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CLARENCE THOMAS, VICTIM? PERHAPS, AND VICTIMIZER? YES—A STUDY IN SOCIAL AND RACIAL ALIENATION FROM AFRICAN-AMERICANS

MICHAEL DEHAVEN NEWSOM*

I. INTRODUCTION

The nomination of Clarence Thomas as an Associate Justice of the United States Supreme Court unhinged many African-Americans, including this writer. Many simply had no idea of what to make of a situation that involved the combustible mixture of gender, race, class, political duplicity, political ideology, and alleged sexual harassment, nor of the African-American man who sat at the center of the maelstrom. Valiant attempts, however, were made to sort out the issues raised by President Bush's cynical decision to offer up Clarence Thomas as "the best person for [the] position"[1] vacated by retirement of Thurgood Marshall.[2] But sorting out and settling are two rather different things. Clarence Thomas continues to be a thorn in the side of many African-Americans and the storm has not subsided. This paper will attempt to explain why Justice Thomas writes opinions and casts votes on the Court that continue

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1. *The Supreme Court: A Nominee is Presented, Excerpts From News Conference Announcing Court Nominee*, N.Y. TIMES NAT'L, July 2, 1991, at A14 (statement of President Bush). "Certainly Bush was exaggerating." Catharine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L. REV. 117, 120 (1993). Wells argues that Thomas was not, however, an affirmative action appointment. *See id*. at 121–22 (arguing that "[t]here are two reasons, however, why it makes sense to believe that Thomas was not an affirmative action appointment and that Bush was not trying to maintain diversity on the Court by appointing the 'best-qualified Black,'" because "the claim that Thomas is the best-qualified Black is so clearly false that it could not be credited except in the presence of some exceedingly negative stereotypes about Black people and their achievements," and because "Bush has consistently demonstrated in real and concrete terms that he is not the sort of man who places a positive value on diversifying American political life" given "[h]is repeated opposition to civil rights legislation and the employment practices of his own administration [as] strong evidence that George Bush is sincerely and firmly opposed to affirmative action in all its forms").

2. *See* RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS (Anita Faye Hill & Emma Coleman Jordan eds., 1995); AFRICAN AMERICAN WOMEN SPEAK OUT ON ANITA HILL-CLARENCE THOMAS (Geneva Smitherman ed., 1995); RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992).

to bother, frustrate, annoy, and exasperate many African-Americans. It is the thesis of this paper that Clarence Thomas is deeply alienated from most African-Americans, and his alienation largely operates to repudiate, disavow, and otherwise insult African-Americans, a fact of which many whites are not aware.[3] This paper also suggests that Thomas's victimizing alienation is perfectly suited for a high court bent, unfortunately, on maintaining white hegemony.

Felix Geyer tells us that "[a]lienation is a venerable concept, with its roots going back some two millennia." [4] Its modern meanings might trace their origins to the works of Karl Marx,[5] but others would also point to Sigmund Freud and psychoanalysis.[6] In addition, the experiences of African-Americans and other people of color have led to yet another school of thought on the subject of alienation.[7] While there are thus several different perspectives or analytical frameworks within which one can think about the concept of alienation, some generalizations are possible. Alienation has six dimensions: powerlessness, meaninglessness, normlessness, social isolation, self-estrangement, and cultural estrangement.[8] All six are aspects of distance or separation. William Monroe writes:

> Alienation implies dissatisfaction, discontent, boredom . . . *the desire to be elsewhere*. Though the reasons may be vague, the conviction is clear and sharp: the here-and-now is not good enough. At its most subversive, the call of alienation emanates from a transcendent realm beyond historicity or originates

3. *See* John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to "The Law School Five,"* 46 HOW. L.J. 175, 181 (2003) (stating that he "think[s] that whites generally have no idea of the intensity of black negative feelings toward Justice Thomas"). Professor Calmore's article shares many of the themes and modalities of this essay. *See id.* His main purpose, however is to connect Justice Thomas's alienation to a need for "linking critical race theory to a critical pedagogy that helps to re-socialize law students and orient them toward a critical race practice." *Id.* at 183. The purpose of the present essay is to explore the nature and dimensions of that alienation and to suggest that Thomas is as much a victimizer as he is a victim of racial oppression. *See infra* note 24. As such, the purpose of the present essay is to sound the tocsin, to warn, to alert, and to argue that Justice Thomas's victimizing alienation advances the true goals and objectives of the United States Supreme Court, goals and objectives that must change if righteousness shall fall like the rain and justice move like that rolling river. And yet, our purposes ultimately come together; perhaps re-socializing law students will produce lawyers, legislators and opinion leaders who will seek to reorient, if not change, the goals and objectives of the Supreme Court, for change is surely needed.

