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“To Help, Not To Hurt”: Justice Thomas’s Equality Canon

William S. Consovoy and Nicole Stelle Garnett

INTRODUCTION

In his twenty-five years on the Supreme Court, Justice Clarence Thomas has earned the (sometimes grudging) respect of legal scholars and commentators, including many who disagree with him, for his careful, principled, analytic approach to many areas of law.¹ Race is not among them. For his allegiance to a “color blind” Constitution,² Justice Thomas has been accused of judicial activism,³ rank hypocrisy,⁴ racial self-hatred,⁵ and racial betrayal.⁶ These criticisms, which profoundly misrepresent Justice Thomas’s views on race, are both unfortunate and avoidable. In the race context, more than any other area of the law, Justice Thomas has explained the reasons for his views, including his desire to restrain government policies that he believes harm minorities. As he has explained, “It pains me deeply . . . to be perceived by so many members of my

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1. See, e.g., MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT & THE FUTURE OF CONSTITUTIONAL LAW* 72 (2005).
 2. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
 3. See Jeffrey Rosen, *Moving On: In His Latest Incarnation, Justice Clarence Thomas Takes His Text From Booker T. Washington*, *NEW YORKER*, Apr. 29, 1996, at 66-73.
 4. See Robert Lee Hotchkiss, Jr., *Clarence Thomas Is Too a Hypocrite!*, *L.A. TIMES* (Oct. 18, 2007), <http://www.latimes.com/opinion/la-oew-hotchkiss18oct18-story.html> [<http://perma.cc/35Y4-3AJS>].
 5. See Jack E. White, *Uncle Tom Justice*, *TIME* (June 26, 1995) <http://content.time.com/time/magazine/article/0,9171,134324,00.html> [<http://perma.cc/U44A-5C45>].
 6. See RANDALL KENNEDY, *SELLOUT: THE POLITICS OF RACIAL BETRAYAL* 87-143 (2008).

race as doing them harm. All the sacrifice, all the long hours of preparation were to help, not to hurt.”⁷

This Essay seeks to correct the myriad misapprehensions about Justice Thomas’s racial equality decisions. These opinions reflect, first and foremost, his conviction that the Fourteenth Amendment’s Equal Protection Clause, as properly understood, precludes the government from discriminating against and between people on the basis of race.⁸ What distinguishes his racial equality opinions, making them both compelling and controversial, is that he also explains why he believes that race-based government policies are not only unconstitutional, but also unwise, unjust, and harmful to their intended beneficiaries.

Our approach is descriptive: we seek to explain his views on race using his own words and drawing upon his life experiences. In Part I, we begin with the proposition that it is impossible to comprehend Justice Thomas’s views on racial equality without understanding how his life experiences uniquely influence his approach to questions of race and the law.⁹ In Part II, we turn to several recurring themes in his racial equality opinions: his belief that racial preferences stigmatize their beneficiaries;¹⁰ his concern that the prevailing notion that racial integration is necessary to black achievement is rooted in a presumption of racial inferiority;¹¹ his worry that affirmative action efforts provide cover for the failure to address the urgent needs of disadvantaged Americans;¹² and his knowledge that seemingly benign policies can mask illicit motives.¹³ In closing, we briefly address the claim that Justice Thomas’s race opinions are out of step with his stated jurisprudential commitments.

I. JUSTICE THOMAS’S UNIQUE PERSPECTIVE ON RACE

Justice Thomas’s remarkable story—told in his own powerful words in his autobiography, *My Grandfather’s Son*—is by now well-known.¹⁴ Unfortunately, his detractors frequently discount how profoundly his life experiences influence his views of social institutions and policies, especially those that intersect with

7. Clarence Thomas, Speech to the National Bar Association (July 28, 1998), <http://teachingamericanhistory.org/library/document/speech-to-the-national-bar-association> [<http://perma.cc/Y96P-N76S>].

