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GRUTTER AND THE PASSION OF JUSTICE THOMAS: A RESPONSE TO PROFESSOR KEARNEY

Ronald Turner*

INTRODUCTION

In an April 1996 speech delivered at the University of Kansas School of Law, Justice Clarence Thomas discussed his views on judging.¹ Declaring that judges are “bound by the will of the people as expressed by the Constitution and federal statutes,”² Thomas stated that “[t]he popular idea that Justices and judges somehow ‘make’ the law, or represent the interests of certain constituencies (or help the Constitution ‘evolve’) is a dangerous idea that is at war with the very concept of impartial judging and the rule of law.”³ Legal realism, Critical Legal Theory, Critical Race Theory, Critical Feminist Theory — these and other “schools of thought” posit, in Thomas’s view, that “the law itself, is merely a product of the person and, more importantly, the social structure and class that produced him or her,” such that “law becomes a means of oppression or of social control by the political, cultural, and economic elite of which judges are a part.”⁴

Rejecting the notion that judges are “not bound by anything at all save one’s own conscience,”⁵ Justice Thomas told his audience that “judges must be impartial referees who are willing at times to defend constitutional principles from attempts by different groups, parties, or the people as a whole, to overwhelm them in the name of expediency.”⁶ Accusing “the critical theorists and the political

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¹ This speech was subsequently published in the University of Kansas Law Review. Justice Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1 (1996).

² *Id.* at 2.

³ *Id.*

⁴ *Id.* at 3.

⁵ *Id.* at 2.

⁶ *Id.* at 4.

interest groups [of] wish[ing] to destroy” the value of impartiality,⁷ Justice Thomas said:

[I]mpartiality is the very essence of judging and of being a judge. A judge does not look to his or her sex or racial, social, or religious background when deciding a case. It is exactly these factors that a judge must push to one side in order to render a fair, reasoned judgment on the meaning of the law. In order to be a *judge*, a person must attempt to exorcise himself or herself of the *passions, thoughts, and emotions that fill any frail human being*. He 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.⁸

In cases involving the Constitution, impartiality is obtained and maintained by “seek[ing] the original understanding of the provision’s text,”⁹ Thomas stated, as the judge’s analysis is tethered “to the understanding of those who drafted and ratified the text.”¹⁰

⁷ *Id.*

⁸ *Id.* (second emphasis added). Whether the desired and posited impartiality can be achieved is questionable.

[T]his claim to impersonal and impartial authority, whether made in the name of reason, knowledge, or law, is always false. It inevitably depends upon the repression of the socially created character of meaning in favor of a meaning imagined to be free from contingency and the mere conventionality of language.

Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1269 (1985); see also Samuel H. Pillsbury, *Harlan, Holmes, and the Passions of Justice*, in *THE PASSIONS OF LAW* 330 (Susan A. Bandes ed., 1999) (“Anglo-American legal culture has long held that law is good to the extent that it comes from detached, principled — and dispassionate — decision makers.”); Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605, 605 (1996) (“Pure impartiality is an ideal that can never be completely attained. Judges, after all, are human beings who come to the bench with feelings, knowledge, and beliefs . . . about legal issues they must decide.”).

⁹ Thomas, *supra* note 1, at 6.

¹⁰ *Id.* at 7. Thomas explained that looking to and being governed by the original understanding helps judges to remain impartial:

[This approach] places the authority for creating legal rules in the hands of the people and their representatives rather than in the hands of the nonelected, unaccountable federal judiciary. Thus, the Constitution means not what the Court says it means, but what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean. . . . We as a nation adopted a written Constitution precisely

Justice Thomas's views on — and call for — impartial judging, and his declaration that passion and emotion have no place in judicial decision making, immediately came to mind as I read Professor Mary Kate Kearney's article, *Justice Thomas in Grutter v. Bollinger: Can Passion Play a Role in a Jurist's Reasoning?*¹¹ In this article, Kearney focuses on Justice Thomas's opinion in the United States Supreme Court's recent and highly anticipated decision in *Grutter v. Bollinger*,¹² wherein Thomas disagreed with the Court's holding that the University of Michigan Law School constitutionally considered the race of certain applicants when making student admissions decisions.¹³ Focusing on and embracing Thomas's opinion, Kearney argues that Thomas, "the only black member of the Supreme Court . . . has a unique vantage point on affirmative action,"¹⁴ that his opinion "stripped away the formalism that can distance judges . . . from the reality of the situation at hand,"¹⁵ and that Thomas's views on and opposition to affirmative action are "infused by [his] personal experiences"¹⁶ and an undefined notion of "passion."¹⁷

Assuming *arguendo* that Professor Kearney correctly characterizes Justice Thomas's opinion as an expression of his passion-driven and personalized opposition to affirmative action,¹⁸ this response agrees with Professor Kearney that passion *can* play a role in a jurist's legal reasoning and conclusions. But *should* passion play such a role, and to what extent? Justice Thomas has forcefully derided and

because it has a fixed meaning that does not change.

Id.

¹¹ Mary Kate Kearney, *Justice Thomas in Grutter v. Bollinger: Can Passion Play a Role in a Jurist's Reasoning?*, 78 ST. JOHN'S L. REV. 15 (2004).

¹² 539 U.S. 306 (2003).

¹³ See discussion *infra* Part I.

¹⁴ Kearney, *supra* note 11, at 34.

¹⁵ *Id.* at 35.

