

## **‘Beware of Elites Bearing Theories’: Clarence Thomas on Race and Education**

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### **Abstract**

*No matter one's political loyalties, it seems worthwhile to take seriously Clarence Thomas's ideas about education because over the past twenty-five years most have acquired the force of law. This article explains Thomas' views on the legitimacy and efficacy of affirmative action as a remedy to educational segregation. It also addresses his views on integration/segregation and diversity, the developments of which are intimately tied to affirmative action. Each is related to ever-shifting definitions and deployments of the notion of colorblindness. Understanding Clarence Thomas with respect to education requires an examination of his biography, as paradigmatic of many black male experiences in the second half of the 20th century. The article argues that it is unproductive to claim that Thomas' conservatism in the realm of racial politics is either irrational or exceptional. That does not equate, however, to championing Thomas' positions on affirmative action, diversity, and integration.*

**Keywords:** supreme court, affirmative action, segregation, educational law, colorblindness

"There is nothing you can do to get past black skin ... I don't care how educated you are, how good you are at what you do – you'll never have the same contacts or opportunities, you'll never be seen as equal to whites."

– Clarence Thomas, quoted by Juan Williams (1987)

It would be fair to say that no black public figure in the past thirty years has been the target of more unapologetically racial slurs by liberals than Clarence Thomas. Film director Spike Lee offered that “Malcolm X, if he were alive today, would call Thomas a handkerchief head, a chicken-and-biscuit-eating Uncle Tom,” and writer June Jordan characterized Thomas as “virulent Oreo phenomenon” (Perazzo 2002). From Carl Rowan (1991), the noted Washington journalist, came this opinion: “The thing that bothers me about his appointment [to the Supreme Court] – if they had put David Duke on, I wouldn't scream as much because they would look at David Duke and reject him for what he is. If you gave Clarence Thomas a little flour on his face, you'd think you had David Duke talking.” The contempt these commentators feel for Thomas appears to derive from his response to the affirmative action policies of which he was a supposed beneficiary. This, along with the conservative company he keeps, is understood as a betrayal of blackness and of black people in general. More dispassionate proponents of affirmative action discount Thomas' narrative of stigma and resistance on different grounds. Patricia Gurin (2004) suggests that the feelings expressed by Clarence Thomas and other like-minded “beneficiaries” of affirmative action policies are not representative. Hers is the dominant narrative in which minority students who are able to enroll in elite schools by virtue of affirmative action policies are grateful for the opportunities extended to them, and normally feel obligated to make sure that those who follow have equal opportunities. But there is no doubt that Clarence Thomas feels himself more the victim than the beneficiary of the affirmative actions that resulted in his admission to Yale Law School and the Supreme Court. He claims to have experienced the “racial preferences” he was shown as a form of social and psychological violence that deprived him of the pride of his own accomplishments and made him the object of racist scorn and ridicule among the very people he would most like to serve, that is, members of the black community.

In language echoing civil rights cases from *Plessy to Brown*, he opposes racial preference and affirmative action programs because they “stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt [the] attitude that they are ‘entitled’ to preferences” (*Grutter v. Bollinger* 539 U.S. 306, 373, 2003, Thomas concurring). Thomas’ autobiography (2007) recounts feelings of his own victimization and brutalization, about his despair and about his conversions and path toward healing. His rejection of integrationist discourse has been interpreted both as the cause of his conversion to the conservative cause, and as the substance of the oppression he feels he has experienced. Most aggravating to his critics is his position that affirmative action does more harm than good, permanently stigmatizing all blacks who attain conventional success, as undeserving (Kearney 2004; Turner 2005).

Yet the perhaps radical notion of taking Clarence Thomas seriously – that is, not to reject his opinions or his personal history out of hand – has resulted in a growing literature (see Smith 1997; Dean 2004; Kearney 2004; K. Thomas, 2004; Onwuachi-Willig 2005a, 2005b; Turner 2005; Schraub 2007, for example) that situates him within a longer tradition of black political thought, and attempts to explain rather than excoriate the source and quality of his views. On practical grounds, it seems worthwhile to take the legal philosophy of Clarence Thomas seriously because most of the views and prescriptions he has expressed with regard to education during his almost twenty-five years on the bench have now acquired the force of law. He has been a most forceful and consistent spokesperson for a radical alternative to the previously dominant narrative of integrated, multicultural education.

