have to wonder what is going to happen to your son or daughter on the way to or from school"); Symposium, *supra* note 62, at 37.

Clarence Thomas once argued the following in an interview:

> The sections where the poorest people live aren't really livable. If people can't go to school, or rear their families, or go to church without being mugged, how much progress can you expect in a community? Would you do business in a community that looks like an armed camp, where the only people who inhabit the streets after dark are the criminals . . . . If you want to encourage business in these areas, then stopping crime has got to be at the top of the list.

Symposium, *supra* note 62, at 37.

140. *See* Randall Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1421–43 (1988). In *McCleskey v. Kemp*, 481 U.S. 279 (1987), a study revealed that "even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks." *Id.* at 287 (discussing the results of the Baldus study).

141. Of course, such reasons ignore the racism that precedes a capital trial, including police targeting of black persons and the discretion of prosecutors in determining who will be charged with what crime, and if that charged crime should be a capital offense. *See* Angela J.

individuals in criminal matters because, they believe, in such instances, that individual Blacks will always suffer because of racism, whether conscious or unconscious.[142]

In sum, for black conservatives, the emphasis should be placed on protecting law-abiding Blacks through the "politics of distinction" and strict law enforcement. Additionally, for black conservatives, black liberals' support of discretion in considering mitigating social factors should be stopped because, contrary to what black liberals think, such discretion only harms black defendants by opening them to racism, instead of resulting in juror recognition of the effects of racism and life circumstances for each individual.

II. BIRTH OF A "NATIONALIST": HOW CLARENCE THOMAS BECAME BLACK AND RIGHT

There is nothing you can do to get past black skin.

— Clarence Thomas[143]

The evolution of Clarence Thomas into a black conservative—or as some would argue, the ultimate cultural dissenter[144]—provides an interesting chronicle of racial identity development. Sociologists and psychologists have long studied the construction of race in society and its impact on an individual's identity.[145] In 1994, Michael Omi and Howard Winant introduced racial formation theory, which refers to the "sociohistorical process by which racial categories are created, inhabited,

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Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 26–33 (1998) (discussing how racism, both unconscious and conscious, results in discriminatory treatment of Blacks by police and prosecutors); Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1674–84 (1996) (same); Christopher E. Smith, *The Supreme Court and Ethnicity*, 69 OR. L. REV. 797, 830 (1990) (noting that "[p]rosecutors make subjective decisions, based on a complex variety of factors, about whether to seek the death penalty"); *see also* Cole, *supra* note 138, at 2566 ("Racial stereotypes are likely to influence the police officer's decision about whom to watch or stop, the prosecutor's decision about which charges to pursue, the judge's decision about whether to set bail, the jury's decision to convict, the judge's sentence, and the parole board's decision on early release.").

142. Such views are in line with black conservative views on other issues, such as affirmative action, which rest on the idea that the only way for Blacks to ensure fairness is to eliminate "subjective" decisionmaking from the process.

143. Williams, *supra* note 55, at 72.

144. Sunder, *supra* note 30, at 497 n.6 (citing Maureen Dowd, *Liberties; Black and White*, N.Y. TIMES, Feb. 14, 2001, at A31, in which Justice Clarence Thomas is quoted as saying "the war in which we are engaged is cultural, not civil"); *see also* Smith & Walton, *supra* note 30, at 215 (stating that "[c]onservatives in black America are dissenters from the mainstream left/liberal ideological consensus that characterizes the community").

145. *See generally* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (exploring theories of racial formation).

transformed, and destroyed."[146] Specifically, this theory provides that race is not a fixed term, but is instead an evolving set of social meanings that are formed and transformed under a constantly shifting society.[147] In essence, supporters of this school argue that race is a social factor.[148]

Prior to Omi and Winant's work, several psychologists examined the means through which individuals socially develop their racial identity,[149] in particular black identity. William Cross, professor of psychology at the University of Massachusetts-Amherst, was among the first to examine the psychological development of black identity in 1971. In so doing, Cross outlined a process he termed "nigrescence," which is the pattern through which individuals become "Black" in terms of one's manner of thinking about, and evaluating, oneself and one's reference group.[150] Scholars, such as Janet Helms, professor of counseling psychology and director of The Institute for the Study and Promotion of Race and Culture at Boston College, have expounded upon Professor Cross's theory of racial identity development.[151] As Professor Helms explains in her book, *Black and White Racial Identity: Theory, Research, and Practice*, the impact of racial identity on any particular individual is complex. Within any racial group, "various kinds of racial identity can exist, and consequently, racial consciousness per se usually is not considered to be dichotomous, present, or absent, but rather is polytomous."[152]

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146. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 55 (2d ed. 1994).

147. *Id.* at 55.

148. *See* Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207, 210 (1996) ("Identity ascription may be performed by the self or by others. And identity is always contextual."); *see also* Frank Rudy Cooper, *Understanding "Depolicing": Symbiosis Theory and Critical Theory*, 71 UMKC L. REV. 355, 369–70 (2002) (discussing how different cultural contexts cause a single identity to be interpreted in various ways).

149. *See* Janet E. Helms, *Introduction: Review of Racial Identity Terminology*, in BLACK AND WHITE RACIAL IDENTITY: THEORY, RESEARCH, AND PRACTICE 3, 3 (Janet E. Helms ed., 1990) (stating that "the term 'racial identity' actually refers to a sense of group or collective identity based on one's *perception* that he or she shares a common racial heritage with a particular racial group").

150. *See* WILLIAM E. CROSS, JR., SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY (1991); William E. Cross, Jr. & Peony Fhagen-Smith, *Patterns of African American Identity Development: A Life Span Perspective*, *in* NEW PERSPECTIVES ON RACIAL IDENTITY DEVELOPMENT 243, 243 (Charmaine L. Wiejeyesinghe & Bailey W. Jackson eds., 2001) (noting that "nigrescence" means "to become black").

151. Professor Janet Helms was among the first academics to study the development of white racial identity. *See generally* Helms, *supra* note 149.

152. *Id.* at 7. David Demo and Michael Hughes also expounded upon Cross's work on black identity, arguing that black identity is a multidimensional concept that encompasses a wide array of feelings, including closeness to other Blacks and a commitment to African and African-American culture. David Demo & Michael Hughes, *Socialization and Racial Identity Among Black Americans*, 53 SOC. PYSCHOL. Q. 364 (1990).

Indeed, the rise in the number of black conservatives in today's society displays exactly the varied nature of black racial identity and consciousness. More specifically, the mere existence of Clarence Thomas, one of the most prominent members of the Black Right, reflects exactly how a person who strongly identifies as a Black[153] can cultivate values and beliefs in ways that differ from the vast majority of members in his or her racial group.[154]

In fact, despite Justice Thomas's conservative views, which some have argued are antithetical to black identity,[155] there is no doubt that his life has been marred by racism, racial hierarchy, and economic inequality. More importantly, it is clear, as Justice Thomas has expressed himself, that race and racism have played a significant role in shaping his persona.[156] A brief recounting of part of his life story demonstrates as much, in particular the manner in which he arguably may have progressed through the stages of nigrescence, as developed by Professor Cross and other black scholars such as Professor Beverly Daniel Tatum.[157] Professor Cross's nigrescence model involves five stages of racial identity development: (1) pre-encounter, (2) encounter, (3) immersion, (4) internalization, and (5) internalization-commitment.[158]

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153. Thomas, *supra* note 30, at 6 (asserting that "policies affecting black Americans had been an all-consuming interest of [his] since the age of sixteen").

154. *Cf.* WATTS, *supra* note 66, at 248 (asking "[w]hy can't a black man or woman espouse a more conservative viewpoint . . . and still 'reflect the African-American community'").

155. *See, e.g.*, Jack E. White, *Uncle Tom Justice*, TIME, June 26, 1995, at 36 (asserting that no "true" black person would hold Justice Thomas's views); *see also* Smith, *supra* note 7, at 528 (claiming that some persons have argued that Justice Thomas is not a "real" black man).

156. Indeed, Justice Thomas himself has described the importance of racial experiences in the development of his ideology, noting that, at certain points, his "attitudes approached black nationalism" and citing leaders such as Malcolm X, Richard Wright, Frederick Douglass, and Booker T. Washington as some of his heroes. *See* Interview by Bill Kaufman with Clarence Thomas (Nov. 1987), *available at* http://www.reason.com/cthomasint.shtml (on file with the Iowa Law Review).

157. The nigrescence model has been criticized for various reasons, including its tendency to simplify the development of racial identity as a process of increasing racial identification and its identification of an emotionally healthy racial identity for Blacks as being one centered around Afrocentrism. *See* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1174–75 (2004). Nevertheless, I briefly discuss this model because it is the most well-known of the racial identity development models.

158. BEVERLY DANIEL TATUM, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? AND OTHER CONVERSATIONS ABOUT RACE 76 (1997) (highlighting the five stages of nigrescence and extending it to cover youths in their phases of racial-identity development); Cross & Fhagen-Smith, *supra* note 150, at 244 (same); *see also* Bailey W. Jackson III, *Black Identity Development: Further Analysis and Elaboration*, *in* NEW PERSPECTIVES ON RACIAL IDENTITY DEVELOPMENT, *supra* note 150, at 15–16 (describing the stages of black-identity development as being: naïvete, or the absence of social consciousness or identity; acceptance, meaning acceptance of the perceived worth of black people and culture; resistance or the rejection of prevailing white culture's description and valuing of black people; redefinition or the renaming, reaffirming, and reclaiming of one's sense of blackness, black culture, and racial identity; and internalization, meaning the integration of redefined racial identity into aspects of

As noted earlier, one could argue that Justice Thomas has gone through each of the stages of nigrescence throughout his life.[159] Thomas began his life poor and destitute in the segregated town of Pin Point, Georgia in 1948. When Thomas was less than two years old, his father abandoned him, his sister, and his mother, who was pregnant with her third child, another boy. In 1954, the same year that *Brown v. Board of Education*[160] was decided, Thomas started first grade at the segregated Haven Home Elementary School.[161]

In 1955, because Thomas's mother could no longer afford to raise and keep all of her children, Thomas and his brother went to live (without their sister) with their grandfather, Myers Anderson ("Anderson"), and their grandmother, Christine Anderson, in Savannah, Georgia.[162] Although barely

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one's identity).

159. During the first stage, the pre-encounter stage, the black individual views the world from a white frame of reference and internalizes many of the beliefs and values of the dominant white culture, including the idea that whiteness is superior. In this stage, the black individual has not yet recognized the societal significance of his or her membership in a racial group. *See* TATUM, *supra* note 158, at 76. Under the nigrescence model, an individual graduates to the second stage, the encounter stage, when an event or series of events causes that individual to acknowledge the personal impact of racism. In this stage, the individual begins to struggle with the idea of what it means to be a member of a group targeted by racism. *See id.*; *see also* Cross & Fhagen-Smith, *supra* note 150, at 244 (describing this stage as depicting "the event or series of events that challenge and destabilize ongoing identity").

During the third stage, the immersion stage, the black individual begins to unlearn the negative stereotypes about Blacks in the United States and starts to develop a positive sense of self. This development is often accompanied with anger from the individual regarding racism by Whites and a strong desire to surround oneself with symbols of racial identity. During this stage, a black individual is engaged in self-discovery, actively seeks out knowledge about his or her own racial and cultural history, and unlearns many of the negative stereotypes that were internalized during the pre-encounter stage. Eventually, the individual's anger is subsided in the fourth stage of development, internalization, where the individual develops a sense of security about his or her own racial identity. TATUM, *supra* note 158, at 76; *see also* Cross & Fhagen-Smith, *supra* note 150, at 244 (describing the stage as signaling "the habituation, stabilization, and finalization of the new sense of self"). As this stage progresses, the individual begins to establish meaningful relationships across boundaries, including with Whites. Finally, in the fifth stage, internalization-commitment, which is described as being minimally distinct from the fourth stage, the black individual is anchored in a positive sense of racial identity. More importantly, he or she has discovered methods for transforming his or her "sense of identity into ongoing action expressing a sense of commitment to the concerns of Blacks as a group." *See* TATUM, *supra* note 158, at 76; *see also* Cross & Fhagen-Smith, *supra* note 150, at 244 (describing a person in the fifth stage as achieving "a strong Black identity at the *personal* level" and then "join[ing] with others in the community for long-term struggles to solve Black problems and to research, protect, and propagate Black history and Black culture").

160. 347 U.S. 483 (1954).

161. *See* ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 51–60 (2001) [hereinafter THOMAS, BIOGRAPHY].

162. *See* GREENYA, *supra* note 5, at 30–31; *see also Nomination of Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 102d Cong. 108 (1991) [hereinafter *Hearings*] (testimony of Clarence Thomas) ("Our mother only earned $20 every 2 weeks as a maid, not enough to take care of us. So she arranged for us to live with

able to read and write himself, Anderson was a strong supporter of education and managed to earn enough money to send Thomas to an all-black Catholic school.[163]

It was in these Catholic schools and a Catholic seminary that Thomas arguably entered into the first two stages of nigrescence, the "pre-encounter" and "encounter" stages. When Thomas reached the tenth grade, he began to attend an all-white Catholic boarding school called St. John Vianney Minor Seminary and, for the first time, experienced "culture shock."[164] Thomas once described his first day at the all-white school, saying, "When I walked in there and saw I was in a room with all these white kids, I just about died."[165]

Despite having to adjust to a strange, all-white environment, Thomas excelled as a student and an athlete at St. John Vianney.[166] His social successes at the school, however, were far more limited, primarily because of racism. Thomas's white classmates at St. John Vianney repeatedly teased him, at times telling him, "Smile, Clarence, so we can see you."[167] For Thomas, who had been ridiculed as a child for his "nigger naps" and routinely called "America's Blackest Child,"[168] the taunts were painful.[169] During his tenure at St. John Vianney, Thomas entered what he has described as a "self-hate" stage,[170] going to great lengths to fit in with his

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our grandparents later, in 1955. Imagine, if you will, two little boys with all their belongings in two grocery bags."). As Thomas has repeatedly stated, he gained the morals and values that have served as the foundation for his success in the Anderson household. Although lacking formal education, Anderson, who, unlike many Blacks at that time, had built and owned his own house, was also a strong proponent of self-reliance. *See* GREENYA, *supra* note 5, at 29–30; *see also* Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 331, 335 (noting that "it was remarkable that [her] grandmother had had any property at all; a divorced, Black woman who'd raised three daughters alone in the segregated South with not even a high school education").

163. Like his grandfather and grandmother, who raised Thomas in their home, Justice Thomas is now raising his grand-nephew Mark. Justice Thomas assumed custody over Mark after his father was convicted of drug charges in 1997. *See* GREENYA, *supra* note 5, at 16; Tony Mauro, *Decade After Confirmation, Thomas Becoming a Force on High Court*, FULTON COUNTY DAILY REP., Aug. 20, 2001, at 1.

164. *See* Alvin Wyman Walker, *The Conundrum of Clarence Thomas: An Attempt at a Psychodynamic Understanding*, *at* http://www.raceandhistory.com/historicalviews/clarencethomas.htm (last visited Jan 12, 2005) (on file with the Iowa Law Review).

165. *Id.*

166. Williams, *supra* note 55, at 74.

167. *See* GREENYA, *supra* note 5, at 44.

168. *See* Williams, *supra* note 55, at 74. Since the antebellum period, there has been serious intraracial discrimination among Blacks based upon skin tone. *See generally* MIDGE WILSON ET AL., THE COLOR COMPLEX (1993); Trina Jones, *Shades of Brown, The Law of Skin Color*, 49 DUKE L.J. 1487, 1515–22 (2000) (detailing the history of colorism within the black community).

