

On *Parents Involved* and the Problematic Praise of Justice Clarence Thomas

by RONALD TURNER*

Introduction

In *The Seattle and Louisville School Cases: There is No Other Way*,¹ a recent comment on the United States Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*,² Judge J. Harvie Wilkinson III focuses, among other things, on Justice Clarence Thomas's concurrence in that case. Describing, endorsing, and indeed celebrating Thomas's "passion and eloquence" and courage,³ Judge Wilkinson argues that the "Thomas concurrence is a culmination of a remarkable string of pronouncements on race and education by the Court's sole African American Justice."⁴

In this brief essay, I argue that Judge Wilkinson's praise of Justice Thomas is problematic in two respects. First, in applauding Justice Thomas for the "intensely personal statements"⁵ found in the Justice's judicial opinions and for speaking "from the depths of the

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1. J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There is No Other Way*, 121 HARV. L. REV. 158 (2007).

2. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (holding that race-conscious student assignment plans voluntarily adopted by the Seattle, Washington and Jefferson County, Kentucky school boards violated the Equal Protection Clause of the Fourteenth Amendment).

3. Wilkinson, *supra* note 1, at 164, 167.

4. *Id.* at 164.

5. *Id.*

American and African American experience,”⁶ Wilkinson praises Thomas for doing that which the Justice decries: the commission of an act of nonoriginalist and discretionary judging grounded in and reflecting the Justice’s race and ideology.⁷ Second, Wilkinson uncritically embraces Thomas’s invocation of Frederick Douglass (whose “portrait hangs in Thomas’s chambers”)⁸ as iconic support for the view that “the Constitution does not permit ‘measures to keep the races together’ any more than it allowed measures to keep the races apart.”⁹ As discussed below,¹⁰ this unquestioning acceptance of Thomas’s reliance on the purported views of Douglass is a notable illustration of the perils of celebratory commentary.

I. Justice Thomas on Judging

How should judges decide cases?¹¹ In an April 1996 speech Justice Thomas expressed his concern that “the public, and often those in the legal profession and academia, view judges as enjoying great latitude within which to express their personal preferences.”¹² Thomas lamented what he termed the “popular misconception” that “[p]olitics and personal views rather than law, are seen as motivating forces behind Supreme Court decisions.”¹³ Judges are “impartial referees” and “impartiality is the very essence of judging and of being a judge.”¹⁴ Thomas stated:

6. *Id.* at 169.

7. See *infra* notes 15–18, and accompanying text.

8. KEVIN MERIDA & MICHAEL A. FLETCHER, *SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS* 278 (2007).

9. Wilkinson, *supra* note 1, at 167 (Thomas, J., concurring) (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 780–81 (2007)).

10. See *infra* notes 80–83, and accompanying text.

11. See ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 107 (1996) (“The conversation-stopping question ‘[h]ow should judges decide cases?’ has remained the central question in the theory of law.”).

12. Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 2 (1996).

13. *Id.*

14. *Id.* at 4; see also Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1202 (1992) (quoting Supreme Court nominee Thomas’ testimony that “as a judge, ‘[y]ou want to be stripped down like a runner,’ and ‘shed the baggage of ideology.’”). A sports umpire analogy was made by then-Judge John G. Roberts, Jr., in his Supreme Court confirmation hearing. Roberts told the Senate Judiciary Committee that “[j]udges are like umpires. Umpires don’t make rules; they apply them. And nobody ever went to a ballgame to see the umpire.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States: Hearing Before the S. Comm. on the*

A judge does not look to his or her sex or racial, social, or religious background when deciding a case. It is exactly these factors that a judge must push to one side in order to render a fair, reasoned judgment on the meaning of the law. In order to be a judge, a person must attempt to exorcise himself or herself of the passions, thoughts and emotions that fill any frail human being. He must become almost pure, in the way that fire purifies metal, before he can decide a case. Otherwise, he is not a judge, but a legislator, for whom it is entirely appropriate to consider personal and group interests.¹⁵

Rejecting the views of “legal realists” and “critical theorists”¹⁶ who, in his characterization, believe that “law was merely personal discretion,”¹⁷ Thomas argued that if “judging is simply the exercise of personal discretion by a judge, then cases, legal rules, and, indeed, the law itself, is merely the product of the person and, more importantly, the social structure and class that produced him or her.”¹⁸

When it comes to interpreting and applying the Constitution—“a difficult challenge because the Constitution itself is written in broad and sometimes ambiguous terms”¹⁹—Thomas has made clear that “judges should seek the original understanding of the provision’s text, if that text’s meaning is not readily apparent.”²⁰ Thomas believes

Judiciary, 109th Cong. 55 (2005). Judge Richard Posner, criticizing Roberts’s umpireal analogy, contends that “[n]either [Roberts] nor any other knowledgeable person actually believed or believes that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires.” RICHARD A. POSNER, *HOW JUDGES THINK* 78 (2008).

