

# USING THE MASTER'S "TOOL" TO DISMANTLE HIS HOUSE: WHY JUSTICE CLARENCE THOMAS MAKES THE CASE FOR AFFIRMATIVE ACTION

Angela Onwuachi-Willig\*

*Justice Clarence Thomas, the second black man to sit on the Supreme Court, is famous, or rather infamous, for his opposition to affirmative action. His strongest critics condemn him for attacking the very preferences that helped him reach the Supreme Court. None, however, have considered how Thomas's life itself may be used as a justification for affirmative action. In what ways can the master's "tool" be used to dismantle his house?*<sup>1</sup>

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\* Acting Professor of Law, University of California, Davis, aonwuachi@ucdavis.edu. J.D., University of Michigan Law School; B.A., Grinnell College. Thanks to Richard Banks, Kathy Bergin, Jacquelyn Bridgeman, Miriam Cherry, Fernando Colon-Navarro, Luis Fuentes-Rohwer, Aya Gruber, Bill Hing, Kevin Johnson, Tom Joo, Natasha Martin, Eboni Nelson, Reginald Oh, Stephen Smith, Madhavi Sunder, Carlton Waterhouse, and Marty West for their helpful comments. Dean Rex Perschbacher's support has been generous and invaluable. My assistant Cherita Laney and the staff of the U.C. Davis Law Library, especially Erin Murphy and Aaron Dailey, provided valuable assistance. Most importantly, thanks to my husband Jacob and my children, Elijah and Bethany, for their love and support.

1. This phrase was coined by renowned feminist, Audre Lorde. See AUDRE LORDE, *SISTER OUTSIDER: ESSAYS & SPEECHES* 110–13 (1984). By using the phrase "master's tool," I do not mean to suggest that Justice Thomas is a puppet of the conservative Right in developing his jurisprudence. Indeed, in a prior article, I defend Justice Thomas against criticisms that he is a mere clone of Justice Scalia, arguing that his jurisprudence in certain areas is "raced" and is rooted in black conservatism, which has a distinct history and foundation from white conservatism. See Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. (forthcoming 2005) (manuscript at 57–84, on file with Author). My use of the term "tool" instead applies to the way Republican administrations have seemingly used Thomas, because of his race, to advance their political goals, while simultaneously opposing affirmative action and then viewing Thomas as "the epitome of the right kind of affirmative action working the right way." Kevin Merida & Michael A. Fletcher, *Supreme Discomfort*, WASH. POST, Aug. 4, 2002, at 24.

*This Article analyzes Justice Thomas's appointment to the Supreme Court and contends that his nomination to and performance on the Court ironically make the case for forward-looking affirmative action. Specifically, this Article examines various pro-affirmative action arguments, such as the benefit of cross-racial understanding through interracial diversity, the destruction of stereotypes through an exposure to intraracial diversity of viewpoints, and the redefining of traditional standards of merit, and then utilizes such reasoning to explain how Justice Thomas himself actually lends support to a continuation of forward-looking affirmative action.*

## INTRODUCTION

Justice Clarence Thomas is well-known for his opposition to affirmative action,<sup>2</sup> partially because he is a black<sup>3</sup> man and such opposition is contrary to the views of most Blacks,<sup>4</sup> but mostly because he is a black man who is viewed as turning his back on a policy that helped him advance to his current standing.<sup>5</sup> To Justice Thomas, the claim that he has pulled up the ladder of affirmative action after climbing

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2. By "affirmative action" I refer to the act of considering the race of underrepresented racial minorities as a plus factor in hiring and recruitment and of broadening standards of merit that are used to select persons for positions or programs. See Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 614 (1998) (describing affirmative action as a "program or policy where race, national origin, or gender is taken into account"); see also Anupam Chander, *Minorities, Shareholders, and Otherwise*, 113 YALE L.J. 119, 120 n.3 (2003). This Article draws upon case law and articles concerning affirmative action in employment and education and focuses solely on "forward-looking" affirmative action, not remedial affirmative action, which is designed to remedy past discrimination by a school or employer. See Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 70-74 (2004) (analyzing and defending forward-looking justifications for affirmative action); Sarah Stroud, *The Aim of Affirmative Action*, 25 SOC. THEORY & PRAC. 385, 386 (1999) (asserting that the aim of affirmative action should be viewed as the "forward-looking" goal of eliminating "unwarranted attitudes that impede rational deliberation about career choices and aspirations and thereby keep people from achieving their full potential").

3. Throughout this Article, I capitalize the word "Black" or "White" when used as a noun to describe a racialized group. Also, I prefer to use the term "Blacks" rather than the term "African-Americans" because the term "Blacks" is 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 (1992).

4. See *Poll: Public Split on Affirmative Action*, ASSOCIATED PRESS, Mar. 7, 2003 (stating that eighty-nine percent of Blacks still think affirmative action programs are necessary).

5. See Eugene Volokh, *Judging Clarence Thomas*, GLENNREYNOLDS.COM, June 30, 2002 (stating that "[I]ots of people have criticized Justice Clarence Thomas' anti-race-preferences opinion [in *Grutter*] . . . on the grounds that there's reason to think that he has benefited from some such preferences"), at <http://frontpagemag.com/articles/readarticle.asp?ID=8646>; see also Maureen Dowd, Editorial, *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").

it is unfounded because he has not been a beneficiary of the policy.<sup>6</sup> Justice Thomas's supporters, such as Thomas Sowell, his mentor and a black senior fellow at the Hoover Institute, agree, contending that affirmative action had not started at the time that Thomas enrolled at Holy Cross College in Massachusetts and that no one has proved that racial preferences played any role in Thomas's admission to Yale Law School.<sup>7</sup>

Thomas's critics, however, vehemently contest these assertions, insisting that a long line of facts prove that he has repeatedly benefited from racial preferences.<sup>8</sup> According to these critics, Thomas benefited from racial preferences when he received a scholarship to attend Holy Cross,<sup>9</sup> when he received admission to Yale Law School,<sup>10</sup> and when he was appointed by President Ronald Reagan (despite purposefully directing his career outside of civil rights and into areas such as tax

6. See *Justice Clarence Thomas, A Classic Example of an Affirmative Action Baby*, J. BLACKS HIGHER EDUC., Jan. 31, 1998, at 35 [hereinafter *Classic Example*] (stating that Justice Thomas has repeatedly denied being a beneficiary of affirmative action). In an interview in the late 1980s, Thomas asserted, "This thing about how they let me into Yale—that kind of stuff offends me. All they did was stop stopping us." Juan Williams, *A Question of Fairness*, ATLANTIC MONTHLY, Feb. 1, 1987, at 75. Thomas has also denied that race played a role in his nomination to the Court. See JOHN GREENYA, SILENT JUSTICE: THE CLARENCE THOMAS STORY 171 (2001) (noting that when Thomas was asked for his response to critics who claimed that his seat on the Court was a result of a racial preference, "Thomas replied, 'I think a lot worse things have been said. I disagree with that, but I'll have to live with it'"). But see *Classic Example*, *supra*, at 36 (reporting that Thomas, whom the author asserts has engaged in "revisionist" history, once stated in remarks to staff at the EEOC in 1983, "[b]ut for [affirmative action programs], God only knows where I would be today").

7. *Classic Example*, *supra* note 6, at 35.

8. See, e.g., *id.* at 35–36. The irony in such assertions by Thomas's critics, many of whom are liberal, is that their comments are often made as insults, despite the fact that the politically liberal position on affirmative action, unlike the conservative position, is that affirmative action beneficiaries fully deserve the benefits they are awarded. Cf. Robyn E. Blumner, *Justice Thomas's Dissent*, ST. PETERSBURG TIMES, June 29, 2003, at 7D ("[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.").

9. See GREENYA, *supra* note 6, 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"); ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 109 (2001) (noting that clergy established a Martin Luther King scholarship fund days after Martin Luther King, Jr.'s death to recruit students from inner city high schools). In fact, John E. Brooks, who was President of the College of Holy Cross during Thomas's tenure at the school, has maintained that Thomas was "[c]ertainly" a beneficiary of affirmative action in admission to the college. *Classic Example*, *supra* note 6, at 35.

10. *Classic Example*, *supra* note 6, at 36 (reporting that James Thomas, an admissions officer at Yale Law School when Thomas applied in 1971, "has stated that 'it's pretty clear' that [Thomas] benefited from affirmative action during the admissions process"); see also SCOTT D. GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 12 (1999) (asserting that Thomas was admitted under Yale Law School's affirmative action plan to recruit qualified minorities).

law)<sup>11</sup> to be the Assistant Secretary of the U.S. Department of Education and later Chairperson of the Equal Employment Opportunity Commission (“EEOC”),<sup>12</sup> both agencies dedicated to protecting the civil rights of citizens.<sup>13</sup> Moreover, there was that embarrassing moment upon Thomas’s confirmation to a second term as Chairman of the EEOC, when the Republican Assistant Attorney General Bradford Reynolds toasted Thomas as “the epitome of the right kind of affirmative action working the right way.”<sup>14</sup>

Above all of these positions, however, Thomas’s appointment to the U.S. Supreme Court by the first President Bush in 1991 was the most controversial.<sup>15</sup>

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11. See Scott D. Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 S.U. L. REV. 43, 43 (1997) (describing Thomas’s desire to avoid any stigma associated with race); Christopher Edley Jr., *Doubting Thomas: Law, Politics and Hypocrisy*, WASH. POST, July 7, 1991, at B1 (describing Thomas’s statement that he focused on corporate matters so he would “not be ‘typed’ . . . [as] a civil rights specialist”).

12. While not labeling these appointments as the result of affirmative action, Thomas has conceded that race played a role in his appointments as Assistant Secretary for the Department of Education and Chairperson for the EEOC. See THOMAS, *supra* note 9, at 186. Prior to these appointments, Thomas had stated, “‘If I ever went to work for the EEOC or did anything directly connected with blacks, my career would be irreparably ruined. The monkey would be on my back to prove that I didn’t have the job because I’m black. People meeting me for the first time would automatically dismiss my thinking as second-rate.’” Williams, *supra* note 6, at 75. After accepting his jobs at the EEOC and the Department of Education, Thomas explained his rationale for taking the positions, stating:

When I was asked to go to the Department of Education as well as come here [the Equal Employment Opportunity Commission], you’re dang right I was insulted. *What other reasons besides the fact that I was black?* But then I had to ask myself, if you don’t do it, what are you going to say about these issues in the future? If you had an opportunity to get in there and you didn’t do it, what standing do you have to complain? As one friend put it to me, “Clarence, put up or shut up.” And I wasn’t going to shut up.

THOMAS, *supra* note 9, at 186 (emphasis added). In 2000, Justice Thomas advised Brian Jones, a rising black star in the Republican Party, not to accept a position as assistant attorney general for civil rights because “[i]t was a black job.” Kevin Merida & Michael A. Fletcher, *Narrowly Defined Image Belies Jurist’s Quiet Clout*, WASH. POST, Oct. 10, 2004, at A1.

13. See Merida & Fletcher, *supra* note 1.

14. Williams, *supra* note 6, at 82 (describing Thomas’s reaction to Reynolds’s statement as hurt and disgusted); see also GREENYA, *supra* note 6, at 127; Merida & Fletcher, *supra* note 1.

15. See Victoria Benning, *Thomas Hearings’ Ripples Felt in Omaha for Blacks, the Issues Reach Beyond Harassment, Race*, OMAHA WORLD-HERALD, Oct. 17, 1991, at 1 (stating that the “vote was narrower than any margin for a confirmed high court justice in more than a century”). The most interesting rift over Thomas’s nomination was within the black community. See A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1407 (1995) (noting that the National Bar Association, the premier organization of black lawyers, was divided on Thomas’s nomination—128 opposed, 124 supported, and thirty-one took no position). Although traditional civil rights groups, such as the NAACP, opposed Thomas’s appointment to the bench, polls showed that anywhere from fifty percent to seventy percent of Blacks supported Thomas’s nomination. See Peggy PETERMAN, *Most Blacks Glad Thomas Confirmed, Now Want Him to Change*, ST. PETERSBURG TIMES, Oct. 17, 1991, at 13A (“[M]ore [black people] were for Clarence Thomas than were against him, but

Despite former President Bush's declaration that Thomas's race played no role in his nomination,<sup>16</sup> many viewed race as the ultimate explanation for Thomas's appointment to the Supreme Court.<sup>17</sup> 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."<sup>18</sup> In all, Thomas's critics viewed him as unqualified for the job,<sup>19</sup> or at best, minimally qualified for the job.<sup>20</sup>

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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."); see also THOMAS *supra* note 9, at 352 (noting that in July 1991, fifty-seven percent of Blacks favored Thomas's nomination, a higher percentage than of Whites); Editorial, *No Longer Invisible*, WALL ST. J. EUR., Oct. 28, 1991, at 6 (noting that between sixty percent to seventy percent of Blacks supported Thomas's confirmation). While some Blacks feared Bush's replacement candidate if Thomas did not succeed, others held out hope that "Thomas ultimately would prove himself committed to the advancement of civil rights in his decision-making on the Court." Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 483 (2000).

16. President George H.W. Bush proclaimed, "The fact that [Thomas] is black and a minority had nothing to do with this in the sense that he is the best qualified at this time." THOMAS, *supra* note 9, at 346; see also JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 21 (1994). *But see* GREENYA, *supra* note 6, 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").

17. See Edley, *supra* note 11 ("Those who oppose affirmative action . . . should oppose the Thomas nomination, because only color can account for his selection."); cf. Manning Marable, *Clarence Thomas and the Crisis of Black Political Culture*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 61, 64 (Toni Morrison ed., 1992) ("At best, Thomas's published writings revealed the working of a mediocre mind."); Edward Lazarus, *Making Sense of Thomas' Cross Burning Remarks and First Amendment Law*, FINDLAW, Dec. 26, 2002 (noting "that Thomas's qualifications, compared to those of other potential candidates, were limited"), at [www.cnn.com/2002/LAW/12/26/findlaw.analysis.lazarus.thomas](http://www.cnn.com/2002/LAW/12/26/findlaw.analysis.lazarus.thomas). Many of Thomas's critics contend that his appointment to the bench was due to the combination of his race and his conservative politics. See generally Gerber, *supra* note 11 (discussing how Thomas's critics perceived him).

18. *Classic Example*, *supra* note 6, at 36.

19. Professor Cornel West of Princeton University summed up many of the critiques of those who opposed Thomas when he argued the following about Thomas's qualifications: "The fact that Thomas was simply unqualified for the Court—a claim warranted by his undistinguished record as a student (mere graduation from Yale Law School does not qualify one for the Supreme Court!); his turbulent eight years at the EEOC, where he left thirteen thousand age-discrimination cases dying on the vine for lack of investigation; and his mediocre performance during a short fifteen months as an appellate court judge—was not even mentioned" in opposition to Thomas's nomination. Cornel West, *Black Leadership and the Pitfalls of Racial Reasoning*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 390–91 (Toni Morrison ed., 1992).

20. With the exception of George Harris Carswell (a Fourth Circuit Judge with a history of supporting segregation), whose confirmation was rejected by the United States

Putting Thomas's qualifications for the bench aside, to say that race played no role in his nomination to the Court is disingenuous.<sup>21</sup> It would take conscious effort to ignore the political pressures on the first President Bush to nominate a black candidate to replace Thurgood Marshall, the Court's first black Justice.<sup>22</sup> Additionally, although one would be hard pressed to argue that Thomas was unqualified for a seat on the Court (especially because there is no required set of qualifications),<sup>23</sup> Thomas, despite having a very impressive career, arguably had not achieved the same overall distinction in his legal career as most other Justices on the bench at the time of his appointment.<sup>24</sup> For example, though Thomas graduated from the elite Yale Law

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Senate with a vote of forty-five to fifty-five, Thomas is the only Supreme Court nominee to be rated by the American Bar Association ("ABA") as simply "qualified." Fax from Denise A. Cardman, Senior Legislative Counsel of the ABA, Supreme Court Nominees (May 11, 2004) [hereinafter Cardman Fax]. See also Catharine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L. REV. 117, 121 (1993). Additionally, of all the nominees who were ultimately confirmed to the Supreme Court, Justice Thomas is the only one who was not unanimously voted as qualified. Twelve reviewers voted for him as "qualified," two voted for him as "not qualified," one exercised a right of recusal, and none voted for him as "well qualified." Cardman Fax, *supra*. It is also worth noting that Republicans have argued that the ABA committee that evaluates judicial nominees is systematically biased against conservatives. Thomas's age at the time—early forties—also may have affected his rating by the ABA.

21. *Amicus Briefs in Grutter v. Bollinger and Gratz v. Bollinger, in Support of the University of Michigan: Brief Amici Curiae of Veterans of the Southern Civil Rights Movement and Family Members of Murdered Civil Rights Activists*, 14 BERKELEY LA RAZA L.J. 89, 98 (2003) [hereinafter *Brief Amici*] ("No one can seriously dispute that, when the first President Bush selected Justice Clarence Thomas to fill the vacancy left by the retirement of Justice Thurgood Marshall, Justice Thomas's race was a factor—one among many—that President Bush considered. No one can seriously contend it was entirely a coincidence that the second African American ever to sit on the Supreme Court was selected to fill the vacancy created when the first African American Justice retired . . ."); see also Eva Jefferson Patterson, *Affirmative Action and the California Civil Wrongs Initiative*, 27 GOLDEN GATE U. L. REV. 327, 336 (1997) (same).

22. See THOMAS, *supra* note 9, at 347 (noting that Edwin Meese, a friend of Thomas, conceded that "that the president was influenced somewhat by putting a minority on the court[, b]ecause this was Thurgood Marshall's spot").

23. See WILLIAM D. BADER & ROY M. MERSKY, *THE FIRST ONE HUNDRED EIGHT JUSTICES* 21 (2004) ("There are no established criteria, tests, or guidelines for appointment to the Supreme Court."); Wells, *supra* note 20, at 119 (noting that "there is little consensus among lawyers and scholars as to what should count as qualifications for a Supreme Court appointment").

24. See Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 HOW. L.J. 323, 339 & n.91 (2004) (highlighting that persons have asserted that "Justice Thomas 'had a relatively undistinguished career by Supreme Court standards'" and noting his disagreement with that assessment) (quoting Mark A. Graber, *Justice Thomas and the Perils of Amateur History*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 71 (Earl M. Maltz ed., 2003)). See also Ifill, *supra* note 15, at 481 (stating that Thomas had not "[d]istinguish[ed] himself in . . . the world of big law firm practice [or] academia prior to becoming a judge on the District of Columbia Court of Appeals").

This is not to say that qualifications that are traditionally considered to constitute high distinction in law are necessary to serve as a Supreme Court Justice. Indeed, a significant argument in this Article is that traditional standards of merit must be re-parameterized. See

School, he did not graduate at the top of his law school class, unlike former Justice Byron White, Justice Antonin Scalia, Chief Justice William Rehnquist, Justice Sandra Day O'Connor, and Justice John Paul Stevens, who all graduated at the top of their respective classes.<sup>25</sup> Additionally, unlike many of his colleagues who had clerked for a Supreme Court Justice or a federal appellate court judge, Thomas had never clerked for a federal judge.<sup>26</sup> Similarly, while Thomas had held significant leadership positions such as Assistant Secretary of the United States Department of Education and Chairperson of the EEOC,<sup>27</sup> one could argue that he had not distinguished himself as a

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discussion *infra* Part I.C and Conclusion. I borrow from scientists the term “re-parameterize,” which means to shift or change the way a complex system is described or understood by altering the primary components of a model of the system. *See* discussion *infra* Part II.C.; *see, e.g.*, Maxwell L. King & Thomas S. Shively, *Locally Optimal Testing When a Nuisance Parameter Is Present Only Under the Alternative*, 75 REV. ECON. & STATS. 1, 1–7 (1993) (applying the re-parameterization technique to two examples from econometrics literature and demonstrating that their test has better power properties than tests previously proposed in the literature).

