JUSTICE THOMAS AND AFFIRMATIVE ACTION: BAD FAITH, CONFUSION, OR BOTH

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The Supreme Court recently heard arguments in *Fisher v. University of Texas at Austin*,[1] a lawsuit challenging racial preferences used by the University of Texas to admit a diverse undergraduate class. Although there are a number of uncertainties about the case—that is, will Justice Kennedy vote with the conservatives to end once and for all affirmative action in this country, and will the Court even reach the merits given the numerous jurisdictional obstacles to the case[2]—one thing is certain: Justice Thomas will vote to strike down the admissions program at the University of Texas and, if he writes an opinion, will once again argue (some might say rant) that our Constitution must be colorblind. Justice Thomas will vote this way even though doing so is at odds with virtually everything Justice Thomas has ever publicly said about proper constitutional interpretation. The point of this Essay is to bring light to this troubling judicial hypocrisy.

Both in his opinions and public interviews, Justice Clarence Thomas often claims that fidelity to original intent and constitutional text is the most important element of constitutional interpretation.[3] He claims that the best way for a judge to keep his personal views out of his judicial decisions is through rigid adherence to the text and history of the Constitution.[4]

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1. 132 S. Ct. 1536 (2012) (mem.).

2. *See generally* Adam D. Chandler, *How (Not) To Bring an Affirmative-Action Challenge*, 122 YALE L.J. ONLINE 85 (2012), http://yalelawjournal.org/2012/10/01/chandler.html (discussing possible problems of mootness, standing, and sovereign immunity for the *Fisher* case).

3. *See* Lewis v. Casey, 518 U.S. 343, 367 (1996) (Thomas, J., concurring) ("It is a bedrock principle of judicial restraint that a right be lodged firmly in the text or tradition of a specific constitutional provision before we will recognize it as fundamental."); Steven B. Lichtman, *Black Like Me: The Free Speech Jurisprudence of Clarence Thomas*, 114 PENN ST. L. REV. 415, 444 n.110 (2009) ("For Thomas, divining the Framers' intentions is the fulcrum of his entire jurisprudence.").

4. *See infra* Part I.

Despite this rhetoric, many of Justice Thomas's decisions reflect an obvious disregard for text and history. Of course, we cannot expect complete consistency between a Justice's overarching philosophy and his votes. In Thomas's case, however, the gap is so large that there are only two possible explanations for the variance between his rhetoric and his results: bad faith or complete confusion.

A confused Justice (or even a Justice acting in bad faith) who also believed in significant judicial deference might bring dishonor to the Court but at least would not unduly interfere with important decisions of more accountable political actors like the officials at the University of Texas. Unfortunately, Justice Thomas also happens to display an alarming lack of deference to the important policy choices of these officials.

I. CONFUSED CONSTITUTIONAL INTERPRETATION

In a public interview, Justice Thomas once said the following about why he only hires law clerks who share his views on how to interpret the Constitution: "[T]he one thing that I won't give ground on is the view that we have to adhere to [the Constitution] or to [a] statute. . . . Some people don't think that. They think it's a point of departure, and I don't abide that here."[5] Thomas has also made it clear that he thinks a judge must try hard to push away his "racial, social, or religious background" when interpreting the Constitution and that a judge "must become almost pure, in the way that fire purifies metal, before he can decide a case. Otherwise, he is not a judge, but a legislator, for whom it is entirely appropriate to consider personal and group interests."[6]

In his judicial decisions, Justice Thomas has at times applied this textualist approach. For example, he does not accept the Court's substantive due process jurisprudence, which allows the Court to identify fundamental rights not explicitly mentioned in the Constitution (like the right to terminate a pregnancy). He has said the following about that doctrine: "[A]ny serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does. I cannot accept a theory of constitutional interpretation that rests on such tenuous footing."[7] He has made similar statements about the Dormant Commerce Clause, a doctrine the Court uses to limit discriminatory state legislation, but a doctrine not supported by any constitutional text.[8]

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5. *Justice Clarence Thomas*, 13 SCRIBES J. LEGAL WRITING 99, 124 (2010).

6. Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 4 (1996).

7. McDonald v. Chicago, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring).

8. *See* United Haulers Ass'n, Inc., v. Oneida Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349–55 (2007) (Thomas, J., concurring).

