JUSTICE CLARENCE THOMAS: THE BURNING OF CIVIL RIGHTS BRIDGES

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I. INTRODUCTION

"Don't burn the bridge that brought you safely cross." This message was drilled into our psyche as we grew up in the segregated South. We were taught that if somehow we managed to cross the bridge and achieve success in our individual lives, it was our duty and our mission to *strengthen* the bridge for those who would follow us. It was a message going back to the Underground Railroad, through Jim Crow and the attendant mass exodus of blacks from Southern plantations to Northern factories.

In a sense, the Civil Rights Movement of the last century embodied the concept of building and strengthening bridges. For a period following World War II and ending with the ascension of William Rehnquist as the Chief Justice of the United States, the United States Supreme Court was viewed by the civil rights community as the proverbial "balm in Gilead," the place to turn for the building and maintenance of bridges. At the urging of NAACP Legal Defense Fund Director-Counsel Thurgood Marshall and

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others, the Supreme Court for a season moved away from its historical antipathy towards black Americans.[1] During that season, the Court breathed new life into the Fourteenth Amendment, and it resurrected the "sleeping Lazarus" of a Reconstruction civil rights law banning private acts of racial discrimination.[2] As Congress enacted new civil rights laws, the Court interpreted the new legislation liberally, fully consistent with the age-old principle of statutory construction that remedial legislation should be liberally construed.[3] Having argued the most important civil rights cases which came before the Court, "Mr. Civil Rights" Thurgood Marshall became the first black justice on the highest court of the land. In his judicial capacity, Justice Marshall continued his effort to make the American dream a reality for all citizens.

Unfortunately for the cause of civil rights, Justice Marshall's replacement on the Supreme Court was Judge Clarence Thomas, a Yale Law School graduate who was admitted under its affirmative action program.[4] In the intervening years, often with Justice Thomas casting the deciding vote, the Supreme Court has reverted to its pre-World War II civil rights mode. Put another way, instead of being the wall against the flood in the civil rights context, the Supreme Court has become the flood itself!

In this Article, we review Justice Thomas's jurisprudence in two areas: education and voting rights. We conclude that having crossed over and reaped the benefits of the civil rights bridges, Justice Thomas has largely burned the bridges that gave him safe passage.

II. THE EQUAL EDUCATION BRIDGE

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditure for education both demonstrate our recogni-

1. In *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1856), the Supreme Court virtually precipitated the Civil War. There, the Court held that Congress was powerless to prevent the spread of slavery into the new states and territories. *See id.* at 449-52. It also held that a black person could never be a citizen of the United States, observing that black Americans were "altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect." *Id.* at 407. The Supreme Court put an end to Congressional efforts to prevent racial discrimination when it struck down the Reconstruction-Era-Civil Rights Act. *See* The Civil Rights Cases, 109 U.S. 3, 25 (1883).

Finally, the Court gave a green light to racial segregation and repression when it handed down its infamous "separate but equal" doctrine in *Plessy v. Ferguson,* 163 U.S. 537, 550-52 (1896). The majority opinion rejected "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act [requiring segregation], but solely because the colored race chooses to put that construction upon it." *Id.* at 551.

2. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) (holding that 42 U.S.C. § 1982 applies to private and public discrimination).

3. 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, 3 SUTHERLAND ON STATUTORY CONSTRUCTION § 60:1, at 250 (7th ed. 2008).

4. *See* KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS 122 (2007).

> tion of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[5]

Those words are no less true today than they were fifty-six years ago.

The Supreme Court having sanctioned "separate but equal" state facilities, for the next half century, allowed "separate and unequal" to become the order of the day. The Southern states and many of the border states adopted laws requiring the segregation of schools.[6] Black school facilities were always inferior to those of white students. In many instances, there were no educational facilities for blacks; the all-white school boards built schools for white children but provided meager funds to black churches for the education of black children. Over a period of years, Thurgood Marshall and staff attorneys of the NAACP Legal Defense Fund, as well as cooperating local attorneys, devised and refined a strategy for the dismantlement of the "separate but equal" doctrine.[7] Their efforts culminated in the 1954 *Brown* case, involving school districts from Kansas, South Carolina, Virginia, and Delaware.

