

5-1-2016

## Clarence Thomas, Fisher v. University of Texas, and the Future of Affirmative Action in Higher Education

Scott D. Gerber

*Ohio Northern University Pettit College of Law*

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Education Law Commons](#), [Legislation Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Scott D. Gerber, *Clarence Thomas, Fisher v. University of Texas, and the Future of Affirmative Action in Higher Education*, 50 U. Rich. L. Rev. 1169 (2016).

Available at: <https://scholarship.richmond.edu/lawreview/vol50/iss4/4>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# CLARENCE THOMAS, *FISHER V. UNIVERSITY OF TEXAS*, AND THE FUTURE OF AFFIRMATIVE ACTION IN HIGHER EDUCATION

*Scott D. Gerber* \*

I was flattered to be invited to participate in a February 21, 2014, symposium at the University of Chicago Law School sponsored by the Midwest Black Law Students Association about “Affirmative Action: Past, Present & Future.” The organizers said that they invited me because they thought I would say something different from my colleagues at the event. They were correct. After all, academia is dominated by the Left, and racial preferences are the sacred cow of the Left, whereas I am a libertarian who sincerely believes that racial preferences are unconstitutional.<sup>1</sup> More importantly, Clarence Thomas thinks they are unconstitutional, and he is coming closer with each passing Term to convincing a majority of his colleagues on the U.S. Supreme Court of this fact.

I have written and spoken a lot about Justice Thomas’s jurisprudence over the years,<sup>2</sup> and the organizers and I decided that it

---

\* Professor of Law, Ohio Northern University Pettit College of Law. I thank Roger Clegg and George Dent for comments on a draft of this article. I also thank Eric Segall and his faculty colleagues at Georgia State University College of Law for inviting me to present it there on March 31, 2014, and Brown University’s Political Theory Project for hosting me while I edited it. The article is dedicated to Peg Cain, my wonderful administrative assistant who retired in December 2013 after nearly four decades of great work at Ohio Northern University.

1. See, e.g., SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 173–75 (1995) [hereinafter GERBER, *TO SECURE THESE RIGHTS*]. My most recent legal thriller uses a fictionalized U.S. Supreme Court challenge to racial preferences in higher education as the lawsuit that drives the story forward. See SCOTT DOUGLAS GERBER, *MR. JUSTICE: A NOVEL* (2011); Scott Douglas Gerber, *The Fact of Legal Fiction*, *THE BENCHER*, Nov./Dec. 2013, at 18, 19, <http://inns.innsocourt.org/for-members/current-members/the-bencher/recent-bencher-articles/novemberdecember-2013/the-fact-of-legal-fiction.aspx>. For an excellent libertarian civil rights reader, see *RACE & LIBERTY IN AMERICA: THE ESSENTIAL READER* (Jonathan Bean ed., 2009).

2. See, e.g., SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999; expanded ed. 2002) [hereinafter GERBER, *FIRST PRINCIPLES*];

might be interesting for everyone if my contribution to the symposium endeavored to place Justice Thomas's concurring opinion in *Fisher v. University of Texas* ("*Fisher I*")<sup>3</sup> in the larger context of his voluminous writings on race in general and affirmative action in particular. This article does that, and it also discusses the commentary on Justice Thomas's *Fisher I* opinion because the reaction to what he writes, especially on matters of race, is almost as important as the opinions themselves.<sup>4</sup> The article concludes with some brief comments on *Schuette v. Coalition to Defend Affirmative Action*, a 2014 case about the constitutionality of a 2006 amendment to the Michigan state constitution banning racial preferences in Michigan,<sup>5</sup> and on *Fisher v. University of Texas* ("*Fisher II*")<sup>6</sup> which the Court will be deciding by the end of June 2016. Justice Scalia's recent death figures prominently in the concluding section.

### I. FISHER I (2013)

In *Fisher I*, the U.S. Supreme Court, in a 7-1 opinion by Justice Kennedy, vacated and remanded the ruling of the U.S. Court of

---

Scott D. Gerber, *Clarence Thomas, in 2* ENCYCLOPEDIA OF THE UNITED STATES CONSTITUTION 736 (David Schultz ed., 2009); Scott D. Gerber, *Justice for Clarence Thomas: An Intellectual History of Justice Thomas's Twenty Years on the Supreme Court*, 88 U. DET. MERCY L. REV. 667 (2011) [hereinafter Gerber, *Justice for Clarence Thomas*]; Scott Douglas Gerber, *The Partisan Reaction to Clarence Thomas's My Grandfather's Son: How Reviewers Have Proven Themselves Unable to Put Politics Aside to Provide a Fair Assessment of the Justice's Memoir*, FINDLAW (Dec. 4, 2007), [http://writ.news.findlaw.com/books/reviews/20071204\\_gerber.html](http://writ.news.findlaw.com/books/reviews/20071204_gerber.html) (reviewing CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007)); Scott D. Gerber, Opinion, *The Ideas of Justice Thomas*, WASH. POST (July 28, 1998), <https://www.washingtonpost.com/archive/opinions/1998/07/28/the-ideas-of-justice-thomas/3023d71f-2ae5-48bf-95b7-e143c5c2d9ab/>; Scott D. Gerber, Clarence Thomas and the Declaration of Independence, Presentation at the Princeton University James Madison Program in Ideas and Institutions Conference on the Declaration of Independence (Apr. 5, 2002) (on file with author); Scott D. Gerber, *Book Discussion on The Jurisprudence of Clarence Thomas*, C-SPAN (Jan. 27, 1999), <http://www.c-span.org/video/?119622-1/book-discussion-jurisprudence-clarence-thomas>. For a recent book that tracks the arguments I articulated in my book about Justice Thomas, see RALPH A. ROSSUM, UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION (2014). For an example of what I have said about Justice Thomas in media interviews, see John Blake, *Three Questions for Clarence Thomas*, CNN (June 25, 2013), <http://www.cnn.com/2013/06/09/us/clarence-thomas-three-questions/> (an interview about *Fisher v. University of Texas* and *Shelby County v. Holder*).

3. *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring).

4. See, e.g., GERBER, FIRST PRINCIPLES, *supra* note 2.

5. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

6. *Fisher v. Univ. of Tex. (Fisher II)*, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (June 29, 2015) (No. 14-981).

Appeals for the Fifth Circuit.<sup>7</sup> The Fifth Circuit had affirmed the decision of the U.S. District Court for the Western District of Texas that the University of Texas's affirmative action admissions policy met the standards of *Grutter v. Bollinger*<sup>8</sup>: that an institution of higher education may consider the race of applicants as a factor in admissions decisions, provided that race is not used too mechanically and that all applicants are evaluated on an individualized basis.<sup>9</sup> Justice Kennedy concluded for the Court that the Fifth Circuit had failed to apply strict scrutiny in its decision upholding the admissions policy.<sup>10</sup> The Court faulted the Fifth Circuit for presuming that the University had acted in good faith and for placing the burden of rebutting that presumption upon Ms. Fisher, the white plaintiff who had been denied admission to the University.<sup>11</sup> The Court reminded the lower court that, under *Grutter*, the burden rested primarily with the University to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.<sup>12</sup>

Justice Kagan recused herself from the case.<sup>13</sup> Justice Scalia wrote a one-paragraph concurring opinion in which he noted that he remains convinced that race-based admissions practices are unconstitutional, but that Ms. Fisher did not ask the Court to overturn *Grutter*.<sup>14</sup> Justice Ginsburg issued the only dissent in the case.<sup>15</sup> She insisted that the lower courts were correct in concluding that the University's admission policy satisfied the *Grutter* requirements.<sup>16</sup>

## II. JUSTICE THOMAS'S CONCURRING OPINION IN *FISHER I*

Justice Thomas's practice has tended to be to pen lengthy opinions the first time an issue comes before him on the Supreme

7. *Fisher I*, 133 S. Ct. at 2415, 2422, 2432.

8. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (University of Michigan law school case); see also *Gratz v. Bollinger*, 539 U.S. 244 (2003) (University of Michigan undergraduate school case).

9. *Fisher v. Univ. of Tex. (Fisher I)*, 631 F.3d 213, 247 (5th Cir. 2011), *vacated*, 133 S. Ct. at 2411.

10. *Fisher I*, 133 S. Ct. at 2419–22.

11. *Id.* at 2420.

12. *Id.* at 2421.

13. *Id.* at 2422.

14. *Id.* (Scalia, J., concurring).

15. *Id.* at 2432 (Ginsburg, J., dissenting).

16. *Id.* at 2434.

Court and to write shorter opinions that refer back to the relevant lengthy opinion if the Court is revisiting a particular issue.<sup>17</sup> His separate opinion in *Fisher I* does not conform to this pattern. While it is true that Justice Thomas cited a number of his prior civil rights opinions in *Fisher I*—*Missouri v. Jenkins*;<sup>18</sup> *Adarand Constructors, Inc. v. Peña*;<sup>19</sup> *Grutter v. Bollinger*<sup>20</sup>—he supplemented those citations with detailed arguments that buttressed them.<sup>21</sup> This confirms what I concluded in a 2007 essay about Justice Thomas’s dissenting opinion in *Virginia v. Black*, in which he insisted that cross-burning is not entitled to First Amendment protection<sup>22</sup>: questions of racial justice concern him more than those in any other area of law.<sup>23</sup>

In an eleven-page concurring opinion in *Fisher I*, Justice Thomas equated the racial classifications embraced by the University of Texas with two of the Supreme Court’s most reviled decisions<sup>24</sup>: *Korematsu v. United States*, in which the Court permitted the internment of people with Japanese ancestry during World War II;<sup>25</sup> and *Plessy v. Ferguson*,<sup>26</sup> wherein the Court endorsed the “separate-but-equal” doctrine eventually rejected unanimously in *Brown v. Board of Education*.<sup>27</sup> Justice Thomas thundered: “[W]hile the University admits that racial discrimination in admissions is not ideal, it asserts that it is a temporary

---

17. GERBER, *FIRST PRINCIPLES* (expanded ed.), *supra* note 2, at 290–91; *see, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 490–97 (1997) (Thomas, J., concurring) (noting that he “continue[d] to adhere to the views [he] expressed in *Holder v. Hall*,” before elaborating further about why he was troubled by the Court’s decision making in redistricting cases).

18. *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

19. *Adarand Constructors v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

20. *Grutter v. Bollinger*, 539 U.S. 306, 349 (Thomas, J., concurring in part and dissenting in part).

21. *Fisher I*, 133 S. Ct. at 2422 (Thomas, J., concurring).

22. *Virginia v. Black*, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting).

23. *See* Scott D. Gerber, *Justice Thomas and the Burning Cross*, *FIRST AMENDMENT CTR.* (Oct. 8, 2007), <http://www.firstamendmentcenter.org/justice-thomas-and-the-burning-cross>; *see also Black*, 538 U.S. at 394–95 (explaining his conclusion that the Virginia statute prohibited conduct, not expression). Justice Thomas’s prior departures from concisely referring back to his initial opinion on a similar subject occurred when the Court was revisiting questions about racial justice. *See* GERBER, *FIRST PRINCIPLES* (expanded ed.), *supra* note 2, at 290–91.

24. *Fisher I*, 133 S. Ct. at 2422–32 (Thomas, J., concurring).

25. *Korematsu v. United States*, 323 U.S. 214 (1944).

26. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

27. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

necessity because of the enduring race consciousness of our society. . . . [T]he University echoes the hollow justifications advanced by the segregationists” in previous cases.<sup>28</sup>

The essence of Justice Thomas’s civil rights jurisprudence is his belief that equality under the Constitution requires that every person be treated as an *individual* rather than as a member of a racial, ethnic, or religious *group*.<sup>29</sup> Justice Thomas’s individualistic approach to civil rights law was in full sail when the Court’s lone African American Justice reminded Texas’s flagship institution of higher education that the “Equal Protection Clause guarantees every person the right to be treated equally by the State, without regard to race. ‘At the heart of this [guarantee] lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups.’”<sup>30</sup>

And it is because the Equal Protection Clause guarantees every American’s constitutional right to be treated as an *individual*, Justice Thomas insisted, that the Court “‘must subject all racial classifications to the strictest of scrutiny.’ Under strict scrutiny, all racial classifications are categorically prohibited unless they are ‘necessary to further a compelling government interest.’”<sup>31</sup> Unfortunately for the University of Texas, Justice Thomas continued:

[T]he educational benefits flowing from student body diversity—assuming they exist—hardly qualify as a compelling state interest. Indeed, the argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950’s, but emphatically rejected by this Court. And just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then, see *Brown v. Board of Education*, 347 U.S. 483 (1954), the alleged educational benefits of diversity cannot justify racial discrimination today.<sup>32</sup>

Moreover, Justice Thomas pointed out that discriminatory admissions programs, such as the one implemented by the University of Texas, harm minority students by encouraging them to en-

28. *Fisher I*, 133 S. Ct. at 2427 (Thomas, J., concurring).

29. See, e.g., GERBER, *FIRST PRINCIPLES*, *supra* note 2, at 69–112 (discussing Justice Thomas’s civil rights jurisprudence).

30. *Fisher I*, 133 S. Ct. at 2422 (Thomas, J., concurring) (quoting *Missouri v. Jenkins*, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring)).

31. *Id.* (quoting *Johnson v. California*, 543 U.S. 499, 514 (2005) and *Jenkins*, 515 U.S. at 121 (Thomas, J., concurring)).

32. *Id.* at 2424–25.

roll in institutions of higher education where many cannot do the work. He wrote:

The University admits minorities who otherwise would have attended less selective colleges where they would have been more evenly matched. But, as a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete.<sup>33</sup>

Justice Thomas made the same point another way when he reminded colleges and universities that the "worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities."<sup>34</sup> He added:

It is also noteworthy that, in our desegregation cases, we rejected arguments that are virtually identical to those advanced by the University today. The University asserts, for instance, that the diversity obtained through its discriminatory admissions program prepares its students to become leaders in a diverse society. . . . The segregationists likewise defended segregation on the ground that it provided more leadership opportunities for blacks. . . . Indeed, no court today would accept the suggestion that segregation is permissible because historically black colleges produced Booker T. Washington, Thurgood Marshall, Martin Luther King, Jr. and other prominent leaders. Likewise, the University's racial discrimination cannot be justified on the ground that it will produce better leaders.<sup>35</sup>

### III. REACTION TO JUSTICE THOMAS'S CONCURRING OPINION IN *FISHER I*

There was not as much reaction to Justice Thomas's concurring opinion in *Fisher I* as I expected, perhaps because the Supreme Court itself did little more than remind the nation's lower courts that "strict scrutiny" means *strict* scrutiny—even when the decisions being challenged are those made by institutions of higher education. Or perhaps the reason for the paucity of commentary is that Justice Thomas's position on affirmative action has been unambiguous for a long time. With respect to the latter possibility, Marc Morial, president and CEO of the National Urban

---

33. *Id.* at 2431.