¹⁶ *Id.*

¹⁷ *Id.* at 28. "Passion" can have several meanings and connotations. "Passion is intense, fervent, ardent. But it is also overwhelming, irrational, out of control. And dangerous. Used and defined this way, *passion is the antithesis of the impartiality judges aspire to attain.*" Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman's The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 633, 636 (1996) (emphasis added).

¹⁸ See Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1629 (2003) (arguing that in his *Grutter* opinion, Thomas "expressed in passionate terms his opposition to affirmative action"). All would not agree with this view. See, e.g., Stanley Fish, *One Man's Opinion*, N.Y. TIMES, June 30, 2003, at A21:

In fact the opinion is a repudiation of the personal in favor of the principles of justice as Justice Thomas understands them. He asks, what does the equal protection clause forbid? The answer he finds is that the clause forbids discrimination on the basis of race, whether that discrimination is benign or malign in intention.

Id.

decried judicial resort to and use of passion and emotion.¹⁹ Thus, and interestingly, Kearney praises the (in her view) passionate Thomas for engaging in and committing the very act of judicial partiality the Justice denounced in his 1996 speech. As I argue herein, her article serves as an exemplar of what can occur when passionate judicial work product is the subject of an admiring, but in important respects uncritical, scholarly critique.

I. GRUTTER AND THE THOMAS OPINION

In *Grutter v. Bollinger*,²⁰ the Supreme Court held that the University of Michigan Law School's consideration of race as one factor in its student admissions decisions did not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution.²¹ In an opinion joined by Justices Stevens, Souter, Ginsburg and Breyer, Justice O'Connor endorsed the diversity rationale set forth in Justice Powell's opinion in *Regents of the University of California v. Bakke*.²² O'Connor concluded "that student body diversity is a compelling state interest that can justify the use of race in university admissions."²³ In her view, whether diversity was essential to the law school's mission was a judgment lying "primarily within the

¹⁹ See *supra* notes 1–10 and accompanying text.

²⁰ 539 U.S. 306 (2003). For an examination of the Court's decision, see Bell, *supra* note 18; Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459 (2004); David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483 (2004); Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347 (2003); Bryan K. Fair, *Taking Educational Caste Seriously: Why Grutter Will Help Very Little*, 78 TUL. L. REV. 1843 (2004); Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003); Ronald Turner, *The Too-Many-Minorities and Racegoating Dynamics of the Anti-Affirmative-Action Position: From Bakke to Grutter and Beyond*, 30 HASTINGS CONST. L.Q. 445 (2003).

²¹ See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

²² 438 U.S. 265 (1978). In *Bakke* the Court held (1) that the University of California at Davis medical school's reservation of sixteen out of one hundred seats in an entering class for special admissions applicants unlawfully discriminated on the basis of race, and (2) that race could be one of a number of factors considered in the admissions process. Justice Powell's separate opinion provided the fifth and majority-creating vote for both holdings. Writing only for himself in Part IV-D of his opinion, Powell opined that "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education." *Id.* at 311–12. For an account of Powell's consideration and resolution of the legal issues raised in *Bakke*, see JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 455–501 (1994).

²³ 539 U.S. at 325.

expertise of the university,”²⁴ a judgment to which the Court deferred under a presumption of “‘good faith’ on the part of a university . . . absent ‘a showing to the contrary.’”²⁵ Focusing on “the educational benefits that diversity is designed to produce,”²⁶ O’Connor wrote that “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path of leadership be visibly open to talented and qualified individuals of every race and ethnicity.”²⁷ In seeking to enroll a “critical mass” of minority students, the law school sought to assemble an “exceptionally academically qualified” and diverse class that would yield “the educational benefits that diversity is designed to produce.”²⁸

Justice O’Connor determined, further, that the law school’s admissions policy was narrowly tailored as the policy considered race as a plus factor and did not operate as a quota.²⁹ Acknowledging that there was “some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted,”³⁰ she reasoned that “[s]ome attention to numbers,’ without more, does not transform a flexible admissions system into a rigid quota.”³¹ The admissions files of all candidates were subjected to a “highly individualized, holistic review” with “no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity.”³²

²⁴ *Id.* at 328.

²⁵ *Id.* at 329 (quoting *Bakke*, 438 U.S. at 318–19).

²⁶ *Id.* at 330. O’Connor wrote that the “Law School’s admissions policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’” *Id.* “‘Classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’” *Id.* Emphasizing the importance of education to the preparation of students for work and citizenship, she opined that “the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.” *Id.* at 331.

²⁷ *Id.* at 332.

²⁸ *Id.* at 330. One analyst and critic of affirmative action argues that empirical evidence supporting the “claim . . . that black students must be admitted in numbers sufficient to provide a certain ‘critical mass’ on campus . . . is neither asked nor given.” THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY* 142 (2004). Sowell argues further that “a ‘critical mass’ is likely to be counterproductive academically” where “an anti-intellectual black subculture reduces black students’ performances well below what they are capable of.” *Id.* at 143 (citing JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA*, at chs. 3, 4 (2000)).

²⁹ *Grutter*, 539 U.S. at 334–35.

³⁰ *Id.* at 336 (quoting *Bakke*, 438 U.S. at 323).

³¹ *Id.*

³² *Id.* at 337. In *Gratz v. Bollinger*, 539 U.S. 244 (2003), decided on the same day as *Grutter*, the Court held that a University of Michigan undergraduate admissions program automatically awarding one-fifth of the points necessary for admission to certain underrepresented minority applicants was not narrowly tailored to achieve the compelling interest in educational diversity and was therefore unconstitutional.