25. *See* THE SUPREME HISTORICAL SOCIETY, *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1789–1995*, at 461–65, 486–525 (Clare Cushman ed., 1995) [hereinafter SUPREME]. Upon his confirmation, Thomas joined Justices Harry Blackmun, Anthony Kennedy, Sandra Day O'Connor, William Rehnquist, Antonin Scalia, David Souter, John Paul Stevens, and Byron White on the bench. *Id.* at 462, 487, 496–97, 512. Former Justice Byron White, a Rhodes Scholar, graduated from Yale Law School *magna cum laude*. *Id.* at 462. Justice Antonin Scalia graduated *magna cum laude* from Harvard Law School and was a note editor on the *Harvard Law Review*. *Id.* at 512. Chief Justice William Rehnquist graduated first in his class at Stanford Law School, and Justice Sandra Day O'Connor graduated third in that very same class. *Id.* at 497. Finally, Justice John Paul Stevens graduated first in his class at Northwestern University School of Law with the highest grades of any student in the law school's history. *Id.* at 502. It is important to note, however, that Yale had stopped giving letter grades by the time Thomas attended the school.

Justice Thomas would later be joined by Justices Ruth Bader Ginsburg and Stephen Breyer. *Id.* at 531–40. Justice Ginsburg, who graduated first in her class from Columbia Law School and was an editor of the *Columbia Law Review*, led a distinguished career as a professor at Rutgers Law School and later at Columbia Law School. Justice Ginsburg was a key player in early sex discrimination litigation cases and won five of six Supreme Court cases involving sex stereotyping before leading an equally distinguished career on the United States Court of Appeals for the D.C. Circuit. *See id.* at 532–35. Justice Breyer, a Marshall Scholar who graduated *magna cum laude* from Harvard Law School and clerked for Supreme Court Justice Arthur Goldberg, also led a distinguished career as a law professor at Harvard Law School, worked as an assistant special prosecutor in the Watergate investigation, and developed a reputation “as one of the leading jurists of his generation” during his fifteen years on the United States Court of Appeals for the First Circuit. *See id.* at 537–40.

26. *See id.* at 462, 487, 497, 502. The late Justice White clerked for Supreme Court Justice Fred Vinson, Rehnquist clerked for Supreme Court Justice Robert Jackson, Stevens clerked for Supreme Court Justice Wiley Rutledge, and Justice Harry Blackmun clerked for his predecessor on the United States Court of Appeals for the Eighth Circuit, John B. Sanborn. *See id.*

27. *See supra* note 12 and accompanying text (detailing how Thomas himself indicated that race was the primary factor in his obtaining these positions).

fierce litigator, astute politician, or prominent scholar, as did some of his colleagues.<sup>28</sup> Finally, Thomas's experience as a judge on the U.S. Court of Appeals for the D.C. Circuit was minimal; he served for less than two years on that court with no evident impact.<sup>29</sup> Thus, even Thomas's most loyal supporters would have to concede that, on some level, Thomas joined the Supreme Court under the "shadow" of some racial preference.<sup>30</sup>

Regardless of whether one believes Justice Thomas or his critics about whether he benefited from affirmative action, one question is never answered: why does it matter? Even if Thomas were a beneficiary of affirmative action, that fact would not forever bind him to support the policy.<sup>31</sup> Therefore, why should anyone care if Thomas benefited from affirmative action, other than to sneer at his opposition to the use of racial preferences while those preferences were a factor in his advancement to the Court?<sup>32</sup>

This Article provides one simple reason why one should care about whether Justice Thomas was a beneficiary of affirmative action: that perhaps, the Justice himself can be an argument for the legitimacy of affirmative action. To borrow slightly from a phrase of former Republican Assistant Attorney General Bradford Reynolds, Justice Thomas is, in certain ways, an example of affirmative action "working the right

28. See SUPREME, *supra* note 25, at 487, 502, 512, 522–23; Mark Tushnet, *A Tribute to Justice Thurgood Marshall: Lawyer Thurgood Marshall*, 44 STAN. L. REV. 1277, 1277 (1992) (citing Andrew Rosenthal, *Marshall Retires from High Court*, N.Y. TIMES, June 28, 1991, at A1) (asserting that Marshall graduated first in his class at Howard University School of Law and was a great trial lawyer and appellate advocate who "won 29 of 32 cases he argued before the Supreme Court").

29. In contrast, it is reported that Blackmun wrote several notable opinions during his eleven years on the Eighth Circuit Court of Appeals; Stevens "gained distinction as a legal craftsman" during his five years on the Seventh Circuit Court of Appeals; Souter served successfully as a judge on the trial, appellate, and supreme courts of New Hampshire; and Scalia was highly admired for his legal intellect while on the D.C. Circuit. See SUPREME, *supra* note 24, at 464, 487, 503–04, 523–24.

30. Throughout his adult life, Thomas made efforts to escape from this shadow. For example, while at Yale Law School, Thomas avoided classes in civil rights and focused on tax and antitrust courses to rebut what he perceived as his white classmates' belief that black law students were at Yale simply to fulfill a quota. See GREENYA, *supra* note 6, at 68, 94. As noted earlier, after law school, Thomas deliberately did not seek legal work as a civil rights lawyer to avoid any perception that his race played a role in his lawyering. See Gerber, *supra* note 11, at 44.

31. See Volokh, *supra* note 5 (asserting that Justice Thomas has a duty to vote against any policy he thinks is unconstitutional regardless of "gratitude").

32. See Sheryl McCarthy, Editorial, *How Dare Justice Thomas Dissent on This One*, NEWSDAY (N.Y.), June 26, 2003, at A40 (asserting that "[i]f Clarence Thomas really believes what he said about the University of Michigan case, we should expect his resignation by the end of the week"); Maureen Dowd, Editorial, *Could Thomas Be Right?*, N.Y. TIMES, June 25, 2003, at 25 ("[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 makes him crazy that people think he is where he is because of his race, but he is where he is because of his race. . . . It's impossible not to be disgusted at someone who could benefit so much from affirmative action and then pull up the ladder after himself.").

way.”<sup>33</sup> After all, although Justice Thomas’s credentials were not as distinguished as those of his peers on the Court in a conventional sense,<sup>34</sup> he cannot be completely faulted for this “lack” of qualifications. Like many beneficiaries of affirmative action,<sup>35</sup> Thomas faced numerous obstacles that may have prevented him from obtaining certain credentials.<sup>36</sup> For example, when Thomas graduated from Yale Law School in 1974, there were very few black federal judges<sup>37</sup> who could hire law

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33. Merida & Fletcher, *supra* note 1. In other ways, Thomas is not a good example of “affirmative action working.” See discussion *infra* Conclusion.

34. Given consistent and harsh criticism regarding Thomas’s lack of qualifications for the bench during and after his appointment, I expected to find a huge disparity between Thomas’s credentials and those of his peers, but, on the contrary, I found that the disparity was not as wide as I originally imagined, if not minimal. For example, prior to their appointments to the United States Supreme Court, neither White nor Rehnquist had any judicial experience. See SUPREME, *supra* note 25, at 462–65, 487.

35. Beneficiaries of race-based affirmative action (which is intrinsically linked to class) often face numerous obstacles, including daily societal discrimination; impoverished schools, lacking not only in luxuries such as Advanced Placement or Honors courses but also in necessities, such as books; standardized test scores that predict race and class more than performance; and lowered expectations based on racial stereotypes from teachers. See Dawn R. Swink, *Back to Bakke: Affirmative Action Revisited in Educational Diversity*, 2003 B.Y.U. EDUC. & L.J. 211, 253–54 (2003) (describing the disadvantages that many black, Latino, and Native American students must overcome). Some have argued that affirmative action primarily benefits middle-class minorities who do not face many of these obstacles. See Walter Benn Michaels, *Diversity's False Solace*, N.Y. TIMES, Apr. 11, 2004, at 13 (contending that “[w]hen students and faculty activists struggle for cultural diversity, they are in large part battling over what skin color the rich kids should have”); see also Grutter v. Bollinger, 539 U.S. 306, 355 n.3 (2003) (Thomas, J., concurring in part and dissenting in part) (arguing that the law school’s admissions process “does nothing for those too poor or uneducated to participate in elite higher education”). Even if one accepts this assertion, there are numerous studies that demonstrate that, when wealth is defined in terms broader than just income alone, including assets, prestige of job and education level required for job, savings, retirement, and so on, Blacks and Latinos are far from being in the same position as Whites. See generally MELVIN OLIVER & THOMAS 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); R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029, 1068 (2001) (pointing out that “middle class blacks hold dramatically less wealth than whites with comparable education and income” and that “[I]ow socioeconomic status whites, as measured by education and income, have a wealth-holding comparable to many middle class blacks”); see also Deborah C. Malamud, *Affirmative Action: Diversity of Opinions: Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 967–88 (1997) (same); Cheryl I. Harris, *Mining in Hard Ground*, 116 HARV. L. REV. 2487, 2537–38 (2003) (book review) (same).

36. See Merida & Fletcher, *supra* note 1 (detailing some of the obstacles that a poor Thomas faced).

37. In May of 1974, there were sixteen black judges out of 506 judges on the federal bench: twelve district court judges, three circuit court judges, and one Supreme Court Justice. See PETER BARNETT, *LAW CLERKS IN THE UNITED STATES COURTS AND STATE APPELLATE COURTS: AN AMERICAN JUDICATURE SOCIETY RESEARCH STUDY* 7 (1973) (indicating the number of federal judges in 1973); see also Elaine Jones & Edward B. Toles, *Presidential Appointments of African-American Article III Judges* (Jan. 30, 2003), at [www.jtbf.org/](http://www.jtbf.org/)

clerks,<sup>38</sup> and even fewer white judges who were hiring black law clerks at the time,<sup>39</sup> a problem that still remains to this day.<sup>40</sup> Additionally, as Thomas himself has noted,

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pres\_appt.htm. Even in present times, Blacks make up a small percentage of all federal judges. See James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 169 n.68 (2003) (asserting that the number of black federal district judges was thirty-four in 1992 and seventy-one in 2001 and the number of black federal appellate judges was nine in 1992 and twelve in 2001).

38. Many black judges have taken a special interest in hiring minority law clerks. See Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality, and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 139 & n.241 (1997) (“Similarly, the presence of African American judges often corresponds to a marked increase in the hiring of African American court personnel.”); see, e.g., Arthur L. Burnett, Sr., *Promoting Diversity as the Ultimate Means of Achieving True Equality for All Persons in the Nation*, 50 FED. LAW. 47, 49 n.19 (2003) (“An outstanding example of such a mentor is Senior Judge Damon Keith of the U.S. Court of Appeals for the Sixth Circuit, who, over his 35 years on the bench, has had 61 minority judicial law clerks—African-American, Asian, Hispanic, American Indian, and Arab American—out of 72 judicial law clerks.”); James O. Freedman, *Thurgood Marshall: Man of Character*, 72 WASH. U. L.Q. 1487, 1497 (1994) (noting that Justice “Marshall chose more black and minority law clerks than any other Justice, and many of these men and women now serve on the faculties of the nation’s leading law schools,” including Professor Randall Kennedy of Harvard Law School and Professor Stephen Carter of Yale Law School); J. Clay Smith, Jr., *United States Foreign Policy and Goler Teal Butcher*, 37 HOW. L.J. 139, 148 & n.42, 148 (1994) (recording that “Hastie’s first law clerk, John R. Wilkens, was black,” that Goler Teal Butcher was “the first black woman to clerk at the federal circuit level,” and that “Hastie’s selection of Professor Butcher is an example of how a racially diverse judiciary expanded the opportunities of talented black men and women to federal and state judicial clerkships”).

39. See Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2126–27 (1992) (pointing out that “[p]rior to Marshall’s appointment, only one African-American had served as a law clerk to any of the Justices”).

40. Several years ago, the United States Supreme Court Justices were heavily criticized for the low number of minority clerks. See Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the McDonnell Douglas Prima Facie Case Test*, 50 CASE W. RES. L. REV. 53, 69 n.77 (1999) (describing the NAACP’s protest against the Justices’ hiring practices); see also Tony Mauro, *U.S. Court Justices Grilled Over Lack of Diversity Among Clerks*, N.J. L.J., Mar. 20, 2000, at 11 (reporting on a congressional hearing concerning the paucity of minority law clerks selected by Supreme Court Justices); cf. Randall Kennedy, *The Clerkship Question and the Court*, AM. LAW., Apr. 1999, at 114 (noting that the paucity of minorities in the highest circles of the legal profession is a problem but asserting that it stems from many sources, “including the social inequities that effectively bar all too many blacks from any higher education . . . and customs and reflexes that make it more difficult for black students to gain access to the valuable social networks that advance careers in the law”). The lack of minority law clerks is especially significant, given the important role that clerks make in assisting judges in their decisions. See generally JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS* (1980) (investigating how clerks may influence judges in making decisions).

Justice Thomas, who has had one black law clerk since his appointment and has one incoming black clerk, Larry Thompson, Jr., has suggested that “the dearth of black law clerks [i]s attributable less to race and more to class.” Merida & Fletcher, *supra* note 1.

after his graduation he encountered vicious racism as a black man seeking a law firm job in his home state of Georgia.<sup>41</sup>

Yet based on Thomas's rise from Pin Point, Georgia, to Yale Law School to the U.S. Court of Appeals for the D.C. Circuit, Thomas had at least demonstrated that he had the potential to become a good Supreme Court Justice with an independent judicial voice and to make unique contributions for the Court.<sup>42</sup> The only question is, how has he met the task?

This Article analyzes Justice Thomas's appointment to the Supreme Court and contends that Justice Thomas's seat and performance on the Court ironically make the case for forward-looking affirmative action. Part I examines and discusses several of the arguments that proponents of affirmative action assert in favor of the policy, in particular, enhanced learning and performance as a result of interracial diversity, the negation of stereotypes about group viewpoints as a result of exposure to intraracial diversity of perspective, and a rejection of traditional standards of merit. Part II of this Article then explicates the various ways in which Justice Thomas, a "tool"<sup>43</sup> of sorts of

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41. See Onwuachi-Willig, *supra* note 1 (manuscript at 41–42) (noting that Thomas had been rejected by every law firm in Atlanta and that Thomas still has those rejection letters in his possession). It bears noting that Justices O'Connor and Ginsburg experienced similar discrimination when they sought jobs upon their graduation. As Justice Ginsburg once remarked, after O'Connor graduated near the top of her class at Stanford Law School, "no private firm would hire her to do a lawyer's work." Ruth Bader Ginsburg, *Remarks on Women's Progress in the Legal Profession in the United States*, 33 TULSA L.J. 13, 14 (1997) (quoting O'Connor as saying "'I interviewed with law firms in Los Angeles and San Francisco . . . but none had ever hired a woman before as a lawyer, and they were not prepared to do so'"); Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1219 (1992) (describing the gender discrimination she experienced "when law firms would only hire [her], a 'lady lawyer,' as a legal secretary"). Like O'Connor, despite her excellent credentials, Ginsburg also experienced difficulty finding a job. She "received no job offers from New York law firms" and was not "able to obtain a clerkship interview with a Supreme Court Justice." SUPREME, *supra* note 25, at 532. Ultimately, District Court Judge Edmund L. Palmieri hired her as his law clerk. See *id.*

In response to criticism about the lack of minority law clerks at the Supreme Court, Justice Thomas once replied, "'I would love to see the day when I have . . . four minority clerks who can hold their heads up proudly and high around that Court and say, 'I am here under the same criteria, doing the same job, and I'm just as good as anybody else here.'" He added, 'I think any member of the Court would be proud of that.'" Tony Mauro, *Clerks: Minority Ranks Rise*, LEGAL TIMES, Oct. 16, 2000, at 10.

42. See Scott D. Gerber, *Justice Clarence Thomas: First Term, First Impressions*, 35 HOW L.J. 115, 120–21 (1992) (indicating "that initial bewilderment [on the Court] is less likely to occur for new Justices with prior judicial or political experience" and that Thomas's "extensive service as chairman of the EEOC and his tenure . . . on the D.C. Circuit" were good preparation for the Court).

43. As noted earlier, my use of the term "tool" applies only to the way Republican administrations have used Clarence Thomas, because of his race, to advance their political goals, while simultaneously opposing affirmative action. Merida & Fletcher, *supra* note 1. In fact, as several scholars have explained, the Bush administration used Thomas's race and class background to defend his nomination. See Yxta Maya Murray, *The Cultural Implications of Judicial Selection*, 79 CORNELL L. REV. 374, 379–81 (1994) (analyzing Thomas's confirmation process and how it was infused with race consciousness). For example, as Professor Kendall

the Bush administration (which vigorously opposed affirmative action),<sup>44</sup> makes the case for forward-looking affirmative action, including through his own jurisprudence. Finally, this Article identifies the various ways in which Justice Thomas's career may not serve as a good defense for affirmative action, in particular, the ways in which the Justice's life does not advance several of the reasons underlying the support of race consciousness in admissions and hiring, including through judicial appointments. This Article then concludes with a discussion of the ways in which Justice Thomas, through his dissent in *Grutter v. Bollinger*,<sup>45</sup> has laid the foundation for truly transforming selection criteria in schools and in the workplace.

## I. IN DEFENSE OF AFFIRMATIVE ACTION

If affirmative action means what I described, what I'm for, then I'm for it.

—George W. Bush<sup>46</sup>

Forward-looking affirmative action programs in employment and admissions have evolved over a period of more than forty years. This Part of the Article focuses and reflects on selected arguments in favor of forward-looking affirmative action, such as the contribution of differing perspectives based on racial diversity and the manner in which intraracial diversity of perspective helps to defeat racial stereotyping about what is the "minority viewpoint." Part I.A provides a brief history of the development of race-based affirmative action in the United States and addresses certain pro-affirmative action arguments as they relate to the benefits of diversity. Part I.B then describes such views as they relate to expanding traditional standards of merit.

### A. Brief History of Affirmative Action

The term "affirmative action" as it relates to race discrimination was first used in 1961<sup>47</sup> when President John F. Kennedy issued Executive Order 10,925,<sup>48</sup>

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Thomas of Columbia University School of Law illustrated, Thomas's qualifications for the court were often framed in terms of his rise from poverty and against discrimination. See Kendall Thomas, *Strange Fruit*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 380 (Toni Morrison ed., 1992) (quoting Senator John Danforth as stating "'Nobody here was born black in the segregated South. Nobody here was raised in a shack for 7 years without plumbing, in a broken home. Nobody knows that. Nobody has experienced that. Clarence Thomas has.'").

44. See Neal Devins, *Adarand Constructors, Inc. v. Pena and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673, 679, 690–91 (1996) (noting that, during the first Bush administration, forces favoring affirmative action dominated); Emmanuel O. Iheukwumere & Phillip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 TEMP. POL. & CIV. RTS. L. REV. 1, 10 (2001) ("Although Reagan's successor, George Bush, promised 'a kinder, gentler presidency,' White House opposition to affirmative action continued unabated during his administration.").

45. 539 U.S. 306 (2003).

46. George W. Bush, Presidential Debates in St. Louis, Missouri (Oct. 17, 2000), <http://www.debates.org/pages/trans2000c.html>.