169. *See* Williams, *supra* note 55, at 74.

170. *Id.*

white classmates and internalizing the racism he encountered.[171] At the same time, Thomas seemed to enter into what can be described as the second stage of nigrescence, "encounter," where these series of taunts and racial events caused him to recognize fully the impact of racism. Ultimately Thomas's efforts to gain acceptance from his classmates would be of no avail, and Thomas would eventually come to believe that "there is nothing a black man can do to be accepted by whites."[172]

At Immaculate Conception Seminary in Missouri, where Thomas enrolled after high school to become a priest, he continued through what could be defined as the "encounter" stage, struggling with the idea of what it means to be black and thus a constant target of racism. In fact, Thomas's stay at the seminary would be brief as result of this struggle with targeted racism, with Thomas leaving soon after hearing a white classmate and future priest declare the following about the shooting of Dr. Martin Luther King, Jr.: "Good, I hope the son-of-a-bitch dies."[173] According to Thomas, after overhearing this statement, he "knew [he] couldn't stay in that so-called Christian environment any longer."[174]

As Thomas pursued his education at Holy Cross College in Worcester, Massachusetts,[175] he arguably moved into the third stage of nigrescence, "immersion," where he began to unlearn negative stereotypes about Blacks, developed anger about racism by Whites, and surrounded himself with symbols of racial identity.[176] Indeed, at Holy Cross, Thomas embraced Black Nationalism,[177] helped found the Black Student Union, and became involved with programs sponsored by the Black Panthers,[178] such as its free

171. *See id.*

172. *Id.*

173. GREENYA, *supra* note 5, at 48. As a general matter, Thomas felt that the Church was ignoring critical issues of race. As Thomas once explained of his departure from the seminary, "dogs were being sicced on blacks . . . and the church was focusing on what songs to play at services." Symposium, *supra* note 62, at 29 (quotations omitted).

174. GREENYA, *supra* note 5, at 48–49 (quoting Thomas as explaining his departure with these words: "This was a man of God, mortally stricken by an assassin's bullet, and one preparing for the priesthood had wished evil on him"). As Thomas would explain many years later, the day Martin Luther King, Jr. was shot was a "demarcation between hope and hopelessness" for him. *Id.* at 49.

175. Thomas attended Holy Cross with the assistance of a Martin Luther King Scholarship that was aimed at attracting more high-achieving black students to the college. *See id.* at 54 (stating that in the late 1960s, Holy Cross "pushed to find and admit more black students under a relatively new policy known as affirmative action").

176. *See* Williams, *supra* note 55, at 74.

177. Black Nationalism is a set of beliefs that focuses on the need for the cultural, political, and economic separation of Blacks from white society. The Black Nationalist Movement, which began with Marcus Garvey's Universal Negro Improvement Association, set an agenda to acquire economic power and provide Blacks with a sense of community. As an alternative to assimilation, black nationalists sought to maintain and promote their separate identity as a people of African ancestry. *See* Farrar, *supra* note 56, at 110–14.

178. GREENYA, *supra* note 5, at 57. The Black Panther Party was a radical black political

breakfast programs for black children. Thomas also led a walkout at Holy Cross over the issue of divestment from South Africa, which at that time had a system of apartheid.[179]

Just as Thomas had done in primary and secondary school, he excelled in his classes at Holy Cross. Despite his academic successes, however, Thomas was not a vocal participant in the classroom. As Thomas would later explain, he did not voluntarily speak in the classroom in high school, college, and later law school because of the discomfort he felt as a result of his childhood speech.[180] As Thomas explained, he had grown up in a rural area of the South where there remained a major influence of Gullah, a mixture of English and African language.[181] As a consequence, while he learned to speak standard English, he would edit his speech and his words before speaking, which resulted in his doing more listening than speaking.[182]

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organization that was founded by Huey P. Newton, Bobby Seale, and David Hilliard in 1966. The Party outlined a Ten Point Platform and Program, which called for a redress of the long-standing grievances of Blacks in the United States, including full employment for all black people, overdue payment of forty acres and two mules, decent housing, education that teaches black children of their history, free health care, an end to police brutality, freedom of all Blacks from government correctional facilities, and trials by a jury of actual peers for all Blacks. *See* Cynthia Deitle Leonardatos, *California's Attempt to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947, 956–60 (1999).

According to Thomas, he was so militant, "[he] thought George McGovern was a conservative." Kevin Merida & Michael A. Fletcher, *Supreme Discomfort*, WASH. POST, Aug. 4, 2002, at 23. Although Thomas considered himself liberal and a militant during his days at Holy Cross, he was the sole dissenter to a proposal for a black dormitory/hall on campus. Thomas eventually decided to live in the black dormitory/hall, but brought his white roommate from the previous year to live with him. GREENYA, *supra* note 5, at 60 (noting that Thomas dissented in part "'because he didn't want to make it easy for whites to avoid him'").

179. Apartheid, which means "apartness," is the name given to the practice of segregation by race in South Africa that began in 1948. The policy, however, extended back to the beginning of white settlement in South Africa in 1652. After the primarily Afrikaner Nationalists came to power in 1948, the social practice of apartheid was legalized and remained in practice until 1994. *See* NANCY L. CLARK & WILLIAM H. WORGER, SOUTH AFRICA: THE RISE AND FALL OF APARTHEID 3–6 (2004). *See generally* Lisa R. Pruitt, *No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession*, 23 MICH. J. INT'L L. 545 (2002) (describing certain after-effects of apartheid in the legal profession for black and colored lawyers). In 1994, the first multiracial elections occurred in South Africa, with an electoral victory for the African National Congress. *See* Adrien Katherine Wing, *Towards Democracy in a New South Africa*, 16 MICH. J. INT'L L. 689, 691–92 (1995) (book review). Prior to that, there were global efforts to force the abolition of apartheid in South Africa, including those directed toward divestment of South African securities. *See* Joel C. Dobris, *Arguments in Favor of Fiduciary Divestment of "South African" Securities*, 65 NEB. L. REV. 209, 210 (1986).

180. *See* GREENYA, *supra* note 5, at 20, 56 ("One reason for my being inconspicuous was that I had difficulty speaking proper English. . . . I would think about the right way to phrase a question while I was trying to say it, and trip over myself. Some people thought I had a stuttering problem. So I remained quiet.").

181. *See id.*, at 20, 56 (describing Thomas's stated reasons for his silence on the bench); *see also* KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS 3 (2004) (describing Gullah culture).

182. *See* GREENYA, *supra* note 5, at 20, 56; *see also* Scott D. Gerber, *"My Rookie Years Are*

After graduating ninth in his class from Holy Cross, Thomas attended Yale Law School. At Yale, Thomas's militancy began to dwindle, and his opposition to affirmative action policies, particularly quotas, began to grow.[183] Thomas felt stigmatized by what he believed to be his white classmates' view that the black law students at Yale were not there because of their academic qualifications, but merely to fulfill a quota.[184] As Thomas later explained about his days at Yale, "You had to prove yourself every day because the presumption was that you were dumb and didn't deserve to be there on merit."[185] Indeed, Thomas felt so stigmatized by what he perceived as his classmates' opinions that he avoided classes in civil rights and constitutional law, instead opting to take tax, corporate, and antitrust law[186] to prove his abilities.[187]

Upon his graduation from Yale, one of the country's most elite law schools, Thomas found himself jobless. He had been rejected by every law

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Over"—Clarence Thomas After Ten Years, 10 AM. U. J. GENDER SOC. POL'Y & L. 343, 349–50 (2002).

183. *See* Williams, *supra* note 55, at 75 (detailing an interview with Thomas, in which he described his feelings at Yale).

184. *See id.*

185. GREENYA, *supra* note 5, at 68, 94 (stating that Thomas described his experience as being one in which "every time [he] walked into a law class at Yale it was like having a monkey jump down [his] back from the Gothic arches"). Additionally, as Thomas saw it, at Yale, affirmative action primarily assisted only middle-class Blacks, not the masses. According to Thomas, most of the Blacks who graduated from Yale were the children of black lawyers, doctors, and teachers. *See* Neil A. Lewis, *Thomas's Journey on Path of Self-Help*, N.Y. TIMES, July 7, 1991 (noting that at Yale, Thomas was "usually attired in bib overalls and a dark wool watch cap, as if to announce he was a man of the common folk");Williams, *supra* note 55, at 75 ("Man, quotas are for the black middle class. But look at what's happening to the masses. Those are my people. They are just where they were before any of these policies.")(quoting Thomas); *see also* GREENYA, *supra* note 5, at 68 (same).

186. *See* Williams, *supra* note 55, at 75 (noting that Thomas purposefully avoided civil rights classes). As Professor Dorothy Brown has shown, however, even tax law is affected by race. *See* Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What's Tax Policy Got to Do with It?*, 21 U. ARK. LITTLE ROCK L. REV. 759, 760–68 (1999) (analyzing how certain tax statutes have a disparate impact based on race). The same holds true for corporate law. *See, e.g.*, Thomas W. Joo, *A Trip Through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735, 738–48 (2003) (discussing the lack of diversity among corporate directors and the executive officers they appoint, and how diversity would contribute to better management decision-making and greater shareholder wealth).

187. *See* Williams, *supra* note 55, at 75 (describing Thomas's comments that he shunned civil rights courses because he did not want to be viewed as a student who must be coddled because he is black). More recently, the Justice advised a young black male from a housing project, who planned to attend Brown University, to avoid "classes and orientation on race relations." He explained to the youth, "What I 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." Calmore, *supra* note 21, at 212–13 (quoting 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).

firm in Atlanta.[188] None of the law firms were hiring black law school graduates as attorneys, even if they graduated from Yale Law School.[189] It was at this point that one could argue Thomas entered the fourth stage of nigrescence, "internalization," where he began to develop a sense of security about his racial identity and began to establish meaningful relationships across racial boundaries. Perhaps the most important of these relationships was with John Danforth, a Yale alumnus and then-Republican Attorney General of Missouri, who hired Thomas to serve as counsel for the state department of revenue and the tax commission.[190]

In 1975, Thomas furthered his break with the black left as he discovered the work of Thomas Sowell, a black conservative economist.[191] In 1980, Thomas seemingly entered the last and final stage of nigrescence, "internalization-commitment," after being invited by Sowell to the Fairmont Conference in San Francisco, California, a conference for black conservatives who were seeking "an alternative to the consistently leftist thinking of the civil rights leadership and the general black leadership."[192] At this conference, Thomas found his home, thereby beginning his entrenchment in the Republican Party and developing an ideology and course of action for addressing his concerns about the plight of individuals in the black community.[193]

In 1981, Ronald Reagan appointed Thomas to serve as the assistant secretary for the Civil Rights Division in the Department of Education.[194] According to Thomas, he "initially resisted and declined taking the position

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188. *See* Stephen Henderson, *Clarence Thomas Urges UGA Law Graduates to Persevere*, MACON TELEGRAPH, May 18, 2003, at 1; *see also* GREENYA, *supra* note 5, at 70 (quoting Thomas as saying, "Prospective employers dismissed our grades and diplomas . . . assuming we got both primarily because of preferential treatment"). According to Justice Thomas, he still possesses the rejection letters from law firms in Atlanta. *See id.*

189. *See* Henderson, *supra* note 188, at 1.

190. *See* Williams, *supra* note 55, at 75.

191. *See* Thomas, *supra* note 30, at 5.

192. *Id.*

193. *See id.*; GREENYA, *supra* note 5, at 89 (stating that "Sowell's main tenets of black self-sufficiency and avoidance . . . of 'victimization mentality' resonated deeply within the still-young Clarence Thomas"). Thomas described his experience at and after the conference as both uplifting and depressing. He stated:

> [F]or those of us who had wandered in the desert of political and ideological alienation, we had found a home, we had found each other. For me, this was also the beginning of public exposure that would change my life and raise my blood pressure and anxiety level. After returning from San Francisco, the *Washington Post* printed a major op-ed article about me and my views presented at the "Fairmont Conference." Essentially, the article listed my opposition to busing, affirmative action as well as my concerns about welfare. The resulting outcry was consistently negative.

Thomas, *supra* note 30, at 6.

194. *See* GREENYA, *supra* note 5, at 98.

of assistant secretary for civil rights simply because [his] career was not in civil rights and [he] had no intention of moving into th[e] area."[195] Although Thomas was sure that his appointment was due to his race, he ultimately decided to accept the position upon persuasion from friends.[196] According to Thomas, during his tenure as assistant secretary, he held "strategy meetings among blacks who were interested in approaching the problems of minorities . . . and who were willing to admit error and redirect their energies in a positive way."[197]

After spending only ten months in the position at the Department of Education, Thomas was then promoted to become the Chair of the Equal Employment Opportunity Commission ("EEOC").[198] The Reagan Administration's failure to view Thomas as anything other than a black man, however, became clear upon his confirmation to a second term as Chairman of the EEOC. At the confirmation, then-Assistant Attorney General Bradford Reynolds toasted Thomas, declaring that Thomas was "the epitome of the right kind of affirmative action working the right way." [199]

On July 11, 1989, the first President Bush nominated Clarence Thomas to the United States Court of Appeals of the D.C. Circuit.[200] Less than two years later, on July 1, 1991, President Bush nominated Judge Thomas to succeed Associate Justice Thurgood Marshall.[201] Former President Bush asserted that Thomas was "the best qualified person for the job on the merits,"[202] behind snickers that Thomas's lack of judicial experience and his law school record hardly made him qualified for the job.[203]

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195. Thomas, *supra* note 30, at 6; *see also* Williams, *supra* note 55, at 75.

196. *See* GREENYA, *supra* note 5, at 98; *see also* THOMAS, BIOGRAPHY, *supra* note 161, at 186 (2001).

197. Thomas, *supra* note 30, at 6.

198. *See* GREENYA, *supra* note 5, at 101.

199. Merida & Fletcher, *supra* note 178, at 24; *see also* GREENYA, *supra* note 5, at 127.

200. GREENYA, *supra* note 5, at 149.

201. *See* Evelyn Wilson, Comment, *Comments On "An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague,"* 20 S.U. L. REV. 141, 141 (1993).

202. *Justice Clarence Thomas, A Classic Example of an Affirmative Action Baby*, J. BLACKS HIGHER EDUC., Jan. 31, 1998, at 36, 36 [hereinafter *A Classic Example*]; *see also* GREENYA, *supra* note 5, at 171 (stating that President Bush was supposed to refer to Judge Thomas as the "best man" for the job instead of the "best qualified"). Many of Thomas's critics contend that his appointment to the bench was the result of a racial preference. For example, at the time of Thomas's appointment, Democratic Senator Joseph Biden stated, "Had Thomas been white, he never would have been nominated. The only reason he is on the Court is because he is black." *A Classic Example*, *supra* at 36; *see also* Edward Lazarus, *Making Sense of Thomas' Cross Burning Remarks and First Amendment Law*, *at* http://www.cnn.com/2002/LAW/12/26/findlaw.analysis.lazarus.thomas (last visited Dec. 12, 2005) (noting "that Thomas's qualifications, compared to those of other potential candidates, were limited") (on file with the Iowa Law Review).