8. See *infra* text accompanying notes 77-82.

9. See *infra* text accompanying notes 14-33.

10. See *infra* text accompanying notes 23-39.

11. See *infra* text accompanying notes 41-55.

12. See *infra* text accompanying notes 66-76.

13. See *infra* text accompanying notes 56-61.

14. CLARENCE THOMAS, *MY GRANDFATHER’S SON* (2007).

race. It is impossible to understand Justice Thomas without understanding his past. Clarence Thomas was born poor into a world defined by segregation;¹⁵ he was abandoned by his father and raised by his grandfather—a proud, hard-working, and functionally illiterate man.¹⁶ He attended both all-black schools and integrated, all-white ones.¹⁷ He studied to be a Catholic priest but left the seminary after overhearing one of his classmates celebrate when Martin Luther King, Jr. was shot.¹⁸ Justice Thomas came of age in turbulent times. He lived through the birth of the civil rights movement and the death of Martin Luther King, Jr. He entered grade school in the shadow of *Brown v. Board of Education* and graduated law school as Boston rioted over busing. Justice Thomas flirted with black nationalism and eventually found a home in the black conservatism of Booker T. Washington and Frederick Douglass.¹⁹ He marks the day he read Thomas Sowell's book *Race and Economics* as his intellectual turning point.²⁰ Sowell's focus on the importance of self-reliance and the dangers of social engineering rang true.²¹

Contrary to his critics' uncharitable assertion that his emphasis on this remarkable story during his confirmation hearings represented a contrived "Pinpoint Strategy" to secure confirmation—and his recounting of it in *My Grandfather's Son* as a ploy to improve his public image²²—Justice Thomas's past shapes who he is as a man and a jurist. To understand Justice Thomas is to understand the vectors between his biography and his warning in *Parents Involved*: "If our history has taught us anything, it has taught us to beware of elites bearing racial theories."²³ There is a reason why, when nominated to the

15. *Id.* at 1-2.

16. *Id.* at 3-21.

17. *Id.* at 6, 14-15, 28, 32-33, 50.

18. *Id.* at 38-44.

19. *Id.* at 56-65; see also Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005) (arguing that Justice Thomas's thought is deeply grounded in black conservatism); Stephen F. Smith, *Clarence X? The Black Nationalist Behind Justice Thomas's Constitutionalism*, 4 N.Y.U. J.L. & LIBERTY 583, 625 (2009) (arguing that Justice Thomas has developed "a distinctive brand of conservative jurisprudence that is infused with black nationalism").

20. THOMAS, *supra* note 14, at 106-107; THOMAS SOWELL, *RACE AND ECONOMICS* (1975).

21. THOMAS, *supra* note 14, at 106 (describing his reaction to Sowell's book: "I felt like a thirsty man gulping down a glass of cool water. Here was a black man who was saying what I thought.").

22. Jeffrey Toobin, *Unforgiven: Why Is Clarence Thomas So Angry?*, NEW YORKER (Nov. 12, 2007), <http://www.newyorker.com/magazine/2007/11/12/unforgiven> [<http://perma.cc/3GND-C29T>].

23. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 780-81 (2007) (Thomas, J., concurring).

Supreme Court, he first thanked his grandparents and the nuns at St. Benedict School: When his life was crumbling all around him, ordinary Americans living dignified lives in the midst of injustice and oppression – not a government program favored by elites – set him on a path that ended at One First Street. For Justice Thomas, his grandparents, his nuns, St. Benedict, Savannah’s segregated public library, and the Jesuit priest who began recruiting African-American students to Holy Cross are all icons of his grandfather’s oft-repeated admonition, “Old man can’t is dead. I helped bury him.”²⁴ And, perhaps no less so, for Justice Thomas, urban renewal,²⁵ busing,²⁶ and affirmative action²⁷ all are icons of a failure of a society too blindly committed to social engineering to heed Frederick Douglass: “What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us!”²⁸

More than in any other area of the law, Justice Thomas’s experiences have influenced his views on race. For Justice Thomas, the Court’s race cases are a living reminder of broken promises. Growing up in segregated Georgia helped him see through “faddish social theories” and recognize that “[w]hat was wrong” when the Court decided *Brown* “in 1954 cannot be right today.”²⁹ His remarkable life journey has taught him that “blacks can achieve in every avenue of American life without the meddling of university administrators.”³⁰ After he “spent the mid-60’s as a successful student in a virtually white environment . . . [and] accepted the loneliness that came with being the ‘integrator,’ the first and the only,” he “learned the hard way that a law degree from Yale meant one thing for white graduates and another for blacks” because “racial

24. THOMAS, *supra* note 14, at 13.

25. *Id.* at 147 (“I feared that the unintended effects of social-engineering policies like urban renewal would be at least as bad as the problems themselves.”).