47. The term had previously been used in the National Labor Relations Act of 1935, which authorized the NLRB to provide "affirmative action" remedies, such as reinstatement of

which required that any contractor with a federal contract of \$10,000 or more “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, or national origin.”<sup>49</sup> Although the term “affirmative action” was first linked to racial discrimination in President Kennedy’s 1961 executive order, its creation was actually part of a long line of executive orders that were intended to expand employment opportunities for Blacks.<sup>50</sup> Such efforts to improve job opportunities for Blacks began twenty years earlier with President Franklin Roosevelt’s issuance of Executive Order 8802<sup>51</sup> in 1941, which was promulgated in response to the demands of black labor leaders.<sup>52</sup>

Thus, when President Lyndon Johnson expanded the policy of affirmative action by issuing the famous Executive Order 11,246,<sup>53</sup> the environment was ripe for the new order’s procedures.<sup>54</sup> Eventually, by the mid-1960s and early 1970s, affirmative action had spread into the educational arena.<sup>55</sup> Soon, with Executive Order 11,246 and certain other regulations permitting the use of voluntary policies in the absence of prior discrimination,<sup>56</sup> forward-looking affirmative action programs developed across the nation and eventually evolved into policies that consciously acknowledged race and gender in an effort to increase minority and female participation in contracting, employment, and education.<sup>57</sup>

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employees in the event of unfair labor practices by management. M. ALI RAZA ET AL., *THE UPS AND DOWNS OF AFFIRMATIVE ACTION PREFERENCES* 8 (1999); see also West, *supra* note 2, at 612–13.

48. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

49. *Id.*

50. See RAZA ET AL., *supra* note 47, at 7.

51. Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941).

52. See *The Executive Order Program*, 84 HARV. L. REV. 1275, 1280 (1971).

53. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sep. 24, 1965).

54. See Robert M. Berdahl, *Policies of Opportunity: Fairness and Affirmative Action in the Twenty-First Century*, 51 CASE W. RES. L. REV. 115, 117 (2000) (“Linked to the provision of equal opportunity, affirmative action was meant to counterbalance the many years in which equal opportunity had been denied to African-Americans by many forms of institutionalized racism.”); Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1159, 1161–63 (1996) (discussing the various goals of affirmative action).

55. See West, *supra* note 2, at 619; Swink, *supra* note 35, at 214–15.

56. See, e.g., 45 C.F.R. § 80.3(b)(6)(ii) (1973) (“Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.”).

57. See Susan Low Bloch, *Looking Ahead: The Future of Affirmative Action*, 52 AM. U. L. REV. 1507, 1507 n.3 (2003). For example, in 1970, the Department of Labor required employers with fifty or more employees to create timetables and establish goals for hiring minority workers. See *id.* But see Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL’Y REV. 402, 405–11 (1987) (arguing why goals and timetables will not end employment discrimination).

Moreover, these programs were recognized and upheld by the Supreme Court in cases such as *United Steelworkers of America v. Weber*.<sup>58</sup> In *Weber*, a group of white plaintiffs challenged a voluntary affirmative action program that was a hybrid remedial and forward-looking program in that it was adopted to eliminate traditional patterns of racial segregation but not any particular discrimination by the employer itself.<sup>59</sup> The program required that fifty percent of all openings in "in-plant" craft training programs be reserved for Blacks until the percentage of black craft-workers was commensurate with the percentage of Blacks in the local labor force.<sup>60</sup> The plaintiffs alleged that the program discriminated against them in violation of Title VII because it placed an unfair burden on Whites.<sup>61</sup> The Supreme Court, however, rejected their claims.<sup>62</sup> In so doing, the Court asserted:

It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.<sup>63</sup>

Just one year earlier in *Regents of University of California v. Bakke*,<sup>64</sup> the Supreme Court, through Justice Powell's decision, explicitly recognized one of the benefits of forward-looking affirmative action in education when it described the gains that could be garnered from a diverse body of students who could bring varying perspectives based upon their backgrounds.<sup>65</sup> In that case, Alan Bakke, a white male in his thirties, filed a lawsuit against the University of California at Davis Medical School, alleging that the school's admissions policy was unconstitutional under the Equal Protection Clause because it reserved certain seats in its entering class for minority students,<sup>66</sup> thereby causing his rejection by the medical school.<sup>67</sup> In the end, the Court, with a fifth vote from Justice Powell, upheld the lower court's decision to

58. 443 U.S. 193 (1979).

59. *See id.* at 201.

60. *See id.* at 199, 208.

61. *See id.* at 197-201.

62. *See id.*

63. *See id.* at 204. In *Johnson v. Transp. Agency of Santa Clara County*, 480 U.S. 616 (1987), the Supreme Court later upheld a voluntary affirmative action program, which included women.

64. 438 U.S. 265 (1978).

65. *Id.* at 321-22 (including in Justice Powell's Appendix the Harvard College Admissions Program description, which stated that "[t]he belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions"); *see also* Karst, *supra* note 2, at 60 (asserting that the Powell opinion "[j]ustified the consideration of race as one factor in a public university's admissions process designed to produce diversity in its student body for educational purposes").

66. *Bakke*, 438 U.S. at 276-78.

67. Bakke had applied to twelve medical schools, including the University of California-Davis. *See* Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981, 985-86 (1999). Bakke was rejected by all twelve schools. The next year Bakke focused his energies on Davis alone. *Id.*

admit Bakke into medical school.<sup>68</sup> At the same time however, the Court, also with Powell's vote, overturned the lower court's prohibition on race consciousness.<sup>69</sup> Asserting that it was not necessary to set aside a certain number of seats to obtain a racially diverse student body,<sup>70</sup> Justice Powell proclaimed that schools could use race to obtain a more diverse entering class.<sup>71</sup> In so doing, he quoted from a catalogue of Harvard College, noting that, "[a] farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer."<sup>72</sup>

As time progressed and challenges to non-remedial affirmative action programs flourished,<sup>73</sup> proponents of affirmative action articulated numerous other benefits of non-remedial policies, expounding upon the principles of diversity and cross-racial understanding that Justice Powell expressed in *Bakke*.<sup>74</sup> These precepts are practically limitless and include factors such as the preparation of persons for work

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68. *Bakke*, 438 U.S. at 320; see also Susan Welch & John Gruhl, *Does Bakke Matter? Affirmative Action and Minority Enrollments in Medical and Law Schools*, 59 OHIO ST. L.J. 697, 702 (1998) (asserting that "Powell provided the fifth vote for one issue from each bloc [of Justices on the Court], and his opinion became the controlling opinion").

69. *Bakke*, 438 U.S. at 319–20; see also Kim Forde-Mazrui, *Will Affirmative Action Survive?*, LEGAL TIMES, June 17, 2002, at 24 (stating that Justice Powell concluded that "some attention to race was constitutional to achieve a diverse student body").

70. *Bakke*, 438 U.S. at 316.

71. *Id.* at 314–15; see also Adrien Katherine Wing, *Race-Based Affirmative Action in American Legal Education*, 51 J. LEGAL EDUC. 443, 444 (2001) (asserting that Powell's opinion held "that race could be a plus factor in admissions").

72. *Bakke*, 438 U.S. at 316 (emphasis added); see also *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003).

73. Within the past ten years, numerous interest groups have mounted an attack against voluntary affirmative action programs in the courts. See Swink, *supra* note 35, at 211 (declaring that "affirmative action is under the most serious attack it has endured in decades"); Carla D. Pratt, *In the Wake of Hopwood: An Update on Affirmative Action in the Education Arena*, 42 HOW. L.J. 451, 451 (1999) (noting that opponents of affirmative action have been waging war on the policy in the courts). The attack has also occurred outside of the courtroom, and the bases of these attacks range from claims of reverse discrimination to the imposition of damaging stigma on minority students to claims regarding the unfair admission of unqualified students. In 1996, Ward Connerly, then a Regent of the University of California, rallied Californians to vote for Proposition 209, which prohibited the use of racial preferences in public employment, education, and contracting. Connerly and his followers have also targeted other states, such as Michigan. See Susan E. Eckes, *Race Conscious Admissions Programs: Where Do Universities Go from Gratz and Grutter?*, 33 J.L. & EDUC. 21, 55 (2004) ("In response to the U.S. Supreme Court *Grutter* case, Ward Connerly and other conservative activists plan to sponsor ballot initiatives, similar to that of California's Proposition 209, which bans racial preferences. In addition to Michigan, Connerly hopes to have three or four such ballot measures on state ballots by November 2004. As it stands, the *Grutter* decision has no direct effect on California's public colleges or universities because of Proposition 209. The state of Washington has passed a similar measure."); Pratt, *supra*, note 73 at 460 (describing the success of anti-affirmative action initiatives in California and Washington); see also Wing, *supra* note 71, at 446–47 (same).

74. See *Bakke*, 438 U.S. at 316–26.

and leadership in an increasingly diverse society,<sup>75</sup> enhanced performance and learning through the inclusion of all people,<sup>76</sup> confidence in the integrity of educational institutions and workplaces,<sup>77</sup> the negation of racial labels about “minority” jobs or roles,<sup>78</sup> the defeat of racial stereotyping about the existence of a monolithic minority viewpoint through an exposure to intraracial diversity of opinion,<sup>79</sup> an expansion of traditional standards of merit,<sup>80</sup> compensation for wrongful

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75. See Karst, *supra* note 2, at 60, 66–68 (reporting that the Supreme Court reasoned that the “inclusion of substantial numbers of minority students in the universities is a matter of compelling importance . . . because the universities are gateways to leadership in American institutions” and stating that “valuing diversity has helped the bottom line”); see also *Grutter*, 539 U.S. at 330 (citing Brief of Amici Curiae for American Educational Research Association et al. at 3, *Grutter*, 539 U.S. 306 (No. 02-241)) (noting that “numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals’”).

76. See Karst, *supra* note 2, at 67 (describing the use of affirmative action in the armed services and noting that “the inclusion of minority officers in all levels of the officer corps” improved the services’ performance). See generally Patricia McKeown, *Diversity in the Workplace: What Does It Mean for Your Bottom Line?*, WISC. LAW., Apr. 1994, at 10–11 (“The diversity experts, major law firms across the country and corporate law departments all say the same thing: it’s time to wake up and smell the bottom line. Diversity isn’t just a nice idea. It’s becoming an issue of competitiveness, with the most diverse firms getting the edge in an increasingly diverse marketplace.”); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. L.J. BUS. & FIN. 85, 90–131 (2000) (arguing that diversity can be managed to enhance productivity and that the business community has taken the lead in this effort); see also Chander, *supra* note 2, at 165–77 (arguing that the reasons why the law protects minority shareholders are also the reasons why the law should sometimes promote affirmative action for minority races). But see Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351, 363 (2004) (deconstructing the shareholder wealth argument as it applies to diversity and affirmative action and explicating the dangers in “founding a racial agenda on nonracial values”); David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”*: *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1559 (2004) (arguing that “there are also good reasons to believe that black lawyers who maintain a normative understanding of diversity that goes beyond corporate self-interest may also have important advantages in building a credible ‘business case’ for diversity in their own careers”).

77. *Grutter*, 539 U.S. at 332 (“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.”).

78. See Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 10 ASIAN L.J. 127, 134 (2003) (asserting that “[a] further harm of segregation and underrepresentation is the perpetuation of detrimental stereotypes, continuing the myth that certain groups are inherently incapable of attaining certain accomplishments or performing certain jobs”). See also Devon W. Carbado & Mitu Gulati, *What Exactly Is Racial Diversity?*, 91 CAL. L. REV. 1149, 1155 (2003) (same). Cf. Brief of Amicus Curiae of American Federation of Labor & Congress of Industrial Organizations in Support of Respondents, *Grutter* (No. 02-241), *Gratz* (No. 02-516) (providing social science evidence to show that students who attend diverse schools are less likely than others to think in terms of racial stereotypes).

79. See Cynthia Estlund, *Taking Grutter to Work*, 7 GREEN BAG 215, 220 (2004) (translating the arguments in *Grutter* to the corporate context and asserting that “cooperation

injuries caused by societal discrimination,<sup>81</sup> a greater likelihood that historically disadvantaged groups will receive needed services and donations because individuals tend to be most charitable to members of their own racial and ethnic groups,<sup>82</sup> an increased number of role models for all young people, especially minorities,<sup>83</sup> and an acknowledgement and understanding that merit can be defined in various ways.<sup>84</sup>

### *B. The Benefits of Diversity*

Although, as noted above, numerous arguments have been articulated in favor of affirmative action, the hallmark of most forward-looking affirmative action policies is diversity. The importance of achieving diversity through affirmative action has been repeatedly detailed in numerous articles and books<sup>85</sup> and, most recently, in

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among diverse co-workers builds interpersonal bonds, combats stereotypes, and promotes understanding and empathy across racial lines"); Karst, *supra* note 2, at 71 ("Sustained daily association with another person in carrying out a joint task takes you beyond the point where you look at that person and see nothing but a racial or ethnic label; as you become well-acquainted with the whole person, the label fades. And when this sort of interaction is multiplied across more and more individuals' experience, the labels will lose their importance on a larger scale.").

80. See Kenneth L. Karst & Harold W. Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 963–70 & *passim* (1974) (arguing that the idea of merit is not self-defining and is not limited to only certain types of past performance).

81. See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 865 (1995) (analyzing corrective justice as a rationale for affirmative action).

82. See Paul Brest, *Some Comments on Grutter v. Bollinger*, 51 DRAKE L. REV. 683, 683–86 (2003) (stating that individuals tend to give to organizations that support "groups with which they identify on the basis of characteristics such as race, ethnicity, and religion"); see also Brest & Oshige, *supra* note 81, at 867–72 (same).

83. See Chen, *supra* note 78, at 134 ("[D]iversity provides role models for those historically excluded. It can provide a source of hope and inspiration for those who would otherwise limit their horizons and aspirations."). See also Chemerinsky, *supra* note 54, at 1165–66 (same); Angela I. Onwuachi-Willig, *Bird Creates Buzz About Race in the NBA: The Importance of Role Models is Evident Even in Pro Basketball Careers*, SACRAMENTO BEE, Jul. 6, 2004, at B7 (discussing the need for role models in sports and schools). The Supreme Court has rejected the "role model" argument as a basis for using race in layoffs. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). In dissent, Justice Stevens argued in favor of the constitutionality of a program that worked to provide an integrated faculty, asserting that there is "a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason." *Id.* at 316 (Stevens, J., dissenting) (emphasis in original).

84. See Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 214–24 (2003) (urging a re-evaluation of admissions choices).

85. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); Brest, *supra* note 82, at 683–85 (discussing why diversity is important to legal education); Kevin R. Johnson & Angela Onwuachi-Willig, *Rollin' on the River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools"*, 11 AFR.-AM. L. & POL'Y REP. (forthcoming 2005) (manuscript at 5–9, on file with Author).

the Supreme Court's decision, *Grutter v. Bollinger*.<sup>86</sup> As previously mentioned, the pronounced benefits of diversity are manifold, including enhanced knowledge and learning among participants of differing backgrounds because of exposure to diverse perspectives,<sup>87</sup> an increased ability to work and live with persons of different backgrounds,<sup>88</sup> the destruction of racial stereotypes about intellectual capacity and viewpoints,<sup>89</sup> and recognition that merit can be defined in many ways.<sup>90</sup>

In defending affirmative action, proponents contend that interracial diversity is critical in promoting understanding across racial lines because it helps to ensure meaningful representation of people who belong to marginalized racial groups and who may bring perspectives that persons outside of their group may not hold.<sup>91</sup> Such diversity, these supporters contend, enables individuals to empathize with people who are different than they are and to relate to them in a way that one can only relate to another person in the flesh.<sup>92</sup> After all, when people interact regularly across racial lines, they learn to appreciate their similarities and differences,<sup>93</sup> and they learn to

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86. 539 U.S. 306, 325 (2003) (“[T]oday we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”).

87. See Expert Report of Patricia Gurin: Summary and Conclusions, *Grutter* (No. 97-75928), available at <http://www.umich.edu/~urel/admissions/legal/expert/summ.html> (asserting that “[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills”).

88. See Karst, *supra* note 2, at 60 (noting that an educational advantage of student diversity is “the preparation of graduates for a society and a work force that are growing more and more diverse”).

89. See Swink, *supra* note 35, at 211 (stating that learning with “people from different walks of life and diverse backgrounds . . . helps [to] destroy racial stereotypes and animosity”).

90. See Guinier, *supra* note 84, at 134 n.87 (noting that there are many ways to define merit and that “[m]erit is contextual and a function of institutional mission”).

91. See Carbado & Gulati, *supra* note 78, at 1158–61 (detailing how a person’s viewpoint is influenced by racial identity and how diversity may shape the content of discussions); see also *Grutter*, 539 U.S. at 319 (same).

92. See Chemerinsky, *supra* note 54, at 1163 (stating that discussions about race and affirmative action in his constitutional law class were vastly different when a significant number of minorities were present and that his “students learned more and benefited more from the discussion when minority students were present”); see also *Bakke*, 438 U.S. at 312 n.48 (quoting President William Bowen of Princeton University) (“[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, ‘People do not learn very much when they are surrounded only by the likes of themselves.’”).

93. See Brest, *supra* note 82, at 685 (arguing that “[a] class drawn from various backgrounds allows students to appreciate commonalities as well as differences among their classmates, and to learn to communicate across racial boundaries”).

communicate and work across socially constructed racial boundaries.<sup>94</sup> Moreover, prejudice against and the alienation of certain racial minorities can be reduced,<sup>95</sup> and stereotypes about the abilities of certain groups or their belonging are more easily defeated when there is increased interaction among people of various races.<sup>96</sup> For example, students who are exposed to competent minority teachers are less likely to hold onto negative stereotypes not only about the intellectual capacities of minority teachers but also about their minority peers.<sup>97</sup> In fact, some studies have demonstrated that the recruitment of women and minorities under affirmative action programs has, in various instances, helped to reduce the beliefs of certain white men in the inferiority of other groups.<sup>98</sup>

Additionally, racial and ethnic diversity serves as a constant reminder of the need to be inclusive in all aspects of life.<sup>99</sup> As Dr. Patricia Gurin explained on behalf of the University of Michigan in *Grutter*, students who are educated in racially and ethnically diverse educational environments are also more likely to interact with a diverse group of friends, live in diverse neighborhoods, and work in diverse places of employment.<sup>100</sup> In other words, not only do students in integrated schools gain new perspectives on particular issues from their peers and learn how to co-exist with different people as a result of diversity, but students and workers in diverse environments also better learn how to interact with clients and constituencies that are becoming increasingly more diverse within our global society.<sup>101</sup>

94. See Brest & Oshige, *supra* note 81, at 862 (exploring the rationales for affirmative action and how they apply to different racial groups).

95. *Id.* at 863.

96. See Carbado & Gulati, *supra* note 78, at 1155–56 (describing how diversity disrupts negative social meanings about race).

97. See Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 329 (2002) (“When non-minority students were not exposed to outstanding minority teachers, they too easily harbored distorted views of minority students as intellectually deficient. Likewise, some nonminority faculty had confused views of minority students, because they had had no occasion to work with minority peers of equal standing in the profession.”). Cf. Alice M. Noble-Allgire, *In Pursuit of Justice Powell’s Vision: Diversity-Conscious Admissions Is Just the First Step*, 14 BERKELEY LA RAZA L.J. 255, 272 (2003) (asserting that a “lack of diversity on the faculty sends a powerful, unspoken message about who is entitled to . . . respect and authority within the law school and within the legal profession as a whole”).

98. See Brest & Oshige, *supra* note 81, at 870–71 (referring to a study of the California Parks and Recreation Department) (citation omitted).

99. See Carbado & Gulati, *supra* note 78, at 1154 (“Racial diversity has the potential to facilitate inclusion.”); Chen, *supra* note 78, at 134 (noting how diversity helped the ACLU broaden its agenda to include “the rights of women, gays and lesbians, and language minorities”).