34. *Id.* at 2429.

35. *Id.* at 2426.

League, announced after the *Fisher I* decision that he has stopped commenting on Justice Thomas's opinions because "I don't expect Clarence Thomas to ever support affirmative action even though he was the beneficiary of affirmative action."<sup>36</sup>

As of the date of the Midwest Black Law Students Association symposium for which this article was originally prepared, there had been one law review article<sup>37</sup> and ten newspaper/news-magazine articles commenting on Justice Thomas's *Fisher I* opinion. Only two were penned by authors from the Right. Noted conservative political commentator George F. Will wrote in his *Washington Post* column:

In an opinion concurring with the majority's conclusion that strict scrutiny was required but not applied to Texas's use of race, Justice Clarence Thomas says of "racial engineering": There is no compelling governmental interest in whatever educational benefits supposedly flow from racial diversity that must be achieved by racial discrimination. Thomas should tell the chief justice that the way to stop discrimination on the basis of race is to stop pretending that strict scrutiny of such discrimination somehow makes it something other than what it is.<sup>38</sup>

Conservative law professor Gail Heriot agreed with the "mismatch" theory described by Justice Thomas in an article about the *Fisher I* case published in the libertarian *Cato Supreme Court Review*. She wrote:

There are many reasons to oppose race-preferential admissions policies. Perhaps the most fundamental is this: As Justice Clarence Thomas discussed in his *Fisher* concurrence, for all the good intentions of those who originated these policies, they apparently don't work. If the mounting empirical evidence is correct, we now have fewer African-American physicians, scientists, and engineers than

---

36. Elizabeth Flock, *Clarence Thomas Suggests Affirmative Action Is Like Jim Crow*, U.S. NEWS & WORLD REP. (June 24, 2013, 12:15 PM), <http://www.usnews.com/news/article/s/2013/06/24/clarence-thomas-suggests-affirmative-action-is-like-jim-crow> (quoting Marc Morial).

37. Several others have since been published. See, e.g., Joseph O. Oluwole & Preston C. Green III, *Harrowing Through Narrow Tailoring: Voluntary Race-Conscious Student Assignment Plans*, *Parents Involved and Fisher*, 14 WYO. L. REV. 705, 762–68 (2014) (describing Justice Thomas as "the forever lost vote" for racial preference programs).

38. George F. Will, *Opinion, Court Doesn't Resolve Wrongs of Affirmative Action*, WASH. POST (June 24, 2013), [http://www.washingtonpost.com/opinions/george-f-will-court-doesnt-resolve-wrongs-of-affirmative-action/2013/06/24/544ee214-dd04-11e2-bd83-e99e43c336ed\\_story.html](http://www.washingtonpost.com/opinions/george-f-will-court-doesnt-resolve-wrongs-of-affirmative-action/2013/06/24/544ee214-dd04-11e2-bd83-e99e43c336ed_story.html).

we would have had using race-neutral methods. We have fewer college professors and lawyers too. Whatever affirmative action's legal and constitutional status, it has backfired on its own terms.<sup>39</sup>

Of course the Left disagreed with the flattering portrayals of Justice Thomas's opinion offered by Will and Heriot. In fact, while my most recent assessment of the reaction to Justice Thomas's jurisprudence reported that even his critics now tend to express their differences with him in a far more professional tone than they did earlier in his tenure,<sup>40</sup> such is not the case with the Left's reaction to his separate opinion in *Fisher I*. I suppose that should not be surprising—as I mentioned at the outset of this article, racial preferences are the sacred cow of the Left. Symmetry dictates that I limit my discussion of this unfortunate fact to several representative examples only.

Three particularly disturbing commentaries were published in the *Huffington Post*, *Twitter*, and the *Chicago Defender*. Larry Bodine wrote in the *Huffington Post*:

Clarence Thomas was especially shameless in his separate opinion. . . . He says if it were up to him, he would pull the ladder up and strike down the university's diversity program. Governor George Wallace, who called out the National Guard to prevent black students from entering the University of Alabama in 1963, would be proud.<sup>41</sup>

Roland Martin was more concise with his vitriol on *Twitter*. He managed to insult a U.S. Supreme Court Justice in 140 characters or less: "Clarence Thomas is hilarious. I got mine but I'll make sure you don't get yours!"<sup>42</sup> At least Bodine and Martin were man enough to sign their names to their mean-spirited statements. An "Anonymous" submission to the *Chicago Defender* took the easy way out by defaming Justice Thomas without attribution. That "brave" soul insisted that Justice Thomas had thrown a "hissy fit" in *Fisher I* and that he was a "self-loather and willing tool of the White establishment."<sup>43</sup>

---

39. Gail Heriot, *Fisher v. University of Texas: The Court (Belatedly) Attempts to Invoke Reason and Principle*, 2012–2013 CATO SUP. CT. REV. 63, 64. Heriot is a member of the U.S. Commission on Civil Rights.

40. Gerber, *Justice for Clarence Thomas*, *supra* note 2, at 672–83.

41. Larry Bodine, Opinion, *Supreme Court: How to Do Our Dirty Work Against Affirmative Action*, HUFFINGTON POST (June 26, 2013, 12:18 PM), [http://www.huffingtonpost.com/larry-bodine/fisher-texas-supreme-court\\_b\\_3497952.html](http://www.huffingtonpost.com/larry-bodine/fisher-texas-supreme-court_b_3497952.html).

42. Flock, *supra* note 36 (quoting Roland Martin's tweet).

43. Anonymous, *Clarence Thomas: Affirmative Action Policies Are Like Segregation*,

However, two respectful criticisms suggest that at least some on the Left are willing to treat Justice Thomas with professionalism, even when it comes to expressing disagreement with his views about racial preferences.<sup>44</sup> The first took the form of an op-ed in the *Atlanta Journal-Constitution* by a former chief justice of the Georgia Supreme Court, Leah Ward Sears, who wrote: “I continue to respect Justice Thomas as a jurist. But I don’t believe that affirmative action can, in any way, be likened to slavery.”<sup>45</sup> The second was an op-ed in the *New York Times* by Lee C. Bollinger, who happened to be president of the University of Michigan during the Court’s 2003 foray into the vexing subject of affirmative action in higher education. Bollinger, who is now president of Columbia University, is worth quoting at length:

The greatest moments of jurisprudence have never been merely dry legal analysis, but have been linked to broader principles—and historical and social realities—from which they derive. One cost of Monday’s ruling may be the failure to renew a conversation about racial justice as the civil-rights era recedes further and further into the past. Strikingly, it was Justice Clarence Thomas who most engaged the vital historical context, writing that “arguments advanced by the University in defense of discrimination are the same as those

---

CHI. DEFENDER, June 26, 2013, at 8; see also Mark S. Brodin, Opinion, *Supreme Court Dodges Affirmative Action Hot Potato—Or Did It?*, MASS. L. WKLY. (July 3, 2013) (“Such accusations are as bizarre as they are defamatory. Can it be seriously contended that turning away a white candidate in order to make room for someone from a historically underrepresented demographic carries the same baggage as separating black from white school children during the Jim Crow era, with its ‘colored’ and ‘white’ water fountains? Is a surgeon’s therapeutic amputation of a gangrenous finger the equivalent of a torturer’s similar act to inflict pain?”).

