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# Clarence Thomas

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United States Supreme Court  
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## Clarence Thomas

### Part I: Biography

Clarence Thomas is a man of principle, a believer in ideals, and a champion of perseverance. He is quiet, yet thoughtful, a voracious reader and thinker. He is a father, a husband, and an associate justice on the Supreme Court of the United States. He has struggled with personal demons, internal and external challenges to his beliefs, and challenges to his credibility. A descendant of slaves, he has seen both the best and the worst of America in his lifetime.

Thomas's ancestors trace back to two plantations in Georgia, namely the Thomas plantation and the King plantation.<sup>1</sup> Thomas's paternal grandfather, Norman "November" Thomas, was born in 1907 "into a sharecropping family and picked cotton by hand as a boy."<sup>2</sup> While growing up in the early 1900s, November was exposed to the institutional racism and violence that continued to plague the South after the Civil War.<sup>3</sup> Despite the conditions, November Thomas would embody traits that would later influence his grandson.<sup>4</sup> November championed the importance of hard work, and was a man of faith.<sup>5</sup> One of Clarence Thomas's cousins, Evelyn Thomas, recollected that November "would always preach to us . . . as far as doing the right thing, staying in school . . . getting an education."<sup>6</sup> Like his grandson, November could be firm, but was

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<sup>1</sup> ANDREW PAYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 11-13 (Encounter Books 2001).

<sup>2</sup> *Id.* at 39.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 42 ("Clarence Thomas would share many of November's traits-good-natured but steely-willed, and given to flashes of anger"). Evelyn Thomas would note after the contentious Anita Hill hearings, Clarence spoke "just like his grandfather." *Id.* at 42.

<sup>5</sup> *Id.* at 41.

<sup>6</sup> *Id.* at 41-42.

often happy, he could speak with authority and decisiveness, but also retained a sense of humor.<sup>7</sup> Clarence's father, M.C. Thomas, was November's son.<sup>8</sup>

While Thomas's paternal grandfather had an influence on him, it was his maternal grandfather, Myers Anderson, who played the key role in shaping his identity.<sup>9</sup> Anderson's mother and Thomas's great-grandmother, Lutricia Allen, died while Myers was young.<sup>10</sup> Anderson's father, Isaac, left the family while Myers was young, leaving him to be raised in Liberty County, Georgia, by his uncles, who by that point had become responsible for sixteen children.<sup>11</sup> Myers worked in the fields, attending school only through third grade.<sup>12</sup> Nevertheless, Myers learned how to read from the nuns at the local St. Benedict's Church.<sup>13</sup> Myers fathered a child named Leola Anderson, who would be Clarence's mother.<sup>14</sup> Myers later went on to marry another woman, Christine Anderson, who would be Clarence's beloved grandmother.<sup>15</sup>

Clarence Thomas was born in Pin Point, Georgia, on June 23, 1948.<sup>16</sup> Thomas was the middle of three children belonging to M.C. and Leola.<sup>17</sup> Clarence's upbringing was humble, namely in a house with "a corrugated tin roof and wooden siding caulked with a makeshift epoxy of flour and water. Newspapers provided both insulation and wallpaper. There was a dirt floor and no electricity or plumbing."<sup>18</sup> The house was lighted with kerosene lamps and shared an outhouse

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<sup>7</sup> *Id.* at 42.

<sup>8</sup> *Id.* at 52.

<sup>9</sup> Thomas entitled his memoir *My Grandfather's Son* as a tribute to Myers Anderson. See CLARENCE THOMAS, MY GRANDFATHER'S SON (HarperCollins Publishers 2007).

<sup>10</sup> THOMAS, *supra* note 1, at 42.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 43.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 44.

<sup>15</sup> *Id.* at 44-45.

<sup>16</sup> *Clarence Thomas*, The Oyez Project at IIT Chicago-Kent College of Law, [http://www.oyez.org/justices/clarence\\_thomas](http://www.oyez.org/justices/clarence_thomas) (last visited November 6, 2014).

<sup>17</sup> *Id.*

<sup>18</sup> THOMAS, *supra* note 1, at 55.

with other neighbors.<sup>19</sup> M.C., Thomas's father, created a quagmire when he impregnated both his wife, Leola, with a third child, and simultaneously impregnated another woman in the town.<sup>20</sup> Feeling trapped, M.C. took off for Philadelphia, and from then on would not be involved in his children's lives.<sup>21</sup> Struggling to raise three children on her own, Leola decided to remarry.<sup>22</sup> Her new husband, however, refused to accept her children.<sup>23</sup> She decided to send her two sons to live with their grandparents, Myers and Christine Anderson.<sup>24</sup>

Thomas's experience with his grandfather would establish the bedrock of his principles and beliefs. Myers enforced discipline and a strict schedule, emphasizing education and limiting idle time.<sup>25</sup> Myers consistently emphasized "work, education, and faith."<sup>26</sup> Despite financial hardship, Anderson pulled both Thomas and his brother out of public school and enrolled them at the local St. Benedict school.<sup>27</sup> The nuns enforced order, academic excellence,<sup>28</sup> and did not succumb to the racial discrimination that continued to permeate the public school systems.<sup>29</sup> Myers enforced near perfect attendance and rigorous study habits,<sup>30</sup> and when school was out he kept the boys busy by having them work for him in operating his business.<sup>31</sup> When Thomas finished his school obligations and completed his grandfather's assignments, he was allowed to go to the

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 55-56.

<sup>22</sup> *Id.* at 64.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 66; *Clarence Thomas*, The Oyez Project at IIT Chicago-Kent College of Law, *supra* note 16.

<sup>26</sup> THOMAS, *supra* note 1, at 69.

<sup>27</sup> *Id.*

<sup>28</sup> For example, when Thomas proudly announced that he finished sixth on the entrance exam for St. Pius X High School, his eighth-grade teacher, Mother Virgilius Reidy, scolded his for being lazy and "wasting all [his] God-given ability." *Id.* at 80.

<sup>29</sup> *Id.* at 69-70.

<sup>30</sup> *Id.* at 71-72.

<sup>31</sup> *Id.* at 73.

library, and soon became an avid reader.<sup>32</sup> Myers Anderson's teachings would greatly influence Thomas's views on welfare and affirmative action.<sup>33</sup>

After a few years in high school, Thomas decided he would enter the priesthood and enrolled in St. John Vianney Minor Seminary in 1964.<sup>34</sup> Despite being a very strong student, Thomas developed a habit while at the seminary school that would follow him throughout his professional career, silence unless called on.<sup>35</sup> As Thomas continued to excel in school, he was increasingly ostracized and subject to racial slurs by the white classmates he surpassed.<sup>36</sup> Near the end of his high school career, Thomas was admitted to Immaculate Conception, a college seminary, to continue his path toward the priesthood.<sup>37</sup> While at college, Thomas was exposed to the works of St. Thomas Aquinas, which later became an important part of Thomas's beliefs and philosophy on the law.<sup>38</sup> While at Immaculate Conception, Thomas began to question his faith and his road to the priesthood, and eventually left the seminary and the Catholic Church altogether.<sup>39</sup> Thomas's grandfather was upset with this news, and kicked him out of the house when Thomas returned to Georgia.<sup>40</sup> Thomas would eventually enroll at Holy Cross College in Massachusetts.<sup>41</sup>

After Martin Luther King's death, Holy Cross began an initiative to increase recruitment efforts for African-American students, which Thomas benefitted from.<sup>42</sup> Admittedly, Thomas departed for Holy Cross "with no hope in [his] religion, no faith in [his] country, and no desire to

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<sup>32</sup> *Id.* at 73-74.

<sup>33</sup> Myers Anderson once told Thomas, "I never took a penny from the government because it takes your manhood away . . . I'd prefer to starve to death first." *Id.* at 73.

<sup>34</sup> *Id.* at 81.

<sup>35</sup> *Id.* at 85.

<sup>36</sup> *Id.* at 90.

<sup>37</sup> *Id.* at 91.

<sup>38</sup> *Id.* at 97-98.

<sup>39</sup> *Id.* at 106; 108.

<sup>40</sup> *Id.* at 108.

<sup>41</sup> *Id.* at 109.

<sup>42</sup> *Id.*

be in a predominately white school again.”<sup>43</sup> This conflict would make Holy Cross an interesting time in Thomas’s life. Thomas identified with the Black Power movement, yet at the same time opposed many of the initiatives by the black students that advanced separatism and putting his education in jeopardy.<sup>44</sup> Thomas would later describe his time at Holy Cross as his “radical” years and “years of rage.”<sup>45</sup> However, despite his interest in Malcolm X<sup>46</sup> and his immersion in the “politics of anger,” Thomas began to question these views, believing that such politics were ultimately “destructive.”<sup>47</sup> Thomas realized that he was reaching a crossroads in his beliefs, namely whether he believed “in the principles of this country or not[.]”<sup>48</sup>

While at Holy Cross, Thomas met the woman who would become his first wife, Kathy Ambush.<sup>49</sup> Ultimately, Thomas would graduate *cum laude* from Holy Cross<sup>50</sup> and be accepted into Yale Law School.<sup>51</sup> While at Yale, Thomas would experience first-hand both the positive and negative effects of affirmative action.<sup>52</sup> Thomas once said that “the worst experience of his life was when whites at Yale told him he was admitted there only because of racial quotas.”<sup>53</sup> Thomas recognized that while these affirmative action programs helped young minorities obtain admission to schools, they would inevitably be viewed as inferior and only there because of their race.<sup>54</sup> Thus,

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<sup>43</sup> *Id.* at 109.

<sup>44</sup> *Id.* at 117-18 (when black students at Holy Cross sought to claim their own floor in the dormitory, Thomas would oppose and say that they were there to “get to know white people and understand their culture.”) *See also id.* at 123 (Thomas opposed a plan for black students to walk-out at Holy Cross, realizing that it put their education in jeopardy).

<sup>45</sup> *Id.* at 120; 129.

<sup>46</sup> *Id.* at 128.

<sup>47</sup> *Id.* at 129.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 119; 133.

<sup>50</sup> *Id.* at 134.

<sup>51</sup> *Id.* at 133.

<sup>52</sup> Yale had in place a system in which it “set aside up to 10 percent of the places in the entering class for members of minority groups, who would compete against each other, rather than whites, for those slots.” *Id.* at 140.