Moreover, diversity factors other than race were considered, and every applicant could inform the school of the contribution his or her admission would make to diversity.³³ Nor did the policy unduly burden persons who were not members of the favored racial or ethnic groups, O'Connor concluded.³⁴

Having found that the admissions program was constitutional, Justice O'Connor cautioned (in what Professor Lani Guinier calls a "puzzling clause"³⁵) that "all governmental use of race must have a logical end point."³⁶ This "durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."³⁷ In the Justice's words:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.³⁸

In his partial concurrence and dissent,³⁹ Justice Thomas began by quoting a passage from a January 1865 speech by Frederick Douglass.⁴⁰ In that speech Douglass stated, among other things, that "if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let

³³ See 539 U.S. at 337. "Because the Law School considers 'all pertinent elements of diversity,' it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants." *Id.* at 341.

³⁴ See *id.*

³⁵ See Guinier, *supra* note 20, at 118.

³⁶ 539 U.S. at 342.

³⁷ *Id.* For an examination of O'Connor's discussion of sunset affirmative action provisions, see Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O'Connor's Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541 (2003).

³⁸ 539 U.S. at 343.

³⁹ Readers interested in a more extensive review of Thomas's opinion should see Turner, *supra* note 20, at 480-87.

⁴⁰ 539 U.S. at 349-50 (Thomas, J., concurring in part and dissenting in part). This was not the first time a Thomas opinion began with a reference to and quotation of Douglass. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring); see also KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* 6 (2004) (observing that behind the desk in Thomas's Supreme Court chambers "hangs a large portrait of Frederick Douglass, the escaped slave turned Republican abolitionist whose fiery radicalism Thomas often quotes in his Supreme Court opinions").

him alone!”⁴¹ “Like Douglass,” Thomas wrote, “I believe blacks can achieve in every avenue of American life without the meddling of university administrators.”⁴²

For Justice Thomas, “diversity . . . is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue.”⁴³ In his view, the law school was only interested in “aesthetics,” in “a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.”⁴⁴ Conceding that true meritocracy is not “the order of the day at the Nation’s universities,”⁴⁵ Thomas, “with . . . force and some anger,”⁴⁶ opined that affirmative action improperly results in the admission of undeserving African Americans.⁴⁷

[N]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test (LSAT). Nevertheless, law schools continue to use the test and then attempt to “correct” for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body.⁴⁸

Thomas accused the law school of constructing “a façade” in which “a class looks right, even if it does not perform right. The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the

⁴¹ 539 U.S. at 350 (quoting Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts on 26 January 1865*, in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (John W. Blasingame & John R. McKivigan eds., 1991)). See *infra* notes 71–75 and accompanying text for more on Thomas’s use and selective quotation of this speech.

⁴² 539 U.S. at 350; see also *id.* at 378 (“It has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to ‘[d]o nothing with us!’ and the Nation adopted the Fourteenth Amendment.”).

⁴³ *Id.* at 354 n.3.

⁴⁴ *Id.* Thomas explained:

The Law School’s argument, as facile as it is, can only be understood in one way: Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits. It is the *educational benefits* that are the end, or allegedly compelling state interest, not “diversity.”

Id. at 355.

⁴⁵ *Id.* at 368.

⁴⁶ Fish, *supra* note 18.

⁴⁷ 539 U.S. at 371–73.

⁴⁸ *Id.* at 369–70.

opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition."⁴⁹

"Who can differentiate between those who belong and those who do not?"⁵⁰ This was a critical question for Justice Thomas. He expressed his concern that observers would not be able to distinguish between the "handful of blacks who would be admitted in the absence of racial discrimination" and those African Americans ("[t]he majority of blacks . . . admitted to the Law School") who were the beneficiaries of affirmative action.⁵¹ Thomas asserted that, under the law school's policy, all blacks "are tarred as undeserving"⁵² and are stigmatized:

When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma — because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.⁵³

⁴⁹ *Id.* at 372. Thomas saw no evidence that Michigan's minority law graduates "have received a qualitatively better legal education (or become better lawyers) than if they had gone to a less 'elite' law school for which they were better prepared. And the aestheticists will never address the real problems facing 'underrepresented minorities,' instead continuing their social experiments on other people's children." *Id.* (footnote omitted).

⁵⁰ *Id.* at 373.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* In an article discussing the "blow to dignity and self-worth" delivered by the "culture of victimology," Thomas wrote that "[w]hen 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." Justice Clarence Thomas, *Victims and Heroes in the "Benevolent State"*, 19 HARV. J. L. & PUB. POL'Y. 671, 679 (1996). "In a world where the less fortunate are given special treatment and benefits . . . the so-called beneficiaries of state-sponsored benevolence are denied the opportunity to derive any sense of satisfaction from their hard work and self-help." *Id.*

Thomas has recognized that the stigmatization of affirmative action argument can go too far:

Most significantly, there is the backlash against affirmative action by "angry white males." I do not question a person's belief that affirmative action is unjust because it judges people based on their sex or the color of their skin. But something far more insidious is afoot. For some white men, preoccupation with oppression has become the defining feature of their existence. They have fallen prey to the very aspects of the modern ideology of victimology that they deplore.

Id. at 680.

