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CALLING THEM AS HE SEES THEM: THE DISAPPEARANCE OF ORIGINALISM IN JUSTICE THOMAS'S OPINIONS ON RACE

JOEL K. GOLDSTEIN*

ABSTRACT

During his first two decades on the Court, Justice Clarence Thomas has been associated with originalism and is often viewed as its leading judicial proponent. Justice Thomas has linked originalism with the effort to limit judicial discretion and to promote judicial impartiality. In cases dealing with many constitutional provisions, Justice Thomas has shown his commitment to originalism by often writing solitary concurrences and dissents advocating an originalist analysis of a problem. Yet in constitutional cases dealing with race, Justice Thomas routinely abandons originalism and embraces the sort of constitutional arguments based on morality or consequentialism that he often discounts. These opinions in race cases are often powerful and impassioned, just not originalist. Justice Thomas's behavior in these race cases indicates that he is less committed to originalism than often suggested or than he claims. In these cases, he has often provided a distinctive, and personal, perspective to the Court. In doing so, however, he departs from the originalism that he has otherwise advocated as the route to judicial impartiality.

INTRODUCTION

During his first two decades on the Supreme Court, Justice Clarence Thomas has established himself as its most outspoken originalist. In numerous opinions and nonjudicial utterances, Justice Thomas has propounded an approach to interpreting the Constitution which insists that its text be

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construed in accordance with some version of originalism. Originalism, according to Justice Thomas, is the legitimate way to understand the Constitution, the secret to protecting judicial impartiality, and the elixir to preventing judges from imposing their values on constitutional decisionmaking.

The commitment to originalism that is so conspicuous in so many of Justice Thomas's constitutional opinions is less evident when he writes about race. In those cases, he makes few, if any, references to 1789 (or 1791) or 1868 to find constitutional meaning. Instead, time and again he interprets the relevant constitutional language by emphasizing other aids, including the sort of moral, consequentialist, and policy-oriented arguments that trigger his criticism—even outrage—in other contexts. And he reaches results that seem inconsistent with where originalism would lead.

The divergence in Justice Thomas's approach in constitutional cases dealing with race is perceptible and recurring. It has characterized his judicial behavior from the beginning of his tenure on the Court and has continued through the Court's most recent terms. For instance, in *Fisher v. University of Texas at Austin*,¹ he again wrote a concurring opinion in a constitutional case dealing with race but justified his conclusions on moral and consequential, not originalist, arguments.

The disappearance of originalism from this body of Justice Thomas's opinions is noteworthy in view of his intense interest in, and strong beliefs and feelings about, constitutional, historical, and policy issues relating to race. Such issues are clearly not matters of indifference to Justice Thomas. Far from it. He writes about these topics frequently when they come before the Court and sometimes introduces considerations based on race in cases ostensibly about something else. His opinions in these cases are passionate. One might expect Justice Thomas to deploy originalism, the constitutional theory he champions, to interpret the Constitution on issues that engage him so deeply. He does not. In fact, the converse is true. Race cases are one of the rare constitutional issues where his reliance on originalism largely vanishes.

Justice Thomas has not explained or even acknowledged the absence of an originalist presentation from his jurisprudence in constitutional cases dealing with race, and this silence is equally conspicuous. Although Justice Thomas has participated in discussions of correct and incorrect modes of constitutional interpretation and has written and spoken about constitutional interpretation since joining the Court, he has not offered any published justification of why his judicial methodology in race cases differs so markedly from his practice in many other areas of constitutional law.

1. 133 S. Ct. 2411, 2428–32 (2013) (arguing that the “racial tinkering” of universities through affirmative action policies does more to harm than to help minorities).

It cannot be said that Justice Thomas's failure to use originalism as his interpretive compass in race cases is surprising in view of the consistency in that particular omission during the more than two decades he has served on the Court. But predictability of the pattern does not make it any less anomalous.

The disappearance of originalism in race cases raises questions regarding Justice Thomas's jurisprudence. It might suggest that he is a less faithful originalist than he has professed or that he sometimes uses originalism to reach desired results but abandons that methodology when it will not generate a congenial outcome. In a sense, neither conclusion would necessarily separate Justice Thomas from many other jurists who treat originalism as one of a number of valid types of constitutional argument. Yet two factors distinguish Justice Thomas's behavior in this regard. First, those other jurists subscribe to more pluralistic theories of constitutional adjudication. Unlike Justice Thomas, they do not claim that originalism is the only valid path, and accordingly, their departures from it do not deviate from the interpretive theories they espouse. Second, Justice Thomas's failure even to acknowledge the discrepancy between his professed theory and his performance in constitutional cases dealing with race suggests either that he is oblivious to the pattern or does not believe himself compelled to explain it.

Justice Thomas's tendency to jettison originalism in race cases also raises questions about originalism. It might suggest that the methodology of originalism simply cannot produce the outcomes in race cases some of its proponents have claimed, both in justifying the results in *Brown v. Board of Education*² and *Bolling v. Sharpe*³ and in supporting opposition to race conscious decisionmaking in affirmative action cases. My purpose here is not to investigate the merits of that question. Justice Thomas's behavior itself cannot prove that originalism is deficient in this regard, but the failure of such a prominent and admired originalist to use that interpretive technique in race cases is curious to say the least.

Although Justice Thomas does generally prefer some brand of originalism, his behavior in constitutional cases dealing with race suggests that such an orientation is not his ultimate jurisprudential commitment. If it were, he would either draw from originalism extensively in writing on those cases, as he often does elsewhere, or perhaps he would explain why the originalist tools he uses in other contexts are not useful interpretive instruments in race cases. Instead, his opinions in race cases appear to draw heavily from his deeply held beliefs and feelings about racial justice in-

2. 347 U.S. 483, 495 (1954) (holding that racial segregation in public education violated the Equal Protection Clause of the Fourteenth Amendment).

3. 347 U.S. 497, 500 (1954) (holding that racial segregation in public schools in the District of Columbia violated the Fifth Amendment Due Process Clause).

formed by his own experience. Yet just as conflicts emerge between his professed methodology of originalism and his handling of constitutional cases involving race, so too, do inconsistencies emerge in his handling of high profile race cases. Ultimately, in race cases, whatever value Justice Thomas brings to the Court comes not because he adheres to a rigorous or consistent form of adjudication—he doesn’t—but because he speaks passionately based on a distinctive set of experiences and values. Far from being the impartial jurist Justice Thomas has celebrated as the model and with which he has associated originalism, Justice Thomas’s discussions of race draw heavily from lessons in his own life.

This Article begins by discussing Justice Thomas’s stated aspiration to be an originalist justice and describes his performance generally in this respect. Part II shows how he abandons originalism in constitutional cases dealing with race. Part III discusses in more depth his opinions in cases discussing race issues to show his engagement in that area. Part IV draws conclusions.

I. ORIGINALISM AND JUSTICE THOMAS

A. *Justice Thomas’s Case for Originalism*

Since joining the Court, Justice Thomas has pronounced impartiality as “the very essence of judging and of being a judge.”⁴ This vision informed his comments during his confirmation proceedings, where he expounded an uncompromising view of judicial neutrality. In nominating him, President George H.W. Bush had said that he told Judge Thomas “that he ought to do like the umpire: Call them as you see them.”⁵ At his confirmation hearings, Judge Thomas declared that a judge had to “become accustomed to not having views, formed views on issues that may come before him or her. You become impartial or neutral.”⁶ Whether interpreting a statute or the Constitution, Judge Thomas said, the judicial role was limited; and the judge’s role was “at no point to impose his or her will or his or her opinion in that process, but, rather, to go to the traditional tools of constitutional interpretation or adjudication, as well as to statutory construction, but not, again, to impose his or her own point of view or his or her predilections

4. Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 4 (1996). See also CLARENCE THOMAS, MY GRANDFATHER’S SON: A MEMOIR 238 (2007) (discussing the process that an impartial judge follows in each case in order to determine his or her ultimate ruling).

5. The President’s News Conference in Kennebunkport, Maine, 1991 PUB. PAPERS 801, 805 (July 1, 1991).

6. *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings on Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States Before the Senate Committee on the Judiciary*, 102d. Cong., Pt. 1, 134 (1991) [hereinafter, *Thomas Hearings*].

or preconceptions.”⁷ A judge should not be an activist or have an agenda⁸ or “strong ideology” or “ideological views” but should “strip down, like a runner” to relieve himself from such baggage.⁹

In his opinions while on the Court and in his extrajudicial writings, Justice Thomas has embraced originalism as the way to advance judicial impartiality and to protect judicial opinions from reflecting the personal biases of particular jurists.¹⁰ Justice Thomas provided his most developed published statement of some of his ideas in a 1996 speech on “Judging” at the University of Kansas School of Law. There he celebrated the importance of impartiality in judging, prescribed limiting judicial discretion as a means to promote impartiality, and offered originalism as a methodology to limit judicial discretion. Justice Thomas vigorously rejected the notion that judges make law.¹¹ Instead, judges are to be “impartial referees.”¹² In fact, a jurist “must attempt to exorcise himself or herself of the passions, thoughts, and emotions that fill any frail human being. He must become almost pure” in order to perform the judicial function.¹³ In order to render a fair judgment, a judge must “push to one side” identifying characteristics such as race or sex.¹⁴ Just as a black referee would not be expected to favor black participants in calling a sporting event, a black judge cannot favor the “perceived interests” of black litigants.¹⁵ A jurist, especially a justice, must

7. *Id.* at 135; *see also id.* at 137 (stating that a judge’s personal views should not play a role and that a judge should consider recusal if he or she is unable to be “impartial or objective”); *id.* at 180 (discussing the need for a judge to be impartial and to be perceived as such); *id.* at 183 (stating that judges must shed personal opinions and not express strong opinions to preserve impartiality); *id.* at 334 (stating that a judge should not read views into the Constitution).

8. *Id.* at 172.

9. *Id.* at 203; *see also id.* at 267 (claiming that a judge strives for “impartiality” and “strip[s] down from . . . policy positions”).

10. *See, e.g.,* *Kelo v. New London*, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting) (“When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution’s original meaning.”); *Lewis v. Casey*, 518 U.S. 343, 367 (1996) (Thomas, J., concurring) (declaring “[s]trict adherence” to text and tradition “is essential if we are to fulfill our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views.”); *see also* Thomas, *supra* note 4, at 4–8 (celebrating importance of judicial impartiality and recommending originalism as a means to limit judicial discretion and promote impartiality); *A Conversation with Justice Clarence Thomas*, 37 PEPP. L. REV. 7, 20 (2009) (“It’s what I’m trying to find from the people who were there, or who were close to that . . . Is it perfect? No it’s not. And some people like to call it originalism. But it keeps me from putting my personal views on it.”).

11. Thomas, *supra* note 4, at 2–5.

12. *Id.* at 4.

13. *Id.*

14. *Id.*

15. *Id.* at 5.

adopt an adjudicatory methodology which will minimize judicial discretion and promote judicial restraint.¹⁶

Justice Thomas offered originalism as the methodology central to his vision of judging. According to Justice Thomas, judges cannot use ambiguous constitutional language to justify imposing “our modern theories and preconceptions upon the Constitution.”¹⁷ Instead, in constitutional cases courts should search for the “original understanding” of constitutional language, the meaning of which is not clear.¹⁸ Moreover, under originalism the Constitution means what it was understood to mean by the delegates at the Philadelphia and the ratifying conventions.¹⁹ Justice Thomas also justified originalism as implied by the written nature of the Constitution.²⁰ The decision to adopt a written Constitution rejected a vision of one whose meaning evolved or changed.

Five years after his Kansas lecture, Justice Thomas sounded very similar themes in his Francis Boyer Lecture to the American Enterprise Institute. Judges must be “impartial referees,” he proclaimed.²¹ They must push to the side their race, gender, and religion and “must attempt to keep at bay those passions, interests, and emotions that beset every frail human being.”²² Although the Constitution was written “in broad, sometimes ambiguous terms,” it lent itself to “correct” answers which could be discovered if judges adopted “principles of interpretation and methods of analysis that reduce judicial discretion.”²³ He said constitutional interpretation “should seek the original understanding” if the text’s meaning is not clear.²⁴ Constitutional meaning was determined by “the understanding” of the drafters and ratifiers.²⁵

More recently, in a lecture to the Manhattan Institute, Justice Thomas again invoked originalism as a means to preserve judicial impartiality. He declared that constitutional interpreters could either try to discern the Framers’ intent “or make it up”²⁶ and that interpretive methods that are not based on the Framers’ original intent “have no more basis in the Constitution than

16. *Id.* at 6.

17. *Id.*

18. *Id.*

19. *Id.* at 7.

20. *Id.*

21. Clarence Thomas, *Be Not Afraid*, AMERICAN ENTERPRISE INSTITUTE (Feb. 13, 2001), <http://www.aei.org/publication/be-not-afraid/>.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Clarence Thomas, *How to Read the Constitution*, WALL ST. J. (Oct. 20, 2008), <http://online.wsj.com/article/SB122445985683948619.html> (reprinting excerpts from Justice Thomas’s Wriston Lecture to the Manhattan Institute).

the latest football scores.”²⁷ Justice Thomas conceded that although even conscientious efforts to apply the Framers’ original intent were flawed, originalism at least was “legitimate” and “impartial.”²⁸

B. Justice Thomas as Constitutional Originalist

Justice Thomas’s judicial performance has also evidenced a commitment to some form of originalism in interpreting the Constitution. To be sure, only a fraction of the opinions Justice Thomas writes address constitutional matters. He writes relatively few majority opinions in constitutional cases²⁹ and, when he does, he often relies heavily on judicial precedent rather than on originalist reasoning,³⁰ an unsurprising course in view of the institutional responsibility to write for a group most of whose members do not share his professed commitment to originalism.