<sup>53</sup> *Id.* at 141.

<sup>54</sup> *Id.*

despite being benefitted by affirmative action, Thomas would later oppose it.<sup>55</sup> While at Yale, Thomas moved away from the more liberal viewpoints he espoused while at Holy Cross and would begin drifting to the right, finding “comfort instead in the philosophy of black self-help enunciated by Booker T. Washington and, in his own, homespun way, Myers Anderson.”<sup>56</sup> Thomas worked at a civil rights law firm after his second year at Yale,<sup>57</sup> but ultimately decided not to accept an offer there. This misstep cost him as he was rejected from every law firm he applied to thereafter.<sup>58</sup> Thomas was left with no job and a pregnant wife.<sup>59</sup> In a stroke of luck, Yale alumnus and Missouri Attorney General John Danforth contacted the school looking for “good African-American lawyers.”<sup>60</sup> After interviews, Thomas accepted Danforth’s offer,<sup>61</sup> which allowed Thomas to establish the connections that would ultimately propel him to Washington, D.C., and thereafter to the Supreme Court of the United States.

Professionally, Thomas was a successful litigator at the Missouri Attorney General’s office.<sup>62</sup> Personally, he continued to hone and sharpen his political philosophy, becoming more conservative.<sup>63</sup> After Danforth left the Attorney General’s office for a seat in the United States Senate, Thomas began looking for new prospects,<sup>64</sup> and eventually landed a lucrative offer as an in-house attorney at a large company, Monsanto.<sup>65</sup> Thomas quickly became bored with this often tedious, albeit lucrative work, and obtained a position, after two years, as Senator Danforth’s

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<sup>55</sup> *Id.* at 143.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 145.

<sup>58</sup> *Id.* at 148.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 149.

<sup>62</sup> *Id.* at 156-57;167.

<sup>63</sup> *Id.* at 163; 164-165.

<sup>64</sup> *Id.* at 168.

<sup>65</sup> *Clarence Thomas*, The Oyez Project at IIT Chicago-Kent College of Law, *supra* note 16.

legislative aid.<sup>66</sup> When Ronald Reagan won the presidential election in 1980, Thomas saw an opportunity.<sup>67</sup> After attracting the attention of the administration, Thomas secured an appointment as assistant secretary for civil rights in the Department of Education (OCR).<sup>68</sup> Once Thomas accepted an appointment in the Reagan administration, his marriage dissolved.<sup>69</sup> While in this position, Thomas would hire Anita Hill.<sup>70</sup> When he arrived at OCR, Thomas was put in a tough predicament. The Reagan administration was trying to drive a hard line in opposition to affirmative action and race policies.<sup>71</sup> Thomas, fearing he would lose the support of his liberal staff and the African-American community, would often push back against these hard line policies proposed by the administration.<sup>72</sup>

While Thomas was at OCR, the position of Chairman of the EEOC opened up, and Thomas would ultimately be offered and would accept the position.<sup>73</sup> When Thomas arrived at the EEOC, he found it in shambles.<sup>74</sup> The previous chairman of the EEOC neglected to track money, a suspicious sum in excess of \$1 million had been given out to employees for advances on travel expenses, for nearly 900 contracts to which the agency was a party, it had no information as to whether the contracted work was performed, and the payroll system was so outdated that the agency was issuing checks to “former and deceased employees.”<sup>75</sup> The office space was “environmentally unsound,”<sup>76</sup> and there was a huge backload in cases, the magnitude of which no

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<sup>66</sup> *Id.*; THOMAS, *supra* note 1, at 174.

<sup>67</sup> *Id.* at 179; 180.

<sup>68</sup> *Clarence Thomas*, The Oyez Project at IIT Chicago-Kent College of Law, *supra* Note 16.

<sup>69</sup> THOMAS, *supra* note 1, at 186.

<sup>70</sup> *Id.* at 188.

<sup>71</sup> *Id.* at 194.

<sup>72</sup> *Id.* at 195; 200-01; 202-03.

<sup>73</sup> *Id.* at 210.

<sup>74</sup> *Id.* at 212-13.

<sup>75</sup> *Id.* at 213.

<sup>76</sup> *Id.* (the walls were green with mold and mildew, carbon monoxide caused dizziness and headaches, and there were fleas in carpeting).



one knew when Thomas took the position.<sup>77</sup> The figure was later determined to be 12,000 cases pre-1979, and given that the EEOC only disposed of roughly 1,000 cases a year, the backlog would continue to worsen.<sup>78</sup> Thomas, despite push back from yet another ideologically hostile agency, was able to make significant inroads on cleaning up the EEOC and maximizing its efficiency.<sup>79</sup> However, while Thomas was successful as a manager, he continued to bump heads with members of the Reagan administration, who pushed for eradication of many of the policies implemented during the Carter administration.<sup>80</sup>

During the Reagan administration, Thomas was seen as “an evolving conservative.”<sup>81</sup> Thomas espoused libertarian views during the first Reagan term.<sup>82</sup> He firmly believed in individual rights and opposed extensive governmental intervention.<sup>83</sup> As a part of this philosophy, Thomas believed that individuals should be “judged on the basis of individual merit and individual conduct . . . not . . . on the basis of accidents of birth or conditions which are immutable.”<sup>84</sup> Although he would later deny such a viewpoint at his confirmation hearing, Thomas “endorsed a right to life for the unborn,” and therefore at least tacitly opposed the Supreme Court’s decision in *Roe v. Wade*.<sup>85</sup>

After Reagan was re-elected for a second term, the administration demanded that Thomas toe the line on the administration’s civil rights policy, which Thomas reluctantly agreed to.<sup>86</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 226.

<sup>80</sup> *Id.* at 239 (refusing to speak out against affirmative action); *id.* at 240 (denying Department of Justice plan that refused to comply with federal affirmative action plan); *id.* at 241-42 (refusing to take a definitive stand against racial quo quotas).

<sup>81</sup> *Id.* at 244.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 245 (during this time Thomas became interested in Ayn Rand’s *Atlas Shrugged* and the *Fountainhead*).

<sup>84</sup> *Id.* at 245-46.

<sup>85</sup> *Id.* at 246.

<sup>86</sup> *Id.* at 260-61.

Thomas was re-appointed as chairman of the EEOC and survived a rigorous confirmation hearing by Congress.<sup>87</sup> By the late 1980s, Thomas's philosophy finally congealed, now resembling "Reagan-style conservatism."<sup>88</sup> As Thomas's biographer explains, by the conclusion of the 1980s Thomas's philosophy had several pillars.<sup>89</sup> The first was "distrust of government," largely based on his experience with segregation and his experience at the EEOC.<sup>90</sup> The second was economic liberty, derived from his grandfather's ethos and his belief that economic liberty was the only way to overcome racism.<sup>91</sup> In sum, Thomas's ideal society "orbited the individual."<sup>92</sup> This philosophy ties in with Thomas's allegiance to natural law, which he believed championed individual autonomy.<sup>93</sup>

When George H.W. Bush became president, he nominated Thomas to fill a vacant position on the United States Court of Appeals for the D.C. Circuit.<sup>94</sup> Thomas would only be there for a short time before being nominated by President Bush to the United States Supreme Court on July 1, 1991.<sup>95</sup> Having already failed to confirm one of Bush's nominations, both Thomas and the administration knew that confirmation by the Senate would not be an easy task.<sup>96</sup> Thomas's nomination was "instantly controversial," as he was opposed by both civil rights organizations and many women's organizations who feared that headway made on affirmative action and abortion may be undone.<sup>97</sup> After a 7-7 vote by the Senate Judiciary Committee, the nomination was set to

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<sup>87</sup> *Id.* at 283-84.

<sup>88</sup> *Id.* at 286.

<sup>89</sup> *Id.* at 299.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 300.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 306 ("Thomas noted that natural law allows society to place firm limits on governmental action and to ensure individual autonomy.").

<sup>94</sup> *Id.* at 319.

<sup>95</sup> THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/the-current-court/justice-clarence-thomas/> (last visited Nov. 6, 2014).

<sup>96</sup> THOMAS, *supra* note 1, at 354-55.

<sup>97</sup> *An Outline of the Anita Hill and Clarence Thomas Controversy*, <http://chnm.gmu.edu/courses/122/hill/hillframe.htm> (last visited Nov. 6, 2014).

go to the full Senate for a vote.<sup>98</sup> The proceedings, however, “took a sudden and dramatic turn” when Anita Hill, who had worked for Thomas in the Department of Education and the EEOC, came forward to raise allegations of sexual harassment.<sup>99</sup> Hill’s allegations proved inconclusive, and Thomas, after delivering an impassioned speech accusing the Senate Committee of presiding over a “high-tech lynching,” carried the day.<sup>100</sup> Thomas was ultimately confirmed by the Senate, 52-48.<sup>101</sup> Thomas’s second wife, Virginia Lamp, would describe the ordeal as the “hardest thing I’ve ever gone through.”<sup>102</sup>

Even on the Supreme Court, Justice Thomas has continued to receive criticism, he has been “dismissed as a man of little accomplishment, an opportunistic black conservative who sold out his race, joined the Republican Party and was ultimately rewarded with an affirmative action appointment to the nation’s highest court, a sullen, intellectual lightweight so insecure he rarely opens his mouth in oral arguments.”<sup>103</sup> Thomas shuns these critics, emphasizing that his job is to write opinions.<sup>104</sup> Justice Thomas has written over 300 opinions during his tenure on the Supreme Court.<sup>105</sup> When asked if he would ever change his views, as some Justices do when they reach the bench, Thomas held firm, explaining that “[m]y journey has over the years been almost that of a prodigal son where you journey away from your roots in the South. And now, I’ve returned to my roots . . . . And that’s why I entitled my book ‘My Grandfather’s Son.’ I have returned to my grandfather and to the way he raised me. And I think that’s home and that’s where I’ll stay.”<sup>106</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> THOMAS, *supra* note 1, at 428.

<sup>101</sup> *An Outline of the Anita Hill and Clarence Thomas Controversy*,

<http://chm.gmu.edu/courses/122/hill/hillframe.htm>, *supra* note 97.