When the actual text of the Constitution is ambiguous, Justice Thomas purports to apply a strict originalist approach to constitutional interpretation. Relying on this theory, Thomas has hinted he might return to a nineteenth century understanding of the Commerce Clause, has said that the Establishment Clause should not be incorporated against the states, and has said that the Second Amendment protects an individual right to own guns.[9] At times, Justice Thomas goes to considerable lengths to defend what he believes is the original understanding of the Constitution and our political structure. For example, in his dissent in *U.S. Term Limits v. Thornton*,[10] Justice Thomas spent over eighty pages supporting his historical argument that the states should be allowed to impose term limits on members of Congress.[11] In *McDonald v. City of Chicago*,[12] Justice Thomas devoted fifty-six pages to arguing that the historical background to the Fourteenth Amendment demonstrated that the right to own guns should be applied to the states not through the Due Process Clause, as the plurality held, but through the Privileges and Immunities Clause (a completely different and rarely used section of the Fourteenth Amendment). Justice Thomas was the only Justice on the Court to embrace that position, which he defended on the basis of his unique views of the text and history of the Constitution.

Justice Thomas does not suggest that a rigid adherence to text and history is merely a tool that judges should use to interpret the Constitution, nor does he concede that, at times, other, more practical considerations or even precedent can trump text or history. Unlike Justice Scalia, he does not purport to be a "faint-hearted" originalist.[13] Rather, Justice Thomas has quite often argued that constitutional interpretation must be grounded in text and history (and not the philosophies of the Justices) to be legitimate.[14]

The problem with this approach is that Justice Thomas often reaches results obviously at odds with the text and history of the Constitution without giving any reasoned explanation for the inconsistency. To provide just a few of many examples (other than affirmative action), Justice Thomas has interpreted the Eleventh Amendment, the text of which is completely clear and bars only suits brought against states by citizens "of another state," to also prohibit

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9. For a good description of Thomas's originalism, see Lee J. Strang, *The Most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 U. DET. MERCY L. REV. 873, 876–878 (2011).

10. 514 U.S. 779 (1995).

11. *See* Strang, *supra* note 9, at 878.

12. *McDonald*, 130 S. Ct. at 3058.

13. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

14. *See* Stenberg v. Carhart, 530 U.S. 914, 982 (2000) (Thomas, J., dissenting).

suits by citizens of the same state as the defendant.[15] He has never provided an explanation as to how the phrase "another state" can mean "the same state" and has never explored the original understanding of the Eleventh Amendment. Justice Thomas has also never explained how the original understanding of the Tenth Amendment, or its clear text, supports an anticommandeering principle that prohibits Congress from requiring states to take action when Congress regulates interstate commerce.[16] If anything, the original understanding of the Constitution suggests that the framers foresaw and understood that Congress could commandeer the states when exercising its enumerated powers.[17] Yet, Justice Thomas supports the ahistorical and antitextual anticommandeering principle.

There are other examples of Justice Thomas ignoring original intent and clear history to reach results he prefers, but by far the most obvious, and perhaps the most important, is his approach to affirmative action cases. He has not only failed to conduct any serious historical evaluation of the constitutional issue, but he has affirmatively distorted facts, ignored clear history against his position, and overtly injected his own personal values and preferences into his decisions in a way he often decries as illegitimate and inappropriate when other Justices do the same.

II. AFFIRMATIVE ACTION

In his first written judicial opinion on affirmative action, *Adarand Constructors, Inc. v. Pena*,[18] Justice Thomas made it clear that he believes all racial preferences violate the Fourteenth Amendment, no matter what the motive and regardless of which governmental entity, state or federal, uses the classification. He wrote the following:

> As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who

15. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 380–81 (2006) (Thomas, J., dissenting) (failing to draw a distinction between citizens of another state and citizens of the defendant state as the distinction applies to concepts of sovereign immunity evidenced by the Eleventh Amendment).

16. *See* New York v. United States, 505 U.S. 144, 177–80 (1992) (explaining Justice O'Connor's majority opinion, which Justice Thomas joined, which appeared dismissive of a historical argument posed by the respondent United States, and asserted that the Tenth Amendment does not give Congress the authority to force the states to enact regulations).