Concurrences and dissents afford a justice a better opportunity to establish and express an independent judicial voice, and Justice Thomas has made frequent use of such discretionary opinions in constitutional cases to take issue with non-originalist methodologies and to celebrate originalism and apply arguments associated with it. In an early opinion, he suggested that recourse to ““evolving standards of decency,”” a tool of living constitutionalists,³¹ was illegitimate because it transformed the role of the federal judiciary in an unintended way.³² On another occasion, he caricatured “the pervasive view that the Federal Constitution must address all ills in our society.”³³ A 1999 dissenting opinion called for overruling a decision which “constitutionalizes a policy choice that a majority of the Court found desirable at the time. . . . This sort of undertaking is not an exercise in constitutional interpretation but an act of judicial willfulness that has no logical stopping point.”³⁴ More recently, he chastised the majority for following its own sense of morality rather than original understanding in order to shape future societal consensus.³⁵ Justice Thomas’s enthusiasm for originalism

27. *Id.*

28. *Id.*

29. See Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 73–74 (Earl M. Maltz ed., 2003).

30. *But see* Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013) (relying in part on the original meaning of the Sixth Amendment in holding that a defendant has the right to a jury trial regarding any fact that increases the range of possible penalties).

31. See, e.g., Lawrence v. Texas, 539 U.S. 558, 571–72, 579 (2003) (relying on evolving standards to strike down Texas law outlawing same sex sodomy).

32. Farmer v. Brennan, 511 U.S. 825, 859–60 (1994) (Thomas, J., concurring).

33. Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting).

34. Mitchell v. United States, 526 U.S. 314, 343 (1999) (Thomas, J., dissenting).

35. Miller v. Alabama, 132 S. Ct. 2455, 2482 (2012) (Thomas, J., dissenting) (arguing for original understanding in construing Cruel and Unusual Punishment Clause of Eighth Amendment); see also Graham v. Florida, 560 U.S. 48, 97, 101 (2010) (Thomas, J., dissenting) (rejecting

was such that in *McIntyre v. Ohio Elections Commission*³⁶ he found that even a long-standing (“a century of practice”) and widespread (“by almost all of the States”) practice³⁷ must yield to originalism, even when Justice Scalia and Chief Justice Rehnquist thought the original meaning too obscure to be recalled³⁸ and when “[t]he historical record is not as complete or as full as I would desire.”³⁹

Justice Thomas’s confirmation testimony might have encouraged the expectation that such ongoing history and tradition of the sort he encountered in *McIntyre* would help shape constitutional meaning. Although he had indicated that original intent was important,⁴⁰ he signaled that it would not constitute a trump card in his manner of constitutional adjudication. Constitutional interpretation should understand “what our Founders believed” but also “our history and our tradition, not just what their beliefs were when they drafted the document.”⁴¹ In interpreting the word “liberty,” he said an “important point is what did the Framers think they were doing,” but that question presented only part of the inquiry since “[t]he world didn’t stop with the Framers. The concept of liberty wasn’t self-defining at that point.”⁴² Accordingly “it is important . . . that you then look at the rest of the history and tradition of our country.”⁴³

Yet rather than joining Justice Stevens’s majority opinion striking down Ohio’s ban on distributing anonymous campaign literature, Justice Thomas wrote a thirteen page concurring opinion reaching the same result as the Court but based on his assessment of the “original understanding” of

right of Court to decide Eighth Amendment issues based on evolving or national consensus or moral conceptions).

36. 514 U.S. 334 (1995).

37. *Id.* at 370 (Thomas, J., concurring).

38. *Id.* at 371–72 (Scalia, J., dissenting).

39. *Id.* at 367 (Thomas, J., concurring).

40. *Thomas Hearings*, *supra* note 6, at 112; *id.* at 168 (referring to natural law as relevant in understanding the Framers’ views and values); *id.* at 170–71 (describing natural law as a way to understanding the Framers’ views, not as a theory of adjudication); *id.* at 179 (limiting the use of natural law to understanding what the Framers meant and were trying to do); *id.* at 189 (limiting the use of natural law to understanding the intent of the drafters of the Civil War Amendments); *id.* at 237–38 (discussing recourse to beliefs of the Founders to understand liberty and other constitutional concepts); *id.* at 274, 275–77; *id.* at 303 (advocating looking at the Framers’ intent); *id.* at 342 (discussing the importance of looking at the Framers’ intent).

41. *Id.* at 193.

42. *Id.* at 269–70.

43. *Id.* at 270; *see also id.* at 273 (“[H]ow do we determine how our country has advanced and grown . . . ? It is an amorphous process at times, but it is an important process.”); *id.* at 274 (arguing that meaning of liberty does not stop at time of framing of Constitution but “evolves with the country, it moves with our history and our tradition.”); *id.* (arguing that Framers used “liberty” because it was a “broad concept” that “evolves over time” and that in interpreting it courts have accordingly looked to the “ideals” and “values” “that we share as a culture” which have “evolved over time” in “that specific provision”).

the First Amendment.⁴⁴ Justice Thomas rejected the majority's reasoning "because it deviates from our settled approach to interpreting the Constitution and because it superimposes its modern theories concerning expression upon the constitutional text."⁴⁵ The longstanding practice of anonymous publication "should be irrelevant to our analysis, because it sheds no light on what the phrases 'free speech' or 'free press' meant to the people who drafted and ratified the First Amendment."⁴⁶ That "certain types of expression have 'value' today has little significance; what *is* important is whether the Framers in 1791 believed anonymous speech sufficiently valuable to deserve the protection of the Bill of Rights."⁴⁷

Justice Thomas claimed, "When interpreting other provisions of the Constitution, this Court has believed itself bound by the text of the Constitution and by the intent of those who drafted and ratified it."⁴⁸ The same commitment to original meaning should govern the First Amendment "for '[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.'"⁴⁹ Justice Thomas has reiterated this static approach to constitutional meaning on other occasions.⁵⁰

As his *McIntyre* concurrence signaled, Justice Thomas has often written discretionary opinions to apply some form of originalism in constitutional cases. One week after he issued his thirteen page *McIntyre* concurrence, he wrote a nineteen page concurrence to advocate use of original understanding to redefine the Court's Commerce Clause jurisprudence in *United States v. Lopez*.⁵¹ Although Justice Thomas joined the Court's majority opinion that, for the first time in nearly sixty years, struck down an act of Congress as beyond its power under the Commerce Clause, he wrote separately to advocate a return to original understanding in future Com-

44. *McIntyre*, 514 U.S. at 358–59 (rejecting the Court's "methodology" focusing on the "honorable tradition" and "value" of anonymous speech to focus on whether original the understanding of "freedom of speech" included anonymous speech).

45. *Id.* at 370.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 359 (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905)).

50. *See, e.g., Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2751 (2011) (Thomas, J., dissenting) (arguing that as a written document, the Constitution's meaning does not change); *Utah v. Evans*, 536 U.S. 452, 491 (2002) (Thomas, J., concurring in part and dissenting in part) ("We should be guided, therefore, by the Census Clause's original meaning, for [t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." (internal quotation marks omitted)). *Cf. Grutter v. Bollinger*, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part) (arguing that the meaning of the Equal Protection Clause will not change in twenty-five years).

51. 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

merce Clause cases.⁵² Specifically, Justice Thomas argued that the majority's "substantial effects" test was inconsistent with the text and history of the Constitution. Justice Thomas indicated a preference for a jurisprudence based on original understanding⁵³ but did not reject all roles for precedent⁵⁴ since others in the *Lopez* majority thought it "too late in the day to undertake a fundamental reexamination of the past 60 years."⁵⁵ Justice Thomas's emphasis on original understanding differed markedly not only from that of the other four dissenters but also from Justice Kennedy's precedent-focused concurrence, which Justice O'Connor joined, and Chief Justice Rehnquist's majority opinion for five justices including Justice Thomas. Significantly, no other justice joined Justice Thomas's opinion.

A decade later, Justice Thomas again advanced an originalist approach to the Commerce Clause in *Gonzales v. Raich*.⁵⁶ He construed "commerce" in light of what that term meant "at the time of the founding" based on his reading of "founding-era dictionaries, Madison's notes from the Constitutional Convention, The Federalist Papers, and the ratification debates."⁵⁷ He was interested in what "commerce" meant "not simply to those involved

52. *Id.* at 584 ("I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.").

53. *Id.* at 601 n.8 ("Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years."); *see also id.* at 585 ("My goal is simply to show how far we have departed from the original understanding . . ."); *id.* ("At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes."); *id.* at 586 ("In fact, when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably."); *id.* ("As one would expect, the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture."); *id.* at 590 ("The exchanges during the ratification campaign reveal the relatively limited reach of the Commerce Clause and of federal power generally. The Founding Fathers confirmed that most areas of life (even many matters that would have substantial effects on commerce) would remain outside the reach of the Federal Government. Such affairs would continue to be under the exclusive control of the States."); *id.* at 590–91 ("Early Americans understood that commerce, manufacturing, and agriculture, while distinct activities, were intimately related and dependent on each other—that each 'substantially affected' the others . . . Yet, despite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, the founding generation did not cede authority over all these activities to Congress.").

54. *See, e.g., id.* at 585 ("In an appropriate case, I believe that we must further reconsider our 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence."); *id.* at 601 ("This extended discussion of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions.").

55. *Id.* at 601 n.8.

56. 545 U.S. 1 (2005).

57. *Id.* at 58 (Thomas, J., dissenting).

in the drafting and ratification processes, but also to the general public.”⁵⁸ He has also used originalist methodologies to analyze a range of issues in other cases dealing with constitutional structure.⁵⁹

Justice Thomas does not use originalism only in cases interpreting the structural provisions of the Constitution. He has frequently deployed originalism to interpret some of the Constitution’s open-ended language regarding individual rights. In *Morse v. Frederick*,⁶⁰ Justice Thomas joined Chief Justice Roberts’s majority opinion but wrote a concurrence to argue that the First Amendment was not originally understood to protect student speech in public schools. Justice Thomas reached that conclusion based on the behavior of contemporary political actors. “If students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them. They did not.”⁶¹

Justice Thomas has gone out of his way to embrace various forms of originalism in other cases involving a range of rights, including interpreting the First Amendment’s Establishment Clause,⁶² the First Amendment’s Free

58. *Id.* at 59; *id.* at 70 (“The interconnectedness of economic activity is not a modern phenomenon unfamiliar to the Framers.”); *id.* (“the Framers understood what the majority does not appear to fully appreciate”); *see also* *American Trucking Ass’ns, Inc. v. Los Angeles*, 133 S. Ct. 2096, 2105–06 (2013) (Thomas, J., concurring) (concurring separately in unanimous opinion to argue that federal statute regulating intrastate commerce is unconstitutional); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2677 (2012) (Thomas, J., dissenting).

59. *See, e.g., Arizona v. Inter Tribal Council of Ariz., Inc.* 133 S. Ct. 2247, 2263–64 (2013) (Thomas, J., dissenting) (invoking original intent to interpret the Voter Qualifications Clause of the Constitution); *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2567–70 (2013) (Thomas, J., concurring) (using original understanding to argue that the Indian Commerce Clause does not allow Congress to regulate Indian child custody proceedings); *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2677 (2012) (Thomas, J., dissenting) (arguing that the “substantial effects” test is inconsistent with the original understanding of the Commerce Clause); *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting) (invoking the Framers’ intent regarding presidential power and national security); *Utah v. Evans*, 536 U.S. 432, 491 (2002) (Thomas, J., concurring in part and dissenting in part) (using originalism to interpret the Census Clause); *Printz v. United States*, 521 U.S. 898, 937 (1997) (Thomas, J., concurring) (arguing that the Court’s Commerce Clause doctrine should return to original understanding); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 621–24 (1997) (Thomas, J., dissenting) (applying various forms of originalism to the Import-Export Clause); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 871–77 (1995) (Thomas, J., dissenting) (using originalism to construe the Tenth Amendment and to derive basic principles of federalism).

60. 551 U.S. 393 (2007).

61. *Id.* at 411 (Thomas, J., concurring); *see also id.* at 418–19 (“As originally understood, the Constitution does not afford students a right to free speech in public schools.”).

62. *Van Orden v. Perry*, 545 U.S. 677, 692–93 (2005) (Thomas, J., concurring) (calling for return to original meaning of “Establishment Clause”); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 856–57 (1995) (Thomas, J., concurring) (“Even if Madison believed that the principle of nonestablishment of religion precluded government financial support for religion *per se* (in the sense of government benefits specifically targeting religion), there is no indication that at the time of the framing he took the dissent’s extreme view that the government must

Speech Clause,⁶³ the First Amendment's Petition Clause,⁶⁴ the Search and Seizure Clause of the Fourth Amendment,⁶⁵ the Takings Clause of the Fifth Amendment,⁶⁶ the Self-Incrimination Clause of the Fifth Amendment,⁶⁷ the Right to Counsel Clause of the Sixth Amendment,⁶⁸ the Confrontation Clause of the Sixth Amendment,⁶⁹ the Cruel and Unusual Punishment Clause of the Eighth Amendment,⁷⁰ the Privileges or Immunities Clause of

discriminate against religious adherents by excluding them from more generally available financial subsidies."); *id.* at 863 ("The dissent identifies no evidence that the Framers intended to disable religious entities from participating on neutral terms in evenhanded government programs. The evidence that does exist points in the opposite direction and provides ample support for today's decision.").

63. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2752 (2011) (Thomas, J., dissenting) (arguing that the original understanding of the Free Speech Clause does not authorize a party to speak to a minor without the permission of a parent); *Morse*, 551 U.S. at 411, 418–19 (Thomas J., concurring) (arguing that the original understanding of the First Amendment did not protect student speech in public schools); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358–59 (1995) (Thomas, J., concurring) (arguing that the First Amendment precludes a state from prohibiting the distribution of anonymous political materials).

64. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2501–02 (2011) (Thomas, J., concurring) (expressing doubt that lawsuits are within the Petition Clause under its original meaning).

65. *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995) (applying the common law "knock and announce" requirement to police).

66. *Kelo v. City of New London*, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting) ("Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power."); *id.* at 508 ("This would contradict a bedrock principle well established by the time of the founding: that all takings required the payment of compensation."); *id.* at 508–09 (citing early dictionaries and eminent domain practice to identify meaning of the term "use"); *id.* at 514 (criticizing Court for adopting "its modern reading blindly, with little discussion of the Clause's history and original meaning"); *id.* at 521 ("I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause . . .").

67. *Salinas v. Texas*, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) (arguing that the Fifth Amendment does not prohibit adverse comment on a criminal defendant's pre-custodial silence because at "founding, English and American courts strongly encouraged defendants to give unsworn statements and drew adverse inferences when they failed to do so").