44. For a model of how to present both sides of the emotional issue of racial preferences in higher education in a professional and informative fashion, see *Affirmative Action: Should Universities Consider Race in Admission?*, Janus Constitution Day Lecture Produced by the Political Theory Project at Brown University (Sept. 17, 2014), <https://www.brown.edu/academics/political-theory-project/events/2014/09/affirmative-action-should-universities-consider-race-admission> (debate between Randall Kennedy and Stuart Taylor, Jr. introduced by Steven G. Calabresi). See generally RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* (2013); RICHARD H. SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* (2012). Kennedy has been less kind to Justice Thomas on other occasions. See, e.g., Randall Kennedy, *Colorblind Constitutionalism*, 82 *FORDHAM L. REV.* 1, 11 (2013) (“Thomas’s equation of racial distinction intended to impose white supremacy with racial distinctions intended to undue white supremacy is one of the silliest formulations in all of American law.”).

45. Leah Ward Sears, Opinion, *Former Chief Justice of Georgia Supreme Court: Affirmative Action Is Not Like Slavery*, ATLANTA JOURNAL-CONST. (June 28, 2013, 10:27 AM), <http://www.ajc.com/weblogs/get-schooled/2013/jun/28/former-chief-justice-georgia-supreme-court-affirma/>.

advanced by the segregationists.” I disagree profoundly with his logic, though I admire his candor.<sup>46</sup>

#### IV. JUSTICE THOMAS’S “LIBERAL ORIGINALISM” IN RACE CASES

The Left wing Center for American Progress was likewise concerned about Justice Thomas’s concurring opinion in *Fisher I*, especially with respect to how different his position on racial preferences is from that of the Justice he replaced, civil rights icon Thurgood Marshall. A press release by the Center read in pertinent part:

In his remarkable concurring opinion, Justice Thomas invokes Justice Marshall’s name, along with his arguments as a lawyer in *Brown*, to assert that affirmative action violates the constitutional rights of white college applicants. If there was any doubt before this concurrence, it is now clear that the second black justice is doing everything in his power to undo nearly everything that the first black justice accomplished—as a lawyer and a judge—to ensure a more equal society.<sup>47</sup>

A blog post about *Fisher I* by Scott Lemieux for the liberal *American Prospect* magazine provides a convenient segue for explaining *why* Justice Thomas disagrees with Justice Marshall about racial preferences, and why Justice Thomas is *correct* to do so. Lemieux wrote: “The original understanding of [the] 14th Amendment can be interpreted as forbidding all state affirmative action only if the principles of equal protection are defined at such a high level of abstraction that there’s no meaningful distinction between ‘originalism’ and any other form of constitutional interpretation.”<sup>48</sup> Lemieux and other critics of Justice Thomas’s views about racial preferences clearly do not understand the Justice’s “liberal originalism” on questions of equality,<sup>49</sup> an original-

---

46. Lee C. Bollinger, Opinion, *A Long, Slow Drift from Racial Justice*, N.Y. TIMES (June 24, 2013), [http://www.nytimes.com/2013/06/25/opinion/a-long-slow-drift-from-racial-justice.html?smid=fb-share&\\_r=0](http://www.nytimes.com/2013/06/25/opinion/a-long-slow-drift-from-racial-justice.html?smid=fb-share&_r=0).

47. Press Release, Billy Corriher, Assoc. Dir. of Research for Legal Progress at the Ctr. for Am. Progress, *Clarence Thomas: The Anti-Thurgood Marshall* (July 9, 2013), <http://www.americanprogress.org/issues/civil-liberties/news/2013/07/09/69044/clarence-thomas-the-anti-thurgood-marshall/>.

48. Scott Lemieux, Opinion, *Yes, Justice Thomas, Affirmative Action Is Constitutional*, AM. PROSPECT BLOG (June 25, 2013), <http://prospect.org/article/yes-justice-thomas-affirmative-action-constitutional>.

49. Eric J. Segall, a respected liberal constitutional law professor who kindly invited me to speak about Justice Thomas at Georgia State University College of Law on March 31, 2014, likewise does not understand Justice Thomas’s originalism. See Eric J. Segall, *Justice Thomas and Affirmative Action: Bad Faith, Confusion, or Both?*, WAKE FOREST L.

ism, as I have pointed out elsewhere, that traces to Thomas Jefferson, Abraham Lincoln, and Martin Luther King Jr., and an originalism that places the Declaration of Independence at the heart of the American conception of civil rights.<sup>50</sup>

When Jefferson wrote the Declaration during the summer of 1776, he was inspired by the prevailing individual rights political theory of the day (most notably, that of 17th century British theorist John Locke). When Lincoln condemned slavery in the 1850s and 1860s, he was doing so on individual rights grounds (slaves were people, Lincoln insisted, who were entitled to enjoy the rights of individuals—especially the right to be free). And when Reverend King delivered his famous “I Have a Dream” speech in

---

REV. ONLINE 11 (2013), <http://wakeforestlawreview.com/2013/02/justice-thomas-and-affirmative-action-bad-faith-confusion-or-both/>. Mark V. Tushnet, by contrast, appreciates the distinction in Justice Thomas’s jurisprudence between liberal originalism and conservative originalism. See MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 96 (2005) (“The law professor Scott Gerber suggests that positions like this reflect a division within Thomas, between what Gerber calls liberal originalism, which tells judges to interpret the Constitution in light of the Declaration of Independence, and conservative or Borkean originalism, which tells them to regard the compromises embedded in the Constitution as expressing the framers’ underlying principles. . . . There’s surely something to Gerber’s position.”); Mark Tushnet, *Kormendy Lecture: Understanding the Rehnquist Court*, 31 OHIO N.U. L. REV. 197, 208 (2005) (same). Tushnet, as generous a scholar as there is in the legal academy, is almost certainly the most prolific Left wing constitutional law professor of the present day. See generally Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J. L. & PUB. POL’Y 489 (2004) (discussing my [Scott Gerber’s] liberal originalist theory of constitutional interpretation); Book Note, *Justice Thomas’s Inconsistent Originalism*, 121 HARV. L. REV. 1431, 1434–35 (2008) (reviewing CLARENCE THOMAS, MY GRANDFATHER’S SON: A MEMOIR (2007)) (“Professor Scott Gerber has aptly observed a dichotomy in Justice Thomas’s jurisprudence. He notes that Justice Thomas takes a ‘liberal originalist’ approach to civil rights issues, particularly affirmative action, and a ‘conservative originalist’ approach to civil liberties issues, such as abortion.”).

50. The analysis that follows in this section borrows from several of my earlier works. See, e.g., Scott D. Gerber, Opinion, *Justice Thomas and Mr. Jefferson*, LEGAL TIMES (May 5, 2003), <http://www.nationallawjournal.com/id=900005386271/Justice-Thomas-and-Mr-Jefferson> [hereinafter Gerber, *Justice Thomas and Mr. Jefferson*]. For more about “liberal originalism” in general, see GERBER, TO SECURE THESE RIGHTS, *supra* note 1; Scott D. Gerber, *Liberal Originalism: The Declaration of Independence and Constitutional Interpretation*, 63 CLEV. ST. L. REV. 1 (2014). “Liberal originalism” maintains that the Constitution should be interpreted in light of the political philosophy of the Declaration of Independence. “Conservative originalism” dictates that judges should endeavor to discern the original intent and/or original understanding of the Constitution’s authors. One of the conclusions of my book about Justice Thomas’s jurisprudence is that he is a liberal originalist in civil rights cases and a conservative originalist in other areas of constitutional law. See GERBER, FIRST PRINCIPLES, *supra* note 2, at 193. It was Justice Thomas’s shared interest in the Declaration that led me to start writing about him in the first place. See, e.g., Gerber, *Justice for Clarence Thomas*, *supra* note 2, at 667–68; see also Gordon S. Wood & Scott D. Gerber, *The Supreme Court and the Uses of History*, 39 OHIO N.U. L. REV. 435, 445–46 (2013) (transcript of a debate about originalism).