4. Felix Geyer, *Introduction: Alienation, Ethnicity, and Postmodernism*, *in* ALIENATION, ETHNICITY, AND POSTMODERNISM ix, xi (Felix Geyer ed., 1996).

5. Richard Schmitt, *Introduction: Why is the Concept of Alienation Important?*, *in* ALIENATION AND SOCIAL CRITICISM 1–6 (Richard Schmitt & Thomas E. Moody eds., 1994).

6. *See* Geyer, *supra* note 4, at ix–x, xi, xiii.

7. Howard McGary, *Alienation and the African-American Experience*, *in* ALIENATION AND SOCIAL CRITICISM, *supra* note 5, at 133–35.

8. Geyer, *supra* note 4, at ix.

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> in a consciousness superior to the encultured self. While the modes or strategies of alienation are many, they all seem to share the conviction that persons and communities have become estranged from their true destiny or potential. Thus the sulky signs of alienation often imply an intense but diffuse accusation.[9]

Alienation is necessarily a relational concept; it stems from the lack of a proper balance between individuals and social groups, settings or contexts.[10] It is a product of the man-made world.[11] As a consequence, alienation is not "monolithic; . . . in fact, no one is simply alienated, but persons are alienated in specific respects and may thus be suffering alienation in some contexts of their lives and be inflicting alienation in other contexts."[12] Suffering alienation may even yield a social good because alienation can be a "functional response[] to dysfunctional cultural situations."[13] More precisely, "[a]lienation is inseparable from function and even contributes, in its fashion, to healthy function."[14] Nonetheless, while alienation might validate liberty,[15] "many of our strategies of alienation have denatured themselves by adopting methods of coercion, gestures of intimidation, and rubrics of violence,"[16] the antithesis of freedom. One cannot easily map the social value or utility of alienation as an abstract proposition; much depends on particular or specific facts or context.

The final point to bear in mind is Howard McGary's claim that African-Americans, as a group, are *not* "alienated or estranged from themselves."[17] This proposition seems counterintuitive, given the conventional wisdom that holds that African-Americans frequently cannot trust, or do not trust, each

9. WILLIAM MONROE, POWER TO HURT: THE VIRTUES OF ALIENATION 5 (1998) (alteration in original) (footnote omitted).

10. *See* Roy S. Bryce-Laporte & Claudewell S. Thomas, *Epilogue* to ALIENATION IN CONTEMPORARY SOCIETY: A MULTIDISCIPLINARY EXAMINATION 382, 385–86 (Roy S. Bryce-Laporte & Claudewell S. Thomas eds., 1976) (arguing that individuals must enjoy a sense of belonging and feel a sense of belonging to the social organizations of which they are members while at the same time these organizations must concede individual rights and provide "adequate services, equal protection, promised opportunities, and just rewards").

11. Felix Geyer & Walter R. Heinz, *Introduction* to ALIENATION SOCIETY AND THE INDIVIDUAL: CONTINUITY AND CHANGE IN THEORY AND RESEARCH, at xi, xxxii (Felix Geyer & Walter R. Heinz eds., 1992).

12. *See* Schmitt, *supra* note 5, at 18. *See also* Geyer & Heinz, *supra* note 11, at xxxii (stating that "[t]he alienated have automatically been viewed as the victims; but some of them at least may also be the perpetrators" and thus "[m]ore emphasis should be placed on investigating how precisely those who are alienated may further the continued existence of alienating conditions on all levls [sic] of social reproduction").

13. MONROE, *supra* note 9, at 7.

14. *Id.* at 210.

15. *Id.* at 211.