68. *Rothgery v. Gillespie County*, 554 U.S. 191, 218 (2008) (Thomas, J., dissenting).

69. *See, e.g., Williams v. Illinois*, 132 S. Ct. 2221, 2260–64 (2012) (Thomas, J., concurring) (arguing that original understanding limits the Confrontation Clause to formalized testimonial materials); *Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011) (Thomas, J., concurring) (advancing originalist argument to limit the scope of the Confrontation Clause); *Davis v. Washington*, 547 U.S. 813, 835–36 (2006) (Thomas, J., concurring in part and dissenting in part) (same).

70. *See, e.g., Miller v. Alabama*, 132 S. Ct. 2455, 2484 (2012) (Thomas, J., dissenting) (arguing that mandatory life sentence without parole does not violate original understanding); *Graham v. Florida*, 560 U.S. 48, 130 (2010) (Thomas, J., dissenting) (arguing for an application of original understanding in interpreting the Cruel and Unusual Punishment Clause); *Baze v. Rees*, 553 U.S. 35, 94–95, 97, 99, 107 (2008) (Thomas, J., concurring) (citing contemporary dictionaries, Framers' intent, and contemporary practice); *Farmer v. Brennan*, 511 U.S. 825, 859 (1994) (Thomas, J., concurring) (using eighteenth-century dictionaries to define punishment as deriving from judicial sentence, not relating to conditions of confinement); *Helling v. McKinney*, 509 U.S. 25, 38 (1993); *see id.* at 38 ("At the time the Eighth Amendment was ratified, the word 'punishment' re-

the Fourteenth Amendment,⁷¹ and the Due Process Clause of the Fourteenth Amendment,⁷² and hints at it in other contexts.⁷³

In these cases, Justice Thomas does not simply give lip service to originalism. On the contrary, he typically explores originalist underpinnings of issues at some length. For instance, in *Rothgery v. Gillespie County*,⁷⁴ Justice Thomas was the only dissenter in an 8-1 decision holding that the Sixth Amendment right to counsel attached at the initial appearance of an arrested individual for a determination of probable cause and bail. The Court's decision was not supported, Justice Thomas wrote, by "the original meaning of the Sixth Amendment or any reasonable interpretation of our precedents."⁷⁵ Although Justice Thomas seemingly relied on precedent as well as originalism, the latter mode of argument clearly drove his analysis. The key question, Justice Thomas suggested, was what the constitutional phrase "criminal prosecutions" "meant when the Sixth Amendment was adopted" and what it "would have been understood to entail by those who adopted the Sixth Amendment."⁷⁶ Blackstone was the starting point for Justice Thomas's analysis and the next six paragraphs of his dissent digested Blackstone's usage, a discussion Justice Thomas reinforced by citing an early version of Noah Webster's dictionary. Justice Thomas cited nineteenth century cases consistent with his view that "criminal prosecutio[n]" as used in the Sixth Amendment "refers to the commencement of a criminal suit by filing formal charges in a court with jurisdiction to try and punish the defendant."⁷⁷ The "original meaning" of the Sixth Amendment accordingly cut "decisively" against the Court's conclusion.⁷⁸

ferred to the penalty imposed for the commission of a crime Nor, as far as I know, is there any historical evidence indicating that the [F]ramers and ratifiers of the Eighth Amendment had anything other than this common understanding of 'punishment' in mind.").

71. *Saenz v. Roe*, 526 U.S. 489, 521 (1999) ("[T]he majority attributes a meaning to the Privileges or Immunities Clause that likely was unintended when the Fourteenth Amendment was enacted and ratified."). Justice Thomas said he "would look to history to ascertain the original meaning of the Clause." *Id.* at 522. He stated that "I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant." *Id.* at 528.

72. *Turner v. Rogers*, 131 S. Ct. 2507, 2521 (2011) (Thomas, J., dissenting) (arguing that original understanding did not afford Due Process Clause right to appointed counsel for indigent defendant facing incarceration in civil contempt proceeding).

73. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 80 (2000) ("I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision.").

74. 554 U.S. 191 (2008).

75. *Id.* at 218 (Thomas, J., dissenting).

76. *Id.* at 219.

77. *Id.* at 223.

78. *Id.* at 224.

Several markers confirm the strength of Justice Thomas's apparent commitment to originalism in many of these cases. He has been willing to stake out an originalist position even when doing so leaves him filing a concurrence or dissent that no other justice joins, as he has on numerous occasions.⁷⁹ Justice Thomas's adherence to originalism is sufficiently zealous that at times he is willing to overturn precedents that others view as too entrenched to touch. In *Mitchell v. United States*,⁸⁰ for instance, Justice Thomas joined Justice Scalia's dissent which resisted extending *Griffin v. California*,⁸¹ a Warren Court decision that precluded a judge or prosecutor from commenting about a defendant's failure to testify in a criminal case. Whereas Justice Scalia, Chief Justice Rehnquist, and Justice O'Connor characterized *Griffin* as "a wrong turn" based largely on its inconsistency with originalism,⁸² they concluded that was "not cause enough to overrule it."⁸³ Justice Thomas wrote a separate and solitary dissent to announce that he "would be willing to reconsider *Griffin*" in an appropriate case largely on originalist grounds.⁸⁴ He has also argued for abandoning the Court's Dormant Commerce Clause doctrine, which has evolved over the last two centuries, and for replacing it with reliance on the Import-Export Clause based on originalist argument.⁸⁵

This willingness to stand alone in asserting originalist arguments and in overturning doctrine others accept has been an enduring characteristic of Justice Thomas's service on the Court. In 2007, he wrote a solitary concurrence⁸⁶ to call on the Court to overturn *Tinker v. Des Moines Independent Community School District*⁸⁷ on originalist grounds. In *Haywood v. Drown*,⁸⁸ he argued, based on Framers' intent, that state courts were not obligated to hear federal claims,⁸⁹ a position sufficiently radical that Chief

79. See, e.g., *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2261 (2013) (Thomas, J., dissenting); *Rothgery*, 554 U.S. at 218 (2008) (Thomas, J., dissenting); *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (Thomas, J., concurring); *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (Thomas, J., dissenting); *Kelo v. City of New London*, 545 U.S. 469, 505 (2005) (Thomas, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358 (1995) (Thomas, J., concurring).

80. 526 U.S. 314, 331 (1999).

81. 380 U.S. 609, 615 (1965).

82. *Mitchell*, 526 U.S. at 332–36.

83. *Id.* at 336. But see *Helling v. McKinney*, 509 U.S. 25, 42 (1993) (Thomas, J., dissenting) ("*Stare decisis* may call for hesitation in overruling a dubious precedent, but it does not demand that such a precedent be expanded to its outer limits.").

84. *Mitchell*, 526 U.S. at 341, 343 (Thomas, J., dissenting).

85. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

86. *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (Thomas, J., concurring).

87. 393 U.S. 503 (1969).

88. 556 U.S. 729 (2009).

89. *Id.* at 742–68 (Thomas, J., dissenting).

Justice Roberts and Justices Scalia and Alito declined to join that portion of Justice Thomas's dissent.⁹⁰ More recently, in *McDonald v. City of Chicago*,⁹¹ Justice Thomas argued for a return to the "original meaning" of the Fourteenth Amendment that would incorporate certain rights against the states via the Privileges or Immunities Clause rather than through the Due Process Clause.⁹² Justice Thomas acknowledged, but was not deterred by, the "volume of precedents" resting on the Due Process Clause.⁹³ By contrast, Justice Alito and the three other justices who also believed that the Second Amendment applied to the states, declined to depart from the *Slaughter-House Cases*⁹⁴ and refused to join Justice Thomas's opinion. In *Berghuis v. Smith*, Justice Thomas wrote a two paragraph concurrence to alert potential litigants that he would be willing to reconsider the cases guaranteeing defendants in criminal cases a jury that represents "a fair cross section of the community" on the grounds that in 1791 the Sixth Amendment conferred no such protection since when the amendment was ratified, many states excluded various classes of people from that activity.⁹⁵ Every other justice joined Justice Ginsburg's opinion for the Court without elaboration.

Justice Thomas's devotion to originalism has caused some conservative academics to regard some of his positions as unduly activist.⁹⁶ Even Justice Scalia has reportedly distinguished his own interpretive methodology from that of Justice Thomas in terms that suggest some reservation regarding his colleague's approach. Justice Scalia reportedly said: "I am an originalist, but I am not a nut."⁹⁷

Justice Thomas has championed originalism but has not followed a consistent approach in applying it in his written opinions.⁹⁸ At times, Jus-

90. *Id.* at 742.

91. 130 S. Ct. 3020 (2010).

92. *Id.* at 3062, 3086 (Thomas, J., concurring).

93. *Id.* at 3062–63.

94. 83 U.S. 36 (1873).

95. 559 U.S. 314, 334 (2010) (Thomas, J., concurring).

96. *See, e.g.*, Ernest Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1166–67 (2002) (criticizing Justice Thomas's Commerce Clause opinions as activist). *Cf.* Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 273 (2005) (arguing for reliance on precedent, rather than originalism, to promote judicial restraint).

97. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 120 (Anchor reprint 2008) (2007).

98. Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J.L. & LIBERTY 494, 511, 514 (2009). *But see* RALPH A. ROSSUM, *UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION* 13 (2014) (arguing that Justice Thomas incorporates different originalist methodologies "into his own distinctive original general meaning approach")

tice Thomas has emphasized the Framers' original intent,⁹⁹ on other occasions, the Constitution's original understanding based on how constitutional language was interpreted when adopted,¹⁰⁰ and sometimes the Constitution's original objective meaning when adopted rather than what the Framers intended or contemporary audiences understood.¹⁰¹ Sometimes, he has mixed approaches.¹⁰² Although one perceptive scholar sees some virtue in

99. See, e.g., *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247, 2264 (2013) (Thomas, J., dissenting) (discussing the Framers' intent regarding the Voter Qualifications Clause); *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 859–60 (1996) (relying in part on the intent of the Framers in interpreting the Export Clause); *Loving v. United States*, 517 U.S. 748, 779 (1996) (Thomas, J., concurring) (referring to what the Framers did and “sought”); *Wilson v. Arkansas*, 514 U.S. 927, 931, 934 (1995) (looking to the Framers' intent to determine the meaning of “reasonable” in the Fourth Amendment); *White v. Illinois*, 502 U.S. 346, 358–59, 363 (1992) (Thomas, J., concurring in part and concurring in the judgment) (using text and the original intent of the drafters to interpret the Confrontation Clause).

100. *Miller v. Alabama*, 132 S. Ct. 2455, 2482 (2012) (Thomas, J., dissenting) (criticizing the majority opinion as inconsistent with the original understanding of the Cruel and Unusual Punishment Clause); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2751 (2011) (Thomas, J., dissenting) (looking to the beliefs of the founding generation to interpret the First Amendment); *Morse v. Frederick*, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring) (looking to original understanding to interpret the application of the First Amendment to public schools); *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (applying precedent because parties had not argued “that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision”); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (criticizing “substantial effects” test as inconsistent with “original understanding”); *Printz v. United States*, 521 U.S. 898, 937 (1997) (Thomas, J., concurring) (calling for an interpretation of the Commerce Clause based on “original understanding”); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358–59, 370 (1995) (Thomas, J., concurring) (calling for determining whether “freedom of speech” as “originally understood” protected anonymous political leafleting).

101. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2501 (2011) (Thomas, J., concurring) (applying the original meaning of the Petition Clause); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3058 (2010) (Thomas, J., concurring) (seeking to discern how ordinary citizens at the time of ratification would have interpreted the meaning of the Privileges or Immunities Clause); *Rothgery v. Gillespie County*, 554 U.S. 191, 218 (2008) (Thomas, J., dissenting) (using original meaning to determine the meaning of “criminal prosecution” in the Sixth Amendment); *Apprendi v. New Jersey*, 530 U.S. 466, 518 (2000) (Thomas, J., concurring) (arguing the decision reinstates original meaning of Fifth and Sixth Amendments); *United States v. Hubbell*, 530 U.S. 27, 49–50 (2000) (Thomas, J., concurring) (arguing that the original meaning of “witness” in the Self-Incrimination Clause included all who gave evidence not just those who testified); *Farmer v. Brennan*, 511 U.S. 825, 859 (1994) (using late-eighteenth-century dictionaries to define “punishment”); *Helling v. McKinney*, 509 U.S. 25, 38, 40 (1993) (using late-eighteenth-century dictionaries and other sources to discover “original meaning” of “punishment” when the Eighth Amendment was ratified).

102. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2580 (2011) (discussing ratification-era practices to determine meaning); *United States v. Comstock*, 560 U.S. 126, 161–62 (2010) (Thomas, J., dissenting) (relying on evidence of intent of drafters and ratifiers and invoking intent and understanding); *Fed. Commc'n Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 532 (2009) (Thomas, J., concurring) (articulating original meaning as criteria in a First Amendment case but arguably applying original understanding); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 621–37 (1997) (Thomas, J., dissenting) (referring alternatively to original un-

Justice Thomas's pluralistic approach to originalism since it allows him to access more historical information, please a wider body of originalist academics, and defer committing to one originalist approach,¹⁰³ others point out that less fully specified originalist theories lend themselves to ideological wobbling.¹⁰⁴ In some respects, this flexibility does not distinguish the originalist from other constitutional interpreters who use various modes of constitutional argument to reach or justify results. Yet the originalist can take little comfort from a conclusion that he or she is no different from other interpreters. For the originalist claim of interpretive superiority rests largely on the assertion that originalism imposes objective constraints that align it with the rule of law. Nonetheless, Justice Thomas's many admirers praise what they see as his principled commitment to originalism.¹⁰⁵

II. RACE AND THE DISAPPEARANCE OF ORIGINALISM

Justice Thomas's approach to constitutional interpretation is quite different in cases dealing with race. Here, as elsewhere, Justice Thomas generally reaches conservative conclusions. He has repeatedly articulated a color-blind Constitution and has argued that a uniform standard of strict scrutiny applies whenever a government entity uses a racial classification,

derstanding, original usage, original meaning, and original intent in discussing Import-Export Clause); *Helling*, 509 U.S. at 38 (Thomas, J., dissenting) (using late-eighteenth-century dictionaries and other sources to discover meaning of "punishment" when Eighth Amendment was ratified but also focusing on what Framers and ratifiers had "in mind").