In *Brown*, the Court pointed out that its decision did not turn on the equality *vel non* of "tangible factors" such as buildings and curricula.[8] In the lead case, for example, the district court had found that the tangible factors were relatively equal.[9] The Supreme Court thus framed the question: "Does segregation of children in public schools, solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"[10]

In addressing the issue, the Court turned to two fairly recent precedents:

> In *Sweatt v. Painter*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views

5. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
6. *See, e.g.*, *id.* at 486 n.1 (describing statutes which permitted or required school segregation).
7. *See generally* RAWN JAMES, JR., ROOT AND BRANCH: CHARLES HAMILTON HOUSTON, THURGOOD MARSHALL, AND THE STRUGGLE TO END SEGREGATION 65-75, 217-35 (2010).
8. *Brown*, 347 U.S. at 492.
9. *Id.* at 492 n.9.
10. *Id.* at 493.

> with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[11]

The Court then cited approvingly the findings of the United States District Court for the District of Kansas:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[12]

Based on these authorities and findings, a unanimous Supreme Court concluded that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[13]

Nearly two decades after *Brown* was decided, and a few years after the Supreme Court abandoned the "all deliberate speed" formula for school desegregation in favor of a "desegregate now" approach,[14] the first major roadblock for school desegregation was erected in the case *San Antonio Independent School District v. Rodriguez*, where the Court held that education is not a fundamental right protected by the Constitution.[15] Therefore, the State of Texas was not required to equalize funding between its poor minority districts and its affluent white districts.[16] A year later, the Court

11. *Id.* at 493-94.

12. *Id.* at 494 (quotation marks omitted) (quoting Brief for Appellants at 8-9, *Brown*, 347 U.S. 483 (1954) (No. 1), 1952 WL 47265).

13. *Brown*, 347 U.S. at 495.

14. *See* Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).

15. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

16. Mr. Justice Marshall filed a vigorous dissent:

> The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside. The majority's decision represents an abrupt departure from the mainstream of recent state and federal and court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth. More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens.

Id. at 70-71 (Marshall, J., dissenting) (footnote omitted).

handed down its decision in *Milliken v. Bradley*, the Detroit School Case.[17] There, the Court forbade the inclusion of adjacent suburban school districts in a metropolitan school board's desegregation plan.[18]

As a law clerk to Justice Robert Jackson in 1952, William Rehnquist urged the Justice not to overturn *Plessy*'s "separate but equal" doctrine.[19] While Justice Jackson gave a deaf ear to this advice when he voted to overturn *Plessy,* Bill Rehnquist did not throw in his towel of dedication to *Plessy* after his appointment to the Supreme Court in 1971. But so long as Justice Marshall remained on the Court, the basic principles of *Brown* went largely unchallenged.[20]

With the abrupt resignation of Justice Marshall and President Bush's choice of Judge Thomas to replace him in 1991, Chief Justice Rehnquist found a bold and strident new ally in his mission to chip away at the underpinnings of *Brown* and ultimately to destroy its core.

In his first term on the Court, Justice Thomas wrote a concurring opinion expressing his rather strong view that under the Fourteenth Amendment, a state may continue to operate historically black colleges: "In particular,

17. Milliken v. Bradley, 418 U.S. 717 (1974).

18. *Id.* at 752-53. Again, Justice Marshall movingly dissented:

> In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court held that segregation of children in public schools on the basis of race deprives minority group children of equal educational opportunities and therefore denies them the equal protection of the laws under the Fourteenth Amendment. This Court recognized then that remedying decades of segregation in public education would not be an easy task. Subsequent events, unfortunately, have seen that prediction bear bitter fruit. But however imbedded old ways, however ingrained old prejudices, this Court has not been diverted from its appointed task of making 'a living truth' of our constitutional ideal of equal justice under law. *Cooper v. Aaron*, 358 U.S. 1, 20 (1958). After 20 years of small, often difficult steps towards that great end, the Court today takes a giant step backwards. Notwithstanding a record showing widespread and pervasive racial segregation in the educational system provided by the State of Michigan for children in Detroit, this Court holds that the District Court was powerless to require the State to remedy its constitutional violation in any meaningful fashion. Ironically purporting to base its result on the principle that the scope of the remedy in a desegregation case should be determined by the nature and extent of the constitutional violation, the Court's answer is to provide no remedy at all for the violation proved in this case, thereby guaranteeing that Negro children in Detroit will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past.

Id. at 781-82 (Marshall, J., dissenting).

19. In his infamous memorandum, Rehnquist forebodingly wrote:

> One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.
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> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed.

RICHARD KLUGER, SIMPLE JUSTICE 606 (1976) (quoting Memorandum from William H. Rehnquist to Justice Jackson).