16. *Id.*

17. McGary, *supra* note 7, at 142.

other.[18] McGary puts his claim in context, however. First, he concedes that some African-Americans have experienced such alienation.[19] Indeed, the thesis here is that Clarence Thomas is precisely such an African-American. Nonetheless, McGary contends:

> [Lack of recognition of blacks by whites in American society] does not always lead to alienation. Even though African-Americans have experienced hostility, racial discrimination, and poverty, they still have been able to construct and draw upon institutions like the family, church, and black community to foster and maintain a healthy sense of self in spite of the obstacles that they have faced.[20]

He presses the point, rejecting the central claim of many who seek to understand alienation through the prism of the experience of oppressed racial minorities.[21]

> This . . . is not to say that these [African-American] communities provide their members with all that is necessary for them to flourish under conditions of justice, but only that they provide enough support to create the space necessary for them to avoid the deeply divided and estranged selves described in some recent work on alienation.[22]

He concludes: "I don't deny that a hostile racist society creates the kind of assault that can lead to alienation, but only that this assault can be and has been softened by supportive African-American communities."[23] McGary argues, therefore, for the critical importance of community in assessing whether or not African-Americans, generally, are estranged from other blacks, while at the same time recognizing that such estrangement can and does occur.

In light of the foregoing, the thesis of this paper, restated, is that for whatever reason or reasons, Clarence Thomas is estranged and socially isolated from African-Americans as a group. It is also the thesis of this paper that Clarence Thomas's alienation finds powerful expression in the utter lack of African-American institutional or community support for his views on race and the votes that he casts on the Court in furtherance thereof.[24] To the contrary,

18. One finds powerful expression of this idea in literature. *See generally* LORRAINE HANSBERRY, A RAISIN IN THE SUN (1959) (describing that the son of the heroine is conned by another African-American out of the insurance money that was to fund a move by his family from the Chicago ghetto to a formerly all-white neighborhood).

19. McGary, s*upra* note 7, at 142.

20. *Id.*

21. *See supra* note 7 and accompanying text.

22. McGary, *supra* note 7, at 142.

23. *Id.* at 142–43.

24. It is also the thesis of this writer that whether or not Clarence Thomas is a victim by virtue of his alienation, he is surely a perpetrator, victimizing African-Americans by way of the votes that he casts on the Court. The proper proof of this proposition, which requires a careful reading and analysis of scores of opinions, is beyond the scope of this paper. However, one need

the only institutional or community support that Clarence Thomas has comes from reactionary whites,[25] particularly those who see the Supreme Court as the defender of white hegemony.

This paper will explore Clarence Thomas's alienation from black people from a variety of perspectives, each of which points in the same direction. Part II will examine two competing macro-narratives that frame the tension between Clarence Thomas and a substantial majority of African-Americans.[26] The first of them, the "Civil Rights Macro-Narrative," received definitive treatment at the hands of A. Leon Higginbotham, a distinguished American

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only consider *Bush v. Gore*, 531 U.S. 98 (2000), in which Thomas joined four other Justices on the Court in electing George Bush president of the United States, notwithstanding the salient fact that more than ninety percent of African-American voters supported a different candidate, the one who actually won the popular vote, on the basis of votes cast or attempted to be cast by the lowly American people. *See* Jamin B. Raskin, *What's Wrong with Bush v. Gore and Why We Need to Amend the Constitution to Ensure it Never Happens Again*, 61 MD. L. REV. 652, 702 (2002). If one takes into account the chicanery involved in disenfranchising African-Americans in Florida, see Raskin, *supra* at 202–03, and the incredible snafus in ballot design and defective voting machines, see Jon L. Mills, *Florida on Trial: Federalism in the 2000 Presidential Election*, 13 STAN. L. & POL'Y REV. 83, 85 (2002), Gore carried the State of Florida in the 2000 presidential election. This writer assumes that the African-American community as a whole knew which major-party candidate would further its interests and which one would not. One cannot easily dismiss a vote this lopsided as the product of dementia, delusion, or ignorance.

It is certainly true that *anybody* who voted for Gore was victimized by the Court's coup d'état, and it is more than likely that all Americans ultimately were victimized by the Court's unprincipled power grab. None of this detracts, however, from the plain fact that Thomas's vote victimized black people even as it victimized others.

Whether Thomas's alienation accomplishes some socially useful purpose is doubtful at best. The personal freedom or liberty of one individual—Clarence Thomas—might be socially valuable. *See* Bryce-Laporte & Thomas, *supra* note 10, at 384–85. The question, however, is whether we can afford the cost, or bear the negative externalities that might flow from an irresponsible exercise of individual freedom. Exaggerated claims of autonomy ignore the complex interconnectedness that constitutes social reality. *See* Schmitt, *supra* note 5, at 13–14.