26. *Id.* at 78-79 (describing busing as a “harebrained social experiment”).

27. *Grutter v. Bollinger*, 539 U.S. 306, 372 (2003) (Thomas, J., concurring in part and dissenting in part) (expressing frustration that proponents of affirmative action “will never address the real problems facing ‘underrepresented minorities,’ instead continuing their social experiments on other people’s children.”).

28. *Id.* at 349 (quoting Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts (Jan. 26, 1865)*, in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (J. Blasingame & J. McKivigan eds., 1991)).

29. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 778 (2007) (Thomas, J., concurring).

30. *Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part).

preference had robbed [his] achievement of its true value.”³¹ It was his own anger that led him to “understand,” but ultimately reject, “the comforts and security of racial solidarity, defensive or otherwise. Only those who have not been set upon by hatred and repelled by rejection fail to understand its attraction.”³² And, being his grandfather’s son gave him the confidence to declare his own independence and to “assert my right to think for myself, to refuse to have my ideas assigned to me as though I was an intellectual slave because I’m black . . . to state that I’m a man, free to think for myself and do as I please [and] to assert that I am a judge and I will not be consigned the unquestioned opinions of others.”³³

II. JUSTICE THOMAS’S PRINCIPLED APPROACH TO RACE

Justice Thomas’s race jurisprudence is, foremost, informed by his understanding of what the original meaning of the Fourteenth Amendment demands.³⁴ His race opinions, however, have a moral dimension that distinguish them from his opinions in other areas. Justice Thomas does not just disagree with the legal foundations of these decisions. He believes that they are morally wrong, harmful to their intended beneficiaries, and disrespectful of African-American achievements and abilities.

A. *Racial Discrimination Is Never “Benign”*

Justice Thomas’s moral condemnation of the Court’s willingness to permit what it terms “benign” racial discrimination is based on three principal concerns.

Justice Thomas’s first concern is that racial preferences stigmatize their intended beneficiaries. As he has explained, “[T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called ‘benign’ discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence.”³⁵ Not only do “such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by

31. Thomas, *supra* note 7.

32. *Id.*

33. *Id.*

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

35. *Id.* at 241.

the government's use of race," but they "stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."³⁶

Justice Thomas struck this same note in his dissent in *Grutter v. Bollinger*.³⁷ He observed, "[E]ach year, the [University of Michigan] Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. 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."³⁸ As a result, "When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement." He emphasized, "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."³⁹

Justice Thomas's second concern is that the Court's race opinions reflect assumptions about racial inferiority. This concern is reflected in his insistence on the distinction between *de jure* segregation, on the one hand, and racial imbalance (sometimes called "*de facto* segregation"), on the other. He has made clear that racial segregation—that is, the legal separation of races—is always unconstitutional, but he has also insisted that racial concentrations resulting from other factors are neither unconstitutional nor necessarily undesirable. In *Missouri v. Jenkins*, which addressed the scope of the federal courts' equitable powers to eliminate the vestiges of *de jure* segregation, Justice Thomas observed:

The mere fact that a school is black does not mean that it is the product of a constitutional violation Instead, in order to find unconstitutional segregation, we require that plaintiffs "prove . . . a current condition of segregation resulting from *intentional state action* . . . [T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation is *purpose* or *intent* to segregate."⁴⁰

36. *Id.*

37. *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part and dissenting in part).

38. *Id.*

39. *Id.* at 372.

40. 515 U.S. 70, 115 (1995) (Thomas, J., concurring) (quoting *Keyes v. Sch. Dist. No. 1, Denver*, 413 U.S. 189, 205-206 (1973)).