<sup>102</sup> CBS NEWS, CLARENCE THOMAS: THE JUSTICE THAT NOBODY KNOWS,

<http://www.cbsnews.com/news/clarence-thomas-the-justice-nobody-knows/> (last visited Nov. 6, 2014).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

## Part II: Analysis of Opinions

In the 22 years and counting<sup>107</sup> that Clarence Thomas has been on the Court, he has been involved in many major opinions spanning countless areas of law. Thomas's judicial philosophy congealed when he joined the Supreme Court, culminating in an originalist perspective on the Constitution.<sup>108</sup> Originalists believe that "the Constitution should be interpreted in accordance with its original meaning . . . the meaning it had at the time of enactment."<sup>109</sup> One author further clarifies that Thomas should be viewed as a "liberal originalist" due to his "willingness to rely on the natural rights tradition."<sup>110</sup> To be clear, Thomas's version of originalism diverges with that of his colleague, Justice Antonin Scalia (who has been referred to as a "conservative originalist"), in that they "disagree about whether originalism is limited to an interpretation of the Constitution's language only, or whether the political-philosophical context of the Constitution's framing should also factor into the analysis."<sup>111</sup> Scalia believes that it is the legislature's duty to provide or deny "natural rights."<sup>112</sup> Thomas, by contrast, is called a "liberal originalist" because he is more open to the protection of natural rights, as espoused in the Declaration of Independence.<sup>113</sup> Thus view

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<sup>107</sup> *Clarence Thomas*, The Oyez Project at IIT Chicago-Kent College of Law, *supra* Note 16.

<sup>108</sup> THOMAS, *supra* note 1, at 474.

<sup>109</sup> UNIVERSITY OF SAN DIEGO SCHOOL OF LAW, CENTER FOR THE STUDY OF CONSTITUTIONAL ORIGINALISM, <http://www.sandiego.edu/law/centers/csco/> (last visited Nov. 6, 2014).

<sup>110</sup> Timothy Sandefur, *Clarence Thomas's Jurisprudence Unexplained*, 4 N.Y.U. J. L. & Liberty 535, 554.

<sup>111</sup> *Id.* at 553.

<sup>112</sup> *Id.* (explaining that in regards to abortion, "Scalia has repeatedly declared that it is up to the democratic process to provide or deny a right to abortion").

<sup>113</sup> *Id.* at 554; *see also id.* at 536 (recognizing Thomas's belief in "Jeffersonian principles of individual liberty articulated in the Declaration of Independence").

is made clear in Thomas’s opinions interpreting the Fourteenth Amendment and is driven by Thomas’s interest in separating the Constitution from slavery.

### A. Originalism

Thomas’s strong adherence to originalism manifested itself right away when Thomas joined the Court.<sup>114</sup> Thomas’s dissenting opinion in *Doggett v. United States*<sup>115</sup> is a clear example. In *Doggett*, the Court held that an 8 ½ year window between a criminal’s indictment and arrest, as a result of government negligence, was a violation of the Sixth Amendment right to a speedy trial.<sup>116</sup> Thomas dissented, explaining that the Speedy Trial Clause was not intended to cover this type of delay.<sup>117</sup> Thomas began his dissent by noting that while Doggett’s story was unusual, even extraordinary,<sup>118</sup> the Court’s conclusion that his Sixth Amendment right to a speedy trial was violated was erroneous because he “suffered none of the harms that the right was designed to prevent.”<sup>119</sup> Thomas explained that the Speedy Trial Clause was designed to protect against the “major evils” of “‘undue and oppressive incarceration’ and the ‘anxiety and concern accompanying public accusation.’”<sup>120</sup> Doggett, during the 8 ½ years, was never in custody or subject to bail.<sup>121</sup> He was unaware of his indictment, so he did not experience “the anxiety or humiliation that typically accompanies a known criminal charge.”<sup>122</sup> Thus, Thomas reasoned that

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<sup>114</sup> THOMAS, *supra* note 1, at 474.

<sup>115</sup> 112 S. Ct. 2686 (1992).

<sup>116</sup> *Doggett*, 112 S. Ct. at 2694.

<sup>117</sup> *Id.* at 2694-95 (Thomas, J., dissenting); *see also* THOMAS, *supra* note 1, at 474.

<sup>118</sup> *Doggett*, 112 S. Ct. at 2694-95 (Thomas, J., dissenting) (Doggett turned his life around from criminal to homeowner and computer operations manager by the time he was finally tried).

<sup>119</sup> *Id.* at 2695.

<sup>120</sup> *Id.* (quoting *United States v. Marion*, 404 U.S. 307, 320 (1971)).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

because the core concern is impairment of liberty, not delay-related prejudice, Doggett was not entitled to protection under the Speedy Trial Clause.<sup>123</sup> While such a lengthy delay undoubtedly hinders the defendant's case, a defendant, where applicable, may still rely on non-constitutional protections such as statutes of limitations, and other Constitutional protections such as the Due Process Clause.<sup>124</sup>

In subpart B of his dissent, Thomas examined English common law to determine that while delay was disfavored, there was no prohibition preventing prosecution of these cases after time had elapsed.<sup>125</sup> Therefore, Thomas found that Doggett's case fell outside the purview of the Speedy Trial Clause. Thomas, addressing the majority, concluded that “[b]y divorcing the Speedy Trial Clause from all considerations of prejudice to an accused, the Court positively invites the Nation’s judges to indulge in an ad hoc and result-driven second-guessing of the government’s investigatory efforts. Our Constitution neither contemplates nor tolerates such a role.”<sup>126</sup>

A second major dissent in which Thomas expressed strong originalist overtures was *Hudson v. McMillian*.<sup>127</sup> In that case, the Court was confronted with the issue of whether use of excessive force by a corrections officer against a prisoner constituted cruel and unusual punishment where no serious injury resulted.<sup>128</sup> According to the prisoner, after a verbal argument with the corrections officer, he was put in handcuffs, taken out of his cell, and began to be transported to “administrative lockdown.”<sup>129</sup> On the way there, he claimed to have been punched “in the mouth, eyes, chest, and stomach” while an accompanying officer held him and kicked and

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 2698.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 2701.

<sup>127</sup> 112 S.Ct. 995 (1992).

<sup>128</sup> *Id.* at 997.

<sup>129</sup> *Id.*

punched him from behind.<sup>130</sup> The prisoner suffered minor injuries including bruises and “swelling of his face, mouth, and lip,” in addition to loosened teeth and a cracked partial dental plate.<sup>131</sup> The majority opinion, authored by Justice O’Connor, held that while *de minimis* use of physical force does not violate the Eighth Amendment, here the injuries sustained were not *de minimis*, and therefore the prisoner’s claim should not have been dismissed.<sup>132</sup>

Justice Thomas filed a dissent, contending that before a finding of cruel and unusual punishment can be made, the prisoner must demonstrate that he suffered “significant injury.”<sup>133</sup> Thomas qualified this bold statement by explaining that the prisoner is not without recourse;<sup>134</sup> he is just without remedy under the Eighth Amendment. Thomas noted that it is a recent phenomenon in and of itself that the Cruel and Unusual Punishment Clause applies to “deprivations that were not inflicted as part of the sentence for a crime.”<sup>135</sup> Thomas noted that the background of the Amendment, including its “English antecedents, its adoption by Congress, its construction by this Court, and the interpretation of analogous provisions by state courts,” does not provide any support for the proposition that the Amendment should regulate treatment of prisoners.<sup>136</sup> It was not until 185 years after the adoption of the Amendment that it was applied to a case in which a prisoner claimed mistreatment in prison.<sup>137</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1001.

<sup>133</sup> *Id.* at 1005 (Thomas, J. dissenting).

<sup>134</sup> Thomas explained that the “use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not cruel and unusual punishment.” *Id.* at 1005.

<sup>135</sup> *Id.* (“For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration.”)

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1006 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)).

Justice Thomas explained that the Eighth Amendment has both an objective and subjective component.<sup>138</sup> The Eighth Amendment does not apply to every conceivable deprivation, only to deprivations “involving ‘serious’ injury inflicted by prison officials acting with a culpable state of mind.”<sup>139</sup> The majority, Thomas explained, by re-defining the objective component as “contextual and responsive to contemporary standards of decency,” eliminates the longstanding significant injury requirement under the Eighth Amendment and reduces the inquiry to a purely subjective analysis of the prison official’s intent.<sup>140</sup> Thomas concluded that the Court’s expansion of the Cruel and Unusual Punishment Clause is an example of the erroneous “view that the Federal Constitution must address all ills in our society.”<sup>141</sup> Abusive behavior by prison guards, while deplorable, is not *per se* unconstitutional as the Eighth Amendment is not a code of prison regulation.<sup>142</sup>

A final opinion in which Thomas strongly adhered to his originalist philosophy is *Wilson v. Arkansas*.<sup>143</sup> In *Wilson*, the Court was called upon to decide whether the common law principle requiring police officers to “knock and announce” their presence before conducting a search of a home is required under the Fourth Amendment.<sup>144</sup> The majority opinion, authored by Justice Thomas, recognized that “[a]t the time of the framing, the common law of search and seizure recognized a law enforcement officer’s authority to break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority.”<sup>145</sup> Thomas held that the “knock and announce” requirement “forms a part of the reasonableness inquiry under the Fourth Amendment.”<sup>146</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 1007.

<sup>141</sup> *Id.* at 1010.

<sup>142</sup> *Id.*

<sup>143</sup> 514 U.S. 927 (1995).

<sup>144</sup> *Id.* at 928.

<sup>145</sup> *Id.* at 929.

<sup>146</sup> *Id.*



In this case, petitioner Wilson made a series of drug sales to an informant who was working with the Arkansas State Police.<sup>147</sup> At one transaction, petitioner brandished a firearm and threatened the informant with death if the informant turned out to be working with the police, but proceeded to sell the informant drugs anyway.<sup>148</sup> The next day, the police obtained a warrant to conduct a search of the petitioner's home.<sup>149</sup> When the police arrived, they found the main door to the home open, they then proceeded through an unlocked screen door and identified themselves as police officers.<sup>150</sup> The police uncovered drugs, and found petitioner in the bathroom flushing marijuana down the toilet.<sup>151</sup>

In determining whether the knock and announce principle is part of the Fourth Amendment reasonableness inquiry, Thomas began by looking at the common law to determine the “traditional protections against unreasonable searches and seizures . . . at the time of the framing.”<sup>152</sup> Thomas, after taking a comprehensive look at the common law, concluded that there is “no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.”<sup>153</sup> Thomas further noted that the “knock and announce principle” was “woven quickly into the fabric of early American law” in that most states that ratified the Fourth Amendment also enacted similar constitutional provisions or statutes that modeled the common law approach.<sup>154</sup> In addition to states, early American courts also upheld the knock and announce principle.<sup>155</sup> As a result, Thomas concluded that there was “little doubt

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 931.