25. Clarence Thomas finds support from individual African-American conservatives, few in number though they may be. *See infra* note 357 and accompanying text. On the other hand, whites regularly fawn over Clarence Thomas. *See generally*, Nancie G. Marzulla, *The Textualism of Clarence Thomas: Anchoring the Supreme Court's Property Rights Jurisprudence to the Constitution*, 10 AM. U. J. GENDER SOC. POL'Y & L. 351 (2002) (praising Thomas's "individualism" in the area of property rights); Senator John D. Ashcroft, *Justice Clarence Thomas: Reviving Restraint and Personal Responsibility*, 12 REGENT U. L. REV. 313, 313 (2000) (lauding Thomas's "vital role in advancing the conservative legal tradition of interpreting the law, not creating it"); Edwin Meese, III, *The Jurisprudence of Clarence Thomas*, 12 REGENT U. L. REV. 349, 349 (2000) (applauding Thomas's "fidelity to the Constitution"); David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339 (1996) (approving Thomas's Tenth Amendment jurisprudence).

26. *See* Michael deHaven Newsom, *Independent Counsel? No. Ombudsman? Yes: A Parable of American Ideology and Myth*, 5 WIDENER L. SYMP. J. 141, 148–51 (2000) (defining ideologies as macro-narratives and myths as micro-narratives).

jurist and a fierce and persistent critic of Clarence Thomas, in a law review article.[27] This macro-narrative celebrates the works of African-Americans and their white allies in the struggle to make America's promise a reality for African-Americans and others for whom the dream has been long deferred. Justice Thomas gave the second, the "Color-Blindness Macro-Narrative," a clear shape and expression in an important and revealing law review article.[28] Thomas's macro-narrative celebrates the works of white men of illiberal racial views and casts African-Americans in the role of mere spectators.[29] Part III will return to Judge Higginbotham and study his criticism of Justice Thomas, which began in 1992,[30] was continued two years later,[31] and was reaffirmed yet again in 1995 in a speech delivered at New York University.[32] The judge's *œuvres* have led to several responses from African-Americans, three of which warrant comment.[33] This encounter demonstrates the isolation of Clarence Thomas from large numbers of the community of black law professors. Part IV will leave Clarence Thomas and A. Leon Higginbotham, at least for the nonce, and turn to an overview of African-American political ideology,[34] and will demonstrate that the Civil Rights Macro-Narrative more nearly reflects the political views of African-Americans than does the competing Color-Blindness Macro-Narrative. Part V will return to the words and deeds of Justice Thomas and demonstrate that alienation plausibly accounts for them. Part VI will examine Justice Thomas's place in African-American communities by looking at the controversy that continues to swirl around Thomas through the prism of the African-American characters in Harriet Beecher Stowe's sprawling, unruly, and racist novel, *Uncle Tom's Cabin*. When all is said and done, Clarence Thomas, whose governing macro-narrative and conservative ideology appear to differ not at all from that of the most reactionary whites, and most nearly

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

28. Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 691 (1987).

29. *See id.*

30. *Open Letter*, *supra* note 27.

31. A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405 (1994) [hereinafter *Retrospect*].

32. Hon. A. Leon Higginbotham, Speech at New York University (Nov. 1995) (broadcasted nationally on C-SPAN) [hereinafter *Speech*].

33. *See generally*, Evelyn Wilson, *Comments on "An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague,"* 20 S.U. L. REV. 141 (1993); Randall Kennedy, *Justice Thomas and Racial Loyalty*, 20 AMERICAN LAWYER 91 (1998); Stephen F. Smith, *The Truth About Clarence Thomas and the Need for New Black Leadership*, 12 REGENT U. L. REV. 513 (1999–2000).

34. Political ideologies are, perforce, macro-narratives. *See* Newsom, *supra* note 26. However, they constitute merely one subset of macro-narratives. The macro-narratives telling the story of the African-American struggle are not necessarily *political* narratives.

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resembles Sambo, one of Simon Legree's black henchmen who helped Legree murder Uncle Tom. Not surprisingly, Sambo was deeply and profoundly alienated from other blacks on Legree's hellish Louisiana plantation. Part VII will briefly discuss the "fit" between Thomas's victimizing alienation and the Supreme Court, given its dedication to white racial hegemony.