I have asked elsewhere whether, “[g]iven his fear of stigma,” Justice Thomas possibly sees himself as one of those African Americans in “high places” who have been stigmatized by affirmative action.⁵⁴ As Professor Mark Tushnet has noted, “[o]ne would have to have a completely tin ear not to hear the reference to high places in government as identifying Justice Thomas himself. . . . [Thomas] is concerned that some people will regard *him* as unqualified for [the Court]. And not without reason.”⁵⁵ The Justice’s concern about color-coded stigma is not new. A beneficiary of Yale Law School’s affirmative action program,⁵⁶ “Thomas felt stigmatized, and he blamed affirmative action” when his efforts to obtain a position with a law firm were not successful.⁵⁷ One of Thomas’s colleagues on the Court, Justice Antonin Scalia, has commented on Thomas’s view of affirmative action:

⁵⁴ Turner, *supra* note 20, at 487 & n.200.

⁵⁵ Mark Tushnet, *Clarence Thomas’s Black Nationalism*, 47 HOW. L.J. 323, 338–39 (2004). Tushnet recalls a political science professor’s statement that Thomas “‘had a relatively undistinguished career by Supreme Court standards’ before his appointment.” *Id.* at 339 (quoting Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 71 (Earl M. Maltz ed., 2003)). Tushnet “note[s] his] disagreement with this assessment of Justice Thomas’s pre-Court career.” *Id.* at 339 n.91.

⁵⁶ See FOSKETT, *supra* note 40, at 3 (explaining that Thomas “entered Yale Law School as one of the first beneficiaries of an affirmative action program designed to right the wrongs of racial discrimination”); *id.* at 120 (reporting Yale Law School’s minority application committee member’s discussion of the development of admissions formula for, and evaluation of, black applicants at time of Thomas’s application); see also *id.* at 284 (“Thomas . . . believed he had been tagged with a ‘badge of inferiority’ when he was admitted to Yale under the school’s first official affirmative action policy.”); SAMUEL A. MARCOSSON, ORIGINAL SIN: CLARENCE THOMAS AND THE FAILURE OF THE CONSTITUTIONAL CONSERVATIVES 28 (2002) (noting that Thomas benefitted from affirmative action “in being admitted to Holy Cross College and Yale Law School”); Juan Williams, *A Question of Fairness*, ATLANTIC ONLINE (Feb. 1987) (At Yale, Thomas “remembers feeling the ‘monkey was on my back’ because classmates believed that he and the dozen or so other blacks in his class were there to satisfy the school’s social-policy goals, not because of their academic qualifications.”), at <http://theatlantic.com/politics/race/thomas.htm>.

⁵⁷ FOSKETT, *supra* note 40, at 134. According to an acquaintance of Thomas, Clarence and I talked many times about the damage that affirmative action was doing to our reputations The things that he and I worked so hard for . . . had been trashed, because of the perception in the larger society — and even among too many black folk — that whatever we have, we have because somebody gave us some break. *Id.* at 134–35. See also Clarence Thomas, Commencement Address at Syracuse University College of Law (May 19, 1991), in 42 SYRACUSE L. REV. 815, 817 (1991), in which Thomas notes, “[b]y the time I graduated from law school in May of 1974, I had been rebuffed in my efforts to obtain employment in major law firms in my home state of Georgia” and “I was steeped in frustration.”

I think that's the thing [Thomas] hates most about affirmative action, that it takes away from the accomplishments of those who can make it in any league You go out and people say, Yeah, sure you did this, but who knows? You might just be the "show black" or the "affirmative action black."⁵⁸

In February 1987, journalist Juan Williams reported that, while celebrating President Reagan's appointment of Thomas to a second term as the chair of the Equal Employment Opportunity Commission, then assistant attorney general for civil rights Bradford Reynolds "raised his glass" and said, "It's a proud moment for me to stand here . . . because Clarence Thomas is the epitome of the right kind of affirmative action working the right way."⁵⁹ Williams wrote:

Clarence Thomas flinched. Some of his aides looked down and shook their heads. After all Thomas had been through in defense of the [Reagan] Administration position on civil rights, Reynolds had implicitly dismissed him as an affirmative-action hire. And, worse, Reynolds had thought it a compliment. Thomas showed a look of cold hurt — a look of disgust. He folded his arms across his chest and looked away from Reynolds. . . . A few days later, when I asked about his reaction to Reynolds's comment, Thomas waved his hand, as if swatting away the memory. "I can't pay no attention to Brad," he said.⁶⁰

II. PROFESSOR KEARNEY ON JUSTICE THOMAS

In her article, Professor Kearney notes that "Clarence Thomas, the lone African-American member of the Court," did not sign Justice O'Connor's majority opinion in *Grutter*.⁶¹ Providing a descriptive account of the various parts of Thomas's opinion,⁶² she writes that the opinion's "opening grabbed the reader's attention when Justice Thomas invoked the words of Frederick Douglass."⁶³ Having "led off with the stirring rhetoric" of Douglass's address,⁶⁴ "Justice Thomas immediately introduced his personal beliefs into the opinion when he stated that he shared

⁵⁸ FOSKETT, *supra* note 40, at 284.

⁵⁹ Williams, *supra* note 56.

⁶⁰ *Id.*

⁶¹ Kearney, *supra* note 11, at 17.

⁶² *See id.* at 18–26.

⁶³ *Id.* at 18.

⁶⁴ *Id.* at 32.