20. Aside from *Rodriguez* and *Milliken,* Justice Marshall saw brakes imposed on *Brown* in his last public school desegregation case, *Board of Education v. Dowell,* 498 U.S. 237 (1991), where, in a 5-3 decision, the Court gave its stamp of approval for the dissolution of school desegregation orders even where the school system has not fully achieved the objectives of the desegregation plan. *See id.* at 249-51.

we do not foreclose the possibility that there exists 'sound educational justification' for maintaining historically black colleges *as such*."[21]

Missouri v. Jenkins[22] afforded Justice Thomas the first opportunity to fully express his disdain for *Brown*. The case dealt with the permissible remedies where liability for failure to desegregate has been clearly established. The district court, among other things, ordered the State of Missouri to fund salary increases for the instructional and noninstructional staff of the district and utilized student test scores as an indicator of whether the school district had dismantled its historically dual school system.[23] In a 5-4 decision, the Supreme Court held that the remedial relief was an abuse of the district court's discretion and reversed the lower court.[24]

Obviously, Justice Thomas's vote in *Jenkins* was crucial to the majority decision. In a concurring opinion, he wrote: "It never ceases to amaze me that the courts are so willing to assume that anything that is predominately black must be inferior."[25] He then called into question the central premise of *Brown*, that black students suffer psychological harm from segregation:

Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Public school systems that separated blacks and provided them with superior educational resources—making blacks "feel" superior to whites sent to lesser schools—would violate the Fourteenth Amendment, whether or not the white students felt stigmatized, just as do school systems in which the positions of the races are reversed. Psychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause. The judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of the social sciences.[26]

Justice Thomas's reasoning is refuted by the express words of *Brown*.[27]

In his *Missouri v. Jenkins* concurrence, Justice Thomas "became the first Supreme Court Justice to criticize *Brown* directly."[28] That criticism was echoed in two subsequent Supreme Court cases.

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21. United States v. Fordice, 505 U.S. 717, 748 (1992) (Thomas, J., concurring).
22. Missouri v. Jenkins, 515 U.S. 70 (1995).
23. *See id.* at 100-01, 103.
24. *See id.* at 100, 103.
25. *Id.* at 114 (Thomas, J., concurring).
26. *Id.* at 121.
27. Two quotations from *Brown* establish that Justice Thomas was plainly mistaken when he boldly asserts that "[s]egregation was not unconstitutional because it might have caused psychological feelings of inferiority." *Id.* The *Brown* court explicitly found that "[t]o separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954). The Court further wrote that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, [the finding that segregation has a detrimental psychological effect on black children] is amply supported by modern authority." *Id.* Moreover, notwithstanding Justice Thomas's protestations to the contrary, the *Brown* Court expressly relied on the social sciences in overturning *Plessy. See id*. at 494 n.11.

Grutter v. Bollinger raised the issue of affirmative action in higher education.[29] The plaintiff was a white citizen of Michigan who sought and was denied admission to the prestigious University of Michigan Law School, a state institution. She brought an action against the law school, alleging that in violation of the Equal Protection Clause of the Fourteenth Amendment, her application was rejected because of the law school's use of race in its admissions policies. However, a majority of the Supreme Court held that because the challenged program did not require the admission of a specified percentage of minority law students, and it worked only to ensure a "critical mass" of underrepresented minorities, it was narrowly tailored to serve a compelling state interest and thus passed constitutional muster.[30] The 5-4 opinion was written by Justice Sandra Day O'Connor.

In a lengthy dissent, Justice Thomas protested that "the Court insists on radically expanding the range of permissible uses of race to something as trivial (by comparison) as the assembling of a law school class."[31] He argued that there was no compelling state interest in maintaining a public law school at all, more less an elite one.[32] Eschewing the Court's reliance on "social science evidence," he cited "growing evidence" that education in a racially diverse environment "actually impairs learning among black students."[33] He found no constitutional fault in the use of "legacy" admissions[34] or in the "many other kinds of arbitrary admissions procedures."[35] In perhaps the unkindest cut of all, the doubting and dissenting Justice Thomas wrote:

> The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. . . . While these students may graduate with law degrees, there is no evidence that they have received a qualitatively better legal education (or become

28. Scott D. Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 S.U. L. REV. 43, 56 (1997).

29. Grutter v. Bollinger, 539 U.S. 306 (2003). On the same day that *Grutter* was decided, the Court also handed down *Gratz v. Bollinger*, 539 U.S. 244 (2003). By a 6-3 vote, the Court struck down the University of Michigan's undergraduate admissions program because it automatically gave twenty points to every underrepresented minority student. *Id.* at 255, 275-76.