With that in mind, I aim to disambiguate Thomas’ views on the legitimacy and efficacy of affirmative action as a remedy to educational segregation, from the views of other conservative and liberal skeptics. I will also address his views on legal and everyday notions of integration/segregation and diversity, the development of which are intimately tied historically and conceptually to affirmative action. Each of these concepts, in turn, is tethered to the ever-shifting definitions and polemical deployments of the notion of colorblindness. Understanding the jurisprudence of Clarence Thomas with respect to education requires an examination of his biography, as paradigmatic in many respects of the black male experience in the second half of the 20<sup>th</sup> century. It will be important to counter the supposition of many of his detractors that the choice of conservatism in the realm of racial politics is either irrational or exceptional; that does not equate, however, to championing Thomas’ positions on affirmative action, diversity, and integration. Rather, our goal is to arrive at a fuller appreciation of how educational policy and law related to race have developed since the *Brown* decision in 1954.

### ***1. Clarence Thomas and his Experience with Affirmative Action***

Born in 1948 in a rural black community in the heart of the Jim Crow South, Clarence Thomas’ early childhood was both idyllic and impoverished. The language of the Thomases was Gullah. At age seven, their house burned down and family moved to Savannah, where young Clarence attended a segregated public school, living with his maternal grandparents, who were relatively prosperous. Thomas began attending a nearly all-white Catholic school, worked in his grandfather’s fuel oil business, and fell under the sway of his grandfather’s strict philosophy of self-help and hard work. His grandfather, Myers Anderson, was the spiritual descendant of Booker T. Washington, and Thomas is the spiritual descendant of his grandfather, as suggested by the title of his autobiography, *My Grandfather’s Son*. Raised in the Catholic Church, and in a parochial school, Thomas grew up apart from both the larger black and white communities of Savannah. He was an outstanding student, albeit one who never felt that he fit in, and was accepted to study at Conception Seminary College in Missouri. He remained there only for a year, though, repulsed by the overt racism he experienced. He then gained admittance to Holy Cross, where he taped a picture of Malcolm X to his wall, grew his hair into an Afro, and joined the civil rights struggles of the mid-1960s.

#### **1.1 Yale Law School**

Clarence Thomas graduated from Holy Cross in 1971, was admitted to Yale Law School in the fall under the kind of quota-based affirmative action program struck down in *Bakke*, and graduated in 1974. Thomas’ experience at Yale did not result in a conversion to conservatism, but he did turn away from the black (leftist) radicalism of his undergraduate days. The most meaningful of these relationships were those with classmate and later UN representative, John Bolton, and with John Danforth, then the attorney general of Missouri, and later Republican Senator from Missouri.

Thomas recounts a “fateful” conversation with Bolton on the subject of government intrusion into the private lives of individuals, which brought to his mind one of his grandfather's dicta: Going on public assistance “takes away your manhood ... You do that and they [the government] can ask you questions about your life that are none of their business” (Thomas 2007, 75). Thomas also became skeptical of the wisdom of bussing to achieve desegregation, and of the racial arguments for the disproportionate failures of black law students to pass the bar exam, a failure he felt was due mostly to poor education. Thomas was by no means alone among blacks of that period in questioning the equation of ending de jure school segregation and pursuing integration at all costs. His earlier hero, Malcolm X, advocated separate schools for black children in the interest of their healthy racial and spiritual development, and advocated a black self-help philosophy in line with that of Booker T. Washington and Thomas' grandfather.

The life-long resentment that Thomas expresses for his experiences in New Haven crystallized in his inability, upon graduation, to land the kind of job he observed his fellow graduates landing. He felt that he had been dispossessed of property he had justly earned, and he was left disillusioned by the distributive justice that affirmative action was purported to deliver, a disillusionment he later stated in frankly racial terms that linked his upbringing in the Jim Crow south with his higher education in the north.