1963, his "dream" was that his children would one day live in a nation "where they will not be judged by the color of their skin but by the content of their character."<sup>51</sup> Clarence Thomas shares this vision of the American regime. He has for most of his public life.

For example, Thomas wrote in a 1987 article in the *Howard Law Journal* that the "founding principles of equality and liberty" set forth in the Declaration of Independence "dictate the policy of action towards Black Americans."<sup>52</sup> The then-chairman of the U.S. Equal Employment Opportunity Commission (the "EEOC") credited the first Justice Harlan as the initial member of the Supreme Court to appreciate the connection between the Declaration and the enforcement of the nation's civil rights laws.<sup>53</sup> In particular, Justice Thomas applauded Justice Harlan's solitary dissent in the infamous 1896 case of *Plessy v. Ferguson*, the case in which the Court constitutionalized the practice of racial segregation.<sup>54</sup> It was in that stinging dissent that Justice Harlan coined the phrase that would later become so closely associated with Justice Thomas himself: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."<sup>55</sup>

Similarly, in a 1985 article in the *Stetson Law Review* Thomas discussed his daily responsibilities of enforcing the nation's civil rights laws as chairman of the EEOC. His rejection of the agency's group-based emphasis was clear. He wrote:

I intend to take EEO enforcement back to where it started by defending the rights of individuals who are hurt by discriminatory practices. To do this, we intend to pursue individual cases as well as pattern and practice cases. . . . Those who insist on arguing that the principal [sic] of equal opportunity, the cornerstone of civil rights, means preferences for certain groups have relinquished their roles as moral and ethical leaders in this area. I bristle at the thought, for example, that it is morally proper to protest against minority racial preferences in South Africa while arguing for such preferences here.<sup>56</sup>

---

51. Martin Luther King Jr., *I Have a Dream*, Address Delivered at the Lincoln Memorial in Washington, D.C. (Aug. 28, 1963), reprinted in *THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT* 317, 319 (Scott Douglas Gerber ed., 2002).

52. Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 *HOW. L.J.* 983, 983–84 (1987).

53. *Id.* at 991–92.

54. *Id.* at 992.

55. *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J., dissenting).

56. Clarence Thomas, *The Equal Employment Opportunity Commission: Reflections*

Thomas's critics strived during his 1991 Supreme Court confirmation process to mischaracterize his views about the Declaration of Independence. For example, Harvard Law School Professor Laurence H. Tribe wrote in a scathing *New York Times* op-ed that Thomas would use the Declaration to turn back the clock to the darkest days of the nation's history:

Most conservatives criticize the judiciary for expanding its powers, "creating" rights rather than "interpreting" the Constitution. . . . Clarence Thomas, judging from his speeches and scholarly writings, seems instead to believe judges should enforce the Founders' natural law philosophy—the inalienable rights "given man by his Creator"—which he maintains is revealed most completely in the Declaration of Independence. He is the first Supreme Court nominee in 50 years to maintain that natural law should be readily consulted in constitutional interpretation.<sup>57</sup>

What critics such as Tribe failed to mention was that Thomas was articulating the standard individual rights interpretation of the Declaration—the same interpretation shared by Jefferson, Lincoln, and King. "[T]o secure these rights," the Declaration proclaims, "governments are instituted among men."<sup>58</sup> Indeed, Thomas made this point repeatedly during his confirmation battle. For instance, when asked by then-Senator Howard Metzenbaum (D-Ohio), arguably his most unwavering opponent on the Judiciary Committee, about a speech he had previously given, Thomas responded:

[T]he point I think throughout these speeches is a notion that we should be careful about the relationship between the Government and the individual and should be careful that the Government itself does not at some point displace or infringe on the rights of the individual. That is a concern, as I have noted here, that runs throughout my speeches.<sup>59</sup>

Justice Thomas has continued to speak publicly about the Declaration of Independence since his confirmation to the Supreme Court. He reminded the faculty and students of James Madison

*on a New Philosophy*, 15 STETSON L. REV. 29, 35 (1985). Of course apartheid is no longer the law in South Africa. See, e.g., *Apartheid*, BRITANNICA ONLINE ENCYCLOPEDIA, <http://www.britannica.com/topic/apartheid> (last visited Apr. 15, 2016).

57. Laurence H. Tribe, Opinion, *Clarence Thomas and "Natural Law,"* N.Y. TIMES, July 15, 1991, at A15.

58. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

59. *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States Before S. Comm. on the Judiciary*, 102d Cong. 431 (1991) (statement of Clarence Thomas, Judge, United States Court of Appeals for the D.C. Circuit).

University that Madison, the chief architect of the Constitution, based it on “universal principles,” which “[w]e find . . . most succinctly and, indeed, elegantly stated by Madison’s close friend, Thomas Jefferson, in our Declaration of Independence.”<sup>60</sup> Justice Thomas went on in his speech to describe how the Constitution secures the rights promised to all Americans by the Declaration.<sup>61</sup> Justice Thomas’s critics would be well served by reading this speech.

His critics also should read his February 9, 1999, Lincoln Day address to the Claremont Institute. There, Justice Thomas urges the American people “to be ever vigilant in reminding us—me and everyone else who has the privilege of serving our nation through public office—of the principles of our founding and how they apply to the controversies of our time.”<sup>62</sup> That speech, in my judgment, is the most significant speech about the Declaration of Independence since Reverend King’s “I Have a Dream.”

Justice Thomas is, of course, not alone in his commitment to the Declaration of Independence. However, what makes him the most important voice today on the Declaration is the official position he occupies in the American regime: one of nine members of the nation’s highest Court. Justice Thomas, in short, has the power to do something about effectuating the individual rights principles of the Declaration. His civil rights opinions and votes—several of which he cites in his *Fisher I* opinion—demonstrate that he has been more than willing to act on those principles during his tenure on the Court.

In 1995’s *Missouri v. Jenkins*, for example, Justice Thomas became the first Supreme Court Justice to directly criticize *Brown v. Board of Education*. Although he called state-mandated segregation “despicable,” he said that the Court was wrong in 1954 to rely on disputable social science evidence to declare segregation unconstitutional rather than invoking the constitutional principle

---

60. Clarence Thomas, James Madison Day Lecture, Remarks Delivered at James Madison University (Mar. 15, 2001), [http://www.jmu.edu/jmuweb/general/news2/general\\_200132382450.shtml](http://www.jmu.edu/jmuweb/general/news2/general_200132382450.shtml).

61. *Id.*

62. Clarence Thomas, The Virtue of Practical Wisdom, Remarks Delivered at the Third Annual Claremont Institute Lincoln Day Colloquium (Feb. 9, 1999), reprinted in *THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT* 243, 247 (Scott Douglas Gerber ed., 2002).

that “the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups.”<sup>63</sup>

Justice Thomas’s conception of civil rights as an individual, not a group, concern also explains his approach to voting rights. In 1994’s *Holder v. Hall*, Justice Thomas wrote in a concurring opinion that racial groups should not “be conceived of largely as political interest groups,” that blacks do not all think alike, and that existing case law should be overturned to eliminate claims for “proportional allocation of political power according to race.”<sup>64</sup> Justice Thomas echoed these views in several more recent Voting Rights Act cases, including *Northwest Austin Municipal Utility District Number One v. Holder*<sup>65</sup> and *Shelby County v. Holder*.<sup>66</sup> He again wrote separately in those cases.<sup>67</sup>

With respect to racial preferences, Justice Thomas issued three separate opinions on the subject that laid the groundwork for his concurring opinion in *Fisher I*. In *Adarand*, the 1995 government contracting case that, like *Fisher I*, seemingly called the constitutionality of racial preferences into serious question, Justice Thomas invoked the Declaration of Independence as the rule of decision.<sup>68</sup> He wrote:

There can be no doubt that the paternalism that appears to lie at the heart of this [affirmative action] 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

---

63. *Missouri v. Jenkins*, 515 U.S. 70, 118, 120–21, 123 (1994) (Thomas, J., concurring).