30. *Grutter*, 539 U.S. at 334-35.

31. *Id.* at 357 (Thomas, J., concurring in part and dissenting in part).

32. This argument is uncomfortably reminiscent of the post-*Brown* position of the Prince Edward County School Board, which elected to close the schools rather than to desegregate them. Griffin v. County Sch. Bd., 377 U.S. 218, 221 (1964).

33. *Grutter*, 539 U.S. at 364 (Thomas, J., concurring in part and dissenting in part).

34. *Id.* at 368. Legacy admissions, by their very nature, are comparable to the despicable "grandfather clauses" used to allow illiterate whites to vote while subjecting blacks to literacy tests.

35. *Id.*

> better lawyers) than if they had gone to a less "elite" law school for which they were better prepared.[36]

Notably, the Justice failed to cite any evidence in support of these statements.

Twin landmark cases, *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*,[37] had the potential of affording Justice Thomas and his three compatriot Justices the opportunity to completely burn down the *Brown* bridge.

At issue were voluntary school desegregation plans in Seattle, Washington, and Jefferson County, Kentucky. Six years before the decisions were announced, Jefferson County was relieved from a court order requiring it to implement a school desegregation plan. Its schools had been segregated by law. Following the implementation of the plan over a period of twenty years, white flight had resulted in a reduction of the white student population to 36%. A third of those students were enrolled in predominantly white schools. After the system was declared unitary in 2000, the school board elected to continue assigning students based on race in order to achieve racial balance in the schools.

The schools of Seattle were never officially segregated. Nonetheless, it implemented a system which allowed all high school students to rank the schools of their choice; if a school was over-subscribed, race was used as one of the "tiebreakers" in an effort to keep the schools within range of the overall black-white ratio of total student population.[38]

Justice Thomas joined the plurality of Chief Justice Roberts (with Justice Scalia and Justice Alito) which opined that race can never be used in determining which public schools students may attend.[39] In his concurrence, Justice Thomas limited the meaning of the word segregation to the separation of students on the basis of race *pursuant to a governmental policy*.[40] Hence, according to his definition, "resegregation is not occurring in Seattle or Louisville" because the segregated schools are not the result of official action by the school board.[41] He defined "racial imbalance" as "the failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large."[42] "Racial imbal-

36. *Id.* at 372.
37. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).
38. *Id.* at 712.
39. *See id.* at 732-33 (plurality opinion).
40. *Id.* at 749 (Thomas, J., concurring).
41. *Id.* at 748.
42. *Id.* at 749 (citing Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982)). Contrary to the impression created by Justice Thomas, the *Washington* Court did not define racial imbalance. Rather, it referred to a Seattle School Board resolution defining "'racial imbalance' as 'the situation that exists when the combined minority student enrollment in a school exceeds the districtwide combined average by 20 percentage points, provided that the single minority enrollment . . . of no school will exceed 50 percent of the student body.'" *Washington*, 458 U.S. at 460 (quoting Seattle Sch. Dist. No. 1 v. Washington, 473 F. Supp. 996, 1006 (W.D. Wash. 1979)).
The case was an earlier iteration of *Parents Involved.* The "extraordinary question" was "whether an

ance," in his view, "is not segregation."[43] It is synonymous with "integration."[44] Relying on arguments of the segregation lawyers in *Brown,* Justice Thomas boldly asserted that there are no measures by which invidious racial discrimination may be distinguished from benign racial classifications: "It is the height of arrogance for Members of this Court to assert blindly that their motives are better than others."[45] He declared that "[j]ust as school districts lack an interest in preventing resegregation, they also have no present interest in remedying past segregation."[46] In sum, it is Justice Thomas's judgment that the Supreme "Court does not sit to 'create a society that includes all Americans' or to solve the problems of 'troubled inner city schooling.'"[47]

Fortunately, Justice Thomas and his like-minded colleagues were unable to persuade a fifth Justice to wholeheartedly embrace their constitutional dogma. Justice Kennedy agreed with them that the Seattle and Jefferson County plans violated the Fourteenth Amendment, but he found that their approach and its implications are "inconsistent . . . with the history, meaning, and reach of the Equal Protection Clause."[48] He opined that diversity is a compelling state interest which school boards may pursue in appropriate circumstances.[49] Implicitly addressing pronouncements in Justice Thomas's concurrence, he wrote:

The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. . . . School districts can seek to reach *Brown*'s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.[50]

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elected local school board [namely, the Seattle School Board] may use the Fourteenth Amendment to *defend* its program of busing for integration from attack by the State." *Id.* at 459.