Frederick Douglass's views about the ability of blacks to 'achieve in every avenue of American life without the meddling of university administrators.'"⁶⁵ This invocation of Douglass, an iconic historical figure, and the placement of Douglass on the anti-affirmative-action side of the debate, are indeed strong rhetorical moves — after all, the argument goes, if Frederick Douglass was opposed to affirmative action, the practice must be unconstitutional.⁶⁶

Focusing on Justice Thomas's "perspective," Professor Kearney states that "Thomas's dissent has received widespread attention and criticism," and provides citations to four newspaper articles criticizing Thomas's "opposition to affirmative action"⁶⁷ She then points to the "tone and rhetoric" of Thomas's opinion and the Justice's forceful criticism, "infused by personal experiences," of the Michigan law school's affirmative action policy.⁶⁸ "Justice Thomas is certainly not the first Justice to inject passion and a personal element into an opinion,"⁶⁹ Kearney informs

⁶⁵ *Id.* at 18 (quoting *Grutter*, 539 U.S. at 349).

⁶⁶ On the use of another iconic African-American figure in discussions of and debates about racial matters, see Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King, Jr.'s Legacy to Prove the Colorblind Thesis*, 2 MICH. J. RACE & L. 101 (1996).

⁶⁷ Kearney, *supra* note 11, at 26–27. According to Kearney, "[m]any of those critics assume that [Thomas] has been the beneficiary of affirmative action policies, and they are offended that he is opposing those very policies that they believe have led him to his current position on the Supreme Court." *Id.* at 27 (footnote omitted). For two reasons, Kearney argued, these criticisms are problematic:

First, they assume without proof that Justice Thomas's achievements are related to the color of his skin and not to his abilities. Second, they validate one of the concerns that he expressed in his opinion: that affirmative action policies lead people to believe that minorities who reach high levels cannot possibly be there on the basis of merit.

Id. (footnote omitted); see also Fish, *supra* note 18 (rejecting the view of those who read Thomas's "opinion as a personal expression of anger at having been the beneficiary of a policy that retroactively casts a shadow over his achievements").

⁶⁸ Kearney, *supra* note 11, at 27.

⁶⁹ *Id.* at 27–28; see also *id.* at 33 (noting that in expressing his views on affirmative action, Thomas "has only followed suit and done what other Supreme Court Justices have done before him"). In support of this point, Kearney quotes William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law"*, 10 CARDOZO L. REV. 3 (1988). In his lecture honoring Justice Cardozo, Justice Brennan opined that "qualities other than reason" have a role to "play in the judicial process." *Id.* at 9. Brennan discussed "the rubric of 'passion,' a word . . . [that] is general and conveys much of what seems at first blush to be the very enemy of reason." *Id.* Passion includes "the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason." *Id.* Passion and "the dialogue between head and heart is precisely what was missing from the formalist conception of judging." *Id.* Of course, Brennan stated, "[i]t is . . . one thing for a judge to recognize the value that awareness of passion may bring to reason, and quite another to give way altogether to impassioned judgment." *Id.* at 11. "It is often the highest calling of a judge to resist the tug of such

us, and “[i]t may be argued that the use of rhetoric, emotion, and life experiences is more appropriate in a dissenting opinion. In that situation, a Justice may feel less constrained by the conventions of appellate opinion writing and, therefore, freer to express his own beliefs.”⁷⁰

Comparing and contrasting Justice Thomas’s *Grutter* opinion with Justice Blackmun’s dissenting and “emotional opinion”⁷¹ in *DeShaney v. Winnebago County Department of Social Services*,⁷² Professor Kearney contends that “Justice Thomas’s dissent in *Grutter* balanced reason and passion.”⁷³ Reiterating that Thomas’s opinion began with Douglass’s “Let him alone!” address,⁷⁴ Kearney correctly notes that Thomas’s quotation of the Douglass speech omits critical language and passages.⁷⁵ Consider the full quotation of that portion of the Douglass address

sentiments,” Brennan concluded, noting Cardozo’s admonition that a judge is not free to pursue “his own ideal of beauty or of goodness” and “is not to yield to spasmodic sentiment, to vague and unregulated benevolence.” *Id.* (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921)).

For more on emotion and reason in the law, and the argument that the dichotomy of reason and emotion is misleading, see Richard A. Posner, *Emotion Versus Emotionalism in Law*, in *THE PASSIONS OF LAW* 309–29 (Susan A. Bandes ed., 1999).

⁷⁰ Kearney, *supra* note 11, at 28–29 (footnote omitted).

⁷¹ *Id.* at 29.

⁷² 489 U.S. 189 (1989). *DeShaney* held that the state of Wisconsin had no duty under the Due Process Clause of the Fourteenth Amendment to protect a young boy from his abusive father after state social workers and officials received reports of possible abuse but did not seek to remove the boy from the father’s custody. Dissenting from the Court’s holding and judgment, and expressing his concern for “[p]oor Joshua!,” *id.* at 213 (Blackmun, J., dissenting), Justice Blackmun complained that “the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts,” *id.* at 212. Arguing that “formalistic reasoning has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment,” *id.*, Blackmun wrote that he “would adopt a ‘sympathetic’ reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging,” *id.* at 213 (citation omitted). For an excellent discussion of *DeShaney*, see Laura Oren, *The State’s Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C. L. REV. 659 (1990).

⁷³ Kearney, *supra* note 11, at 32.