203. *See* Dowd, *supra* note 118, at 25 (mocking that Thomas "was nominated by the [first President Bush] with the preposterous claim that he was the 'best qualified' man for the job"); Christopher Edley, Jr., *Doubting Thomas: Law, Politics and Hypocrisy*, WASH. POST, July 7, 1991, at

Although an overall majority of Blacks supported Clarence Thomas's nomination to the Court,[204] his nomination caused an uproar among some prominent feminist and minority civil rights groups,[205] especially after allegations of sexual harassment from Anita Hill, a black female graduate of Yale Law School who had worked with Thomas at the Department of Education and the EEOC.[206] Hill claimed that Thomas sexually harassed her during her tenure in those departments. After Hill's sexual harassment charge was leaked to the press, Congress presided over public hearings that questioned both Thomas and Hill about the charge.[207]

B1 (arguing that Thomas is professionally less distinguished than all the Justices except Kennedy and Souter).

204. Polls showed that anywhere from 50% to 70% of Blacks supported Thomas's nomination.

> [M]ore [black people] were for Clarence Thomas than were against him, but it's close.... [A] sizable number of black people say they simply want an African-American on the U.S. Supreme Court. If it's got to be a tarnished Clarence Thomas, so be it. That's what happens when it takes so long for a group of people, such as African-Americans, to get recognition."

Peggy Peterman, *Most Blacks Glad Thomas Confirmed, Now Want Him to Change*, ST. PETERSBURG TIMES, Oct. 17, 1991, at 13A. The reasons for supporting Thomas varied. Some Blacks believed that Thomas would prove to be an advocate for civil rights while on the bench. Others were more skeptical, such as Joseph Lowery of the Southern Christian Leadership Conference, a supporter who explained that he was willing to support Thomas during his confirmation hearings "because '[he] figured that if a white man named [Hugo] Black could learn to think colored, then a Negro named Tom might learn to think black.'" Jeffrey Rosen, *Moving On*, NEW YORKER, Apr. 29 & May 6, 1996, at 68, 68.

205. *See* Joyce A. Baugh & Christopher E. Smith, *Doubting Thomas: Confirmation Veracity Meets Performance Reality*, 19 SEATTLE U. L. REV. 455, 467 (1996) (describing several feminist organizations that opposed Thomas). Even in everyday public circumstances, Justice Thomas draws harsh criticisms from his challengers. For instance, while standing in a public library with childhood friend Lester Johnson, a woman approached Justice Thomas and his company to say, "I just wanted to see what a group of Uncle Toms look like." Merida & Fletcher, *supra* note 178, at 8. Additionally, Leonard Small, a childhood friend of Justice Thomas, said of him, "People don't understand why we call people Uncle Toms.... But in the novel [Uncle Tom's Cabin], Eliza ran from slavery and Uncle Tom stayed. While we are trying to run for freedom, Clarence Thomas is not only staying, he's telling." *Id.* at 27.

Thomas was also heavily criticized for how he lambasted his sister in public. Thomas once said of his sister, "She gets mad when the mailman is late with her welfare check." Williams, *supra* note 55, at 75; *see also* GREENYA, *supra* note 5, at 117. At the time Thomas made these comments about his sister, she was not on welfare. Thomas's sister later explained why she had ever been on public assistance, stating that "[w]hen she was on welfare . . . she was not only taking care of her kids but had responsibility for her elderly aunt, who raised her, and an uncle." Merida & Fletcher, *supra* note 178, at 28. To her, her choice was simple—"[She] had a choice of taking care of these old people or keeping a job." *See id.*

206. *See* Scott D. Gerber, *Justice Clarence Thomas: First Term, First Impressions*, 35 HOW. L.J. 115, 117 (1992). According to a *Washington Post* article in 1992, "the public believed Anita Hill by a margin of 53 percent to 37 percent." JOHN C. DANFORTH, RESURRECTION 200 (1994) (citing Richard Morin, *Harassment Consensus Grows; Poll Finds Greater Awareness of Misconduct*, WASH. POST, Dec. 18, 1992, at A1).

207. *See* Adrienne D. Davis & Stephanie Wildman, *The Legacy of Doubt: Treatment of Race and*

In response to the challenges to his nomination and appointment,[208] Thomas famously called the Thomas-Hill hearings a "high-tech lynching for uppity blacks who in any way deign to think for themselves."[209] In so doing, he abandoned black conservatives' rejection of what they call victimology and has been heavily criticized by many people for claiming racism after chastising others for doing the same in the past.[210] Despite Hill's allegations of harassment and the extreme opposition to Thomas's confirmation by prominent organizations on the left, Thomas was confirmed as an Associate Justice of the Supreme Court. His confirmation was by the narrowest margin in modern history, 52–48.[211]

Sex in the Hill-Thomas Hearings, 65 S. CAL. L. REV. 1367, 1369–72 (1992) (noting that National Public Radio correspondent Nina Totenberg aired the complaint, which caused Congress to delay Thomas's confirmation vote to hold hearings on Hill's allegations).

208. The Latino/a community experienced a similar debate regarding the nomination of Miguel Estrada to the United States D.C. Circuit Court of Appeals. Indeed, Estrada was called "a Justice Clarence Thomas in the making, a young lawyer thrust toward the Supreme Court as a conservative ideologue no more representative of Hispanics than Thomas was of blacks." Frank Davies, *Bush Court Nominee Raises Liberal Hackles—Critics Characterize Honduran-American as Far-Right Ideologue Lacking in Experience*, STAR LEDGER, Jan. 6, 2002, at 29.

209. *Hearings*, *supra* note 162, at 157 (testimony of Clarence Thomas). Thomas further claimed that the hearings regarding Hill's allegations were "a message that you [meaning Blacks] kow-tow to an old order, this is what will happen to you, you will be lynched, destroyed, caricatured by a committee of the U.S. Senate, rather than hung from a tree." *Id.* at 158.

210. *See* Donna Britt, *Those Fateful, Hateful Hearings*, WASH. POST, Oct. 15, 1991, at E1 ("What else do I hate? The warp speed with which bootstrapper extraordinaire Clarence Thomas adopts the pose of black victim whenever it suits him."). Another report asserted:

> Judge Thomas has consistently played the race card. . . . Clarence Thomas has always benefited from his race and victimization. It's just that he has made his case slyly, in subtext, most recently with his sharecropper grandfather in the starring role. . . . Who lynched whom? Judge Thomas's appeal to that brutal imagery was at once his shrewdest and most deplorable tactic.

Brent Staples, *Lynching, as Surreal Slogan*, N.Y. TIMES, Oct. 17, 1991, at A26. Many have criticized Thomas for "playing the race card" by claiming to be a victim of a "high-tech lynching" during his confirmation hearings, not only because Thomas sought to downplay his race in his professional life, but also because Thomas's accuser was not a white, but a black, woman. Five black law professors at the University of North Carolina stated:

> In a nation "in which African Americans are disproportionately poor, undereducated, imprisoned and politically compromised . . . identity—racial identity—very clearly matters. Were that not the case, Justice Thomas, for all his claims to the contrary, could not have declared himself the victim of a 'high-tech lynching' during the heated opposition to his appointment to the Supreme Court."

Merida & Fletcher, *supra* note 178, at 11; *see also* Kendall Ford, *Strange Fruit*, *in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 368 (Toni Morrison ed., 1992) (noting the irony in Thomas claiming a lynching when the alleged victim was a black woman).

211. *See* FOSKETT, *supra* note 181, at 47.

The enormous support that Thomas received from the first President Bush's administration,[212] as well as many prominent white Republican Congressmen and politicians,[213] only worked to heighten suspicions among the black community.[214] One of the most vocal critics of Thomas both before and after his nomination was the highly regarded Judge Leon Higginbotham, the late federal judge from the United States Third Circuit Court of Appeals. In fact, after Thomas was seated on the Court, Judge Higginbotham published a letter to Justice Thomas in the *University of Pennsylvania Law Review* that condemned the Justice for his critique of civil rights organizations and lawyers, and urged Justice Thomas to use his new role to "assure equal justice under law for all persons."[215]

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212. George H.W. Bush and his administration had been heavily criticized for having "racist" politics. For example, Bush was lambasted for utilizing a demonized image of Willie Horton in television advertisements during his campaign as a means of engendering fear in middle and upper class white Americans. Willie Horton was a black criminal who, while on a work release program of the Dukakis governorship, raped and murdered a white woman. *See* Richard Dvorak, *Cracking the Code: "De-coding" Racial Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 626–27 (2000) (describing how former President Bush used Willie Horton to appeal to Whites' racism and fear of black male criminals).

213. In defense of Justice Thomas, Republican Senator Danforth, a friend and former supervisor, asserted, "'What Clarence is all about . . . is that in this country you should have the freedom to think what you want to think, whether you're black, white, or anything else.'" David Gergen, *The Brief on Clarence Thomas*, U.S. NEWS & WORLD REP., July 15, 1991, at 84, 84 (quoting Senator Danforth). Additionally, David Duke, a "former" white supremacist, openly declared support for Thomas's nomination. Likewise, Strom Thurmond, once a staunch segregationist, became one of Thomas's strongest supporters. *See Hearings*, *supra* note 162, at 22–25 (testimony of Clarence Thomas).

214. *See* Smith, *supra* note 80, at 11 ("There is something wrong when white men rally around a black man. Why would all these white senators rally around this black man? After all, this is America.").

215. A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1028 (1991). *But see* Wilson, *supra* note 201, at 145–47 (defending Justice Thomas's right to vote conservatively and "make his contribution in his own way").

During his confirmation hearings, Clarence Thomas asserted that he recognized the sacrifices that many civil rights activists had made for him, stating:

> So many others gave their lives, their blood, their talents. But for them I would not be here. Justice Marshall, whose seat I have been nominated to fill, is one of those who had the courage and the intellect. He is one of the great architects of the legal battles to open doors that seemed so hopelessly and permanently sealed and to knock down barriers that seemed so insurmountable to those of us in the Pin Point, [Georgias] of the world.
>
> The civil rights movement, Rev. Martin Luther King and the SCLC, Roy Wilkins and the NAACP, Whitney Young and the Urban League, Fannie Lou Haemer, Rosa Parks and Dorothy Hite, they changed society and made it reach out and affirmatively help. I have benefited greatly from their efforts. But for them there would have been no road to travel.

Hearings, *supra* note 162, at 109 (testimony of Clarence Thomas).

In contrast to the white conservative community, which has consistently praised Justice Thomas as one of the brightest judicial figures, much of the black community has largely ignored or ridiculed the Justice.[216] Numerous protests and challenges to Justice Thomas's appearance at several events indicate that it is unlikely that any wholesale approval of the Justice from much of the black community will occur in the near future.[217]

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216. Calmore, *supra* note 21, at 180. For example, for the past seven years, *Ebony* Magazine has not listed Justice Thomas as one of the 100 most influential African-Americans. Thomas has been consistently ridiculed within the black and liberal communities. *Id.* Additionally, the now-defunct *Emerge* Magazine twice parodied the Justice on its cover. In the first cartoon, Thomas was wearing an Aunt Jemima-style headscarf. *Id.* In the second cartoon, Thomas was pictured as a lawn jockey standing in front of the Supreme Court. Inside the pages of the magazine, there was a drawing of Clarence Thomas shining the shoes of Justice Scalia. *See* George E. Curry & Trevor W. Coleman, *Uncle Thomas: Lawn Jockey of the Far Right*, EMERGE, Nov. 1996, at 38, 38.

217. Most recently, on February 28, 2002, five black law professors at the University of North Carolina boycotted Justice Thomas's visit to the law school. Calmore, *supra* note 21, at 181. These law professors have been named "The Law School Five." Along with their boycott, the five professors issued a statement. It reads in part:

> 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. Plans for his visit include a breakfast with students, lunch and coffee with the faculty, visits to selected classes, and an afternoon appearance at the Carolina Club. 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. We note, parenthetically, that Justice Thomas follows the recent visits of Justices Scalia and O'Connor. Thus, within the last few years the law school will have brought to the campus three of the five justices who have voted consistently to turn back the clock on racial progress.
>
> We live, today, in a United States that increasingly calls on African Americans to disavow the salience of race in American life, to claim that identity doesn't matter, and that race consciousness in any and every form is pernicious, even when it seeks to rectify racial wrongs. But in a United States in which African Americans are disproportionately poor, undereducated, imprisoned, and politically compromised, identity—racial identity—very clearly matters. Were that not the case, Justice Thomas, for all his claims to the contrary, could not have declared himself the victim of a "high-tech lynching" during the heated opposition to his appointment to the Supreme Court.
>
> 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 Americans *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 . . . .

Thomas's own reaction to protests against his appearances exhibits his hurt at being shunned and rejected by the black community. In 1998, Justice Thomas spoke at the annual convention of the National Bar Association, the largest organization of black judges, after much protest and debate.[218] In his speech to the members of the Association, Justice Thomas defended his right to "think for himself."[219] In his highly charged speech, he asserted:

> 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, all the sacrifice, all the long hours of preparation were to help, not hurt. . . . I have come here today not in anger or to anger, though my mere presence has been sufficient, obviously, to anger some, nor have I come to defend my views, but rather to assert my right to think for myself, to refuse to have my ideas assigned to me, as though I was an intellectual slave.[220]

Clearly, Justice Thomas identifies strongly as a black man and believes that his ideologies are best suited to aid Blacks.[221] However, thus far, he has

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Id. at 225 app.

218. *See* Richard Willing, *Black Jurist Conference Begins with Controversy*, USA TODAY, Sept. 25, 1998, at 7A. Numerous members of the National Bar Association complained and protested after its Chairman publicly announced the invitation for Justice Thomas to speak at the organization's annual convention. *Id.* Judge A. Leon Higginbotham was among those who tried to have Thomas disinvited to the meeting. In a letter circulated before the convention, he wrote, "It makes no more sense to invite Clarence Thomas than it would have for the National Bar Association to invite George Wallace for dinner the day after he stood in the schoolhouse door and shouted 'Segregation today and segregation forever.'" Mona Charen, *Rejection Is Price Thomas Pays for Keeping Integrity*, FT. WORTH TELEGRAM, Aug. 2, 1998, at 4 (quoting Higginbotham). Despite this strong protest, several prominent black legal figures came to Justice Thomas's aid, most notably Judge Damon Keith, United States Circuit Judge for the Sixth Circuit. In fact, Judge Keith defended the invitation that was extended to the Justice, and the invitation was not withdrawn. Justice Thomas refused to cancel his appearance at the convention. *See* Vern Smith & Ellis Cose, *The Obligations of Race*, NEWSWEEK, Aug. 10, 1998, at 53.

The National Bar Association's annual conference and the University of North Carolina have not been the only places where an appearance by Clarence Thomas has been boycotted by members of the black community. For example, in 1996, school officials at a predominantly black middle school in Landover, Maryland revoked an invitation for Justice Thomas to speak at the school's eighth grade graduation. Parents and children successfully rallied to get Justice Thomas reinvited as a speaker. *See* Jackie Cissell, *Justice Clarence Thomas: He's Not Going Away, No Matter How Hard His Critics Pray*, NEW VISIONS COMMENT. (Nat'l Ctr. Pub. Pol'y Res., D.C.), July 1996, at 1. Likewise, two black board members of the ACLU of Hawaii resigned after the organization invited Justice Thomas to speak in a debate on affirmative action. *See* Merida & Fletcher, *supra* note 178, at 11. One of the black board members, Eric Ferrer, proclaimed that inviting Justice Thomas would be like "inviting Hitler to come speak on the rights of Jews." *Id.* at 11; Calmore, *supra* note 21, at 180.