<sup>153</sup> *Id.* Thomas, collecting English common law cases, noted that common law courts have held that the sheriff may break the door down, but should announce his or her presence and request that the door be open. *Id.*

<sup>154</sup> *Id.* at 933.

<sup>155</sup> *Id.*

that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure."<sup>156</sup> However, this did not end the inquiry, as not every entry requires the police officers to knock and announce their presence, such as where there is danger of physical violence, where a prisoner escapes, or where there is reason to believe evidence would be destroyed.<sup>157</sup> Thomas ultimately remanded the case for a determination of whether these factors were present.<sup>158</sup> Importantly, however, Thomas maintained his originalist perspective in deciding the outcome of the case.

## **B. Fourteenth Amendment**

Thomas's interpretation of the Fourteenth Amendment, as discussed above, is derived from his view that the original intent of the Constitution is to bring about the guarantees of the Declaration of Independence. Thomas views the Constitution as colorblind, and therefore abhors any disparate treatment based on race. Thomas, as discussed below, has also sought to revive the Privileges and Immunities Clause as a means to protect substantive rights under the Constitution, as he feels that route is more in touch, and more consistent with, the original intent of the framers.

### **1. Equal Protection Clause**

Thomas has been consistently vocal in his opposition to affirmative action admissions criteria for universities. In 2003, the Court considered two major affirmative action cases, *Gratz v. Bollinger*<sup>159</sup> and *Grutter v. Bollinger*.<sup>160</sup> In *Gratz*, the Court considered the issue of whether the University of Michigan's system of using racial preference in its undergraduate admissions process

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<sup>156</sup> *Id.* at 934.

<sup>157</sup> *Id.* at 935-36.

<sup>158</sup> *Id.* at 937.

<sup>159</sup> 539 U.S. 244 (2003).

<sup>160</sup> 539 U.S. 306 (2003).

violated the Equal Protection Clause of the 14<sup>th</sup> Amendment.<sup>161</sup> Two students, Jennifer Gratz and Patrick Harnacher, were Caucasian and were denied admission to the University of Michigan.<sup>162</sup> The record was clear that if both of the prospective students were one of the specifically listed minority groups, they would have been admitted to the University.<sup>163</sup> The University had a scheme in which minority groups were given a discrete number of points in a selection index.<sup>164</sup> The Court held that the scheme was unconstitutional because it was not narrowly tailored to achieve the University's interest in diversity.<sup>165</sup>

The majority concluded that the admissions policy did not provide any "individualized consideration" because it automatically awarded 20 points to every underrepresented minority without any consideration of the individual merits of their application.<sup>166</sup> The large amount of points awarded had the effect of making race decisive in the decision to admit a student.<sup>167</sup> Therefore, the system was not the least restrictive means.

Justice Thomas filed a short concurrence in this case. He explained that he "would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause."<sup>168</sup> Thomas further explained that the scheme used by Michigan's College of Literature, Science, and the Arts falls because it did not allow for "consideration of nonracial distinctions among underrepresented minority applicants."<sup>169</sup>

The Court's decision earlier that day, in *Grutter v. Bollinger*, reached an opposite conclusion. In *Grutter*, the Court considered the admissions policy of the law school which had a

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<sup>161</sup> *Gratz*, 539 U.S. at 249.

<sup>162</sup> *Id.* at 251.

<sup>163</sup> *Id.* at 254-55.

<sup>164</sup> *Id.* at 255-56.

<sup>165</sup> *Id.* at 275.

<sup>166</sup> *Id.* at 271-72.

<sup>167</sup> *Id.* at 272.

<sup>168</sup> *Id.* at 281 (Thomas, J. concurring).

<sup>169</sup> *Id.*

separate admissions system of seeking to achieve a “critical mass” of underrepresented minorities.<sup>170</sup> Unlike the scheme in *Gratz*, the law school’s policy did not assign a discrete value to underrepresented minorities, but rather conducted a “flexible assessment” of variables beyond just GPA and LSAT score, with race being one of the variables considered.<sup>171</sup> The Court adopted wholesale Justice Powell’s decision in *Regents of Univ. of California v. Bakke*,<sup>172</sup> which found that “student body diversity is a compelling state interest that can justify the use of race in university admissions.”<sup>173</sup> The majority distinguished this system from unconstitutional quota or racial balancing systems, hinging its decision on the fact that the university sought a “critical mass” of students, which “is defined by reference to the educational benefits that diversity is designed to produce,” which the majority found to be substantial.<sup>174</sup> Thus, because race was considered as part of a larger, individualized inquiry, and because race was used in a “flexible, nonmechanical way,” the Court found the plan to be sufficiently narrowly tailored to survive strict scrutiny.<sup>175</sup>

Justice Thomas, strongly opposed to affirmative action, wrote an elaborate opinion concurring in part and dissenting in part. Thomas began his opinion by citing to one of Frederick Douglass’s speeches, in which Douglass stated that he was not asking for “benevolence” or “pity,” but simply for African-Americans to be left alone.<sup>176</sup> After citing this passage, Thomas explained that he, like Douglass, believes that “blacks can achieve in every avenue of American life without the meddling of university administrators.”<sup>177</sup> Thomas then explained his view that this policy is an exercise in racial discrimination, no different than an obviously unconstitutional scheme of

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<sup>170</sup> *Grutter*, 539 U.S. at 316.

<sup>171</sup> *Id.* at 315-16.

<sup>172</sup> 438 U.S. 265 (1978).

<sup>173</sup> *Grutter*, 539 U.S. at 325.

<sup>174</sup> *Id.* at 329-30.

<sup>175</sup> *Id.* at 334.

<sup>176</sup> *Id.* at 350 (Thomas, J. concurring in part and dissenting in part).

<sup>177</sup> *Id.*

having a heightened standard for minority students and a lower standard for everyone else.<sup>178</sup> In Thomas's view, they are flip sides of the same coin, racial discrimination is racial discrimination, and it is unconstitutional in all its forms.

Part I of Thomas's opinion begins by collecting cases on the Court's former treatment of racial classifications. Only the government's interest in national security<sup>179</sup> has been held to be sufficiently compelling to discriminate based on race.<sup>180</sup> By contrast, the University's interest in a diverse student body does not rise to the same level as the government's interest in national security.

In part II of his opinion, Thomas closely examined the University's proposed interest, namely obtaining the "educational benefits that flow from student body diversity."<sup>181</sup> Thomas explained that diversity, for its own sake, is not the compelling interest asserted by the University; rather, diversity is simply the means to achieve the University's interest, which is to improve the education at the law school.<sup>182</sup> The law school believed that the only way to reach this educational benefit was to achieve a racially mixed student body.<sup>183</sup> Therefore, in Thomas's view, what the Court really upheld was the "use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution."<sup>184</sup>

Thomas explained that the fundamental flaw in the majority's reasoning was that by adopting Justice Powell's opinion, it allows the Court to engage in an ad hoc, "know it when we see it" approach to determining whether a compelling interest exists, which is inherently

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<sup>178</sup> *Id.* at 350.

<sup>179</sup> *Korematsu v. United States*, 324 U.S. 885 (1945).

<sup>180</sup> *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part).

<sup>181</sup> *Id.* at 354.

<sup>182</sup> *Id.* at 354-55.

<sup>183</sup> *Id.* at 355.

<sup>184</sup> *Id.* at 356.

unworkable.<sup>185</sup> Here, the majority expanded “the range of permissible uses of race to something as trivial . . . as the assembling of a law school class” and maintaining a public and elite law school, for which there is no pressing necessity, and certainly not a compelling interest.<sup>186</sup> Even to the extent there is an interest in having a law school, or elite law school, Michigan has failed to state a cognizable interest because the vast majority of the students who attend the University of Michigan do not remain in state to practice law.<sup>187</sup> Therefore, in Thomas’s view, the University could not assert a compelling interest and, as a result, “should be forced to choose between its classroom aesthetic and its exclusionary admissions system,” as proper application of strict scrutiny would not allow the University to maintain its prestige at the expense of a least restrictive alternative.<sup>188</sup>

Finally, Thomas explained that the majority’s opinion presupposes that the Law School’s admission program actually benefits the minority students who are admitted as a result of the program.<sup>189</sup> The program, Thomas points out, does not look for students who will actually succeed in the practice of law, but just seeks a class that “looks right, even if it does not perform right.”<sup>190</sup> The program may offer the benefits of an elite law degree, but the otherwise unprepared minority students may find it difficult to compete.<sup>191</sup> More than just inability to compete, the program creates a dynamic where non-minority students feel superior to minority students, and non-minority students resent minority students for getting favorable treatment.<sup>192</sup> Even the minority students who are admitted without any consideration of race “are tarred as undeserving.”<sup>193</sup>

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<sup>185</sup> *Id.* at 357.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 358; 360.

<sup>188</sup> *Id.* at 361.

<sup>189</sup> *Id.* at 371.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 373.

<sup>193</sup> *Id.*

Thomas concludes his opinion by agreeing with two of the majority's points, namely that discrimination between preferred minority groups is unconstitutional, and that in 25 years the admission plan would become unconstitutional.<sup>194</sup>

The final major affirmative action opinion that Justice Thomas was involved in is *Fisher v. University of Texas at Austin*,<sup>195</sup> in which he filed a concurring opinion. In *Fisher*, the Court considered the admissions policy of the University of Texas which, like *Grutter*, considered "race as one of various factors in its undergraduate admissions process" without assigning a particular value to race, but making it a priority to secure a "critical mass."<sup>196</sup> The Court, finding that the Court of Appeals did not properly apply the rigorous strict scrutiny analysis, remanded the case.<sup>197</sup> The University implemented a program in which race was not explicitly considered, but a "holistic metric of a candidate's potential contribution to the University" was used to give students credit for personal experiences.<sup>198</sup> This effort was buttressed by outreach programs by the University.<sup>199</sup> The Texas State Legislature also enacted what was known as the Ten Percent Plan, which granted "automatic admission to any public state college, including the University, to all students in the top 10% of their class at high schools in Texas that comply with certain standards."<sup>200</sup> Finally, after the Court's decision in *Grutter*, the University began explicitly considering race as a "one of many 'plus factors' in an admissions program that considered the overall individual contribution of each candidate."<sup>201</sup>

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<sup>194</sup> *Id.* at 374-78.