⁷⁴ *Id.*

⁷⁵ *Id.* at 18 n.22. Kearney quotes a newspaper columnist’s discussion of crucial language from Douglass’s speech omitted by Thomas. See DeWayne Wickham, Editorial, *Thomas Distorts Douglass’ Speech*, USA TODAY, June 30, 2003, available at http://www.usa-today.com/news/opinion/editorials/2003-06-30-opcom_x.htm (stating that an ellipsis in the Thomas quotation replaced Douglass’s original words “that put what Douglass said into proper context”). Having noted this criticism, and apparently agreeing that the omitted language altered the actual context of the speech, Kearney nonetheless calls attention to and speaks positively of Thomas’s use of Douglass’s speech. Kearney, *supra* note 11, at 18.

quoted in Thomas's opinion, with those passages of the speech not quoted by Thomas set out in italics:

I think the American people are disposed to be generous rather than just. I look over this country at the present time, and I see Educational Societies, Sanitary Commissions, Freedmen's Association, and the like — all very good; but in regard to the colored people, there is always more that is benevolent, not pity, not sympathy, but simply justice. The American people have always been anxious to know what they shall do with us. Gen. Banks was distressed with solicitude as to what he should do with the negro. Everybody has asked the question, and they learned to ask it early of the abolitionists: "What shall we do with the negro?" 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! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! I am not for tying or fastening them on the tree in any way, except by nature's plan, and if they will not stay there let them fall. And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! If you see him 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 workshop, just let him alone, — your interference is doing him positive injury.⁷⁶

As can be seen, critical passages are omitted from the Douglass quotation set forth in Justice Thomas's opinion. Douglass did not express any opposition to, or indicate any problem with, the work of the Freedmen's Association and other "religious, secular, and quasi-governmental agencies created during the Civil War to meet the spiritual, intellectual, and medical needs of both freedmen and Union soldiers."⁷⁷ Douglass was concerned about and criticized Nathaniel Banks, a

⁷⁶ Douglass, *supra* note 41, at 68.

⁷⁷ *Id.* at 68 n.12 (editors' note). Indeed, for Douglass, the Freedmen's Bureau represented a "commitment by the government to attend to the interests of his people," and "[t]here was no job, short of president or pope, that . . . Douglass would have liked better" than serving as the head of the Bureau. WILLIAM S. MCFEELY, FREDERICK DOUGLASS 241, 260 (1991).

Louisiana general who forced freed slaves to work on plantations.⁷⁸ And, while Douglass did plead for others to leave blacks alone, it is clear from the full text and context of the speech that his plea was directed not to some unnamed meddlers, but rather to those who inflicted positive injury on blacks by interfering with them as they sought to go to school or to work or vote or tried to dine at a hotel. Douglass, speaking in 1865, was not expressing views that unquestionably support Justice Thomas's opposition to some contemporary conception of affirmative action in higher education. Thomas's invocation and channeling of Douglass only tells us what the Justice thinks that "Douglass, a former slave and consummate realist," speaking one hundred and thirty-eight years before the *Grutter* decision, and not having experienced a future containing the stubborn legacies of slavery and Jim Crow and de jure and de facto racial discrimination and subordination,⁷⁹ would say today about the need for and the desirability of the specific type of affirmative action at issue in *Grutter*.

Professor Kearney also states that Justice Thomas "employed the personal pronoun 'I' and used scathing rhetoric to decry the effects of those policies on students with lesser qualifications," and in "strong language . . . challenged the majority's position that affirmative action helps and does not hurt its recipients."⁸⁰ According to Kearney, this critique was "expanded and personalized" in the course of the Justice's discussion of affirmative action's effects on African-American hiring and workplace promotions.⁸¹ Leaving no doubt of her belief that Thomas's race and passion were of import, she states:

Justice Thomas is the only black member of the Supreme Court and therefore has a unique vantage point on affirmative action. He is the most likely member of the Court to have had

⁷⁸ Banks implemented "serfdom" and "a plan of forced labor for freedmen and women" in Louisiana. JOHN STAUFFER, *THE BLACK HEARTS OF MEN: RADICAL ABOLITIONISTS AND THE TRANSFORMATION OF RACE* 277 (2002); see also e. christi cunningham, *Identity Markets*, 45 HOW. L.J. 491, 519 (2002); Gregory D. Stanford, *Thomas Shamelessly Hijacks Language of Cultural Icon*, MILWAUKEE J. SENTINEL, June 29, 2003, at 4J.

⁷⁹ Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 4 (2002); see also Wickham, *supra* note 75. Evidence of Douglass's racial realism is found in his September 1865 statement retreating from the view that "colored people in this country [should not] combine and act together as a separate class" and should abandon "colored conventions, colored exhibitions, colored associations of all kinds." MCFEELY, *supra* note 77, at 243. In light of what he called the "persistent determination of the present Executive of the nation [President Andrew Johnson], and also the apparent determination of the portion of the people to hold and treat us in a degraded relation," Douglass recognized the need for race-conscious associations and initiatives. *Id.*

⁸⁰ Kearney, *supra* note 11, at 32, 33.