II. A CLASH OF MACRO-NARRATIVES

A. *The Civil Rights Macro-Narrative*

Judge Higginbotham clearly believed in the moral power and force of the macro-narratives that recount the struggles, hopes, dreams, and aspirations of African-Americans for equal justice in America, narratives that often centered on the continuing work of civil rights lawyers and civil rights organizations.[35] Collectively, these macro-narratives comprise the Civil Rights Macro-Narrative (Narrative), and they powerfully reinforce McGary's insight that black institutions can ameliorate black alienation largely through means of community or group identification.[36] Higginbotham's construction of the Narrative specifically related to and incorporated the life of Clarence Thomas as a life distant and disconnected in important ways from other blacks. Higginbotham thereby underscored Thomas's alienation from large numbers of black people, and he used that alienation to punctuate and dramatize the Narrative.

For Judge Higginbotham, the Narrative embodied "the culmination of years of heartbreaking work by thousands who preceded" Justice Thomas.[37] It consisted of "the memory of their sacrifices."[38] The Narrative related "this country's history of civil rights lawyers and civil rights organizations; its history of voting rights; and its history of housing and privacy rights."[39] The history "has affected [Thomas's] past and present life."[40] The Narrative also declared that, in the words of Justice Thurgood Marshall, "for millions of Americans, there still remain 'hopes not realized and promises not fulfilled,'"[41] because this country "continue[s] to struggle for equality."[42] James Baldwin had told us that as of 1962, just before the centennial of the Emancipation Proclamation, "the country is celebrating one hundred years of freedom one

35. *See Open Letter*, *supra* note 27, at 1015–18.

36. *See supra* notes 17–23 and accompanying text.

37. *See Open Letter*, *supra* note 27, at 1007.

38. *Id*.

39. *Id*.

40. *Id*.

41. *Id*. at 1013 (quoting Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987)).

42. *See Open Letter*, *supra* note 27, at 1013.

hundred years too soon."[43] The core truth of the Narrative lies in the ongoing unfinished struggle of African-Americans for true racial equality.

Higginbotham declared that the struggles that comprise the Civil Rights Macro-Narrative produced substantial gains for Clarence Thomas.[44] Higginbotham constructed the following four-part analysis in order to advance his argument: (1) [T]he impact of the work of civil rights lawyers and civil rights organizations on [Thomas's] life; (2) other than having picked a few individuals to be their favorite colored person, what it is that the conservatives of each generation have done that has been of significant benefit to African-Americans, women, or other minorities; (3) the impact of the eradication of racial barriers in the voting on [Thomas's] own confirmation, and (4) the impact of civil rights victories in the area of housing and privacy on [Thomas's] personal life.[45]

On the first point, Judge Higginbotham referred specifically to and incorporated into the Narrative, the works of Charles Hamilton Houston, William Henry Hastie, Thurgood Marshall, "and that small cadre of other lawyers associated with them, who laid the groundwork for success in the twentieth-century racial civil rights cases."[46] For Judge Higginbotham, "[t]he philosophy of civil rights protest evolved out of the fact that black people were forced to confront this country's racist institutions without the benefit of equal access to those institutions."[47] The meaning of such protest, as it manifested itself in the Narrative, was well put by Frederick Douglass:

> The whole history of the progress of human liberty shows that all concessions yet made to her august claims, have been borne of earnest struggle . . . . If there is no struggle there is no progress
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> . . . .
>
> This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will.[48]

Thus, "[t]he struggles of civil rights organizations and civil rights lawyers have been both moral and physical, and their victories have been neither easy

43. *Id*. at 1014 (quoting James Baldwin, *The Fire Next Time: My Dungeon Shook*, *in* THE PRICE OF THE TICKET 336 (1985)).

44. *Id.* at 1015.

45. *Id*.

46. *Id*.

47. *Open Letter*, *supra* note 27, at 1016.

48. *See id.* at 1016 (quoting Philip S. Foner, West India Emancipation, Speech delivered by Frederick Douglass at Canadaigua, New York (Aug. 4, 1857), *in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE, 1850–1860, at 437 (1950)).

nor sudden."[49] But there were victories even if other victories continue to elude our grasp.[50] Civil rights protests worked.[51]

Finally, Judge Higginbotham incorporated a series of micro-narratives illustrating the larger theme of the Narrative by way of individual cases and circumstances and by way of moral and physical protest, beginning in 1833.[52] Grounding the grand Narrative in a series of micro-narratives demonstrated and reinforced its legitimacy, reality, and its moral force and claims.