I was bitter toward the white bigots whom I held responsible for the unjust treatment of blacks, but 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, turning against them when it served their purposes. At least southerners were up front about their bigotry: you knew exactly where they were coming from, just like the Georgia rattlesnakes who always let you know when they were ready to strike. Not so the paternalistic big-city whites who offered you a helping hand so long as you were careful to agree with them, but slapped you down if you started acting as if you didn't know your place. Like the water moccasin, they struck without warning – and now I had stepped within striking distance (Thomas 2007, 76).

Thomas was prepared to accept the redistribution of goods promised by affirmative action in the form of a position in one of the corporate legal firms where his white classmates had gone to work, and was disappointed in the persistence of white skin privilege. He perceived his diploma as a guarantee of his inferiority that he, as a black man in a decidedly un-colorblind society, could not un-prove.

### **1.2 Nomination and Confirmation to the Supreme Court**

In 1978, Thomas accepted a position as legislative assistant to John Danforth, who had been elected to the Senate in 1976. Prior to the 1980 presidential contest, Thomas (2007, 131) registered for the first time as a Republican:

It was a giant step for a black man, but I believed it to be the logical one. I saw no good coming from an ever-larger government that meddled with incompetence if not mendacity in the lives of its citizens, and I was particularly distressed by the Democratic Party's ceaseless promises to legislate the problems of blacks out of existence. Their misguided efforts had already done great harm to my people.

Notable here is Thomas' strong self-identification as a black man and member of a “people,” alongside a fundamental distrust of the ability or will of the government, especially a government of liberal democrats, to achieve racial equality or harmony through legislation. Thomas' development as a black conservative was strongly influenced by economists Walter Williams and Thomas Sowell. He felt particular attraction to Sowell's argument that affirmative action in law school admissions had the empirical consequence, intended or not, of placing capable black students in situations where they had little chance of succeeding, and removing them from educational situations where they might have succeeded. The “deficiency” of a disproportionate share of black students at elite law schools is for Sowell (1992) not a function of inferiority, per se, but rather a function of the pervasive lack of educational opportunities prior to admission to law school that would ensure success for black students. However, these failures reproduce the feelings among many that black students are not constitutionally, that is, racially, competent to excel. The preoccupation with admitting minority students, even when not qualified to succeed, also produces, in Sowell's view, resentment among white students.

During the Reagan-Bush years, Thomas served as Assistant Secretary of Education for the Office of Civil Rights for two years, and then as Chairman of the Equal Employment Opportunity Commission for eight years. He was appointed to the United States Court of Appeals for the District of Columbia Circuit in 1989, and was confirmed easily. George H.W.

Bush nominated Clarence Thomas to the Supreme Court in 1991 to fill the seat of the retiring Thurgood Marshall. Despite the fact that Thomas had served as a judge for less than two years, Bush called him the “best qualified candidate at the time,” and told Thomas and others that race was not an important factor in his decision. The nomination was universally perceived as an instance of affirmative action, performed by a President strongly opposed to affirmative action. Bush's choice of Thomas infuriated black and white liberal activists. The NAACP, the Urban League and the National Organization of Women vociferously opposed Thomas' confirmation. The Senate Judiciary Committee voted 7-7 with respect to Thomas' nomination and sent the matter on to the full Senate, but allegations of sexual misconduct by Anita Hill brought the case back to the committee.

The second round of the hearing became a national spectacle and one of the defining events in Thomas' life. The eventual result was confirmation by a small margin of 52-48 in the full senate. The most dramatic moment of the hearing was Thomas' characterization of the proceedings:

This is not an opportunity to talk about difficult matters privately or in a closed environment. This is a circus. It's a national disgrace. And from my standpoint, as a black American, it is a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree (*Hearings of the Senate Judiciary Committee* 1991).

Some accused Thomas of “playing the race card” in order to disarm the white liberal senators in charge of the metaphorical lynching (see Merida & Fletcher 2007), but in playing the race card Thomas presaged one side of his views on colorblindness. That is to say, he rejected the fiction that the proceedings, especially with regard to the sexual harassment charge, were race-neutral, accusing the senators on the committee of being anything but colorblind, and of putting their recognition of skin color to historically familiar ends, i.e. a lynching. Whether or not Thomas was guilty of what Anita Hill charged lost some of its importance in the identification of a black man as the subject of the lynching story, because in that narrative the victim can only be presumed innocent and his punishment can never be justified. Opinion polls at the time indicated much more public sympathy for Thomas than for Hill.