⁸¹ *Id.* at 33.

direct experience with racial discrimination. Those experiences have informed and shaped his beliefs, and he gave voice to them in *Grutter*. These subjective beliefs are not necessarily inaccurate or wrong — instead, they enlightened his perspective. His voice resonated powerfully because it is the product of deeply held convictions. When he wrote passionately about the Law School's affirmative action policy, he compelled the reader to listen to that voice.⁸²

Thus, for Professor Kearney, the Justice Thomas who authored the *Grutter* opinion is not just a Supreme Court Justice, but an African-American Justice who approached the question of the constitutionality of affirmative action from a racialized, experiential, and passionate perspective. As Kearney does not detail the exact nature and specifics of Thomas's personal experiences, and how and why those experiences shaped and informed the Justice's anti-affirmative-action views and subjective beliefs,⁸³ it is difficult to assess the accuracy of her contention. Kearney further argues that Thomas "stripped away the formalism that can distance judges, particularly Supreme Court justices, from the reality of the situation at hand,"⁸⁴ and "moved the language of judging from the detached to the personal and the essence of judging from abstract legal discourse to a search for the truth. The

⁸² *Id.* at 34 (footnote omitted). On this view, Thomas is speaking in a voice of color. "[T]he voice-of-color thesis holds that because of their different histories and experiences with oppression, black, Indian, Asian, and Latino/a writers and thinkers may be able to communicate to their white counterparts matters that the whites are unlikely to know." RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 9 (2001); see also Alex M. Johnson, Jr., *The New Voice of Color*, 100 *YALE L.J.* 2007 (1991). A fair reading and implication of Kearney's contention that Thomas gave voice to his experiences with racial discrimination is that Thomas possesses a "deeper understanding of certain issues," DELGADO & STEFANCIC, *supra*, at 82, than that possessed by those who are not black and who have not experienced discrimination. Kearney thus places Thomas squarely within a school of thought he has expressly rejected.

Interestingly, in another case, *Virginia v. Black*, 538 U.S. 343 (2003), the Court held that a Virginia law banning cross burning with the intent to intimidate did not violate the First Amendment. Justice Thomas argued that the Court erred "in imputing an expressive component to the activity in question." *Id.* at 388 (Thomas, J., dissenting). In a non-formalist and Thomasian critical race theory moment, he stated: "In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred and the profane. I believe that cross burning is the paradigmatic example of the latter." *Id.* (citation omitted).

⁸³ For a recent effort to explain the impact of Thomas's pre-Court life and experiences on his judicial philosophy and civil rights jurisprudence, see Nathan W. Dean, *The Primacy of the Individual in the Political Philosophy and Civil Rights Jurisprudence of Justice Clarence Thomas*, 14 *GEO. MASON U. CIV. RTS. L.J.* 27 (2004).

⁸⁴ Kearney, *supra* note 11, at 35.

passion in Justice Thomas's opinion infused his reasoning with a power that is difficult to ignore."⁸⁵ If Thomas's emotion and passion did in fact strip away formalism, as Kearney suggests, he departed from a critical tenet of formalism; for if asked whether a jurist should resort to or give in to emotion in deciding a case, a formalist "would probably answer, 'Not at all.'"⁸⁶

If Professor Kearney is correct, Justice Thomas's critique of race-conscious affirmative action resonates and is made all the more powerful by the fact that Thomas is a black man with a "unique vantage point on affirmative action."⁸⁷ Praising the Justice's approach, she approves of a judicial opinion and analysis of law based on, and grounded in, the personal and the passionate, the biographical and the biological. Rather than taking Thomas's arguments as they are and assessing them without regard to the color of the Justice's skin,⁸⁸ she assumes and runs the risk of celebrating "not . . . the quality of the argument but . . . the skin color of the arguer."⁸⁹

One wonders what Justice Thomas would make of such praise, for it is manifestly contrary to and inconsistent with his pronouncements on the proper role of the judge engaged in the interpretation and application of the Constitution.⁹⁰ Recall that in his 1996 Kansas speech, Thomas made it crystal clear that the interpretive and applicative enterprise should be based on the original understanding of the pertinent constitutional text and historical context, with the judge's personal views playing no legitimate role in his or her decision.⁹¹ Thomas also spoke of the way in which Court observers speculate about "how the personal backgrounds and predispositions of the Justices influenced their votes."⁹² Moreover, identifying impartiality as the essence of principled judging,⁹³ Thomas declared that the judge who looks to race or sex or other aspects of his or her background when deciding a case, and who fails to "attempt to exorcise himself or herself of the passions, thoughts, and emotions that fill any frail human being" is not a judge at all.⁹⁴ Instead, he or she acts like a legislator who, unlike Thomas's ideal judge, may

⁸⁵ *Id.*

⁸⁶ Posner, *supra* note 69, at 321.

⁸⁷ Kearney, *supra* note 11, at 34.

⁸⁸ See Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065, 2065 (1991). Professor Carter recounts a conversation with a professor who stated that knowing that Carter was black would have helped her place an argument Carter had made in an article "in its proper perspective." Carter asked "[w]hy . . . could she not simply take the argument as it was, evaluating it without regard to the color of [his] skin?"

⁸⁹ *Id.* at 2079.

⁹⁰ See *supra* notes 1–10 and accompanying text.

⁹¹ *Id.*

⁹² Thomas, *supra* note 1, at 2.

⁹³ See *id.* at 4.

⁹⁴ *Id.*

legitimately be partial and may appropriately be influenced by, and act on, passion and emotion.

To reiterate, if one agrees with Professor Kearney's characterization of, and argument that, Justice Thomas's *Grutter* opinion is the product of Thomas's passion and personal views on affirmative action, it must be asked whether his opinion can be squared with — or is instead a departure from — the Justice's call for impartial and dispassionate judging and principled adjudication.⁹⁵ The importance of this question is and should be obvious to those who believe that "passion is the antithesis of the impartiality judges aspire to attain."⁹⁶ Given Thomas's position regarding the judge's institutional and impartial role in construing the Constitution, his personal views, no matter how strongly and passionately held and espoused, are not the point.