<sup>195</sup> 133 S. Ct. 2411 (2013).

<sup>196</sup> *Id.* at 2415.

<sup>197</sup> *Id.*

<sup>198</sup> *Fisher*, 133 S. Ct. at 2415-16.

<sup>199</sup> *Id.* at 2416.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

The Court began its analysis by reaffirming that “obtaining the educational benefits of ‘student body diversity is a compelling state interest that can justify the use of race in university admissions.’”<sup>202</sup> However, the means must still be narrowly tailored toward achieving that end.<sup>203</sup> The Court noted that it applied deference to “a university’s ‘educational judgment that such diversity is essential to its educational mission,’” but that deference is not complete.<sup>204</sup> It is for courts to examine whether there is “no workable race-neutral” alternative that would allow the educational benefits associated with diversity to be achieved.<sup>205</sup> The Court of Appeals erred by granting deference to the University when analyzing the narrowly tailored requirement.<sup>206</sup> Both the District Court and the Court of Appeals impermissibly deferred to “the University’s good faith in its use of racial classifications.”<sup>207</sup>

Justice Thomas filed a concurrence, agreeing that strict scrutiny was not properly applied but noting that *Grutter v. Bollinger* should be overruled.<sup>208</sup> Justice Thomas reiterated that *Grutter* fell outside of the Court’s precedent insofar as it found a compelling interest in racial discrimination for reasons unrelated to national security or remedying past discrimination.<sup>209</sup> In direct contravention of strict scrutiny, the Court in *Grutter* impermissibly deferred to the university’s determination that racial discrimination was necessary to achieve the desired educational benefit.<sup>210</sup> In *Fisher*, Thomas similarly undertook an exacting analysis of the University’s interest, namely its interest in “attaining ‘a diverse student body and the educational

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<sup>202</sup> *Id.* at 2418 (quoting *Grutter*, 539 U.S. at 325).

<sup>203</sup> *Id.* at 2419-20.

<sup>204</sup> *Id.* at 2419.

<sup>205</sup> *Id.* at 2420.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 2421.

<sup>208</sup> *Id.* at 2422 (Thomas, J., concurring).

<sup>209</sup> *Id.* at 2423-24.

<sup>210</sup> *Id.* at 2424.



benefits flowing from such diversity.”<sup>211</sup> Analyzing the syntax, Thomas concluded that the University had a purported interest in both “diversity for its own sake” and “attaining educational benefits that allegedly flow from diversity.”<sup>212</sup> First, Thomas noted that the Court has repeatedly made clear that diversity for its own sake cannot be a compelling interest,<sup>213</sup> and that even if educational benefits did flow from diversity, which is unclear, it does not rise to the level of a compelling interest.<sup>214</sup> Thomas likened this case to *Brown v. Board of Education*, noting that in *Brown* the Court rejected an argument by segregationists that “educational benefits justify racial discrimination,” and the same conclusion should hold in this case.<sup>215</sup> Relatedly, Thomas emphasized that even if the school was faced with closure due to inability to engage in racial discrimination, it would still be an insufficient interest to discriminate.<sup>216</sup> Thomas mentions that many of the same arguments the University advanced in support of its racially discriminatory scheme parallel the arguments made by segregationists.<sup>217</sup> For example, the University argued that its program allows students to become better leaders in a diverse world, which parallels the segregationist argument that segregated schools “provided more leadership opportunities for blacks.”<sup>218</sup> The University also contends that racial discrimination is necessary, at least in the immediate future, “because of the enduring race consciousness of our society.”<sup>219</sup> Thomas rejected those arguments, and concluded that because the arguments were unavailing when they were first

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Thomas wrote that “even *Grutter* recognized” that “diversity as an end is nothing more than impermissible ‘racial balancing.’” *Id.* at 2424.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 2425-26 (“If the Court were actually applying strict scrutiny, it would require Texas either to close the University or to stop discriminating against applicants based on their race. The Court has put other schools to that choice, and there is no reason to treat the University differently.”).

<sup>217</sup> *Id.* at 2426.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 2427.

made by segregationists, there is no reason that they should be valid now to uphold a racially discriminatory scheme.<sup>220</sup>

As in *Grutter*, Thomas raised the concern that “race has little to do with the alleged educational benefits of diversity.”<sup>221</sup> The entire notion hinges on the toxic premise that “it is possible to tell when discrimination helps, rather than hurts, racial minorities.”<sup>222</sup> Thomas explained that racial discrimination can never be “good,” and can quickly lead to abuse.<sup>223</sup> Thomas also re-raised his concern that this racial discrimination does a disservice to minority students because they are less prepared and end up performing worse than their classmates, and no evidence presented by the University suggested that favored “students are able to close this substantial gap during their time at the University.”<sup>224</sup> Thomas contends that the students who benefit from the University’s program are inevitably stamped with a badge of inferiority, which taints their accomplishments.<sup>225</sup> And finally, the harm extends beyond just the minority students who actually benefit from the program, because there is no way to distinguish students that benefitted from the admissions process and those that have not, so even minority students who were admitted without consideration of race are harmed.<sup>226</sup>

## **2. Substantive Due Process and the Privileges and Immunities Clause**

During his tenure on the Court, Thomas has steadfastly opposed the Court’s substantive due process jurisprudence. For example, in *Troxel v. Granville*,<sup>227</sup> the Court dealt with the fundamental right of parents to rear their children. The Court was called upon to determine the

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<sup>220</sup> *Id.* at 2428.

<sup>221</sup> *Id.* at 2429.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 2429 (“Slaveholders argued that slavery was a ‘positive good’ that civilized blacks and elevated them in every dimension of life.”).

<sup>224</sup> *Id.* at 2431.

<sup>225</sup> *Id.* at 2432.

<sup>226</sup> *Id.*

<sup>227</sup> 530 U.S. 57 (2000).

constitutionality of a Washington statute which permitted “any person” to petition a Washington court for visitation rights “at any time.”<sup>228</sup> The statute gave Washington courts the power to grant visitation rights whenever visitation, in the court’s view, would serve the best interest of the child.<sup>229</sup> In *Troxel*, the child’s parents had a relationship that ultimately ended, and the father, who had regular visitation, ultimately committed suicide.<sup>230</sup> After the death of the father, the children’s mother, Tommie Granville, sought to limit the paternal grandparent’s visitation rights, and the grandparents petitioned the court for relief.<sup>231</sup> Recognizing that “the State’s recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship,” the Court was asked to decide whether, “as applied to Tommie Granville and her family, [the Washington statute] violates the Federal Constitution.”<sup>232</sup>

The Court began its analysis by quoting the text of the Fourteenth Amendment, namely that “no State shall ‘deprive any person of life, liberty, or property, without due process of law,’”<sup>233</sup> and referenced its interpretation that the clause “includes a substantive component” that provides heightened protection for fundamental rights and liberties.<sup>234</sup> The majority recognized that the liberty interest “of parents in the care, custody, and control of their children” is the “oldest of the fundamental liberty interests recognized by this Court.”<sup>235</sup> As part of this liberty, parents have the constitutional right to direct both the upbringing and education of their children.<sup>236</sup> This protection also encompasses “the fundamental right of parents to make decisions concerning the care,

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<sup>228</sup> *Id.* at 60.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 60-61.

<sup>232</sup> *Id.* at 64-65.

<sup>233</sup> *Id.* at 65.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

custody, and control of their children.”<sup>237</sup> Recognizing this broad right, the Court held that as applied to Granville, the broadly worded Washington statute infringed on her constitutional rights.<sup>238</sup> The statute gives no deference whatsoever to the fit parent’s judgment as to what is best for the child, and allows the court to disregard any decision made by the parent and award visitation to anyone if the court decides it is in the best interest of the child.<sup>239</sup>

Thomas filed a short concurrence. He explained that he concurred in the judgment because “neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision,” which suggests that if they had, he would have agreed.<sup>240</sup> Because no such challenge had been raised, the Court’s precedent recognizing the fundamental right of parents resolved the case.<sup>241</sup>

Thomas has consistently cast doubt on recognition of unenumerated rights under the Due Process Clause of the Fourteenth Amendment. For example, Thomas reaffirmed his disapproval of substantive due process in the recent case of *Perry v. New Hampshire*,<sup>242</sup> in which the Court held that the due process clause does not require inquiry into reliability of an eyewitness identification of a defendant when no otherwise unnecessary suggestive means were used by law enforcement.<sup>243</sup> Thomas filed a concurrence, again, as in *Troxel*, stating that assuming the Court’s prior due process precedent is valid, the Court reached the right conclusion.<sup>244</sup> However, Thomas wrote separately to express the view that the Court’s prior precedents recognizing a “substantive

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<sup>237</sup> *Id.* at 66.

<sup>238</sup> *Id.* at 67.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 80 (Thomas, J., concurring in the judgment).

<sup>241</sup> *Id.*

<sup>242</sup> 132 S. Ct. 716 (2012).

<sup>243</sup> *Id.* at 717.