In cases blurring this distinction, Justice Thomas has called out his colleagues for assuming that integration is necessary for African-American achievement, an assumption that he worries is rooted in a presumption of racial inferiority. This theme emerged in Justice Thomas's first term on the Court in *United States v. Fordice*, which addressed whether Mississippi had taken sufficient steps to remedy past intentional segregation in the higher education context.⁴¹ In a concurrence, Justice Thomas emphasized that "racial imbalance does not itself establish a violation of the Constitution."⁴² Indeed, there might be a "sound educational justification' for maintaining historically black colleges *as such*,"⁴³ including the fact that "for many, historically black colleges have become a symbol of the highest attainments of black culture."⁴⁴ He concluded, "It would be ironic indeed if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges."⁴⁵

He returned to this theme in his concurrence in *Missouri v. Jenkins*.⁴⁶ "It never ceases to amaze me," he began, "that the courts are so willing to assume that anything that is predominantly black must be inferior."⁴⁷ Unfortunately, "the Court has read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority."⁴⁸ He admonished, "there simply . . . is no reason to think that black students cannot learn as well as when surrounded by members of their own race as when they are in an integrated environment."⁴⁹ On the contrary, "black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement."⁵⁰

He returned to these themes in *Parents Involved in Community Schools*, which addressed an Equal Protection challenge to the voluntary use of racial

41. 505 U.S. 717 (1992).

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

43. *Id.* at 748.

44. *Id.* at 748-49.

45. *Id.* at 749.

46. 515 U.S. 70 (1995).

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

48. *Id.*

49. *Id.* at 121-22.

50. *Id.* at 122 (citing *Fordice*, 505 U.S. at 748 (Thomas, J., concurring)).

classification in K-12 school assignment policies.⁵¹ In his stinging concurrence, Justice Thomas criticized the dissent's willingness to "give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education*."⁵² "It is far from apparent," he continued, "that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement."⁵³

These opinions demonstrate that Justice Thomas's unapologetic refusal to endorse racial integration as a goal *for its own sake* does not, as some commentators have suggested, reflect callousness toward disadvantaged minorities.⁵⁴ Rather, his opposition is rooted both in his respect for African-American institutions and his concern that the assumption that integration is necessary to improve black academic achievement presumes racial inferiority. "After all," he observed in *Jenkins*, "if integration . . . is the only way that blacks can receive a proper education, then there must be something inferior about blacks."⁵⁵

Justice Thomas's third concern is that government policies justified as "benign" sometimes mask bad motives. "Slaveholders," he pointed out in *Fisher v. University of Texas*, "argued that slavery was a 'positive good' that civilized blacks and elevated them in every dimension of life,"⁵⁶ and "segregationists similarly asserted that segregation was not only benign, but good for black students."⁵⁷ Just as the University of Texas argued that "the diversity obtained through its discriminatory admissions program prepares its students to become leaders in a diverse society,"⁵⁸ he observed, "segregationists likewise defended segregation on the ground that it provided more leadership opportunities for blacks."⁵⁹ And, the assertion that "student body diversity improves interracial

51. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Thomas, J., concurring).

52. *Id.* at 748.

53. *Id.* at 761.

54. See, e.g., Jared A. Levy, Note, *Blinking at Reality: The Implications of Justice Clarence Thomas's Influential Approach to Race and Education*, 78 B.U. L. REV. 575 (1998); Ellen Goodman, *Color Clarence Thomas Conservative*, SEATTLE TIMES (July 6, 2007), <http://www.seattletimes.com/opinion/color-clarence-thomas-conservative> [<http://perma.cc/3XSP-4YKS>]; Clarence Lusane, *Clarence Thomas as "Judge Dread"*, BALTIMORE SUN (July 13, 1995), http://articles.baltimoresun.com/1995-07-13/news/1995194034_1_justice-thomas-clarence-thomas-court-justice-clarence [<http://perma.cc/2S92-ZV8U>].

55. *Jenkins*, 515 U.S. at 122 (Thomas, J., concurring).

56. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2429 (2013) (Thomas, J., concurring).