17. *See* Printz v. United States, 521 U.S. 898, 945 (1997) (Stevens, J., dissenting) ("[T]he historical materials strongly suggest that the founders intended to enhance the capacity of the Federal Government by empowering it—as a part of the new authority to make demands directly on individual citizens—to act through local officials.").

18. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (Thomas, J., concurring).

> wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").
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> These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. . . . So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. . . .
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> In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.[19]

Although *Adarand* involved a federal set-aside program for contractors, Justice Thomas has adhered to these views when voting to strike down racial preferences in graduate school admissions and undergraduate admissions, as well as in the use of racial balancing to counteract housing patterns leading to segregated public schools.[20] In these cases, Justice Thomas wrote passionately about the harm caused by racial preferences, his desire for a "color-blind" Constitution, and the societal need to abide by a formalistic view of racial equality. He wrote a long concurring opinion in the Court's most recent affirmative action decision, setting forth his views that racial imbalance in public schools and segregation are not the same thing, that racially imbalanced schools are not necessarily bad for the races or education, and that local school districts do not have

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19. *Id.* at 240–41.

20. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

constitutionally sufficient reasons for using racial tools to redress racially unbalanced public schools.[21]

In none of these decisions has Justice Thomas explored the original intent of the drafters of the Fourteenth Amendment or the expectations, general or specific, of the people who ratified that Amendment; nor has he addressed in any way the historical context of race-based governmental programs designed by the majority to help minority groups. In addition, Justice Thomas has never explored the ambiguity of the word "equal" in the Fourteenth Amendment when applied to a specific race of people who, for generations, were explicitly treated unequally under the law by local, state, and federal governments. If text and history are the only legitimate grounds for constitutional interpretation, Justice Thomas's affirmative action jurisprudence is illegitimate.

First, the text of the Fourteenth Amendment does not by itself foreclose racial classifications used by majorities to assist minorities. Although we are all guaranteed the "equal protection of the law," what that means is contestable in the context of generations of slavery, Jim Crow, and formal, legal, and overt racial discrimination against people of color. For example, the use of legacy admissions is constitutional but largely benefits whites because of historical discrimination. If colleges and universities are allowed to take alumni status into account, why can't they also take race into account? The word "equal," by itself and out of context, simply cannot resolve the difficult issues surrounding affirmative action.

Second, many scholars have demonstrated that, according to the best evidence we have, the drafters and ratifiers of the Reconstruction Amendments would have believed racial preferences designed to assist the newly freed slaves were in fact fully consistent with those Amendments.[22] Justice Thomas has never tried to counter these arguments about original intent, nor has he even acknowledged them. He has frequently cited the dissenting opinion of Justice Harlan in *Plessy v. Ferguson*,[23] an 1896 opinion that tells us absolutely nothing about racial preferences to help disadvantaged groups, as it involved the forced segregation of whites and blacks on public transportation. It was also decided many years after the Equal Protection Clause was ratified.

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21. *Parents Involved*, 551 U.S. at 748 (Thomas, J., concurring).

22. *See* Andrè Douglas Pond Cummings, Grutter v. Bollinger, *Clarence Thomas, Affirmative Action and the Treachery of Originalism: "The Sun Don't Shine Here in This Part of Town,"* 21 HARV. BLACK LETTER L.J. 2, 46 (2005) (citing Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 478, 499 (1998); Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 11 (1997)).

23. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Contrary to his frequently repeated admonitions about keeping personal views out of the judiciary, Thomas's affirmative action jurisprudence is nothing more and nothing less than his personal preference for a formalized, color-blind Constitution. Rather than citing to text or history, he has emphasized the stigmatizing effects of racial preferences and how they undercut the quest for racial equality. He feels so strongly about this policy position that he devoted almost an entire opinion to defending it.[24] He may be right, or he may be wrong, but he has failed to justify such a reading through text or history.

The only real history Justice Thomas has recounted in his affirmative action opinions focuses on the views of Frederick Douglass, a famous abolitionist. The problem is that Justice Thomas misrepresents Douglass's views. In *Grutter*, Justice Thomas quoted Douglass as follows:

> In regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the Negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us . . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us![25]

Justice Thomas's purpose was clear. He argued that Douglass would have been against any racial preferences and just wanted formal equality for all Americans regardless of race (which is conveniently Justice Thomas's view). The problem is that Justice Thomas took Douglass out of context, omitted relevant parts of the very quote he relied on for his color-blind argument, and failed to review much of Douglass's life work, some of which strongly leads to the opposite conclusions about affirmative action asserted by Justice Thomas.