219. Justice Clarence Thomas, Address at the National Bar Association's Annual Meeting (July 29, 1998), *available at* http://douglassarchives.org/thom_b30.htm (on file with the Iowa Law Review).

220. *Id.*

221. It is clear from his words that Justice Thomas is hurt by his ostracism from the black

failed to meet the challenge of convincing most others that he is not a puppet of "forces hostile to his own people."[222]

III. BLACK ROBE, BLACK VOICE

Although many Blacks and Whites refuse to see Justice Thomas as anything other than an "Uncle Tom,"[223] his jurisprudence on certain issues, regardless of whether one views his ideologies as beneficial to black people, speaks volumes as to whether he is a "slave" of any white conservative, including Justice Scalia. In particular, when considered in light of the philosophies that have developed into black conservative thought, which focuses on the effects of certain policies on black people as opposed to mere principles of formal equality, one can readily see that Justice Thomas's jurisprudence on key issues—such as education and desegregation, affirmative action, and crime—are rooted in black conservative ideology. This Part evaluates and analyzes selected Supreme Court opinions and explicates how Justice Thomas embraces various strands of black conservative thought (as distinct from white conservative ideology) in his opinions.

A. *EDUCATION/DESEGREGATION*

> I am the only one at this table who attended a segregated school . . . . And the problem with segregation was not that we didn't have white people in our class. The problem was that we didn't have equal facilities. We didn't have heating, we didn't have books, and we had rickety chairs. All society owed us was equal resources and an equal opportunity to make something of ourselves.
>
> –Clarence Thomas, in 1995 at the Justices' conference in which *Missouri v. Jenkins* was discussed[224]

As noted earlier, a significant component of black conservative thought on education is its critique of the strategy that was employed by civil rights

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community. Essayist Debra Dickerson said the following about the Justice after she engaged in long conversations with him about the difficulties that black Republicans face:

> I think he would clearly love his relationship with the black community to be different. . . . There is a wistfulness there. You can't be outside of the fold and not feel it. . . . He is the lowest of the low in sort of official blackdom. It's unfair, and it's got to hurt.

Merida & Fletcher, *supra* note 178, at 11.

222. Symposium, *supra* note 62, at 28 (quoting Glenn C. Loury).

223. Justice Thomas is not the only person to be labeled a traitor to the race. Many other black conservatives, including J.C. Watts, Colin Powell, Condoleezza Rice, and Shelby Steele, "have been labeled expedients, Uncle Toms, oreos, [and] sell-outs." *See* WATTS, *supra* note 66, at 3.

224. Rosen, *supra* note 204, at 66.

activists in their efforts to improve the lot of black children in public schools.[225] For many black conservatives (and even for some black liberals today),[226] this strategy focused far too much on an integrative ideal, and not enough on improving the actual educational opportunities and resources available to black children.[227]

More importantly, the view that the past civil rights strategy improperly relied on the belief that integration in itself was the solution to educational inequalities is one that Justice Thomas has expressed repeatedly, both on and off the bench. For example, even before Thomas sat on the Court, he articulated these very same criticisms, stating:

> There were grand opportunities for them to focus on the proper education of minority kids, the kids who are getting the worst education, and instead they're talking about integration. God—I went to segregated schools. You can really learn how to read off those books, even if white folks aren't there. I think segregation is bad, I think it's wrong, it's immoral. I'd fight against it with every breath in my body, but you don't need to sit next to a white person to learn how to read and write. The NAACP needs to say that.[228]

Additionally, in response to a question by Senator Specter during his confirmation hearings on September 16, 1991, Thomas asserted:

> The concern that a number of us raise with respect to just as individuals in this society, as individuals who have watched the changes in our country, was simply that if we could demonstrate that the educational opportunities were improving for minorities, then whether it is busing or any other technique, then use it, but make sure that we are helping these young kids. That was totally

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225. *See supra* Part I.B.2.

226. *See, e.g.*, Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401 (1993). Derrick Bell, professor of law at New York University School of Law, has even asserted that he would have dissented from *Brown*, arguing that the Court should have enforced *Plessy v. Ferguson*, 163 U.S. 537 (1896), which established the concept of "separate but equal." *See* BELL, *supra* note 89, at 20–27; Derrick A. Bell, *Bell, J., dissenting, in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 185 (Jack M. Balkin ed., 2001)

227. *See* Symposium, *supra* note 62, at 30.

228. *See* Interview by Bill Kaufman with Clarence Thomas (Nov. 1987), *available at* http://www.reason.com/cthomasint.shtml (on file with the Iowa Law Review); *see also* GREENYA, *supra* note 5, at 33 (noting that Thomas stated that the nuns in the all-black school he attended gave "the same tests the white schools took" and that "[t]hey refused to let [Thomas and his classmates] buy into the notion that [they] could never do well, despite all the stereotypes of inferiority around [them]").

> out of the legal context. That just simply would have been a preference that I expressed as a citizen.[229]

As a Supreme Court Justice, Thomas received his first opportunity to insert these principles into his jurisprudence in *United States v. Fordice*.[230] In *Fordice*, a lawsuit was filed against the State of Mississippi, alleging that despite the Court's decision in *Brown v. Board of Education*,[231] the state had continued its policy of *de jure* segregation in its public university system by maintaining five almost completely white universities and three almost exclusively black universities. In filing this lawsuit, the plaintiffs referenced the state's history of discrimination in its public university system.[232] In particular, the plaintiffs specified that the University of Mississippi had only admitted its first black student in 1962, which was eight years after the first decision in *Brown*, and even then only under court order.[233] Additionally, they explained that, although in 1973 the state had devised a plan (which was rejected by the U.S. Department of Health, Education, and Welfare) to disestablish the *de jure* segregated university system, the state had refused to fund the plan until 1978, and even then with only half the financing requested.[234] Finally, the plaintiffs concluded that, by the mid-1980s, more than ninety-nine percent of Mississippi's white students were enrolled at the five almost completely white universities, and seventy-one percent of the state's black students were enrolled at the three almost exclusively black universities.[235]

In deciding whether the State of Mississippi had met its affirmative duty to dismantle its dual university system, the Court first noted that a state does not satisfy "its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation."[236] The Court then held that even though students attend college by choice in the higher education context, that fact is insufficient by itself to show that a state has abandoned its dual, race-based system.[237] "If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent

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229. *Hearings*, *supra* note 162, at 489 (testimony of Clarence Thomas).

230. 505 U.S. 717 (1991).

231. *See generally* Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown I*); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (*Brown II*). In *Brown I*, the Supreme Court held that state-mandated segregation in public educational institutions was unconstitutional, and in *Brown II*, the Supreme Court ordered an end to segregated public education "with all deliberate speed." *Brown II*, 347 U.S. at 301.

232. *See Fordice*, 505 U.S. at 723–25.

233. *See* Meredith v. Fair, 306 F.2d 374 (5th Cir. 1962), *cert. denied*, 371 U.S. 828 (1962).

234. *See Fordice*, 505 U.S. at 722–23.

235. *See id.* at 724–25.

236. *Id.* at 728.

237. *Id.* at 729.

practicable and consistent with sound educational practices."[238] The Court further held that, had the Fifth Circuit applied the correct standard to the plaintiffs' claims, it may have concluded that Mississippi's admissions standards policies, program duplication in the black and white institutions, and mission assignments, although race neutral, substantially restricted students' choices of which institution to enter based on race. Accordingly, the Court remanded the case.[239]

Justice Thomas authored a concurrence in *Fordice*, agreeing with the majority's ruling that a state does not satisfy its "obligation to dismantle a dual system of higher education merely by adopting race-neutral policies" and the standard that the majority had established for evaluating desegregation in the higher education context.[240] In so doing, Justice Thomas began his concurrence with a quote from W.E.B. Du Bois, who once argued that all-black schools could be more conducive to advancing the learning of black children than integrated schools.[241] Noting Du Bois's statement that "'[w]e must rally to the defense of our schools,'"[242] Thomas explained that he wrote a separate concurrence to emphasize that the standard applied in *Fordice* did not compel the elimination of racial balance within the system as required in the grade-school context and thus would not necessitate the "destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions."[243]

Although Justice Thomas agreed that a court could assume discriminatory intent from policies adopted during the *de jure* era to produce segregative effects that continued to produce such effects, he also stressed the majority's holding that these policies must be reformed and

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238. *Id.*

239. *Fordice*, 505 U.S. at 732–43.

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

241. *See id.*; *see also* W.E.B. Du Bois, *Does the Negro Need Separate Schools*, 4 J. NEGRO EDUC. 328 (1935). Justice Thomas's reference to Du Bois is ironic, given Du Bois's strong opposition to Washington. It is also ironic because Du Bois's argument, as clarified later, rested on the idea that Blacks should rally behind separate schools *as a practical matter* because of Whites' hostility to Blacks. *See id.* at 330 (arguing that there must be separate schools "because of an attitude on the part of white people which is not going materially to change in our time"). In this sense, the segregation was not by choice, but by concession; it is segregation by individual choice that Justice Thomas does not contest and on which he bases his jurisprudence on desegregation. *See supra* Part I; *see also* Sheryll Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 730, 733–34 (2001) (maintaining that, for some of the black middle class, the decision to live in an all-black neighborhood is an "acceptance of defeat in trying to fully enter the American mainstream" based on a desire to escape racism by Whites in their own homes and neighborhoods).

242. *Fordice*, 505 U.S. at 745 (Thomas, J., concurring) (quoting W.E.B. Du Bois, *Schools*, 13 CRISIS 111, 112 (1917)).

243. *Id.*

analyzed in accordance with sound educational practices.[244] In so doing, Justice Thomas focused on historically black colleges and universities, noting their continuing value despite the racist reasons behind the creation and development of many such colleges and universities.[245] Furthermore, Justice Thomas expressed concern that, if courts foreclosed the possibility that there were sound educational justifications for maintaining historically black colleges and universities, such schools, which had maintained a significant value as a learning ground for numerous black leaders and allowed for the upward mobility of many Blacks, would be destroyed, ultimately depriving young black students of an opportunity to attend college.[246] Again, as his fellow black conservatives have expressed over time, Justice Thomas worried that black students would lose an important educational benefit simply for the sake of integration alone.[247] As Justice Thomas noted, historically black colleges and universities are "a symbol of the highest attainments of black culture," and "[i]t would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges."[248]

Moreover, Justice Thomas's focus in his concurrence was very different from that of Justice Scalia, who concurred in part and dissented in part.[249] Justice Scalia agreed that Mississippi was required under the Constitution to remove discriminatory barriers at its public universities and colleges, that this requirement did not mandate equal funding between the historically white and historically black institutions, and that Mississippi's admissions requirements needed to be reviewed. Yet, Justice Scalia chose to focus his energies on the ambiguities in the majority's standard for evaluating the

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244. *See id.* at 745–48.

245. *See id.* at 748; *see also* Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 HOW. L.J. 323, 337–38 (2004) (noting that Justice Thomas "praises predominantly black institutions as valuable in themselves").

246. *See Fordice*, 505 U.S. at 748 (Thomas, J., concurring); *see also* Scott Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 S.U. L. REV. 43, 48–53 (1997) (analyzing Justice Thomas's concurrence in *Fordice*).

247. *See Fordice*, 505 U.S. at 748 (Thomas, J., concurring).

248. *Id.* at 749. Thomas described the importance of historically black schools in his opinion:

> The colleges founded for Negroes are both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of higher learning for their children. They have exercised leadership in developing educational opportunities for young blacks at all levels of instruction, and, especially in the South, they are still regarded as key institutions for enhancing the general quality of the lives of black Americans.

Id. (quoting CARNEGIE COMM'N ON HIGHER EDUC., FROM ISOLATION TO MAINSTREAM: PROBLEMS OF THE COLLEGES FOUNDED FOR NEGROES 11 (1971)).

249. *See id.* at 749 (Scalia, J., concurring in part and dissenting in part).

efficacy of a state's efforts to disestablish de jure segregation.[250] Specifically, he criticized and rejected the majority's test as ambiguous and unattainable.[251] Although Justice Scalia agreed with Justice Thomas that the standards that applied to evaluating a formerly de jure system in the grade school context did not apply in the higher education context, Justice Scalia questioned what the majority meant by requiring that the state's prior de jure system must be eliminated to the extent practicable and consistent with educational practices.[252] For Justice Scalia, the former de jure states had only one duty: "to eliminate discriminatory obstacles to admission."[253] Unlike Justice Thomas, Justice Scalia joined in the majority opinion only insofar as it held that Mississippi failed to meet its burden to show that it had eliminated intentional discriminatory admission standards. To Justice Scalia, it was the unattainable and vague standards that proved most troublesome,[254] and not necessarily the continued survival of "a symbol of the highest attainments of black culture."[255]

Three years after *Fordice*, Justice Thomas sat on another case, *Missouri v. Jenkins*,[256] which addressed another state's attempts to remedy previously mandated segregation by law. In that case, the State of Missouri challenged the district court's orders requiring the state to fund salary increases for instructional and non-instructional staff within the Kansas City School District and to continue to fund remedial quality education programs, "because student achievement levels were still at or below national norms at many grade levels."[257] The salary increases and the remedial quality education programs were part of a larger proposed plan to convert the

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250. *Id.* at 749–55.

251. *Id.* at 750–53 (Scalia, J., concurring in part and dissenting in part).

252. *Id.* at 752–53.

253. *Id.* at 755 ("Establishment of neutral admission standards, not the eradication of all 'policies traceable to the *de jure* system . . . having discriminatory effects' is what *Hawkins* is about.") (citations omitted).

254. Justice Scalia concluded:

> What I do predict is a number of years of litigation-driven confusion and destabilization in the university systems of all the formerly *de jure* States, that will benefit neither blacks nor whites, neither predominantly black institutions nor predominantly white ones. Nothing good will come of this judicially ordained turmoil, except the public recognition that any court that would knowingly impose it must hate segregation. We must find some other way of making that point.

Id. at 762.

255. Justice Scalia did comment, however, on how the *Fordice* decision could negatively affect historically black colleges and universities. For example, Justice Scalia interpreted the decision as preventing the adoption of any policy to provide equal funding to both black and white institutions because "equal funding, like program duplication, facilitates continued segregation—enabling students to attend schools where their own race predominates without paying a penalty in the quality of education." *Id.* at 759.

256. 515 U.S. 70 (1995).