Even though the Seattle schools were never officially segregated, the school board in 1978 adopted a "Seattle Plan" for what Justice Thomas would characterize as racially imbalanced schools. The Plan involved extensive busing, among other things. Disgruntled parents appealed to the legislature, and Initiative 350 was placed on the ballot in an effort to preclude desegregative busing and other features of the Seattle Plan. The Initiative was easily approved by the voters of Washington. *See id.* at 461-63.

The Supreme Court, in a decision by Justice Blackmun, affirmed the three-judge court's holding that the Initiative violated the Fourteenth Amendment. *Washington*, 458 U.S. at 487. The Court thereby gave its imprimatur to what Justice Thomas so roundly condemns: a school board's voluntary decision to use busing as a means of remediating a racial imbalance in its schools.

43. *Parents Involved*, 551 U.S. at 749 (Thomas, J., concurring).

44. *Id.* at 750 n.2.

45. *Id.* at 779 n.27; *see also id.* at 778 n.27 ("It is no answer to say that these cases can be distinguished from *Brown* because *Brown* involved invidious racial classifications . . . . The segregationists in *Brown* argued that their racial classifications were benign.").

46. *Id.* at 751.

47. *Id*. at 766 n.14.

48. *Id*. at 782-83 (Kennedy, J., concurring).

49. *Parents Involved*, 551 U.S. at 787-89.

50. *Id.* at 787-88.

Further, Justice Kennedy sanctioned the use of race-conscious remedies in a general way to provide equal educational opportunity to all students "without treating each student in different fashion solely on the basis of a systematic, individual typing by race."[51] He suggested as constitutionally sound approaches the "strategic site selection of new schools; drawing attendance zones with general recognition of the [racial composition] of neighborhoods;" targeted student and faculty recruitment, and "tracking enrollment[]" and performance "statistics by race."[52]

III. WHERE WE ARE TODAY

It has been almost twenty years since Clarence Thomas was appointed as the 106th Justice of the United States Supreme Court in October 1991 to fill the seat vacated by Justice Thurgood Marshall. One month after Justice Thomas was appointed, another prominent jurist—Judge A. Leon Higginbotham Jr. of the Third Circuit Court of Appeals, often touted as the heir-apparent to Justice Marshall—penned his now infamous open letter to the newly seated Thomas.[53] Judge Higginbotham began by cautioning Justice Thomas to understand the history that landed him in his place of prestige and power:

> When I think of your appointment to the Supreme Court, I see not only the result of your own ambition, but also the culmination of years of heartbreaking work by thousands who preceded you. I know you may not want to be burdened by the memory of their sacrifices. But I also know that you have no right to forget that history.[54]

To ensure that Justice Thomas moved forward with a fresh recall of the civil rights battles that had made his success possible, Judge Higginbotham provided a primer on the premier civil rights organizations and their lawyers who were on the frontline of major civil rights legal victories, particularly in the area of education. He briefly summarized the struggle for equality at the ballot box and identified the cases that enabled Thomas to live in an integrated, upscale Virginia neighborhood with his legally wed white wife.[55]

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51. *Id*. at 789.

52. *Id*.

53. A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992).

54. *Id*. at 1007.

55. Two years later, in 1994, Judge Higginbotham authored another piece on Justice Thomas, responding in part to black conservative critics who questioned the judge's authority to publicly chide Thomas as he had. *See* A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 Hastings L.J. 1405 (1994) [hereinafter *Retrospect*]. One commentator charged:

> Judge Higginbotham demands something from this Black Justice that he does not demand from a White Justice. He would allow a White Justice to choose to be liberal or conservative, average or great, pro business or pro people, but deny to Justice Thomas the right to choose his stance on issues affecting the helpless, the weak, and the out-numbered.