<sup>244</sup> *Id.* at 730 (Thomas, J., concurring).

due process” right to ‘fundamental fairness’ were “wrongly decided because the Fourteenth Amendment’s Due Process Clause is not a ‘secret repository of substantive guarantees against unfairness.’”<sup>245</sup> Perhaps Thomas’s strongest stance opposing recognition of substantive rights under the Due Process Clause of the Fourteenth Amendment came in *McDonald v. City of Chicago, Ill.*,<sup>246</sup> in which Thomas wrote “the Court has determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights.”<sup>247</sup> Thomas then continued by stating that

All of this is a legal fiction. The notion that a constitutional provision that guarantees only “process” before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words. Moreover, this fiction is a particularly dangerous one. The one theme that links the Court’s substantive due process precedents together is their lack of a guiding principle to distinguish “fundamental” rights that warrant protection from nonfundamental rights that do not.<sup>248</sup>

Thomas, dissatisfied with the Court’s substantive due process jurisprudence, has sought to reinvigorate the Privileges and Immunities Clause as a source of protection for fundamental rights, a source which Thomas feels is more in line with an originalist interpretation of the Constitution. Thomas first began to examine the use of the Privileges Immunities Clause in his dissent in *Saenz v. Roe*,<sup>249</sup> and again in *McDonald*. In *Saenz*, the Court was confronted with the constitutionality of a California statute that limited the welfare benefits that new residents of the state could collect, which in turn saved the state a substantial amount of money.<sup>250</sup> The Court relied on the Privileges

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<sup>245</sup> *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598-99 (1996)).

<sup>246</sup> 561 U.S. 742 (2010).

<sup>247</sup> *Id.* at 811 (Thomas, J., concurring in part and concurring in the judgment).

<sup>248</sup> *Id.*

<sup>249</sup> 526 U.S. 489 (1999).

<sup>250</sup> *Id.* at 492-93.

and Immunities Clause of the Fourteenth Amendment to find the statute unconstitutional.<sup>251</sup> The Court explained that “the right to travel—the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State . . . is protected not only by the new arrival’s status as a state citizen, but also by her status as a citizen of the United States.”<sup>252</sup>

Thomas dissented, explaining that the majority attributed a “meaning to the Privileges and Immunities Clause that likely was unintended when the Fourteenth Amendment was enacted and ratified.”<sup>253</sup> Thomas noted that scholars have recognized that the Court’s decision in the *Slaughter-House Cases* incorrectly interpreted the meaning of the Privileges and Immunities Clause,<sup>254</sup> and proceeded to look to the original meaning of the clause. Specifically, Thomas looked to an 1825 decision entitled *Corfield v. Coryell*, in which Justice Washington “rejected the proposition that the Privileges and Immunities Clause guaranteed equal access to all public benefits . . . that a State chooses to make available.”<sup>255</sup> Rather, Thomas concluded that “at the time the Fourteenth Amendment was adopted, people understood that ‘privileges or immunities of citizens’ were fundamental rights, rather than every public benefit established by positive law.”<sup>256</sup> Finally, Thomas suggested that Privileges and Immunities Clause jurisprudence should possibly displace “portions of our equal protection and substantive due process jurisprudence.”<sup>257</sup> After hinting at the use of the Privileges and Immunities Clause in *Saenz*, Thomas, in *McDonald* sought to use the clause to incorporate the Second Amendment, and the protections of the Bill of Rights generally, against the states, rather than the Due Process Clause.<sup>258</sup>

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<sup>251</sup> *Id.* at 510-11.

<sup>252</sup> *Id.* at 502.

<sup>253</sup> *Id.* at 521 (Thomas, J., dissenting).

<sup>254</sup> *Id.* at 522, n.1.

<sup>255</sup> *Id.* at 525-26.

<sup>256</sup> *Id.* at 527.

<sup>257</sup> *Id.* at 528.

<sup>258</sup> *McDonald*, 561 U.S. at 805-06 (Thomas J. concurring in part and concurring in the judgment) (“I agree with the Court that the Fourteenth Amendment makes the right to keep and bear arms set forth in the Second Amendment

### C. Connick v. Thompson

One of Thomas's more controversial opinions is *Connick v. Thompson*,<sup>259</sup> in which he wrote for the majority in a contentious 5-4 decision. The case involved a wrongful conviction of John Thompson for armed robbery and murder, which led to him being placed on death row.<sup>260</sup> The prosecutors in his case failed to disclose key exculpatory evidence to the defense, as required by the Court's decision in *Brady v. Maryland*.<sup>261</sup> It was not until Thompson had spent 18 years in prison, 14 of which were on death row, and had only a month left before his scheduled execution that his convictions were vacated.<sup>262</sup> After being released, Thompson sued Harry Connick, who was the District Attorney overseeing the prosecutors responsible, for damages on the theory that he "failed to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused the nondisclosure in Thompson's robbery case."<sup>263</sup> The majority, led by Justice Thomas, held that the district attorney's office could not be held liable under Section 1983 for failure to train based on a single violation.<sup>264</sup>

Thomas began the substantive analysis by laying out the standard for a Section 1983 claim, namely that plaintiffs must prove that the action taken by the government official or officials that caused the injury was pursuant to a municipal policy.<sup>265</sup> Thomas explained that a municipal policy may include "decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law."<sup>266</sup> Thomas noted

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"fully applicable to the States" I write separately because I believe there is a more straightforward path to this conclusion, one that is more faithful to the Fourteenth Amendment's text and history [i.e. the Privileges and Immunities Clause].").

<sup>259</sup> 131 S. Ct. 1350 (2011).

<sup>260</sup> *Id.* at 1355.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 1356.

<sup>265</sup> *Id.* at 1359.

<sup>266</sup> *Id.*

that in limited circumstances, a local government may violate Section 1983 when it fails “to train certain employees about their legal duty to avoid violating citizens’ rights,” as such failure to train may amount to an official government policy.<sup>267</sup> A failure to train claim can only succeed where the plaintiff can demonstrate “deliberate indifference” to the rights of the people affected by the government’s conduct.<sup>268</sup> Deliberate indifference is a high bar as it demands that the municipal actor completely disregard the known and obvious consequences of his or her actions.<sup>269</sup> Therefore, while a high bar, if a city is on notice, either actual or constructive, that an omission in its training program is causing officials to violate the constitutional rights of citizens, the city can be found liable under Section 1983 for deliberate indifference if the program is retained despite knowledge of its unconstitutional application.<sup>270</sup> Anything less than that exacting standard, explained Thomas, would result in a sort of *respondeat superior* liability for municipalities.<sup>271</sup> Finally, to succeed on a failure to train Section 1983 claim, the plaintiff must ordinarily establish that a “pattern of similar constitutional violations by untrained employees” occurred to show that the municipality was deliberately indifferent.<sup>272</sup>

However, because Thompson could not establish such a pattern of violations, he relied on an even more narrow theory of liability, namely the “single-incident” theory.<sup>273</sup> The “single incident” theory is derived from the Supreme Court’s decision in *Canton*,<sup>274</sup> which provided an extreme hypothetical in which no pattern of conduct would be necessary to find a violation, namely “a city that arms its police force with firearms and deploys the armed officers into the public to

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.* (citing *Canton*, 489 U.S. at 388).

<sup>269</sup> *Id.* at 1360.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 1361.

<sup>274</sup> *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).



capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force.”<sup>275</sup>

Measured against this stringent standard, Thomas concluded that failing to train prosecutors as to the requirements of *Brady* did not rise to the same degree of indifference as posed by the Court’s hypothetical in *Canton*.<sup>276</sup> Thomas reasoned that attorneys all have undertaken legal training that has equipped them to “interpret and apply legal principles, understand constitutional limits, and exercise legal judgment.”<sup>277</sup> Moreover, lawyers are required in most states to satisfy continuing legal education requirements to continue to practice law.<sup>278</sup> Attorneys also learn on the job from other attorneys, including in the Prosecutor’s office.<sup>279</sup> Lawyers are also subject to character and fitness standards both to be admitted to the bar and to maintain a level of diligence and competence.<sup>280</sup> Based on all of this, Thomas concluded that “[i]n light of this regime of legal training and professional responsibility, recurring constitutional violations are not the ‘obvious consequence’ of failing to provide prosecutors with formal in-house training about how to obey the law” because they are both trained and ethically bound to understand the requirements of *Brady*.<sup>281</sup> Without evidence of recurring violations, Connick, as district attorney, was entitled to rely on the professional training of his prosecutors.<sup>282</sup>

Thomas concluded that this situation is outside the realm of the hypothetical posed in *Canton* because the hypothetical in that case “assumes that the armed police officers have no knowledge at all of the constitutional limits on the use of deadly force” whereas it is undisputed

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<sup>275</sup> *Connick*, 131 S. Ct. at 1361 (citing *Canton*, 489 U.S. at 390).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 1362.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 1363 (quoting *Bryan Cty.*, 520 U.S. at 409).

<sup>282</sup> *Id.*

that “the prosecutors in Connick’s office were familiar with the general *Brady* rule.”<sup>283</sup> As a result, there could be no finding of municipal liability in this case. Thomas finished the opinion by addressing the dissent, which would have found liability under *Canton*.<sup>284</sup> Thomas rebutted that the dissent misses the mark because unlike the police officers in *Canton*, prosecutors “are equipped with the tools to find, interpret, and apply legal principles.”<sup>285</sup> Thomas pointed out that the dissent’s real issue was not with the holding, but with the Court’s precedent recognizing the stringent standard for municipality liability under Section 1983, especially in single incident cases.<sup>286</sup> As such, Thompson’s large verdict was overturned.

### **Part III: Analysis**

The first section of Part II illustrates Justice Thomas’s adherence to an originalist perspective in interpreting the Constitution. In fact, Thomas has been described by at least one scholar as a more faithful originalist than even Justice Scalia.<sup>287</sup> While on the bench, Thomas has, “[a]cross doctrinal areas . . . advocated that the Supreme Court clear away accumulated nonoriginalist precedent to make room for the Constitution’s original meaning.”<sup>288</sup> Thomas has similarly been praised by originalists for shunning “[o]ther common facets of legal interpretation,” including “consequences, precedent, justice, legal doctrines and tests, and deference to elected branches” where they deviate from “a faithful articulation and application of the Constitution’s original meaning.”<sup>289</sup> This is made clear from the sample opinions in Part II. In *Doggett*, for example, Thomas strictly adhered to an originalist interpretation by surveying the original meaning

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 1364.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Cf.* Professor Lee J. Strang, *The Most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 U. DET. MERCY L. REV. 873, 873-4 (2011).

<sup>288</sup> *Id.* at 876.