15. Thomas, *supra* note 12, at 4.

16. See generally LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 13–22, 82–87, 177–79 (1996) (discussing legal realism, critical legal studies, and critical race theory).

17. Thomas, *supra* note 12, at 6.

18. *Id.* at 3; see also John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903, 910 (1997) (commenting on this argument by Justice Thomas, John Calmore remarked, “While I am unaware of any claim within Critical Race Theory that ‘judging is simply the exercise of personal discretion by a judge,’ it is claimed that neither judging nor the law is free from the subordinating features Justice Thomas cites.” (quoting Thomas, *supra* note 12, at 3)).

19. Thomas, *supra* note 12, at 5.

20. *Id.* at 6; see also *id.* at 7 (“[T]he Constitution means not what the Court says it means, but what the delegates of the Philadelphia and state ratifying conventions understood it to mean. . . . We as a nation adopted a written Constitution precisely because it has a fixed meaning that does not change.”).

originalism²¹ promotes judicial impartiality by reducing a judge's resort to discretion-based decisionmaking.²² Justice Thomas has employed originalist methodology in his opinions in cases involving the Commerce Clause,²³ the First Amendment,²⁴ the Takings Clause,²⁵ and the Fourteenth Amendment's Privileges or Immunities Clause.²⁶ Interestingly, no attempt to discern the original understanding or meaning of the Fourteenth Amendment's Equal Protection Clause²⁷ is found in Thomas's concurring opinion in *Parents Involved*.²⁸

II. *Parents Involved*: Justice Thomas, Concurring

In *Parents Involved*, the Supreme Court, in a 5–4 vote, held that voluntary racial integration and pupil assignment plans adopted by school boards in Seattle, Washington, and Jefferson County, Kentucky, violated the Equal Protection Clause.²⁹ Grounding his analysis in what he described as the “heritage” of the Court's seminal

21. See generally JONATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005); ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007). For a recent, prominent, and much discussed exemplar of the Court's originalist approach in interpreting and applying the Second Amendment, see *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

22. See Thomas, *supra* note 12, at 6.

23. See *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (“[W]e ought to temper our Commerce Clause jurisprudence in a manner that . . . is more faithful to the original understanding of that Clause.”).

24. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring) (“[T]he history of public education suggests that the First Amendment, as originally understood, does not protect student speech in schools.”); *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (arguing that the Court should return to and apply the original meaning of the Establishment Clause).

25. See *Kelo v. City of New London*, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting) (arguing that the Court's takings decisions “have strayed from the [Public Use] Clause's original meaning” and should be reconsidered).

26. See *Saenz v. Roe*, 526 U.S. 489, 521, 522 (1989) (Thomas, J., dissenting) (“look[ing] to history to ascertain the original meaning of the Clause”).

27. See U.S. CONST. amend. XIV, § 1, cl. 4 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

28. See James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 150 (2007) (“Whatever else one might say about the Court's opinion, it is not originalist. Nor does Justice Thomas's concurring opinion rely, more than fleetingly and vaguely, on originalism.”).

29. For discussions and examinations of the Court's decision, see Goodwin Liu, ‘History Will Be Heard’: An Appraisal of the Seattle/Louisville Decision, 2 HARV. L. & POL'Y REV. 53 (2008); Ryan, *supra* note 28; Ronald Turner, *The Voluntary School Integration Cases and the Contextual Equal Protection Clause*, 51 HOW. L.J. 251 (2008).

and canonical decision in *Brown v. Board of Education*,³⁰ Chief Justice John G. Roberts Jr.'s plurality opinion³¹ concluded that the at-issue plans did not further a recognized compelling governmental interest and were "not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity" ³² Instead, Roberts opined, the plans were "directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate."³³ In a concurring opinion providing the fifth and majority-creating vote for striking down the plans, Justice Anthony M. Kennedy agreed with the plurality that the plans were not sufficiently narrowly tailored, but disagreed with Roberts's conclusion that the pursuit of racial diversity is not a compelling governmental interest.³⁴

The four dissenting Justices, in a lengthy opinion authored by Justice Stephen G. Breyer,³⁵ complained that the plurality

distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown's* promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause.³⁶

30. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

31. Roberts' opinion was joined in full by Justices Antonin Scalia, Clarence Thomas, and Samuel Anthony Alito, Jr.

32. *Parents Involved*, 551 U.S. at 726.

33. *Id.*

34. Justice Kennedy wrote that while school districts may "continu[e] the important work of bringing together students of different racial, ethnic, and economic backgrounds," public schools cannot pursue this objective by "resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications." *Id.* at 798 (Kennedy, J., concurring). Concluding, further, that parts of Chief Justice Roberts' plurality opinion "imply an all-too-unyielding insistence that race cannot be a factor when, in my view, it may be taken into account." *Id.* at 787. Kennedy opined that school officials pursuing racial diversity could constitutionally employ certain race-conscious measures, including site selection of schools, drawing demographic-cognizant attendance zones, and the targeted recruiting of students and faculty. *See id.* at 789.

