

# THE TRUTH ABOUT CLARENCE THOMAS AND THE NEED FOR NEW BLACK LEADERSHIP

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It has been almost nine years since Associate Justice Clarence Thomas was confirmed as the 106th Justice of the United States Supreme Court. During that time, he has come under sharp and unrelenting criticism from almost all segments of the media.<sup>1</sup> Indeed, some of his harshest attacks have come from the civil rights community, which one would have expected to welcome the ascent of a black American to the pinnacle of his profession. For example, at the 1995 convention of the National Association for the Advancement of Colored People ("NAACP"), Justice Thomas was repeatedly called a "pimp" and a "traitor."<sup>2</sup> Retired U.S. Court of Appeals Judge A. Leon Higginbotham, whom some in the civil rights community had hoped would succeed the late Justice Thurgood Marshall on the Supreme Court, entered the fray in the years prior to his death, arguing in a recent speech that Justice Thomas is "dragging blacks back to the oppression of the past."<sup>3</sup>

Is all this part of some personal vendetta against Justice Thomas? Maybe in part, but far more is at work here. Clearly, the debate about Justice Thomas (which has almost uniformly been one-sided and mean-spirited) involves more than a referendum on the man's character and jurisprudential views. Simply put, the relentless assaults on the Justice are part and parcel of a larger struggle for the hearts and minds of black America, a veritable last gasp of those who have traditionally viewed themselves as leaders of the black community to maintain their hold on power and of the liberal Democrats to maintain control over their core constituency.

For many, Justice Thomas personifies the rise of black conservatism in America. The symbolism is inevitable, for Justice Thomas's seat on the Nation's High Court makes him not only one of the most powerful people in America, but also the highest ranking black legal officer in the country. As the standard-bearer for black conservatives, it is only natural for civil rights leaders and other Thomas

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<sup>1</sup> See, e.g., Jack E. White, *Uncle Tom Justice*, TIME, June 26, 1995, at 36.

<sup>2</sup> See Jeff Jacoby, *How the Right Is Demonized*, B. GLOBE, Dec. 21, 1995, at 19.

<sup>3</sup> *Speech of Hon. A. Leon Higginbotham*, New York University (Nov. 1995) (broadcast nationally on C-SPAN).

critics to single him out for denunciation because the continued spread of conservative ideas in the black community poses a direct threat to the status quo in that community and has the potential of filling the leadership vacuum that is widely perceived to exist there.

Given the broad public policy implications of the relentless assaults on the Justice, and given that the Justice is viewed as representing the cause of black conservatism, it is appropriate, as we approach the ninth anniversary of his nomination and confirmation, to review the man's record on the Court to determine whether the charges leveled against him are well-founded. After a thorough review of Justice Thomas's opinions and voting record on the Supreme Court, it is clear that the attacks are unjustified. As any impartial review of his record reveals, Justice Thomas is an influential justice of great ability who, by his cogent writings and consistent vision of the Constitution, has carved out an important place for himself on the Court and in American history. The Justice, therefore, should be a source of great pride to black Americans and also a source of hope that the failed policies of the past will be replaced by a future in which black Americans, freed from the restraints of victimology and poverty, will be able to realize their full potential in America.

### I. THE JURISPRUDENCE OF JUSTICE THOMAS

Much has been written in the press about the votes Justice Thomas has cast in his eight years on the Supreme Court. All but a few of the press accounts are exercises in political advocacy, and usually *ad hominem* assaults on Justice Thomas, not neutral legal analysis and fair, objective reporting. More than any other figure in Supreme Court history, Justice Thomas has been consistently singled out for negative treatment in the media, and there seems to be no end in sight.

The press treatment of the Justice's voting record falls into three broad categories. The most common position taken in the media accounts is that Justice Thomas is merely a puppet of Justice Antonin Scalia, a conservative jurist who, like Thomas, served in the Reagan Administration before becoming a judge.<sup>4</sup> This persistent criticism comes from Thomas critics at both ends of the political spectrum.<sup>5</sup> The next class of Thomas-bashing can only be described as a form of "psychobabble" of the worst kind: the Justice decides Supreme Court

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<sup>4</sup> See, e.g., Bob Cohn, *Hunkering Down for Battle*, NEWSWEEK, Nov. 14, 1994, at 54.

<sup>5</sup> See Joan Biskupic, *Scalia, Thomas Stand Apart on the Right; Supreme Court Conservatives Challenge Majority's Views of Law*, WASH. POST, June 24, 1994, at A1 (citing Bruce Fein, a former Reagan Administration lawyer, and noted liberal constitutional scholar Georgetown law professor Louis Seidman as agreeing that "Thomas is basically in Scalia's pocket") [hereinafter "Biskupic, *Scalia, Thomas Stand Apart*"].

cases, we are told, simply out of a quest for revenge against the groups that opposed his nomination to the Court.<sup>6</sup> Finally, and more disturbingly, the Justice is increasingly criticized on the ground that he holds views that no black person who is “really black”—that is, no black person who does not suffer from “racial self-hatred”—could honestly hold.<sup>7</sup>

These criticisms share in common the notion that Justice Thomas’s views are not to be taken seriously because, for one reason or another, they are not the product of independent thought and personal conviction. Instead, these critics charge, his views are merely those of a particular white man (Justice Scalia) or of the stereotypical “white man” (which critics suggest is a white supremacist), or they are the product of the Justice’s supposed desire for revenge against various groups that opposed his nomination to the Court. In either case, Justice Thomas simply does not count, and his arguments and views need not be—and, therefore, are not—considered and debated fairly and on the merits.

The view that Justice Thomas’s opinions and votes on the Court are to be ignored and marginalized was taken to its lawless conclusion in a recent law review article contending that lower courts should ignore any Supreme Court precedent in which he cast the deciding vote.<sup>8</sup> Although that sensationalistic article is hardly a serious work of legal scholarship, it is noteworthy as an illustration of a much broader point—that the attacks on Justice Thomas, though presented as criticisms of the man and his jurisprudence, reflect nothing more than fundamental disagreement with larger forces the Justice represents or is perceived to represent. Among these forces are the Supreme Court’s (and the Nation’s) recent drift to the right of center and the emergence of a strong conservative voice within the black community.<sup>9</sup>

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<sup>6</sup> See, e.g., Neil A. Lewis, *2 Years After His Bruising Hearing, Justice Thomas Can Rarely Be Heard*, N.Y. TIMES, Nov. 27, 1993, at § 1, p.7 (suggesting that the “resentments” of Justice Thomas “might figure in his jurisprudence”); Jeff Toobin, *Doubting Thomas*, THE NEW YORKER, Sept. 27, 1993 (arguing that the Justice’s votes are “guided to an unusual degree by raw anger” and lie at the “heart of Thomas’s strategy for striking back at his liberal critics”).

<sup>7</sup> See, e.g., White, *supra* note 1, at 36 (finding it “maddening” that a black man could hold views like Justice Thomas’s and calling him “the scariest of all hobgoblins” based on those views).

<sup>8</sup> See Mark V. Tushnet, *Clarence Thomas: The Constitutional Problems*, 63 GEO. WASH. L. REV. 466 (1995).

<sup>9</sup> See, e.g., Juan. Williams, *Thomas and The Isolation Of the Liberal Establishment*, WASH. POST, Sept. 15, 1991, at C1 (“[T]he entire Clarence Thomas episode illustrates the degree to which representatives of organized labor, of black interest groups, of women’s organizations—much of the American Left, in fact—have lost their influence over mainstream thinking.”); E.J. Dionne, Jr., *Schism in Black Community Brought to the Bar; Focus Sharpened on Schism in Black Community*, WASH. POST, July 4, 1991, at A1 (“The nomination of Clarence Thomas to the Supreme Court has underscored the diversity

Naturally, there is room for reasonable differences of opinion as to the proper resolution of Supreme Court cases and as to the types of policies that will promote black progress and empowerment. Contrary to the black leadership's ruthless attempts to silence those within the black community who disagree with the positions and policies it deems orthodox, debate on those subjects is to be welcomed. It is most unfortunate, however, that Justice Thomas—who is, by any objective measure, an influential jurist of extraordinary ability and competence—is made to be the “whipping boy” of those who find themselves on the losing side of that debate in the courts, in the legislatures, and in the public policy arena.

An honest review of his work product on the Court proves that each of the received criticisms of Justice Thomas is patently wrong. He is a fiercely independent person and thinker who decides cases on the basis of their legal merit, as he perceives it, and not for any ulterior motive. Far from hating himself and other black people on account of race, his speeches and writings on the Court manifest a genuine concern with the welfare of black America and a rejection of well-intentioned, but nonetheless misguided policies reflexively advocated by the black orthodoxy and by liberals that have arguably impeded the progress of blacks. His writings and voting record on the Court, which are usually distorted or simply ignored by Thomas critics, make any other view untenable, as explained below.

#### *A. Myth #1: Justice Thomas as Justice Scalia's Puppet*

Although it has been argued that Justice Thomas has “become Justice Antonin Scalia's automatic second vote,”<sup>10</sup> that criticism is plainly inaccurate and unfair. It is true that the two Justices usually vote together. In the 1997-1998 Court Term, for example, Justices Thomas and Scalia voted together 93% of the time.<sup>11</sup> Their high rate of agreement does not, however, prove or even suggest that Justice Thomas merely follows Justice Scalia's lead.

In their crusade to discredit Justice Thomas, critics fail to mention two salient facts that refute their contention that Justice Thomas merely

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of viewpoints that exists in America's black community, giving new visibility to the nation's black conservatives and highlighting a century-old debate among black intellectuals over the best path to political power and economic success.”)

<sup>10</sup> Bob Cohn, *Hunkering Down for Battle*, NEWSWEEK, Nov. 14, 1994, at 54.

<sup>11</sup> See Marcia Cole, *OK, Let's All Go to the Right: A Rare Consensus and Clear Conservatism Characterized the Court's 1997-1998 Term*, NAT'L L.J., Aug. 10, 1998, at B7 [hereinafter “Cole”]; see also Joan Biskupic, *Court's Conservatives Make Presence Felt; Reagan Appointees Lead Move Rightward*, WASH. POST, July 2, 1995, at A1 (stating that Justices Scalia and Thomas voted together in 90% of the cases during the 1994-95 term).

follows Justice Scalia. First, such high rates of agreement are commonplace on the Supreme Court. For example, during the same Term that Justices Thomas and Scalia agreed 93% of the time, President Clinton's two appointees to the Court, Justices Ruth Bader Ginsburg and Stephen G. Breyer, agreed 86% of the time.<sup>12</sup> Also, in Justice Anthony M. Kennedy's first term on the Court, he voted with Chief Justice William H. Rehnquist 93% of the time.<sup>13</sup> Curiously, however, Justices Breyer and Kennedy are not dismissed as mere "followers" of Justice Ginsburg and the Chief Justice, respectively, despite their similarly high rates of agreement.