103. Maggs, *supra* note 98, at 515–16.

104. Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 16 (2011) (arguing that versions of originalism that are not well specified are manipulable to achieve conservative results); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1244 (2002) ("Originalism is a doctrine of convenience and, even then, not consistently applied.").

105. See, e.g., Richard Albert, *The Next Constitutional Revolution*, 88 U. DET. MERCY L. REV. 707, 729, 735 (2011) (praising Justice Thomas for his principled commitment to originalism); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 15 (2006); Edwin Meese III, *The Jurisprudence of Clarence Thomas*, 12 REGENT U. L. REV. 349, 349 (2000) (praising Thomas for fidelity to the Constitution and originalism); Timothy Sandefur, *Clarence Thomas's Jurisprudence Unexplained*, 4 N.Y.U. J.L. & LIBERTY 535, 553 (2009) (praising Justice Thomas as a "strong and consistent" originalist); Lee J. Strang, *The Most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 U. DET. MERCY L. REV. 873, 876–77 (2011) (praising Justice Thomas for the consistency and purity of his originalism); see also Maggs, *supra* note 98, at 510, 516 (describing Justice Thomas as originalist but noting that his methodology uses a confluence of original intent, understanding, and meaning); John Yoo, *Twenty Years of Justice Thomas*, WALL ST. J. (Oct. 21, 2011), <http://online.wsj.com/news/articles/SB10001424052970204485304576642963032597504> (calling Justice Thomas the original Constitution's "greatest defender"); John Yoo, *The Real Clarence Thomas*, WALL ST. J. (Oct. 9, 2007), <http://online.wsj.com/articles/SB119189308788652936> (calling Justice Thomas "the justice most committed" to the Framers' intent).

whether to burden or benefit a racial minority.¹⁰⁶ Yet he reaches and justifies these results without apparent reliance on originalism.

The characteristics that for two decades have defined so many of Justice Thomas's discretionary writings in other constitutional cases disappear in his concurrences or dissents in constitutional cases dealing with race. In these opinions, Justice Thomas does not say he is following the original intent, understanding, or meaning of the Constitution. He does not refer to eighteenth or nineteenth century dictionaries or treatises to define terms. He does not examine the debates or writings of the relevant Framers or ratifiers to fathom their intent or understandings regarding those concepts. He does not explore the practices or expectations of the contemporaneous generations to try to capture what they meant or thought. These originalist tools, which he has favored for more than two decades in other constitutional cases, are largely absent from his interpretive toolkit in constitutional cases dealing with race.

Justice Thomas's opinions on race either are bereft of originalist argument or contain only the most passing originalist references when discussing the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment—the two constitutional provisions those cases chiefly implicate. Instead, in these cases, Justice Thomas emphasizes arguments based on precedent, as well as consequential and moral reasoning.

A review of five significant constitutional cases dealing with race illustrates these points. In each case, Justice Thomas wrote a concurring or dissenting opinion. As such, he was not discharging an institutional responsibility to present a consensus view. The decision to write was discretionary and signaled his desire to address the topic individually rather than rely on a colleague's exposition. In four of the five cases, no other justice joined Justice Thomas's opinion; although Justice Scalia joined most of Justice Thomas's opinion in the fifth case, *Grutter v. Bollinger*,¹⁰⁷ it, too, seemed to reflect Justice Thomas's unaltered voice. Thus, the views and approach in these opinions can fairly be attributed to Justice Thomas alone. Additionally, in four of the five cases, Justice Thomas wrote lengthy opinions in which he necessarily invested a substantial amount of time and had plenty of space to develop his approach. Excluding his two page concurrence in *Adarand v. Peña*,¹⁰⁸ these opinions averaged almost twenty-seven pages. Each interpreted the Fifth or Fourteenth Amendment's explicit or implicit equal protection guarantee, yet notwithstanding the length of the

106. See, e.g., *Bush v. Vera*, 517 U.S. 952, 1000 (1996) (Thomas, J. concurring) ("Strict scrutiny applies to all governmental classifications based on race . . .").

107. 539 U.S. 306 (2003).

108. 515 U.S. 200 (1995).

opinions, Justice Thomas offered no elaborated originalist presentation. These opinions relied instead on other modes of constitutional argument.

Although the principal issue before the Court in *Missouri v. Jenkins*¹⁰⁹ was whether the Court could use the interdistrict remedy of magnet schools to address intradistrict violations of the Equal Protection Clause, Justice Thomas used his concurrence to launch a more broad-based discussion of the Court's Equal Protection Clause jurisprudence in the public school context.¹¹⁰ Justice Thomas's lengthy concurring opinion recast *Brown v. Board of Education*¹¹¹ and argued that lower federal courts had exceeded their equitable powers. He asserted that *Brown* "did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race," a conclusion he supported with a simple citation: "See McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995)."¹¹²

Justice Thomas's terse reference to Professor McConnell's controversial¹¹³ originalist defense of *Brown* hardly qualifies as much of an originalist argument. Justice Thomas never discussed any of the evidence regarding the original meaning of the Equal Protection Clause but simply asserted that at the "heart" of *Brown*'s "interpretation of the Equal Protection Clause lies the principle that the Government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups."¹¹⁴ Justice Thomas never specifically said he was justifying *Brown* on originalist grounds. In his article, Professor McConnell admitted that his attempt to harmonize *Brown* and originalism represented a dramatic break from an overwhelming contrary consensus view shared by scholars from across the ideological and methodological spectrum, ranging from Ronald Dworkin, Lawrence Tribe, and many others on the left, to Raoul Berger, Alexander Bickel, and Robert Bork on the right.¹¹⁵ Nonetheless, Justice Thomas did not discuss, or even mention, a single work that represented the orthodox thesis Professor McConnell's argument challenged.

109. 515 U.S. 70 (1995).

110. *Id.* at 120–21 (Thomas, J., concurring).

111. 347 U.S. 483 (1954).

112. *Jenkins*, 515 U.S. at 120 (Thomas, J., concurring).

113. See, e.g., Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1883 (1995) (criticizing McConnell's argument as failing to justify the result in *Brown* on an originalist basis); Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 223 (1996) (arguing that McConnell fails to show school desegregation is consistent with original intent or understanding).

114. *Jenkins*, 515 U.S. at 120–21 (Thomas, J., concurring).

115. Michael J. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 950–52 (1995).

Furthermore, it is unclear how much Professor McConnell's article actually helped Justice Thomas reach his conclusion. Justice Thomas's opinion was issued on June 12, 1995, the case having been argued on January 11, 1995. Professor McConnell's article appeared in the May 1995 volume of the *Virginia Law Review*. Unless Justice Thomas had access to an early draft, the article could hardly have shaped Justice Thomas's thinking. More likely, the citation was a late addition to his concurrence to support a conclusion already reached, which is consistent with Justice Thomas's failure to discuss any of the evidence Professor McConnell provided.

Whereas Justice Thomas's discussion of the Equal Protection Clause relied primarily on precedent, along with moral and consequentialist arguments,¹¹⁶ in discussing the separate and more general point that federal courts had exceeded their equity powers¹¹⁷ Justice Thomas presented a lengthy originalist argument replete with citations to Blackstone, Thomas Jefferson, Alexander Hamilton, and Anti-Federalist writings.¹¹⁸ "Such extravagant uses of judicial power are at odds with the history and tradition of the equity power and the Framers' design," Justice Thomas opined. "The available historical records suggest that the Framers did not intend federal equitable remedies to reach as broadly as we have permitted."¹¹⁹ Justice Thomas was an originalist in *Jenkins* when discussing Article III of the Constitution but not when regarding the Equal Protection Clause.

That same day, in *Adarand Constructors v. Peña, Inc.*,¹²⁰ Justice Thomas penned a short concurrence in which he equated race-based affirmative action with Jim Crow laws. He argued that laws designed to subjugate a race are morally and constitutionally equivalent to "those that distribute benefits on the basis of race in order to foster some current notion of equality."¹²¹ Justice Thomas wrote that "the paternalism that appears to lie at the heart of this [affirmative action] program is at war with the principle of inherent equality that underlies and infuses our Constitution."¹²² In sup-

116. See *Jenkins*, 515 U.S. at 114 (Thomas, J., concurring) ("It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."); *id.* at 121–122 ("Given that desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment.").

117. U.S. Const. art. III, §§ 1, 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .").

118. *Jenkins*, 515 U.S. at 126–31 (Thomas, J., concurring).

119. *Id.* at 126.

120. 515 U.S. 200 (1995).

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

122. *Id.*; see also *id.* (Thomas, J., concurring) (criticizing premise underlying dissents of Justices Stevens and Ginsburg that "there is a racial paternalism exception to the principle of equal protection").

port, he cited only the Declaration of Independence and its proposition that “[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”¹²³ Justice Thomas cited the Declaration but did not argue that it provided the original meaning of the Fifth Amendment. Nor did he explain why the original meaning of the Fifth Amendment prohibited racial classifications, especially those used to help a disadvantaged minority. Instead, most of his opinion attacked such programs as immoral and productive of bad consequences.¹²⁴

Those two cases provided Justice Thomas with opportunities to present originalist arguments in cases dealing with school desegregation and affirmative action. Both majority opinions relied heavily on precedent. Both decisions presented Justice Thomas with an occasion to demonstrate that originalism could provide a sturdier foundation for that result. He let that opportunity pass.

His failure to use originalism to discuss the Equal Protection and Due Process Clauses in these two cases becomes more curious in the context of his work on other constitutional matters that term. Less than two months earlier, he wrote concurrences to present originalist interpretations of the First Amendment’s Free Speech Clause in *McIntyre* and of the Commerce Clause in *Lopez* rather than rest conclusions on the non-originalist modes of constitutional interpretation in the majority opinions. In those two cases, Justice Thomas thought it important to justify outcomes with extensive citations to originalist sources rather than rely on a colleague’s opinion reaching the same result based on precedent. But not in *Jenkins* or *Adarand*. Less than one month earlier he had presented originalist interpretations of the Qualifications Clause and the Tenth Amendment in his dissent in *United States Term Limits, Inc. v. Thornton*¹²⁵ and of the Fourth Amendment’s Search and Seizure Clause.¹²⁶ Less than three weeks after *Jenkins* and *Adarand* came down, he made originalist arguments in interpreting the Establishment Clause in *Rosenberger v. Rector & Visitors of University of Virginia*.¹²⁷ Justice Thomas used originalist arguments in these five constitutional cases handed down during spring 1995, just not when he addressed race.

123. *Id.* (internal quotation marks omitted). *But see* John Eastman, *Reflections on Justice Thomas’s Twenty Years on the Bench*, 88 U. DET. MERCY L. REV. 691, 704 (2011) (describing Justice Thomas’s citation to the Declaration of Independence as “[e]nough said”).

124. *Adarand*, 515 U.S. at 241 (1995) (Thomas, J., concurring).

125. 514 U.S. 779 (1995).

126. *Wilson v. Arkansas*, 514 U.S. 927 (1995).

127. 515 U.S. 819 (1995).

Eight years after *Jenkins-Adarand*, Justice Thomas failed to base his opinion on originalist argument in *Grutter v. Bollinger*¹²⁸ where a five-justice majority upheld the use of race conscious decisionmaking in admissions at the University of Michigan Law School. Justice Thomas joined Chief Justice Rehnquist's principal dissent as well as Justice Scalia's brief opinion but also contributed his own twenty-nine page opinion. Justice Thomas's opinion was more than three times longer than Chief Justice Rehnquist's principal dissent that spoke for four justices. It occupied roughly sixty percent of the space the four dissents used. Notwithstanding its length, the opinion lacked any originalist argument, unless the reference in the very last paragraph to "the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause"¹²⁹ is deemed to be such. The absence of any significant originalist discussion is perhaps more noteworthy because Justice Thomas implicitly envisioned the Constitution as a static document, whose meaning did not change over time,¹³⁰ thereby inviting an originalist justification. Justice Thomas discussed precedent and made generous use of consequentialist and moral argument,¹³¹ and used such arguments to support his assertion that the Constitution mandates an anti-classification interpretation of the Equal Protection Clause,¹³² a conclusion the opinion reiterated frequently.¹³³ Much of his opinion attacked, on consequentialist grounds, the diversity interest Michigan offered—and the Court accepted—for the race conscious admissions pro-

128. 539 U.S. 306 (2003).

129. *Id.* at 378 (Thomas, J., concurring in part and dissenting in part).

130. *Id.* at 351 ("I believe that the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.").

131. *See, e.g., id.* at 349 (quoting 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!"); *id.* at 350 ("Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators.").

132. *Id.* at 353–54 ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. 'Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society.'" (quoting *Adarand Constructors, Inc. v. Pena*, 515 U. S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in judgment))).

133. *Grutter*, 539 U.S. at 368 (Thomas, J., concurring in part and dissenting in part) ("What the Equal Protection Clause does prohibit are classifications made on the basis of race."); *id.* at 371 ("clearly the majority still cannot commit to the principle that racial classifications are *per se* harmful and that almost no amount of benefit in the eye of the beholder can justify such classifications."); *see also Gratz v. Bollinger*, 539 U.S. 244, 281 (2003) (Thomas, J., concurring) ("I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.").

gram. Such programs harmed, rather than helped, African-Americans, in part by stigmatizing them,¹³⁴ and might perpetuate black underperformance on standard tests, thereby confirming “the bigot’s prophecy,”¹³⁵ he argued.

Similarly, Justice Thomas used non-originalist reasoning in 2007 in *Parents Involved in Community Schools v. Seattle School District No. 1*.¹³⁶ Justice Thomas joined Chief Justice Roberts’s opinion for the Court, but wrote a separate thirty-four page concurrence to respond to the dissent. Again, he repeatedly asserted a broad anti-classification principle,¹³⁷ but one not linked to evidence of original intent, understanding, or meaning. The sole originalist reference came in a footnote responding to a point in the dissent. Justice Thomas wrote, “I have no quarrel with the proposition that the Fourteenth Amendment sought to bring former slaves into American society as full members.”¹³⁸ He continued:

What the dissent fails to understand, however, is that the color-blind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination—indeed, it requires that such measures be taken in certain circumstances. . . . Race-based government measures during the 1860’s and 1870’s to remedy state-enforced slavery were therefore not inconsistent with the color-blind Constitution.¹³⁹

In addition to precedent, Justice Thomas used consequential arguments in *Parents Involved*. The “race-based student-assignment programs before us are not as benign as the dissent believes,” he asserted, since, as he wrote in *Adarand*, “[r]acial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination.”¹⁴⁰ This type of race conscious decisionmaking “pits the races against one another, exacerbates racial tension, and ‘provoke[s] resentment among those who believe that they have been wronged by the government’s use of race,’” he stated, again citing his *Adarand* opinion.¹⁴¹ Justice Thomas repeatedly invoked the

134. *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part).