Furthermore, conspicuously absent from Justice Thomas's *Grutter* opinion is an analysis of what, if anything, the framers and ratifiers of the Fourteenth Amendment's Equal Protection Clause thought or may have thought about the constitutionality of voluntary race-conscious measures and initiatives enacted and implemented by governmental entities.⁹⁷ Did the framers and ratifiers of the Fourteenth Amendment believe that race-conscious governmental programs did not offend (their understanding of) equal protection principles?⁹⁸ While consideration of those subjects would not ineluctably lead to the conclusion that race-conscious affirmative action is constitutional, the focus would be on that which Thomas says matters — the text and history of the Fourteenth Amendment — and not the Justice's subjective beliefs and personal views of the desirability and perceived problems of affirmative action programs. Given Thomas's declaration that a judge's impartial interpretation of the Constitution is and must be tethered "to the

⁹⁵ Elsewhere Justice Thomas has emphasized that "a judge must be disciplined when making decisions. It takes time, intellect, intellectual honesty, and hard work to decide cases properly and to get them right." Justice Clarence Thomas, *Transition from Policymaker to Judge — A Matter of Deference*, 26 CREIGHTON L. REV. 241, 252–53 (1993).

⁹⁶ Abrahamson, *supra* note 17, at 636.

⁹⁷ For discussions of the existence of race-conscious governmental measures and actions at the time of the framing and ratification of the Fourteenth Amendment, see RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW* 125 (2004); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 431–32 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754, 772–73 (1985); Turner, *supra* note 20, at 466–67 n.96.

⁹⁸ See MARCOSSON, *supra* note 56, at 24 (answering this question in the affirmative); see also Cass R. Sunstein, *The Rehnquist Revolution*, NEW REPUBLIC, Dec. 27, 2004, at 36. Sunstein notes that "a great deal of historical work suggests that, as originally understood, no provision of the Constitution bans affirmative action programs," and that Justice Thomas has "repeatedly declared that the Constitution forbids such programs," but has "not so much as bothered to investigate the original understanding." *Id.*

understanding of those who drafted and ratified the text,”⁹⁹ one can fairly ask whether Thomas’s policy arguments made in opposition to affirmative action are partial and untethered and, consequently, methodologically and analytically unsound.

Again, if Kearney is correct that the persuasive power of Thomas’s opinion is generated and enhanced by the passion of this African-American Justice (her label and categorization, not mine), one can easily and fairly conclude that the opinion does not meet Thomas’s declared standards of impartial, deracinated, dispassionate, unemotional, and nonbiographical judging. Kearney thus praises Thomas for engaging in the very same judicial (mis)conduct as the jurist who (in Thomas’s words) fails to “become almost pure, in the way that fire purifies metal, before he can decide a case.”¹⁰⁰

I am not and should not be understood as saying that Justice Thomas’s views on and opposition to affirmative action are not legitimate or that he should not express them. Disagreement with or the questioning of one or the other side of the affirmative action debate has been and will continue to be part of the legal, political and social landscape, and differing conclusions have been and will continue to be reached by judges, scholars, legislators, institutions, and citizens grappling with the question of whether certain race-conscious affirmative action is constitutional. So I agree with Professor Kearney that “[a] discussion of Justice Thomas’s opinion . . . should not focus on whether he has a right to express his own views on affirmative action.”¹⁰¹ That he has that right is not questioned here. What can and should be questioned, however, is the route taken by the Justice to his anti-affirmative-action destination. Kearney’s reading and characterization of Thomas’s *Grutter* opinion highlights and, perhaps ironically, raises fundamental questions about the Justice’s methodology as measured against, not Kearney’s or this writer’s preferred approach or analysis, but Justice Thomas’s own conception of the proper and dispassionate role and function of the judge. As one commentator noted, “when it comes to the Equal Protection Clause . . . a voice speaks which *Justice* Thomas cannot ignore: that of *Clarence* Thomas.”¹⁰²

CONCLUSION

One problem with employing and endorsing a completely or predominantly passionate and emotional approach when considering a legal issue, for both the jurist and the scholar, is that such an approach can shortcut rigorous inquiry and, as concerns the scholar, deprive us of the benefits of the educative and revelatory

⁹⁹ Thomas, *supra* note 1, at 7.

¹⁰⁰ *Id.* at 4.

¹⁰¹ Kearney, *supra* note 11, at 33.

¹⁰² MARCOSSON, *supra* note 56, at 25.

critique. Professor Kearney was obviously moved by Justice Thomas's personal and passionate "search for the truth."¹⁰³ So moved, it is perhaps understandable that she finds rhetorical power in the opinion. So moved, it is understandable that she is (and others may be) ready to accept Thomas's challenge that the "focus [should be] on the reality of affirmative action rather than its lofty and somewhat amorphous goals. We should accept this challenge and, in doing so, decide whether these goals are best advanced by policies such as the one in place at the University of Michigan Law School."¹⁰⁴ But, moved or not, and accepting for the sake of argument Kearney's account of the passionate nature and basis of Thomas's opinion, we should and must question whether a "fair, reasoned judgment on the meaning of the law" has been reached by a jurist exorcised of the passions and emotions that, according to Justice Thomas, separate the pure from the contaminated, the judge from the legislator, personal preferences from the rule of law, and "Force and Will" from "reason and judgment."¹⁰⁵

¹⁰³ Kearney, *supra* note 11, at 35.

¹⁰⁴ *Id.*

¹⁰⁵ Thomas, *supra* note 1, at 4.