The selectivity with which that criticism is leveled is more than simply curious when placed in historical context. In fact, it could be argued that there is a hint of racial prejudice lurking behind the criticism that Justice Thomas blindly follows Justice Scalia in deciding cases. Only two blacks have served on the Nation's High Court—Justice Thomas and the late Justice Thurgood Marshall. Both Justices were men of great accomplishment and strong conviction, yet both have been dismissed as merely taking their lead from white colleagues on the Court. Justice Marshall, despite his many achievements, was privately referred to by law clerks at the Supreme Court "as 'Mr. Justice Brennan-Marshall' for his pattern of voting with [Justice] William Brennan."<sup>14</sup> Of course, in spite of their high rates of agreement with each other (which averaged 94.3% from 1980-89 and stood at an incredible 100% during the 1984 and 1988 Terms),<sup>15</sup> Justice Marshall was not a puppet of Justice Brennan. The accusation is no more apt when directed against Justice Thomas.

Second, the usual measure of agreement among Justices is deceptively high because it looks only at the bottom line—the result for which the Justice voted—without considering the Justices' articulated rationales for reaching that result.<sup>16</sup> The Court's 5-4 decision in *United States v. James Daniel Good Real Property*,<sup>17</sup> a case in which Justices Thomas and Scalia are viewed as in agreement, illustrates how deceptive statistical rates of agreement can be. In *Good Real Property*, the Court held that, as a general matter, the Due Process Clause requires notice and a hearing before the Government may seize real

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<sup>12</sup> See *id.*

<sup>13</sup> See Joan Biskupic, *New Term Poses Test For Alliance At Center of Conservative Court; Justices Gather Amid Campaign That May Limit Reagan-Bush Legacy*, WASH. POST, Oct. 4, 1992, at A12; see also Cole, *supra* note 11 (stating that Justices Rehnquist and Kennedy voted together in 92% of the cases during the 1997-98 term).

<sup>14</sup> D. Price, *Twisting Thomas*, MEDIA CRITIC, Winter 1996, at 37.

<sup>15</sup> See *id.*

<sup>16</sup> See Price, *supra* note 14, at 37.

<sup>17</sup> 510 U.S. 43 (1993).

property through civil forfeiture proceedings. Justices Thomas and Scalia dissented, but on close examination, the written explanations given for their respective votes reveals substantial disagreement between them, differences that the statistics failed to capture.

Justice Scalia joined the Chief Justice's dissenting opinion, which vigorously argued that due process did not require any process at all based on a line of 19th century cases upholding *ex parte* seizures of real property in satisfaction of delinquent tax obligations.<sup>18</sup> To them, the Due Process Clause simply does not impose procedural requirements for civil forfeiture of real property, whether or not the person whose property is declared forfeit has been convicted of a crime, presumably because at common law the property itself was viewed as the "wrongdoer" despite the guilt or innocence of the property owner.

Justice Thomas, by contrast, wrote a separate dissenting opinion resting on much narrower grounds than those advanced by the Chief Justice and Justice Scalia. Justice Thomas expressed "sympath[y]" for the majority's "stress upon the protection of individuals' traditional rights in real property," which he viewed as "central to our heritage."<sup>19</sup> He also indicated that "like the majority," he is "disturbed by the breadth of new civil forfeiture statutes," which he viewed as "so broad that [they] differ[] not only in degree, but in kind, from [their] historical antecedents."<sup>20</sup> Unlike the Chief Justice and Justice Scalia, who gave controlling weight to the history of civil forfeiture in the tax context, Justice Thomas reasoned that his "concerns regarding the legitimacy of the current scope of the Government's real property forfeiture operations lead [him] to consider these cases as only helpful to the analysis, not dispositive."<sup>21</sup> Ultimately, Justice Thomas agreed with the result reached by the Chief Justice and Justice Scalia, not on the broad theory they advocated, but rather on "the facts of this case"—namely, that the owner of the property had previously been convicted of using the property in question for a forfeitable purpose.<sup>22</sup> As the divergent reasoning of Justices Thomas and Scalia in *James Daniel Good Real Property* demonstrates, statistical rates of agreement between Justices can fundamentally distort the picture by masking important differences of opinion among the Justices.

Furthermore, even accepting the statistics at face value, it should come as no surprise that Justice Thomas and Justice Scalia often vote together because they share the same judicial philosophy. Justice

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<sup>18</sup> See *id.* at 69 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>19</sup> *Id.* at 81 (Thomas, J., concurring in part and dissenting in part).

<sup>20</sup> *Id.* at 81-82.

<sup>21</sup> *Id.* at 83.

<sup>22</sup> See *id.* at 83-84.

Thomas believes, and Justice Scalia agrees, that “the Federal Government’s powers are limited and enumerated,” which means that “the Federal Government enjoys no authority beyond what the Constitution confers.”<sup>23</sup> Justice Thomas believes, and Justice Scalia agrees, that to avoid intruding on the province of the political branches of Government, the federal courts must construe the broad, majestic phrases used in the Constitution (such as “cruel and unusual punishment”) “in light of the constitutional text and history,”<sup>24</sup> and “the meaning ascribed to [them] by the Framers.”<sup>25</sup> Because of the limitations the Constitution imposes on both rights and powers conferred by the document, Justice Thomas believes, and Justice Scalia agrees, that the Constitution does not, and cannot, “address all ills in our society.”<sup>26</sup>

It is only natural that two judges who share the same jurisprudential outlook would end up in agreement as to the proper outcome of a wide variety of cases. This was proven to be true in the case of Justices Marshall and Brennan, who shared the same liberal activist view of the law and thus voted together a high percentage of the time. The voting record of Justices Thomas and Scalia suggests that the same phenomenon is at work between them, no more and no less. As one court-watcher has explained, arguments that Justice Thomas’s votes reflect blind allegiance to Justice Scalia rather than independent thought “play down the fact that Thomas espoused conservative ideas long before he joined the court. As a GOP administration official and as a federal appeals court judge, he expressed views similar to Scalia’s.”<sup>27</sup> Thus, the mere fact that Justices Thomas and Scalia are in agreement as to the outcome of many cases that come before the Court does not prove, let alone suggest, that Justice Thomas blindly follows Justice Scalia.

To make the contrary case with any degree of plausibility, critics need to find support for their allegation in Justice Thomas’s writings on the Court. Not surprisingly, the critics usually make no effort to prove their assertion beyond citing the Justices’ statistical rates of agreement. One critic who made the rare attempt to do so argued in a recent article that the two Justices’ “pattern on opinions is that Scalia writes it up and

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<sup>23</sup> U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 847 (1995) (Thomas, J., dissenting); see also, e.g., United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (arguing that “there are real limits to federal power” under the Constitution).

<sup>24</sup> Farmer v. Brennan, 511 U.S. 825, 862 (1994) (Thomas, J., concurring in judgment).

<sup>25</sup> Wilson v. Arkansas, 514 U.S. 927, 931 (1995) (Thomas, J.); see also, e.g., McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 358 (1995) (Thomas, J., concurring in judgment).

<sup>26</sup> Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting).

<sup>27</sup> Biskupic, *Scalia, Thomas Stand Apart*, *supra* note 5, at A1.

Thomas signs it.”<sup>28</sup> As one would expect from their high rates of agreement, Justice Thomas (like a number of his colleagues on the Court) has joined a number of opinions written by Justice Scalia, but this only tells half the story: Justice Scalia has, without comment, signed onto a number of significant separate opinions written by Justice Thomas.

Without discussing each such instance, and without discussing the large universe of opinions for the Court that Justice Thomas authored and that Justice Scalia joined, a few examples should suffice to make the point. In *Hudson v. McMillian*,<sup>29</sup> one of Justice Thomas’s first opinions on the Court, and *Helling v. McKinney*,<sup>30</sup> he argued in dissent that the Eighth Amendment’s prohibition on “cruel and unusual punishments” does not apply to prison conditions unless those conditions are imposed by the sentencing judge or jury as a part of the criminal sentence. Even though Justice Scalia had previously accepted the proposition that prison conditions were subject to Eighth Amendment review,<sup>31</sup> Justice Thomas strongly challenged that proposition in *Hudson*, and Justice Scalia reversed course and joined the *Hudson* dissent without comment. Justice Scalia likewise signed onto Justice Thomas’s dissent in *Helling*, again without comment. *Hudson* and *Helling* should, standing alone, dispel any claim that Justice Thomas is a blind follower. The fact that Justice Scalia, who is, by all accounts, a proud man who does not lightly admit error, switched his position on the Eighth Amendment issue shows that Justice Scalia obviously has great respect for Justice Thomas’s views and abilities.

Indeed, in one sense Joan Biskupic’s superficial analysis has the matter precisely backwards: In a number of the most important cases decided over the last two terms, it has been Justice Thomas who “writes it up” and Justice Scalia who silently concurs. In what may have been one of the most important cases before the Court in recent years, *U.S. Term Limits, Inc. v. Thornton*,<sup>32</sup> Justice Thomas wrote a lengthy, vigorous dissent from the Court’s decision declaring unconstitutional state efforts to impose term limits for Members of Congress. Justice Scalia, along with Chief Justice Rehnquist and Justice Sandra Day O’Connor, joined the dissent without comment. The Chief Justice, as the senior Justice in dissent, assigned the *Term Limits* dissent to Justice Thomas, and for a junior Justice to get the writing assignment in such a

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<sup>28</sup> *Id.* (citing cases where Justice Scalia authored an opinion and Justice Thomas signed on without comment).

<sup>29</sup> 503 U.S. 1 (1992).

<sup>30</sup> 509 U.S. 25 (1993).

<sup>31</sup> See, e.g., *Wilson v. Seiter*, 501 U.S. 294 (1991) (Scalia, J.).

<sup>32</sup> 514 U.S. 779 (1995).



high-profile case demonstrates the complete confidence the Chief Justice has in Justice Thomas. The confidence was well-placed because Justice Thomas's dissent was so complete and persuasive that his colleagues in dissent did not add so much as a single word to the Justice's dissenting opinion.

Similarly, in what is probably the most significant voting rights decision in a decade, *Holder v. Hall*,<sup>33</sup> Justice Thomas again took center stage, joined without comment by Justice Scalia. In *Holder*, a splintered Court ruled that Section 2 of the Voting Rights Act of 1965, as amended,<sup>34</sup> does not regulate changes in the size of local governing bodies, even where such changes are alleged to dilute the voting strength of minorities. Justice Thomas filed a lengthy separate opinion concurring the Court's judgment, an opinion which a reporter for *The New York Times* conceded was an "extraordinary document."<sup>35</sup> Justice Thomas argued that the watershed civil rights legislation guarantees blacks and other minorities full and equal access to the political process, but, by its own terms, does not guarantee any group any particular outcome in the political process.<sup>36</sup> Accordingly, Justice Thomas concluded, so-called "vote dilution" claims, which seek to regulate the substantive outcomes of the political process in the absence of barriers to political participation by minorities, do not state a claim under the statute.<sup>37</sup>

Here, again, Justice Thomas was able to persuade Justice Scalia to abandon a position Justice Scalia had previously taken before Justice Thomas joined the Court. In at least one prior case, Justice Scalia had accepted the Court's ruling in *Thornburg v. Gingles*<sup>38</sup> that vote dilution claims are cognizable under the Voting Rights Act.<sup>39</sup> When Justice Thomas circulated his *Holder* opinion, Justice Scalia changed his mind and joined Justice Thomas in rejecting the view that vote dilution is a legitimate theory of vote discrimination under Section 2. As these cases and other like them show, Justice Scalia has joined a number of important separate writings by Justice Thomas, just as Justice Thomas has joined a number of similar writings by Justice Scalia. To be sure,

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<sup>33</sup> 512 U.S. 874 (1994).