100. See Gurin, *supra* note 87 (“Students educated in diverse settings are more motivated and better able to participate in an increasingly heterogeneous and complex democracy. . . . Students with the most diversity experiences during college had the most cross-racial interactions five years after leaving college.”).

101. See Estlund, *supra* note 79, at 220 (“Where diversity is a given among the multiple constituencies with which a firm’s employees interact—suppliers, contractors, customers, and employees scattered throughout the far-flung units of a global enterprise—the experience of working with diverse co-workers will prepare employees to deal more effectively

Finally, in addition to improving cross-racial understanding, proponents of affirmative action assert that meaningful diversity assists in breaking down racial stereotypes because it forces people to learn that there is no “‘minority viewpoint’ but rather a variety of viewpoints among” minorities.<sup>102</sup> In so doing, it teaches majority and minority members alike that not all people of the same race think or act the same. Moreover, it helps to display the range of political thought among racial minorities and within each racialized group<sup>103</sup> and helps to enrich understanding of issues by ensuring the representation of numerous voices.<sup>104</sup> Indeed, this argument in favor of affirmative action supports a central tenet of Critical Race Theory that there is not just one voice, but many voices that should be valued in society.<sup>105</sup> More importantly, as many race scholars have argued, this rationale recognizes the need for including many voices within legal discourse, including many voices of color.<sup>106</sup>

### C. *Re-Parameterizing Traditional Standards of Merit*

As well as outlining the benefits that flow from diversity, proponents of affirmative action also point to the way in which the policy helps schools and businesses focus on what is relevant in predicting performance,<sup>107</sup> or more importantly, in helping these places fulfill their educational and workplace missions.<sup>108</sup>

with those constituencies.”); cf. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585–602 (1990) (detailing the dangers and disadvantages in not including the voices of women of color in feminist legal theory).

102. *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003) (quoting Dean Kent Syverud of Vanderbilt University Law School).

103. *Id.*

104. See 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).

105. See John A. Powell, *A Minority-Majority Nation: Racing the Population in the Twenty-First Century*, 29 FORDHAM URB. L.J. 1395, 1413–14 (2002) (noting that a “need exists to theorize about the relationship between groups of color and methods of giving their lived experience voice” but maintaining that the black-white paradigm can be useful in exploring the subordination of all people); see also Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5 (2004) (forthcoming 2005) (manuscript at 8–12, on file with Author).

106. Cf. Juan F. Perea, *The Black White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213, 1219–53 (1997) (asserting that it is critical for discussions on race to extend beyond the black/white binary).

107. See CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 101 (1997) (“[M]erit should include the talents of those without privilege. . . . A good affirmative action plan broadens the definition of qualification, expanding the pool of talent available for any given opportunity.”). Cf. 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 important for the education the test takers seek).

108. See Guinier, *supra* note 84, at 160, 194–97 (arguing that structural mobility “focuses society’s educational resources on those who are most likely to fulfill the aims of democracy”).

In essence, the use of affirmative action and the performance of its beneficiaries help to demonstrate that individual merit itself is not self-defining<sup>109</sup> and is not limited to any particular category of standards.<sup>110</sup> As Justice Powell himself acknowledged about Harvard College's program in *Bakke*, affirmative action can direct a place to consider a broad range of qualities in determining merit, including "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important."<sup>111</sup> In sum, affirmative action may ensure that the characteristics sought in prospective applicants for schools and jobs truly predict whether those individuals will make the kinds of contributions that the institutions want them to make by creating a space in which other important factors, such as an individual's efforts in overcoming significant socioeconomic obstacles, can be considered in the selection process.<sup>112</sup>

The expansion of merit standards in affirmative action programs uncovers the fiction of a truly meritorious system.<sup>113</sup> As several scholars have argued, merit is not a race-neutral concept,<sup>114</sup> but rather a set of standards in any particular context where decision-makers have deferred to "social preferences about what constitutes value and how that value is produced."<sup>115</sup> In many instances, traditional "merit standards were developed by dominant social groups, in ways that [were intended to] disproportionately benefit[] their descendants."<sup>116</sup> For example, Professor Daria

109. See Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 582 (2002) (acknowledging that merit can have many meanings).

110. See Karst, *supra* note 2, at 62 n.8 (arguing that merit should be defined as potential fulfillment of social needs).

111. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978).

112. See Lani Guinier, *Confirming Action*, 25 LAW & SOC. INQUIRY 565, 572–75 (2000) (stating that a Michigan study has confirmed that affirmative action is "a better method for identifying qualified lawyers than conventional techniques" and forces a school to consider what it "is attempting to do when it then educates or trains the applicant who becomes a student").

113. *Id.* at 565 (arguing that a generational study on the careers of University of Michigan Law School Graduates revealed "that conventional test-based admission policies both mask and support deep flaws in the way we allocate opportunity and privilege").

114. Guinier, *supra* note 84, at 121 (asserting that current normative conceptions of merit are arbitrary); Banks, *supra* note 35, at 1034 (noting that "[m]erit is necessarily defined with respect to particular contexts, goals, and values").

115. Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1454, 1473 (1998) (highlighting the fact that "for merit to do the job of rewarding ability and creating social value (and thereby displace bias), it must depend on and defer to subjective, arbitrary, status-oriented, culturally-specific definitions of 'social value'"). See also Guinier, *supra* note 84, at 134 (same); PATRICIA A. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 98–99 (1991) (same).

116. Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1718, 1721 (asserting that "[m]erit is what the victors impose"). See also Roithmayr, *supra* note 115, at 1475–94 (examining the history of law school admissions to prove that merit standards are the result of subjective, race-conscious preferences for particular kinds of abilities).

Roithmayr has revealed through a study of the history of law school admissions exactly how powerful individuals in the dominant group developed subjective social standards of merit for the purpose of excluding immigrants and Blacks from the legal profession.<sup>117</sup> Specifically, Professor Roithmayr demonstrated how a direct effort to exclude Blacks, Latinos, and Eastern and Southern Europeans spawned the creation of the American Bar Association, “selective institutions,” and aptitude tests and also shifted American legal education from one based on practical experience to one based on abstract legal reasoning.<sup>118</sup> Indeed, as was detailed in Professor Roithmayr’s article, such efforts proved extremely successful in locking out minorities from the legal profession, even though small numbers of minorities had previously succeeded in those jobs.<sup>119</sup> For example, although in 1900 the state of Mississippi had twenty-four black lawyers and South Carolina had twenty-nine, after more than forty years of changes designed to exclude racial minorities from the law, those numbers had dropped to three and five, respectively, by 1940.<sup>120</sup>

Finally, as many proponents of affirmative action have asserted, traditional merit standards should be reevaluated, not only because they are often based on biased social factors and values, but also because they do not correlate highly with an individual’s success in a particular field.<sup>121</sup> For example, a recent study at an elite law school disclosed that the LSAT explained only fourteen percent of the difference in first-year grades.<sup>122</sup> Likewise, scholars Richard Lempert, David Chambers, and Terry Adams discovered in their study of graduates of the University of Michigan Law School that traditional factors, such as LSAT scores, had almost no relation to measures of post-law school success for minority students who were admitted in part because of affirmative action.<sup>123</sup> In fact, the authors found that after graduation such minority students paralleled their white peers in advancement to positions of responsibility and in satisfaction with their careers, and outperformed their white peers in terms of service to and giving back to the community, another frequently cited benefit of affirmative action.<sup>124</sup> In sum, these studies support what this Article refers to as the need for a “re-parameterization” of merit standards by revealing the weaknesses

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117. See Roithmayr, *supra* note 115, at 1475–94.

118. See *id.*

119. See *id.* at 1483–84.

120. See *id.* at 1484.

121. See Sturm & Guinier, *supra* note 107, at 969.

122. See *id.* at 971 (referring to a study completed at the University of Pennsylvania Law School); see also William C. Kidder, *The Rise of Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 187 (2000) (asserting that the LSAT predicts sixteen percent of the difference).

123. David L. Chambers 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); see also Richard Delgado, *Official Elitism or Institutional Self Interest: 10 Reasons Why UC-Davis Should Abandon the LSAT (And Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS. L. REV. 593, 598 (2001) (asserting that the LSAT does not test all relevant skills and also measures some that are irrelevant).

124. Chambers et al. *supra* note 123, at 443–47, 453–59, 468–503; see also Richard Lempert et al., *Myths About . . . Affirmative Action*, ARIZ. ATT’Y, Oct. 2001, at 27–29 (contradicting five myths of affirmative action with the results of their empirical investigation).

in factors that have been traditionally used for admission and hire. Much like scientists might change the parameters used to model a complex system when it is discovered that the old model does not appropriately describe its behavior, we must begin to re-parameterize the selection standards that we use for schools and jobs as we learn more about the failures of such standards.<sup>125</sup>

## II. ISN'T IT IRONIC?

And life has a funny, funny way of helping you out . . . helping you out.

—Alanis Morissette<sup>126</sup>

Many of the previously described arguments attach with equal force to judicial selections,<sup>127</sup> including when viewed in relation to Justice Thomas's life. This Part of the Article first considers how certain pro-affirmative action concepts apply to courts and the judicial selection process and then demonstrates how Justice Thomas's career, and even selected portions of his own dissent in *Grutter*, support the continuation of forward-looking affirmative action.

### A. *But All the Judges Are "Raced"*<sup>128</sup>

As noted above, many of the arguments regarding racial diversity in schools and workplaces can be transferred to a discussion of racial diversity on the bench.<sup>129</sup> For example, in the same way that interracial diversity in schools and in the workplace can promote cross-racial understanding and improve learning and performance due to differing perspectives, "[d]iversity on the bench can enrich judicial decision-making by including a variety of voices and perspectives in the deliberative process."<sup>130</sup> As

125. See *supra* note 24 and accompanying text (discussing the term "re-parameterize").

126. Alanis Morissette, *Ironic*, on JAGGED LITTLE PILL (Maverick/Warner 1995).

127. See Ifill, *supra* note 15, at 405–37.

128. The term "raced" means that the views and approaches of all judges are influenced in part by their race or races, just as they are by other factors, including but not limited to class, gender, and sexuality. Specifically, the term "raced" rejects the idea that Whites, unlike Blacks and other minorities, are neutral, objective, and uninfluenced by race. See Barbara J. Flagg, "Was Blind, but Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969–80 (1993).

129. See generally Johnson & Fuentes-Rohwer, *supra* note 105 (manuscript at 21–30); Ifill, *supra* note 15, at 405–37; Ifill, *supra* note 38, at 124–27 (asserting that racial minorities could seek to compel states to adopt affirmative action judicial selection plans).

130. Ifill, *supra* note 15, at 405; see also Ifill, *supra* note 38, at 99; see also LINN WASHINGTON, BLACK JUDGES ON JUSTICE: PERSPECTIVES FROM THE BENCH 83–84 (1994) ("Black judges also bring a perspective that is sorely lacking in their absence. They bring some perspective, some insight from a segment of the community that has simply gone unrepresented. This perspective is born out of an experience that one has had growing up in a Black community as opposed to a white community."). Judge Jerome Frank also once declared that men are not stripped of all their prejudices, biases, and influences simply because they are wearing a black robe and have taken the "oath of office as a judge." *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652–53 (2d Cir. 1943).

Chief Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit once explained, “it is inevitable that judges’ different professional and life experiences have some bearing on how they confront various problems that come before them.”<sup>131</sup> Thus, judges of all races will bring their understanding of people, human experience, and even their own experiences with race and the law to the bench with them.<sup>132</sup> Furthermore, Professors Sherrilyn Ifill, Kevin Johnson, and Luis Fuentes-Rohwer have argued that because the idea of pure judicial neutrality is a myth,<sup>133</sup> it is imperative that courts, including the Supreme Court, are comprised of individuals who represent a cross-section of the country—with differing views that are undeniably influenced by life experience.<sup>134</sup> According to Judge Damon Keith of the Sixth Circuit Court of Appeals, even Justice Thomas himself has acknowledged the importance of increasing the number of minority judges, once proclaiming, “we have to get more Blacks on the

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131. Edwards, *supra* note 97, at 325, 329 (also explaining that an assertion that racial diversity betters our system for justice is not the same as saying race routinely influences the decisionmaking of judges).

132. See Chen, *supra* note 78, at 136–38 (describing how one judge’s experience as a child watching his grandfather be humiliated because of limited English-speaking skills informed that judge’s understanding of language discrimination). Cf. 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”).

133. See Ifill, *supra* note 38, at 97 (noting that “[d]iversity efforts are [often] countered with the argument that judges are impartial and thus need not be representative of particular racial groups”). Cf. David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 542 (2003) (“When people are asked to describe themselves in a few words, [black] people invariably note their race and white people almost never do. Surveys tell us that virtually all [black] people notice the importance of race several times a day. White people rarely contemplate the fact of our whiteness—it is the norm, the given. It is a privilege to not have to think about race.”) (quoting Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604–05 (1999)); Ifill, *supra* note 15, at 424 (noting that Whites, in being considered the norm in society, have the privilege of seeing themselves as “neutral, unbiased, or impartial”).

134. See Johnson & Fuentes-Rohwer, *supra* note 105 (manuscript at 30–38) (analogizing judges to juries and arguing that, much like with diversity of juries, “pulling a group of judges from a cross section of the community may . . . benefit the decision-making process”). As Magistrate Judge Edward Chen of the Northern District of California, the first Asian Pacific American to be named to the federal bench in that district, once asserted, the federal bench is incredibly lacking in diversity. As of September 30, 2001, out of nearly 1,600 active federal judges, including Article III, magistrate, bankruptcy, and court of claims judges, only 7.2% were Blacks, 4.0% were Latino/as, 0.8% were Asian-Americans, 0.1% were Native Americans, and none were Pacific Islanders. See Chen, *supra* note 78, at 129 (noting that in “contrast, according to the 2000 census, African Americans were 12.3% of the U.S. population, Latinas/os were 12.5%, Asian Pacific Americans were 3.7%, and Native Americans were 0.9%”).

federal bench.”<sup>135</sup> In fact, in 1998, Justice Thomas proved his commitment to diversity on the bench when he, at the request of his friend Judge Keith, made important phone calls to Senators Orrin Hatch and Trent Lott to ensure the confirmation of U.S. District Judge Victoria Roberts, then a black female Clinton nominee whose nomination had been held up for a year by Republicans.<sup>136</sup>

More importantly, racial diversity on the bench can actually help to secure impartiality “by ensuring that a single set of values or views do not dominate judicial decision-making.”<sup>137</sup> Having judges of different races on the same court, especially on appellate courts where panels of judges decide cases, exposes each judge to different approaches and views on cases and can result in any one judge seeing an issue or point that the judge on his or her own may have disregarded. Indeed, such interaction may ultimately change the way in which a judge will vote and thus the outcome of a case.<sup>138</sup> In sum, racial diversity on the court enhances judicial deliberations not only because it increases the chance of bringing different perspectives to the courtroom, but also because it likely influences the scope and manner of discourse amongst judges.<sup>139</sup>

In fact, numerous studies have demonstrated how life experiences and the perspective from which a judge may analyze a case can affect his or her vote, particularly in non-unanimous cases.<sup>140</sup> For example, in one such study of federal

135. Wiley Henry, *Judge Thomas Weathers Protest Storm*, TRI-STATE DEFENDER, Aug. 5, 1998, at 1A (describing Judge Keith’s introduction of Justice Thomas at the National Bar Association Convention in 1998).

136. See Kevin Merida & Michael A. Fletcher, *Thomas’s Across-the-Aisle Aid Puzzles Even the Beneficiaries*, WASH. POST, Oct. 10, 2004, at A15; see also Merida & Fletcher, *supra* note 12 (stating that “Thomas has intervened or offered help on behalf of several stalled African-American judicial candidates” including Yale Law School classmate, Judge Eric Clay of the U.S. Court of Appeals for the Sixth Circuit).

137. Ifill, *supra* note 15, at 411. See also RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 94, 352–56 (2003) (“The nation contains such a diversity of moral and political thinking that the judiciary, if it is to retain its effectiveness, its legitimacy, *has* to be heterogeneous, and the members of a heterogeneous judicial community are not going to subscribe to a common set of moral and political dogmas that would make decisionmaking determinate.” (emphasis in original)).

138. See Chen, *supra* note 78, at 136–38. But see Darrell Steffensmeier & Chester L. Britt, *Judges’ Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749, 749 (2001) (finding that there were small sentencing effects based on the race of the judge and that there was also much similarity in sentencing practices, although black judges were more likely to sentence both white and black offenders to prison).

139. See Carbado & Gulati, *supra* note 78, at 1159 (“People with different racial identities have different experiences and thus view the world differently”); Edwards, *supra* note 97, at 329 (arguing that the presence of black judges changes our system of justice for the better). See also GERBER, *supra* note 10, at 6 (arguing that political preferences affect the jurisprudence of judges and asserting that “Justice Thomas’s acclimation period on the Supreme Court reveals . . . that judging and writing about judging are inherently political activities”).

140. See Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 601–10, 617 (2003) (describing several recent empirical studies concerning the effect of judges’ races on judicial decision-making but noting that “[i]n the majority of cases—many of which are routine and resolved by

appellate courts between 1981 and 1996, Nancy Crowe, a Radcliffe Institute Fellow at Dartmouth College, found that the race of a judge could affect how he or she voted on race and sex discrimination cases.<sup>141</sup> Overall, Crowe determined that black judges, because of the unique perspective they gain from experiences with racism,<sup>142</sup> are more likely to vote for plaintiffs than white judges in both race and sex discrimination cases.<sup>143</sup> Specifically, she found that black male judges are even more likely to vote for sex discrimination plaintiffs than white female judges.<sup>144</sup> Moreover, Crowe concluded that there were noticeable differences in the voting behavior of black and white judges in race discrimination cases, with black judges voting for plaintiffs ninety percent of the time, while white judges voted for plaintiffs only forty-one percent of the time.<sup>145</sup> Crowe, who also determined that partisanship played a strong role in judges' votes on race discrimination cases,<sup>146</sup> discovered that even black Republican judges were more likely to vote for a race discrimination plaintiff than a white male or female Democratic judge.<sup>147</sup> In essence, Crowe found that a judge's race and experiences with race could and did play a significant role in the way that a judge approached a case, interpreted issues, and, in some instances, reached a conclusion.<sup>148</sup>

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settlement—race and gender of the judge likely will not affect outcomes”). Cf. Edwards, *supra* note 97, at 329 (asserting that five to ten percent of cases can be categorized as hard and more likely to be influenced by a judge's personal views). This is not to say that minority judges are any less impartial than white judges; to say that a judge brings a different perspective to a case does not mean that a judge fails to follow the law. See *id.* at 328.

141. Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981–1996*, at 80, 83 fig.3.1 (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with the University of Chicago Library). But see Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 144–46 tbls.2–3 (2000) (studying pairs of Clinton appointees based on race and/or gender and finding no statistically significant difference between black and white Clinton district court appointees).

142. See Crowe, *supra* note 141, at 84 (“If African-American judges have experienced discrimination during their lifetimes, they may feel affinity for other victims of discrimination. . . . If the life experiences of African-Americans give them a unique perspective on discrimination, that perspective is apparently not limited to members of their own social group, it applies to others who find themselves similarly situated as well.”).

143. See *id.* at xiii, 80, 83 fig.3.1 (reporting that “85 percent of the votes by African-American judges were cast for plaintiffs, compared to 45 of the votes of white judges”).

144. See *id.* at 83 fig.3.1.

145. See *id.* at 137, 110–11, 114 fig.4.1.

146. See *id.* at 80, 83 fig.3.1 (finding, for example, that a white male Republican judge voted for the sex discrimination plaintiff only twenty-eight percent of the time, while a white male Democratic judge voted for the plaintiff seventy-six percent of the time, and that white male Democratic judges voted for race discrimination plaintiffs forty-nine percent of the time while white male Republicans judges voted for the plaintiff only twenty percent of the time).