64. *Holder v. Hall*, 512 U.S. 874, 905, 912 (1994) (Thomas, J., concurring in the judgment).

65. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 229 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

66. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631–32 (2013) (Thomas, J., concurring).

67. *See id.*; *Nw. Austin Mun. Util. Dist. No. 1*, 557 U.S. at 212 (Thomas, J., concurring in part and dissenting in part).

68. *Adarand Constructors v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment). It is possible to find racial preferences unconstitutional without invoking the Declaration of Independence. Justice Scalia did not rely on the Declaration. *See, e.g.*, *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. 2411, 2422 (2013) (Scalia, J., concurring). Other leading conservative civil rights lawyers and scholars focus on the text and history of the 14th Amendment. *See, e.g.*, Roger Clegg, *Originalism and Affirmative Action*, NAT’L REV. ONLINE (Apr. 10, 2013), <http://www.nationalreview.com/bench-memos/345181/originalism-and-affirmative-action-roger-clegg> (citing his own work and that of Michael Rappaport).

their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").<sup>69</sup>

Justice Thomas again invoked the Declaration in his twenty-nine-page separate opinion in the 2003 University of Michigan affirmative action case, *Grutter v. Bollinger*. After criticizing the *Grutter* majority for "fail[ing] to justify its decision by reference to any principle,"<sup>70</sup> Justice Thomas closed his opinion by reminding his colleagues that the controlling principle—that articulated in the Declaration—required the case to come out the other way. He wrote:

[T]he majority has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. . . . 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. Now we must wait another 25 years to see this principle of equality vindicated. I therefore respectfully dissent . . . .<sup>71</sup>

In the racial preferences case decided most closely in time with *Fisher I*, 2007's *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Thomas continued with this theme.<sup>72</sup> He wrote:

The dissent attempts to marginalize the notion of a colorblind Constitution by consigning it to me and Members of today's plurality. . . . But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy*: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."<sup>73</sup>

## V. CONCLUSION: *SCHUETTE* (2014) & *FISHER II* (2016)

The Left's intelligentsia conveniently fails to mention that "[a] clear majority of Americans, 67 percent, are opposed to considering race and ethnicity in college admissions," and instead insist

69. *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment).

70. *Grutter v. Bollinger*, 539 U.S. 306, 357 (2003) (Thomas, J., concurring in part and dissenting in part).

71. *Id.* at 378.

72. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748, 779, 782 (2007) (Thomas, J., concurring).

73. *Id.* at 772.

“that students should be admitted solely based on merit.”<sup>74</sup> In short, most Americans agree with Justice Thomas, which makes the vitriol heaped upon him on the subject of racial preferences even more inappropriate than it already is.<sup>75</sup>

Clarence Thomas has written and spoken more forcefully about the Declaration of Independence than any public figure since Martin Luther King Jr.<sup>76</sup> His profound commitment to the individual rights principles of the nation’s founding document has helped bring the Supreme Court to the verge of doing what a liberal originalist understands the Constitution to *require* it to do: declare racial preferences unconstitutional, so that every American is judged by the content of his or her character rather than by the color of his or her skin.

The people of Michigan embraced this fundamental tenet of liberal originalism when they amended Michigan’s state constitution in 2006 to forbid state-sponsored racial preferences in Michigan. The amendment, commonly known as “Prop 2,” provides that the “state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”<sup>77</sup>

---

74. Allie Bidwell, *Majority of Americans Oppose Affirmative Action in College Admissions*, U.S. NEWS & WORLD REP. (July 24, 2013, 5:40 PM), <http://www.usnews.com/news/newsgram/articles/2013/07/24/majority-of-americans-oppose-affirmative-action-in-college-admissions> (discussing a Gallup poll).

75. Justice Thomas’s opposition to racial preferences has long subjected him to insulting remarks from the Left. For example, in response to his separate opinion in *Grutter*, Maureen Dowd wrote in her *New York Times* column that Justice Thomas’s opinion “is a clinical study of a man who has been driven barking mad by the beneficial treatment he has received,” while Henry Louis Gates Jr. called the nation’s highest-ranking African American jurist a “hypocrite” on the subject. Maureen Dowd, Opinion, *Could Thomas Be Right?*, N.Y. TIMES (June 25, 2003), <http://www.nytimes.com/2003/06/25/opinion/could-thomas-be-right.html>; Kyla King, *Harvard Educator Touts Affirmative Action: The Head of the University’s Black Studies Program Calls Supreme Court Justice Clarence Thomas a Hypocrite*, GRAND RAPIDS PRESS, Jan. 15, 2002, at A11 (quoting Professor Gates).

76. See, e.g., Scott Douglas Gerber, Opinion, *Clarence Thomas’ Moment*, HOUS. CHRON. (Nov. 16, 2012, 7:29 PM), <http://www.chron.com/default/article/Clarence-Thomas-moment-4045059.php>. The Left does not like it when I point this out. See, e.g., Ronald Turner, Opinion, *On King and Color-Blindness*, HOUS. CHRON. (Nov. 26, 2012, 5:41 PM), <http://www.chron.com/opinion/outlook/article/On-King-and-color-blindness-4068057.php> (an op-ed by a University of Houston law professor about my op-ed in the *Houston Chronicle*).

77. MICH. CONST. art. I, § 26(2).

The campaign for the passage of Prop 2 was spearheaded by Ward Connerly and Jennifer Gratz.<sup>78</sup> Connerly is a wealthy African American Republican who helped pass a similar amendment to the California state constitution in the 1990s.<sup>79</sup> Gratz was one of the plaintiffs in the 2003 decisions by the U.S. Supreme Court holding that the University of Michigan may, as a matter of federal constitutional law, consider the race of applicants as a factor in admissions decisions, provided that it is not used too mechanically and that all applicants are evaluated on an individualized basis.<sup>80</sup> Of course, it was the University of Michigan cases that the Supreme Court concluded the Fifth Circuit had failed to apply properly in *Fisher I*, and it was the University of Michigan cases that Justice Thomas said should be overruled.

Many on the academic Left have long endorsed a theory known as “popular constitutionalism”: the idea that constitutional law should be defined *outside* of the courts by the people themselves, “whether . . . we act in the streets, in the voting booths, or in legislatures as representatives of others.”<sup>81</sup> The Left’s commitment to popular constitutionalism is what made the recent challenge to Prop 2 so bizarre: the people of Michigan were engaged in the ultimate expression of popular constitutionalism when they amended their state constitution to render the Supreme Court’s decisions in the University of Michigan cases inapplicable in the state of Michigan. But, as I have mentioned twice before in this article, racial preferences are the sacred cow of the Left. Legal consistency obviously gave way to political expediency in the Left’s challenge to Prop 2.