<sup>34</sup> 42 U.S.C. § 1973(a).

<sup>35</sup> Linda Greenhouse, *The Supreme Court: Voting Rights; Justices Void Order Requiring Florida Redistricting*, N.Y. TIMES, July 1, 1994, at A18.

<sup>36</sup> See *Holder*, 512 U.S. at 945-46 (Thomas, J., concurring in judgment).

<sup>37</sup> See also *Johnson v. De Grandy*, 512 U.S. 997, 1031 (1994) (Thomas, J., joined by Scalia, J., dissenting) (adhering to Justice Thomas's *Holder* opinion).

<sup>38</sup> 478 U.S. 30 (1986).

<sup>39</sup> See *Chisom v. Roemer*, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting) ("I would read § 2 as extending vote dilution claims to elections for 'representatives,' but not to elections for judges.").

Justice Thomas has not joined *all* of Justice Scalia's writings (which, in itself, shows that Justice Thomas can think for himself), but then again neither has Justice Scalia joined all of Justice Thomas's writings.

Indeed, though Thomas critics pretend as if it were otherwise, Justices Thomas and Scalia have disagreed in quite a few cases of far-reaching importance. In *McIntyre v. Ohio Elections Commission*,<sup>40</sup> a major Free Speech case where the Court held that the First Amendment protects the right to disseminate anonymous political literature, Justice Thomas was on the side that prevailed, and Justice Scalia wrote the dissent. Justice Scalia, joined only by the Chief Justice, argued that there was no First Amendment violation because enough states had enacted measures during this century banning anonymous political speech as to entitle the Ohio law invalidated by the Court to "a strong presumption of constitutionality."<sup>41</sup> Justice Thomas wrote separately and rejected Justice Scalia's reasoning as fundamentally misguided. Justice Thomas forcefully argued that Justice Scalia—who has been, ironically enough, the prime adherent of the view that tradition should inform constitutional interpretation—had seized upon the wrong tradition. The relevant tradition was derived not from the "innovation of modern times that has permitted the regulation of anonymous speech,"<sup>42</sup> as Justice Scalia argued, but rather from "the practices and beliefs held by the Founders concerning anonymous political articles and pamphlets."<sup>43</sup> Because "the Framers shared the belief that such activity was firmly part of the freedom of the press"<sup>44</sup>—*The Federalist Papers* themselves, after all, were published anonymously—Justice Thomas agreed with the Court that anonymous political speech enjoys First Amendment protection.

Justices Thomas and Scalia also parted company in *Garlotte v. Fordice*,<sup>45</sup> in *Musick, Peeler & Garrett v. Employers Insurance*,<sup>46</sup> and in *Richmond v. Lewis*.<sup>47</sup> In *Garlotte*, the Supreme Court held that prisoners sentenced to multiple consecutive sentences can challenge in a proceeding for *habeas corpus* sentences they have already served, as long as they are still serving one of the consecutive sentences. Justice Scalia agreed; Justice Thomas, however, did not.<sup>48</sup> In *Musick, Peeler & Garrett*, Justice Scalia joined five other Justices in ruling that

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<sup>40</sup> 514 U.S. 334 (1995).

<sup>41</sup> *Id.* at 376 (Scalia, J., dissenting).

<sup>42</sup> *Id.* at 367 (Thomas, J., concurring in judgment).

<sup>43</sup> *Id.* at 360 (Thomas, J., concurring in judgment).

<sup>44</sup> *Id.* at 367 (Thomas, J., concurring in judgment).

<sup>45</sup> 515 U.S. 39 (1995).

<sup>46</sup> 508 U.S. 286 (1993).

<sup>47</sup> 506 U.S. 40 (1992).

<sup>48</sup> See *Garlotte*, 515 U.S. at 47 (Thomas, J., dissenting).

defendants held liable for securities fraud under Rule 10b-5 have an implied right to sue joint wrongdoers for contribution, a holding of obvious importance to securities markets. Justice Thomas dissented along with Justices Harry A. Blackmun and O'Connor, arguing that the Court had exceeded the proper judicial role by creating a right to contribution that Congress had not seen fit to create.<sup>49</sup> Finally, in *Lewis* Justice Thomas joined the majority in vacating a death sentence on Eighth Amendment grounds because the sentence rested at least in part on an unconstitutionally vague aggravating factor,<sup>50</sup> but Justice Scalia filed a solo dissent arguing that the sentence of death should be upheld.<sup>51</sup>

In a tax case of far-reaching importance, both in terms of constitutional law and in terms of its implications for the Nation's foreign policy, Justice Thomas, agreeing with the position of the Clinton Administration, voted to invalidate California's controversial worldwide combined income reporting requirement for foreign-based multinational corporations.<sup>52</sup> Justice Scalia joined the majority in upholding the tax scheme. In another tax case, *United States v. McDermott*,<sup>53</sup> Justice Thomas dissented from the Court's ruling announced by none other than Justice Scalia. Justice Scalia wrote for the Court that as to after-acquired property, a federal income tax lien has priority over a previously docketed judgment lien, but Justice Thomas, joined by Justices John Paul Stevens and O'Connor, disagreed.<sup>54</sup>

Admittedly, despite their importance in their respective areas of the law, some of these cases are either too complicated or not sexy enough to command treatment in the popular press. Whether or not the press sees fit to report on such comparatively uninteresting, but nonetheless significant decisions, however, the fact remains that these and other cases show that Justice Thomas has not hesitated to split with Justice Scalia when he believed the law required that result. In light of his demonstrated willingness to part company with—and, indeed, to take Justice Scalia head-on, as in *McIntyre* and *McDermott*—it is both wrong and unfair for critics to assert that Justice Thomas unthinkingly takes his lead from Justice Scalia.

In sum, if Thomas critics ever bothered to pay anything more than superficial attention to Justice Thomas's voting record and to the dynamic between the two jurists, they would have discovered that in the

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<sup>49</sup> See *Musick*, 508 U.S. at 305 (Thomas, J., dissenting).

<sup>50</sup> See 506 U.S. at 52-53 (Thomas, J., concurring).

<sup>51</sup> See *id.* at 53 (Scalia, J., dissenting).

<sup>52</sup> See *Barclays Bank v. Franchise Tax Bd.*, 512 U.S. 298 (1994).

<sup>53</sup> 507 U.S. 447 (1993).

<sup>54</sup> See *id.* at 455 (Thomas, J., dissenting).

Thomas-Scalia partnership, Justice Thomas is an active participant, not a passive follower. Like Justices Brennan and Marshall before them, Justices Thomas and Scalia share a common outlook on the law and a common view of the proper role of courts in our society. As a consequence, the mere fact that they agree a significant percentage of the time “doesn’t imply that one justice is pulling the other’s marionette strings.”<sup>55</sup> The two men, like their colleagues on the Court, decide cases based on their independent, and often divergent, views of what the law requires. If Justice Thomas is to be criticized, therefore, it should be on the basis of his jurisprudential views, and other Justices who share these views should be equally criticized with the same degree of vigor and venom that is reserved for Justice Thomas. No other Justice is attacked as a puppet of another, despite similarly high rates of agreement with other Justices, and Justice Thomas should not be attacked on that fallacious ground, either. Although, as with any other jurist, one may reasonably disagree with some of his views, there is no reasonable basis for disagreement concerning Justice Thomas’s qualifications to serve on the Supreme Court. His consistent record of achievement on the highest court in the land should be a constant source of pride and admiration to all black Americans—indeed, to *all* Americans.

### *B. Myth #2: Justice Thomas’s Purported Quest for Revenge*

It has been argued by some in the media that Justice Thomas decides cases not in an honest attempt to follow the law, but rather in an attempt to subvert the law by ruling against groups that opposed his successful nomination to the Court.<sup>56</sup> The argument is both audacious and entirely speculative because these critics can point to no evidence supporting their charge. The criticism is not a serious one and may be, therefore, dispensed with in short order, for two reasons.

*First*, Justice Thomas *has*, in fact, voted in favor of groups that opposed his nomination. If he were truly possessed by a single-minded obsession for revenge, as his armchair psychologist critics allege, it is obvious that sexual harassment claims would be high on his “hit list,” given that allegations of sexual harassment had almost derailed his nomination. It is interesting to note, therefore, that in the two sexual harassment cases that have come before Supreme Court since his

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<sup>55</sup> Price, *supra* note 14, at 37.

<sup>56</sup> See, e.g., Toobin, *supra* note 6 (opining that the Justice’s conservative votes are the product of “raw anger” and lie at the “heart of Thomas’s strategy for striking back at his liberal critics”); White, *supra* note 1, at 36 (stating that Justice Thomas’s votes are the result of “bilious rage”).

confirmation in 1991, Justice Thomas voted *both times* in favor of the woman claiming that she was sexually harassed and in favor of the numerous women's and civil rights groups that filed "friend of the court" briefs in support of the women.<sup>57</sup>

In each case, there was ample ambiguity in the law for Justice Thomas to rule against the woman's groups if he had wished. Any doubt in this regard is dispelled by the fact that the lower courts in both cases had ruled against the sexual harassment plaintiff and by the fact that the Bush Administration strongly defended the *Franklin* dismissal. Nevertheless, Justice Thomas voted to reinstate the women's complaints and to allow their cases to proceed.

In fact, Justice O'Connor's opinion for the Court in *Harris* substantially eased a women's burden of stating a sexual harassment claim. Not only did her opinion conclude that a sexual harassment plaintiff need not show psychological injury in order to prevail under Title VII; it strongly reaffirmed the principle that "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create a hostile work environment, Title VII is violated."<sup>58</sup> Justice Scalia wrote separately to criticize the majority for "let[ting] virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages," though, in the end, he joined the Court's opinion.<sup>59</sup> Justice Thomas, significantly, joined Justice O'Connor's opinion, not Justice Scalia's.

Women's groups hailed *Harris* as a landmark triumph for women's equality, but in doing so did not so much as note Justice Thomas's agreement with the Court. Thomas critics bent on dismissing his record as the product of rage, not legal analysis, likewise ignored the fact that Justice Thomas passed up not one, but *two* golden opportunity to retaliate against the woman's groups who almost cost him his rightful place on the Supreme Court. Nor can the Justice's votes in *Franklin* and *Harris* be cynically dismissed as efforts to avoid resurrecting in the public eye the sexual harassment claim that had been leveled against him and that the Senate, after full investigation, had deemed

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<sup>57</sup> See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (reversing a ruling that a plaintiff may prevail on a claim that sexual harassment on the job was so pervasive as to violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, only by making the difficult showing that the harassment adversely affected her "psychological well-being"); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (reversing decision denying a teacher who claimed she had been sexually harassed the right to sue under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*).