147. Compared to black male Republican judges, who voted for the race discrimination plaintiff sixty percent of the time, white male Democratic judges voted for race discrimination plaintiffs only forty-nine percent of the time, and white female Democratic judges voted for the plaintiffs only slightly more at fifty-one percent. See Crowe, *supra* note 141, at 114 fig.4.1.

148. See *id.* at 80–84, 110–115, 83 fig.3.1, 114 fig.4.1.

Likewise, Professor David Oppenheimer conducted a study of California employment law cases that revealed how race, specifically that of the juror, judge, or plaintiff, can affect the outcome of a case.<sup>149</sup> Relying in part on previous studies conducted by Professor Michael Selmi,<sup>150</sup> Professor Oppenheimer determined that the fact that only 200 out of 1600 active federal judges were people of color played a role in the outcomes of discrimination cases tried between 1995 and 1997, verdicts in which plaintiffs had a success rate for plaintiffs of forty percent before a jury and only nineteen percent before a judge.<sup>151</sup> He further concluded that the fact that seventy-seven percent of all California Superior Court judges were white<sup>152</sup> ultimately influenced how cases were shaped before state juries,<sup>153</sup> which found for non-white plaintiffs in only thirty-six percent of all race discrimination cases as compared to fifty-three percent of all employment discrimination cases and in only twenty-five percent of race termination cases as compared to forty-seven percent of all termination cases.<sup>154</sup>

In addition to these studies, several Supreme Court Justices have noted the way that one's personal experience and attributes can influence judicial deliberations and decision-making.<sup>155</sup> For example, Justice O'Connor once expressed to a group of female visitors at the Court that having Justice Ginsburg on the Court made "a night and day difference" for her.<sup>156</sup> Furthermore, with respect to race, several Justices have remarked on the importance of the unique perspective that the late Justice Thurgood Marshall, the first racial minority to sit on the Court,<sup>157</sup> brought to the bench.<sup>158</sup> For

149. See Oppenheimer, *supra* note 133, at 513–17.

150. See Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001).

151. See Oppenheimer, *supra* note 133 at 558–59.

152. See *id.* at 558.

153. See *id.* at 558–59.

154. See *id.* at 542–43.

155. See Edwards, *supra* note 97, at 329 ("And in a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better-informed discussion. . . . A deliberative process enhanced by collegiality and a broad range of perspectives necessarily results in better and more nuanced opinions—opinions which, while remaining true to the rule of law, over time allow for a fuller and richer evolution of the law."). But see Crowe, *supra* note 141, at 141–42, 153–57, 156 fig.5.2 (strangely finding that the presence of a black judge on a panel had a "negative impact on the decision making behavior of white male judges in race discrimination cases, [as a] panel composed entirely of white males was more likely to rule for a race discrimination plaintiff than a panel that included one African American judge").

156. Crowe, *supra* note 141, at 1 (citation omitted). The visitors were the women on the United States Olympic Basketball Team for 1996. See *id.* Justice O'Connor said to them, "I can't tell you how happy I was when she [Justice Ginsburg] got to the court. It makes a night and day difference to have women on the bench." *Id.*

157. See Kevin R. Johnson, *On Appointment of a Latina/o to the Supreme Court*, 13 BERKELEY LA RAZA L.J. 1, 3 (2002) (noting that Thurgood Marshall was the first black Supreme Court Justice).

158. See, e.g., Julian Abele Cook, Jr., *Dream Makers: Black Judges on Justice*, 94 MICH. L. REV. 1479, 1484 (1996) (quoting Justice Harry Blackmun as describing the "precious quality that the black justice had brought to the Court . . . [as] Marshall was the only justice

example, Justice Lewis Powell once articulated how Justice Marshall's "unique contribution" to the court derived from his "direct experience with racial segregation in this country."<sup>159</sup> Additionally, in her tribute to Justice Marshall in the *Stanford Law Review*, Justice O'Connor described how the late Justice "profoundly influence[d]" her, a woman who prior to *Brown v. Board of Education*<sup>160</sup> had not been exposed to racial tensions and "had no personal sense . . . of being a minority in a society that cared primarily for the majority."<sup>161</sup> As O'Connor so vividly explained about the effect that Marshall had on the Court:

*Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice. At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.*<sup>162</sup>

Similarly, the late Justice Byron White described the impact that Justice Marshall's voice had on him as a jurist, noting:

*Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match. Thurgood could tell us the way it was, and he did so convincingly, often embellishing with humorous, sometimes hair-raising, stories straight from his own past. He characteristically would tell us things that we knew but would rather forget; and he told us that we did not know due to the limitations of our own experience.*<sup>163</sup>

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who had ever defended a murder suspect . . . [and] [h]e was the only justice who had defended and worked with so many poor women that he actually knew how they suffered financially, were pained emotionally, [and] often became psychological wrecks over knowledge that another baby was on the way" (internal citation omitted)).

159. BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT?: THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS 137–38 (1991) (citing an interview with Justice Powell in which he argued that diversifying the bench with previously excluded groups can bring new insights to the court).

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

161. O'Connor, *supra* note 41, at 1217.

162. *See id.* at 1217 (emphasis added).

163. Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 *STAN. L. REV.* 1215, 1216 (1992) (emphasis added); *see also* Johnson, *supra* 157, at 3 (quoting Justice Brennan as saying: "What made Thurgood Marshall unique as a Justice? Above all, it was the special voice that he added to the Court's deliberations and decisions. His was a voice of authority: he spoke from first-hand knowledge of the law's failure to fulfill its promised protections for so many Americans."); Anthony M. Kennedy, *The Voice of Thurgood Marshall*,

Even Chief Justice Rehnquist, who often found himself on the opposite side of Marshall, has cited the late Justice's "insightful perspective on key issues of our time" as a contribution to the Court.<sup>164</sup>

Apart from the influence of diversity among their colleagues, judges can also be significantly influenced by insights they may gain from racial diversity in their personal lives. In fact, Dean Peter Alexander of Southern Illinois University School of Law described a rather compelling story about such effects on Chief Justice Warren before the Supreme Court's decision in *Brown v. Board of Education*.<sup>165</sup> As Dean Alexander wrote in a speech presented as part of a commemoration of the fiftieth anniversary of *Brown*:

Sometime before the Court announced the first of the *Brown* decisions, Chief Justice Warren decided to go to Virginia to tour Civil War sites. His Black chauffeur drove him from Washington, D.C., to the various sites. At the end of the first day, he checked into a hotel and assumed that his driver would do the same. The next day, the Chief Justice found his driver in the car and learned that he had spent the night not in a hotel but in the car because he couldn't find accommodations for himself in segregated Virginia. Warren said of his reaction upon hearing this: "I was embarrassed, I was ashamed."<sup>166</sup>

No huge leaps are required to see that this cross-racial experience surely affected Chief Justice Warren, not only causing him to change his vacation plans by cutting his trip short and immediately returning to Washington, but perhaps his personal understanding of racism, for "[h]e had come as close as any White person could to the racial discrimination to which a Black man was commonly subjected and he did not like it."<sup>167</sup>

Although many persons may disagree with Justice Thomas's philosophies and opinions, his presence on the Court supports a continuation of forward-looking affirmative action in the sense that he too brings a diverse perspective to the Court due to his racial background.<sup>168</sup> In the same way that Justice Marshall brought a special

44 STAN. L. REV. 1221, 1221 (1992) (noting how Justice Marshall reminded the other Justices of their "moral obligation as a people to confront those tragedies of the human condition which continue to haunt even the richest and freest of countries"); cf. Ifill, *supra* note 15, at 448 (detailing how Justice Ginsburg claimed that "female justices would compel the men to '[l]ook at life differently'" (citing *Ruth Bader Ginsburg Sworn in as Supreme Court Justice* (CNN television broadcast, Aug. 10, 1993))).

164. William H. Rehnquist, *Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1213, 1213 (1992).

165. 347 U.S. 483 (1954). In *Brown*, the Supreme Court held that segregation of children in public schools solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment. See *id.* at 493–95.

166. Peter C. Alexander, *From Brown to Topeka to the Future*, 96 LAW LIBR. J. 219, 221 (2004).

167. *Id.*

168. See Onwuachi-Willig, *supra* note 1 (manuscript at 57–84) (demonstrating that Justice Thomas's jurisprudence on certain issues is steeped in black conservative thought, which has a history and foundation that are distinct from white conservatism). See generally

perspective to the Court based on his personal experiences with racism,<sup>169</sup> Justice Thomas (who, by the way, is well-known for citing great black leaders such as Frederick Douglass and W.E.B. DuBois in his opinions)<sup>170</sup> also brings a unique, black conservative perspective to the Court today.<sup>171</sup> Indeed, as Justice Powell once spoke of Thurgood Marshall, some of Justice Thomas's unique views stem from his experiences with racial segregation and discrimination.<sup>172</sup> In fact, much like Justice Marshall, Justice Thomas has shared during deliberations a philosophy on desegregation that has clearly been shaped by his own personal experiences in Jim Crow schools.<sup>173</sup> For example, during a conference on *Missouri v. Jenkins*,<sup>174</sup> a case in which the Supreme Court determined that a desegregation order designed to attract more students from the suburbs was beyond the remedial authority of the district court,<sup>175</sup> Justice Thomas passionately added:

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 [were] equal resources and an equal opportunity to make something of ourselves. . . . The evil of

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Mark Tushnet, *supra* note 24 (arguing that traces of black nationalism exist in Justice Thomas's opinions).

169. See Edwards, *supra* note 97, at 328 (“[B]lack judges may sometimes bring a unique vision to the judicial deliberative process. Because of the long history of racial discrimination and segregation in American society, it is safe to assume that a disproportionate number of blacks grow up with a heightened awareness of the problems that pertain to . . . areas of the law,” such as equal opportunity and discrimination, standing, and criminal law). Additionally, although there has never been a Latino/a, Asian-American, or Native American Justice on the Court, a nominee from any of these racialized groups would also likely bring a “special” perspective to the Court. See Johnson & Fuentes-Rohwer, *supra* note 105 (manuscript at 9–12); Johnson, *supra* note 157, at 2–3, 7–14 (discussing how a Latino/a Justice may bring new perspectives to the Supreme Court).

170. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting a speech Frederick Douglass delivered to a group of abolitionists); United States v. Fordice, 505 U.S. 717, 745 (1992) (Thomas, J., concurring) (quoting W.E.B. DuBois).

171. See Onwuachi-Willig, *supra* note 1 (manuscript at 57–84) (demonstrating that Justice Thomas's jurisprudence on certain issues is steeped in black conservative thought).

172. My comparison of Justices Marshall and Thomas is not to suggest that Justice Thomas's appointment or service on the Court has had the same impact as that of Justice Marshall, who could never be replaced. 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, Yale Law School Professor and former law clerk to Justice Thurgood Marshall, has said that “many people still will not forgive [Thomas] for not being Thurgood Marshall” and that “Thomas was never going to be able to fill the shoes of the distinguished civil rights lawyer”).

173. Cf. GERBER, *supra* note 10, at 198 (“Justice Thomas is . . . an especially fascinating example of the realist maxim that judges read their policy preferences into the law they are interpreting.”).

174. 515 U.S. 70 (1995).

175. See *id.* at 91–92.

segregation was that black students had inferior facilities, not that they were denied the chance to go to school with white students. . . . All my classmates and I wanted . . . was the choice to attend a mostly black school or mostly white school, and to have the same resources in whatever school we chose.<sup>176</sup>

While Justice Thomas was wrong to note that he was the only one to have attended a segregated school,<sup>177</sup> his perspective on segregated schools was certainly unique among the other Justices at the table, many of whom may have attended segregated schools, but not because of their entire race's perceived inferiority.<sup>178</sup> To that end, Justice Thomas's comments likely forced his peers to view the case from a different angle, thereby advancing one of the goals of affirmative action by shaping his colleagues' approach to a case and enriching the discussion of legal issues.<sup>179</sup>

Similarly, Justice Thomas brings to the Court a unique ideology on affirmative action, which has seemingly been influenced by his experiences at Yale Law School (whether consciously or unconsciously).<sup>180</sup> In the past, Justice Thomas openly discussed his feelings about the stigma he believed affirmative action caused for him at Yale, describing his days there as trying to get a "monkey" off his back because he believed that his classmates felt he was there only because of his race.<sup>181</sup> These same points about stigma have materialized in Justice Thomas's opinions on the Supreme Court. For example, in his concurring opinion in *Adarand Constructors, Inc. v. Pena*,<sup>182</sup> Justice Thomas referred to what he believed to be the policy's stigmatizing effects, claiming that affirmative action programs "stamp minorities with a badge of inferiority" and "engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race."<sup>183</sup>

Again, in *Grutter*, Justice Thomas reemphasized that he believed all minorities were considered undeserving because of affirmative action and asserted, perhaps thinking of how he has been perceived by much of the public,<sup>184</sup> that there is always an open question of whether skin color played a role in the advancement of any

176. Jeffrey Rosen, *Moving On*, NEW YORKER, Apr. 29 & May 6, 1996, at 66.

177. Of course, an all-white school is segregated, too.

178. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (internal quotations omitted) (noting that racial segregation is "usually interpreted as denoting inferiority of the [N]egro group" and this "sense of inferiority . . . has a tendency to [retard] the educational and mental development of [N]egro children").

179. See discussion *supra* Section I.A.

180. See Mary Kate Kearney, *Justice Thomas in Grutter v. Bollinger: Can Passion Play a Role in a Jurist's Reasoning?*, 78 ST. JOHN'S L. REV. 15, 32–35 (2004) (arguing that Justice Thomas's personal experiences with affirmative action are evident in his jurisprudence and that they strengthen his voice in the debate).

181. *Williams*, *supra* note 6, at 74.

182. 515 U.S. 200 (1995).

183. *Id.* at 241 (Thomas, J., concurring in part and concurring in the judgment).

184. See Onwuachi-Willig, *supra* note 1 (manuscript at 1–2 & nn.6–9) (stating that Thomas has repeatedly been described as lacking independent thought and has been referred to as Scalia's clone, puppet, and even "bitch").

high-achieving person of color.<sup>185</sup> In fact, much like Justice Marshall, Justice Thomas has not been shy about sharing his views on affirmative action during deliberations, which undoubtedly have somewhat shaped the Justices' discussions of these cases. For example, during deliberations on *Adarand*, Thomas used his personal experiences to appeal to his colleagues on the Court, discussing his life with his grandfather and stating "[my] grandfather had worked hard, . . . he never asked for handouts from the state. He hadn't made a great living, and his business had been restricted to black neighborhoods; but he had not needed affirmative action to get his contracts."<sup>186</sup>

Justice Thomas's unique perspective can also be observed in his opinions on redistricting and voting rights. For example, in *Holder v. Hall*,<sup>187</sup> Justice Thomas drafted a concurrence with a critical eye toward the role of race in drawing districting lines. In *Holder*, the Supreme Court held that a voting dilution challenge to a governing authority's size under section 2 of the Voting Rights Act of 1965 could not be maintained.<sup>188</sup> Justice Thomas, concurring in the judgment, argued that actions under the Voting Rights Act are restricted to eradicating practices that limit minority access to registering to vote and voting<sup>189</sup> and criticized what he referred to as the "destructive assumptions" behind supporting majority-minority districts.<sup>190</sup> Such assumptions, Thomas maintained, only result in what can be called "racial balkanization,"<sup>191</sup> further the stereotype that "members of the racial group must think alike," and emphasize "differences between candidates and voters that are irrelevant."<sup>192</sup> Justice Thomas further argued that such assumptions actually leave minorities susceptible to more harm because they ignore not only the individuality of each black voter but also the idea that a group of voters consisting of ten to twenty

185. See *Gutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part).

186. Rosen, *supra* note 176, at 66.

187. 512 U.S. 874 (1994).

188. *Id.* at 882–85.

189. *Id.* at 893–99 (Thomas, J., concurring in the judgment).

190. *Id.* at 894 (Thomas, J., concurring in the judgment).

191. *Id.* at 892, 905 (Thomas, J., concurring in the judgment) ("We have involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of 'political apartheid.' Blacks are drawn into 'black districts' and given 'black representatives'; Hispanics are drawn into Hispanic districts and given 'Hispanic representatives'; and so on.") (citing *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting)) (internal citations omitted).

192. *Id.* at 906 (Thomas, J., concurring in the judgment); *cf.* *Easley v. Cromartie*, 532 U.S. 234, 266–67 (2001) (Thomas, J., dissenting) ("[R]acial gerrymandering offends the Constitution whether the motivation is malicious or benign. It is not a defense that the legislature merely may have drawn the district based on the stereotype that blacks are reliable Democratic voters."). *But see* Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1229–45 (2003) (demonstrating through strong empirical evidence that Justice Thomas's opinions concerning the relationship between racial identity and politics are incorrect); Chemerinsky, *supra* note 54, at 1175 (recognizing that "groups often share common interests and goals" and arguing that "drawing election lines to create majority . . . districts recognizes that such individuals are both individuals and members of a group, and that group identity can matter").

percent of the electorate in a district can significantly influence an election, and because they destroy any need for coalition building across racial lines.<sup>193</sup> Moreover, Thomas contended, the assumptions work only to create white districts in which white representatives will not have to answer to minorities, actually diminishing minority power.<sup>194</sup> According to Justice Thomas, single-member majority-minority districts indicate only “‘how’ members of a minority are to control seats, but not ‘how many’ seats they should be allowed to control.”<sup>195</sup> In essence, for Thomas, such districts dilute rather than strengthen minority voting power because they concentrate such power in a few districts as opposed to spreading smaller but influential pockets of it across many districts.<sup>196</sup>

While no Justices have openly discussed the influence that Justice Thomas’s unique perspective may have had on them, his impact on the other Justices is becoming more noticeable. In fact, such impact was most evident in *Virginia v. Black*,<sup>197</sup> a case involving a constitutional challenge to a state statute that made it a felony “for any person . . . with the intent of intimidating any person or group . . . to

193. *Holder*, 512 U.S. at 900–01, 907 (Thomas, J., concurring in the judgment).

194. *Id.* at 907 (Thomas, J., concurring in the judgment) (“‘Black-preferred’ candidates are assured election in ‘safe black districts’; white-preferred candidates are assured election in ‘safe white districts.’ Neither group needs to draw on support from the other’s constituency to win on election day. As one judge described the current trend of voting rights cases: ‘We are bent upon polarizing political subdivisions by race. *The arrangement we construct makes it unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens.*’”) (quoting *United States v. Dallas County Comm’n*, 850 F.2d 1443, 1444 (11th Cir. 1988) (Hill, J., concurring) (emphasis added)).

195. *Id.* at 902 (Thomas, J., concurring in the judgment); see also *Reno v. Bossier Parrish Sch. Bd.*, 520 U.S. 471, 491 (1997) (Thomas, J., concurring) (“Such action necessarily decreases the level of minority influence in surrounding districts, and to that extent ‘dilutes’ the vote of minority voters in those other districts, and perhaps dilutes the influence of the minority group as a whole.” (emphasis in original)). In his movie *FAHRENHEIT 9/11*, (Lions Gate Films 2004), Michael Moore vividly displays the importance of actually having black faces in Congress. Moore’s film begins with a scene in which several minority members of the House of Representatives—eight black women, one Asian-American woman, and one black man—objected to the ratification of Bush’s election to President. To have Bush’s election debated, each objector needed a signature from just one senator. As Moore demonstrated, no senator provided the required signature. It is worth noting that no senators at that time were black. See *id.*

196. Stephen F. Smith, *The Truth About Clarence Thomas and the Need for Black Leadership*, 12 REGENT U. L. REV. 513, 547–48 (1999–2000) (defending Thomas’s philosophy on minority–majority districts); see also Carol M. Swain, *Not “Wrongful” by Any Means: The Court’s Decisions in the Redistricting Cases*, 34 HOUS. L. REV. 315, 320–21 (1997) (arguing that “minorities are in a win-win situation when they are positioned to influence more legislators than the handful they can elect when packed in oversized majority-minority districts”).