257. *See id.* at 73.

district's public schools into magnet schools that "would draw non-minority students from the private schools who have abandoned or avoided [the school district], and draw in additional non-minority students from the suburbs."[258]

In ruling on the State of Missouri's challenge to the district court's remedial orders for the school district, the Supreme Court, in an opinion authored by Chief Justice Rehnquist, held that the challenged orders were beyond the remedial authority of the district court.[259] Specifically, in reviewing the authority by which the district could approve salary increases for instructional and non-instructional staff, the Court asserted that a proper analysis of the case would rest on whether the remedy "'[wa]s necessarily designed . . . to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'"[260] The Court then held that the order approving across-the-board salary increases was beyond the scope of the district court because it was grounded in an effort to "'improv[e] the desegregative attractiveness'" of the school district, rather than to eliminate racially identifiable schools within the district.[261] In addition, the Court determined that the district court's order requiring the State to continue to fund remedial quality education programs was not an appropriate test for deciding whether the dual school system had achieved partial unitary status because it was grounded in an effort to improve student achievement levels to meet national norms, as opposed to focusing on "whether the reduction in achievement by minority students attributable to prior *de jure* segregation ha[d] been remedied to the extent practicable."[262] Accordingly, the Court remanded the case to the district court to determine if, consistent with the Supreme Court's opinion, the district court's supervision should be withdrawn.[263]

As in *Fordice*, Justice Thomas filed a concurring opinion to emphasize "a few thoughts with respect to the overall course of [the] litigation."[264] Obviously referring to the school district's plan to create magnet schools that would attract white students and suburban students back to the district, Justice Thomas emphasized the black conservative concept that a focus on integration unnecessarily withdraws attention from the quality of education that black children are receiving in schools in their own neighborhoods. He wrote:

258. *Id.* at 77 (quoting *Fordice*, 505 U.S. at 759).
259. *See id.* at 90–93.
260. *Id.* at 87 (quoting Milliken v. Bradley, 418 U.S. 717, 746 (1974)).
261. *Jenkins*, 515 U.S. at 91–93, 98–100.
262. *Id.* at 101.
263. *See id.* at 102.
264. *Id.* at 114 (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. Instead of focusing on remedying the harm done to those black schoolchildren injured by segregation, the District Court here sought to convert the Kansas City, Missouri, School District (KCMSD) into a "magnet district" that would reverse the "white flight" caused by desegregation.[265]

For Justice Thomas, the very idea of creating a school district simply to attract Whites was offensive, because he believed that the idea rested on the false notion that the schools would automatically improve if their white population returned.[266]

Like his conservative brethren, Justice Thomas's main issue was black empowerment, not integration for integration's sake.[267] As Justice Thomas further expressed in his concurrence:

> Racial isolation itself is not a harm; only state-enforced segregation is. After all, if separation is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve.[268]

Indeed, Justice Thomas took his argument one step further, arguing, as he did in *Fordice*, that predominantly black schools (despite their origins in state-enforced segregation) are often well-suited to provide education and

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265. *Id.*; *see also* Brown, *supra* note 124, at 312–13 ("Justice Thomas criticizes the focus on integration as a route to educational equality and encourages the black community to look within itself: in other words, to exploit resources innovatively that presently exist in the black community.").

266. *Jenkins*, 515 U.S. at 114, 119 (Thomas, J., concurring) (noting that such ideas rest on an assumption of black inferiority).

267. *See id.* at 121–22 ("Given that desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment."); *cf.* Michael A. Middleton, Brown v. Board: *Revisited*, 20 S. ILL. U. L.J. 19, 21 (1995) (commenting that the author was bothered by the idea that the problem of addressing "damaging effects of segregation . . . can be corrected by the simple expedient of appropriately mixing Black and White bodies"). *But see* Jose Felipe Anderson, *Perspectives on* Missouri v. Jenkins*: Abandoning the Unfinished Business of Public School Desegregation "With All Deliberate Speed,"* 39 HOW. L.J. 693, 695 (1996) (arguing that we "must pursue integration even while acknowledging recent failures that have led some to call for the abandonment of techniques designed to integrate public schools").

268. *Jenkins*, 515 U.S. at 122 (Thomas, J., concurring). Greenya argues that:

> Thomas wants to know in every instance what integration means for blacks. If it means losing the alternative of going to their own schools, running their own businesses, then he doesn't like it. He has too many scars from episodes in which, in the name of integration, he was the only black.

GREENYA, *supra* note 5, at 50.

direction to young black children for a variety of reasons.[269] In particular, Thomas explained that, "[b]ecause of their distinctive histories and traditions, black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement."[270] Much like his fellow black conservatives, Justice Thomas was pointing to this symbol of African-American history to show that Blacks had repeatedly overcome segregation and other similar obstacles to educate themselves. Only this time, as Thomas was contending, the legal obstacle of Jim Crow had been removed, and thus the decisions to attend these institutions were by choice.

In fact, Thomas's concurrence in *Jenkins* has been used by one author to support an Afrocentric curriculum that "articulates a vision of black culture which meets the intersubjective needs of black youth."[271] Much like Thomas and his black conservative cohorts, this author maintained that blacks should turn inward and construct creative remedies to utilize the resources within the community to advance academic achievement among black children.[272]

Indeed, in *Zellman v. Simmons-Harris*,[273] the case in which the Supreme Court held that a voucher program in Ohio did not violate the Establishment Clause,[274] Justice Thomas himself expressed this concept of "turning inward," starting with a quote by Frederick Douglass: "Education . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free."[275] In so doing, Thomas highlighted that "failing urban public schools disproportionately affect minority children

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269. *Jenkins*, 515 U.S. at 121–22 (Thomas, J., concurring) ("[Historically black schools] can be both a source of pride to blacks who have attended them and a source of hope to black families who want the benefits of . . . learning for their children.").

270. *Id.* at 122. One commentator explained:

> Essentially, black educators took institutions that were scorned and resource-deprived, and turned them into thriving centers of academic excellence. Moreover, these schools provide benefits that go far beyond the academic enrichment of individual students; often they accrue to the larger black community.

Brown, *supra* note 124, at 319.

271. Brown, *supra* note 124, at 314.

272. *See id.*

273. 536 U.S. 639 (2002).

274. For a discussion of constitutional questions raised under the religion clauses, see Alan E. Brownstein, *Constitutional Questions About Vouchers*, 57 N.Y.U. ANN. SURV. AM. L. 119 (2000) (discussing the need for careful constitutional limits on public funding of religious institutions).

275. *Zellman*, 536 U.S. at 676 (Thomas, J., concurring) (quoting *The Blessings of Liberty and Education: An Address Delivered in Manassas, Virginia, on 3 September 1894*, *in* 5 THE FREDERICK DOUGLASS PAPERS 616, 623 (John W. Blassingame & John R. McKivigan eds., 1992)).

most in need of educational opportunity."[276] He also contended that, just as Blacks had supported and fought for public education during Reconstruction, they now advocated school choice and voucher programs, because these programs offered them hope and a means to properly educate their children despite struggling communities.[277] In essence, like his fellow black conservatives, Justice Thomas viewed these programs as vital, because they helped minority parents to rely on themselves and make their own choices for their children's education.

B. AFFIRMATIVE ACTION

> [Clarence] Thomas's critics may snigger that he is sitting comfortably in one of the most powerful seats in government, trying to tell everyone else to make it on merit. But this attitude only proves Thomas right.
>
> —Robyn Blumer[278]

Justice Thomas's stance opposing affirmative action has received enormous press not only because it seems, to many, to be hostile to black interests, but also because it looks as if Justice Thomas is rejecting his personal history.[279] A number of Thomas's critics condemn him for drawing

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276. *Id.* at 681 (Thomas, J., concurring).

277. *Id.* at 681–82 (Thomas, J., concurring). Thomas noted:

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

Id. (quoting JAMES D. ANDERSON, EDUCATION OF BLACKS IN THE SOUTH, 1860–1935, at 18 (1998)); *see also id.* at 682 n.7 (Thomas, J., concurring). He continued:

> Minority and low-income parents express the greatest support for parental choice and are most interested in placing their children in private schools. "[T]he appeal of private schools is especially strong among parents who are low in income, minority, and live in low-performing districts: precisely the parents who are the most disadvantaged under the current system."

Id. at 682 n.7 (Thomas, J., concurring) (quoting TERRY MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC 164 (2001)).

278. Robyn E. Blumer, *Justice Thomas's Dissent*, ST. PETERSBURG TIMES, June 29, 2003, at 7D.

279. *See* Angela Onwuachi-Willig, *Using the Master's Tool to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. (forthcoming 2005) (manuscript at 1–5, on file with the Iowa Law Review) (describing the abundance of commentators who feel that Justice Thomas has pulled up the ladder of affirmative action after climbing it). Justice Thomas denies ever being a beneficiary of affirmative action. In an interview in the late 1980s, Thomas once asserted, "This thing about how they let me into

up the ladder of affirmative action after he has climbed it.[280] In response, Justice Thomas has asserted that his critics' words only support his views on affirmative action, demonstrating how affirmative action negatively affects those who have worked hard to achieve on their own by tagging them as beneficiaries of race-based preferences.[281]

This alleged negative impact of affirmative action, however, is not the only element of Justice Thomas's philosophy on the subject. Embedded in Justice Thomas's opposition to affirmative action are four other central ideas: (1) that the approval and support of affirmative action by Whites is not void of self-interest, but rather affirmative action is merely "window dressing" that is not designed to address true inequalities; (2) that affirmative action is actually harmful to Blacks because it causes low self-esteem; (3) that affirmative action is harmful because it does not directly foster equality for Blacks, but instead reinforces a self-defeating sense of victimization; and (4) that affirmative action fails to assist the vast majority of poor black people and instead mostly assists the black middle and upper middle classes.[282]

Thus, unlike white conservative ideology, which posits that affirmative action is unfair because it results in "reverse" discrimination against Whites,

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Yale—that kind of stuff offends me. All they did was stop stopping us." *A Classic Example*, *supra* note 202, at 35. Abraham Goldstein, Dean of Yale Law School from 1970 to 1975, and James Thomas, who was an admissions officer for Yale Law School when Clarence Thomas applied in 1971, assert otherwise. For example, Dean Goldstein stated he had "no doubt . . . that in some measure Clarence was preferred because of his background." *See id.*

280. *See, e.g.*, Maureen Dowd, *Where Would Thomas Be Without Affirmative Action?*, SEATTLE POST-INTELLIGENCER, June 26, 2003, at B7 (asserting that Thomas "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").

281. *See* Grutter v. Bollinger, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part) (stating that affirmative action unfairly stigmatizes Blacks who would have been admitted based on "merit" alone and tars them as "undeserving").

282. *See generally id.* at 349–73; *see also* Williams, *supra* note 55, at 74; *cf.* Seth N. Asumah & Valencia Perkins, *Black Conservatism and the Social Problems in Black America*, 30 J. BLACK STUD. 51, 64 (2000) (noting that "Black conservatives add a self-esteem portion to their position [on affirmative action], claiming that affirmative action destroys the self-image of Black people" and that black conservatives "believe the pride of achievement is diluted because many Whites maintain that beneficiaries of affirmative action receive jobs, promotions, and school admissions without being qualified"). Stephen Carter wrote:

> The best black syndrome creates in those of us who have benefited from racial preferences a peculiar contradiction. We are told over and over that we are among the best black people in our professions. And we are flattered. . . . But to professionals who have worked hard to succeed, flattery of this kind carries an unsuitable insult, for we yearn to be called what our achievements often deserve: simply the best—no qualifiers needed!

STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 52 (1992). Stephen Carter does not identify as a black conservative. *See id.* at 7 ("[M]y views on many other matters are sufficiently to the left that I do not imagine the conservative movement would want me.").

Justice Thomas's philosophy and jurisprudence on affirmative action concentrates on what he views as its poisonous impact on the lives and psyche of black people.

The first affirmative action case from Justice Thomas's tenure on the Supreme Court was *Adarand Constructors, Inc. v. Pena.*[283] In that case, the Supreme Court reviewed whether the government's practice of giving general contractors on government projects the financial incentive of additional compensation to hire subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals" violated the equal protection component of the Fifth Amendment's Due Process Clause.[284] The majority, with whom Thomas concurred, held that all racial classifications imposed by a federal, state, or local governmental actor, whether benign or not, must be analyzed by a reviewing court under strict scrutiny, meaning that all racial classifications imposed by a governmental actor have to serve a compelling governmental interest and must be narrowly tailored to further that interest.[285]

Justice Scalia filed an opinion that concurred in part and concurred in the judgment of the majority's opinion.[286] He wrote that the "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."[287] Justice Scalia stressed that such a concept was foreign to the Constitution, which focuses on the individual.[288]

In writing his concurring opinion, Justice Thomas gave a small taste of how his jurisprudence on affirmative action aligns with black conservative thought and how it differs from Justice Scalia's.[289] Like many of his fellow black conservatives, Justice Thomas did not focus on the harm that affirmative action causes to "innocent" white individuals, but instead expressed his views regarding what he deemed to be affirmative action's harmful impact on minorities. First, he noted his belief that there was a racial paternalism underlying the dissent's view that distinctions could be made under the constitution "between laws designed to subjugate a race and those that distribute benefits on the basis of race."[290] Then, he iterated his belief that affirmative action could be nothing other than harmful to Blacks

283. 515 U.S. 200 (1995).

284. *Id.* at 205. "Socially and economically disadvantaged individuals" included "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." *Id.* (citing 15 U.S.C. §§ 637(d)(2), (3)(1994)).

285. *Id.* at 227–30 (Scalia, J., concurring in part and concurring in the judgment).

286. *See id.* at 227.

287. *Id.* at 227–30 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989)).

288. *See Adarand*, 515 U.S. at 227–30 (Scalia, J., concurring in part and dissenting in part).

289. *See supra* Part I.B.3.

290. *Adarand*, 515 U.S. at 240 (Thomas, J., concurring).

and other minorities, stating that "there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination."[291] Finally, Justice Thomas identified what he believes to be the stigmatizing effects of the program on minorities, stating:

> So-called "benign" discrimination teaches many [Whites] that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. 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.[292]

It would be nearly ten years before Justice Thomas would receive another occasion to incorporate core principles of black conservative thought into his jurisprudence on affirmative action. The occasion arose with the Supreme Court's grant of certiorari on two cases from the Sixth Circuit concerning affirmative action at the University of Michigan, one in the undergraduate Literature, Science, and Arts program and the other in the law school.

The cases, *Gratz v. Bollinger*[293] and *Grutter v. Bollinger*,[294] ended a debate over the legality of affirmative action that had transpired since *Regents of the University of California v. Bakke*,[295] the Supreme Court's decision on the affirmative action program at the University of California-Davis Medical School in 1977.[296] In *Gratz*, two white students who applied for and were denied admission to the University of Michigan's College of Literature,

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291. *Id.* at 241; *see also id.* at 240 (stating that "there is a moral and constitutional equivalence between laws designed to subjugate race and those that distribute benefits on the basis of race in order to foster some current notion of equality" and that "*[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law*") (emphasis added).

292. *Id.* at 241; *cf.* WATTS, *supra* note 66, at 206 (asserting that race-based solutions "feed on the notion that membership in a certain race is a handicap, a sure cause of underperformance").

293. 539 U.S. 244 (2003).

294. 539 U.S. 306 (2003).

295. 438 U.S. 265 (1978). In *Bakke*, the Supreme Court reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. As the Supreme Court noted in *Grutter*, "[t]he only holding for the Court in *Bakke* was that a 'State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.'" *Grutter*, 539 U.S. at 322–23 (quoting *Bakke*, 438 U.S. at 320).

296. Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMM. 171, 171–72 (2004) ("The latest pair of cases announced a truce of sorts in affirmative action hostilities.").

Science, and Arts as residents of Michigan filed a lawsuit, claiming that the university's use of racial preferences in undergraduate admissions violated their rights under the Equal Protection Clause of the Fourteenth Amendment.[297] In reviewing the case, the Supreme Court, in a 6–3 decision, concluded that the college's admissions policy, which automatically distributed twenty points to every underrepresented minority applicant solely because of race, was not narrowly tailored to achieve the interest in racial diversity that was claimed to justify its program and therefore was unconstitutional.[298] Justice Thomas joined the majority and wrote a concurrence that was void of any explicitly "raced" thought.[299]

His dissent in the *Grutter* opinion, however, was bursting with many core ideas of black conservative ideology. In *Grutter*, Barbara Grutter, a white resident of the State of Michigan who had applied for and was denied admission to the University of Michigan Law School, filed a lawsuit alleging, like the plaintiffs in *Gratz*, that the law school had violated her constitutional rights under the Fourteenth Amendment.[300] Specifically, she alleged that "her application was rejected because the Law School uses 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.'"[301] She further argued that the law school had no compelling interest for such use of race.[302]

In describing its admissions process, the law school provided evidence to show that, while it maintained records on the racial and ethnic composition of the class, it never required the admission of a certain percentage of minority law students.[303] Instead, it individually reviewed each application with race as a plus factor.[304] Furthermore, the law school showed that it worked only to ensure a "critical mass" of underrepresented minority students at the school "such that underrepresented minority students do not feel isolated or like spokespersons for their race" and such that classroom discussion and the educational experience outside of the classroom could be enhanced by diverse backgrounds and perspectives.[305] The law school also presented evidence that demonstrated that the elimination of its current

297. *Gratz*, 539 U.S. at 252.