<sup>58</sup> *Harris*, 510 U.S. at 21 (citation and internal quotation marks omitted).

<sup>59</sup> *Id.* at 24 (Scalia, J., concurring).

unfounded. "Raw anger" and "bilious rage" of the type Jeff Toobin and Jack White diagnose in Justice Thomas, one would expect, would not be so carefully discriminating or so easily controlled. Pretending that adverse facts (such as Justice Thomas's votes in favor of sexual harassment plaintiffs) simply do not exist may be good political advocacy, but it is certainly lousy journalism and shoddy legal analysis.

*Second*, the conservative votes Justice Thomas has cast on the Supreme Court are not retaliatory for the simple reason that they are fully consistent with the conservative views he expressed *before* his bruising confirmation battle, both as a high-ranking official in the Reagan Administration and as a judge on the U.S. Court of Appeals for the District of Columbia Circuit. To give but two of many possible examples, before joining the Supreme Court, Justice Thomas had been a vocal critic of race- and gender-based affirmative action.<sup>60</sup> In fact, while on the D.C. Circuit, he authored an important opinion striking down gender-based preferences for women in radio licensing proceedings before the Federal Communications Commission, as violative of the equal protection component of the Fifth Amendment's Due Process Clause.<sup>61</sup> *Lamprecht v. FCC* reflected his view that for the Government to provide preferences based on immutable characteristics such as gender and race violates constitutional equal protection principles, which require the Government to treat people as individuals, not as members of race or gender classes.

Three years later, when the question of the constitutionality of racial preferences came before the Supreme Court, Justice Thomas, consistent with his prior views, joined Justice O'Connor's majority opinion declaring that all racial preferences, whether or not viewed as "benign," are subject to strict scrutiny under equal protection principles.<sup>62</sup> He issued a brief concurring opinion explaining, in part, that "the paternalism that appears to lie at the heart of this [race-based affirmative action] program is at war with the principle of inherent equality that underlies and infuses our Constitution."<sup>63</sup> As support for that proposition, he cited, as he had in his 1987 *Howard Law Journal* article, the Declaration of Independence's affirmation of the principle

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<sup>60</sup> See, e.g., Clarence Thomas, *An Afro-American Perspective: Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 1987 *HOW* L.J. 691, 700 (stating that "racial preference policies" represent "the opposition of . . . color-blind principles" embodied in the Constitution) [hereinafter "Thomas, An Afro-American Perspective"]; *id.* at 703 (arguing that "first principles of equality and liberty should . . . lead us above petty squabbling over 'quotas,' 'affirmative action,' and race-conscious remedies for social ills").

<sup>61</sup> See *Lamprecht v. FCC*, 935 F.2d 382 (D.C. Cir. 1992).

<sup>62</sup> See *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200 (1995).

<sup>63</sup> *Id.* at 241 (Thomas, J., concurring in part and concurring in judgment).

that “all men are created equal.”<sup>64</sup> Moreover, he adhered to his long-standing view that the Constitution is color-blind, and therefore does not distinguish between “malign” and “benign” racial distinctions, in at least three other high-profile Supreme Court cases.<sup>65</sup>

Similarly, while serving in the Reagan Administration, Justice Thomas was sharply critical of the federal courts’ practice of remedying violations of the Voting Rights Act by redrawing electoral districts to create so-called “majority-minority” districts in which minorities are so numerous as to be assured that they would be able to elect their desired candidates to public office. In *Holder v. Hall*,<sup>66</sup> Justice Thomas again criticized the concept of majority-minority districts, arguing, for example, that “our drive to segregate political districts by race can only serve to deepen racial divisions by destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions.”<sup>67</sup> Consistent with his prior view that drawing electoral lines on account of race, regardless of motives, is equivalent to “segregation,” Justice Thomas has also joined the Supreme Court in invalidating racially gerrymandered districts on equal protection grounds in *Miller v. Johnson* and *Shaw v. Reno*.

None of this, of course, would come as a surprise to the liberal special interest groups which lined up in vocal opposition to his nomination. They opposed his nomination in the first place precisely *because* they suspected, correctly, that he would remain true to his conservative beliefs.<sup>68</sup> The record is clear, therefore, that there simply has been no shift in Justice Thomas’s position on the issues since his confirmation battle—he was a conservative as a Reagan Administration official and as a judge on the D.C. Circuit, and he remains a conservative as a Justice.

The unassailable fact that Justice Thomas’s views have not changed in response to his bitter confirmation battle is absolutely fatal to the charge that Justice Thomas’s voting record is the product of “raw anger” or “bilious rage” toward the groups that opposed his nomination. This oft-repeated but unexplained charge necessarily assumes that Justice

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<sup>64</sup> See *id.*

<sup>65</sup> See *Missouri v. Jenkins*, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring) (arguing that “the government must treat citizens as individuals, and not as members of racial, ethnic or religious groups” and that “[i]t is for this reason that we must subject all racial classifications to the strictest of scrutiny”); see also *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995); *Shaw v. Reno*, 509 U.S. 630, 656-57 (1993).

<sup>66</sup> 512 U.S. 874 (1994).

<sup>67</sup> *Id.* at 907 (Thomas, J., concurring in judgment).

<sup>68</sup> See, e.g., Richard L. Berke, *Two Democrats on Senate Panel Say They Will Oppose Thomas*, N.Y. TIMES, Sept. 27, 1991, § A, at 1 (“Judge Thomas, who is black, has been criticized by civil rights groups for his conservative stands, including his opposition to affirmative action programs as a chairman of the [EEOC] in the Reagan Administration.”).

Thomas's views have fundamentally shifted in response to his confirmation experience—in other words, that but for the opposition to his nomination, Justice Thomas would have been something other than the conservative Justice he is. Of course, as previously shown, there has been no such shift in his views, and Thomas critics never even attempt to show otherwise.

As a result, the conventional wisdom with regard to Justice Thomas is, yet again, completely off the mark. Justice Thomas's conservative voting record is not part of some grand design on his part to retaliate against anyone, but rather reflects his honest appraisal of the law and his adherence to the conservative beliefs that won his nomination both support from the Right and opposition from the Left. As always, there is reasonable room for disagreement on the issues, but there is no support whatsoever for the rather shocking claim that Justice Thomas is abusing his place on the Court in a venal quest for revenge. Indeed, the very fact that Thomas critics resort to making such a facially absurd suggestion—which, curiously enough, they do not make as to other conservative Justices, such as Chief Justice Rehnquist, who, like Justice Thomas, endured unusually bruising confirmation hearings—speaks volumes about the relative weight they assign in their reporting to providing the public with reliable information versus advancing their own political agendas irrespective of the demands of truth and fairness.

### *C. Myth #3: Justice Thomas as a Traitor to his Race*

The most disturbing charge against Justice Thomas is a racist one—that he holds views that no “true” black person could hold.<sup>69</sup> It is important to understand at the outset just how absurd the claim is. On this view, the color of one's skin dictates his views, and so if one is black he simply *must*, for example, support affirmative action and oppose welfare reform. The view has a rather paradoxical corollary, which is that one's views effectively dictate one's skin color; thus, Justice Thomas is not really black (which is what it means to call him an “Uncle Tom” or a “traitor” to his race). Although a description of this noxious view should be its own refutation, Thomas critics persist in invoking it in their quest to discredit Justice Thomas and to turn blacks against him. For example, Leon Higginbotham gave a bitter and intensely personal attack on the Justice in a speech delivered in the Fall of 1995 at New York University.<sup>70</sup> The entire rancorous speech was based on the view

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<sup>69</sup> See, e.g., White, *supra* note 1, at 36. This subsection builds upon ideas originally explored in Stephen F. Smith, *On Justice Clarence Thomas*, PUB. INT., Summer 1996, at 72-9.

<sup>70</sup> See Speech, *supra* note 3.



that Justice Thomas is not really black, and, for that reason alone, the speech is worthy of attention here. The speech is particularly noteworthy, however, because it demonstrates so clearly that the black community desperately needs a new generation of leadership because the traditional civil rights leadership comprised of hold-overs from the protest-based movement of the 1960s and 1970s is no longer relevant to the present-day concerns of the black community.

Higginbotham begins by juxtaposing Justice Thomas against a "real" black man, former Chairman of the Joint Chiefs of Staff Colin Powell, suggesting that Powell, unlike Justice Thomas, has not turned his back on blacks.<sup>71</sup> Higginbotham concealed from his audience an obvious similarity between the two men which rendered the entire juxtaposition a fallacy: Both men, unlike Higginbotham and the traditional civil rights leadership, are members of the Republican Party and rose to power by virtue of their affiliation with Republican presidents. If Higginbotham were to take to its logical conclusion his view that no "true" black person can disagree with the orthodox, Democratic view declared by the civil rights leadership, it seems obvious that Powell would be as much a "traitor" as Justice Thomas.

Undeterred by the sheer fallacy of the comparison, however, Higginbotham proceeded savagely to attack the Justice's status as a black man in every way possible. He reminded his listeners that the Justice is married to a white woman, Virginia Lamp Thomas, and asserted that the Justice "hates black women."<sup>72</sup> He accused the Justice of having deep-seated psychological problems, which he diagnosed as "racial self-hatred to a clinical degree." Justice Thomas's psychological disorder, Higginbotham argued, explained why he had constantly voted to "drag blacks back to the oppression of the past."<sup>73</sup>

Higginbotham claimed that his interpretation of the Justice's record was proven by the Justice's votes in the racial districting cases,<sup>74</sup> the race "remedy" cases,<sup>75</sup> and the "cruel and unusual punishments" case.<sup>76</sup> Higginbotham argued that in *Hudson*, the Justice argued that "it did not violate the Constitution" for prison guards to beat up a black prisoner. In the districting cases, Higginbotham asserted, Justice Thomas voted to resurrect "white supremacy" in this country.<sup>77</sup> To Higginbotham, the Justice's argument in *Jenkins* that the Constitution is color-blind, with citation to the statement in the Declaration of Independence that "all

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<sup>71</sup> See *id.*

<sup>72</sup> *Id.*

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

<sup>74</sup> See *Miller*, 515 U.S. at 900; *Shaw*, 509 U.S. at 630.

<sup>75</sup> See *Adarand*, 515 U.S. at 200; *Jenkins*, 515 U.S. at 70.

<sup>76</sup> *Hudson*, 503 U.S. 1.

<sup>77</sup> See Speech, *supra* note 3.

men are created equal," demonstrated the Justice's belief that, had he lived in slavery, he would have been an "advisor to James Madison" and a "confidant to Thomas Jefferson" when, in reality, Higginbotham said, he would have "fed their hogs" and "hoed their tobacco" as a slave.<sup>78</sup> Higginbotham concluded his review of the cases by noting that Justice Thomas had criticized *Brown v. Board of Education*,<sup>79</sup> the case that overruled the "separate but equal" principle that had legitimated segregation.