197. 538 U.S. 343 (2003).

burn . . . a cross on the property of another, a highway or other public place.”<sup>198</sup> During oral argument, Justice Thomas, who rarely speaks during such proceedings,<sup>199</sup> interrupted the attorney for the petitioner to express his understanding of a burning cross as having no purpose other than to “cause fear” and “to terrorize a population.”<sup>200</sup> Justice Thomas’s view was that of a black man who grew up in the Jim Crow South, with its history of lynchings and racial terrorism.<sup>201</sup> He asserted:

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?<sup>202</sup>

As many reporters noted, the mood of the argument changed after Justice Thomas’s dialogue with Dreeben.<sup>203</sup> As one commentator noted, “Thomas’[s] exasperated outburst changed the course of the debate, with several justices voicing agreement and acknowledging that cross burning in America is a unique symbol.”<sup>204</sup> For example, Justices O’Connor and Scalia, both of whom voted in favor of the constitutionality of the statute, made several comments following up on Justice Thomas’s analysis. For instance, Justice Scalia stated, “Yes. I dare say . . . [i]f you were a black man at night, you’d rather see a man with a rifle than see a burning cross on your front lawn. . . . The whole purpose of that is—to terrorize.”<sup>205</sup> Likewise, having earlier referred to the “reasons we’ve explored this morning” (meaning

198. *Id.* at 348; *see also* *Brief Amici*, *supra* note 21, at 97 (stating that “Justice Thomas’s perspective clearly altered the consideration of the case, and brought insights that were necessary to properly weigh the issues at stake”).

199. *See Cross Burning Case Draws Thomas’ Ire*, JET MAG., Jan. 6, 2003, at 26 (describing Justice Thomas as “[n]ormally stoic and silent during arguments”); 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”).

200. Transcript at Oral Argument at 21, *Virginia v. Black*, 538 U.S. 343 (2002) (No. 01-1107).

201. Lithwick, *supra* note 199, at A35 (noting that Justice Thomas “let loose with a personal accounting of what a burning cross means to a black man in America”).

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

203. *See, e.g.*, Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES, Dec. 12, 2002, at A1 (reporting that court’s “mood appeared to have changed” after Justice Thomas spoke).

204. Patty Reinert, *High Court Upholds Cross Burning Ban*, HOUS. CHRON., Apr. 8, 2003, at 01.

205. Transcript at Oral Argument at 28, *Virginia v. Black*, 538 U.S. 343 (2002) (No. 01-1107); Lithwick, *supra* note 199 (reporting the same). *But see* Guy-Uriel Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Critics?*, 93 GEO. L.J. (forthcoming 2005) (manuscript at 56 n.320, on file with Author) (“I cannot help but note that I do not know whether other black men (or black women) would rather see a (presumably white) man on their lawn at night with a rifle than one with a burning cross. But I do know that while this black man would prefer neither; if I must choose, I would take the burning cross. To the extent that the burning cross is a harbinger of things to come, the rifle is the real event.”).

Justice's Thomas's statements),<sup>206</sup> Justice O'Connor asserted, "[a]nd so the question before us is whether burning a cross is such a terrorizing symbol in . . . American culture that even on the basis of heightened scrutiny, it's okay to proscribe it."<sup>207</sup> Even Justice Ginsburg, who ultimately dissented from the majority and also from Justice Thomas's view, distinguished the cross from other symbols, declaring, "[b]ut the cross is not attacking the government. It's attacking people, threatening their lives and limbs. . . . I think you have to separate the symbol that is the burning cross from other symbols that are critical of government, but that don't—that aren't a threat to personal safety."<sup>208</sup> Similarly, Justice Souter, who drafted the dissent in the case, once asked Rodney Smolla, attorney for the respondents, "[b]ut . . . isn't your argument an argument that would have been sound before the cross, in effect, acquired the history that it has? . . . How does your argument account for the fact that the cross has acquired a potency which I would suppose is at least as equal to that of the gun?"<sup>209</sup>

In the end, the majority rejected Justice Thomas's view that laws prohibiting cross burning with the intent to intimidate target vicious conduct, and not speech.<sup>210</sup> But the Court did hold, however, that the Virginia statute constitutionally limited a form of expression that had posed an imminent threat of harm and that the statute did not discriminate on the basis of viewpoint because it restricted any form of cross burning, regardless of whom it targeted.<sup>211</sup> Moreover, it was clear that Justice Thomas's speech about cross burning as part of a "reign of terror"<sup>212</sup> had a profound impact on Justice O'Connor's opinion,<sup>213</sup> with the Court, as some have argued, rendering a decision that was at odds with its precedent<sup>214</sup> in *R.A.V. v. City of St. Paul*<sup>215</sup> and with O'Connor beginning the Court's opinion with an entire section

206. Transcript at Oral Argument at 29, *Virginia v. Black*, 538 U.S. 343 (2002) (No. 01-1107).

207. *Id.* at 34.

208. *Id.* at 46.

209. *Id.* at 30–31.

210. 538 U.S. at 394 (Thomas, J., dissenting) ("[T]his statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point.").

211. *Id.* at 363.

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

213. See Paul Brest, *Diversity Gives Depth to the Law*, L.A. TIMES, Jan. 3, 2003, at B13 ("While most white members of the Supreme Court understand the message conveyed by cross burning, reports of the recent oral argument in the cross-burning case suggest that the justices were given a new perspective after listening to Justice Clarence Thomas' passionate description from the bench.").

214. See Charles, *supra* note 205 (manuscript at 29–34) (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); Reinert, *supra* note 204, at 01 (asserting that the "decision appeared to conflict with the high's court's previous rulings").

215. 505 U.S. 377 (1992).

devoted to the historical meaning of cross burnings in the United States.<sup>216</sup> Clearly, Justice Thomas and his unique perspective impacted the way the other Justices approached the case, forcing them to view the cause of action from a different angle, even if they ultimately rejected his analysis.<sup>217</sup> By the same token, it is likely that other comments Justice Thomas has made during deliberations at the Court have had a similar impact on the manner in which his colleagues have discussed and analyzed other cases, thereby enhancing the judicial process<sup>218</sup> and again boosting one of the primary goals of forward-looking affirmative action.<sup>219</sup>

### *B. Voices Within*

In addition to buttressing pro-affirmative action arguments concerning the benefits of interracial diversity of perspective among judges, Justice Thomas's seat and performance on the Court also support pro-affirmative action claims regarding gains from non-minorities' exposure to *intra*racial diversity of perspective. Specifically, Justice Thomas's presence and conservative political views shatter any stereotypes about the existence of a monolithic minority viewpoint<sup>220</sup> and perceptions that minority judges are automatically biased against white litigants, a view that has led to many unfounded requests for recusal of black judges.<sup>221</sup>

Indeed, it is no secret that Justice Thomas's views on many issues that concern race are widely disparate from those of many Blacks, most notably the late Justice Marshall.<sup>222</sup> For the Justices who served on the bench during Justice Marshall's

216. *Virginia v. Black*, 538 U.S. at 352–59 (describing the history of the burning cross and the Ku Klux Klan in the United States); *see also* Charles, *supra* note 205 (manuscript at 45).

217. *See* Charles, *supra* note 205 (manuscript at 41–44) (arguing how the epistemic authority that Justice Thomas held as black man who could uniquely feel the harms of cross burning framed the disposition of *Virginia v. Black*).

218. *See supra* Part II.A & notes 133–36.

219. *See* discussion *supra* Part I.B.

220. *See* Chen, *supra* note 78, at 135 (noting that diversity in general helps to “dispel traditional stereotypes that Asian Pacific Americans and other minorities are not sufficiently intelligent, articulate, or decisive to be judges”); Edwards, *supra* note 97, at 327–28 (stating that “there is no overriding ‘black perspective’ on which black judges rely in their decision making”).

221. In the past, litigants have challenged the impartiality of minority judges where discrimination was at issue, a burden that black judges continue to face. *See, e.g.*, *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 2–4, 10 (S.D.N.Y. 1975) (involving a request for recusal of Judge Constance Baker Motley in a gender discrimination case against a law firm and the judge's response that “if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear the case, or many others, by virtue of the fact that all of them [are] attorneys, of a sex, often with distinguished law firm or public service backgrounds”); *Pennsylvania v. Local Union 542*, 388 F. Supp. 155, 165–79 (E.D. Pa. 1974) (concerning the request for a recusal of Judge Leon Higginbotham in a union discrimination case, where the judge declared that there was no conflict between impartiality and being black and expressing solidarity with one's community).

222. *See* Johnson & Fuentes-Rohwer, *supra* note 105 (manuscript at 9–12, 47–48, 50) (“Although both are African American, Thurgood Marshall and Clarence Thomas approach

tenure and who now serve on the bench with Justice Thomas, the difference between the only two racial minorities to sit on the Supreme Court must be striking.

If nothing else, Justice Thomas surely destroys the myth that there is only one “black voice” and that all Blacks think alike and stick together.<sup>223</sup> Indeed, whereas Justice Thomas, the second black justice on the Court, vehemently opposes affirmative action, Justice Marshall, the first black justice, was its champion.<sup>224</sup> For example, in his dissent in *City of Richmond v. J.A. Croson Co.*,<sup>225</sup> a case in which the Court struck down a construction set-aside program benefiting minorities,<sup>226</sup> Justice Marshall indicated that the Court’s decision “mark[ed] a deliberate and giant step backward in the Court’s affirmative-action jurisprudence.”<sup>227</sup> Unlike Justice Thomas, who has asserted that there can be no distinctions “between laws designed to subjugate a race and those that distribute benefits on the basis of race,”<sup>228</sup> Justice Marshall argued the exact opposite in *Croson*, stating that “[a] profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism.”<sup>229</sup> While some may find Justice Thomas’s opinions to be personally distasteful, there is no arguing that his presence makes clear that no one black person can enlighten others as to what all Blacks may think.<sup>230</sup>

In fact, the divergence between Justice Thomas’s and Justice Marshall’s views—and in many respects, the views of the vast majority of Blacks<sup>231</sup>—is not limited to affirmative action alone.<sup>232</sup> Perhaps the two black Justices’ most notable

the law from dramatically different perspectives and could be expected to reach different conclusions in the same cases.”).

223. See Edwards, *supra* note 97, at 327 (asserting that the range of political and ideological positions among black lawyers is staggering); Ifill, *supra* note 15, at 421 (noting that “[t]he black community has never been monolithic in its view of how best to advance its collective economic, political, and social interests”).

224. See *Why Clarence Thomas Doesn't Deserve a Black Forum: NO PLACE AT THE TABLE*, EMERGE, Sept. 1998, at 58 (“Justice Marshall believed that affirmative action was helpful to minorities and women, while Justice Thomas views it as a cancer to be eradicated.”).

225. 488 U.S. 469 (1989).

226. *Id.* at 498–510. The Court held that the City had failed to show its past discrimination against the minority beneficiaries of the program and had not narrowly tailored its program to remedy the past effects of discrimination. *Id.*

227. *Id.* at 529 (Marshall, J., dissenting).

228. *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

229. *Croson*, 488 U.S. at 551–52 (Marshall, J., dissenting).

230. See Emily Calhoun, *An Essay on the Professorial Responsibility of Affirmative Action in Higher Education*, 12 TEMP. POL. & CIV. RTS. L. REV. 1, 6–7 (2002) (discussing the burdens on “token” minority students in classrooms and detailing the pressures of being expected to represent one’s race).

231. See, e.g., *Poll: Public Split on Affirmative Action*, ASSOCIATED PRESS, Mar. 7, 2003 (stating that eighty-nine percent of Blacks still think affirmative action programs are necessary).

232. One commentator has described what he viewed as a striking difference between the two Justices in a 1996 case that Thomas has referred to as his favorite, *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400 (1996). That case involved Williams Hiles, a switchman, who

differences are exhibited in their opinions on crime-related matters.<sup>233</sup> While Thurgood Marshall's opinions are known for the manner in which they maintained a regard for the rights of prisoners and for criminal defendants' right to a fair trial,<sup>234</sup> Justice Thomas's criminal jurisprudence has earned him nicknames such as "[t]he youngest, cruelest justice"<sup>235</sup> and "Clarence the Cruel."<sup>236</sup> Thomas first earned this reputation as the "cruelest justice" when he issued a dissent in *Hudson v. McMillian*,<sup>237</sup> where he argued that an inmate's beating by two prison guards, which bruised the inmate's face, loosened his teeth, blackened his eye, burst his lip, and cracked his dental plate, did not violate the Eighth Amendment's Cruel and Unusual Punishment Clause<sup>238</sup>—a vote that all agree Justice Marshall never would have cast.<sup>239</sup>

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sought to recover damages for injuries he sustained while adjusting a misaligned drawbar between two cars. *Id.* Hiles's actions, referred to as coupling, "accounted for 11 of the 76 deaths among railroad workers during a recent six-year period." Tony Mauro, *Decade After Confirmation, Thomas Becoming a Force on High Court*, FULTON CTY. DAILY REP., Aug. 20, 2001, at 1. In ruling on Hiles's claim, the Supreme Court, in a decision written by Justice Thomas, held that the railroad was not liable under the Safety Appliance Act for the injuries Hiles sustained while straightening a misaligned drawbar, a decision which made it harder for railroad workers, many of whom are Black, to recover damages for such accidents. As the commentator noted about Justice Thomas's decision and how it would likely differ from one of Justice Marshall, "Justice Thomas is proud of a decision that makes the railroad workplace less safe. *Not to inject race into it, but Thurgood Marshall would have known the consequences of the decision to African-Americans in a heartbeat.*" *Id.* (emphasis added).

233. Justice Thomas's criminal law jurisprudence holds true to his philosophy that "a criminal justice system is to hold people accountable for the consequences of their actions." Hon. Clarence Thomas, *Keynote Address*, 1 MICH. L. & POL'Y REV. 269, 271–76 (1996) (discussing how he perceives the criminal justice system should be affected by the ideal of personal responsibility).

234. See generally Melvin Gutterman, *The Prison Jurisprudence of Justice Thurgood Marshall*, 56 MD. L. REV. 149 (1997) (discussing Justice Marshall's prison jurisprudence and how such jurisprudence reflected his passion for prison reform).

235. Editorial, *The Youngest, Cruelest Justice*, N.Y. TIMES, Feb. 27, 1992, at A24.

236. Derrick Z. Jackson, *Thomas's Cruel View of Prisoners*, BOSTON GLOBE, Feb. 28, 2003, at A19; see, e.g., *Helling v. McKinney*, 509 U.S. 25, 40–42 (1993) (arguing that the Court should overrule *Estelle v. Gamble*, 429 U.S. 97 (1976), which established that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment). Cf. Christopher E. Smith, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 DRAKE L. REV. 593, 599–610 (1995) (discussing Justice Thomas's jurisprudence on Eighth Amendment, death penalty, and habeas corpus cases).

237. 503 U.S. 1 (1992).

238. *Id.* at 18 (Thomas, J., dissenting). Professor Stephen Smith of the University of Virginia School of Law has made clear that Justice Thomas did not argue "that beating prisoners is acceptable conduct that is permitted by the Constitution." See Smith, *supra* note 196, at 539. As Professor Smith highlighted the following:

Importantly, in concluding that the Eighth Amendment afforded no basis for relief, Justice Thomas emphasized that "if available state remedies were not constitutionally adequate, [the prisoner] would have a claim [for relief] under the Due Process Clause of the Fourteenth Amendment" and stated that he "agree [d]" that the Due Process Clause "is the appropriate, and appropriately limited, federal constitutional inquiry in this case."

Additionally, unlike Justice Marshall, who asserted in his concurrence in *Batson v. Kentucky*<sup>240</sup> that the racially discriminatory use of peremptory challenges in jury selection is so inescapable that peremptories should be banned entirely,<sup>241</sup> Justice Thomas argued in a dissent in *Miller-El v. Cockrell*<sup>242</sup> that the petitioner had failed to demonstrate that reasonable jurists could debate whether he provided clear and convincing evidence to prove racial discrimination in the use of peremptory challenges.<sup>243</sup> Justice Thomas made this argument in the face of the majority's determination that the petitioner had proved the plausibility of his underlying constitutional claim under 28 U.S.C. § 2254(d)(2) by producing historical evidence of a memorandum that ordered attorneys in Dallas District Attorney's Office not to allow Blacks and Mexican-Americans on the jury<sup>244</sup> and evidence showing that ninety-one percent of eligible black jurors were excluded<sup>245</sup> from the petitioner's venire.<sup>246</sup>

*Id.* at 540.

239. See Hon. Julian Abele Cook, Jr., *Thurgood Marshall and Clarence Thomas: A Glance at Their Philosophies*, 73 MICH. B.J. 298, 300–01 (1994) (asserting that the two Justices had strong differences in opinion on the rights of an individual under the Eighth Amendment). Cf. Note, *Lasting Stigma: Affirmative Action and Clarence Thomas's Prisoners' Rights Jurisprudence*, 112 HARV. L. REV. 1331, 1341–47 (1999) (concluding that Justice Thomas's conservative jurisprudence is in part due to his attempts to distinguish himself from Justice Marshall).

240. 476 U.S. 79 (1986).

241. *Id.* at 102–08 (Marshall, J., concurring) (“Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge. . . . Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.”).

242. 537 U.S. 322 (2003).

243. *Id.* at 354–70 (Thomas, J., dissenting).

244. The 1963 circular read, “Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.” *Id.* at 334–35, 346–47 (internal quotations and citations omitted); see also *Batson*, 476 U.S. at 104 (Marshall, J., concurring) (ironically citing to the instruction book in the same Dallas County at issue in *Miller-El*, which advised prosecutors to conduct jury selection so as to “eliminate ‘any member of a minority group’”).

245. *Cockrell*, 537 U.S. at 331, 342 (“Of the 11 African-American jurors remaining [after removals for cause], . . . all but 1 were excluded by peremptory strikes exercised by the prosecutors. . . . In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury. . . . In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans.”).

246. Other evidence presented included the fact that three of the State's proffered race-neutral rationales for striking African Americans—“ambivalence about the death penalty; hesitancy to vote to execute defendants capable of being rehabilitated, and the jurors' own family history of criminality”—pertained just as well to some white jurors who were not challenged and who did serve on the jury and that fact the State used racially disparate questioning. *Id.* at 343; see, e.g., *id.* at 332, 344–45 (“Most African-Americans (53% percent, or 8 out of 15) were first given a detailed description of the mechanics of an execution in Texas. . . . Only then were these African-American venire members asked whether they could render a decision leading to a sentence of death. Very few prospective white jurors (6%, or 3

In all, the distinctions between Justice Marshall's and Justice Thomas's judicial careers, and between Justice Thomas's political views and those of many members of the black community, advance the goal of affirmative action by breaking down stereotypes about the lack of diversity in minority perspectives.<sup>247</sup> They highlight differences among Blacks in both their experiences and views in a way that can enhance the learning process both in schools and in jobs.<sup>248</sup> For example, as Professors Paul Brest and Miranda Oshige once acknowledged, the inclusion of even affluent Blacks in affirmative action programs can be as beneficial as the participation of poor Blacks,<sup>249</sup> as "the experiences of growing up . . . as an affluent African American in the United States are nonetheless quite different from growing up white" or from growing up black and poor.<sup>250</sup>

In sum, although the benefits of including Justice Thomas's "raced" jurisprudence are highly debatable in light of the fact that his views could potentially result in a greater number of decisions that most Blacks view as harmful,<sup>251</sup> there is a benefit to Justice Thomas's standing as a symbol to the general public of the array of viewpoints among Blacks and other minorities in the United States.<sup>252</sup> His presence alone helps to destroy the idea that all Blacks think and act alike. Destroying the perception of uniformity in views among Blacks is positive in the sense that it not only breaks down stereotypes but also opens the door for discussions about differing

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out of 49) were given this preface prior to being asked for their views on capital punishment."'). One more convincing piece of evidence was proof that state courts failed to consider the evidence of the prosecution's use of the jury shuffle. *See id.* at 334–35, 346 ("This practice permits parties to rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empanelled. . . . On at least two occasions the prosecution requested shuffles when there were a predominant number of African-Americans in the front of the panel."); *see also* Michael M. Gallagher, *Abolishing the Texas Jury Shuffle*, 35 ST. MARY'S L.J. 303, 312–19 (2004) (arguing that the jury shuffle has outlived its usefulness and that Texas should join the forty-nine other states that disallow its use).