35. Joined by Justices John Paul Stevens, David Hackett Souter, and Ruth Bader Ginsburg.

36. *Parents Involved*, 551 U.S. at 803–04 (Breyer, J., dissenting).

Justice Thomas joined Chief Justice Roberts's opinion and wrote separately to address several arguments made in Justice Breyer's dissent. At the outset, Thomas noted his view that "resegregation is not occurring in Seattle or Louisville,"³⁷ and argued that there is a difference between segregation and racial imbalance. "[S]egregation is the deliberate operation of a school system to carry out a governmental policy to separate pupils in schools solely on the basis of race."³⁸ "Racial imbalance is the failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large."³⁹ Acknowledging that "presently observed racial imbalance might result from past *de jure* segregation," Thomas posited that "racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices."⁴⁰ Given Thomas's position that racial imbalance is not the same as state-mandated segregation,⁴¹ he concluded that seeking to address such imbalance via a voluntary integration plan is not a "genuinely compelling state interest."⁴²

Focusing on an issue he had considered in the early 1980s when he served as the assistant secretary for civil rights in the Reagan Administration's Department of Education,⁴³ Thomas argued that there is a "tenuous relationship between forced racial mixing and

37. *Id.* at 748 (Thomas, J., concurring).

38. *Id.* at 749 (citation omitted) (internal quotation marks omitted).

39. *Id.* (citation omitted).

40. *Id.* (citation omitted).

41. "Racial isolation itself is not a harm; only state-enforced segregation is." *Missouri v. Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring); see also Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 *HOW. L.J.* 323, 324 (2004) (for Thomas, racial imbalance is "not in itself anything of constitutional concern.").

42. *Parents Involved*, 551 U.S. at 756 (Thomas, J., concurring).

43. See CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* 137–40 (2007). In a staff meeting, shortly after assuming the assistant secretary position, Thomas "asked to see any studies that compared the academic performance of black students in integrated primary and secondary schools with black students in segregated or predominantly black schools. None was forthcoming, and when I pursued the matter, a staffer told me that none existed." *Id.* at 142–43. He later read reports indicating that, in his words, black students in integrated schools "were less likely by far to enroll in the more challenging courses and more likely to have discipline problems The data also made it clear that black males were dropping out of high school at an alarming rate, and that those who remained rarely did well academically." *Id.* For Thomas, that "data spelled doom for blacks in America . . . I was overwhelmed by a feeling of hopelessness. Members of my own race were caught in a cruel trap not of their own making . . . It was more than I could take. I sat at my desk and wept." *Id.* at 143–44.

improved educational results for black children”⁴⁴ He noted “the fact of black achievement in ‘racially isolated’ environments” before and after *Brown* and pointed to “evidence that black students attending historically black colleges achieve better academic results than those attending predominantly white colleges.”⁴⁵ In fact, Thomas wrote, Seattle’s K-8 “African-American Academy,” with “a ‘nonwhite’ enrollment of 99%,”⁴⁶ “reportedly produced test scores higher across all grade levels in reading, writing and math.”⁴⁷ Thus,

44. *Parents Involved*, 551 U.S. at 765 (Thomas, J., concurring). Justice Thomas had previously made clear his view that “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.” *Jenkins*, 515 U.S. at 121–22 (Thomas, J., concurring). Arguing that “[w]e must forever put aside the notion that simply because a school district today is black, it must be educationally inferior,” *id.* at 138, Thomas observed that black middle and high schools “can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement.” *Id.* at 122. It is noteworthy that Thomas has also recognized that urban minority children “have been forced into a system that continually fails them.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring). Joining the *Zelman* Court’s decision upholding as constitutional an Ohio school voucher program, Thomas opined that “failing urban public schools disproportionately affect minority children most in need of educational opportunity. . . . Today . . . the promise of public school education has failed poor inner-city blacks.” *Id.* at 681–82. This “failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives. If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination’s effects.” *Id.* at 683.

45. *Parents Involved*, 551 U.S. at 763 (Thomas, J., concurring) (citations omitted). Reading this sentence in Justice Thomas’s opinion brought to mind journalist Ron Suskind’s account of a meeting between Thomas and Cedric Jennings, an African-American honor student at Frank W. Ballou Senior High, “the most troubled and violent school in the blighted southeast corner of Washington, D.C.” See RON SUSKIND, *A HOPE IN THE UNSEEN: AN AMERICAN ODYSSEY FROM THE INNER CITY TO THE IVY LEAGUE* 1 (1998, revised and updated 2005). Asked by Thomas if he knew what college he would be attending, Jennings responded, “You bet. I’m off to Brown University.” *Id.* at 120. Thomas replied, “Well, that’s fine, but I’m not sure if I would have selected an Ivy League school. . . . You’re going to be up there with lots of very smart white kids, and, if you’re not sure about who you are, you could get eaten alive.” *Id.* According to Suskind’s book, Thomas also told Jennings to avoid “classes and orientation on race relations” and to say to himself “I’m not a black person, I’m just a person.” *Id.* at 121. Learning that Jennings planned to major in math, Thomas expressed his approval. “That’s what I look for in hiring my clerks—the cream of the crop. I look for the maths and the sciences, real classes, none of that Afro-American studies stuff. If they’ve taken that stuff as an undergraduate, I don’t want them. You want to do that, do it in your spare time.” *Id.* Jennings attended and graduated from Brown, and earned graduate degrees from Harvard as well as the University of Michigan. See *id.* at 377, 383.