135. *Id.* at 377.

136. 551 U.S. 701 (2007).

137. *Id.* at 751 (Thomas, J., concurring) (“The Constitution generally prohibits government race-based decisionmaking, but this Court has authorized the use of race-based measures for remedial purposes in two narrowly defined circumstances.”); *see also id.* at 752 (“Rather, race-based government decisionmaking is categorically prohibited unless narrowly tailored to serve a compelling interest.”); *id.* (“The Constitution abhors classifications based on race”); *id.* (“Therefore, as a general rule, all race-based government decisionmaking—regardless of context—is unconstitutional.”); *id.* at 758 (“We have made it unusually clear that strict scrutiny applies to every racial classification.”); *id.* at 766 n.14 (“The United States Constitution dictates that local governments cannot make decisions on the basis of race.”).

138. *Id.* at 772 n.19.

139. *Id.*

140. *Id.* at 759 (internal quotation marks omitted).

141. *Id.*

“colorblind” Constitution¹⁴² metaphor, an ideal he associated with the first Justice Harlan and with Thurgood Marshall,¹⁴³ while likening the dissenters in *Parents Involved* to the segregationists in *Brown v. Board of Education*. Once again, he failed to connect that idea to originalist sources.

Most recently, in *Fisher v. University of Texas at Austin*,¹⁴⁴ Justice Thomas joined Justice Kennedy’s majority opinion but wrote a concurring opinion to argue that *Grutter* should be overruled. His twenty page opinion exceeded the combined length of the majority opinion, Justice Scalia’s concurrence, and Justice Ginsburg’s dissent but contained no originalist argument. Justice Thomas cited his concurring or dissenting opinions in *Jenkins*, *Adarand*, and *Grutter* regarding the perils of racial classification and argued that *Grutter* was inconsistent with the Court’s precedents. Racial diversity could not produce benefits that would satisfy the Court’s “compelling interest” or “pressing necessity” tests. The premise of much of his argument was that race-based decisionmaking, whether for Jim Crow segregation or affirmative action, are moral equivalents. Finally, he made the utilitarian argument that affirmative action has “insidious consequences.”¹⁴⁵ He never suggested, however, that the original intent, understanding, expectation, or meaning of the Fourteenth Amendment precluded race conscious decisionmaking to produce diversity nor did he offer any historical evidence to support those positions.¹⁴⁶

In view of Justice Thomas’s professed commitment to originalism and the prominent role some variation of that methodology plays in so many of his significant constitutional opinions, his quite different approach in race cases is, to say the least, intriguing. In constitutional cases involving race, he does not explicitly invoke originalism and his references to originalist sources, if any, are striking in their brevity and cryptic nature. If anything, the summary of these five cases dealing with race overstates his resort to originalism since it presents each potentially originalist reference in those

142. *Id.* at 772 (“Most of the dissent’s criticisms of today’s result can be traced to its rejection of the colorblind Constitution.”); *id.* at 780 (“In place of the colorblind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart.”); *id.* at 782 (“Because ‘[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens,’ such race-based decisionmaking is unconstitutional.”).

143. For a criticism of the assertion that Thurgood Marshall and the other attorneys representing school children in *Brown* were anti-classificationists, see Joel K. Goldstein, *Not Hearing History: A Critique of Chief Justice Roberts’ Reinterpretation of Brown*, 69 OHIO ST. L.J. 791 (2008).

144. 133 S. Ct. 2411 (2013).

145. *Id.* at 2431 (Thomas, J., concurring).

146. This brief summary does not exhaust the constitutional cases dealing with race in which Justice Thomas has written discretionary opinions without invoking originalism. See, e.g., *Bush v. Vera*, 517 U.S. 952, 999–1000 (1996) (Thomas, J., concurring) (arguing for an application of strict scrutiny to review intentional creation of majority-minority districts based on *Adarand*, not originalism).

opinions though greatly condensing the non-originalist arguments that dominate those opinions. Whereas, generally, Justice Thomas presents the originalist arguments for his positions in detail, with extensive citation to wide-ranging sources, in race cases, he mentions the few originalist references in passing and with little or no elaboration to suggest that they establish original intent, understanding, or meaning. Instead, he relies on precedent and on moral and consequentialist arguments, all of which are delivered in an impassioned manner. A reader of Justice Thomas's constitutional opinions on race might find them powerful and compelling, but not originalist.

The discrepancy between Justice Thomas's methodology in constitutional cases involving race and those involving many other constitutional subjects is only part of what invites attention. It becomes even more suspect due to the uneasy fit perceived between originalism and the conclusions Justice Thomas reaches in race cases involving claims of equal protection.

First, most who have studied the subject doubt that the Fourteenth Amendment's Equal Protection Clause or the Fifth Amendment's Due Process Clause, based on originalist methodology alone, proscribed "separate but equal" in public schools. A strong consensus has concluded that neither the Framers nor ratifiers of the Fourteenth Amendment nor informed citizens at the time expected the Amendment to outlaw racially segregated schools.¹⁴⁷ Unless the expected applications of the ratifiers or the public are ignored in determining original meaning or unless original meaning is determined at a very high level of generality, as some advocate, it is hard to

147. See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58–59 (1955) (concluding that Congress, which drafted the Fourteenth Amendment, did not intend to preclude segregated schools); Richard H. Fallon, Jr., *Are Originalist Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 10 (2011); Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 4 (2013); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1881 (1995); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 & n.180 (1991); Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 224, 226, 231 (1996); David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 978 (2011); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 489–90 (1954) (describing original intent as "inconclusive" but rejecting the idea that constitutional meaning in 1954 is equivalent to that in 1868); JACK M. BALKIN, *LIVING ORIGINALISM* 105 (2011) (criticizing McConnell for focusing on the original expected application of the drafters but noting in his statement that the ratifiers and the public supported school segregation). But see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953–54 (1995) [hereinafter McConnell, *Desegregation Decisions*] (contesting scholarly consensus and arguing that in the decade following ratification of Fourteenth Amendment many political leaders believed it outlawed school segregation); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1937 (1995).

reconcile *Brown* and *Bolling* with originalism.¹⁴⁸ Many originalists once conceded as much.¹⁴⁹ Since an interpretive theory must be measured in part based on the substantive outcomes it generates,¹⁵⁰ any inconsistency between originalism and *Brown-Bolling* impeaches originalism rather seriously.

Justice Thomas is certainly not prepared to relinquish either holding. He has criticized the Court's reasoning in *Brown*¹⁵¹ but has left no doubt that he believes it and *Bolling* were correctly decided.¹⁵² On other occasions, he has determined original meaning based on the actual or expected applications the framing generation gave various constitutional language.¹⁵³ Giving such priority to expected applications of the 1791 or 1868 generations regarding the constitutionality of segregated schools would make both decisions problematic.¹⁵⁴ Justice Thomas has not addressed this problem in relation to his professed theory.

148. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 233 (1980) ("I cannot think of a plausible argument against [the *Bolling*] result—other than the entirely correct originalist observation that it is not supported by even a generous reading of the fifth amendment."); Fallon, *supra* note 147, at 10; William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1262–63 (2011); David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT 299, 304–05 (2005).

149. See, e.g., Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 352 (1988) (suggesting that desegregation cases were inconsistent with original intent of Constitution); Lino A. Graglia, "Constitutional Theory": *The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 TEX. L. REV. 789, 796–97 (1987); Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 233–34 (1972) (suggesting *Bolling* was wrong in concluding the Fifth Amendment prohibited segregated schools in Washington, D.C. based on its text, history, and political structure, all of which differed from that of the Fourteenth Amendment).

150. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 538–39, 579 (1999) (arguing for the relevancy of likely outcomes of a theory in assessing it). Cf. McConnell, *Desegregation Decisions*, *supra* note 147, at 952 (conceding that any theory not able to generate the result in *Brown* would be discredited).

151. See *Missouri v. Jenkins*, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring).

152. See *id.* (supporting outcome but not rationale in *Brown*); *Thomas Hearings*, *supra* note 6, at 414 (stating he has no quarrel with *Bolling*).

153. See, e.g., *Salinas v. Texas*, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring) (using practice at the time of the founding to determine the meaning of the Fifth Amendment Self Incrimination Clause); *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (Thomas, J., concurring) (using actual and expected applications to argue that the First Amendment does not protect student speech); *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 364 (1995) (Thomas, J., concurring in judgment) (using expected and actual applications to argue that the First Amendment protected anonymous speech); *Holder v. Hall*, 512 U.S. 874, 897–98 (1994) (Thomas, J., concurring) (using early practice to argue that multi-member districts were not unconstitutional).

154. Berger, *supra* note 149, at 352; see also *supra* note 147. Cf. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954) (terming circumstances surrounding the ratification of the Fourteenth Amendment as "[a]t best . . . inconclusive" regarding the constitutionality of separate but equal).

Second, originalism raises questions regarding Justice Thomas's repeated insistence that the Equal Protection Clause of the Fourteenth Amendment and Due Process Clause of the Fifth Amendment envision a color-blind Constitution and compel an anti-classificationist approach. Some respected scholars have argued that those conclusions are inconsistent with originalism. They have argued that, based on originalist sources these clauses permit race conscious decisionmaking to benefit blacks and, in the case of the Fourteenth Amendment, were actually designed to protect blacks, not whites.¹⁵⁵ Some of this scholarship has been around for decades, yet in his opinions, Justice Thomas has neither adopted nor even discussed these findings that suggest affirmative action is consistent with original meaning.¹⁵⁶ This silence is intriguing,¹⁵⁷ especially since Justice Thomas managed to cite Professor McConnell's article the month after it was published.

It is, of course, possible to argue that Justice Thomas's commitment to anti-classificationism and color-blindness reflect the best interpretations of equal protection, but these conclusions are contested, controversial, and not the only plausible readings of the text. Nor are they compelled by originalism. Raoul Berger wrote in 1988 that words like equal protection are "susceptible of an enormous range of meaning."¹⁵⁸ He cautioned that unless cabined by original intent, "those words serve as a crystal ball from which a judge, like a soothsayer, can draw forth anything he wants."¹⁵⁹ Justice Thomas has not based his conclusions regarding the meaning of that language on evidence of original intent, understanding, expectations, or meaning. He has simply asserted his reading and justified it using precedential, moral, and consequential arguments.

155. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 427, 429–432 (1997) (claiming that proponents of the Fourteenth Amendment passed laws specifically directed to benefit blacks); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) (asserting that the Fourteenth Amendment intended affirmative action be used to help blacks); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 481–82 (1998); see also Jonathan L. Entin, *Justice Thomas, Race, and the Constitution Through the Lens of Booker T. Washington and W.E.B. Du Bois*, 88 U. DET. MERCY L. REV. 755, 755 (2011); Marshall, *supra* note 104, at 1230 (stating that strong historical evidence suggests affirmative action is consistent with the Framers' view of the Fourteenth Amendment).

156. See, e.g., 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, 46, 62 (2005) (criticizing Thomas for not considering evidence that the Framers of the Fourteenth Amendment intended affirmative action be used to help blacks); Fallon, *supra* note 147, at 17; Rubenfeld, *supra* note 155, at 427, 432.

157. See, e.g., Marshall, *supra* note 104, at 1230 (accusing conservatives of selective use of originalism).

158. Berger, *supra* note 149, at 351.

159. *Id.*

The disparity is obvious between Justice Thomas's professed and frequent recourse to originalism in constitutional cases generally and his abandonment of it when race is involved. Although some of Justice Thomas's admirers have celebrated his principled originalism with little or no recognition of its disappearance in race cases, Professor Scott Gerber, the author of a book-length study of Justice Thomas's jurisprudence and of other works about him, has observed that Justice Thomas uses a different approach in interpreting constitutional provisions regarding race than he employs for those relating to other matters.¹⁶⁰ Professor Gerber has offered what he characterizes as the oversimplified generalization that "Justice Thomas is a 'liberal originalist' on civil rights and a 'conservative originalist' on civil liberties and federalism." He argues that "Justice Thomas appeals to the *ideal* of equality at the heart of the Declaration of Independence" in interpreting constitutional clauses regarding race, but to "the Framers' *specific* intentions" in addressing certain other constitutional issues.¹⁶¹ Professor Gerber concludes that, in race cases, Justice Thomas's classical liberal or Lockean approach is reflected in his insistence that "the Government must treat citizens as individuals, and not as members of racial, ethnic or religious groups."¹⁶² Professor Gerber has recently repeated this analysis which he initially based on his study of Justice Thomas's first years on the Court. In a 2011 article, he wrote that Justice Thomas's civil rights opinions invoke "the principle of inherent equality at the heart of the Declaration of Independence."¹⁶³

To be sure, before joining the Court, Justice Thomas argued that the commitment of the Declaration of Independence to equality and liberty animated the Constitution¹⁶⁴ and that the latter should be read accordingly. This argument seems problematic in assigning original meaning to the Constitution of 1789 or 1791 given the document's acceptance of slavery and racial inequality.¹⁶⁵ The Declaration may have expressed a powerful aspira-

160. SCOTT D. GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 193 (1999).

161. *Id.*

162. *Id.* at 195 (internal quotation marks omitted). For an elaboration of liberal originalism, see SCOTT D. GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 6–8 (1995).

163. Scott D. Gerber, *Justice for Clarence Thomas: An Intellectual History of Justice Thomas's Twenty Years on the Supreme Court*, 88 U. DET. MERCY L. REV. 667, 671 (2011).

164. Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 983–84 (1987).