247. *See* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 6, 34–37 (1991) (discussing the need for a focus on genuine diversity that does not deny black individuality); WILLIAMS, *supra* note 115, at 103, 121 (same).

248. Brest & Oshige, *supra* note 81, at 876.

249. *Id.* To my mind, however, if choosing between a poor black applicant and a wealthy black applicant of similar qualifications (however broadly that is defined), one should select the poor black applicant, whose successes at that point may indicate a will to succeed that is valuable in any school or job; *cf.* Angela I. Onwuachi-Willig, Note, *Moving Ground, Breaking Traditions: Tasha's Chronicle*, 3 MICH. J. RACE & L. 255, 272–73 (1997) (arguing that a person who came from an economically disadvantaged background or overcame many obstacles just to obtain an education could become a particularly tenacious lawyer).

250. Brest & Oshige, *supra* note 81, at 876.

251. *See* discussion *infra* Conclusion.

252. *See* Carol M. Swain, *Double Standard, Double Bind: African-American Leadership After the Thomas Debacle*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 215, 228–29 (Toni Morrison ed., 1992) (citing the revelation of a diversity of black opinion as a positive, but describing how she ultimately came to oppose Thomas's nomination because of his willingness to cry "race, race, race" when the pressure was on).

viewpoints within the black community.<sup>253</sup> As Nobel Prize-winning novelist Toni Morrison explained about Thomas's confirmation (even though she was not one of his supporters), "something positive and liberating has surfaced" because the clear exposure of differences of thought among black people made it possible, if not necessary, to speak about race matters without "the barriers, the silences, the embarrassing gaps in discourse."<sup>254</sup> Indeed, Thomas's nomination to the Supreme Court reinitiated an awareness of the range of black political thought, an awareness that had been absent from the media since the disputes between civil rights activists who preached non-violence and black nationalists, such as the Black Panthers, who sought freedom, justice, and equality by any means necessary. By doing so, it may make it more possible for Blacks, as Professor Richard Delgado has argued, to reconfigure strategies on civil rights issues that "take account of a complex fragmented racial reality in which [different groups of Blacks] have differing goals and needs."<sup>255</sup>

### C. Working the Right Way

Finally, Justice Thomas himself makes the case for affirmative action because he exposes the weaknesses of traditional standards of merit, both through his performance on the Court and, ironically enough, through his own opinions, specifically his dissent in *Grutter*. In so doing, he adds legitimacy to the demand for a re-parameterization of merit standards. For example, although Clarence Thomas arguably had not achieved similar distinction in his schooling and his career as his fellow Justices at the time of his appointment,<sup>256</sup> he, as several scholars have maintained, has performed on a level equal to his peers—establishing his own voice and philosophies on the way.<sup>257</sup> Indeed, in a prior article, I respond to criticisms that Justice Thomas is a "Scalia clone" by demonstrating how Justice Thomas, through his jurisprudence, does not follow Justice Scalia but instead participates in America's long history of black conservative thought.<sup>258</sup> Moreover, as the years have passed, the quiet Thomas has developed respect among and gained serious attention from numerous scholars.<sup>259</sup> For example, Professor Scott Gerber has dedicated a significant part of his career to studying Justice Thomas and praises the Justice for his fiercely

253. In this section, I do not mean to suggest that the benefit that stems from exposure to interracial diversity of viewpoint outweighs any negatives that come from the results of Justice Thomas's votes on the Court. See *infra* Conclusion.

254. See Toni Morrison, *Introduction: Friday on the Potomac*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY vii–xxx (Toni Morrison ed., 1992).

255. Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547, 1555 (1991) (book review).

256. See discussion *supra* Introduction.

257. See Scott D. Gerber, *Sen. Reid v. Justice Thomas*, WASH. TIMES, Dec. 11, 2004, at A13; Mauro, *supra* note 232, at 1 (asserting that Justices Thomas and Scalia have different approaches to originalism); see also Onwuachi-Willig, *supra* note 1 (manuscript at 57–84) (contrasting Justice Thomas's jurisprudence with Justice Scalia's).

258. See generally Onwuachi-Willig, *supra* note 1 (manuscript at 57–84).

259. See Mauro, *supra* note 232, at 1 (asserting that Justice Thomas "has defined a deep, clearly personal jurisprudence anchored in originalism that is receiving some scholarly respect").

independent voice and adherence to individualistic color-blind constitutionalism.<sup>260</sup> Likewise, others have applauded the Justice for his defense of the First Amendment.<sup>261</sup> Even liberals, such as Professors Guy-Uriel Charles and Mark Tushnet (and even myself), have warned that scholars should pay particular attention to the ways in which Justice Thomas's voice is "raced" and that Justice Thomas himself is a force to be reckoned with.<sup>262</sup> For example, Thomas has been described "'as a right-wing intellectual force in his own right, a radical conservative capable of spinning out bold, well-researched legal essays in clear, provocative prose.'"<sup>263</sup> Indeed, the young black Justice may become the Supreme Court's next Chief Justice, which would also make him the first black Chief Justice.<sup>264</sup>

Most of all, Thomas's appointment to the Court itself tested traditional notions of "qualifications" to serve on the Court. In defending Thomas's nomination to the Court, Thomas's advocates highlighted various forms of "non-traditional" criteria, in particular his life experiences and unique perspective based on those experiences, as important contributions to the Court.<sup>265</sup> In so doing, Thomas's largely Republican supporters ironically conceded the ways in which traditional definitions of merit can be non-neutral and arbitrarily serve to exclude people of color. In essence,

260. See generally GERBER, *supra* note 10; Gerber, *supra* note 11, at 63.

261. See, e.g., Michael A. Fletcher & Kevin Merida, *Jurist Embraces Image as a Hard-Line Holdout*, WASH. POST, Oct. 11, 2004, at A1 (asserting that "Thomas has been one of the amendment's staunchest defenders on the court"); David L. Hudson, *Justice Clarence Thomas: The Emergence of Commercial-Speech Protector*, 35 CREIGHTON L. REV. 485, 486-87 (2002) (claiming that Justice Thomas is a more forceful advocate for commercial speech than his predecessor Justice Marshall).

262. See Scott D. Gerber, "My Rookie Years Are Over": *Clarence Thomas After Ten Years*, 10 AM. U.J. GENDER SOC. POL'Y & L. 343, 348 (2002) (reporting that "[s]ome liberals are now willing to admit that [Justice Thomas] has many interesting things to say"); see, e.g., Onwuachi-Willig, *supra* note 1 (manuscript at 75-81); Charles, *supra* note 205 (manuscript at 34-39); Tushnet, *supra* note 24, at 339. *But see* Fletcher & Merida, *supra* note 261 (arguing that Justice Thomas is not a persuasive force on the court because his "unbending approach makes it difficult to assign him opinions in closely contested cases for fear that he might not be able to hold a majority").

263. GERBER *supra* note 10, at 25.

264. See KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* 4 (2004). Senate Minority Leader Harry Reid recently asserted his opposition to Justice Thomas being appointed Chief Justice. In so doing, Senator Reid declared that Justice Thomas is an "embarrassment" to the Court while proclaiming that Justice Scalia is suitable for the position because he "is one smart guy." Zev Chafets, Editorial, *Slap at Thomas Stinks of Racism*, N.Y. DAILY NEWS, Dec. 8, 2004, at 43; 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. Some commentators have highlighted how the Senator's strikingly different opinions of the two conservative justices may be influenced by the stereotype of black incompetence. See Angela Onwuachi-Willig, *Clarence Thomas as Chief Justice?*, CHI. TRIB., Jan. 2, 2005, at 9.

265. See Murray, *supra* note 43, at 374-85 (describing how the debate regarding Thomas's appointment expanded the criteria that was reviewed in the vote on his nomination to the Court).

by declaring that Thomas was the “best man for the job,”<sup>266</sup> his supporters admitted, even if only for political reasons, that traditional notions of merits can and should be re-parameterized.

More importantly, the language in Justice Thomas’s opinions uncovers the way in which affirmative action can challenge strict adherence to traditional standards of merit. In fact, Justice Thomas challenged reliance on such standards in his dissent in *Grutter*.<sup>267</sup> For example, he acknowledged the inadequacy of traditional merit standards, stating:

[T]here is much to be said for the view that the use of tests and other measures to “predict” academic performance is a poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law. The rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to “merit.”<sup>268</sup>

After pointing out that the practice of legacy admissions flies in the face of true merit, Justice Thomas identified what he viewed as the real problem: the University of Michigan’s refusal to abandon its use of the LSAT,<sup>269</sup> a test that is known to produce racially disproportionate results.<sup>270</sup> Justice Thomas then expressed his belief that the law school was not “looking for those students, who despite a lower LSAT score or undergraduate grade point average, will succeed in the study of law,” but rather was only trying to create a class that looked right.<sup>271</sup> In all, Justice Thomas called for the Court to require the elite institution to re-evaluate its admissions process.<sup>272</sup> Although at times Justice Thomas’s words indicate an acceptance of sorts of the use of standardized tests such as the LSAT,<sup>273</sup> supporters of affirmative action

266. See GREENYA, *supra* note 6, 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”); Wells, *supra* note 20, at 121.

267. Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1629–30 (2003) (noting that Justice Thomas knows the admissions process is not based on merit).

268. *Grutter v. Bollinger*, 539 U.S. 306, 367–78 (2003) (Thomas, J., concurring in part and dissenting in part).

269. *Id.* at 369–70 (Thomas, J., concurring in part and dissenting in part) (“Nevertheless, law schools continue to use the test and then attempt to ‘correct’ for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body.”).

270. See William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving ‘Elite’ College Students*, 89 CAL. L. REV. 1055, 1073–85 (2001) (concluding that the LSAT systematically disadvantages minority law school applicants).

271. *Grutter*, 539 U.S. at 369–70 (Thomas, J., concurring in part and dissenting in part).

272. *Id.* at 366 (Thomas, J., concurring in part and dissenting in part) (stating that “before being given license to use racial discrimination, the Law School [should] be required to radically reshape its admissions process”).

273. See *id.* at 372 (Thomas, J., concurring in part and dissenting in part) (implicitly asserting that the LSAT is a valid measure of success in law school when he stated that the law

should accept the Justice's call for a re-parameterization of the school's standards as a welcome plea for forcing a change in the way merit is defined in general.

### CONCLUSION

*For the master's tools will never dismantle the master's house.*

—Audre Lorde<sup>274</sup>

As demonstrated above, Justice Thomas, in a sense, makes the case for affirmative action. His unique and, in many ways, “raced” perspective on legal issues highlights the benefits of including a broad range of voices in our schools, workplaces, and even in our courts.<sup>275</sup> His dissenting voice from many individuals in the black community on numerous subjects helps to expose the diversity of viewpoints within the black community, revealing that there is no one black voice.<sup>276</sup> His performance on the Court and his own words lay a strong foundation for criticizing an adherence to traditional merit standards that have worked to exclude many minority groups from schools and jobs.<sup>277</sup> Even his life experiences as someone who overcame extreme poverty and racial stereotyping, both before and after school, stand as an example of the systematic social disparity that affirmative action was in part created to address.<sup>278</sup>

But can the master's tool really dismantle his house? The answer is rather complex. As the late Audre Lorde, renowned feminist and activist, once declared, “[The master's tools] may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.”<sup>279</sup>

On the one hand, Lorde's words are fitting because, although Justice Thomas can serve as a good argument for affirmative action in numerous contexts, in other ways, he fails to make the case, particularly within the context of judicial selections. For example, while Justice Thomas brings to the Court a special perspective based on his experiences as a black man who endured the segregated South, his voice does not introduce the traditionally excluded perspectives of the vast majority of Blacks,<sup>280</sup> one

school admitted unprepared students who find themselves overmatched in the law school and outperformed by their white peers).

274. LORDE, *supra* note 1, at 112.

275. See *Brief Amici*, *supra* note 21, at 98 (“Such consideration of the race of a judicial nominee has been beneficial to the Court, not because Justice Thomas has the same world view or shares the same judicial orientation as had Justice Marshall. Rather, it is because each of them, in his own way, brought or brings to the Court's adjudication an awareness and perspective that is based in part on their experiences as African American individuals.” (emphasis added)).

276. See *Sunder*, *supra* note 104, at 497 n.6 (stating that Thomas has been subject to “intimidation” used against him for expressing conservative views unpopular with many black Americans).

277. See *Guinier*, *supra* note 84, at 186 (noting that Thomas described the University of Michigan Law School's actions in “exceptionalizing diversity and disconnecting it from genuine merit [as] problematic”).

278. See discussion *supra* Introduction & notes 34–40.

279. LORDE, *supra* note 1, at 112.

280. See Michael deHaven Newsom, *Clarence Thomas, Victim? Perhaps, and Victorizer? Yes—A Study in Social and Racial Alienation from African-Americans*, 48 ST.

of the often-cited benefits of diversity on the bench.<sup>281</sup> In this sense, Justice Thomas's presence on the Court arguably accomplishes little in increasing most of the black community's faith in the judicial system and judicial decision-making and certainly does less in "representing" the perspective of many Blacks.<sup>282</sup> For Blacks who find themselves disproportionately entangled in the judicial system<sup>283</sup> and in other instances dependent on the judicial system's role in recognizing their basic rights,<sup>284</sup> this form of representation is critical.<sup>285</sup>

To say that the vast majority of Blacks now hold no more confidence in Justice Thomas's likelihood of "representing" their views than in some of his white colleagues is not an exaggeration.<sup>286</sup> Unlike Justice Marshall, who pushed his

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LOUIS U. L.J. 327, 418 (2004) (noting that Justice Thomas's presence on the Court does not allow for a claim "that black people have a representative on the Court, that is to say, a person with whom they feel any real sense of community"); *see also* Ifill, *supra* note 15, at 415 (arguing that "[m]inority judicial candidates who are explicitly promoted to fulfill diversity objectives . . . must offer more than their racial 'face' to demonstrate that they can bring diversity to the bench"); *cf.* Johnson & Fuentes-Rohwer, *supra* note 105 (manuscript at 46–50) (describing how the appointment of a Latino judge, such as Miguel Estrada, may add to diversity and the perception of judicial impartiality but would not further the inclusion of perspectives traditionally absent from the judiciary).

281. *See* WASHINGTON, *supra* note 130, at 174. As Judge Henry Bramwell of the Eastern District of New York, a black conservative, once stated, "[B]lack judges can articulate the problems of the black community. Black federal judges are also needed to combat the prejudice, discrimination, and racism that is deeply rooted in our society." *Id.* Judge Bramwell was the one black judge to contest the Judge Higginbotham's criticisms of Thomas. *See id.* at 175.

282. *See* Johnson, *supra* note 157, at 5 (acknowledging that "Justice Marshall gave voice to the sentiments of many African Americans").

283. *See* CARL T. ROWAN, *THE COMING RACE WAR IN AMERICA: A WAKE-UP CALL* 193–94 (1996) (noting that Blacks comprise 50.8 percent of the inmates in our prisons and jails and that Blacks are incarcerated at a rate of 1,947 per 100,000 black citizens compared to a rate of 306 per 100,000 for white citizens); David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547, 2553–67 (1995) (detailing how the criminal justice system is biased both racially and socioeconomically).

284. *See* Biskupic, *supra* note 172 (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").

285. *See* Chen, *supra* note 78, at 135 ("How can the public have confidence and trust in such an institution if it is segregated—if the communities it is supposed to protect are excluded from its ranks? *A diverse judiciary signals the public acknowledgment of historically excluded communities and sends an invaluable message of inclusion.* It enhances courts' credibility among affected communities who would otherwise feel they have no voice within the institution." (emphasis added)). This is not to suggest that a Supreme Court Justice serves as a representative for any group of people, only to say that such representation of views is one of the cited benefits of diversity on the bench.

286. *Cf.* John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to "The Law-School Five"*, 46 HOW. L.J. 175, 180 (2003) ("[Justice Thomas's] complicated identity as an African American is challenged constantly. Within significant segments of black America, he has been written off. For instance, over the last six years, Ebony Magazine has refused to list Justice Thomas among its 100 most influential African Americans.").

colleagues “to reconcile legal norms with outsider realities,”<sup>287</sup> one could argue that Justice Thomas does not truly bring an outsider viewpoint or alternative, but solely a different (although important) bent on an insider view.<sup>288</sup> In fact, many Blacks would rather leave the fate of civil rights in the hands of Justices Breyer, Ginsburg, Souter, or Stevens.<sup>289</sup> Moreover, as the late Judge Leon Higginbotham once argued, as a minority, Justice Thomas’s support of what are perceived as “insider views” on racial issues may give “an imprimatur of satisfaction and approval” to such positions.<sup>290</sup> In this sense, Justice Thomas’s “voice of color” actually presents a danger to the interests of many Blacks because his race, in some instances, may lend credibility to his positions<sup>291</sup> and thus wrongly signify to others that he is representing the interests of people whose views are actually in direct opposition to his own.<sup>292</sup>

Furthermore, while in some respect Justice Thomas serves as an important role model for all people<sup>293</sup> (especially given his strong commitment to mentoring and speaking before groups of underprivileged black children), in other ways his utility as a role model for minority children and young adults may be inadequate.<sup>294</sup> As many proponents of affirmative action have argued, an important aim of affirmative action is the manner in which it helps to remove limitations that minorities may place on career aspirations due to lack of representation in any given field.<sup>295</sup> Thus, unlike a racially

287. Ifill, *supra* note 15, at 456–57, 484 (stating that Justice Marshall “forced the other Justices to confront and address the reality of life for the poor, for women, for African Americans, and for other marginalized groups”).

288. Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1303 (2002) (maintaining that Justice Thomas’s racial and conservative jurisprudence/politics entrenches a social arrangement that advantages Whites and disadvantages Blacks in access to social resources—education, employment, and housing). Justice Thomas has, however, indicated sensitivity to having the law be accessible to people of all socioeconomic classes and education levels by expressing his desire to write opinions that persons without a college education can understand. See Michael A. Fletcher & Kevin Merida, *Calling the Reputable, Reliable, Right-Leaning*, WASH. POST, Oct. 11, 2004, at A11.

289. Cf. Johnson & Fuentes-Rohwer, *supra* note 105 (manuscript at 51) (“Many, perhaps most, [minorities] . . . would rather have nine [Justice] William Brennans on the Supreme Court than nine Clarence Thomases.”).

290. WASHINGTON, *supra* note 130, at 5.

291. See, e.g., Charles, *supra* note 205 (manuscript at 41–44) (arguing how that Justice Thomas held epistemic authority as black man who could uniquely feel the harms of cross burning in *Virginia v. Black*).