298. *Id.* at 270.

299. *Id.* at 281 (Thomas, J., concurring) (noting only one further observation, which was that the college's policy did not suffer from the constitutional defect of distinctions among underrepresented minority applicants because it did not give a racial preference to members of some underrepresented minority groups).

300. Grutter v. Bollinger, 539 U.S. 306, 316–17 (2003).

301. *Id.* at 317.

302. *See id.*

303. *See id.*

304. *See id.* at 319.

305. *Grutter*, 539 U.S. at 319.

admissions policies would have an extremely negative impact on the number of minorities admitted to the law school.[306]

In *Grutter*, a 5–4 decision authored by Justice O'Connor, the Court held that the law school had a compelling state interest in attaining a diverse student body[307] and that the law school's use of race in its admissions process was narrowly tailored to further that compelling interest of diversity and the educational benefits that flow from having a diverse student body, such as cross-racial understanding, the tearing down of stereotypes, and the preparation of students for working in an increasingly diverse workforce.[308] In holding that the law school had a compelling state interest in diversity, the Supreme Court asserted that it deferred to the law school's judgment that diversity was essential to its educational mission and concluded that "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"[309] In determining that the law school's admissions policies were narrowly tailored to that interest, the Court declared that the law school's policies ensured a highly individualized review of each applicant and gave serious consideration to the myriad of ways that an applicant could contribute to the diversity of the school during that review.[310] Finally, the Court rejected the suggestion that the law school simply lower its admissions standards, stating that such a remedy would make the law school a very different institution and would force the law school to sacrifice an essential component of its educational mission.[311]

In response to the majority opinion, Justice Thomas wrote an equally long dissent rooted in black conservative ideology on affirmative action.[312] Indeed, Justice Thomas began his dissent with a quote from Frederick Douglass, a former slave and an abolitionist, in a speech in 1865.[313]

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306. *Id.* at 326.

307. *Id.* at 328.

308. *Id.* at 329–34.

309. *Id.* at 330 (quoting Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 318–19 (1978)).

310. *Grutter*, 539 U.S. at 337–38.

311. *Id.* at 340. The Court also set a "time limit" on the use of race-conscious policies, noting that it expects "that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* at 343. *See generally* Johnson, *supra* note 296 (exploring the meaning of the twenty-five-year time limit, the Court's authority to set such a time limit, and the practicality of such a time limit).

312. *See* Cass R. Sunstein, *Affirmative Action in Higher Education: Why* Grutter *Was Correctly Decided*, J. BLACK HIGHER EDUC., Oct. 31, 2003, at 80, 80–81 (asserting that Justice Thomas abandoned his commitment to originalism and called "for an extraordinary exercise in judicial activism" in *Grutter*, in light of the fact that "[a] great deal of historical work suggests that affirmative action was accepted by those who ratified the equal protection clause").

313. *Grutter*, 539 U.S. at 349 (Thomas, J., concurring in part and dissenting in part). The quote was as follows:

> [I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have

Emphasizing the black conservative principles of self-reliance and black empowerment, Thomas stated: "Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators."[314] Then, as many other black conservatives have argued, Justice Thomas maintained that the use of affirmative action only impairs minority students and that only self-sufficiency can remedy the disparities that encourage the use of race-conscious admissions. To Justice Thomas, the law school had taken the easy way out of resolving the educational inequalities between Whites and the underrepresented minorities that were the targets of its program.[315] Then, much like he did in *Fordice* and *Jenkins*, Justice Thomas inquired whether the educational advancement of black students was superior in more homogenous schools, noting that there is "growing evidence that racial . . . heterogeneity actually impairs learning among black students" and citing studies that found that black students who attended historically black colleges reported higher academic achievement than those who attended predominantly white colleges.[316] In fact, citing Thomas Sowell, a well-known black conservative and a mentor of his, Justice Thomas maintained that race-conscious admissions policies like that used by the law school harm, rather than help, minority students because they allow insufficiently prepared students to study in elite institutions where they will fail.[317] Moreover, Justice Thomas also argued, just as other black conservatives such as Shelby Steele and John McWhorter have, that current race-conscious admissions policies only "help to fulfill the bigot's prophecy about black underperformance" by creating an incentive for Blacks to embrace black victimology.[318] Specifically, he maintained that "there is no incentive for the black applicant to continue to prepare for the Law School Admissions Test ('LSAT') once he is reasonably assured of achieving the requisite score,"[319] meaning the score above which nearly all Blacks were

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> always been anxious to know what they shall do with us . . . . I have had but one answer from the beginning. 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.

Id. (quoting Frederick Douglass, *What the Black Man Wants*, *in* 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blassingame & John R. McKivigan eds., 1991)).

314. *Id.* at 350.

315. *See id.* at 372–74.

316. *Id.* at 364 (citing Flowers & Pascarella, *Cognitive Effects of College Racial Composition on African American Students After 3 Years of College*, 40 J.C. STUDENT DEV. 669, 674 (1999) and Walter R. Allen, *The Color of Success: African-American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUC. REV. 26, 35 (1992)).

317. *Id.* at 372 (citing THOMAS SOWELL, RACE AND CULTURE 176–77 (1994)).

318. *Grutter*, 539 U.S. at 377 (Thomas, J., concurring in part and dissenting in part).

319. *Id.*; *see also id.* at 377 n.16 ("I use the LSAT as an example, but the same incentive

guaranteed admission. On the other hand, for Whites, those who "aspir[e] to admission at the Law School have every incentive to improve their score to levels above that range."[320] In sum, Justice Thomas asked, as do other black conservatives, what the benefit of diversity is to Blacks, thereby suggesting that the "real" benefit of diversity as constructed in current affirmative action programs was for Whites only.[321]

Additionally, throughout his dissent, Thomas, like other black conservatives, repeatedly questioned the true interests and motives of the law school (and the Whites who control the university), arguing that the law school's interest was purely "aesthetic"—with the law school solely desiring a "certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them."[322] Consistent with this distrust of white interests in black conservative ideology, Justice Thomas then openly wondered why, if the law school so valued diversity, it refused to lower its admissions standards, despite the fact that it would change the nature and status of the law school.[323] Justice Thomas wrote that the law school's "reluctance to do [so] suggests that the educational benefits [from diversity] it alleges are not so significant."[324]

Continuing with his suspicion of the law school's real interest, Justice Thomas turned to the law school's use of the LSAT in its admissions procedures. He wrote that:

> [N]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the . . . LSAT. . . . Nevertheless, law schools continue to use the test and then attempt to "correct" for black underperformance by using racial

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structure is in place for any admissions criteria, including undergraduate grades, on which minorities are consistently admitted at thresholds significantly lower than whites.").

320. *Id.* at 377.

321. *See, e.g.*, STEELE, A DREAM DEFERRED, *supra* note 24, at 136. The following is an example:

> A law professor says, "I want blacks in my classroom when I teach constitutional law. The diversity of opinion helps us better understand the Constitution." But are blacks human beings or teaching tools? Is it good for human beings to be made to play this role, to be brought in, often in defiance of standards, because their color is presumed to carry a point of view that diversifies classroom content?

Id.

322. *Grutter*, 539 U.S. at 354 n.3 (Thomas, J., concurring in part and dissenting in part).

323. *See id.* at 356 n.4.

324. *Id.*; *see also id.* at 355–56 ("In other words, the Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status."); *id.* at 361–62 ("With the adoption of different admissions methods, such as accepting all students who meet minimum qualifications, the Law School could achieve its vision of the racially aesthetic student body without the use of racial discrimination.") (citation omitted).

> discrimination in admissions so as to obtain their aesthetic student body.[325]

This, Justice Thomas suggested, simply showed that the law school was merely interested in window dressing, and not the actual advancement of black students.[326] In his eyes, the law school only cares if its "class looks right, even if it does not perform right."[327] As his fellow black conservatives have often expressed, Justice Thomas finally implied that persons who govern schools such as the University of Michigan Law School were advocating policies for minorities that they would not advocate for their own children. He asserted that "aestheticists will never address the real problems facing 'underrepresented minorities,' instead continuing their social experiments on other people's children."[328]

Finally, Justice Thomas incessantly referred to what he and other black conservatives regard as the demoralizing effect of affirmative action on minorities. Again, as in *Adarand*, Justice Thomas contended that affirmative action unfairly stigmatizes Blacks who would have been admitted based on "merit" alone and tars them as "undeserving."[329] In the end, he asked, "Who

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325. *Id.* at 362.

326. *Id.* at 372–77.

327. *Grutter*, 539 U.S. at 372 (Thomas, J., concurring in part and dissenting in part).

328. *Id.* To support this argument, Justice Thomas proposes the following:

> For example, there is no recognition by the Law School in this case that even with their racial discrimination in place, black *men* are "underrepresented" at the Law School. Why does the Law School not also discriminate in favor of black men over black women, given this underrepresentation? The answer is, again, that all the Law School cares about is its own image among know-it-all elites, not solving real problems like the crisis of black male underperformance.

Id. at 372 n.11; *see also* Tobias Barrington Wolff & Robert Paul Wolff, *The Pimple on Adonis's Nose: A Dialogue on the Concept of Merit in the Affirmative Action Debate*, 56 HASTINGS L.J. (forthcoming 2005) (highlighting how current admissions plans help those who need the assistance least); *cf.* Robert W. Hillman, *The Hidden Costs of Lawyer Mobility: Of Law Firms, Law Schools, and the Education of Lawyers*, 91 KY. L.J. 299, 310 (2002–2003) (highlighting how the rising costs of law school education affect low-income students). *But see* Cheryl Harris, *Mining in Hard Ground*, 116 HARV. L. REV. 2487, 2537–38 (2003) (reviewing LANI GUINIER & GERALD TORRES, THE MINER'S CANARY (2002) (discussing how middle-class Blacks experience disadvantages based on wealth inequality relative to Whites).

329. *Grutter*, 539 U.S. at 372 (Thomas, J., concurring in part and dissenting in part). Thomas opined:

> Beyond the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination "engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race."

Id. (quoting Adarand v. Pena, 515 U.S. 204, 241 (1995) (Thomas, J., concurring in part and concurring in judgment)). He continued:

> Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and

can differentiate between those who belong and those who do not"—a question that has repeatedly been asked about Thomas throughout his career and that, given his life experiences at Yale Law School and in his career, obviously drives in part his views on affirmative action.[330]

C. CRIME

> Look at these young brothers dying in the street—the drive-by shootings, the violence. If dogs were being struck down at the same rate and in the same way, and left bleeding in the gutter, there would be a society of blue-haired women to save our canine friends. But these are young black men bleeding in the gutter, and no one seems to give a damn.
>
> — Clarence Thomas[331]

In the area of criminal law, Justice Thomas has earned a reputation as an unforgiving justice, with many wondering what he meant when he testified before the Senate that he would often watch busloads of prisoners from his window and say to himself, "[T]here but for the grace of God go I."[332] To many, nothing about his criminal jurisprudence shows any empathy

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

Id.

330. *See* Williams, *supra* note 55, at 74.

331. Rosen, *supra* note 204, at 67; *see also* Thomas, *supra* note 30, at 13 ("We should be at least as incensed about the totalitarianism of drug traffickers and criminals in poor neighborhoods as we were about totalitarianism in Eastern bloc countries.").

332. *See, e.g.*, Calmore, *supra* note 21, at 208; Note, *supra* note 21, at 1331. The author of *Lasting Stigma* noted:

> Thomas concluded that his story of professional success in the face of significant obstacles would enable him "to stand in the shoes of . . . people across a broad spectrum" of American society. He spoke of the view from his office, which allowed him to see the busloads of criminal defendants being brought to the courthouse: "And you look out, and you say to yourself, and I say to myself almost every day, But for the grace of God there go I."
>
> Yet in his first Term on the Supreme Court, Justice Thomas issued a dissent in *Hudson v. McMillan* in which he argued that an inmate's beating by two prison guards, a beating that bruised the inmate's face, loosened his teeth, and cracked his dental plate, did not fall within the Eighth Amendment's stricture against cruel and unusual punishments. The dissent sparked scathing criticism and prompted

for criminals. As noted above, however, a core principle of black conservative thought on crime is its advocacy for the severe punishment of criminals and the protection of victims. This is especially true of poor black victims whom black conservatives view as being prisoners in their own homes due to the rapidly deteriorating conditions of their streets and neighborhoods.[333]

Although Justice Thomas has been provided with little opportunity to present these exact principles in his jurisprudence, he did express these very concepts in *Chicago v. Morales*.[334] In *Morales*, the Court considered a Chicago ordinance that required any police officer to issue an order to disperse to any person whom he or she reasonably believed to be a criminal street gang member loitering in any public place with one or more persons.[335] The ordinance had been criticized by many as giving the police a free license to target and harass young men of color for simply standing on the corner.[336] In reviewing the claim that this ordinance violated the Due Process Clause of the Fourteenth Amendment, the Supreme Court struck down the ordinance on the ground that it was unconstitutionally vague in failing to establish minimal guidelines for enforcement.[337]

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one editorial to label Justice Thomas the "[y]oungest, [c]ruelest Justice."

Note, *supra* note 21, at 1331; Eric. L. Muller, *Where, But For The Grace of God, Goes He? The Search For Empathy in the Criminal Jurisprudence of Clarence Thomas*, 15 CONST. COMM. 225, 225–26 (1998) ("Once Judge Thomas became Justice Thomas, this compassionate image tarnished quickly. Empathy was difficult to discern in his dissent in *Hudson v. McMillan*, one of his very early opinions."); Smith, *supra* note 94, at 26 (noting that "[o]ne searches in vain, however, for clear evidence in Thomas's opinions that he has brought his empathic understanding of social reality to the Supreme Court").

When asked at his Senate Confirmation Hearings whether victims should play a greater role in the criminal justice system, Justice Thomas responded:

> My concern would be . . . that we don't jeopardize the rights of the victim. Of course, we would like to make sure that the victims are involved in the process, but we should be very careful, in my view, that we don't somehow undermine the validity of the process; *that an individual who is a criminal defendant is in some way harmed by that.*

Hearings, *supra* note 162, at 133 (testimony of Clarence Thomas) (emphasis added).

333. *See supra* Part I.B.4.

334. 527 U.S. 41, 98–100 (1999) (Thomas, J., dissenting).

335. *See id.* at 45–46.

336. Mauro, *supra* note163, *at* 1.

337. *Morales*, 527 U.S. at 60. The Court noted:

> It applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.

Id. at 63.