These views are, to say the least, shocking and completely insupportable. The notion that all blacks must and do think alike is as obviously racist and untrue as the saying that all blacks look alike. In truth, black people are not and never have been monolithic in their views. To the contrary, there has always been a healthy diversity of opinion within the black community, as in the white community. This is true even as to civil rights issues. For example, in the decades that followed enactment of the Civil War-era constitutional amendments abolishing slavery and guaranteeing blacks and all other "persons" within the United States the equal protection of the laws, W.E.B. DuBois and others argued for an immediate end to all forms of political and social discrimination, rejecting the orthodox approach of Booker T. Washington which favored a more gradual approach temporarily deferring explosive social issues and focusing instead in the short term on achieving economic self-sufficiency and equality for blacks. This debate raged on until after the turn of the century. Indeed, the National Association for the Advancement of Colored People ("NAACP") got its start in 1910 as a dissenting voice in that debate; the fledging group began as a challenge to the tyranny of the so-called "Washington Machine" and urged, in agreement with DuBois, that blacks could no longer defer the struggle for political and civil rights.

This long tradition of dissent within the black community on civil rights issues continued well after the turn of the century. In the first half of this century, some blacks, including Marcus Garvey, argued against integration and in favor of repatriating blacks to Africa or elsewhere. Others, including then-attorney Thurgood Marshall, believed that integration into every aspect of American life was the key to black progress. Similarly, during the 1960s, the mainstream civil rights movement, led by Dr. Martin Luther King, Jr., favored peaceful, nonviolent means of protest, whereas more radical forces, such as Malcolm X and the Black Panther Party, were willing to resort to violent measures. Today, of course, many in the black community agitate for race-conscious remedies such as affirmative action in the belief that

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

<sup>79</sup> 347 U.S. 483 (1954).

racism constitutes an insuperable barrier to black progress. Others, including Justice Thomas and San Jose State English Professor Shelby Steele, oppose affirmative action and argue that, having achieved equality before the law and legal guarantees (at both the state and federal levels) of basic civil rights, black progress depends on improving schools, maintaining strong family structures, and the like. Therefore, Higginbotham and others are simply wrong in arguing that all blacks do, and must, think alike; there have always been divergent voices in the black community on issues of concern.

Those who have disagreed with the prevailing view cannot and should not be dismissed as “traitors” to their race. As W.E.B. DuBois wrote almost a century ago in defense of himself and other black dissenters of his day, “the hushing of the criticism of honest opponents is a dangerous thing.”<sup>80</sup> Yale Law Professor Stephen Carter echoed this theme in a recent book:

The censors [in the black community] have matters backward. Free thinking is not treason; on the contrary, it is the greatest service individuals can perform for their communities. A long chain of black intellectuals, from W.E.B. DuBois to Zora Neale Hurston to James Baldwin to today’s prominent dissenters, has openly proclaimed its unwillingness to be bound by what other, more popular figures in the black community announce as the “right” solutions to the difficulties that racism has spawned, and our understanding has ultimately been richer for it. *Our community needs dissent, it needs dialogue, it needs all of the fresh ideas it can get.*<sup>81</sup>

Because free and open debate is so vital to progress and the search for truth, an enlightened society such as ours, and all who truly favor the advancement of black people, must unequivocally condemn the view that Justice Thomas and other black dissenters are “thinking white” and therefore “are not really black.” Black people have struggled too hard and too long in this country to surrender the precious right to read and think for themselves—rights that were denied them in slavery—to any orthodoxy, whether black or white.

Indeed, it is most ironic that civil rights leaders, of all people, would advocate such a racist view. If all blacks must think alike, then is it not also true that all whites must think alike? If all whites must think alike, then, it would seem, the “white” way of thinking would be the diametrical *opposite* of the “black” way of thinking. It should be obvious that in such a permanent, racially polarized state of affairs, blacks, who currently constitute approximately 12% of the U.S. population, cannot even hope to win any gains in a democracy based on the principle of

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<sup>80</sup> W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 83 (1903).

<sup>81</sup> STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* 114-15 (1991) (emphasis added).

majority-rule. The most blacks can expect, on Higginbotham's perverted way of thinking, is handouts from kind-hearted whites, who are moved either by a sense of compassion or *noblesse oblige* to put aside their "white" way of thinking. This is, to say the least, hardly an ennobling, much less correct, vision of race relations and the role of blacks in this country.

As their use of plantation terms like "Uncle Tom" indicates, it is Justice Thomas's critics who are stuck in the oppression of the past. Justice Thomas, by contrast, invites blacks to live in what Dr. King called the "promised land"—a land where the sky is the limit to their success because all people are judged by the content of their character rather than the color of their skin—a beautiful conception of racial harmony and equality that Jack White, a writer for *Time*, callously denigrates as "a neverland of color-blind philosophizing."<sup>82</sup> The point bears added emphasis: *Justice Thomas is being true to the principles of the civil rights movement in calling for colorblindness.* It was this country's unfortunate willingness to tolerate convenient exceptions from the colorblindness principle embodied in the Declaration of Independence (and, later, in the Thirteenth and Fourteenth Amendments to the U.S. Constitution) that led to slavery in the first place. That is how millions and millions of blacks came to be enslaved and treated as chattel in a Nation whose charter expressly committed it to the "self-evident" principle that "all men are created equal" and "are endowed by their Creator with certain unalienable Rights."

Just as it was the national departure from the principle of colorblindness that led to generations of immeasurable and unconscionable suffering for black Americans, it was the legal and moral principle of colorblindness that freed blacks from the shackles of slavery and lifted the dark veil of segregation.<sup>83</sup> The tradition of colorblindness as a civil rights objective originated among the abolitionist followers of William Lloyd Garrison during the 1830s and 1840s. For instance, in 1839 the Women's Anti-Slavery Society of Lynn, Massachusetts presented the state Legislature with a petition demanding that all laws distinguishing between any citizen of the state because of skin color be repealed. These arguments ultimately prevailed and resulted in the enactment of the Thirteenth and Fourteenth Amendments banning slavery and guaranteeing blacks and all other persons in this country the full benefits of U.S. citizenship.

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<sup>82</sup> White, *supra* note 1, at 36.

<sup>83</sup> For an excellent historical analysis of colorblindness in American history, on which the discussion in the text is based, see ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992).

In response to the “Black Codes” enacted in the South in a pernicious attempt to return blacks to second-class citizenship despite the abolition of slavery in 1865, Congress enacted the Civil Rights Act of 1866, now codified as reenacted at 42 U.S.C. § 1981, which was aimed at ending state-sponsored racial discrimination. The 1866 Act provided, in part, that “[a]ll persons . . . shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens.”<sup>84</sup> The Act also respected the nondiscrimination principle in reverse, providing that all persons “shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”<sup>85</sup> In other words, both the benefits and the burdens of citizenship were to be allocated without regard to race. The message from Congress, therefore, was exactly that of the abolitionists—namely, that the Government should not discriminate on the basis of race, either against or in favor of blacks or any other racial group.

Unfortunately, it was not long before the country again departed from the constitutional and moral principle that race discrimination is wrong. Before the ink with which the Fourteenth Amendment had been written had dried on paper, states passed laws segregating places of public accommodation, and both Congress (for the District of Columbia) and the states passed laws segregating public schools. These laws received the approbation of the Supreme Court in *Plessy v. Ferguson*,<sup>86</sup> in which the Court held that racially segregated facilities were “separate but equal.” As Justice John Marshall Harlan recognized in his prophetic *Plessy* dissent, government-drawn racial distinctions are intolerable: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens,” a fact that bars a “legislative body or judicial tribunal [from] hav[ing] regard to the race of its citizens when the civil rights of those citizens are involved.”<sup>87</sup> It was almost sixty years before the Supreme Court, with its decision overruling the “separate but equal” doctrine in *Brown v. Board of Education*,<sup>88</sup> got around to correcting its lamentable departure in *Plessy* from the colorblindness principle.

With the possible exception of Justice Thomas’s writings and the *Plessy* dissent, nowhere is this racial nondiscrimination principle more forcefully advanced in the law than in the briefs filed by the NAACP Legal Defense Fund (“LDF”) under the legendary leadership of then-attorney Thurgood Marshall. Marshall argued in 1948 that

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<sup>84</sup> 42 U.S.C. § 1981 (1999).

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

<sup>86</sup> 163 U.S. 537 (1896).

<sup>87</sup> *Id.* at 559, 554-55.

<sup>88</sup> 347 U.S. 483.

"[c]lassifications and distinctions based on race or color have no moral or legal validity in our society."<sup>89</sup> He and LDF enlarged upon this legal and moral theme in many later cases. For instance, Marshall argued the following year that "racial criteria are irrational, irrelevant to our way of life and specifically proscribed under the Fourteenth Amendment."<sup>90</sup> Indeed, Marshall's greatest triumph as an advocate, *Brown v. Board of Education*, came in his most forceful presentation of the view that the government should not and cannot, consistent with the Constitution, make racial distinctions among its citizens.

In their briefs before the Supreme Court in *Brown*, Marshall and his colleagues argued the "distinctions imposed . . . based upon race and color alone . . . [are] patently [arbitrary and capricious]."<sup>91</sup> That was so, they argued, because skin color "is a constitutional irrelevance"<sup>92</sup>—or, as the LDF attorneys consistently maintained, "[o]ur Constitution is color-blind."<sup>93</sup> Marshall and his colleagues concluded that "all governmentally imposed race distinctions" are "odious" and that governments, which are "bound to afford equal protection of the laws, must not impose them."<sup>94</sup> Thus, in arguing for colorblindness, as he did *Adarand*, Justice Thomas has remained true not only to the text and fundamental design of the Constitution, as amended, but also to the civil rights movement of the 1960s and before.

More generally, Justice Thomas's conservative views are well within the range of mainstream discourse within the black community. Although only 8% of blacks surveyed consider themselves Republican, as Colin Powell does, conservative views are, as a general matter, commonplace among blacks. According to a 1992 survey by the Joint Center for Political and Economic Studies, a black liberal think-tank, more blacks today describe themselves as "conservative" (33%) than as "liberals" (29%).<sup>95</sup> *The Washington Post* reached the same conclusion in a series of polls conducted in 1991, which found that 35% of blacks surveyed described themselves as "very conservative" or

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<sup>89</sup> ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 146 (1992) (quoting Brief for Petitioner at 27, *Sipuel v. Board of Regents of the Univ. of Okla.*, 332 U.S. 814 (1947)).

<sup>90</sup> *Id.* at 148 (quoting Statement as to Jurisdiction at 13, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950)).

<sup>91</sup> Brief for Petitioner at 6–7, *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>92</sup> *Id.* at 7.

<sup>93</sup> KULL, *supra* note 89, at 156–59. The LDF attorneys were basing their arguments on the dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), where Justice Harlan wrote, "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."

<sup>94</sup> KULL, *supra* note 89, at 157 (quoting Reply Brief for Appellants at 2, *Briggs v. Elliot*, 342 U.S. 350 (1952)).

<sup>95</sup> See James L. Robinson, *On Becoming a Black Conservative*, NAT'L MINORITY POLITICS, Mar. 31, 1995, at 37 (citing survey results).

“conservative.”<sup>96</sup> Justice Thomas’s views are more representative still in light of the fact that “another 35 percent [of blacks] regard themselves as politically moderate.”<sup>97</sup> Adding the percentages of blacks who consider themselves to be conservative or moderate, this means that an incredible 70% of blacks nationwide flatly reject liberalism as an overarching political philosophy.