---

78. Scott Gerber, Opinion, *Michigan’s Controversial Proposition 2, Eliminating Affirmative Action Programs in the State: A Good Example of Popular Constitutionalism?*, FINDLAW (Nov. 16, 2006), [http://writ.news.findlaw.com/commentary/20061116\\_gerber.html](http://writ.news.findlaw.com/commentary/20061116_gerber.html) [hereinafter Gerber, *Michigan’s Controversial Proposition 2*]; Tamar Lewin, *Race Preferences Vote Splits Michigan*, N.Y. TIMES (Oct. 31, 2006), [http://www.nytimes.com/2006/10/31/us/31michigan.html?\\_r=2&](http://www.nytimes.com/2006/10/31/us/31michigan.html?_r=2&).

79. Lewin, *supra* note 78.

80. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

81. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 181 (1999); see also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 5 (1999). Sunstein focuses on the judicial, rather than the popular, side of the question and calls his theory “judicial minimalism.” He agrees with Tushnet and Kramer that the people, not the Court, should enjoy the primary responsibility for determining what the Constitution means. For a critique of popular constitutionalism, see Scott D. Gerber, *The Court, the Constitution, and the History of Ideas*, 61 VAND. L. REV. 1067 (2008).

On October 15, 2013, the Supreme Court heard oral arguments in that challenge, *Schuette v. Michigan Coalition to Defend Affirmative Action*.<sup>82</sup> The U.S. Court of Appeals for the Sixth Circuit had ruled in the case that prohibiting racial preferences through a ballot initiative that amends the Michigan constitution is discriminatory because it puts minorities who want to change the law at a disadvantage.<sup>83</sup> The Sixth Circuit reasoned that Prop 2 violates the guarantee of the Equal Protection Clause of the Federal Constitution that “all citizens ought to have equal access to the tools of political change.”<sup>84</sup> What the Sixth Circuit failed to appreciate, however, is that every Michigan voter did have “equal access” to the democratic process. Proponents of racial preferences simply lost the vote.<sup>85</sup> By definition, in a democracy, somebody loses. In the apt words of Michigan Attorney General Bill Schuette, “[I]t’s fundamentally wrong to treat people differently based on the color of your skin or your gender or your ethnicity. We said no to that in Michigan.”<sup>86</sup>

On April 22, 2014, the Supreme Court ruled 6-2 that the people of Michigan were allowed to ban preferential treatment in the state.<sup>87</sup> The Justices in the majority, albeit in a series of splintered opinions, concluded that policies affecting minorities that do not involve intentional discrimination should be decided at the ballot box rather than in the courts.<sup>88</sup> Justice Sotomayor—who conceded in her memoir that she had been admitted to both

---

82. *Schuette v. Coalition to Defend Affirmative Action*, OYEZ, <https://www.oyez.org/cases/2013/12-682> (last visited Apr. 15, 2016).

83. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 485 (6th Cir. 2012) (en banc).

84. *Id.* at 470.

85. See Gerber, *Michigan’s Controversial Proposition 2*, *supra* note 78.

86. David Eggert, *AG Schuette Focused on Victims, Legal Culture Wars*, CBS (Dec. 31, 2013, 6:16 PM), <http://detroit.cbslocal.com/2013/12/31/ag-schuette-focused-on-victims-legal-culture-wars/> (quoting Bill Schuette).

87. See *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014). Justice Kagan did not participate in the decision. *Id.* at 1638. The Court’s decision legitimated similar measures in other states. See Adam Liptak, *Court Backs Michigan on Affirmative Action*, N.Y. TIMES (Apr. 22, 2014), <http://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html>.

88. See *Schuette*, 134 S. Ct. at 1629 (Kennedy, J., plurality opinion) (joined by Chief Justice Roberts and Justice Alito); *id.* at 1638 (Roberts, C.J., concurring); *id.* at 1639 (Scalia, J., concurring in the judgment) (joined by Justice Thomas); *id.* at 1648 (Breyer, J., concurring in the judgment).

Princeton University and Yale Law School on the basis of affirmative action<sup>89</sup>—disagreed vehemently in a lengthy dissent in which Justice Ginsburg joined.<sup>90</sup>

Significantly, for Justices Thomas and Scalia *Schuetz* provided another opportunity to point out that the Court's "sorry line of race-based-admissions cases" permitting colleges and universities to take race into account were wrong.<sup>91</sup> They also suggested that those decisions were in jeopardy,<sup>92</sup> which is where 2016's *Fisher II* comes in.

The Supreme Court rarely explains why it is granting certiorari,<sup>93</sup> but its decision to revisit the *Fisher* case indicates that at least four of the Justices in the majority were not pleased with how the Fifth Circuit panel handled the case on remand.<sup>94</sup> Who can blame them?<sup>95</sup> After all, the Supreme Court vacated and remanded the same panel's prior decision on the ground that the panel impermissibly deferred to the University on the dispositive question of whether race was being used in too heavy-handed a fashion in the admissions program.

Although the Fifth Circuit panel gave lip service in its latest ruling to the Supreme Court's instructions to review the University's admissions program with—in the panel's words—"more exacting scrutiny,"<sup>96</sup> it simply repeated its previous mistake of deferring to the University too much. The dissenting judge, Emilio M. Garza, pointed this out repeatedly in one of the most persuasive lower court opinions I have ever read. For example, as Judge Garza made clear, what the Supreme Court actually instructed the Fifth Circuit panel to do on remand was afford the University "no deference" at all with respect to its assertion that its chosen

---

89. SONIA SOTOMAYOR, MY BELOVED WORLD 191 (2013).

90. See *Schuetz*, 134 S. Ct. at 1651–83 (Sotomayor, J., dissenting).

91. *Id.* at 1639 (Scalia, J., concurring in the judgment). Justice Thomas joined Justice Scalia's opinion. *Id.*

92. See *id.* at 1639–40.

93. See, e.g., H.W. PERRY JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1994).

94. See *Fisher v. Univ. of Tex. (Fisher II)*, 758 F.3d 633, 637 (5th Cir. 2014), cert. granted, 135 S. Ct. 2888 (June 29, 2015) (No. 14-981).

95. The three paragraphs that follow are drawn from Scott D. Gerber, Opinion, *5th Circuit Thumbs Its Nose at U.S. Supreme Court in Racial Preferences Case*, HUFFINGTON POST (July 17, 2014, 10:05 AM), [http://www.huffingtonpost.com/scott-d-gerber/5th-circuit-thumbs-its-scotus\\_b\\_5593356.html](http://www.huffingtonpost.com/scott-d-gerber/5th-circuit-thumbs-its-scotus_b_5593356.html).

96. *Fisher II*, 758 F.3d at 637.

“means . . . to attain diversity are narrowly tailored to that goal.”<sup>97</sup> Succinctly put, the University was required to explain “with clarity” what it meant by the “critical mass” of minority students that it was endeavoring to enroll.<sup>98</sup> It failed to do so. Instead, the University offered the predictable sorts of dissemblings that colleges and universities typically offer when they are trying to convince reviewing authorities that their illegal admissions programs are not illegal. As Judge Garza aptly put it, “At best, the University’s attempted articulations of ‘critical mass’ before this court are subjective, circular, or tautological.”<sup>99</sup>

The Supreme Court knew this, and that is precisely why it vacated and remanded the case in 2013. It is profoundly disturbing that Judges Patrick E. Higginbotham and Carolyn Dineen King let the University play the same game all over again. (Judge Garza finally recognized what the University was up to, which is why he switched from ruling for the University in the original appeal to ruling against it on remand.)