46. *Parents Involved*, 551 U.S. at 764 (Thomas, J. concurring).

47. *Id.* (citation omitted) (internal quotation marks omitted). Justice Thomas is certainly correct that educational achievements by African Americans and other

he concluded, “the children in Seattle’s African American Academy have shown gains when placed in a ‘highly segregated’ environment.”⁴⁸

Additionally, Justice Thomas was not convinced by social science research supporting the proposition that “state-compelled racial mixing teaches children to accept cooperation and improves racial attitudes and race relations.”⁴⁹ “There is no guarantee... that students of different races in the same school will actually spend time with one another.”⁵⁰ He opined that students in racially integrated schools may find themselves in racially homogenous classes as the result of academic ability groupings, and that “students of different races within the same school may separate themselves socially.”⁵¹ For Thomas, it is not clear that increased contact between students of different races improves racial understandings and relations. “Some studies have even found that a deterioration in racial attitudes seems to result from racial mixing in schools.”⁵²

In the last part of his opinion, Justice Thomas argued for the colorblind constitutionalism of Justice John Marshall Harlan articulated in Harlan’s 1896 dissent in *Plessy v. Ferguson*⁵³ and, according to Thomas, adopted by the plaintiff’s lawyers in *Brown*. “My view of the Constitution is Justice Harlan’s view in *Plessy*: ‘Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.’ And my view was the rallying cry for the lawyers who litigated *Brown*.”⁵⁴ Having invoked and aligned himself with

minorities can and do occur in the absence of white students. See, e.g., Lisa Falkenberg, *Let’s Thank DeBakey for School, Too*, HOUS. CHRON., July 15, 2008, at B1 (noting the success of the DeBakey High School for Health Professions in Houston, Texas: the magnet school is ninety percent black, Latino/a, and Asian and one-half of its students receive free or reduced lunches; ninety-eight percent of its graduates go to college and the school is ranked in the top 100 high schools in the United States by U.S. NEWS AND WORLD REPORT).

48. *Parents Involved*, 551 U.S. at 764 (Thomas, J. concurring).

49. *Id.* at 768.

50. *Id.*

51. *Id.* at 769; see BEVERLY DANIEL TATUM, ‘WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?’: A PSYCHOLOGIST EXPLAINS THE DEVELOPMENT OF RACIAL IDENTITY (rev. ed., 2003) (explaining why and how students of the same race appear to assemble in separate groups in racially integrated settings).

52. *Parents Involved*, 551 U.S. at 770 (Thomas, J., concurring).

53. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that Louisiana statute mandating separate but equal railway accommodations for black and white passengers did not violate the Equal Protection Clause).

54. *Parents Involved*, 551 U.S. at 772 (Thomas, J., concurring). Justice Harlan, the sole dissenter in *Plessy*, wrote that “[e]very one knows that the statute in question had its

Harlan, Thurgood Marshall, and the lawyers who fought to inter the noxious separate-but-equal doctrine in *Brown*, Thomas provocatively linked Justice Breyer's *Parents Involvement* dissent to the segregationists who opposed *Brown*. Breyer's views "first appeared in *Plessy*," Thomas argued, wherein the "Court likewise paid heed to societal practices, local expectations, and practical consequences by looking to 'the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.'"⁵⁵

What was wrong in 1954 cannot be right today. Whatever else the Court's rejection of the segregationist arguments in *Brown* might have established, it certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession. The fact that state and local governments had been discriminating on the basis of race for a long time was irrelevant to the *Brown* Court. . . . And the fact that the state and local governments had relied on statements in this Court's opinions was irrelevant to the *Brown* Court. The same principles guide today's decision. None of the considerations trumpeted by the dissent is relevant to the constitutionality of the school board's race-

origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons." *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting). Declaring that "[i]n view of the Constitution . . . [t]here is no caste here," Harlan stated:

Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Id. at 559. Interestingly, and importantly, the opening sentences in the same paragraph containing the just-quoted passage of Harlan's opinion make clear Harlan's view that the "white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty." *Id.* While many elide and make no reference to "Harlan's acknowledgement of white superiority in the very paragraph in which he proclaimed fealty to colorblindness." Ian Haney Lopez, 'A Nation of Minorities': Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 993 (2007). Thomas has noted and quoted this aspect of Harlan's dissent. See *Parents Involved*, 551 U.S. at 780 (Thomas, J., concurring). For discussions of the race-conscious views of Justice Harlan, see TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN 160-62 (1995); Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996); Laurence H. Tribe, "In What Vision of the Constitution Must the Law be Color-Blind?" 20 J. MARSHALL L. REV. 201 (1986).