165. Marshall, *supra* note 104, at 1230 n.71 ("There is, of course, no originalist argument supporting the claim that the federal government is precluded from supporting affirmative action."); see also Graglia, *supra* note 149, at 796–97 (arguing that the Fifth Amendment Due Process Clause could not originally have prohibited racial discrimination given the Constitution's acceptance of slavery); Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 636–37 (1993).

tion but it seems hard to argue that the Constitution's original intent or meaning was anti-classificationist, color-blind or racially egalitarian since it protected slavery¹⁶⁶ and treated slaves as three-fifths of a person.¹⁶⁷ Indeed, during his confirmation hearings, Judge Thomas acknowledged that the Civil War Amendments were necessary to end slavery, a concession that would seem to rebut any effort to construe the original meaning of the pre-Civil War Constitution as precluding discrimination against blacks.¹⁶⁸ Moreover, any effort to give "liberty" in the Fifth Amendment such a robust reading would conflict with Justice Thomas's general approach to Due Process which assigns "liberty" a much more modest meaning and views the Clause as providing procedural, not substantive, protections.¹⁶⁹

Yet even if the Declaration did infuse the Constitution's original meaning with egalitarianism (notwithstanding the inconsistent practices and attitude of many of the Framers and their generation), Justice Thomas has not asserted that point in race cases to justify his conclusions. On those few occasions where he has invoked the Declaration, he has done so in conclusory fashion¹⁷⁰ without offering anything even approaching an argument that it provides the original meaning of the Constitution or the evidence to

166. U.S. CONST. art. I, § 9 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."); U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, But shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

167. U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

168. *Thomas Hearings*, *supra* note 6, at 272.

169. *See, e.g., McDonald v. City of Chicago*, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words."); *Nat'l Aeronautics and Space Admin. v. Nelson*, 131 S. Ct. 746, 769 (2011) (Thomas, J., concurring) ("And the notion that the Due Process Clause of the Fifth Amendment is a wellspring of unenumerated rights against the Federal Government 'strains credulity for even the most casual user of words.'" (citing Justice Thomas's *McDonald* concurrence)); *see also id.* at 764–65 (Scalia, J., concurring, joined by Justice Thomas) ("This case is easily resolved on the simple ground that the Due Process Clause does not 'guarante[e] certain (unspecified) liberties'; rather, it 'merely guarantees certain procedures as a prerequisite to deprivation of liberty.'" (quoting *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring))).

170. *See, e.g., A Conversation with Justice Clarence Thomas*, IMPRIMIS, Oct. 2007, available at, <http://www.collier.k12.fl.us/character/docs/resources/ClarenceThomas.pdf> ("We should always start, when we read the Constitution, by reading the Declaration, because it gives us the reasons why the structure of the Constitution was designed the way it was."); *see also Adarand v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

support that position. In *McDonald v. City of Chicago*, he asserted that “slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure.”¹⁷¹ Justice Thomas supported that proposition by citing one statement by Luther Martin at the Philadelphia Convention and Abraham Lincoln’s 1854 Peoria Speech. It seems unnecessary to state that these two citations, separately and together, do not provide an originalist case that the Declaration of Independence was part of the Constitution or that the Constitution that allowed slavery prohibited discrimination against blacks. Justice Thomas implicitly conceded the point in his next statement when he acknowledged that “[a]fter the war, a series of constitutional amendments were adopted to repair the Nation from the damage slavery had caused.”¹⁷² If the Declaration provides the original meaning of the Constitution in race cases, one would expect Justice Thomas to cite it routinely in judicial opinions and to provide an explanation in them regarding why his conclusion is compelling.¹⁷³ He has rarely cited the Declaration in opinions and has not explained why his conclusion is compelling in his opinions on the Court.

Moreover, even if Professor Gerber accurately stated the difference in Justice Thomas’s approach (that is, liberal vs. conservative originalist) his description does not justify that dichotomy in the context of Justice Thomas’s other judicial behavior. To be sure, “liberty” and “equal protection” are abstract concepts but so, too, are “freedom of speech” and “cruel and unusual punishment” among other constitutional terms. In construing other open-ended language, Justice Thomas has often looked to the intent, beliefs, and practices of the Framers and ratifiers to infer meaning.¹⁷⁴ Why, for instance, does Justice Thomas believe it appropriate to invoke original expectations in determining whether anonymous leafleting or children’s speech are “freedom of speech” or whether executing a fourteen-year-old is “cruel

171. 130 S. Ct. at 3059. Justice Thomas’s argument is not convincing on its merits. The fact that slavery was “irreconcilable” with “principles of equality, government by consent, and inalienable rights” does not mean that the original meaning of the Constitution can be determined without considering the protection the Constitution gave that institution.

172. *Id.* at 3060.

173. *Contra* Eastman, *supra* note 123, at 704.

174. *See, e.g.*, *Miller v. Alabama*, 132 S. Ct. 2455, 2483–85 (2012) (Thomas, J., dissenting) (looking to practices at the time of the founding regarding trying and executing minors to determine the original understanding of the Eighth Amendment); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2752 (2011) (Thomas, J., dissenting) (looking to the beliefs of the founding generation to interpret the First Amendment); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 359–71 (1995) (Thomas, J., concurring) (looking to the discussions of the Framers and ratifiers as well as their practices and beliefs to determine the original understanding of the First Amendment regarding anonymous political leafleting).

and unusual,” but he does not consider whether the founders or their generation believed in desegregated schools or affirmative action?

Most recently, in fact after this Article was submitted for consideration, Professor Ralph A. Rossum published a book-length study of Justice Thomas’s jurisprudence in which he argued that Justice Thomas has followed an original general meaning approach to constitutional interpretation including cases dealing with race.¹⁷⁵ Starting from Professor Maggs’s insight that Justice Thomas has used original intent, understanding, and public meaning in different cases, Professor Rossum argues that Justice Thomas “has incorporated all three of these approaches into his own distinctive original general meaning approach” which he uses when the meaning of the Constitution’s text is not apparent.¹⁷⁶

Putting aside the accuracy of Professor Rossum’s claim that Justice Thomas uses a coherent and distinctive “original general meaning approach,” one which seems inconsistent with language Justice Thomas has sometimes used celebrating original intent or understanding, Professor Rossum demonstrates convincingly that Justice Thomas uses the various originalist arguments to interpret a range of constitutional clauses. He is less persuasive when he argues that Justice Thomas uses his original general meaning approach in cases dealing with race.

The problem Professor Rossum’s argument encounters is that Justice Thomas simply has not invoked original intent, original understanding, original expected applications, or original public meaning in his opinions dealing with constitutional questions involving race to interpret the Equal Protection or Due Process Clauses. Indeed, in his twenty-two page summary of Justice Thomas’s opinions in these cases,¹⁷⁷ Professor Rossum uses the phrase “original general meaning” only once, and then in describing Justice Thomas’s discussion of the Court’s equitable powers under Article III in *Missouri v. Jenkins*,¹⁷⁸ not regarding any clause protecting equality or liberty in the Fifth or Fourteenth Amendments.

Professor Rossum does view Justice Thomas’s positions on desegregation and racial preference in these cases as originalist, but based largely on arguments Justice Thomas made in two short law review articles¹⁷⁹ he

175. ROSSUM, *supra* note 98.

176. *Id.* at 13. *Cf.* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3072 (2010) (Thomas, J., concurring) (describing the drafters’ statements as relevant to determining the most likely public understanding of a provision at the time of ratification, especially if the statements were publicly disseminated).

177. ROSSUM, *supra* note 98, at 190–212.

178. *Id.* at 195–96.

179. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63, 64–65 (1989); Thomas, *supra* note 164, at 983–88.

wrote before he joined the Court¹⁸⁰ in which he argued that the Declaration of Independence animates the Constitution. Although Justice Thomas has cited the Declaration twice in cases dealing with race, it is curious to say the least that he has not incorporated the arguments from, or cited to, these articles in his opinions dealing with race during the twenty-three years he has served on the Court. Moreover, his articles offer little evidence that the original intent, original understanding, original expected applications, or original meaning of the original Constitution or the Civil War Amendments incorporated the Declaration. They likewise offer little evidence that “liberty” or “equal protection” were intended, understood, or meant by the founders or by the Framers of the Fourteenth Amendment (or by their respective generations) to prohibit racial segregation or race conscious decision-making to benefit African-Americans. That Justice Thomas believes the Declaration’s commitment to equality leads to these conclusions does not mean that the original intent, understanding, meaning, or the original general meaning of its or the Constitution’s concepts produces that result. Those questions depend on historical proof, yet the sort of evidence that Justice Thomas frequently presents in discussing other constitutional clauses from contemporary dictionaries and legal treatises, from the debates proposing or ratifying the relevant constitutional language and from contemporary practice is absent from his opinions on race and from these articles.

Professor Jonathan Entin has taken a different approach in discussing Justice Thomas’s general commitment to originalism yet its absence in his opinions on race. He has recognized that race cases present a “conspicuous exception” to Justice Thomas’s commitment to originalism¹⁸¹ but has argued that Justice Thomas’s “powerful and distinctive argument against affirmative action” and in support of color blindness “deserves serious consideration on its own terms.”¹⁸² Ultimately, Justice Thomas’s approach in these cases “demonstrates that even a committed originalist need not blindly follow any particular interpretive theory, especially when addressing important questions to which the Constitution does not provide explicit answers.”¹⁸³

Even if one agrees that Justice Thomas’s jurisprudence in the constitutional cases involving race “deserves serious consideration,” Professor Entin is quite generous in excusing this inconsistency in Justice Thomas’s jurisprudence. For Justice Thomas, originalism does not provide one

180. ROSSUM, *supra* note 98, at 183–90.

181. Entin, *supra* note 155, at 755.

182. *Id.* at 768; see also Mark Tushnet, *Clarence Thomas’s Black Nationalism*, 47 HOW. L.J. 323, 329–31 (2004).

183. Entin, *supra* note 155, at 768.

interpretive tool in a pluralistic jurisprudential approach that recognizes the validity of various forms of constitutional argument. On the contrary, Justice Thomas has celebrated originalism as the only “legitimate” and “impartial” way to interpret the Constitution and has likened non-originalist approaches to “mak[ing] it up” and compared their constitutional validity to that of “the latest football scores.”¹⁸⁴ Professor Entin may be right that Justice Thomas’s race jurisprudence is “powerful and distinctive” and merits serious consideration, but that does not explain the disappearance of originalism in those opinions and the resort there to forms of argument Justice Thomas has disparaged.

What is striking is not simply the discrepancy between Justice Thomas’s repeated and uncompromising professed commitment to originalism and his reliance on it in many constitutional cases on the one hand and his abandonment of it in those dealing with race on the other hand. What is also noteworthy is Justice Thomas’s failure to account for this deviation between his approach in race cases and his prescription of originalism as essential to judicial impartiality; this silence is disappointing, particularly from a justice who has been relatively outspoken otherwise regarding constitutional interpretation.

Ultimately, the marked divergence suggests that something other than originalism really drives his jurisprudence, at least in part. One possibility is that political conservatism, not originalism, motivates Justice Thomas’s judicial behavior.¹⁸⁵ With few exceptions,¹⁸⁶ he reaches conservative results in constitutional cases when he deploys some originalist methodology and in race cases when he abandons it. This explanation is neither novel¹⁸⁷ nor particularly surprising. Originalism tends to be associated with conservative justices and academics. Originalism has been “a central organizing principle” for the conservative assault on the liberal decisions of the 1960s and 1970s and has furnished a tool for political mobilization as well as for jurisprudential use.¹⁸⁸ Moreover, as Richard H. Fallon, Jr. has point-

184. Thomas, *supra* note 26.

185. See, e.g., GERBER, *supra* note 160, at 211–15 (presenting data showing Justice Thomas’s conservative voting behavior during his first five terms on the Court).

186. See, e.g., *Alleyn v. United States*, 133 S. Ct. 2151 (2013); *United States v. Bajakajian*, 524 U.S. 321 (1998); *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334, 358 (1995).

187. See, e.g., Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545, 563 (2006) (arguing that Justice Thomas’s selective “originalism appears as neither hypocrisy nor a cynical manipulation of the past, but instead as a sincere expression of passionate ideological commitment”); Eric J. Segall, *Justice Thomas and Affirmative Action: Bad Faith, Confusion or Both?*, 3 *WAKE FOREST L. REV. ONLINE* 111, 119 (2013) (accusing Justice Thomas of “judicial hypocrisy and judicial hubris of the worst kind”); Marshall, *supra* note 104, at 1243–44 (accusing judicial conservatives of hypocrisy).

188. Post & Siegel, *supra* note 187, at 545–46, 554–61; see also Richard H. Fallon, Jr., *The Political Function of Originalist Ambiguity*, 19 *HARV. J.L. & PUB. POL’Y* 487, 492 (1996) (calling

ed out, originalists, like others, tend to justify their methodology in part on consequential grounds, a practice that inevitably invites their ideology into the calculation.¹⁸⁹ Originalism thus may appeal to Justice Thomas as an instrument to reach results consistent with his conservative ideology. When it fails to lead to conservative results, he may sacrifice the instrument for the preferred outcome.

There are, however, some responses to this argument. Not often, but occasionally, Justice Thomas uses originalism to reach or defend a result that is not ostensibly conservative. For instance, in *McIntyre*, he used an originalist argument to strike down a statute that would have limited anonymous political speech.¹⁹⁰ The majority consisted largely of more liberal justices—Justices Stevens, Souter, Ginsburg and Breyer—although Justices O'Connor and Kennedy also joined Justice Stevens's opinion while Chief Justice Rehnquist and Justice Scalia dissented. More recently, Justice Thomas concluded that the original meaning of the Sixth Amendment guaranteed a criminal defendant a jury trial with respect to a finding that could increase a mandatory minimum sentence.¹⁹¹ Justices Ginsburg, Breyer, Sotomayor, and Kagan joined all or part of his opinion, whereas the four more conservative justices dissented.

There is, however, a second, more complicated, possibility. It may be that Justice Thomas is generally committed to originalism for jurisprudential reasons and that this commitment helps explain his behavior in most constitutional areas. But he also has strong beliefs and feelings about certain issues that arise in constitutional cases relating to race. It may be that in these cases the strength of these perspectives simply overwhelms his attachment to the dictates of originalism.