But for Thomas, the lynching motif and its insidious association with fears and beliefs about illicit black male sexuality was not just a cultural story, it was part of his own story. He reports being strongly influenced in college by Richard Wright's *Native son* (1940), in which the protagonist, Bigger Thomas, is charged with raping and killing a white girl, for which he is condemned to death. Edith Efron (1992, 1-3) argues that the senators' failure to see beyond Thomas' black skin, with their preoccupation with abortion rights as a proxy for questions about affirmative action that Thomas refused to answer, combined to reproduce the worst kind of racial stereotype.

Thomas was not only the empty-headed black in an empty suit ... he was not only a dumb, shifty, evasive black ... He was not only a cringing and groveling black who knew his place ... He was not only a good black, a willing pawn in the hands of his conservative white masters, but he had been cast in the role of a black criminal taking the Fifth, 100 times, and a would-be butcher of women.

It is in this context – produced in large part by the obfuscated dynamics of the affirmative action that resulted in Thomas' nomination and structured the proceedings throughout – that Thomas invokes the lynching story as a metaphor for his own victimization by elite whites who claim that their version of racial (in)equality is more valid than his. For him, the injury, the victimization, consists primarily in not being seen for what he is, either as a man or as a black. In this manner, for Thomas, affirmative action reinforces the ontological misrecognition of blacks upon which the false logic of lynching depends. Thomas' deployment of this narrative to explain and to defend himself signifies both a political stratagem and an emotional, psychological belief that this narrative, in some way, is a truthful way of telling one's story.

### **1.3 The Disavowal of the Thomas Narrative**

The biography of Clarence Thomas is, in its broader outlines, hardly unique. Not only does his story resonate with the stories of other black and non-white Americans from his generation, but his choice of conservatism, and his rejection of the standard version of the civil rights struggle, places him in the center of long historical tradition of black thought and action. A portrait of Booker T. Washington hangs in his office, and however much Washington may be perceived to have come in second in the debate with W.E.B.

DuBois, there is no question that Washington's version of the American "rags to riches" story and his "self-help" ethic inform the self-conception of many blacks. For example, James Meredith, the first black student through the doors of the University of Mississippi said on the occasion of the fortieth anniversary of this event: "Nothing could be more insulting to me than the concept of civil rights. It means perpetual second-class citizenship for me and my kind" (Byrd 2002). Meredith appears to believe that liberal paternalism and its policies, like affirmative action, is a primary cause of the apparent permanence of racism.

But how and why would endorsement of this view lead to a rejection of Thomas' authenticity as a representative black man, even one of those "faces at the bottom of the well," rather than to the recognition that blacks might have deep-seated disagreements while retaining their racial identity and authenticity? On the one hand, Thomas' recognizable identity as a black man with a black life history, considered apart from his beliefs about race and the law, gained him a large measure of support from blacks and whites, and provided legitimacy for the allegations he made with respect to lynching. On the other hand, Thomas has been excoriated, symbolically cast from the tribe, because his politics have been "identified" as anti-black, undercutting his authenticity as a black man. There is a chasm between the identification of Thomas as an authentic black by white conservatives, quite possibly for their own interests, and the identification within much of the black community of Thomas as a "race traitor" and lackey to the white conservatives who have attempted to co-opt him for their own purposes on the basis of his political beliefs. Within this chasm resonates another chorus in Thomas' self-representation, that having to do with the relationship of "America's blackest child," the disparaging moniker he was given as a child in Savannah, with elite (and light-skinned) blacks who not only, in his view, despise him for his blackness, but seek to appropriate it for their own uses. For Thomas, elitism as a damaging aspect of social and racial stratification is not color-specific. That is, he claims to see elitism in a colorblind way, with no more sympathy for black than for white elitists, all of whom he perceives as racially motivated.