55. *Parents Involved*, 551 U.S. at 773 (Thomas, J., concurring) (quoting *Plessy*, 163 U.S. at 550).

based plans because no contextual detail—or collection of contextual details—can “provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.”⁵⁶

Justice Thomas’s concurrence is not an originalist opinion seeking and discerning the original understanding and meaning of the Fourteenth Amendment’s Equal Protection Clause.⁵⁷ Thomas has made clear his view that originalism⁵⁸ promotes the value and cardinal principle of judicial impartiality and is critical to the reduction of a

56. *Id.* at 778-79 (Thomas, J. concurring) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring)). With regard to Justice Thomas’ statement that contextual details do not require and cannot justify departures from his no-distinction-by-race principle, consider *Johnson v. California*, 543 U.S. 499 (2005). Dissenting from the Court’s application of strict scrutiny review to a California prison policy segregating new inmates by race, Thomas argued that “constitutional demands are diminished in the unique context of prisons.” *Id.* at 541 (Thomas, J., dissenting). Thus, context can in fact matter; when and how it matters are debatable issues. See also Randall Kennedy, *Conservatives’ Selective Use of Race in the Law*, 19 HARV. J.L. & PUB. POL’Y 719, 720 (1996) (arguing that Justices Thomas and Scalia “need to explain their tolerance for racial discrimination in the context of preemptory challenges but their intolerance of affirmative action.”).

57. Because he did not apply an originalist methodology, Justice Thomas did not address and has not indicated whether he agrees or disagrees with the argument and conclusion that the framers and ratifiers of the Fourteenth Amendment did not intend or understand that the amendment would prohibit racial segregation in public schools. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 16–18 (2d ed., 1997) (studying the Fourteenth Amendment “in the service of no other cause than integrity of constitutional construction” and arguing that “segregation was left untouched by the Fourteenth Amendment”); RICHARD A. POSNER, *OVERCOMING LAW* 62 (1995) (“It was unclear, to say the least, that the framers or ratifiers of the Fourteenth Amendment had intended the equal protection clause to prevent racially segregated public education.”); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 156 (1999) (“[T]he very Congress that submitted the Fourteenth Amendment to the states for ratification also supported segregated schools in the District of Columbia,” and the amendment’s supporters assured their opponents that the amendment would not lead to integrated schools.); Alexander Bickel, *The Original Understanding and the Segregation Decisions*, 69 HARV. L. REV. 1, 64 (1955) (“[T]he immediate objectives to which section 1 of the fourteenth amendment was addressed . . . was not expected in 1866 to apply to segregation.”); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 (1991) (“Evidence regarding the original understanding of the Fourteenth Amendment is ambiguous as to a wide variety of issues, but not school segregation. Virtually nothing in the constitutional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation, while contemporaneous state practices render such an interpretation fanciful . . .”). But see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that *Brown* is consistent with and can be squared with originalism).

58. See *supra* notes 20–26 and accompanying text.

judge's discretionary decisionmaking. It ensures that judges decide cases on the basis of the original understanding or meaning of constitutional text and do not act on their politics or personal views. Not employing and therefore not meeting his own standard of non-discretionary judging, Thomas's *Parents Involved* opinion clearly sets forth *his* views on the difference between segregation and racial imbalance, and *his* views on the policy and utility or futility of "racial mixing" in pursuit of improving educational outcomes for black children and in improving the racial attitudes of all children.

As for Justice Thomas's quotation and use of Justice Harlan's colorblind metaphor and argument that Thomas's view is the same as the "rallying cry" of the *Brown* lawyers,⁵⁹ this move may have rhetorical force and argumentative power for those, like Judge Wilkinson, who agree with Thomas's race-neutral construction and application of the Fourteenth Amendment.⁶⁰ Thomas's see-no-color and government-can-make-no-racial-distinctions principles reflect his belief

that there is a moral and constitutional equivalence . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some notion of equality. Government cannot make us equal, it can only recognize, respect, and protect us as equal before the law.⁶¹

59. Reacting to the contention that the *Brown* lawyers' and plaintiffs' challenge to "racial classifications" in the 1950s was the same as, and supported the challenge to, the voluntary integration plans before the *Parents Involved* Court, *Brown* lawyer (and now senior federal Judge) Robert L. Carter stated: "All race was used for at that point in time was to deny equal opportunity to black people. It's to stand that argument on its head to use race the way they use [it] now." Adam Liptak, *The Same Words, But Differing Views*, N.Y. TIMES, June 29, 2007, at A24 (quoting Carter); see also *id.* (*Brown* lawyer Jack Greenberg describing Chief Justice Roberts' characterization of *Brown* as "preposterous," and *Brown* lawyer William Coleman stating that the Court's decision "is 100 percent wrong" and is "dirty pool.").