On the plus side, perhaps the *Fisher* case will end up where Ms. Fisher wanted it to end up in the first place: with the nation’s highest Court declaring once and for all that the Constitution *requires* that colleges and universities assess applicants as individuals rather than as members of racial or ethnic groups.<sup>100</sup> She has some reason to be optimistic: remember that in the 2014 *Schuette* decision the Court ruled that the people of Michigan may amend their state constitution to forbid any consideration of race altogether because colleges and universities can’t be trusted to use it modestly and because at least some lower courts don’t seem to care that they don’t.

I would bet the ranch that Justice Thomas will vote to abolish racial preferences in *Fisher II*, just as he did in *Fisher I*. The wild

97. *Id.* at 665 (Garza, J., dissenting).

98. *Id.* at 666.

99. *Id.* at 667.

100. Not surprisingly, the blogosphere has been inundated with speculation about why the Court agreed to hear *Fisher* again and how the Justices will decide the case the second time around. *See, e.g.*, Emily Bazelon & Adam Liptak, *How Will the Supreme Court Rule on Affirmative Action?*, N.Y. TIMES (Dec. 8, 2015), [http://www.nytimes.com/2015/12/08/magazine/how-will-the-supreme-court-rule-on-affirmative-action.html?\\_r=0](http://www.nytimes.com/2015/12/08/magazine/how-will-the-supreme-court-rule-on-affirmative-action.html?_r=0); Lyle Denniston, *The Mystery of Fisher II Review*, SCOTUSBLOG (July 21, 2015, 12:09 AM), <http://www.scotusblog.com/2015/07/the-mystery-of-fisher-ii-review/>; Alison Somin, *Supreme Court Preview: Of Fisher II and Paper Tigers*, FEDERALIST SOC’Y (Oct. 5, 2015), <http://www.fed-soc.org/blog/detail/supreme-court-preview-of-fisher-ii-and-paper-tigers>.

card, as always, is Justice Kennedy, who has never voted to uphold a race-based admissions program, but who also has displayed a willingness to permit colleges and universities to continue to take race into account on the naïve assumption that they will do so honestly. It is time to face reality: they do not, and they never will.<sup>101</sup>

\*\*\*\*\*

Justice Antonin Scalia died unexpectedly on February 13, 2016.<sup>102</sup> At least two jurisprudential questions arise from this tragic event: (1) how will Justice Scalia's death affect the outcome in *Fisher II* and (2) what will be the impact of his death on Justice Thomas's role on the Court?

With respect to the first question, Justice Scalia's death probably will not have much impact on the outcome of *Fisher II*. Unlike a number of other closely watched cases on the Court's docket this Term, because Justice Kagan will not be participating in *Fisher II* either, there is no possibility of a 4-4 vote in the case. Justices Thomas and Alito and Chief Justice Roberts almost certainly remain solid votes against the University's racial preferences program, while Justices Ginsburg, Breyer, and Sotomayor are strong supporters of it. In short, the case still turns on what Justice Kennedy decides to do,<sup>103</sup> although the Court itself might—but probably won't—be reluctant to decide such an important case with only seven Justices participating.

The second question, the potential impact of Justice Scalia's death on Justice Thomas's role on the Court, dominated the news cycle when, on February 29, 2016, Justice Thomas asked his first question during oral argument in a decade.<sup>104</sup> The speculation

---

101. I first made this argument when the University of Michigan cases had been argued but not yet decided. See Scott D. Gerber, Opinion, *A Naive Notion Gone Awry*, NAT'L L.J., Apr. 7, 2003, at A18. Nothing has happened in the decade-plus that has elapsed since then to change my mind. Indeed, I am more convinced than ever of this unpleasant truth.

102. See, e.g., Adam Liptak, *Justice Scalia, Who Led Court's Conservative Renaissance, Dies at 79*, N.Y. TIMES, Feb. 14, 2016, at A1.

103. For a fascinating essay on what Justice Kennedy might do in *Fisher II*, see Richard Lempert, *Justice Kennedy and the Fisher Revisit: Will the Irrelevant Prove Decisive?* (Mich. Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 499, 2016), <http://ssrn.com/abstract=2740431>.

104. See Scott Douglas Gerber, Opinion, *Clarence Thomas' Views to Loom Larger at Supreme Court Following Scalia's Death*, CLEVELAND.COM (Mar. 6, 2016, 6:16 AM), [http://www.cleveland.com/opinion/index.ssf/2016/03/clarence\\_thomas\\_views\\_sure\\_to.html#incart\\_river\\_index](http://www.cleveland.com/opinion/index.ssf/2016/03/clarence_thomas_views_sure_to.html#incart_river_index).

seems to be that Justice Thomas, as the Court's only remaining proponent of the historical approach to interpreting the Constitution, will step into Justice Scalia's shoes as the nation's leading voice on conservative constitutional theory.<sup>105</sup> The *New York Times*' Adam Liptak made this point with particular poignancy: "Justice Scalia's death was a sort of passing of the baton, leaving Justice Thomas as the only member of the court fully committed to the mode of constitutional interpretation known as originalism, which seeks to apply the understanding of those who drafted and ratified the Constitution."<sup>106</sup>

What statements such as that of Liptak fail to appreciate, however, is that, although Justices Scalia and Thomas tended to vote together in civil rights cases, they approached those cases differently in at least one critical respect: Justice Scalia declined to sign on to those portions of Justice Thomas's opinions that invoked the Declaration of Independence as the rule of decision. And while it can be argued that Justices Scalia and Thomas were both consistent opponents of racial preferences, and it therefore does not matter that one approached the issue as a conservative originalist and the other as a liberal originalist, it would be a mistake to say it does not matter. Ideas matter in constitutional law. Indeed, Justice Scalia was a titan on the Court because of the power of his ideas about conservative originalism, not because of the results he managed to achieve.<sup>107</sup>

I doubt that Justice Scalia's passing will transform Justice Thomas into the loquacious questioner during oral argument that Justice Scalia was. With any luck, however, Justice Thomas's liberal originalism will come to supplant Justice Scalia's conservative originalism as the predominant alternative to the so-called progressive constitutionalism of the Court's Democratic appointees. Justice Scalia himself appeared open to the possibility: Just last Term he finally joined in full an opinion that Justice Thomas authored that invoked the Declaration of Independence. That opinion, Justice Thomas's dissenting opinion in the same-sex marriage case of *Obergefell v. Hodges*, also marked the first time

105. *Id.* What follows borrows from *id.*

106. Adam Liptak, *Thomas Ends 10-Year Silence on the Bench*, N.Y. TIMES, Mar. 1, 2016, at A1.

107. The Second Amendment case *District of Columbia v. Heller* (2008) was arguably Justice Scalia's only significant originalist majority opinion during his entire thirty-year tenure. See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

that Justice Thomas has appealed to the Declaration in a case that did not involve race.<sup>108</sup> As I mentioned in *First Principles*, the jurisprudence of the American Founding mandates that liberal originalism be applied in all categories of constitutional law.<sup>109</sup>

---

108. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting). Justice Scalia actually cited the Declaration of Independence in his own dissenting opinion in the case. See *id.* at 2627 (Scalia, J., dissenting). See generally Scott Douglas Gerber, Opinion, *Clarence Thomas, Gay Marriage and the Declaration of Independence*, WASH. EXAMINER (July 3, 2015, 12:01 AM), <http://www.washingtonexaminer.com/clarence-thom-as-gay-marriage-and-the-declaration-of-independence/article/2567372>.

109. See GERBER, *FIRST PRINCIPLES*, *supra* note 2. See generally GERBER, *TO SECURE THESE RIGHTS*, *supra* note 1.