57. *Id.* at 2430.

58. *Id.* at 2426.

59. *Id.*

relations . . . repeats arguments once marshaled in support of segregation.”⁶⁰ As he observed, “The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities.”⁶¹

But Justice Thomas’s worry that allegedly benign policies may mask illicit motives are not limited to race cases. Consider three examples: First, in *Kelo v. New London*, he warned, “The legacy of this Court’s ‘public purpose’ test [is] an unhappy one Urban renewal projects have long been associated with the displacement of blacks; [i]n cities across the country, urban renewal came to be known as ‘Negro removal.’”⁶² Second, Justice Thomas has suggested that racial bias influenced the enactment of the Tillman Act, an early statute banning corporate speech. In his dissent in *Citizens United v. FEC*, Justice Stevens criticized the majority for making “a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907.”⁶³ But Justice Thomas has noted that “Tillman was from South Carolina, and . . . concerned that the corporations, Republican corporations, were favorable toward blacks[,] . . . he felt that there was a need to regulate them.”⁶⁴ Third, Justice Thomas recently raised questions about the constitutionality of modern civil forfeiture laws in part because “forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings.”⁶⁵

B. *The False Promise of Social Engineering*

That is not to say that Justice Thomas always questions the motives behind policies that seek to advance the prospects of the disadvantaged. Justice Thomas has made clear that because he “wish[es] to see all students succeed whatever their color,” he “share[s], in some respect, the sympathies of those who sponsor the type of discrimination advanced” by proponents of racial prefer-

60. *Id.* at 2427.

61. *Id.* at 2429.

62. 545 U.S. 469, 522 (Thomas, J., dissenting) (quoting Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 47 (2003)).

63. 558 U.S. 310, 394 (2010) (Stevens, J., concurring in part and dissenting in part).

64. Adam Liptak, *Justice Defends Ruling on Finance*, N.Y. TIMES (Feb. 3, 2010), <http://www.nytimes.com/2010/02/04/us/politics/04scotus.html> [<http://perma.cc/3RKT-J2CS>].

65. *Leonard v. Texas*, 137 S. Ct. 847 (2017) (statement of Thomas, J., respecting the denial of certiorari).

ences.⁶⁶ But he rejects these programs as social engineering that offer false promise rather than real solutions to the problems confronting disadvantaged minority students. “Although cloaked in good intentions, [this] racial tinkering harms the very people it claims to be helping.”⁶⁷

In affirmative action cases specifically, Justice Thomas has called out proponents for “aesthetic” solutions that will not actually address real problems. In *Grutter*, Justice Thomas sharply criticized the defendants for ignoring the academic underperformance of “the purported ‘beneficiaries’” of racial preferences.⁶⁸ “The Law School seeks only a facade—it is sufficient that the class looks right, even if it does not perform right.”⁶⁹ He argued that elite universities “tantalize[] unprepared students with the promise of a . . . degree and all of the opportunities that it offers. These outmatched students take the bait, only to find that they cannot succeed in the cauldron of competition.”⁷⁰ Moreover, he warns that racial preferences provide an excuse to avoid undertaking the hard work necessary to equip the underprivileged for success. Proponents of affirmative action, he has argued, care only about their “image[s] among know-it-all elites, not solving real problems like the crisis of male black underperformance.” Therefore, they “will never address the real problems facing ‘underrepresented minorities.’”⁷¹

The sincerity of this concern was evident in Justice Thomas’s concurrence in *Zelman v. Simmons-Harris*, which upheld a modest voucher program that provided poor children with publicly funded scholarships enabling them to attend private and religious schools.⁷² Justice Thomas’s frustration with those who would use the Establishment Clause to deny children this opportunity was palpable. He began by quoting Frederick Douglass: “[E]ducation . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free.”⁷³ He continued, “[M]any of our inner-city public schools deny emancipa-

66. *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part and dissenting in part).

67. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2432 (2013) (Thomas, J., concurring).

68. *Grutter*, 539 U.S. at 371 (Thomas, J., concurring in part and dissenting in part).

69. *Id.* at 371-72.