Justice Thomas left out from the quoted language above the next part of Douglass's speech:

> If you see him (a black person) on his way to school, let him alone, don't disturb him! If you see him going to the dinner table at a hotel, let him go! If you see him going to the ballot box, let him alone, don't disturb him! If you see him going into a work-

24. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003) (Thomas, J., dissenting).

25. *Id.* at 349 (quoting Frederick Douglass, What the Black Man Wants: An Address Delivered in Boston, Massachusetts (Jan. 26, 1865), *in* 4 THE FREDERICK DOUGLASS PAPERS 68 (John Blassingame & John McKivigan eds. 1991)).

> shop, just let him alone,—*your interference is doing him positive injury.*[26]

Douglass was obviously angry at the racial discrimination faced by black citizens at the time he was writing, not making any argument for or against government preferences to make the lives of the newly freed slaves easier. More importantly, at other times in his life and in other speeches, Douglass clearly felt that the Government had not done enough for the black race. In 1875, he said the following:

> [T]he world has never seen any people turned loose to such destitution as were the four million slaves of the South. . . . They were . . . free to hunger, free to the winds and the rains . . . free without bread to eat, or land to cultivate. . . . We gave them freedom and famine at the same time. The marvel is that they still live. What the negro wants is, first, protection of the rights already conceded by law and, secondly, education. *Talk of having done enough for these people after two hundred years of enforced ignorance and stripes is absurd, cruel, and heartless.*[27]

Frederick Douglass gave many speeches on various aspects of the plight of the freed slaves, and it is impossible to know how he would have felt about racial preferences in today's world. But we do know that Justice Thomas never discusses the many programs the late nineteenth century Congress adopted to help people of color, and he never even tries to identify the original understanding of the Fourteenth Amendment as applied to affirmative action programs. Either Justice Thomas is unaware of the many historical and textual arguments supporting affirmative action or he has deliberately chosen to ignore them. Neither alternative speaks well for the Justice.

Justice Thomas's many public statements and written opinions urging the necessity of textual and historical analysis when evaluating constitutional issues, therefore, are either the result of great confusion or great hypocrisy. The issues surrounding affirmative action are complex and emotionally charged, and reasonable people can certainly disagree about the stigmatizing effect of racial preferences. Justice Thomas obviously believes strongly that, in the long run, African Americans will be hurt more than helped by racial preferences. None of that should matter, however, to a Justice who believes that text and history are *all* that should be examined when the Court reviews the decisions of other governmental officials, like those of the Board of Regents of the

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26. Cummings, *supra* note 22, at 47 (quoting Douglass, *supra* note 25).

27. Ronald Turner, *On* Parents Involved *and the Problematic Praise of Justice Clarence Thomas*, 37 HAST. CON. L. Q. 225, 241 (2010) (quoting Frederick Douglass, Celebrating the Past, Anticipating the Future: An Address Delivered in Philadelphia, Pennsylvania (Apr. 14, 1875), *in* THE FREDERICK DOUGLASS PAPERS, *supra* note 25, at 412–13).

University of Texas. For Justice Thomas to substitute his values for government officials' decisions on an issue where the text and the Constitution are at most unclear, but probably favor the validity of those decisions, is judicial hypocrisy and judicial hubris of the worst kind.

CONCLUSION

The constitutional question raised by *Fisher*, and by all affirmative action cases, is whether the Equal Protection Clause of the Fourteenth Amendment prevents governmental officials from using racial classifications to increase diversity, redress prior discrimination, and foster a more racially tolerant society. A Justice sincerely concerned with the text and history of the Fourteenth Amendment would have to concede that there is little constitutional basis for foreclosing majority groups from assisting minority groups in this manner. Justice Thomas claims to be a Justice concerned only with text and history (not the Justices' personal views on difficult policy questions), yet also suggests the Constitution absolutely prohibits all racial preferences. In light of the constitutional text, and its history, he simply cannot have it both ways.