III. JUSTICE THOMAS AND RACE

There is more worth saying about Justice Thomas's treatment of race in constitutional cases than noting his abandonment of originalism in that context for more than two decades. That observation begins rather than ends the discussion. Justice Thomas's work on the Supreme Court on constitutional cases involving race is distinctive and revealing. The topic en-

originalism “most often a political or rhetorical stalking horse for a set of substantive positions with respect to a relatively narrow set of constitutional issues in the current age”); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 273–74 (2005) (arguing that attitudes towards certain salient Court decisions shape theorists' views regarding originalism and precedent).

189. Fallon, *supra* note 104, at 24–28.

190. 514 U.S. at 358.

191. *Alleyne v. United States*, 133 S. Ct. 2151, 2155–64 (2013).

gages him often. He writes about race with a passion rarely evident in his Supreme Court opinions.

Justice Thomas's distinctive engagement in constitutional matters dealing with race is evident in at least three ways. First, Justice Thomas often writes discretionary opinions about racial issues, both in cases where those matters are presented for decision as well as in cases addressing other topics. Mention has previously been made of Justice Thomas's concurrences in *Adarand*, *Jenkins*, *Parents Involved*, and *Fisher*, and his opinion in *Grutter*, all of which addressed either school desegregation or race-conscious decisionmaking. These five opinions represent only part of Justice Thomas's corpus of judicial writings dealing with race.

Justice Thomas's engagement regarding matters dealing with race became apparent during his first term on the Court. In *Georgia v. McCollum*,¹⁹² a case argued only four months after he joined the Court, Justice Thomas criticized the line of cases holding that the Constitution limits the use of peremptory challenges on racial grounds in jury selection.¹⁹³ Justice Thomas argued that the cases, beginning with *Batson v. Kentucky*,¹⁹⁴ "take[] us further from the reasoning and the result of *Strauder v. West Virginia*"¹⁹⁵ and would produce regrettable consequences in "restricting a criminal defendant's use of such challenges."¹⁹⁶ Justice Thomas worried about the impact on black criminal defendants.¹⁹⁷ "I am certain that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes," he wrote.¹⁹⁸ Justice Thomas thought the Court should recognize that racial composition impacted jury outcomes and accordingly should allow race-motivated peremptory strikes based on the supposition that racial identity would affect juror behavior.¹⁹⁹

In *United States v. Fordice*,²⁰⁰ argued the month after he joined the Court, Justice Thomas agreed with the Court's conclusion that aspects of Mississippi's system of higher education still reflected effects of policies traceable to de jure segregation but wrote a separate concurrence partly to argue that the Court's standard "portends neither the destruction of historically black colleges nor the severing of those institutions from their distinc-

192. 505 U.S. 42 (1992).

193. *Id.* at 60–62 (Thomas, J., concurring).

194. 476 U.S. 79 (1986).

195. *Id.* at 60; 100 U.S. 303 (1879).

196. *McCollum*, 505 U.S. at 60.

197. *Id.*

198. *Id.*

199. *Id.* at 60–61.

200. 505 U.S. 717 (1992).

tive histories and traditions.”²⁰¹ Although a state could not close “particular institutions, historically white or historically black, to particular racial groups,” Justice Thomas argued that “it hardly follows that a State cannot operate a diverse assortment of institutions—including historically black institutions—open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another.”²⁰² Justice Thomas insisted on a race neutral admissions policy, yet his resolution specifically endorsed State activity promoting, on a race-conscious basis, programs to appeal to “particular racial groups.”²⁰³ Justice Thomas clearly believed that historically black colleges have continuing value, an idea he has reiterated more recently,²⁰⁴ and noted the irony if “the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges.”²⁰⁵ Justice Thomas distinguished between such “institutional diversity,” which was designed to confer educational advantage, from duplication designed to separate students based on race.²⁰⁶

In the voting rights context, Justice Thomas has attacked approaches that, in his view, equate race with political interests or suggest that minorities only receive representation by those from their racial group.²⁰⁷ In *Holder v. Hall*, Justice Thomas accused the Court 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.’”²⁰⁸ The Court’s voting dilution jurisprudence “should be repugnant to any nation that strives for the ideal of a color-blind Constitution.”²⁰⁹ Justice Thomas complained that

201. *Id.* at 745.

202. *Id.* at 748–49.

203. *Id.*

204. *See, e.g.,* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 763 (2007) (Thomas, J., concurring) (“There is also evidence that black students attending historically black colleges achieve better academic results than those attending predominantly white colleges.”).

205. *Fordice*, 505 U.S. at 749.

206. *Id.* (“No one, I imagine, would argue that such institutional *diversity* is without ‘sound educational justification,’ or that it is even remotely akin to program *duplication*, which is designed to separate the races for the sake of separating the races.”).

207. *See Holder v. Hall*, 512 U.S. 874, 903 (1994) (Thomas, J., concurring) (“Far more pernicious has been the Court’s willingness to accept the one underlying premise that must inform every minority vote dilution claim: the assumption that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well. Of necessity, in resolving vote dilution actions we have given credence to the view that race defines political interest. We have acted on the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own ‘minority preferred’ representatives holding seats in elected bodies if they are to be considered represented at all.”).

208. *Id.* at 905 (citing *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

209. *Id.* at 905–06.

the Court's approach would "exacerbate racial tensions" and "deepen racial divisions by destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions."²¹⁰

To be sure, *Georgia v. McCollum*, *United States v. Fordice*, and *Holder v. Hall* were cases in which race was closely connected to the issue presented to the Court for decision. Yet Justice Thomas has introduced America's racial history or public policy considerations regarding race into opinions in cases where the constitutional issues presented for decision had a more tenuous relationship to race. In *Dawson v. Delaware*,²¹¹ Justice Thomas alone dissented from a decision holding that Delaware had improperly offered evidence at a sentencing hearing about a defendant's membership in the Aryan Brotherhood Prison Gang.²¹² Justice Thomas disagreed with the conclusion of the other justices that membership simply associated Dawson with abstract ideas, not actions, in violation of the First Amendment.²¹³ Justice Thomas thought the jury could reasonably infer past forbidden activity and future dangerous behavior from such membership.²¹⁴ To some extent, Justice Thomas's difference with the others on the Court stemmed from the fact that Dawson belonged to a prison gang, not necessarily the Aryan Brotherhood. Yet he frequently referenced Dawson's association with a "racist" gang and argued that the jury could reasonably infer that its members acted upon "their racial prejudice."²¹⁵ Justice Thomas argued that Dawson's membership in the Aryan Brotherhood suggested bad character, which was relevant information for the jury.²¹⁶

In *Graham v. Collins*,²¹⁷ Justice Thomas wrote a concurring opinion largely dedicated to connecting the restrictions on death penalty sentences to the Court's concern with race bias against blacks. Justice Thomas ended a five page discussion by concluding that "[i]t cannot be doubted that behind the Court's condemnation of unguided discretion lay the specter of racial prejudice—the paradigmatic capricious and irrational sentencing factor."²¹⁸

In *Zelman v. Simmons-Harris*,²¹⁹ Justice Thomas wrote a concurring opinion in a case considering whether a Cleveland school voucher plan vio-

210. *Id.* at 907.

211. 503 U.S. 159 (1992).

212. *Id.* at 169 (Thomas, J., dissenting).

213. *Id.* at 171.

214. *Id.* at 173–76.

215. *Id.* at 171–73.

216. *Id.* at 175.

217. 506 U.S. 461, 478 (1993) (Thomas, J., concurring).

218. *Id.* at 484; *see also id.* at 500 (referring to "the concerns about racial discrimination that inspired our decision in *Furman*").

219. 536 U.S. 639 (2002).

lated the Establishment Clause. He argued that the Establishment Clause did not limit states as much as it restricted the federal government.²²⁰ But the thrust of his concurrence addressed the lack of educational opportunities for inner city minorities. “Today, however, the promise of public school education has failed poor inner-city blacks,” he wrote.²²¹ While the “cognoscenti” might champion “the romanticized ideal of universal public education,” “poor urban families” had an altogether different priority, namely “the best education for their children.”²²²

The following term, Justice Thomas used *Virginia v. Black*,²²³ a case concerning whether a Virginia statute outlawing cross-burning to intimidate someone violated the First Amendment, to deliver a historical discussion regarding the racist underpinnings of cross-burning.²²⁴ Justice Thomas had previously denounced the Ku Klux Klan (“KKK”) and its use of the cross in *Capitol Square Review Board v. Pinette*.²²⁵ Although *Pinette* involved a municipality’s denial of the KKK’s petition to display, not burn, a cross on public property, Justice Thomas was moved to write separately to recall, and denounce, the KKK’s history. He wrote:

There is little doubt that the Klan’s main objective is to establish a racist white government in the United States. In Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan. The cross is associated with the Klan not because of religious worship, but because of the Klan’s practice of cross burning²²⁶

The Klan, Justice Thomas wrote, had “appropriated one of the most sacred of religious symbols as a symbol of hate.”²²⁷

He reprised that theme in 2003 in *Virginia v. Black*. Justice Thomas signaled the importance of the issue by participating in a surprising forum for him, oral argument on December 11, 2002. Justice Thomas twice accused the Deputy Solicitor General, representing the President George W. Bush Justice Department, of “understating . . . the effects” of cross-burning, three times associated the KKK with terror, and called cross-burning a unique activity.²²⁸

220. *Id.* at 678–80 (Thomas, J., concurring).

221. *Id.* at 682.

222. *Id.*

223. 538 U.S. 343 (2003).

224. *Id.* at 388–95 (Thomas, J., concurring).

225. 515 U.S. 753 (1995).

226. *Id.* at 770 (Thomas, J., concurring).

227. *Id.* at 771.

228. Transcript of Oral Argument at 22, *Virginia v. Black*, 538 U.S. 343 (2003) (Dec. 11, 2002).

Justice Thomas continued that discussion in his solitary dissent where he argued that cross-burning could never be protected speech. “In every culture, certain things acquire meaning well beyond what outsiders can comprehend,” he began, and cross-burning was “the paradigmatic example” of the “profane.”²²⁹ The KKK is “[t]he world’s oldest, most persistent terrorist organization” and one long engaged in criminal activity and still fanatically opposing racial equality, he wrote.²³⁰ Cross-burning was not a form of expression but vicious, terroristic conduct, and even the Virginia legislature of the 1950s, one which favored segregationist expression, understood the difference. He wrote:

It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia Legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.²³¹

Whereas *Virginia v. Black* provided an occasion for Justice Thomas to discuss at length the KKK’s racist activities in a free speech case, he wrote a discretionary opinion in *Kelo v. New London*,²³² a takings case, to discuss the adverse impact of urban renewal programs on African-Americans. Justice Thomas joined Justice O’Connor’s principal dissent but also wrote separately, primarily to argue that the Court had strayed from the original meaning of the Public Use requirement of the Takings Clause.²³³ But at the end of his opinion he discussed the “consequences of today’s decision,” namely the tendency of urban renewal programs disproportionately to hurt poor, urban nonwhite communities.²³⁴ “Urban renewal projects have long been associated with the displacement of blacks,” and the decision in *Kelo* would “exacerbate these effects.”²³⁵

229. *Virginia*, 538 U.S. at 388 (Thomas, J., dissenting).

230. *Id.* at 388–89 (quoting M. NEWTON & J. NEWTON, *THE KU KLUX KLAN: AN ENCYCLOPEDIA* vii (1991)).

231. *Id.* at 394.

232. 545 U.S. 469 (2005).

233. *Id.* at 514–23 (Thomas, J., dissenting).

234. *Id.* at 521.

235. *Id.* at 522.

More recently, in *Northwest Austin Municipal Utility District No. 1 v. Holder*,²³⁶ Justice Thomas departed from the other justices, who all joined Chief Justice Roberts's opinion in concluding that granting a litigant bailout relief under Section 5 of the Voting Rights Act avoided the constitutional issue.²³⁷ Only Justice Thomas reached the constitutional issue and concluded that Section 5 was unconstitutional. In explaining why it was no longer constitutional, he devoted seven paragraphs to describing how blacks were denied the vote for decades through the use of violence as well as "subtle methods."²³⁸

Finally, in *McDonald v. City of Chicago*, Justice Thomas wrote a concurring opinion to argue that the Fourteenth Amendment's Privileges or Immunities Clause, not its Due Process Clause, was the vehicle by which the Second Amendment right to keep and bear arms was made applicable as against the states.²³⁹ A considerable portion of his rather lengthy opinion is devoted to discussing efforts in the south before and after the Civil War to terrorize African-Americans, including disarming them to render them defenseless against mob violence.²⁴⁰ He argued that the public understood the purpose of the Privileges or Immunities Clause as affording protection to African-Americans of rights of citizens including the right to keep and bear arms for defensive purposes.²⁴¹

These examples illustrate Justice Thomas's practice of using discretionary opinions to recount aspects of America's racist past or express concerns regarding the impact of certain constitutional doctrine or public policies on racial minorities. Although some of the cases address constitutional issues under the Due Process or Equal Protection Clauses, in other instances Justice Thomas introduced race-related considerations in cases which ostensibly involved other constitutional provisions.

The intensity of these opinions suggests a second characteristic of Justice Thomas's work when he writes about race. In these opinions, Justice Thomas's rhetoric often suggests a high degree of engagement, indeed passion, in the positions advanced. For instance, he began his concurrence in *Missouri v. Jenkins* by observing, "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."²⁴² He went on to argue that those who identify "racial isolation" as a vice subscribe to a "theory of black inferiority."²⁴³

236. 557 U.S. 193 (2009).

237. *Id.* at 212 (Thomas, J., concurring in part and dissenting in part).

238. *Id.* at 218–23.

239. 130 S. Ct. 3020, 3058–88 (2010).

240. *Id.* at 3078–88.

241. *Id.*

242. 515 U.S. 70, 114 (Thomas, J., concurring).

243. *Id.* at 122.