70. *Id.* at 372.

71. *Id.*

72. 536 U.S. 639 (2002).

73. *Id.* at 676 (Thomas, J., concurring) (quoting Frederick Douglass, *The Blessings of Liberty and Education: An Address Delivered in Manassas, Virginia (Sept. 3, 1804)*, in 5 THE FREDERICK DOUGLASS PAPERS 623 (J. Blassingame & J. McKivigan eds., 1992)).

tion to urban minority students.”⁷⁴ He reminded his colleagues of the Court’s prediction in *Brown* that “it is doubtful that a child may be reasonably expected to succeed in life if he is denied the opportunity of an education.”⁷⁵ It is hardly surprising, Justice Thomas observed, that minority families consistently express high levels of support for school choice, since “[t]he failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality and alienation that continues for the remainder of their lives.”⁷⁶

CONCLUSION

This Essay has sought to explain Justice Thomas’s unique perspective on questions of race. We close by briefly addressing the separate contention that his race opinions are inconsistent with his originalist judicial philosophy. As one critic has claimed, “Clarence Thomas abandons his originalist jurisprudential philosophy whenever it fits his political and emotional agenda. He does this in his race jurisprudence.”⁷⁷ Another charged that Justice Thomas “is supposed to be concerned with the original understanding of the Constitution, not the policy debates of those wholly unconnected to the nation’s supreme document.”⁷⁸

These critics miss the point. Justice Thomas’s opinions reflect his view that the Equal Protection Clause, as originally understood, demands colorblindness.⁷⁹ Indeed, he has consistently stated that a proper understanding of the Equal Protection Clause precludes the use of racial classifications in all but the narrowest of circumstances, and therefore, nothing more is needed to resolve the cases. As Justice Thomas explained in *Fisher*, “[I]t does not, for constitu-

74. *Id.*

75. *Id.*

76. *Id.* at 682-83.

77. André Douglas Pond Cummings, *Grutter v. Bollinger, Clarence Thomas, Affirmative Action and the Treachery of Originalism: “The Sun Don’t Shine Here in This Part of Town”*, 21 HARV. BLACKLETTER L.J. 1, 4-5 (2005).

78. Brando Simeo Starkey, *Inconsistent Originalism and the Need for Equal Protection Re-Invigoration*, 4 GEO. J.L. & MOD. CRITICAL RACE PERSP. 1, 20 (2012). See generally Joel K. Goldstein, *Calling Them As He Sees Them: The Disappearance of Originalism in Justice Thomas’s Opinions on Race*, 74 MD. L. REV. 79 (2014) (arguing that Justice Thomas abandons originalism and embraces moral and consequentialist arguments in race cases).

79. A resolution of the scholarly dispute about the original meaning of the Equal Protection clause is beyond the scope of this Essay. See, e.g., Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71 (2013).

tional purposes, matter whether the University's racial discrimination is benign."⁸⁰

In racial equality cases, it is true that Justice Thomas often goes further and responds to his critics *on their terms*. Although Justice Thomas has been criticized for not affording sufficient respect to precedent,⁸¹ he has challenged his critics to defend affirmative action policies under *Brown* and its progeny. Similarly, his detractors criticize him for failing to consider the moral and practical consequences of ruling one way or the other in constitutional cases.⁸² Justice Thomas, however, has spoken directly to the moral and the practical problems posed by the policies being challenged in the cases before the Court. Justice Thomas's willingness to engage in this way reflects the importance of the debate to both him and the nation. But it does not mean his opinions are out of sync with the jurisprudential principles upon which he bases his decisions.

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80. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2429 (2013) (Thomas, J., concurring).

81. See, e.g., Chris Gaspard, Kimbrough and Gall: Taking Another "Crack" at Expanding Judicial Discretion Under the Federal Sentencing Guidelines, 36 PEPP. L. REV. 757, 804 (2009).

82. See, e.g., Christopher E. Smith & Cheryl D. Lema, Justice Clarence Thomas and Incommunicado Detention: Justifications and Risks, 39 VAL. U. L. REV. 783, 801 (2005).