## ***2. Colorblindness: The Critique and Defense of Racial Preferences***

Since John Harlan's dissent to the validation of Jim Crow segregation in *Plessy* (at 559) to the effect that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," colorblindness as a legal, social and psychological concept has been at the center of discussions of affirmative action and diversity. Polemically powerful, but perhaps historically incorrect, Harlan maintained that the Constitution could not countenance establishment of skin color as a criterion for deciding who could or could not ride on a particular railway car. This demand for literal colorblindness in legal contexts has been extended by many to a demand for colorblindness in all social and psychological contexts. This can translate to the belief that one ought not to "see (skin) color" or to the individual assertion that one actually does not see, as in, does not give any meaning to, skin color. Critics of this view tend to associate colorblindness instead with the micro-politics and micro-aggressions against blacks by whites who "suffer" from unconscious racism.

Neil Gotanda (1991, 7) maintains that nonrecognition— the cornerstone of a colorblind perspective — "fosters the systematic denial of racial subordination and the psychological repression of an individual's recognition of that subordination, thereby allowing such subordination to continue." In one sense, nonrecognition is a legal or political technique to achieve a certain kind of end — one in which race can be discounted — and in yet another sense it is an analytical perspective or a disciplinary method. But the coherence of this concept ultimately depends on an account of its motivation and on an account of what individual actors gain consciously and unconsciously from taking a colorblind perspective. This, in turn, rests on the psychological "attempt to deny the reality of internally recognized social conflicts of race" (Gotanda, 9), that is, on a theory of psychological repression. And the object of repression, according to whiteness theories, is white privilege and how it operates in favor of the white person, and to the detriment of black (and other raced) persons in all competitive social realms, e.g. employment, residential opportunities, education, and health care. White privilege is best understood, according to Sullivan (2006, 63), "as a constellation of psychical and somatic habits formed through transaction with a racist world. As such, it often functions as unconscious: seemingly invisible, even non-existent, and actively resisting all efforts to know it."

What is particularly germane here about this critique of colorblindness is the extent to which its scope is seemingly limited to the conscious and unconscious habits of whites. That is to say, a black person (like Clarence Thomas) might well adopt a colorblind perspective on legal or political matters, but it seems obtuse to explain this colorblind perspective and behavior as the repressed recognition of white privilege.

It is much more promising to explore the ways in which the experience of blackness and black disprivilege might predispose one to a rejection of, or a belief in the futility of, raced-based remedies to social or personal problems. Put simply, black conservatives are not the same as white conservatives insofar as formal versus historical race consciousness is concerned (Onwuachi-Willig 2005a; Schraub 2007). They tend toward a historical-race consciousness in which only black self-help has yielded meaningful advancement and change and government assistance has typically patronized its beneficiaries and retarded progress, while giving the appearance of improvement. Clarence Thomas has demonstrated an acute, if highly idiosyncratic, awareness of the realities and consequences of systemic racism for blacks. He seems willing to acknowledge, even, that his faith in constitutional colorblindness might exacerbate the consequences of racism, for some, at least in the short run. As suggested earlier, while Thomas' combinations of views are no more solely determined by his experience than the views of anyone about anything, an understanding of his life and his "personal fable" do shed some light on how he understands skin color, and colorblindness.

In a concurrence in *Parents v. Seattle & Meredith v. Jefferson County* (2007), Thomas argues that the principle of colorblindness is not an aberration introduced by himself and the current court, but rather is an enduring trait of responsible jurisprudence, including that of Thurgood Marshall. In this case, he is concerned to amplify the majority ruling that the voluntary desegregation policies in place in Seattle and Louisville are unconstitutional, because they permit and encourage racial discrimination. Thomas maintains that the minority position, authored by Justice Breyer, on the permissibility of the state using skin color to make determinations about school placement, even for what the minority believe are good reasons, is structurally identical to the position adopted by the segregationists attempting to defeat *Brown*. He suggests that the minority would like to "pin its interpretation of the Equal Protection Clause to current societal practice and expectations, [and] deference to local officials," (*Parents Involved* 551 U.S. at 776, Thomas concurring) a line of reasoning that Thomas shows was also the basis of the argument for continued segregation in *Plessy* and *Brown*. He goes on to argue (at 783) that what was wrong in 1954 cannot be right today. Whatever else the Court's rejection of the segregationists' 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 ... Even if current social theories favor classroom racial engineering as necessary to solve the problems at hand, as the Constitution enshrines principles independent of social theories. In place of the color-blind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart. Although no such distinction is apparent in the Fourteenth Amendment, the dissent would constitutionalize today's faddish social theories that embrace that distinction.