292. See WASHINGTON, *supra* note 130, at 5; Carbado, *supra* note 288, at 1303–05.

293. See WASHINGTON, *supra* note 130, at 36 (describing the personal experience of Judge Veronica MacBeth, a black female judge in California, who stated that “everybody looks up to” judges).

294. See Merida & Fletcher, *supra* note 1 (stating that Robert Brooks, a Savannah radio talk show host who boarded buses from Savannah to Washington, D.C., in support of Thomas’s nomination, felt betrayed by Thomas’s record and declared that he did not want Thomas “held up as a role model”). But see Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1226–28 (1991) (describing the problems with the role model argument for affirmative action).

295. See Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1620 (2003) (describing how affirmative action can offer “hope to young African-Americans that they can escape the ghetto”); Stroud, *supra* note 2, at 386–92 (arguing

diverse student body that may enhance public “confidence in the openness and integrity of educational institutions” simply because of the range of diverse perspectives among students.<sup>296</sup> Justice Thomas’s inclusion on the Court does not necessarily advance the benefit of role modeling or a feeling of inclusion for many minorities.<sup>297</sup> As many scholars have noted, young individuals from socially disadvantaged groups are more likely to have low career aspirations because they do not often see people who look like them and share their background in positions of high achievement.<sup>298</sup> Thus, to the extent that affirmative action assists members of certain racial minorities in achieving visible success, it helps to encourage younger members of similar groups to strive for success and to convince them that such success is attainable.<sup>299</sup> However, if the most effective role models are those whom children and young adults see as being like them,<sup>300</sup> then Justice Thomas does not fit the script, because he is viewed by so many Blacks as a traitor to his race<sup>301</sup> (although perhaps wrongfully).<sup>302</sup> In fact, young Blacks with divergent views may wonder, “Do I have to think like him to succeed at a similar level? Will I be allowed to advance, when deserving, if I do not ‘sell out’ my people?”<sup>303</sup>

Finally, Clarence Thomas does not make the case for affirmative action because of his beliefs regarding how affirmative action stigmatizes minorities.<sup>304</sup> For

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that affirmative action can “expand people’s sense of what is possible for them, so that they can subject the full range of options to the kind of individualized scrutiny that is appropriate to career decisions and goals”); *see also* Edwards, *supra* note 97, at 329 (asserting that the strong presence of black judges serves as an inspiration for minorities who aspire to positions in the legal profession); Chen, *supra* note 78, at 135 (explaining that a diverse judiciary “assures students and young lawyers from historically underrepresented communities that they need not limit their aspirations”).

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

297. *See* Ifill, *supra* note 15, at 482 (“While Thomas’s backers viewed him as a black role model, to many blacks, Thomas was not a role model.”).

298. *See, e.g.,* Brest & Oshige, *supra* note 81, at 869 (stating that young members of an intractably disadvantaged group often come to believe that “regardless of their efforts, group members simply cannot succeed”).

299. *Id.* (describing the importance of same-race role models). *Cf.* Stroud, *supra* note 2, at 386–92 (same).

300. Brest & Oshige, *supra* note 81, at 875 (describing differing perceptions of racial and ethnic identity between two brothers of mixed Irish and Salvadoran heritage—one of them being Professor Ian Haney Lopez—and noting how hiring Professor Lopez, who holds a pan-Latino identity, may benefit members of other Latino groups but hiring his brother who relates most easily with his Anglo side would not serve any of the goals of affirmative action).

301. *See* Smith, *supra* note 196, at 513, 529–30 (noting that Thomas has been called a “traitor” and that “some of his harshest attacks have come from the civil rights community”).

302. *See* Jacquelyn L. Bridgeman, LatCrit IX Symposium, *Defining Ourselves for Ourselves*, 35 SETON HALL L. REV. (forthcoming 2005) (exploring definitions of blackness and describing how the use of terms such as “sellout” and “IncogNegro” are damaging to Blacks).

303. *Cf.* JOHN U. OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT 160 (2003) (defining “role model [as] somebody a person wants to be like” (emphasis in original)).

304. Adarand Constructors Inc. v. Peña, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

Clarence Thomas, who asserts that he did not benefit from the policy,<sup>305</sup> the stigma that affirmative action “places on” minorities, especially people who would have achieved on their own “merit,” nullifies any benefit that may be gained by greater minority or female presence in schools or the workplace.<sup>306</sup> To him, the policy renders all minorities as second-rate and inferior in the eyes of the majority and only works to perpetuate the myth of minority incompetence.<sup>307</sup> Indeed, portions of Justice Thomas’s dissent in *Grutter* almost seemed personal,<sup>308</sup> including his complaint that “[w]hen blacks take positions in the highest place of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement.”<sup>309</sup> Affirmative action supporters, however, contend that any negatives, including stigma, are outweighed by the benefits of the policy.<sup>310</sup> Mainly, though, they have highlighted the fact that the stigma of racial inferiority was not caused by affirmative action, but instead has always existed in American society.<sup>311</sup> After all, the stigma existed when Blacks were deemed to be three-fifths of a person solely for purposes of

305. See *Classic Example*, *supra* note 6, at 35.

306. *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part) (“Beyond the harm the Law School’s racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination ‘engenders attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government’s use of race.’”) (quoting *Adarand*, 515 U.S. at 241). See generally CARTER, *supra* note 247, at 4–5, 11, 47–67 (describing the harmful emotional effects of affirmative action on himself).

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

308. See Guinier, *supra* note 84, at 181 (guessing that Justice Thomas perhaps had a “personal axe to grind” in *Grutter*); see also Tushnet, *supra* note 24, at 338 (“One would have to have a completely tin ear not to hear the reference to high places in government as identifying Justice Thomas himself.”).

309. *Grutter*, 539 U.S. at 373; see also Kearney, *supra* note 180, at 33.

310. 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.”); see also F. Michael Higginbotham, *Affirmative Action in the United States and South Africa: Lessons From the Other Side*, 13 *TEMP. INT’L & COMP. L.J.* 187, 209–210 (1999) (arguing that the positives of affirmative action outweigh its burdens). See generally Michael Selmi, *The Facts of Affirmative Action*, 85 *VA. L. REV.* 697 (1999).

311. See Padilla, *supra* note 310, at 880 (“Blacks and whites must face the fact that affirmative action has made no significant difference in the way whites look at blacks. Competent and successful blacks are still seen as exceptional. *Before and since affirmative action, most white people see another white as competent until proven incompetent and a black person as incompetent until proved competent.*” (emphasis added)); Patterson, *supra* note 21, at 334 (same). See also Guinier, *supra* note 84, at 186 (asserting that “[e]rroneous assumptions about black intellectual inferiority, laziness, and general undeservedness have a long history”).

representation.<sup>312</sup> It existed when Justice Harlan, who has been praised by many for his lone dissent in *Plessy v. Ferguson*,<sup>313</sup> essentially proclaimed the superiority of Whites by saying, “The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time.”<sup>314</sup> It existed during the Jim Crow era,<sup>315</sup> and it continues to exist today.<sup>316</sup> Supporters further contend that such stigma, which is caused by racism,<sup>317</sup> is not likely to disappear unless interaction across racial lines occurs on a regular basis, with individuals of all races coming to learn about and appreciate each other as equals.<sup>318</sup> In sum, what is stigmatizing for most minorities is not affirmative action,<sup>319</sup> but rather beliefs that are rooted in the idea of white superiority. Indeed, as one civil rights activist who attended Boalt Hall Law under an affirmative action program declared, “‘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.”<sup>320</sup>

While Lorde’s words about the inability of the master’s tool to dismantle his house are fitting in the sense that Justice Thomas does not advance certain important benefits of affirmative action, her words are not fitting when applied to selected portions of Justice Thomas’s dissent in *Grutter*, which can serve as a catalyst for instituting true change in society, in particular the admissions processes at schools. Just as the words of many liberals have been co-opted by conservatives, including

312. See Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 428 (1999) (“The three fifths clause provided for counting three-fifths of all slaves for purposes of representation in Congress.”).

313. 163 U.S. 537 (1896). In *Plessy*, Homer Plessy, who was seven-eighths white and one-eighth black, filed a lawsuit, seeking the rights, privileges, and immunity of Whites, after he was thrown out of a white railroad passenger car based on race. *Id.* at 541–42. The Supreme Court held that state-mandated racial segregation in railroad passenger cars did not violate the Equal Protection Clause of the Fourteenth Amendment so long as the separate facilities were equal. *See id.* at 544, 550–51.

314. *Id.* at 559.

315. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (noting that racial segregation is “usually interpreted as denoting inferiority of the [N]egro group” (internal quotations omitted)).

316. See Frank Rudy Cooper, *Cultural Context Matters: Terry’s “Seesaw Effect”*, 56 OKLA. L. REV. 833, 858–59 (2003) (describing how “[p]rejudicial social norms are too pervasive and strong for anyone to avoid without effort”).

317. See Guinier, *supra* note 84, 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 factors, do not generate the same ‘stigma’”). *Cf.* Sturm & Guinier, *supra* note 107, at 995 & n.183 (stating that legacies account for up to twenty-five percent of admissions to top schools).

318. See Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for Brown?*, 103 MICH. L. REV. (forthcoming 2005) (manuscript at 35–36, on file with the Author) (asserting that true racial equality can be achieved only through integration that allows persons to recognize their shared experiences and interests).

319. See F. Michael Higginbotham, *supra* note 310, at 210 (“In the United States, few recipients of affirmative action perceive it as stigmatizing.”).

320. Patterson, *supra* note 21, at 334.

Martin Luther King, Jr.'s hope that his children would one day be "judged by the content of their character rather than the color of their skin,"<sup>321</sup> supporters of affirmative action should use Justice Thomas's "request" for a re-parameterization of admissions standards to meet that challenge and establish an in-road to overhauling traditional standards that have worked to exclude many minorities and women.<sup>322</sup> Indeed, as many scholars including Professors Derrick Bell and Lani Guinier have argued, the short-term push for diversity as opposed to changes in merit standards has served only as a distraction in efforts to achieve racial justice because it gives "undeserved legitimacy to the heavy reliance on grades and test scores that privilege well-to-do, mainly white applicants."<sup>323</sup> In fact, the emphasis on grades and test scores

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321. Many conservatives cite this language when they argue for colorblind policies. However, Martin Luther King, Jr. supported the idea of taking race into account. He once explained,

It is impossible to create a formula for the future which does not take into account that society has been doing something special against the Negro for hundreds of years. How then can he be absorbed into the mainstream of American society if we do not do something special for him now, in order to balance the equation and equip him to compete on a just and equal basis?

*Brief Amici*, *supra* note 21, at 92. Like Dr. King, Dr. Bill Cosby has made statements, specifically comments about lower income Blacks, that have been co-opted by conservatives. See, e.g., *Today: Armstrong Williams, Syndicated Columnist, and Joe Madison, Radio Talk Show Host, Discuss Bill Cosby's Comments About Needed Responsibility in the Black Community* (NBC television broadcast, May 24, 2004) (transcript available at LEXIS, Nexis Library, NBC News File); see also Theodore Shaw, *Even Cosby Knows There Is More to the Story*, TOPEKA CAP.-J., June 3, 2004, at A4 (stating that "conservatives are applauding Bill Cosby for saying that the problems of the black community stem primarily from personal failures and moral shortcomings"). In a speech during a gala commemorating the fiftieth anniversary of *Brown v. Board of Education*, 347 U.S. 483 (1954), Bill Cosby complained about "lower economic" Blacks "not holding up their end in this deal." Among other things, Cosby stated, "*Brown versus Board of Education* is no longer the white person's problem. [Black people] have got to take the neighborhood back. . . . They are standing on the corner and they can't speak English." George Curry, *Bill Cosby Stands Behind Critical Comments*, ATLANTA DAILY WORLD, May 27, 2004, available at [www.zwire.com](http://www.zwire.com).

322. See, e.g., Kidder, *supra* note 122, at 172-218 (establishing that the LSAT is biased against women, people of color, and other outsiders).

323. Bell, *supra* note 267, at 1622 (expressing his view that *Grutter* may not have been the victory it was perceived to be); see also Sturm & Guinier, *supra* note 107, at 957; Lani Guinier, *Our Preference for the Privileged*, BOSTON GLOBE, July 9, 2004, at A13 ("Too many universities use their admissions criteria to consolidate privilege rather than expand opportunity. . . . Admissions decisions reflect a preoccupation with measures of excellence that tell us more about grandparents' wealth than first-year college grades. . . . It disadvantages poor and working-class whites, not just people of color, who may need time to transition academically but who graduate and become leaders in their community at higher rates than their higher-scoring white counterparts. We should evaluate what students will do after graduation, not just during the first year of study." (emphasis added)). Others, such as Justice Thomas, have argued that the focus on diversity harms minorities because it sets them up to fail. *Grutter v. Bollinger*, 539 U.S. 306, 372 (2003) ("These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition."); see also THOMAS SOWELL, RACE AND CULTURE 177 (1994) ("Even if most minority students are able to meet the normal standards at the 'average' range of colleges and universities, the systematic mismatching of

conceals less obvious class biases in traditional admissions processes, such as expensive test preparation courses, personal tutors, and significant counseling and mentoring in private schools.<sup>324</sup> Most importantly, the notion that traditional factors objectively measure merit hides the fact such standards favor only a small group of largely privileged people, with seventy-four percent of students at the 146 most selective colleges coming from the upper twenty-five percent of the socioeconomic ladder, only three percent coming from the bottom twenty-five percent, and roughly ten percent coming from the bottom fifty percent.<sup>325</sup>

Furthermore, as Justice Thomas alluded to in his dissent,<sup>326</sup> because the benefits flowing from diversity are so great, a rejection of those standards that are traditionally used in admissions and in certain jobs<sup>327</sup> should not sacrifice the quality of schools or businesses. This would prove especially true in the school context if a broad base of schools rejected such standards, forcing the extremely influential institutions responsible for “ranking” colleges, such as the *U.S. News and World Report* magazine,<sup>328</sup> to develop new methods for measuring the quality of schools.<sup>329</sup>

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minority students begun at the top can mean that such students are generally overmatched throughout all levels of higher education.”).

324. See Guinier, *supra* note 84, at 148–49 (detailing upper middle-class bias in admissions and asserting that “[q]uantitative measures often reflect family resources and influence rather than a student’s resourcefulness or intelligence”).

325. *Id.* at 148 (citing Anthony P. Carnevale & Stephen J. Rose, The Century Foundation, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, Mar. 2003, at 8, available at [http://www.tcf.org/Publications/Education/carnevale\\_rose.pdf](http://www.tcf.org/Publications/Education/carnevale_rose.pdf)).

326. See *Grutter*, 539 U.S. at 356 n.4 (Thomas, J., concurring in part and dissenting in part).

327. Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1253–54, 1256–77 (1995) (explicating that “employment tests are typically weak predictors of potential productivity and that individual test scores are inaccurate measures of an individual’s true abilities as those abilities are measured by the examination”).

328. In 1998, John Sexton, then the Dean of the New York University School of Law, led 164 out of 180 ABA-approved law schools in drafting and signing a letter that advised law school applicants to conduct individual research on each school and to not rely on the rankings from the *U.S. News and World Report*. See Jorge Fitz-Gibbon, *City Has 3 Top Law Schools/Rates Nation’s Best*, N.Y. DAILY NEWS, Feb. 21, 1998, at 4 (describing law schools’ criticism of the rankings). According to Sexton, “a ranking system inherently assumes that every applicant has identical needs and desires.” *Law School Rankings Evoke Defense*, BUFF. NEWS, Feb. 20, 1998, at A14. See also Guinier, *supra* note 84, at 145–46 (explaining that the “facial neutrality of . . . rankings hides not only their arbitrariness, but also their value choices and tendency to perpetuate existing privilege” and that “quantitative measures can be . . . misused to hold [institutions] accountable to one-size-fits-all standards that discourage pursuit of [their] . . . educational mission”); 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) (contending that “published law school rankings reflect[] a unitary model of legal education by measuring the worth of all law schools by reference to the standards of the elite few”). The American Association of Law Schools has called for the magazine to stop publishing its rankings. See Dana Coleman, *Jersey Deans: Enough Already with the Surveys!*, N.J. LAW., Mar. 9, 1998, at 5 (describing the objection to the rankings by law school deans in New Jersey).

In fact, such a broad-based rejection of standardized test scores is brewing at the college level at a number of elite undergraduate institutions, including Bowdoin and Bates Colleges in Maine, Mount Holyoke College in Massachusetts, and Hamilton College in New York.<sup>330</sup> Instead of relying so heavily on standardized test scores,<sup>331</sup> these schools do not require the submission of SAT or ACT scores, but instead request more essays, interviews, and any other information that may help the admissions committee in assessing a student's ability to succeed at the school. These schools have decided to ask themselves the difficult questions about how to tailor their processes to determine who will actually contribute to the fulfillment of their schools' missions, instead of relying solely on standards that many agree are not perfect predictors for success.<sup>332</sup> Other schools and businesses should follow suit. In fact, after twenty years without the SAT as a requirement for admission, Bates College recently presented findings from a study of its students over the same period. As the college reported, there was virtually no difference between the academic performance or the graduation rate of applicants who had not submitted their SAT scores and those who voluntarily did so.<sup>333</sup> Specifically, Bates found that, between 1985 to 1999, those who did not submit SAT scores earned an average grade point average of 3.06, just slightly lower than those who chose to submit SAT scores, who earned an average grade point average of 3.11.<sup>334</sup> Additionally, Bates found that the graduation rate for those who did not submit SAT scores was just slightly higher than for those who chose not to submit scores—86.7 percent compared to 86.6 percent.<sup>335</sup> Moreover, the school found that the SAT-optional policy had helped it not only increase its applicant pool but also attract a more diverse student body.<sup>336</sup>

In the end, perhaps Justice Thomas has a point, both in his selection to the Court and in his "call" to re-parameterize standards of merit—that decision-makers in schools and in the workplace should truly explore the range of possibilities available for defining merit. What then is the real challenge for supporters of affirmative action

329. See Guinier, *supra* note 84, at 206 (arguing that situating merit within structures of opportunity can encourage schools to focus more on long-term commitments to service and community leadership).

330. See Editorial, *A Healthy SAT Debate*, N.Y. TIMES, Mar. 12, 2001, at A14; 391 *Schools That Do Not Use SAT I or ACT Scores for Admitting Substantial Numbers of Students into Bachelor Degree Programs*, available at [www.fairtest.org/optstat.htm#NY](http://www.fairtest.org/optstat.htm#NY).

331. Students can voluntarily choose to submit their test scores.

332. See *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (acknowledging that applicant's college grade point average and LSAT score are imperfect "predictors of academic success in law school"); see also Chemerinsky, *supra* note 54, at 1172 ("Undergraduate grades and LSAT scores often fail to predict many of the skills needed to succeed in law school and especially to excel as an attorney. More importantly, 'merit' must include all that makes a person deserving of entrance. Because of the importance of diversity, merit often should include what a person will add to the education of other students."); Delgado, *supra* note 116, at 1740–42 (demonstrating how standardized tests, such as the SAT and LSAT, can be culturally biased).

333. See Eric Hoover, *Bates Calls Its SAT-Optional Policy a Boon*, CHRON. HIGHER EDUC., Oct. 15, 2004, at 18.

334. See *id.*

335. See *id.*

336. See *id.*

in the next few years? Supporters should use all the tools available to dismantle the “master’s house,” with Justice Clarence Thomas even serving as one of those tools “working the right way.”<sup>337</sup>

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337. *Classic Example*, *supra* note 6, at 36.

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