This section expands upon the lessons Judge Higginbotham attempted to impart to Justice Thomas in the area of voting rights. It is directed not specifically to Justice Thomas, but to those who might study him and attempt to understand his racial duality. For as Judge Higginbotham assessed only two years into Thomas's tenure on the Court, "[I]t would be futile for anyone to write another open letter to Justice Thomas, asking him to be fair."[56]

A. The Voting Rights Act of 1965

One would be hard pressed to find a more fitting expression for our pluralist democracy than the motto *e pluribus unum*—out of many, one. Our founding fathers envisioned a nation designed to be sensitive to differences in ethnicity and class and also one that could employ these diverse interests in its dynamic system of governance and representation. The history of our nation, however, includes the harsh realities of discrimination that negatively affected large segments of our population. The ugly and prolonged period of racial disenfranchisement between 1877 and 1965 is deplorable both due to the denial of constitutional rights and the maintenance of a system of governance that remained largely unresponsive to the concerns of minority citizens.

The Voting Rights Act of 1965 has been instrumental in combating our sad record of racial disenfranchisement. It is perhaps one of the best examples of this country's commitment to improving our democracy. The Act has been extended on numerous occasions, including in 1970, 1975, 1982, and 1992.[57] The congressional review of the efficacy of the Voting Rights Act over the decades renders it most likely the most studied and debated civil rights measure on this nation's books. In 2006, in light of historical experience and ample evidence of the present effects of long-term discrimination in voting, Congress again found that the Voting Rights Act remains an effective and necessary tool in the ongoing effort to guarantee an equal vote to all Americans, regardless of race, and reauthorized the Act for another twenty-five years.[58]

Shortly after the bill was signed into law by President George W. Bush, a legal challenge to one of its key provisions, § 5, was launched by conservatives intent on having the Act declared unconstitutional. Section 5 requires some states with a history of discrimination, primarily states in the South, to obtain federal approval prior to implementing any changes to their

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Id. at 1413.

56. *Id.* at 1433.

57. *See* Voting Rights Act of 1965, 42 U.S.C. § 1971 (2006).

58. The 2006 reauthorization of the Voting Rights Act extended each of the expiring provisions for another twenty-five years. The language assistance provisions of the act were extended without change. The remaining provisions were extended with revision, with the exception of the provision authorizing federal examiners, which was eliminated altogether. *See id.*

election laws or practices.[59] In *Northwest Austin Municipal Utility District Number One v. Holder*, a small utility district in Texas argued that it should be released from the "preclearance" requirement, or alternatively, if it did not qualify for "bailout," then § 5 should be declared unconstitutional.[60]

The case moved quickly through the courts and ultimately reached the Supreme Court in the spring of 2009. As has become his *modus operandi*, Justice Thomas sat through the oral argument displaying zero intellectual curiosity in this landmark constitutional challenge of the Act that has been characterized as the "crown jewel"[61] of the Civil Rights Movement. Just weeks before the case was argued, the *New York Times* reported that Justice Thomas had not questioned any party before the Supreme Court since February 2006.[62] If Justice Thomas subscribes to the *New York Times*, he either missed the article or did not find it relevant to the weighty decisions on the Court's calendar that month.[63] Later that year, speaking at the University of Alabama, Thomas reportedly suggested that questioning from the bench was pointless[64] and "scoffed at the idea that the [J]ustices try to use questions to influence the opinions of fellow members of the court."[65]

As the case was being deliberated, at least one journalist issued his own open letter of sorts to Justice Thomas. Colbert I. King, of the *Washington Post*, appealed to Thomas based, not on the history of those whose sacrifices paved the way for his achievements, but on his personal history. Quoting Thomas's autobiography, for which he was awarded an astonishing $1.5 million,[66] King reminded Thomas of his grandfather's words: "Don't shame me. And don't shame our race."[67] Justice Thomas's grandfather, Myers Anderson, whom Thomas called "Daddy," practically raised him but did not

59. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973c (2006).

60. Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2508 (2009) [hereinafter NAMUDNO].

61. *See* Ronald Reagan, President of the U.S. of Am., Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), http://www.presidency.ucsb.edu/ws/index.php?pid=42688 ("[T]he right to vote is the crown jewel of American liberties, and we will not see its luster diminished. The legislation that I'm signing . . . demonstrates America's commitment to preserving this essential right.").

62. Adam Liptak, *Rare Glimpse of Thomas, From Bench to Den*, N.Y. TIMES, Apr. 14, 2009, at A11.

63. *See, e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658 (2009); Horne v. Flores, 129 S. Ct. 2579 (2009); Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009); Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009); Supreme Court of the U.S., Arguments Transcripts, http:// www.supremecourt.gov/ oral_arguments/ argument_transcripts.aspx (last visited May 12, 2010).