Not surprisingly, Justice Thomas dissented from the majority, in a writing that was replete with black conservatism. Indeed, as in many of his other opinions, he echoed many of the principles that have been expressed by black conservatives, such as Thomas Sowell, asserting that "[g]angs fill the daily lives of many of our poorest and most vulnerable citizens with a terror that the Court does not give sufficient consideration, often relegating them to the status of prisoners in their own homes."[338] Throughout his dissent, Justice Thomas articulated the black conservative principle on criminal law that promotes a focus on the victim as opposed to the criminal perpetrator.[339] He also emphasized the "politics of distinction," noting how the majority sacrificed good, law-abiding citizens who made up the vast majority of the community, for the sake of protecting the "imagined rights" of a few lawbreakers.[340] He argued:

> As one resident described: "There is only about one or two percent of the people in the city causing these problems maybe, but it's keeping 98 percent of us in our houses and off the streets and afraid to shop." By focusing exclusively on the imagined "rights" of the two percent, the Court today has denied our most vulnerable citizens the very thing that Justice Stevens elevates above all else—"'the freedom of movement.'"[341]

Additionally, Justice Thomas expressed black conservatives' distrust of Whites, specifically hinting that the majority had only furthered the victimization of this society's most vulnerable citizens (whom black conservatives consistently argue are poor Blacks) and that those in the majority made a decision for these citizens that it would not make for their own communities.[342] He wrote:

> Today the Court focuses extensively on the "rights" of gang members and their companions. It can safely do so—people who will have to live with the consequences do not live in our neighborhoods. Rather, people who will suffer from our lofty pronouncements are people like Ms. Susan Mary Jackson; people who have seen their neighborhoods literally destroyed by gangs

338. *Id.* at 99 (Thomas, J., dissenting).

339. *See* Mauro, *supra* note 163, at 1 (referring to a comment that Thomas "is eloquently on the side of low-income, law-abiding citizens, not on the side of the criminals").

340. *Morales*, 527 U.S. at 115 (Thomas, J., dissenting).

341. *Id.*; *see also* Sowell, *supra* note 136 (arguing that "Justice Kennedy [who criticized merciless prison sentences] may feel 'secure' where he lives and works . . . [b]ut the 'equal protection of the laws' under the 14th Amendment *applies also to those who live in less elite circumstances*") (emphasis added); *cf.* GREENYA, *supra* note 5, at 27–28 (quoting Thomas as saying, "I don't understand why those of us who say we are so passionate about little kids can't see that they can't grow up in these environments"—environments where they are assaulted when they go to school or are in fear for their lives).

342. *Morales*, 527 U.S. at 115 (Thomas, J., dissenting).

> and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living and remain good citizens.[343]

In fact, in his dissent, Thomas gave voice to the many concerned, law-abiding citizens whom he argued the ordinance protected. He quoted several of the citizens who supported the ordinance, such as eighty-eight year old Susan Mary Jackson, who testified to the following before the Chicago City Council on the problems of gang loitering:

> We used to have a nice neighborhood. We don't have it anymore . . . . I am scared to go out in the daytime . . . . [Y]ou can't pass because they are standing. I am afraid to go to the store. I don't go to the store because I am afraid. At my age if they look at me real hard, I be ready to holler.[344]

For Justice Thomas, the victims' right to demand a safe neighborhood deserved equal, if not more, weight than the "imagined" rights of persons who break the law by refusing a policeman's orders to disperse.[345]

Additionally, Justice Thomas has incorporated black conservative principles regarding the need to eliminate discretion among jurors in his jurisprudence on capital cases. For example, in *Graham v. Collins*,[346] the Supreme Court rejected the petitioner's claim that the three special issues the sentencing jury was required to answer prevented the jury from considering mitigating evidence of his youth, unstable family background, and positive character traits on the ground that such a holding would require the announcement of a new rule in violation of the principles of another case.[347] Justice Thomas filed a concurring opinion in *Graham*, in which he took advantage of the opportunity to address concerns left by *Furman v. Georgia*.[348] Noting that "[t]he unquestionable importance of race in *Furman* is reflected in the fact that three of the original four petitioners in the *Furman* cases were represented by the NAACP Legal Defense and Educational Fund, Inc.,"[349] Justice Thomas highlighted the dangers of leaving sentencing up to irrational juror considerations, such as class or race animus.[350] He then proclaimed, "[o]ne would think . . . that by eliminating explicit jury discretion and treating all defendants equally, a mandatory death penalty scheme was a perfectly reasonable legislative response to the

343. *Id.*
344. *Id.* at 101.
345. *See id.* at 115.
346. 506 U.S. 461 (1993).
347. *See id.* at 466–68.
348. 408 U.S. 238 (1972).
349. *Graham*, 506 U.S. at 481 (Thomas, J., concurring).
350. *See id.* at 481–85.

concerns expressed in *Furman*."[351] In so doing, he brought to light the black conservative principle that defendants are only protected against discriminatory sentencing in capital cases if no discretion is left with the jury.[352] In sum, as he had done in cases concerning education and desegregation and affirmative action, Justice Thomas has expressed core principles of black conservative thought on crime in his opinions. Based on what he has written over the last thirteen years as a Supreme Court Justice, Thomas is likely to continue to write and develop a "raced" jurisprudence on many issues.

CONCLUSION

What does Justice Clarence Thomas's life and jurisprudence teach us about race and the impact of racial identity? The lessons are many.

First, Justice Thomas's story tells us that race is an inescapable part of a person's identity, whether one is conservative or liberal, a racial minority or a non-minority.[353] Moreover, it demonstrates to us that race manifests itself in one's identity in different ways depending on that individual's personal biography and perceptions of reality.[354] For example, what is evident in

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351. *Id.* at 487. Justice Thomas supports mandatory death sentences because he believes they will help to eliminate racial prejudice and capriciousness in capital sentencing. *See* Smith, *supra* note 94, at 19 (citing Paul M. Barrett, *On The Right: Thomas Is Emerging as Strong Conservative Out to Prove Himself*, WALL ST. J., Apr. 26, 1993, at A1).

352. Somewhat consistent with these views are Justice Thomas's positions in cases involving egregious prosecutorial misconduct. For example, in *United States v. Williams*, 504 U.S. 36 (1992), Justice Thomas split with Justice Scalia, who wrote a majority opinion holding that a district court may not dismiss an otherwise valid indictment on the ground that the government failed to disclose substantial exculpatory evidence to the grand jury. Instead, Justice Thomas joined with Justice Stevens in his dissent, who argued that if a prosecutor withheld evidence that would plainly preclude a finding of probable cause, a district court should be able to dismiss the indictment. *Id.* at 68–70 (Stevens, J., dissenting). Likewise, in *Michaels v. McGrath*, 531 U.S. 1118 (2001), the Supreme Court denied a petition for a writ of certiorari from a case in which the Third Circuit had held that recovery of damages was barred for a wrongfully convicted defendant where child witnesses had been improperly coerced by the prosecution and the defendant's due process rights were violated by the use of such testimony at trial. *See id.* at 1118. In that case, Justice Thomas wrote a dissent in a denial of a petition for writ of certiorari, explaining his opinion that the Third Circuit's view and Court's failure to hear the case "[left] victims of egregious prosecutorial misconduct without a remedy." *Id.* at 1118–19.

353. *See* Haney Lopez, *supra* note 145, at 29 (arguing that race is a powerful social phenomena); *cf.* Chris F. Denove & Edward J. Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 AM. J. TRIAL ADVOC. 285, 293–94, 298 (1995) (noting, based on their demographic study of tort cases, that "[r]ace emerges from the data as the single most important factor in predicting juror orientation").

354. *See* Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 774 (1994) ("'Race' is real, and pervasive: our very perceptions of the world, some theorists argue, are filtered through a screen of 'race.'"); Harris, *supra* note 148, at 210 (asserting that "identity is a complex interplay between what [one] choose[s] and what is forced upon" him or her); *see also* Smith, *supra* note 94, at 18 (analyzing how Justice Thomas "incorporates his own views of social reality" into cases).

Justice Thomas's life and work is that he, like many of his black counterparts, is conservative precisely because he is black. Much like black liberals whose life experiences have shaped their reactions to issues such as affirmative action in a way that makes them liberal,[355] Justice Thomas's experiences with race have led him to adopt ideologies that are strictly based on self-reliance without government interference in a way that makes him conservative.

Much of Justice Thomas's beliefs and ideologies are rooted in the philosophies of his grandfather, Myers Anderson, who raised him.[356] It was Anderson, who, although polite, "never, ever trusted" Whites, or *buckra*;[357] taught Thomas "that government, like many other things in the segregated South, was for whites only";[358] and instilled in Thomas a belief that he "could not depend on white people for help."[359] Even though some of Thomas's experiences, unlike his grandfather's, led him to accept that some Whites could be helpful and encouraging, such as the white nuns who taught Thomas in Catholic school,[360] central to Justice Thomas's views about the route to racial equality is his belief that black people can and should depend only on themselves because the government itself is often the tool used to create two separate but unequal worlds for groups. As the Justice once declared, "I lived under two sets of books . . . . I'm not going back to two sets of books again."[361]

Indeed, a critical component of black conservatism itself is the notion that Blacks should not support programs such as affirmative action or policies that provide leniency for criminal defendants because they fail to address the problems of the black community and serve only the purpose of assuaging the guilty consciences of white liberals.[362] In other words, black

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355. *See* Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1713 (1997) (arguing, for example, that "affirmative action has become to the African-American community what abortion rights have become for the feminist community—the constitutive issue, the program because of which we find ourselves a part of the debate rather than disempowered outsiders").

356. *See supra* Part II.

357. FOSKETT, *supra* note 181, at 63 (noting how Anderson discussed Whites in "coded language his slave ancestors used to describe their owners," such as "*buckra*, a West African word for 'demon'").

358. *Id.*

359. *Id.* at 64 ("No white bank lent Anderson the money he needed to start his business or build his own home.").

360. *Id.* at 66 (describing how the nuns at Thomas's Catholic school made their students, all of whom were black, feel differently about Whites).

361. *Id.* at 72 (quotations omitted); *see* Wells, *supra* note 70, at 139–40.

362. *See* Tushnet, *supra* note 245, at 330 (describing how Justice Thomas's views on education "are infused with scorn for policies supported by elites that assuage their consciences by seeming to address . . . problems [plaguing the black community] without doing so and that allow elites to maintain essentially undisturbed institutions with which they are familiar and from which they benefit").

conservatives' support of colorblindness rests—oddly enough—entirely on their blackness. More specifically, these ideas rest on the belief that their blackness is the very reason they cannot rely on social welfare, government assistance, or benign policies such as affirmative action.

On that same note, Justice Thomas's life and jurisprudence reveal exactly how devastating racism can be and how an individual's thoughts, beliefs, and even jurisprudence, regardless of claims of colorblindness and neutrality, are shaped by experiences with race and racism, both subtle and obvious.[363] Similarly, in the case of persons with white-skin privilege, either their lack of experience with racism or their relationships with people who are deeply affected by it can affect their perspectives.[364] Regardless of how one describes Justice Thomas's jurisprudence, it is clear that he is deeply influenced by his life experiences when deciding questions that directly implicate race.[365] For example, one scholar, Professor Scott Gerber, who argues that Justice Thomas conceives of civil rights as an individual rather than a group concern,[366] has maintained that Thomas changes his approach in deciding "race" cases by shifting from a conservative originalist approach on civil liberties and federalism cases[367] to one of a liberal originalist[368] on civil rights cases.[369]

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363. *See* Kimberle Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33, 35 n.4 (1994) (noting that "Blacks are likely to be somewhat aware that law has played a role in maintaining racial privilege" and that "Whites, although aware that racial subordination is a problem, are unlikely to view racism as a constant or central feature of American life").

364. For example, Sandra Day O'Connor stated:

> Like most of my counterparts who grew up in the Southwest in the 1930s and 1940s, I had not been personally exposed to racial tensions before *Brown*. . . . But as I listened that day to Justice Marshall talk eloquently to the media about the social stigmas and lost opportunities suffered by African American children in state-imposed segregated school, my awareness of race-based disparities deepened. I did not, could not, know it then, but the man who would, as a lawyer and jurist, captivate the nation would also, as colleague and friend, profoundly influence me. . . . Occasionally, at Conference meetings, I still catch myself looking expectantly for his raised brow and his twinkling eye, hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world.

Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217–20 (1992).

365. *See* Onwuachi-Willig, *supra* note 279 (manuscript at 39–47) (detailing how Justice Thomas, much like Justice Marshall, brings his experiences as a black man to the bench).

366. *See* GERBER, *supra* note 3, at 50.

367. A conservative originalist approach focuses on the Framers' intentions in deciding constitutional questions. *See id.* at 193.

368. A liberal originalist approach "appeals to the *ideal* of equality at the heart of the Declaration of Independence." *Id.*

369. *See id.*; *see also* Jagan Nicholas Ranjan, *The Politicization of Clarence Thomas*, 101 MICH. L. REV. 2084, 2094 (2003) (book review) (maintaining that "Justice Thomas's jurisprudence on race departs from the originalism that undergirds most of his jurisprudence").

Indeed, the influence of race and racial identity was most recently and prominently witnessed during oral arguments and in Justice Thomas's dissent in *Virginia v. Black*,[370] a case concerning the constitutionality of a Virginia statute that made it "unlawful for any person or persons with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place."[371] In that case, Justice Thomas broke with his long-standing practice of remaining silent during oral arguments[372] to speak "in a voice of color in analyzing the harm caused by cross burning."[373] Justice Thomas's exchange with the attorney from the Department of Justice, who was arguing in favor of the constitutionality of the Virginia statute, was as follows:

> QUESTION: Mr. Dreeben, aren't you understating the—the effects of—of the burning cross? This statute was passed in what year?
>
> MR. DREEBEN: 1952 originally.
>
> QUESTION: Now, it's my understanding that we had almost 100 years of lynching and activity in the South by the Knights of Camellia and—and the Ku Klux Klan, and this was a reign of terror and the cross was a symbol of that reign of terror. Was—isn't that significantly greater than intimidation or a threat?
>
> MR. DREEBEN: Well, I think they're coextensive, Justice Thomas, because it is—
>
> QUESTION: Well, my fear is, Mr. Dreeben, that you're actually understating the symbolism on—of and the effect of the cross, the burning cross. I—I indicated, I think, in the Ohio case that the cross was not a religious symbol and that it has—it was intended to have a virulent effect. And I—I think that what you're attempting to do is to fit this into our jurisprudence rather than stating more clearly what the cross was intended to accomplish and, indeed, that it is unlike any symbol in our society.
>
> MR. DREEBEN: Well, I don't mean to understate it, and I entirely agree with Your Honor's description of how the cross has been

370. 538 U.S. 343 (2002).

371. VA. CODE ANN. § 18.2-423 (Michie 1996).

372. Dahlia Lithwick, *Personal Truths and Legal Fictions*, N.Y. TIMES, Dec. 17, 2002, at A35 (noting that Justice Thomas "speaks only four or fives times a year, less often than most of his colleagues speak during an average morning").

373. Guy-Uriel Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, 93 GEO. L.J. (forthcoming 2005) (manuscript at 29–34, on file with the Iowa Law Review) (arguing that *Virginia v. Black* represents a complete course reversal with respect to the Court's approach to the constitutionality of anti-cross-burning statutes).