60. See J. Harvie Wilkinson III, *Toward One America: A Vision in Law*, 83 N.Y.U. L. REV. 323, 333–34 (2008) (arguing against "public allocations and benefits . . . premised on ethnicity and race," for "neutrality as to race," and for an understanding of the Equal Protection Clause "reflect[ing] the view that the strongest nation will be one in which each and every human being is freed from the yoke of identification and discrimination based on race").

61. *Adarand Constructors*, 515 U.S. at 240 (Thomas, J., concurring). Justice Stevens, disagreeing with Thomas' equivalence reasoning, found no "moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." *Id.* at 243 (Stevens, J., dissenting). Treating all racial distinctions as equivalent "would disregard the difference between a 'No Trespassing' sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote

Of course, whether Thomas's views are accurate and can persuade those who do not subscribe to colorblind constitutionalism is another matter.⁶²

Justice Thomas's beliefs and embrace of Harlan, what Thomas likes or "simply dislikes as a policy matter,"⁶³ his reading and understanding of *Brown* (a nonoriginalist and "classic legislative decision")⁶⁴ as applied in the context of present-day voluntary race-conscious integration plans—all of these views and positions are important and warrant respectful and rigorous critique. But that critique must include recognition of the fact that Thomas did not employ the originalist methodology that *he* has identified as indispensable to ascertaining the framers' and ratifiers' "fixed meaning" of the Equal Protection Clause free from the influence and decisional distortion of a jurist's personal and policy preferences.⁶⁵ Is not his *Parents Involved* opinion an exemplar of the very "product of the person"⁶⁶ and judge-as-legislator adjudication decried by Thomas?

III. Judge Wilkinson's Praise of Justice Thomas

In praising Justice Thomas's *Parents Involved* concurrence, Judge Wilkinson remarks that

[n]o one has been more eloquent than Justice Thomas in pointing out the heavy price in human pride and dignity that black Americans have been asked to pay—a case that the Carmichaels and Browns and Cleavers of the late 1960s tried

against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers." *Id.* at 245.

62. We do know that Justice Thurgood Marshall rejected the colorblind approach championed by Justice Thomas. As Marshall wrote in his separate opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 401 (1978), "[i]t is because of the legacy of unequal treatment that we must now permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence and prestige in America. . . . If we are ever to become a fully integrated society," Marshall continued, "one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible." *Id.* at 401–02.

63. Ryan, *supra* note 28, at 151.

64. POSNER, *supra* note 57, at 281.

65. See *supra* note 20, and accompanying text.

66. See Thomas, *supra* note 12, at 3.

radically and unsuccessfully to make outside the councils of influence and power.⁶⁷

Thomas “has shattered stereotypes of how African Americans were expected to behave and think, and he has done this with an unquenchable faith in the ability of African Americans to draw upon their personal resources, not only for themselves, but to make our country a better place to be.”⁶⁸ Wilkinson concludes that Thomas’s opinion “should give the final boot to any notion that the Justice is an outlier. In his insistent plea for true nondiscrimination, he has spoken from the depths of the American and African-American experience and made a priceless contribution to the debate on race and education in this country.”⁶⁹

If Judge Wilkinson is correct that the Thomas concurrence is a noteworthy expression of the “intensely personal statements” of “the Court’s sole African-American Justice,”⁷⁰ then Thomas’s opinion is not the judicial work product of an originalist, deracinated, impartial, emotionless, and dispassionate Thomasian model jurist.⁷¹ Instead, it is the pronouncement of, not just a judge, but a racialized and black jurist and a conservative critical race theorist.⁷² Thomas’s racial and

67. Wilkinson, *supra* note 1, at 169.

68. *Id.*

69. *Id.*

70. *Id.* at 164.

71. See *supra* note 15, and accompanying text.

72. See Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, 93 GEO. L.J. 575, 626 (2005). Professor Charles’ article discusses Justice Thomas’ approach to the First Amendment in *Virginia v. Black*, 538 U.S. 343 (2003), wherein the Court held that a Virginia statute prohibiting cross burning with an intent to intimidate did not violate the First Amendment. Thomas “analyzed the harm caused by cross burning from his perspective as a person of color” and “brought sensitivity to the issue that he had acquired on the basis of his experiences as an African American.” Charles, *supra* note 72, at 608. Thomas’ dissenting opinion noted that in “every culture, certain things acquire meaning well beyond what outsiders can comprehend.” *Virginia*, 538 U.S. at 388 (Thomas, J., dissenting). This “reference to ‘outsiders’ is interesting in that the only African-American member of the Court appears to position himself as an outsider who is privy to something that insiders (including, in this case, the other justices) may not comprehend and fully appreciate—the real impact and harms of cross burnings.” Ronald Turner, *Cross Burnings and the Harm-Valuation Analytic: A Tale of Two Cases*, 9 BERKELEY J. AFR.-AM. L. & POL’Y 3, 29 (2007). Not only did Thomas not push aside his racial background as he said a jurist must do when deciding cases (see *supra* note 15 and accompanying text); his analysis, reasoning, and opinion, grounded in his understanding of the African-American experience, influenced the Court’s rejection of the challenge to Virginia’s anti-cross-burning law. See Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative*

social background are thus critical to Wilkinson's analysis and praise of the "passion and eloquence"⁷³ of Thomas, "'a man, a black man'"⁷⁴ whose "long and rather lonely quest for a rightful place for black Americans makes him a worthy successor to the Blacks, Wrights, and Wisdoms from whose region he hails."⁷⁵