64. *See* Jay Reeves, *Clarence Thomas to Other Supreme Court Justices: Be Quiet*, HUFFINGTON POST, Oct. 23, 2009, http:// www.huffingtonpost.com/ 2009/ 10/ 24/ clarence-thomas-to-other-_n_332464.html ("[Justice Thomas] criticized his colleagues . . . for badgering attorneys rather than letting them speak during oral arguments [while simultaneously maintaining that] he and the other eight justices virtually always know where they stand on a case by reading legal briefs before oral arguments.").

65. *Id*.

66. *See* Frank Rich, Op-Ed., *Nobody Knows the Lynchings He's Seen*, N.Y. TIMES, Oct. 7, 2007, § 4, at 14.

67. Colbert I. King, Editorial, *A Voting Rights Reminder for Clarence Thomas*, WASH. POST, May 30, 2009, at A19 (quoting CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007)).

live to see him ascend to the bench of the highest court in the land.[68] King pondered what Mr. Anderson would think of his grandson and stressed that "[i]t would be a crying shame if a black man has a hand in tearing the heart out of the Voting Rights Act."[69]

B. A Crying Shame

The crying shame came not in the defeat of the Voting Rights Act—eight Justices, invoking the time-honored doctrine of constitutional avoidance, refused to reach the constitutional claim advanced in NAMUDNO.[70] Justice Thomas, however, felt compelled to weigh in, trumpeting his view "that § 5 exceeds Congress' power to enforce the Fifteenth Amendment" and was thus unconstitutional.[71]

Justice Thomas's reasoning is almost irrelevant. In his retrospective of Thomas, Judge Higginbotham recounted the assessment of Justice Thomas by his daughter, a clinical psychologist, and several of her colleagues:

> Though, at times you can get some insights on Clarence Thomas merely by looking at his behavior as expressed through his judicial opinions, the stilted language used in judicial opinions often does not reveal some of the underlying motivations in the author's mind. Of course, the very fact that he so consistently votes against the best interest of African-Americans reveals a great deal about his sense of racial identity and his lack of racial self-esteem. Those votes suggest that there are many aspects of racial self-hatred that sometimes trigger the perverse conclusions he reaches.[72]

Justice Thomas's apparent "lack of racial self-esteem" is palpable in his perverse reliance upon *United States v. Cruikshank* for the proposition that the states or the people reserve all powers not conferred upon the federal government by the Constitution.[73] The text of the Tenth Amendment to the Constitution enunciates the same principle: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[74] Granted, *Cruikshank* is cited only once, and it is not indispensable to Thomas's equally odious conclusion that the Voting Rights Act has served its purpose. Still, legal scholars have dubbed "[t]he Supreme Court's decision in . . . Cruikshank [as one that] paralyzed the federal government's attempt to protect black citi-

68. *Id*.
69. *Id*.
70. *See* NAMUDNO, 129 S. Ct. at 2513.
71. *Id*. at 2517 (Thomas, J., concurring in the judgment in part and dissenting in part).
72. *Retrospect*, *supra* note 55, at 1427-28.
73. *See* NAMUDNO, 129 S. Ct. at 2519 (Thomas, J., concurring in the judgment in part and dissenting in part).
74. U.S. CONST. amend. X.

zens by punishing violators of their civil rights. The decision, 'in effect, shaped the Constitution to the advantage of the Ku Klux Klan.'"[75]

When Ronald Reagan signed the 1982 extension of the Voting Rights Act, he acknowledged that "there are differences over how to attain the equality we seek for all our people."[76] Would Justice Thomas find it legitimate to cite *Plessy v. Ferguson*[77] in support of Reagan's proposition? Is the "separate but equal" doctrine to Justice Thomas just another innocuous conception of equality? The renowned late historian John Hope Franklin provided some insight into the mind of Justice Thomas while chair of the Equal Employment Opportunity Commission:

Thomas made his position clear on affirmative action and other possible sources of government relief when he said that it was just as "insane" for blacks to expect relief from the federal government for years of discrimination "as it is to expect a mugger to nurse his victim back to health."[78]