This critique of the liberal position on voluntary desegregation, or integration by any means necessary, establishes the rationale for Thomas' constitutional originalism; that historically contingent interpretations of the Constitution tend toward the legitimation of whatever policy has popular appeal and political clout. That is, they tend in the present to lead away from the principle of colorblindness. His contends implicitly that race-consciousness on the part of elites, whether they are segregationist or desegregationist, inevitably leads to the outcomes that satisfy elites' sense of right and wrong, and tends to reproduce the racial conditions in which the elites of the day have based their power and legitimacy. This insistence that the Constitution demands the government to be colorblind does not mean that Thomas is himself colorblind. On the contrary, it appears that he sees pernicious racial discrimination and race consciousness *everywhere*, much as did Thurgood Marshall, and has no trust in the good intentions of government or most individuals, black or white, to use race in any but harmful ways. From this perspective, identifying individuals as members of a vulnerable group typically results in further victimization, not in relief from discrimination.

It is important to appreciate the influence of Thomas' own educational experience on the development of his views on colorblindness, from all-black to nearly all-white schools in childhood, to attending a Catholic high school and a year of seminary and Holy Cross, and finally to his career a student and alumnus of Yale Law School. Thomas relies on a combination of personal history and interpretation, the exemplary stories of blacks who succeeded by dint of their own efforts, naturalist constitutional principles, and deep-seated conviction about the power of laws that distinguish on the basis of race to create a permanent class of victims. Thomas, according to Dean (2004), advocates emphasizing the "hero" instead of the "victim." As a practical matter, this means dispensing with "the idea that the government can be the primary instrument for the elimination of misfortune."

Jurisprudentially, this means an end to assumptions that blacks do not have the capacity to formulate political ideologies as individuals, an end to "benign" racial classifications that exacerbate institutional dependencies, and an end to presumptions that the private development of predominantly black institutions leads to a necessarily inferior product.

There is certainly ample room to question the wisdom or internal consistency of Thomas' positions, particularly his own take on American racial history as it intertwines with his own personal history. Likewise, the morality of the fervent individualism he learned from his grandfather, and his apparent willingness to sacrifice the well being of others for what he considers the higher principle, is open to criticism. But I must conclude that his brand of colorblindness is of a very different character than the colorblindness associated with repressed recognition of white privilege.

### **3. Affirmative Action**

Thomas' position on affirmative action follows from his beliefs that (a) race-consciousness in legal and governmental decisions is prohibited by the Constitution, and (b) that a black person in America cannot help but be acutely race-conscious in everyday life. The government must be colorblind, but the citizen cannot live in the world and be colorblind. He recognizes that opposition to affirmative action policies in education and the workplace tend to increase de facto racial segregation, but his staunch determination that it is not the role of government to correct social malfunctions leaves frustrated those who believe that interracial contact, particularly in schools, is a necessary condition to increase multicultural harmony and disarm the forces of stigmatization. For Thomas, though, it is not racial separation itself that stigmatizes, it is the conditions of that separation, inequality of resources and recognition, and the racist constructions placed upon that separation, that result in harm. Chief among those conditions are policies that do not adhere to the principles of colorblindness, whose good intentions have, in his view, disastrous results with respect to black self-esteem.

Thomas states his views on affirmative action in education most directly in his minority dissent in *Grutter v. Bollinger* (539 U.S. 306, 2003), which held by a 5-4 vote that the University of Michigan Law School's "diversity-conscious" admissions policy did not offend the constitution, upholding the precedent in *Bakke*. The Law School policy requires individual assessment of all applicant materials, with consideration of a wide range of variables, going beyond test scores and grades. One variable to be considered is an applicant's ethnicity or race. The Law School has a commitment to enrolling a "critical mass" of minority students, a critical mass it might not reach solely on the basis of quantitative data like test scores and grades. But this "critical mass" is not, according to the Law School, a quota. Rather it represents the minimal amount of diversity necessary to accomplish the educational ends of the Law School. Thomas considers this scheme a blatant instance of racial discrimination, inasmuch as a more-qualified white candidate might be excluded in favor of a black or Native American applicant in order to reach this critical mass. The policy has been established, in his view, so that the Law School can "of its own choosing, and for its own purposes, maintain an exclusionary admissions system that it knows produces racially disproportionate results." (*Grutter* at 350, Thomas dissenting) Racial discrimination, that is, their affirmative action admissions policy, should not be a permissible solution to the "self-inflicted wounds of this elitist admissions policy."