This is problematic praise. If Judge Wilkinson is right, Justice Thomas's concurrence is an instance of ideological judging, with ideology understood as "a body of more or less coherent bedrock beliefs about social, economic, and political questions, or, more precisely perhaps, a worldview that shapes one's answers to those questions."⁷⁶ The sources of a judge's ideology include his or her "upbringing, education, salient life experiences, and personal characteristics (which may determine those experiences) such as race, sex, and ethnicity"⁷⁷ Thus, to laud Thomas for authoring an opinion grounded in and reflecting his race, racialized experience, and worldview is to applaud him for the commission of a judicial act lacking the "impartiality [which] is the very essence of judging and of being a judge."⁷⁸ Ironically, Thomas is praised "for engaging in and committing the very act of judicial partiality the Justice [has] denounced"⁷⁹

Judge Wilkinson also highlights the "Let him alone!" exhortation found in Thomas's quotation of the abolitionist Frederick Douglass in

Action, 47 ARIZ. L. REV. 113, 145–48 (2005); see also Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 1002 (2005) ("Regardless of how one describes Justice Thomas' jurisprudence, it is clear that he is deeply influenced by his life experiences when deciding cases that directly implicate race.").

73. Wilkinson, *supra* note 1, at 164.

74. *Id.* at 166 (quoting Justice Thomas).

75. *Id.* at 167 (referring to Justice Hugo Black of Alabama, Fifth Circuit Judge John Minor Wisdom, and Louisiana federal court Judge J. Skelly Wright).

76. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1059 (2006).

77. *Id.* at 1060; see also AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 212 (2005) ("A judge's interpretation is the product of his or her personality and life experience; the product of the balance he or she strikes between certainty and experimentation, security and change, reason and emotion."); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002) (The attitudinal model "holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.").

78. Thomas, *supra* note 12, at 4.

79. Ronald Turner, *Grutter and the Passion of Justice Thomas: A Response to Professor Kearney*, 13 WM. & MARY BILL RTS. J. 821, 824 (2005).

Grutter v. Bollinger.⁸⁰ Arguing that this quotation is the “crux of the Thomas philosophy,”⁸¹ Wilkinson states:

State-enforced segregation was manipulative by nature—a wholesale repudiation of the Douglass plea. But so too was racial balancing, even the benign variety, the sort of interference that Douglass would never countenance. Thus the repeated suspicion in [Thomas’s] *Parents Involved* concurrence of federal judges as “social engineers” and of “elites bearing racial theories.” Even those best of intentions would have been anathema to Douglass—Let him alone!⁸²

Consideration and evaluation of this invocation of Douglass must take into account the fact that Justice Thomas’s quotation of Douglass in *Grutter* omitted key passages of Douglass’s 1865 speech. What follows is the full quotation of the part of the Douglass address Justice Thomas quoted in *Grutter*, with the ellipsed and elided passages omitted by the Justice set out in italics:

. . . *I think the American people are disposed often to be generous rather than just. I look over this country at the present time, and I see Educational Societies, Sanitary Commissions, Freedmen’s Association, and the like,—all very good; but in regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested toward us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply justice. The American people have always been anxious to know what they shall do with us. Gen. Banks was distressed with solicitude as to what he should do with the negro. Everybody has asked the question, and they learned to ask it early of the abolitionists: “What shall we do with the negro?” I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us.*

80. See Wilkinson, *supra* note 1, at 165 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 349–50 (2003)) (Thomas, J., concurring in part and dissenting in part) (quoting Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865*, in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blasingame & John R. McKivigan eds., 1991)); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring) (quoting Frederick Douglass’ statement that “[e]ducation . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free.”); *id.* at 684 (quoting Douglass’ statement that “no greater benefit can be bestowed upon a long benighted people, than giving to them, as we are here earnestly this day endeavoring to do, the means of an education”).