On the merits of the NAMUDNO, Justice Thomas considered the prophylactic requirements of § 5 as "[p]unishment for long past sins."[79] In his view, the lack of "evidence that public officials stand ready, if given the chance, to again engage in concerted acts of violence, terror, and subterfuge in order to keep minorities from voting" meant that "§ 5 is no longer constitutionally justified," which in turn "is not a sign of defeat[but rather] an acknowledgment of victory."[80] In short, the Constitution applies only to the precise set of facts that gave rise to any particular provision. And although Justice Thomas did not say so, others intimated that the election of President Barack Obama is proof positive that we have become a "post-racial" society.[81] But Justice Thomas rejected the notion that discriminatory techniques advance with time sufficient to justify § 5 relief.[82] Justice Thomas concedes that "voter discrimination is [not] extinct."[83] Yet in his view, the govern-

75. W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations*, 48 HOW. L.J. 1, 50 (2004) (quoting Leonard W. Levy, *Cruikshank, United States v: 92 U.S. 542 (1876), in* 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 527, 527 (Leonard W. Levy et al. eds., 1986)).

76. Reagan, *supra* note 61.

77. *See supra* note 1.

78. JOHN HOPE FRANKLIN, THE COLOR LINE: LEGACY FOR THE TWENTY-FIRST CENTURY 15 (1993) (quoting Milton Coleman, *Administration Asks Blacks to Fend for Themselves*, WASH. POST, Dec. 5, 1983, at A1). Professor Franklin added, "One can only wonder if Mr. Thomas, as chairman of the federal government's EEOC, regarded himself as playing the role of the mugger!" *Id*.

79. NAMUDNO, 192 S. Ct. at 2525 (Thomas, J., concurring in the judgment in part and dissenting in part).

80. *Id*.

81. *See, e.g.*, THE POLITICAL PARTICIPATION GROUP, NAACP LEGAL DEF. & EDUC. FUND, INC., "POST-RACIAL" AMERICA? NOT YET: WHY THE FIGHT FOR VOTING RIGHTS CONTINUES AFTER THE ELECTION OF PRESIDENT BARACK OBAMA 5 (2009), *available at* http:// www.naacpldf.org/ Post_Racial_America-Not_Yet/ Post-Racial-America-Not-Yet.pdf ("[T]he *MUD* plaintiff urged the Court to strike down Section 5 of the Voting Rights Act, citing, in part, President Obama's election in arguing that the Act was no longer constitutional.").

82. NAMUDNO, 129 S. Ct. at 2526 (Thomas, J., concurring in the judgment in part and dissenting in part) ("[E]vidence of 'second generation barriers' cannot compare to the prevalent and pervasive voting discrimination of the 1960's.").

83. *Id*.

ment is impotent to aid blacks and other minorities who may suffer some, but not enough, discrimination at the ballot box—the cornerstone of our democracy.

C. Uncle Thomas? Nigger Please!

In his rare appearance before a group of Washington, D.C. high school students, Justice Thomas confessed:

"I tend to be morose sometimes" . . . .

"I am rounding the last turn for my 18th term on the court," he added, but his work—"this endeavor," he called it, "or, for some, an ordeal"—has not gotten easier. "That's one thing about this job," he said. "You get a little tired."[84]

Justice Thomas's expression of weariness might evoke compassion if one forgets his characterization of civil rights warriors as "bitch[ing], moan[ing], . . . and whin[ing]" in defense of anti-discrimination principles.[85] Thomas continued to reveal that "[s]ometimes, when [he] get[s] a little down," he retreats to his den, where he surfs the Internet for inspirational speeches and reminisces about his childhood.[86] One might interpret Thomas's statements as an indication of abject loneliness. But when one who has benefitted from the immeasurable suffering and countless sacrifices of other minorities denies those same benefits to the next generation, it is difficult to find empathy. In the book (which was not without controversy upon publication in 2002) *Nigger: The Strange Career of a Troublesome Word*, Professor Randall Kennedy observed the term *Head Nigger in Charge* (HNIC) "has historically denoted a black person who is in command of a given situation only thanks to the backing of whites."[87] Perhaps Justice Thomas will find continued comfort in the knowledge that he remains the HNIC on the Supreme Court with the power, whether in the majority on a given opinion or not, to influence—as only he does—racial views in America.

IV. CONCLUSION

Hence, while the torch has been ignited on the *Brown* bridge by Justice Thomas and his colleagues, and the flame is constantly being fanned, the bridge has not yet fallen. Justice Kennedy's concurrence in *Parents Involved* is the only fire extinguisher we now possess.

84. Liptak, *supra* note 62.
85. MERIDA & FLETCHER, *supra* note 4, at 120.
86. Liptak, *supra* note 62.
87. RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD 126 (2002). Randall Kennedy clerked for Justice Thurgood Marshall for the 1983–1984 term.