Thomas suggests that the Law School could employ race-neutral means to achieve the desired level of diversity, or racial balance, but has refused to seriously consider this option because it would decrease academic selectivity and change the nature of the institution. But Michigan, he maintains, has no compelling interest in having a law school at all, and certainly not a compelling interest in having an elite law school; nothing that could justify prima facie racial discrimination. The only way that Michigan could demonstrate even a strong need for its own law school, according to Thomas, would be to demonstrate that it provided opportunities for citizens of Michigan to become Michigan lawyers. But the law school's professed interest is rather in being elite, that is, in being a law school primarily for non-Michigan residents who will never practice law in Michigan. In the end, Thomas understands the desired suspension of the colorblind principle of the Constitution in the form of race-conscious admissions as an attempt to maintain the kinds of institutions on which the elite depends for its existence and reproduction, not as the royal road to racial equality.

The situation with regard to affirmative action in the Seattle and Louisville cases is fundamentally different. In both cities, plans were in place that sought to prevent large racial imbalances within schools, which required that not all students were able to attend the school of their first choice, or the school closest school to their homes.

In Seattle, this plan had been adopted voluntarily in the 1970s, but only after threatened litigation, and in Louisville a court-ordered desegregation plan had been in place for more than two decades, but that order had been permitted to expire in 2000. School districts in both cities had voluntarily retained, with some modifications, the previous desegregation policies with respect to student assignment to schools. Thomas argues that only in exceptional circumstances does the Court permit race-based remedies even for past discrimination, and only when they could be directly related to prior de jure discrimination, that is, state-mandated segregation and inequality. These are cases where Thomas (and the Court) are willing to set aside considerations of colorblindness, cases when only race-based remedies prove adequate to address race-based injuries. That is not, however, the case in Seattle or Louisville where, according to Thomas, the policies are meant to produce greater racial balance in the present and future, not remediate past harm. Thomas draws a sharp line between segregation and racial balance. Where de jure segregation can be remediated once and finally, there is no ultimate remedy for racial imbalance. Individual schools will fall in and out of balance in the natural course, and the appropriate balance itself will shift with a school district's changing demographics. Thus, racial balancing will have to take place on an indefinite basis—a continuous process with no identifiable culpable party and no discernable end point. (*Parents Involved* at 759, Thomas concurring)

He dismisses as well Breyer's dissenting view that something less than strict scrutiny is appropriate in this case because, he asserts, that is only to rely on the popular wisdom that integration is an unqualified good that does not require justification and does no harm. For Thomas, nothing in this case mitigates the bald fact of racial discrimination, manifested in the experiences of students in Seattle and Louisville who were forced to attend a particular school not of their (parents') choosing on the basis of skin color. That they were white, and not black, is immaterial to Thomas' argument.

Affirmative action is constitutionally problematic for both its opponents and proponents. Even the majority in *Plessy*, who gave their blessing to racial segregation in all avenues of American life, took pains to show that having different train cars for blacks and whites was permissible under the 14<sup>th</sup> amendment. Segregation, in a literal sense, is as much a case of governmental affirmative action as integration: the difference is in the rationale for not treating everyone equally under the law, as the 14<sup>th</sup> amendment requires. In *Plessy*, all members of the Court except John Harlan, a former slave-holder himself, argued that segregation per se did not harm anyone, and that it furthermore ensured the public safety and furthered social harmony, by keeping classes of people apart who were, in everyone's interest, best kept apart.

As a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and ... in determining the question of reasonableness, it is at liberty to act with reference 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 ... Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation (*Plessy* at 551).