81. Wilkinson, *supra* note 1, at 165.

82. *Id.*

Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! *I am not for tying or fastening them on the tree in any way, except by nature's plan, and if they will not stay there let them fall.* And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! *If you see him on his way to school, let him alone,—don't disturb him! If you see him going to the dinner table at a hotel, let him go! If you see him going to the ballot box, let him alone!—don't disturb him! If you see him going into a workshop, just let him alone,—your interference is doing him positive injury. . . .*⁸³

As noted by Professor Charles Ogletree, Justice Thomas's partial quotation of Douglass gives the appearance "of the plea of a man at one with Justice Thomas in his distrust of remedial schemes. Douglass, however, was no foe [of] social redistribution. On the contrary, he was an avid proponent of the need for reconstruction after the Civil War."⁸⁴ Douglass clearly states that the work of educational societies, sanitary commissions, and the Freedmen's Association were "all very good,"⁸⁵ a view consistent with his approval of the "religious, secular, and quasi-governmental agencies created during the Civil War to meet the spiritual, intellectual, and medical needs of both freedmen and Union soldiers."⁸⁶ (Indeed, "[t]here was no job, short of president or pope, that . . . Douglass would have liked better" than heading the Freedmen's Bureau).⁸⁷

Douglass's "Let him alone!" plea was not a declaration of opposition to race-conscious efforts to address the needs of African Americans. The declaration "Let him alone!" was in direct opposition to General Nathaniel Banks' campaign to implement a color-coded serfdom and force freed slaves to return to and work on plantations.⁸⁸ "Let him alone!" reprimanded those who obstructed and accosted black persons as they tried to go to school, or dine at a hotel, or vote, or work. In that bill of particulars, Douglass left no

83. Douglass, *What the Black Man Wants*, *supra* note 80, at 67–68. Note that in the quoted material the word "justice" was italicized.

84. Charles J. Ogletree, Jr., *From Brown to Tulsa: Defining Our Own Future*, 47 *How. L.J.* 499, 548 (2004).

85. Douglass, *supra* note 80, at 68.

86. *Id.* at 68 n.12 (editors' note).

87. WILLIAM S. MCFEELEY, *FREDERICK DOUGLASS* 260 (1991).

88. See JOHN STAUFFER, *THE BLACK HEARTS OF MEN: RADICAL ABOLITIONISTS AND THE TRANSFORMATION OF RACE* 277 (2002).

doubt as to whom he was addressing and what he meant when he stated that “interference is doing him positive injury.”⁸⁹ Thus, the argument that Douglass indisputably opposed certain governmental actions focusing on and promoting the interests, aspirations, and rights of African Americans, based as it is on the selective quotation of the 1865 speech,⁹⁰ is simply incorrect.

Whether Douglass would agree today with the views attributed to him by Justice Thomas and Judge Wilkinson is a speculative and ultimately unhelpful inquiry since “[t]he cruel legacy of 250 years of slavery in America has proved more stubborn than even . . . Douglass, a former slave and consummate realist, imagined.”⁹¹ Indeed, in an 1875 speech an openly race-conscious and color-aware Douglass said the following:

It is said by some: “We have done enough for the negro.” Yes, you have done a great deal for the negro, and, for one, I am deeply sensible of it, and grateful for it. But after all, what have you done? We were slaves—and you have made us free—and given us the ballot. But the world has never seen any people turned loose to such destitution as were the four million slaves of the South. . . . They were free! [F]ree to hunger; free to the winds and rains of heaven; free to the pitiless wrath of enraged masters, who, since they could no longer control them, were willing to let them starve. They were free, without roofs to cover them, or bread to eat, or land to cultivate, and as a consequence died in such numbers as to awaken the hope of their enemies that they would soon disappear. We gave them freedom and famine at the same time. The marvel is that they still live. What the negro wants is, first, protection of the rights already conceded by law, and, secondly, education. *Talk of having done enough for these people after two hundred years of enforced ignorance and stripes is absurd, cruel, and heartless.*⁹²

89. Douglass, *supra* note 80, at 68.

90. See MERIDA & FLETCHER, *supra* note 8, at 278 (noting that Thomas was selective in quoting Douglass and “omitted key lines from Douglass’s 1865 speech . . . the omitted text was the advocacy part of the speech in which Douglass challenged the nation to stop crushing the rights of blacks”).

91. Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 4 (2002).

92. Frederick Douglass, *Celebrating the Past, Anticipating the Future: An Address Delivered in Philadelphia, Pennsylvania, on 14 April 1875*, in 4 THE FREDERICK DOUGLASS PAPERS, *supra* note 80, at 412–13 (emphasis added).

“What have you done” and the “absurd, cruel, and heartless” “[t]alk of having done enough”⁹³ calls into question, indeed belies, the claim that “Let him alone!” was *the* guiding tenet for Douglass. Accordingly, Douglass should not and must not be placed in the ranks of the race neutralists. Iconography has its limits.

CONCLUSION

Judge Wilkinson praises the intensely personal statements made by Justice Thomas in his *Parents Involved* concurrence and applauds Thomas for speaking from the American and African-American experience. Wilkinson thus lauds Thomas’s approach to and construction of the Equal Protection Clause, even though that which Wilkinson praises is antithetical to Thomas’s call for impersonal, impartial, and deracinated judging. And Wilkinson’s unquestioning embrace of Thomas’s invocation of the abolitionist Frederick Douglass further illustrates the perils and problematics of such praise. While aligning oneself with an iconic figure can be useful in persuading others of the correctness of a contested proposition, the rhetorical power of iconography should never be allowed to serve as an analytic substitute for rigorous and informed critique.

93. *Id.* at 413.