The instinctive conservatism of black Americans is borne out in an array of issue-specific polls. According to a 1995 article in *The Washington Post*:

[W]hether or not they accept the label, many blacks hold conservative views. On the death penalty, according to the Joint Center for Political Studies, blacks tilt 48 to 42 in favor. On denying increased welfare payments to welfare recipients who have more children, 58 percent of blacks approve. Roughly three-quarters back mandatory sentences for drug dealers, and 61 percent feel black leaders are too quick to cite racism as an excuse for black crime.<sup>98</sup>

Recent Gallup polls have made similar findings. As recounted in another recent article, “85 percent [of blacks polled] support school choice. Fifty-three percent of the black public disapprove of mandatory busing and 77 percent feel that minorities should not receive preferential treatment to make up for past discrimination (affirmative action).”<sup>99</sup> Moreover, of blacks surveyed, a whopping 92% believe in God.<sup>100</sup> With regard to the issue that, in reality, drove much of the opposition to Justice Thomas’s nomination—abortion—recent polls find that only 36% of blacks are pro-choice,<sup>101</sup> and no less than 48% of blacks are pro-life, flatly opposing abortion under any circumstances.<sup>102</sup>

Some have argued that the conservatism that silently but assuredly pervades, and the rejection of liberalism that is predominant in, the black community has the potential of producing a mass political realignment similar to that of the early half of the century which moved blacks from the Republican Party (the party to which they had been loyal since the days of Abraham Lincoln and emancipation) over to the Democratic Party—if, that is, Republicans reach out to blacks and make

<sup>96</sup> See Dionne, *supra* note 9, at A1.

<sup>97</sup> Robert J. Caldwell, *Judging Thomas; Who Really Speaks for most Black Americans?*, SAN DIEGO UNION-TRIBUNE, Sept. 22, 1991, at C1.

<sup>98</sup> Tamar Jacoby, *Life in Black and Right; Conservative, African American, Making Waves*, WASH. POST, Aug. 20, 1995, at C1.

<sup>99</sup> Robinson, *supra* note 95, at 37 (citing studies).

<sup>100</sup> See Caldwell, *supra* note 97, at C-1.

<sup>101</sup> See *id.*

<sup>102</sup> See Renee Loth, *The “Monolithic” Minority and the “Model” Minority; Despite the popular belief, not all of America’s blacks are liberals*, BOSTON GLOBE, Sept. 8, 1991, at 81.

their party hospitable to blacks.<sup>103</sup> Justice Thomas himself propounded this view before becoming a judge, predicting in a 1987 speech to a conservative audience that "Black Americans will move inexorably and naturally toward conservatism when we stop discouraging them; when they are treated as a diverse group with differing interests; and when conservatives stand up for what they believe in rather than stand against Blacks."<sup>104</sup>

There is some support for the view that a realignment may be on the horizon. According to recent surveys, "just over a third of black Americans no longer choose the Democratic Party as their political home."<sup>105</sup> Clearly, blacks would be better off if *both* political parties were forced to vie for their votes, instead of being viewed by one party as a sure bet (which, therefore, can be safely ignored) and by the other party as votes that are beyond reach (which, therefore, can be safely ignored). Justice Thomas described the political isolation of the black voter:

Those on the Left smugly assume Blacks are monolithic and will by force of circumstances *always* huddle to the left of the political spectrum. The political Right watches this herd mentality in action, concedes that Blacks are monolithic, . . . and wistfully shrugs at the seemingly unbreakable hold of the liberal Left on Black Americans.<sup>106</sup>

Whether or not such a realignment ultimately occurs, however, the fact remains that on a whole host of issues, including civil rights, the black community *is* more instinctively conservative than liberal.

As a consequence, it is inaccurate to characterize Justice Thomas's views as ones that no "true" black person can hold. Many ordinary black people in this country hold similar views. That should come as no surprise because voters' position on the issues is driven, first and foremost, by socioeconomic factors, not race.<sup>107</sup> According to a more recent account:

As more blacks enter the middle class, they strongly identify with efforts to reduce taxes, improve schools and safeguard neighborhoods. There's a growing sentiment on college campuses and among young African-Americans that having won basic civil rights, the next challenge is for blacks to build businesses and create jobs through entrepreneurship. And widespread support for [the] Million Man

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<sup>103</sup> See, e.g., Jeff Dickerson, *Guess Who's Coming to the Party*, ATLANTA J. & CONST., Nov. 12, 1995, at 1G; Caldwell, *supra* note 97, at C-1.

<sup>104</sup> *Speech of Hon. Clarence Thomas to The Heritage Foundation*, at 4 (June 18, 1987), reprinted in POL'Y REV, Fall 1991, at 72.

<sup>105</sup> Caldwell, *supra* note 97, at C-1.

<sup>106</sup> *Speech of Hon. Clarence Thomas to The Heritage Foundation*, at 1 (June 18, 1987).

<sup>107</sup> See generally WILLIAM J. WILSON, THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS 144 (1978) (documenting that the modern conditions of Black America are more correlated with socioeconomic factors rather than race).



March [in Washington, D.C.] showed blacks are receptive to a message of self-help long preached by conservatives.<sup>108</sup>

In fact, Justice Thomas's nomination was successful, in large part, due to blacks, who rejected their leadership's opposition to his nomination and successfully pressured key southern Democrats to vote to confirm him. For example, blacks in the South favored the nomination by an almost 2-1 margin.<sup>109</sup> Although some have suggested that blacks supported his nomination only because he is black,<sup>110</sup> that theory has credence only if one believes that blacks would knowingly sacrifice their own interests for the sake of maintaining a "black seat" on the Supreme Court. On the safe assumption that such a dim view of the capabilities of the average black American is unwarranted, the alternative conclusion is that black people supported Justice Thomas's nomination so strongly because they did not share their leadership's view that colorblindness is a threat to their well-being and success. Therefore, Justice Thomas's views do not make him a "sell-out" or "traitor" to his race.

Undoubtedly, the traditional black leadership finds his views offensive and Thomas critics find his views "maddening" and "twisted."<sup>111</sup> That, however, is only because their own views are increasingly *less* representative of the views of the average black American. As Professor Stephen Carter has explained, black leaders "stand[] to the left of the country as a whole," but "black Americans tend to be *more* conservative than the nation as a whole on a number of matters."<sup>112</sup> It is obvious that Justice Thomas cannot credibly be attacked as a "traitor" to his race by those whose views are increasingly less representative of the black community than his own.

The black leadership's unwarranted attacks on Justice Thomas for having views shared by a large segment of the black community proves that the black community desperately needs new leadership, leadership based on the realization that we live today in an exciting new millennium, not the 1790s. Even though blacks lived in slavehouses and worked on plantations in the 1790s, that is not the case today. Today, many blacks live in suburbs and work in the professions. It is regrettable, but true that too many blacks have not shared in the

<sup>108</sup> Dickerson, *supra* note 103, at 1G.

<sup>109</sup> See A.L. May, *The Clarence Thomas Nomination; Poll: Southerners Back Thomas; Court faces Senate panel today*, ATLANTA J. & CONST., Sept. 10, 1991, at A1.

<sup>110</sup> See, e.g., L. Harris, *Doubts on Black-Conservative Link*, PHILA. INQUIRER, Oct. 18, 1991, at 19A.

<sup>111</sup> See White, *supra* note 1, at 36.

<sup>112</sup> STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 106, 145 (1991) (*emphasis added*); see generally, e.g., Caldwell, *supra* note 97, at C-1 ("The political hue of the civil rights leadership is overwhelmingly liberal. But 29 percent of black Americans consider themselves politically conservative and another 35 percent regard themselves as politically moderate . . .").

economic progress that the black community and the Nation as a whole has experienced since the 1960s. As Dr. King recognized by conducting his "Poor People's Campaign" after winning enactment of the landmark federal civil rights legislation of the mid- to late-1960s, in an era when basic civil rights are the law of the land, responsible black leadership must turn its focus to creating economic opportunity for the poor. Instead of following Dr. King's lead, the leadership wastes precious time and energy urging policies that arguably perpetuate poverty and dependency and, in the case of affirmative action, benefit groups that have far less claim to preferential treatment than the poverty-stricken—namely, white women and the black elite.<sup>113</sup>

In his recent book entitled *One By One From the Inside Out*, Boston University Economics Professor Glenn C. Loury eloquently summarized the utter failure of the black leadership to take account of the changing conditions and needs of the black community. He explained:

Blacks confront economic, social, and political problems of staggering magnitude. Yet we have a leadership and intellectual class mired in a vision of radical advocacy more suited to the 1950s and 1960s than to the 1990s and beyond. Our professional racial advocacy organizations seem unwilling or unable to address these profound problems in an effectual way. While these conditions are clearly beyond the direct control of anyone in the black community, it is entirely appropriate to assess the quality of leadership by its response to this circumstance. Judged by this standard, the traditional civil rights leadership leaves much to be desired. In the face of a pervasive social pathology in the inner-city ghettos of this country, these spokesmen have found little else to do but repeat the litany of charges about slavery, racism, discrimination, and the callous policies of Republican administrations.

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It is now clear that protest marches, civil rights lawsuits, or affirmative action for millionaire black businessmen cannot be expected to bring about change for those living in the ghettos. It is obvious that racism—though continuing to exist—cannot be blamed for all that ails the black community. Yet the civil rights leadership continues to talk as if it were 1965. They have not noticed that most white Americans have long since stopped listening.<sup>114</sup>

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<sup>113</sup> See, e.g., Suzanne Fields, *An Attempt to Buy Racial Justice Cheap; Many blacks, women see affirmative action as a psychological obstacle*, ATLANTA J. & CONST., Mar. 13, 1995, at 6A (describing "white women" as "the biggest beneficiaries of affirmative action"); Robert L. Woodson, Sr., *Affirmative Action Has Accomplished Little for Most Blacks*, EMERGE, May 31, 1995, at 42 (stating that affirmative action provides "scant benefit" to anyone other than the wealthiest and most privileged in black America).

<sup>114</sup> GLENN C. LOURY, *ONE BY ONE FROM THE INSIDE OUT: ESSAYS AND REVIEWS ON RACE AND RESPONSIBILITY IN AMERICA* 192-93 (1995).

In short, as Professor Loury concludes, the traditional black leadership must wake up or step aside to make way for a new generation of leadership that will lead the black community into the future that generations of blacks have struggled and died to create.

As a final word in criticism of the view that Justice Thomas “thinks white,” it is a sad day for America when someone of Higginbotham’s stature can make such a racist statement as “all blacks think alike” to applause. It is sadder still that only one element within the media would deem it necessary even to criticize the statement.<sup>115</sup> The media is quick to point out racism when it manifests itself in the white community, and rightly so, but apparently feels no need to speak out against racism when manifested by mainstream civil rights figures. To take a recent example, the press roundly, and quite properly, criticized supporters of Patrick Buchanan for urging Louisiana Republican primary voters not to vote for Senator Phil Gramm because he was involved in an interracial marriage—he had the gall, Buchanan’s supporters charged, to divorce a white woman to marry “an Asiatic.”<sup>116</sup> Almost invariably, however, the press corps and commentators conspicuously fall silent when Higginbotham and other critics use Justice Thomas’s interracial marriage as “Exhibit A” in the case to prove that he is a “sell-out” to black people.<sup>117</sup> Racism, however, should be condemned wherever it rears its ugly head and is no more palatable when it comes from black leaders than when it comes from whites.