<sup>289</sup> *Id.* at 877.

of the Sixth Amendment’s Speedy Trial Clause, and found that the clause was designed to defend against the “major evils” of “‘undue and oppressive incarceration’ and the ‘anxiety and concern accompanying public accusation.’”<sup>290</sup> Therefore, while the 8 ½ years during which Doggett was not reprimanded may have amounted to government negligence or inefficiency, it did not fall within the purview of what the Speedy Trial Clause was designed to protect, and therefore should not have amounted to a constitutional violation.<sup>291</sup>

Moreover, Thomas’s opinions in both *Doggett* and *McMillian* illustrate that Thomas, perhaps even at the expense of justice, strictly adheres to the original interpretation of the meaning of the Constitution. In *Doggett*, Thomas made clear that by failing to look at original meaning of the Speedy Trial Clause, the Court effectively divorced “the Speedy Trial Clause from all considerations of prejudice to an accused,” and “invites the Nation’s judges to indulge in an ad hoc and result-driven second-guessing of the government’s investigatory efforts,” a role that was not intended by the Constitution.<sup>292</sup> In Thomas’s view, Constitutional protections are not designed to give judges the authority to reach arbitrary conclusions based on their own judgment; rather, constitutional protections are ingrained by history, to be understood in the manner in which the framers intended. This is not to say that other remedies are unavailable, such as statutes of limitations, but the specific remedy sought was not available under the Speedy Trial Clause.<sup>293</sup>

Thomas’s opinion in *McMillian* is a further illustration of this. *McMillian* is described as one of Thomas’s most “controversial” opinions,<sup>294</sup> but in reality it is just an example of Thomas adhering to his originalist principles, and like *Doggett*, finding that the facts of the particular case

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<sup>290</sup> See note 120, *supra*.

<sup>291</sup> *Doggett*, 112 S.Ct. at 2700-01.

<sup>292</sup> *Id.* at 2701.

<sup>293</sup> *Id.* at 2698.

<sup>294</sup> THOMAS, *supra* note 1, at 475.

did not fall within the traditional protections of the constitutional provision at issue. In *McMillian*, Thomas recognized that while Hudson was injured by prison officials, it was not the type of injury or mistreatment that traditionally falls under the cruel and unusual punishment provision of the Eighth Amendment.<sup>295</sup> The framers simply did not intend to encompass anything less than “significant injury,” so despite the fact that the conduct of the officers was immoral or even tortious, it did not rise to the level of a constitutional deprivation.<sup>296</sup> Thus, despite the deplorable nature of the facts, the Court in its opinion, as in *Doggett*, expanded the framer’s conception of cruel and unusual punishment and espoused the view “that the Federal Constitution must address all ills in our society,” and that is not its function.<sup>297</sup> Rather, Thomas’s view is that regardless of how provocative the facts are, the Constitution should be interpreted according to its original meaning. Thomas received heavy criticism for his dissent in *McMillian*,<sup>298</sup> as many mischaracterized the opinion “as indifference to the torture of inmates.”<sup>299</sup> Later, Thomas would refer to his decision in *McMillian* as an “opinion that is trotted out for propaganda.”<sup>300</sup> A close reading of Thomas’s opinion reveals that it is not because Thomas lacked empathy for the plaintiff, but that the specific constitutional remedy plaintiff was seeking was not contemplated by the framers.

The final case in Part II that demonstrates Thomas’s adherence to originalism is *Wilson v. Arkansas*.<sup>301</sup> There too, Thomas upheld the knock and announce principle by surveying the common law and determining that the requirement that police “knock and announce” their

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<sup>295</sup> *Id.*; see also *Hudson*, 112 S. Ct. at 1005.

<sup>296</sup> See *id.*

<sup>297</sup> See note 141, *supra*.

<sup>298</sup> See *The Youngest, Cruellest Justice*, N.Y. TIMES, Feb. 27, 1992 <http://www.nytimes.com/1992/02/27/opinion/the-youngest-cruellest-justice.html>; see also THOMAS, *supra* note 1, at 638.

<sup>299</sup> THOMAS, *supra* note 1, at 479.

<sup>300</sup> *Id.*

<sup>301</sup> See note 143, *supra*.

presence was specifically contemplated in English common law and at the time of the framing.<sup>302</sup> Thomas's stern adherence to originalism as seen in *Doggett*, *McMillian*, and *Wilson* is the product of Thomas's belief in judicial restraint and strict interpretation of constitutional text. Thomas's stern upbringing by his grandfather has ingrained in him the ability to adhere to his principles and stand for what he believes in, even in the face of adversity.<sup>303</sup> As Thomas explained during an interview he did on *60 Minutes*, "[t]he Constitution is what matters. Not my personal views, whatever they may be."<sup>304</sup>

This segues into another major line of cases in which Thomas has taken a definitive stand, namely his interpretation of the Fourteenth Amendment. Thomas's views on the Equal Protection Clause are intricately tied to his life experiences, which has drawn criticism as Thomas normally seeks to divorce his personal views from constitutional interpretation.<sup>305</sup> Thomas has sought to dovetail originalism with his view of a colorblind constitution, which has also drawn criticism from some scholars.<sup>306</sup> However, a close examination of Thomas's interpretation of the Constitution shows that his Equal Protection jurisprudence comports with his originalist interpretation of the Constitution.<sup>307</sup> The starting point of each of his affirmative action decisions is that the Constitution is "color-blind," and that any use of race requires application of strict

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<sup>302</sup> See note 145, *supra*.

<sup>303</sup> See CBS NEWS, CLARENCE THOMAS: THE JUSTICE THAT NOBODY KNOWS, <http://www.cbsnews.com/news/clarence-thomas-the-justice-nobody-knows/8/>

<sup>304</sup> *Id.*

<sup>305</sup> Eric J. Segall, *Justice Thomas and Affirmative Action: Bad Faith, Confusion, or Both*, <http://wakeforestlawreview.com/2013/02/justice-thomas-and-affirmative-action-bad-faith-confusion-or-both/>

<sup>306</sup> *Id.*

<sup>307</sup> See David C. Durst, *Justice Clarence Thomas's Interpretation of the Privileges or Immunities Clause: McDonald v. City of Chicago and the Future of the Fourteenth Amendment*, 42 U. TOL. L. REV. 933, 938-41 (2011). Thomas has sought to reconcile whether the Constitution contemplated slavery, namely whether the "reasoning in *Dred Scott* captured the original intention of the Constitution." *Id.* Thomas uses the Declaration of Independence to support the view that "we must interpret the Founders' original intent as 'the fulfillment of the ideals of the Declaration of Independence,'" *Id.*; see also THOMAS, *supra* note 1, at 247 (explaining Thomas's discontent with the *Dred Scott* ruling, which essentially held there was no conflict between the Declaration of Independence and slavery, and Thomas's recognition that the Declaration of Independence could be the "way to legitimate the American experiment for black Americans . . .").

scrutiny.<sup>308</sup> This is derived from his belief that original intent of the farmers, in drafting the Constitution, was to bring about the natural rights and protections listed in the Declaration of Independence. Even so, it is undoubtedly true that Thomas's personal experiences with affirmative action have influenced his opinions on affirmative action by universities.

When Thomas applied to Yale Law School, there was a program in place in which the school set aside "up to 10 percent of the places in the entering class for members of minority groups, who would compete against each other, rather than whites, for those slots."<sup>309</sup> As a result, Thomas was ridiculed at Yale by white students and even professors who berated him for only being there because he was black, which infuriated Thomas.<sup>310</sup> While at Yale, Thomas felt that instead of being respected, he was pitied by whites around him, and felt he constantly had something to prove to white students and professors.<sup>311</sup> The stigma of affirmative action extended beyond just fellow students at Yale, when Thomas arrived to work for Senator Danforth as a legislative assistant, he was told by a staffer that the only reason he was there was because he went to Yale, and that the only reason he went to Yale was because of affirmative action, not ability.<sup>312</sup> Thus, affirmative action was a specter that has haunted Thomas throughout his entire career, and which would later influence his jurisprudence on the Court.

For example, in *Grutter*, Thomas noted that government's use of race has hurt minority students by projecting them into a competitive environment for which they are not prepared and, by admitting students who would not have otherwise been admitted, tars all minority students as "undeserving."<sup>313</sup> Thomas's view is that there is no such thing as benign discrimination, it will

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<sup>308</sup> Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 80 (2013).

<sup>309</sup> THOMAS, *supra* note 1, at 140.

<sup>310</sup> *Id.* at 141.

<sup>311</sup> *Id.* at 142.

<sup>312</sup> *Id.* at 178.

<sup>313</sup> *Grutter*, 539 U.S. at 373 (2003).

always bring about negative consequences.<sup>314</sup> What is more, the university itself was not interested in the actual advancement of these minority students, but rather is interested in aesthetics, namely having a class that “looks right, even if it does not perform right.”<sup>315</sup> Thomas wrote an even more fervent opinion in *Fisher*,<sup>316</sup> in which he argued that the justifications for affirmative action was similar to the arguments advanced by proponents of school segregation in *Brown v. Board of Education* and that the Court rejected those arguments then as it should now.<sup>317</sup> Thomas again emphasized that diversity for its own sake has no “educational benefit,” and that the system serves to cause more harm than good to the minority students who are actually admitted.<sup>318</sup>

Thomas’s overtures in both opinions emphasize his resentment toward affirmative action while at Yale, which he states rendered his degree worth only “15 cents” due to his inability to find employment after graduating.<sup>319</sup> In Thomas’s memoir, he recounts that he felt he was being judged by a “double standard” while at Yale.<sup>320</sup> Thomas felt that the racial preferences used by Yale devalued his achievement of graduating from an elite law school.<sup>321</sup> Thus, when confronted with the issue of the constitutionality of affirmative action on the Supreme Court, Thomas opposed such programs, realizing that admission to schools under such a scheme is really only a pyrrhic victory for minority students, and serves only to further stack the odds against them. Further, Thomas’s opinions shed light on his uneasiness with the idea that racial segregation can be “good,” noting that often times the well-intentioned assistance may really be cloaking otherwise self-

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<sup>314</sup> *Id.* at 371.

<sup>315</sup> *Id.* at 372.

<sup>316</sup> See note 195, *supra*.

<sup>317</sup> *Fisher*, 133 S. Ct. at 2424.