> used as an instrument of intimidation against minorities in this country. That has justified 14 States in treating it as a distinctive—
>
> QUESTION: Well, it's—it's actually more than minorities. There's certain groups. And I—I just—my fear is that the—there was no other purpose to the cross. There was no communication of a particular message. It was intended to cause fear—
>
> MR. DREEBEN: It—
>
> QUESTION: —and to terrorize a population.[374]

As this colloquy demonstrates, for Justice Thomas, the burning of a cross with the intent to intimidate contained no expressive value but rather was conduct not subject to a First Amendment analysis, because its history and use in society had left it with no other cultural meaning but "lawlessness" and a "well-grounded fear of physical violence" for its victims.[375] It was Justice Thomas's race and experiences with racism as a black man growing up in the segregated South that shaped his view of a burning cross and, in turn, helped to shape those of his colleagues on the bench.[376]

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374. Transcript of Oral Argument at 22, *Black*, 538 U.S. 343 (2002) (No. 01-1107).

375. *Black*, 538 U.S. at 390–91 (Thomas, J., dissenting). One account from a victim of cross-burning is as follows:

> After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: "Nothing good. Murder, hanging, rape, lynching. Just anything bad that you can name. It is the worst thing that can happen to a person." . . . Mr. Heisser told the probation officer that at the time of the occurrence, if the family did not leave, he believed someone would return to commit murder. . . . *Seven months after the incident, the family still lived in fear. . . . This is a reaction reasonably to be anticipated from this criminal conduct.*

Id. (quoting U.S. v. Skillman, 722 F.2d 1370, 1378 (9th Cir. 1991))(emphasis added by Justice Thomas).

376. *See* Onwuachi-Willig, *supra* note 279 (manuscript at 44–47) (discussing the effect of Justice Thomas's statements during oral arguments). In the end, the majority in *Black* rejected Justice Thomas's position that there was no need to analyze the Virginia statute under any First Amendment tests because cross-burning constituted conduct, not expression. *Black*, 538 U.S. at 358–62. But while the majority rejected Justice Thomas's analysis on the statute and held that the *prima facie* provision within the cross-burning statute was facially unconstitutional, it did hold that the state could outlaw cross-burning that was carried out with the intent to intimidate because the practice was a "particularly virulent form of intimidation." *Id.* at 344. Indeed, many have argued that Justice Thomas's words during oral argument were critical to shaping the majority's analysis of the case, which was, in many ways, contrary to the approach adopted by the Court in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), where the Court held that the banning of certain symbolic conduct, including cross-burning, when done with knowledge that it would arouse "anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender" was unconstitutional. *R.A.V.*, 505 U.S. at 380; *see also* Charles, *supra* note 373, at 41–44 (arguing that other members of the Court deferred to Justice Thomas's concept regarding the harms of cross-burning "[b]ecause Justice Thomas—an African-American

Moreover, it is this same influence of race that separates Justice Thomas's jurisprudence from that of Justice Scalia, Justice Thomas's alleged "puppeteer."[377] Although Justice Scalia and Justice Thomas both adhere to principles of formal equality, Justice Thomas's support of the principle clearly has a raced component to it in that it, much like his conservatism in general, stems from his blackness. In other words, Thomas's position comes from his view that Blacks can be protected only if they are treated exactly the same, as opposed to Justice Scalia's view that all individuals should be treated exactly the same for reasons of evenhandedness alone. For example, Justice Thomas's analysis of a need for colorblind admissions in his dissent in *Grutter* was vastly different from that of Justice Scalia.[378] While Justice Scalia's dissent centered on what he believed to be inherent unfairness toward non-minority individuals who did not receive racial preferences[379] and what he argued was the law school's inappropriate use of racial discrimination "to convey generic lessons in socialization and good citizenship,"[380] Justice Thomas's dissent focused primarily on what he perceived as affirmative action's damaging effects to individual Blacks. These

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colleague, a conservative, raised in the south, a victim of racism—possesses epistemic authority and commands epistemic deference"); Lithwick, *supra* note 372, at A35 ("But with his personal narrative, Justice Thomas changed the terms of the legal debate. After he spoke, members of the court took turns characterizing burning crosses as uniquely threatening symbolic speech . . . ."); *see also* Edward Lazarus, *Making Sense of Thomas' Cross Burning Remarks and First Amendment Law* (acknowledging that "the power of Thomas's verbal assault on cross-burning, its authenticity and historical irrefutability derived directly from his identity and perspective as the Court's only African-American justice."), *available at* http://www.cnn.com/2002/LAW/12/26/findlaw.analysis.lazarus.Thomas.

377. *See* FOSKETT, *supra* note 181, at 2 ("Liberal pundits like to say that the Court's black justice simply obeys Justice Antonin Scalia, as if, Thomas joked, 'he was suddenly my master up here.'").

378. It also highly differed from that of Chief Justice Rehnquist, whose dissent focused on the notion of "critical mass," contending that the law school's program is nothing more than an effort to achieve racial balancing. *See* Grutter v. Bollinger, 539 U.S. 306, 383 (2003) (Rehnquist, C. J., dissenting). Rehnquist noted:

> But the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying "some attention to [the] numbers." As the tables below show, from 1995 through 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school's applicant pool who were from the same groups.

Id.

379. *See id.* at 348 (Scalia, J., concurring in part and dissenting in part) (asserting sarcastically that "[t]he nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand"); *see also* Chander, *supra* note 100, at 168 n.292 (highlighting that "Justice Scalia's reference to the 'nonminority individual' is incorrect," as "affirmative action programs often exclude some racial minority groups—principally Asians—from their benefits").

380. *Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part).

negative effects include what he referred to as resulting stigma by Whites who perceive affirmative action beneficiaries as inferior and affirmative action's unintended validation of traditional standards of merit, in particular the LSAT, that work to disproportionately exclude certain minorities.[381] In fact, it was Justice Scalia who joined all parts of Justice Thomas's dissent and concurrence, specifically highlighting the part of Justice Thomas's dissent that questioned the University of Michigan's use of traditional standards of merit to maintain its elite status, an offshoot of a critique that critical race scholars have consistently made in the past.[382] Like Justice Thomas, Justice Scalia was convinced "that the allegedly 'compelling state interest' at issue here is not the incremental 'educational benefit' that emanates from the fabled 'critical mass' of minority students, but rather Michigan's interest in maintaining a 'prestige' law school whose normal admissions standards disproportionately exclude blacks and other minorities."[383]

Second, criticisms of Justice Thomas's jurisprudence as lacking all independent thought, even in the face of a clearly raced and distinct jurisprudence on certain issues, demonstrate the intensity of the stereotype of black incompetence and dependency.[384] Why view Justice Thomas's voting record as evidence that he is a slave to Justice Scalia and not view Justice Ginsburg's voting record as evidence that she is a clone of Justice Souter or Justice Souter's voting record as evidence that he is a clone of Justice Stevens?[385] Given the actual numbers regarding the voting relationships between judges, the only answer can be race, or more specifically, the stereotype of black dependency and inferiority.[386] After all, the most recent statistics of the Justices' voting relationships indicate that the aforementioned pairs of Justices have agreed in full on a greater percentage of cases than Justices Thomas and Scalia.[387]

Justice Thomas (or one of his black conservative counterparts) might argue that this difference in perceptions of pairs of judges is, in part, due to

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381. *See id.* at 349–78 (Thomas, J., concurring in part and dissenting in part).

382. *See, e.g.*, Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why U.C. Davis Should Abandon the LSAT (And Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 600–13 (2001) (explaining how standardized tests, such as the LSAT, are not good predictors of performance and highly correlate with wealth); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1730–42 (1995) (deconstructing the myth of objective merit and detailing how it disadvantages minorities).

383. *Grutter*, 539 U.S. at 347 (Scalia, J., concurring in part and dissenting in part).

384. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1292–93 (2000) (discussing how black workers have the extra burden of overcoming the stereotype of laziness and intellectual incompetence in the workplace); *see also* Emily Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle through the Doctrine of Good Faith in Contract Law*, 66 PITT. L. REV. (forthcoming 2005).

385. *See supra* note 20.

386. *See* GERBER, *supra* note 3, at 32 (acknowledging that Justice Thomas's race has certainly played a part in how he has been assessed).

387. *See supra* note 20.

the ill use of affirmative action and the damaging effect that affirmative action has on Whites' views regarding the competency of minorities and women. As Justice Thomas remarked in *Adarand*, "[t]hese programs stamp minorities with the badge of inferiority."[388] Indeed, as some scholars have noted, Justice Thomas's reference to this claimed effect of affirmative action was almost personal in *Grutter*.[389]

Justice Thomas's argument about the stigma caused by affirmative action, however, has less force when viewed along with similar criticisms of Justice Marshall, whose life, politics, and jurisprudence stand in stark contrast to Justice Thomas's.[390] The manner in which Justice Marshall was regarded as "intellectually inferior" cannot be attributed to affirmative action, but instead to the stigma that often automatically attaches to Blacks in our society.[391] Unlike Justice Thomas,[392] there is absolutely nothing to indicate that Justice Marshall was ever a beneficiary of affirmative action. To begin with, affirmative action clearly did not exist when Marshall was applying to law school. Moreover, Justice Marshall attended a then *all-black* law school, Howard University School of Law, where he graduated first in his class.[393] Additionally, Justice Marshall's record as an attorney was unlike most other Justices of the Supreme Court, having won case after case before the Court prior to his appointment. Had Justice Marshall done nothing more than win his twenty-nine cases before joining the Supreme Court, one simply could not deny that he was an intellectual force in the legal arena. Yet, he has still been the subject of the same disparaging comments regarding alleged dependency on another Justice and a lack of intellectual power.[394]

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388. Adarand Constructors, Inc. v. Pena, 515 U.S. 204, 241 (1995) (Thomas, J., concurring in part and concurring in judgment).

389. *See* Guinier, *supra* note 108, at 181 (guessing that Justice Thomas perhaps had a personal axe to grind in *Grutter*).

390. *See* Onwuachi-Willig, *supra* note 279 (manuscript at 47–52) (describing the differences in Justice Marshall's and Justice Thomas's jurisprudence on issues of crime and affirmative action); *see also* Note, *supra* note 21, at 1336–37 (arguing that Justice Thomas's conservative jurisprudence is in part due to his attempts to distinguish himself from Justice Marshall).

391. *See* Onwuachi-Willig, *supra* note 279 (manuscript at 61–63) (describing the stigma caused by white supremacist beliefs upon which this country was founded); *cf.* Guinier, *supra* note 108, at 186–87, 190 (describing how racism is linked to stigma and helps to explain "why legacy preferences, which account for a larger percentage of admissions at selective colleges than do racial or ethnic factor, do not generate the same 'stigma'").

392. *See* Onwuachi-Willig, *supra* note 279 (manuscript at 1–9) (discussing how Justice Thomas may be considered a beneficiary of affirmative action); *A Classic Example*, *supra* note 202, at 35 (same).

393. *See* WILLIAMS, *supra* note 12, at 59.

394. In a sense, the lesson from Justice Thomas's life can be likened to the one learned by Chantel Mitchell in *Just Another Girl on the I.R.T.* (Miramax Films 1993). In the movie, Chantel, a straight-A black female student who sees herself as different, ultimately becomes pregnant and has her plans to become a doctor derailed. For Chantel, the lesson is difficult: put one's self in the shoes of many less fortunate girls—pregnant, unmarried, broke and without a high school education—and see how smart one is. This movie shows us that no matter how smart a person is

When denigrations of Justices Marshall and Thomas are viewed side by side, it becomes clear that the stigma of black incompetence and inferiority existed long before affirmative action and that this stigma is likely to attach to the story of any black justice for a long time to come.

Most of all, what Justice Thomas's story teaches us is that the black community's (or even more broadly, the liberal community's) conception of blackness or "black voice" is far too limited.[395] The fact that a black individual holds views in stark contrast with those of the majority of the black community (or even holds views that are perceived as harmful to the black community) does not make his or her views or voice any less "black" or make his or her concern for black people any less sincere.[396] In fact, Justice Thomas's voice is "raced" in a way that exhibits significant concern for black people. For example, his vehement support for school choice (as opposed to integration), his opposition to leniency for criminal defendants, and his stance on affirmative action are all deeply grounded in such concern— in particular, a concern that current policies are simply short-term solutions to festering problems in the black community, such as failing schools and black-on-black crime.[397]

Indeed, as I was researching and learning about black conservative ideology, I found myself (surprisingly) nodding in agreement with some of its concepts and understandings about the issues facing the black community, even though I disagreed with the ultimate route proposed for addressing these problems. Perhaps this is Justice Thomas's most significant lesson for us all, with his seemingly contradictory "black nationalist" and "Reagan conservative" views:[398] not only that the voice of the black conservative can be "raced" in a way that the voice of the white conservative is not,[399] but that the rift between the black conservative and black liberal is

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or how different he or she views himself or herself, he or she is still vulnerable in this world without some means of protection.

395. *See* Kennedy, *supra* note 12, at 14–22 (discussing the use of terms such as "sellout" in defining acceptable boundaries in the black community).

396. *See id.* at 18–26 (explaining the dangers of misidentifying so-called traitors to the race); *see also* Ranjan, *supra* note 369, at 2093 (describing Thomas as "a black man who cares about his race"). *But see* GERBER, *supra* note 3, at 18–19 (quotations omitted) (describing one writer as stating that "Thomas and his supporters are not politically black and have no right . . . to change the political standard"); George Curry, *Editor's Note: "We Were Too Kind,"* EMERGE, Nov. 1996, at 7, 7 ("[O]ur latest depiction [of Justice Thomas on the cover as a lawn jockey] is too compassionate for a person who has done so much to turn back the back the clock on civil rights, all the way back to the pre-Civil War lawn jockey days.").

397. *See* Tushnet, *supra* note 245, at 330 (describing how Justice Thomas's opinions on education and Blacks "are concerned with ensuring that public policy address real problems in education for African-Americans: failing inner-city schools, the relative underperformance of black males, and the like").

398. *See id.* at 335–39 (describing the tensions between Justice Thomas's seeming black nationalist views and his devotion to individualism).

399. *See, e.g.*, Derrick Bell, *Space Traders, in* DERRICK BELL, FACES AT THE BOTTOM OF THE

not so wide after all.[400] Perhaps black conservatives and black liberals would both benefit from listening to each other and taking the other group's concerns seriously.[401] After all, in spite of everything, Justice Thomas appears to be just another brother on the Supreme Court.

WELL: THE PERMANENCE OF RACISM 158, 166–68 (1992). Professor Bell makes this point clear in his portrayal of the black conservative economist Gleason Golightly in *Space Traders* when Golightly states to his white conservative counterparts, who are willing to trade in black Americans in exchange for an enormous wealth of gold and fuel:

> I have supported this administration's policies that have led to the repeal of some civil rights laws, to invalidation of most affirmative action programs, and to severe reduction in appropriations for public assistance. To put it mildly, the positions of mine that have received a great deal of media attention, have not been well received in African-American communities. Even so, I have been willing to be a "good soldier" for the Party even though I am condemned as an Uncle Tom by my people. I sincerely believe that black people needed to stand up on their own feet, free of special protection provided by civil rights laws, the suffocating burden of welfare checks, and the stigmatizing influence of affirmative action programs. *In helping you undermine these policies, I realized that your reasons for doing so differed from mine. And yet I went along.*

Id. at 166–67 (emphasis added).

400. *See* Delgado, *supra* note 57 at 1548–49 (arguing that, in some instances, black critiques from the left and the right converge and those interested in civil rights should take note when such convergence occurs).

401. *See* Kennedy, *supra* note 12, at 25 (contending that "monitoring of dissident black opinion imposes a loss of valuable information and insight"); *see also* Bridgeman, *supra* note 12 (manuscript at 3, 15) ("I wonder if we do not duplicate some of the patterns of silencing and marginalization that we ourselves constantly struggle against when we refuse to take seriously those within our communities who view the world differently.").


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