Finally, it is plain that Higginbotham’s characterization of Justice Thomas’s voting record on the Court is a gross distortion that bears no resemblance at all to the truth. It is simply false that Justice Thomas argued in *Hudson v. McMillian*<sup>118</sup> that beating prisoners is acceptable conduct that is permitted by the Constitution. In fact, his argument was quite the opposite.

The Justice explicitly stated that “[a]busive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt,”<sup>119</sup> which is not exactly how one describes behavior one deems acceptable. As for the legal issue before the Court—whether it offends

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<sup>115</sup> See *Review & Outlook: Higginbotham v. Thomas*, WALL ST. J., Dec. 1, 1995, at A14.

<sup>116</sup> See, e.g., Kevin Merida, *Under Fire, Buchanan Aide Leaves; Pratt Is Linked To Supremacists*, WASH. POST, Feb. 16, 1996, at A1.

<sup>117</sup> A commendable exception, however, is Colbert King’s article pointing out that a number of prominent black civil rights figures, including Frederick Douglass, Justice Marshall (and his two sons), and Marian Wright Edelman all married people of another race. See Colbert King, *The Fuss Over Mixed Marriages*, WASH. POST, Sept. 24, 1991, at A23.

<sup>118</sup> 503 U.S. 1 (1992).

<sup>119</sup> *Id.* at 28 (Thomas, J., dissenting).

the Eighth Amendment's prohibition of "cruel and unusual punishments" to subject a prisoner to physical assaults that do not inflict serious injury—Justice Thomas answered in the negative. He did so, however, not because the prisoner's injuries were "minor," as *The New York Times* claimed in dubbing him the "Youngest, Cruellest Justice,"<sup>120</sup> but rather because, as an original matter, the Eighth Amendment does not "apply at all to deprivations"—whether major or minor—"that were not inflicted as part of the sentence for a crime."<sup>121</sup> Importantly, in concluding that the Eighth Amendment afforded no basis for relief, Justice Thomas emphasized that "if available state remedies were not constitutionally adequate, [the prisoner] would have a claim [for relief] under the Due Process Clause of the Fourteenth Amendment" and stated that he "agree[d]" that the Due Process Clause "is the appropriate, and appropriately limited, federal constitutional inquiry in this case."<sup>122</sup>

Obviously, then, Justice Thomas made two legal assertions in *Hudson*. Those were (1) that prisoner beating does not violate the Eighth Amendment unless the beating was imposed as part of a criminal sentence; and (2) that despite the unavailability of relief under the Eighth Amendment, it would violate the Fourteenth Amendment's Due Process Clause for states to permit prison officials to beat prisoners with impunity. Higginbotham and the media simply misrepresented the Justice's position in pretending that the Justice did not make the second assertion and in attributing to him the view that it is permissible to beat prisoners as long as only "minor" injury results.

As a final point on the *Hudson* case, Higginbotham's emphasis on the apparent fact (which, incidentally, appears nowhere in the record of the case) that the prisoner was black reveals his hopeless and complete obsession with race.<sup>123</sup> The issue in *Hudson* had nothing to do with the race of the prisoner or his attackers (some of whom may well have been black, too) because the application of the Eighth Amendment does not depend on race and, more fundamentally, because beating prisoners is intolerable and unlawful no matter what color the prisoner is. In fact, by emphasizing the prisoner's race, Higginbotham's clear suggestion is that judges should decide cases by reference to the color of litigants' skin.<sup>124</sup> In addition to violating the judicial oath of office, such an approach to judging is hardly one that has historically inured to the benefit of black

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<sup>120</sup> N.Y. TIMES, Feb. 27, 1992, at A 24.

<sup>121</sup> *Hudson*, 503 U.S. at 18 (Thomas, J. dissenting).

<sup>122</sup> *Id.* at 28-29 (citing cases holding that when state actors wrongfully injure people or deprive them of liberty, the Due Process Clause provides a federal remedy for relief in the event state law remedies are inadequate).

<sup>123</sup> See generally Speech, *supra* note 3.

<sup>124</sup> See *id.*

Americans. After all, it was that same notion that the outcome of cases should turn on the race of the parties involved that led to countless black men being lynched in the South in decades past, with complete impunity, for trumped-up charges of rape or imaginary offenses such as "eye rape." In light of that deplorable experience with race-based "justice," blacks should recoil at the idea of lifting the blindfold from the eyes of Lady Justice.

Moreover, "white supremacy" will not result from the Justice's votes, or the Court's rulings, in the racial districting and voting rights cases. In arguing to the contrary, Higginbotham and others implicitly make two controversial assumptions: (1) that citizens can be represented only by political candidates of their own race, and (2) that black candidates cannot be elected if their election depends on winning support from white voters. Both propositions are entirely unfounded. It is self-evident that what matters in deciding whether a given candidate can represent a particular group of citizens is not skin color, but rather the candidate's position on the issues of concern to the voters. Where the candidates' position accords with that of the voters, white candidates can represent black voters, and black candidates can represent white voters, despite racial differences. Anyone who doubts this need only ask himself who he would vote for—someone of his race who disagreed with him on the issues or someone of another race who agreed with him on the issues. To all but the most avowed racist, the choice is obvious.

As for the proposition that blacks cannot be elected except from majority-minority electoral districts, one need only look at the political landscape across the Nation for its refutation. In 1989, the citizens of Virginia—the state that in a different era served as the leader of the Confederacy and as the birthplace of "massive resistance" to desegregation—elected L. Douglas Wilder, a black man, as governor. Because Virginia is only approximately 18% black, Wilder simply could not have been elected without a large share of the white vote. Though there have been isolated instances of racially polarized voting in recent years, Wilder's election cannot be dismissed as a fluke, as the election to Congress of Carol Moseley Braun, Gary Franks, and J.C. Watts from predominantly white districts (Illinois, Connecticut, and Oklahoma, respectively) indicates. In fact, "in cities over 50,000 in population, 83 percent of the black mayors elected over the last 30 years have won office in settings which are *minority black*."<sup>125</sup> Thus, Justice Thomas's insistence on racial colorblindness in the redistricting and voting rights cases does not portend, much less permit, the reinvigoration of "white

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<sup>125</sup> Abigail Thernstrom, *Black Republicans?*, PUB. INT., Summer 1995, at 106, 110 (reviewing MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* (1995)).

supremacy,” an indelible scourge on this Nation’s history that all but a handful of fringe groups recognize as having gone the way of the dinosaur.

On the subject of white supremacy, it is worth noting how Justice Thomas voted when the cause of a white supremacist actually came before the Supreme Court in *Dawson v. Delaware*.<sup>126</sup> In *Dawson*, the petitioner, a death row inmate nicknamed “one of Satan’s disciples” whose prison cell (and body) was adorned with swastikas, argued that he should not be given the death penalty for brutally murdering a woman because he was of “good character” and had been a good prisoner.<sup>127</sup> The State of Delaware attempted to rebut both claims by proving the undisputed fact that he was a member of the “Aryan Brotherhood,” a racist prison gang that exists to retaliate against minority inmates.<sup>128</sup> The state courts upheld his resulting death sentence. The Supreme Court ruled not only that his membership in a white racist gang was “totally without relevance” to the character issue,<sup>129</sup> but that the First Amendment precluded the State from even telling the sentencing jury about Dawson’s membership in the racist group.<sup>130</sup>

Justice Thomas, joined by no one, dissented. He argued that Dawson’s membership in a white supremacist prison gang, especially one that is as “vicious” and as “hostil[e] to black inmates” as the Aryan Brotherhood,<sup>131</sup> was, in fact, relevant at the sentencing phase. To him, just as membership in a “church choir” or “the Boy Scouts” can show good character and conduct,<sup>132</sup> membership in a racist prison group that preaches race-hate and exists to retaliate against minorities can show that an inmate “has not been a ‘well-behaved and well-adjusted prisoner’” and “rebut [the inmate’s] evidence of good character.”<sup>133</sup> Such evidentiary uses of constitutionally protected associations, Justice Thomas argued, did not violate the First Amendment because “the Constitution permits courts and juries to consider character evidence in sentencing proceedings.”<sup>134</sup>

The *Dawson* ruling, which has not received much press attention, is significant for purposes of Higginbotham’s charge that Justice Thomas is paving the way to a reinstatement of “white supremacy” in the United

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<sup>126</sup> 503 U.S. 159 (1991).

<sup>127</sup> *See id.* at 163.

<sup>128</sup> *See id.* at 161.

<sup>129</sup> *See id.* at 165.

<sup>130</sup> *See id.* at 166-67.

<sup>131</sup> *Id.* at 173 n.1 (Thomas, J., dissenting).

<sup>132</sup> *See id.* at 171.

<sup>133</sup> *Id.* at 173.

<sup>134</sup> *Id.* at 177.

States. Although the Court's misguided ruling in *Dawson* cannot be attacked as favoring the cause of white supremacy, it noteworthy that Justice Thomas, whom Higginbotham (erroneously) charges does favor that discredited cause, took the position that people of good moral character simply do not espouse white supremacist or other racist views. That strong condemnation of white supremacy, which the Justice reiterated last Term in *Capitol Square Review Board v. Pinette*,<sup>135</sup> a case involving the Ku Klux Klan, refutes the nonsensical suggestion that the Justice would actively work for or tolerate the reinstatement of white supremacy.

Lastly, Higginbotham is partly, but only partly, correct that Justice Thomas has criticized *Brown v. Board of Education*.<sup>136</sup> He criticized the *Brown* Court not for what it did but for what its opinion failed to do. The Court justified its decision to overrule *Plessy* and its "separate but equal" doctrine by citing widely repudiated sociological evidence purporting to show that legally sanctioned, or *de jure*, segregation "generates a feeling of inferiority" among blacks.<sup>137</sup> Taking Chief Justice Earl Warren's opinion at face value, it was only based on "this finding" that the Court overruled *Plessy*.<sup>138</sup> Although, in Justice Thomas's view, *Brown* clearly (yet belatedly) reached the correct result, the case "was a missed opportunity" because the Court, unlike Justice Harlan's legendary *Plessy* dissent, did not rest firmly and squarely on the colorblindness principle enshrined in the Constitution.<sup>139</sup>

As a result, Justice Thomas's only criticism of *Brown* was an entirely valid one—that, as a result of its misguided focus on the emotional impact of segregation, it did not go far enough in protecting blacks (and others) against state-sponsored discrimination. One may say in defense of Chief Justice Warren's opinion that the point about psychological harm was merely a rhetoric device used, in an opinion written for nonlawyers and lawyers alike, to drive home the point that segregation is wrong. That is an entirely fair point, but it is not fair to suggest that the Justice thinks *Brown* was wrongly decided. He does not, as his writings in *Jenkins* and the *Howard Law Journal* make clear.