<sup>318</sup> *Id.* at 2432; Luke Johnson, *Clarence Thomas Compares Affirmative Action to Slavery, Segregation in Opinion*, Huffington Post (June 24, 2013), [http://www.huffingtonpost.com/2013/06/24/clarence-thomas-affirmative-action\\_n\\_3491433.html](http://www.huffingtonpost.com/2013/06/24/clarence-thomas-affirmative-action_n_3491433.html)

<sup>319</sup> Johnson, *Clarence Thomas Compares Affirmative Action to Slavery, Segregation in Opinion*, Note 318, *supra*.

<sup>320</sup> THOMAS, MY GRANDFATHER’S SON, at 74-75.

<sup>321</sup> Johnson, *Clarence Thomas Compares Affirmative Action to Slavery, Segregation in Opinion*, note 318, *supra*.

interested motives by legislatures or universities.<sup>322</sup> Thus, while Thomas has offered an originalist interpretation of a “color blind” constitution, his opinions on affirmative action drift away from strong adherence to originalism and clearly touch on, and are influenced by, his own experience with affirmative action.

As Part II demonstrates, Thomas is staunchly opposed to recognition of substantive due process rights under the Fourteenth Amendment.<sup>323</sup> Such an interpretation, according to Thomas, is divorced from original meaning of the Constitution and gives judges unbridled discretion.<sup>324</sup> However, Thomas has sought through his jurisprudence to revive the Privileges and Immunities Clause as a way to incorporate the Bill of Rights through the Fourteenth Amendment. Thomas believes that reinvigorating the Privileges and Immunities Clause is more in line with an originalist interpretation and is a less circuitous route to protecting the substantive rights.<sup>325</sup> Taking this position, however, would require the Court to overhaul its entire Privileges and Immunities jurisprudence.<sup>326</sup>

Thomas’s dissent in *Saenz v. Roe*<sup>327</sup> established his view of the Privileges and Immunities Clause, which he would later expand upon in *McDonald*. In *Saenz*, Thomas observed that the

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<sup>322</sup> See, e.g., *Grutter*, 539 U.S. at 372 (“The Law School is not looking for those students who, despite a lower LSAT score or undergraduate grade point average, will succeed in the study of law. The Law School seeks only a facade—it is sufficient that the class looks right, even if it does not perform right.”); THOMAS, MY GRANDFATHER’S SON, at 75 (“. . . I knew I’d made a mistake in going to Yale. I felt as though I’d been tricked, that some of the people who claimed to be helping me were in fact hurting me . . . 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 suited their purposes.”).

<sup>323</sup> See *Troxel*, 530 U.S. at 80 (Thomas, J., concurring in the judgment); *Perry*, 132 S. Ct. at 730 (Thomas, J., concurring); *McDonald*, 561 U.S. at 805 (Thomas, J., concurring in part and concurring in the judgment).

<sup>324</sup> *McDonald*, 561 U.S. at 811 (Thomas, J., concurring in part and concurring in the judgment) (“The one theme that links the Court’s substantive due process precedents together is their lack of a guiding principle to distinguish “fundamental” rights that warrant protection from nonfundamental rights that do not. But neither [the majority nor the dissent] . . . argues that the meaning they attribute to the Due Process Clause was consistent with public understanding at the time of its ratification.”).

<sup>325</sup> See *id.* at 806.

<sup>326</sup> See, e.g., *Saenz*, 526 U.S. 489 (1999); *Slaughter-House Cases*, 83 U.S. 36 (1872).

<sup>327</sup> 526 U.S. 489 (1999).



*Slaughter-House Cases*<sup>328</sup> “all but read the Privileges and Immunities Clause out of the Constitution.”<sup>329</sup> However, in *Saenz*, Thomas urged the Court to reconsider the scope of the Privileges and Immunities Clause in order to incorporate substantive protections and possibly even displace portions of the Court’s current “equal protection and substantive due process jurisprudence.”<sup>330</sup> Thomas makes his position clear in his opinion in *McDonald v. City of Chicago*, in which he further advocates for the Privileges and Immunities Clause to be the center of substantive protection under the Fourteenth Amendment.<sup>331</sup> In *McDonald*, the majority held that “the right to keep and bear arms applies to the States through the Fourteenth Amendment’s Due Process Clause because it is ‘fundamental’ to the American ‘scheme of ordered liberty.’”<sup>332</sup> Thomas, strongly opposed to the majority’s use of the Due Process Clause as the means to uphold the right to bear arms as against the States, sought through his opinion in *McDonald* to use the Privileges and Immunities Clause as the means to incorporate the Second Amendment’s right to bear arms against the states. After a lengthy discussion of the original intent of the Privileges and Immunities Clause, Thomas concluded that the Privileges and Immunities Clause should uphold, at minimum, “those fundamental rights enumerated in the Constitution against the States, including the Second Amendment right to keep and bear arms.”<sup>333</sup>

Thomas took an interest in the Declaration of Independence and the natural rights it establishes early in his career as a means to “synthesize his love of country with the African-American experience, which in many ways was hostile to such nationalism.”<sup>334</sup> While at the

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<sup>328</sup> The Court, in the *Slaughter-House Cases*, interpreted the Privileges and Immunities Clause of the Fourteenth Amendment narrowly to apply to only national citizenship, and not state citizenship. See *Slaughter-House Cases*, 83 U.S. 36 (1872).

<sup>329</sup> *Saenz*, 526 U.S. at 521.

<sup>330</sup> *Id.*

<sup>331</sup> See *McDonald*, 561 U.S. at 805 (Thomas J., concurring in part and concurring in the judgment).

<sup>332</sup> *Id.* at 806.

<sup>333</sup> *Id.* at 835 (Thomas J., concurring in part and concurring in the judgment).

<sup>334</sup> THOMAS, *supra* note 1, at 305.

EEOC, Thomas began to seriously formulate this theory, which rejected the view, articulated in *Dred Scott*, that “the Framers of the Constitution did not intend to extend the same rights to blacks as to whites” in favor of a view that the original intent of the Constitution is to be read in light of the Declaration of Independence, which pointed toward abolition of slavery.<sup>335</sup> This interpretation of the Constitution lies at the heart of Thomas’s Fourteenth Amendment jurisprudence, from Equal Protection, to substantive due process, to the Privileges and Immunities Clause. The starting point of Thomas’s analysis derives from Justice Harlan’s view in dissent in *Plessy*, namely that the Constitution is color blind and is “dedicated to the universal principles of equality and liberty for all American citizens irrespective of race.”<sup>336</sup> The Fourteenth Amendment, therefore, must be read as an extension “of the promise of the original Constitution which in turn was intended to fulfill the promise of the Declaration.”<sup>337</sup> Based on this understanding, any affirmative action programs cannot be constitutional because favoring certain races over others, even if seemingly benign, is out of touch with the framers intent of the Constitution. Moreover, the original intent of the framers suggests that the Privileges and Immunities Clause should be the basis for protecting the substantive rights of individuals against the States, not the due process clause.

The final major opinion in Part II is *Connick*,<sup>338</sup> in which Thomas wrote a controversial opinion for the majority. Similar to *McMillian*, Thomas came under fire almost immediately after the *Connick* decision came down.<sup>339</sup> Nevertheless, Thomas, in a thoroughly reasoned opinion, overturned the jury verdict. Thomas recognized that the claim Thompson was making was evoking a very narrow claim for relief, namely a single incident theory of failure of oversight under Section

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<sup>335</sup> *Id.* at 308.

<sup>336</sup> David C. Durst, *Justice Clarence Thomas's Interpretation of the Privileges or Immunities Clause: McDonald v. City of Chicago and the Future of the Fourteenth Amendment*, 42 U. TOL. L. REV. 933, 941 (2011).

<sup>337</sup> *Id.*

<sup>338</sup> See note 259, *supra*.

<sup>339</sup> Dahlia Lithwick, *Cruel but Not Unusual, Clarence Thomas writes one of the meanest Supreme Court decisions ever*, Slate (Apr. 1, 2011), [http://www.huffingtonpost.com/2011/04/04/clarence-thomas-connick-v\\_n\\_844567.html](http://www.huffingtonpost.com/2011/04/04/clarence-thomas-connick-v_n_844567.html)

1983. Despite the sympathetic nature of the facts, Thomas stuck to the law and precedent to determine that the Court's jurisprudence mandated the otherwise unpopular result. The Court's precedent, having left open only a very small window for such liability, simply did not reach the facts of this case. Thomas's decision in *Connick* represents a data point in Thomas's overall ability to hold his ground on what he believes is right. Thomas has suffered many criticisms while on the Court, ranging from his silence at oral argument<sup>340</sup> to the reasoning in his opinions. However, Thomas remains steadfast in the face of criticism, affirming that "when you're dealing with things that are matters of principle or matters of fact, that you can spend a lot of time worrying about what critics say. You have to do your job. My grandfather never worried about it. You've got to do what's right. You don't engage in this type of pettiness."<sup>341</sup>

#### **Part IV: Conclusion**

Thomas's unique experiences as an American have allowed him to craft a unique jurisprudence and approach to constitutional interpretation. As an African-American conservative, Thomas has relied on natural law and the Declaration of Independence to align those two distinct points of his identity and develop his judicial philosophy. As a conservative, Thomas has developed and rigorously adhered to an originalist interpretation of the Constitution, even at the expense of overruling Court precedent. As an African-American who has experienced pernicious racial discrimination in both academia and elsewhere, Thomas has strongly opposed use of racial discrimination, even if seemingly benign, as constitutionally infirm. Thomas, hardened by a strict upbringing under his grandfather, has learned to stand on principle, even in the face of adversity, as evidenced by the Anita Hill hearings. Thomas has remained steadfast in the face of criticism,

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<sup>340</sup> Jeffrey Toobin, *Clarence Thomas's Disgraceful Silence*, THE NEW YORKER (Feb. 21, 2014), <http://www.newyorker.com/news/daily-comment/clarence-thomass-disgraceful-silence>

<sup>341</sup> CBS NEWS, CLARENCE THOMAS: THE JUSTICE THAT NOBODY KNOWS, *supra* note 102.

namely of his silence on the bench and disagreement with opinions, and criticism by the black community. Unshaken by such criticism, Thomas will go forward and continue to advocate his views and principles on the bench, seeking to ground Constitutional interpretation in the intent of the framers.