In *Adarand*, he argued that morally, as well as constitutionally, affirmative action was as objectionable as malevolent discrimination.²⁴⁴ He began his *Grutter* opinion with an excerpt from Frederick Douglass's impassioned 1865 speech, "What the Black Man Wants," which he followed by stating that "[l]ike Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators."²⁴⁵ He blasted the "aestheticists" who perform "their social experiments on other people's children" and who lure minorities in to situations in which failure is inevitable.²⁴⁶

In *Parents Involved*, he equated the position Justice Breyer and other dissenters took to that of the bigots who espoused Jim Crow laws and practices in earlier eras.²⁴⁷ Even to a proponent of an anti-classificationist, color-blind view of the Equal Protection Clause, equating Justice Breyer to the Orville Faubuses of the world is extreme and inconsistent with the civil discourse Justice Thomas has championed on other occasions.²⁴⁸

In his concurrence in *Fisher v. University of Texas at Austin*, Justice Thomas again drew a moral and constitutional equivalence between affirmative action and Jim Crow segregation.²⁴⁹ This time he accused Justice Ginsburg of harboring "the benighted notion that it is possible to tell when discrimination helps, rather than hurts, racial minorities,"²⁵⁰ suggested that history counsels "greater humility,"²⁵¹ and likened the position the Univer-

244. *Adarand Constructors v. Pena, Inc.*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring in part and concurring in the judgment).

245. *Grutter v. Bollinger*, 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring in part and dissenting in part).

246. *Id.* at 372 ("The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite institutions.").

247. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Thomas, J., concurring) ("Disfavoring a colorblind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education*, 347 U.S. 483 (1954)."); *id.* at 773–81 (equating dissent's arguments to those which sustained Jim Crow laws); *id.* at 777 ("The similarities between the dissent's arguments and the segregationists' arguments do not stop there."). Justice Thomas's concession of Justice Breyer's "good intentions" in a footnote at the end of his opinion does not mitigate the impact of the earlier statements. *See id.* at 782 n.30.

248. *See, e.g.*, Clarence Thomas, *A Return to Civility*, 33 TULSA L.J. 7 (1997); Clarence Thomas, *Civility and Public Discourse*, 31 N. ENG. L. REV. 515 (1997).

249. 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring).

250. *Id.* at 2429.

251. *Id.* (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)) (internal quotation marks omitted).

sity of Texas and Justice Ginsburg espoused to arguments of slave owners and segregationists.²⁵²

These expressions make clear that issues regarding race are not ones Justice Thomas approaches in a detached manner. On the contrary, his discussions in his discretionary opinions regarding race are sometimes emotional as well as analytical. It is not surprising that the other justices almost never join these opinions. They are written in a passionate and personal voice from which others may learn but cannot easily join.

Justice Thomas's 2007 memoir makes clear his intense interest in, and strong views about, racial policy and provides possible insights into some sources of some of the opinions he has expressed in these cases.²⁵³ In the preface, he said that writing the book forced him "to suffer old hurts, endure old pains, and revisit old doubts" and that he was sometimes "surprised by how fresh my feelings still were."²⁵⁴ Although the book did not specify which hurts, pains, and doubts then remained fresh, it discussed the evolution of his thinking on some matters he has addressed on the Court. For instance, he recalls concluding while a student at Holy Cross in the 1960s that preferential policies should be available only for poorer blacks and whites rather than for middle-class blacks.²⁵⁵ But he also did not believe government should increase the dependency of poorer blacks on government, a condition he thought potentially "as diabolical as segregation."²⁵⁶ In applying to Yale Law School, he asked it to consider him as "disadvantaged" and assumed he received an admission preference based on poverty, not race.²⁵⁷ But he soon suffered from the perception that his race accounted for his presence at the nation's most elite law school, and he concluded that "the stigmatizing effects of racial preference" would subsequently discount his achievements.²⁵⁸ He felt "tricked" and hurt by his purported benefactors and was "even more bitter toward those ostensibly unprejudiced whites who pretended to side with black people while using them to further their own political and social ends" than towards white bigots.²⁵⁹ He was "humiliated" by his difficulty finding an appealing job, which he attributed to the fact that race preference tainted his Yale degree.²⁶⁰

He strongly opposed efforts to use busing to integrate schools in the 1970s, preferring to focus on stopping officially supported segregation and

252. *Id.*

253. *See generally* THOMAS, *supra* note 4.

254. *Id.* at ix.

255. *Id.* at 56.

256. *Id.*

257. *Id.* at 74.

258. *Id.* at 75.

259. *Id.*

260. *Id.* at 87.

on promoting education and employment.²⁶¹ He thought blacks were victimized by social engineering theories.²⁶² His work in the legislative and executive branches confirmed his views regarding the fallacy of trying to send blacks to predominantly white schools rather than focusing on their education in their neighborhoods or at historically black institutions.²⁶³ He feared that policies like urban renewal would have unintended consequences harmful to minorities.²⁶⁴ He especially wanted to preserve historically black colleges from disappearing “in the rush toward integration” and was appalled by the indifference of government bureaucrats and civil rights groups who cared only about the racial composition of white colleges rather than educating black students.²⁶⁵

The personal recitals in Justice Thomas’s memoir connect to the passionate opinions he writes regarding constitutional issues dealing with race. The sentiments expressed in *Fordice* regarding the value of historical black colleges will not surprise anyone who has read similar observations in the memoir. Similarly, Justice Thomas’s belief that race conscious decisionmaking stigmatized him and diminished his life’s accomplishments resembles arguments he made in *Grutter* and *Fisher*.²⁶⁶

A final facet of Justice Thomas’s jurisprudence in constitutional race cases provides further reason to believe that his race jurisprudence traces to something other than a consistent legal principle, originalist or otherwise. Although Justice Thomas often states principles in race cases in a formalistic, rule-like manner that allows few, if any, exceptions (for example, color-blind Constitution, no classifications based on race, and so on),²⁶⁷ he occasionally deviates from those assertions.

261. *Id.* at 78–79.

262. *Id.*

263. *Id.* at 141–43.

264. *Id.* at 147.

265. *Id.*

266. Professor Rossum rebuts Justice Thomas’s “critics” and, anticipatorily, an argument of this article by claiming that Justice Thomas’s belief in a color-blind Constitution traces to “the principle of equality in the Declaration of Independence that infuses and underlies the Constitution” not to his personal experiences. ROSSUM, *supra* note 98 at 213. Justice Thomas’s memoir connects many of his views on issues relating to race to experiences which presumably predated his development of this constitutional view. Moreover, the passionate tone of his opinions in constitutional cases dealing with race contrasts with that of his opinions in which he relies on various forms of originalism.

267. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 752 (2007) (Thomas, J., concurring) (“Therefore, as a general rule, all race-based government decisionmaking—regardless of context—is unconstitutional.”); *id.* at 756 (“[T]he programs are subject to the general rule that government race-based decisionmaking is unconstitutional.”); *Gratz v. Bollinger*, 539 U.S. 244, 281 (2003) (Thomas, J. concurring) (“I would hold that a State’s use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.”).

During his first term on the Court, he twice expressed views in a manner that suggested some race-conscious decisionmaking. In *Georgia v. McCollum*, he criticized the Court's extension of the *Batson* line of cases regarding peremptory jury challenges, noting the impact on black defendants in criminal cases. In *Fordice*, he wrote a concurrence stating that the Court's opinion did not jeopardize historic black schools. To be sure, in each instance, he expressed some racial neutrality. In *McCollum*, he opined that the rule barring white criminal defendants from racially based peremptories would also apply to black defendants;²⁶⁸ in *Fordice*, he acknowledged that such historically black schools would need to use race neutral admissions policies.²⁶⁹ But in *McCollum* he made clear his concern that white juries would be prejudiced against black defendants,²⁷⁰ and he asserted in *Fordice* that states could maintain diverse institutions including historically black colleges with "established traditions and programs that might disproportionately appeal to one race or another."²⁷¹

Two years after embracing a near bright-line constitutional principle against racial classifications in *Grutter* and *Gratz* and two years before doing so in *Parents Involved*, Justice Thomas concluded that strict scrutiny did not apply when California prison officials separated inmates based on race. In *Johnson v. California*,²⁷² he criticized the majority for "decid[ing] this case without addressing the problems that racial violence poses for wardens, guards, and inmates throughout the federal and state prison systems."²⁷³ Justice Thomas observed that "[t]he Constitution has always demanded less within the prison walls" and called for deference to "reasonable judgments of officials experienced in running this Nation's prisons."²⁷⁴ He concluded that California's policy of race-conscious assignments was "reasonably related to a legitimate penological interest,"²⁷⁵ the test he applied from the Court's precedent in *Turner v. Safley*.²⁷⁶ Significantly, Justice Thomas did not conclude that the strict scrutiny standard was met but rather that it did not apply in this context.²⁷⁷ He also never bothered to con-

268. *Georgia v. McCollum*, 505 U.S. 42, 62 & n.2 (1992) (Thomas, J., concurring).

269. *United States v. Fordice*, 505 U.S. 717, 749 (1992) (Thomas, J., concurring).

270. *McCollum*, 505 U.S. at 61 (Thomas J., concurring).

271. *Fordice*, 505 U.S. at 748-49 (Thomas, J., concurring).

272. 543 U.S. 499 (2005).

273. *Id.* at 532 (Thomas, J., dissenting).

274. *Id.* at 524.

275. *Id.* at 534.

276. 482 U.S. 78, 89 (1987).

277. *But cf. Johnson*, 543 U.S. at 547 (Thomas, J., dissenting) (raising the possibility that California's policy would pass strict scrutiny depending on whether it was narrowly tailored). In *Grutter*, Justice Thomas had traced strict scrutiny to *Korematsu v. United States*, 323 U.S. 214 (1944), rather than to *McLaughlin v. Florida*, 379 U.S. 184 (1964), and applied its "pressing public necessity" test narrowly to exclude a range of important state interests and to allow government

sider whether *Turner* correctly reflected the original meaning of the Constitution. Instead, Justice Thomas repeatedly invoked *Turner* and other precedents to argue that “constitutional demands are diminished in the unique context of prisons” so that the Court’s strict scrutiny jurisprudence does not apply to racial classifications there.²⁷⁸

In these opinions, Justice Thomas deviated from his usual conclusion that the Constitution forbids all race classifications and requires color-blind decisionmaking to recognize the validity of some race conscious official behavior. In *McCullum*, the perils to black defendants prompted his comment. In *Fordice*, the historic role and continuing value of black institutions of higher education invited his discussion. In *Johnson*, the reality of racial violence in prisons prompted his approach.²⁷⁹ These cases suggest that notwithstanding Justice Thomas’s tendency to assert sweeping bright-line, neutral-sounding rules regarding constitutional meaning in race cases, in applying his jurisprudence these propositions sometimes yield to other considerations. In fact, he seems most likely to invoke this formalistic reasoning to strike down race-conscious governmental action that he believes may stigmatize African-Americans. When he does not perceive that risk, he is sometimes willing to allow some race-conscious decisionmaking in order to pursue racial justice (for example, in *McCullum* and *Fordice*) or other important ends (for example, in *Johnson*).

IV. CONCLUSION

Justice Thomas’s commitment to originalism should lead the Court’s most consistent originalist to use that approach in constitutional cases dealing with race. Yet for more than two decades Justice Thomas has abandoned that methodology in race cases even though he has often written discretionary opinions where he was free to apply his preferred approach. *Fisher* recently presented yet another occasion when, consistent with his longstanding practice, Justice Thomas ignored the opportunity to apply originalism to race-conscious decisionmaking. Although he occasionally includes a reference to the Declaration of Independence, he has for more

to classify based on race only to provide “a bulwark against anarchy, or to prevent violence.” *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part). Many believe *Korematsu* actually applied a much more deferential standard than strict scrutiny, one closer to the standard Justice Thomas would have applied in *Johnson*. See generally, Richard H. Fallon, Jr. *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1277 (2007).

278. *Johnson*, 543 U.S. at 541 (Thomas, J., dissenting); see also *id.* at 544 (“The majority cannot fall back on the Constitution’s usual demands, because those demands have always been lessened inside the prison walls.”).

279. See also *Zelman v. Simmons-Harris*, 536 U.S. 639, 680–84 (2002) (Thomas, J., concurring) (defending school voucher programs to help black children and other minorities in lengthy consequentialist argument).

than two decades made no effort in his opinions to connect the conclusions that the Constitution is color-blind and allows no racial classifications to any discussion of originalism. Although he makes elaborate use of dictionaries and Framers' debates and contemporary practice in so many of his opinions interpreting other constitutional clauses, those originalist tools are absent when he addresses constitutional questions dealing with race. Instead, he uses moral and consequential arguments to support his conclusions in these cases, often in very passionate and personal terms.

Justice Thomas's judicial behavior in this respect should be a source of some concern to originalists. For what does it say about a theory if its most prominent proponent persistently abandons it without explanation in cases that are clearly important to him and to the nation?

This phenomenon also raises questions about Justice Thomas's performance based on the criteria he has set for himself. Justice Thomas has repeatedly described himself as an originalist and has disparaged other methodologies. Justice Thomas's writings, on and off the Court, suggest that cases dealing with race and affirmative action are among those that most engage him, intellectually and emotionally. Yet he has not used his endorsed methodology in addressing these cases nor has he provided any explanation for his failure to do so. At worst, he has reached results in high profile race cases contrary to originalism. At best, he has not provided an elaborated originalist rationale for his conclusions despite repeated opportunity to do so.

Moreover, he has consistently failed to address extensive originalist arguments that contradict his conclusion. Although he cited Professor McConnell's article when it was just off the press, he has never bothered to discuss the work that argued that originalism leads to different results than those he has reached.

Yet Justice Thomas's work in race cases is unique. In cases that do not ostensibly deal with race, he has brought racial history or impacts into the discussion. In cases dealing with race, his opinions are impassioned and quite different from those of the other justices, even those who arrive at similar conclusions. They could not, or would not, have been written by Justice Scalia or by any of the other conservative justices. Others rarely even join Justice Thomas's opinions in race cases. His voice is personal and unique.

This presents an irony regarding Justice Thomas's stated aspirations to function as an impartial justice. What is distinctive about his opinions in race cases is neither their consistency with originalism nor their impartiality. Rather, their distinctive and powerful component resides in the unique perspectives Justice Thomas offers based on his experiences and observations. These perspectives, not originalist analysis, are what he has contributed to our jurisprudence on race. Far from the impartial umpire he asserts

a justice should be, in race cases his experiences and passion regarding the subject seem to influence his consideration of constitutional questions.

Elsewhere, Justice Thomas may apply insights from originalism to resolve constitutional disputes. In race cases, however, he does not call them as the Framers or ratifiers or original generation saw them. Nor does he appear to search for guidance in these cases from these sources regarding how he should see them.

Instead, in constitutional cases dealing with race, he calls them as *he* sees them.