In making the contrary suggestion, Higginbotham and others (including Wade Henderson, director of the Washington, D.C. chapter of the NAACP)<sup>140</sup> ignore the following illuminating—and, for purposes of

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<sup>135</sup> 515 U.S. 753, 770 (1995) (Thomas, J., concurring).

<sup>136</sup> 347 U.S. 483 (1954).

<sup>137</sup> *Id.* at 494.

<sup>138</sup> *See id.* at 495.

<sup>139</sup> *See Thomas, An Afro-American Perspective, supra note 60, at 699* (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *see also Jenkins*, 515 U.S. at 121 (Thomas, J., concurring) (stating that classifications based on race violate the Constitution).

<sup>140</sup> *See, e.g., White, supra note 1, at 36.*

their smear campaign, devastating—passage, among others, in Justice Thomas's eloquent concurring opinion in *Missouri v. Jenkins*:

*Brown I* itself did not need to rely upon any psychological or social-science research in order to announce the *simple, yet fundamental truth that the Government cannot discriminate among its citizens on the basis of race*. . . . At the heart of this interpretation of the Equal Protection Clause lies the principle that the Government must treat citizens as individuals, and not as members of racial, ethnic or religious groups. . . .

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.*<sup>141</sup>

Needless to say, the fact that Justice Thomas has criticized the *Brown* Court for not being emphatic enough about the evils and constitutional infirmities of "Jim Crow" and segregation in particular is hardly a basis for damning him as a "traitor" to his race. Blacks and whites alike (at least those who are committed to the cause of racial equality) should welcome and applaud, not condemn, the Justice's declaration that it is a "simple, yet fundamental truth that the Government cannot discriminate among its citizens on the basis of race."<sup>142</sup> If his views in this regard had carried the day from the very beginning, blacks would have been spared centuries of slavery, lynchings and segregation in America.

The long and short of it is this: Justice Thomas's views are squarely within the mainstream of modern discourse within the black community. Justice Thomas has remained true both to the Constitution and to the traditional civil rights objective of requiring the Government to treat all citizens as individuals, without regard to race. By insisting that the Government remain color-blind, his jurisprudence has ensured that the grievous mistakes of the past that led to slavery and segregation will never again be repeated. Thus, the clock is not being

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<sup>141</sup> *Jenkins*, 515 U.S. at 120 (Thomas, J., concurring) (emphasis added). See also Clarence Thomas, *The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 68 (1989) (criticizing the *Brown* opinion for not "[re]l[ying] on Justice Harlan's arguments [in *Plessy*]" that the Constitution is colorblind).

<sup>142</sup> See White, *supra* note 1, at 36.



turned back by Justice Thomas, nor is his back turned on the black community.

#### *D. Conclusion*

When one honestly and fairly reviews Justice Thomas's writings and voting record on the Supreme Court, the conclusion is inescapable that he is a brilliant jurist who forcefully articulates his views of the law. There is no reasonable basis for doubting that Justice Thomas is every bit as qualified as his colleagues to serve on the U.S. Supreme Court. He has a clear vision of the proper constitutional role of the federal courts in a democratic society, and his writings demonstrate an unyielding commitment to the goals of equality that are enshrined in the Constitution. His votes have reflected views within the wide range of discourse found in the black community and are the product of careful legal reasoning and deliberation, not blind adherence to a colleague's views or a desire for revenge. In his brief tenure on the Court, Justice Thomas has already become an influential member of the Court, as the number of 5-4 decisions of the Court he joined during the 1994-1995 Term shows.<sup>143</sup> There is every reason to expect that trend to continue in the future. Notwithstanding their leaders' alarmist cries to the contrary, rank-and-file blacks have absolutely nothing to fear from—and much to be proud of in—Justice Thomas or the current Supreme Court.

## II. JUSTICE THOMAS: NEW LEADERSHIP FOR THE BLACK COMMUNITY

Justice Thomas's writings have profound and immensely beneficial public policy implications for the black community. The Justice has vigorously opposed the policies of the past which, though well-intentioned, have arguably operated in practice as barriers to black progress. The message for blacks and, indeed, the country as a whole, is that the policies of the last two decades which civil rights leaders view as essential all too often not only fail to work, but may actually hurt black Americans in their laudatory efforts to realize their full potential in America. The obvious conclusion to be drawn from all this is that if the black community is to move forward into the next century, it needs new policies and new leadership, and it needs them now.

Foremost among the policies Justice Thomas has criticized is, of course, affirmative action. Although much of the debate over affirmative action has focused on the unfairness of such programs to white males, Justice Thomas's criticisms of affirmative action largely focus on the deleterious effect such programs have in the black community itself. As

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<sup>143</sup> See Joan Biskupic, *Court's Conservatives Make Presence Felt; Reagan Appointees Lead Move Rightward*, WASH. POST, July 2, 1995, at A1.

he explained in *Adarand Constrs., Inc. v. Pena*,<sup>144</sup> race-based preference policies “stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences,” which may lead them to fail or, even worse, to not even try to succeed.<sup>145</sup> He expounded on this theme at length in a 1995 speech to The Federalist Society:

[T]he culture of victimology—with its emphasis on the so-called “benevolent state”—delivers an additional (and perhaps worse) blow to dignity and self-worth. When the less fortunate do accomplish something, they are often denied the sense of achievement which is so very important for strengthening and empowering the human spirit. . . . [T]hey are just moving along with the “herd” of other victims. Such individuals also lack any incentive to be independent, because they know that as part of an oppressed group they will neither be singled out for the life choices they make nor capable of distinguishing themselves by their own efforts.<sup>146</sup>

The implied message for black Americans: You have been misled into believing that, even though federal law guarantees you basic civil rights and protects you against racial discrimination on the job and in a wide variety of other settings, you cannot succeed without affirmative action and other preferences.

Similarly, the Justice has criticized court-ordered integration when pursued as an end in itself, rather than as a means to the end of remedying tangible, present-day effects of unconstitutional *de jure* segregation.<sup>147</sup> He explains that not only has decades of coerced busing failed to “produce[] the predicted leaps forward in black educational achievement,” but it has arguably hurt black students in their formative years by taking them out of the very schools that “can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement.”<sup>148</sup> Moreover, continued insistence on coerced busing decades after the end of state-sponsored segregation in public schools rests on the erroneous “assum[ption] that anything that is predominantly black must be inferior,”<sup>149</sup> and that “blacks, when left on their own, cannot achieve.”<sup>150</sup> Here, again, Justice Thomas’s message appears to be that yet another program deemed sacrosanct by traditional black leaders (*i.e.*, busing for

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<sup>144</sup> 515 U.S. 200 (1995).

<sup>145</sup> *Id.* at 241 (Thomas, J., concurring in part and concurring in judgment).

<sup>146</sup> *Speech of Hon. Clarence Thomas to The Federalist Society*, at 15-16 (Sept. 22, 1995), reprinted in *LEGAL TIMES*, Oct. 16, 1995, at 10.

<sup>147</sup> *See* *Missouri v. Jenkins*, 515 U.S. 70, 120 (1995) (Thomas, J., concurring).

<sup>148</sup> *Id.* at 121.

<sup>149</sup> *Id.* at 114.

<sup>150</sup> *Id.* at 122.

its own sake) is both unnecessary and harmful to the cause of black progress.

Given the case's obvious political implications, Justice Thomas's separate opinion in *Holder v. Hall*,<sup>151</sup> the voting rights case, perhaps speaks most directly to the need for new black leadership. In *Holder*, the Justice took strong exception to another traditional civil rights policy predicated on incorrect assumptions about blacks and what they can and cannot accomplish in America—the policy of redrawing electoral districts to create racial safe havens (called “majority–minority” districts) for black candidates.<sup>152</sup> That policy, he explained, assumes that all blacks “must think alike and that their interests are so distinct that [they] must be provided a separate body of representatives in the legislature to voice its unique point of view.”<sup>153</sup> He observes that, as in the other contexts, the remedy that civil rights leaders will not relinquish actually works to the detriment of the black community “by destroying any need for voters to build bridges between racial groups or to form voting coalitions.”<sup>154</sup>

Implicit in this analysis, it would appear, is the view that the so-called “black-preferred” candidates—that is, those who are elected from majority-minority districts—are, almost of necessity, ill-equipped to play any effective and meaningful role in the elected body at large. When such districts are created, “white-preferred candidates” need not be responsive to the concerns of blacks because the vast majority of black citizens are packed into compact districts represented by “their own” candidates.<sup>155</sup> In a regime of majority-minority districts, then, the vast majority of the legislature—namely, white representatives elected from districts with comparatively trivial numbers of blacks—represent the interest of white citizens, and the interests of blacks are represented only by the handful of black representatives who are elected from majority-minority districts.<sup>156</sup> The end result is that, to the extent they have needs and policy desires that differ from those of white voters, black voters are denied meaningful, effective representation.

As a consequence, to the extent the black leadership is now distressed to find Republicans firmly in control of both houses of Congress, it has only itself to blame. In its zeal to ensure the election of a handful of black officials in any given jurisdiction, the leadership

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<sup>151</sup> 512 U.S. 874 (1994).

<sup>152</sup> *Id.* at 906 (Thomas, J., concurring in judgment).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 907.

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

<sup>156</sup> *See id.* at 907. There are signs that even the civil rights orthodoxy now admits the drawbacks to its traditional approach. *See* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1457-58 (1991).

unwittingly transformed the Voting Rights Act into electoral welfare for Republicans in the South. Although the leadership got what it wanted (a few friendly black faces in Congress), it is now clear that it also got far more than it bargained for—namely, twelve consecutive years of Republican presidents *and* six consecutive years of Republican control in both houses of Congress. The leadership, therefore, is left in the unenviable position of having to rely for its last line of defense on a Democratic President who is more concerned with winning the votes of white Southerners than he is with losing the votes of blacks nationwide. Unlike the leadership, however, rank-and-file blacks are unwilling to rely on the good graces of a reluctant president. Consequently, many blacks bypassed the traditional leadership of the Democratic and Republican Parties by turning out in 1995 in droves to support a new leader—one who, for all of his obvious faults, preaches a positive, conservative message of self-reliance, economic empowerment and family values. That leader was Minister Louis Farrakhan, and the occasion, of course, was the Million Man March held in Washington, D.C.

Had the country followed the course that Justice Thomas, Dr. King and then-attorney Thurgood Marshall advocated, insisting on government neutrality with respect to race and integrating blacks into all aspects of American life, the state of black America today might be quite different from what is today. Both political parties might have worked for the betterment of the condition of black America out of a need to compete for black votes. The black middle class might be larger and more prosperous. There might not be a “black underclass” lost in a sea of hopelessness, substance abuse and despair, with no perceived stake in the American dream. Maybe more blacks would have gone to college and other institutions of higher learning, and maybe more black families would remain intact. Perhaps even more blacks would take pride in being American instead of disavowing the label “American” or prefacing it with “African-.” Maybe, but, alas, we will never know. It is never too late to try, though. Time is running out.