Harlan dissented on behalf of Homer Plessy, the black man arrested for sitting in the white car of a Louisiana train, who in Harlan's view had in fact been treated unequally on the basis of an unreasonable regulation, unreasonable because it violated the principle of colorblindness. The centrality of this principle to all 14<sup>th</sup> amendment considerations is recognized not only by Thomas; it was the banner under which the NAACP legal fund waged its war against school segregation, and the principle on which Linda Brown was deemed to have been denied her constitutional rights to equal treatment under the law. By 1954, the argument that social segregation was reasonable, promoted public peace and good order, and harmed no one, was no longer credible, even if the argument continued to find wide popular support. In fact, Derrick Bell (1980) argued, segregation came itself to be perceived as a danger to national interests insofar as it undermined American moral authority in its ideological war against communism, and drew far too many comparisons with the genocidal policies of Nazi Germany. On this reading, the decision represented a convergence between the desire to protect the individual rights of a black student, and desire to protect national interests, as understood by the white political elite.

Affirmative action – as a presumptive challenge to 14<sup>th</sup> amendment rights to equal treatment without racial distinctions, to the principle of colorblindness – thus requires a strong rationale, which can generally be reduced to an interest of national or generally social importance great enough to suspend the protection of some individuals' civil rights.

For those like Chief Justice Roberts, who wrote for the majority in *Parents Involved*, the social interest in diversity per se is not sufficient to permit discrimination against those white children required by Seattle's school board policies to attend schools farther from home, or that they did not choose, in order to ensure a critical mass of black and white students in all Seattle high schools. There is the sense in Roberts's argument that while the diversity resulting from the policies invalidated in Seattle and Louisville would be a desirable outcome, but for the fact that these policies unfortunately also discriminate to an unacceptable degree. For Justice Marshall, the interest in providing black and other historically marginalized Americans an even chance for success was sufficiently compelling to offer places to some minority students to the UC-Davis Medical School which otherwise would have gone to "more qualified" white applicants. Contrary to Roberts, he believed that the outcome of diversity and increased opportunity is sufficient justification for the frustration of a few white applicants whose life chances are, in any case, barely affected by a rejection from one law school, or an assignment to a non-neighborhood school. The mainstream of American legal and popular thinking about affirmative action can probably be located in the space between these two positions.

Clarence Thomas stakes a position outside these conventional bounds of thinking about affirmative action, asserting "every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." (*Grutter* at 353, Thomas, dissenting). He recognizes the harm of "reverse discrimination," and the good intentions of supposedly benign racial paternalism, but his main concern is with the debilitating effects of affirmative action on those it is meant to benefit.

There can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences (*Adarand* at 241, Thomas concurring).

This statement reflects perfectly Thomas' dual conception of colorblindness. He demands from the State and from the Court an absolute adherence to the strictest scrutiny, but that position depends on a heightened – or some might say, obsessive – appreciation of the private consequences of being visibly black in America, a perspective that appears grounded in Thomas' own experience with affirmative action.

#### **4. Conclusion**

In this paper we have examined Thomas as a proper subject for serious and respectful dialogue. We can recognize that the intellectual loyalties to which Thomas testifies in his writings are contingent on his history in the same way that any of our loyalties are historically contingent, and that the move toward conservatism was not irrational, nor disjunctive with moves in other directions made by Black man of his generation – Derrick Bell or Henry Louis Gates, for instance – who ended up, politically, in very different places. The constructions Thomas places upon affirmative action, based on his own feelings about being saddled thereby with the presumptions of inferiority, are not universal among those whose histories are marked by affirmative action, and by being placed in a highly marked minority position, but neither are they deviant. What distinguishes Thomas most from his detractors might be his unbending allegiance to the self-help philosophy of his grandfather, an allegiance the inflexibility of which seems in proportion to the ambivalence he has expressed about his grandfather. The self-help philosophy is wedded to a belief in individualism and a strong distaste for group identifications. While Thomas identifies himself as a black man with a distinctly black history and culture, he does not use that identification to align himself with all other blacks, but rather only with those with whom he feels affinity and who are accepting of him. Finally, the philosophy of self-help and individualism are essential to believing in the limited role of government, or of the power of anything or anyone outside oneself and one's intimates, to save you.

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