On the question of the contribution of conservatives, mainly if not exclusively white, to African-Americans and their struggle to get out from under racist oppression, Judge Higginbotham declared that "[a]t every turn, the conservatives, either by tacit approbation or by active complicity, tried to derail the struggle for equal rights in this country."[53] Again, he referred to specific cases, using micro-narratives to the same effect as in the first segment or element of the Narrative, as he pointed to George Bush (the elder), Ronald Reagan, and Strom Thurmond and their opposition to civil rights legislation.[54] Alliance with white conservatives has not advanced the goals and objectives of the struggles that inform the Narrative.

With regard to voting rights, Judge Higginbotham argued that many members of the Senate, facing the Thomas nomination, had to "weigh[] the potential backlash in their states of the black vote that favored [Thomas] for emotional reasons and the conservative white vote that favored [Thomas] for ideological reasons."[55] The very success of the work of civil rights lawyers and civil rights organizations in overturning barriers to the franchise had created a situation in which senators had to take the views of black voters into account, something that they did not have to do in the days of Benjamin Tillman, a racist senator from South Carolina, in the early years of the last century[56] when the struggle had borne but little fruit.

On the final point, Judge Higginbotham showed how the works of civil rights lawyers and civil rights institutions had broken down the barriers erected by laws designed to segregate blacks and whites by geography or district and to criminalize interracial marriages. Here again, he used micro-narratives to shape and explain the larger macro-narrative.[57]

The moral power or force of the Narrative certainly speaks to African-Americans, including Clarence Thomas who has clearly benefited from the

49. *Id*.
50. *Id.* at 1016–18.
51. *Id.*
52. *Open Letter*, *supra* note 27, at 1017.
53. *Id.* at 1019.
54. *Id*.
55. *See id.* at 1020–21.
56. *Id*. at 1021.
57. *Open Letter*, *supra* note 27, at 1022–25.

struggles, and imposes affirmative duties on them, the duty to struggle, as Frederick Douglass might have put it, to persuade power to concede rights to the powerless.[58] The Narrative calls for an African-American community and not idiosyncratic individualism. It, by its terms, however, presents serious difficulties for blacks who are alienated from their own people and who cannot easily make common cause with other African-Americans, who cannot and do not "belong" to African-American structures, institutions, and organizations. The duty to struggle, implicit in the Narrative, presupposes a belonging, a sense of identification with a larger social reality, as well as a decent respect and gratitude for those whose works produced a benefit.

Whether or not the Narrative similarly speaks to non-African-Americans is largely beside the point, the question being whether or not it calls as one of its beneficiaries, Clarence Thomas. The implications of the Narrative as to how non-African-Americans should form community and with whom as well as to the moral significance of alienation or nonconformity, lie beyond the scope of this paper. However, a belief in the power and force and the concomitant duties of African-Americans derived from the Narrative—to join in the moral and physical struggle rather than to reject and demean it—lay at the heart of Judge Higginbotham's critique of Justice Thomas. The thorn in Judge Higginbotham's side was not only that Thomas, a black man, rejected the moral claim of the Narrative, notwithstanding the benefits that he had received, but that Thomas had the power and authority to act on that rejection in ways that were harmful to the struggles, hopes, dreams, and aspirations of African-Americans. Judge Higginbotham's critics, like Justice Thomas, rejected or

58. Elsewhere this author has addressed the question of the moral power or force of macro-narrative and micro-narratives. *See* Newsom, *supra* note 26 (arguing that the ideology of the Watergate break-in and the myth of Richard Nixon as the bad and Archibald Cox as the good led the country into making a disastrous mistake in creating the Independent Counsel); Michael deHaven Newsom, *The American Protestant Empire: A Historical Perspective*, 40 WASHBURN L.J. 187 (2001) [hereinafter Newsom, *Protestant Empire*] (arguing that an ideology of Anti-Roman Catholicism, dedication to the Protestantization of the subject peoples, a commitment to pan-Protestantism, a belief in social reform, and a pragmatic commitment to a war of attrition and a willingness to exercise restraint, albeit with the threat of force in the background, gave rise to the Protestant Empire and a highly problematic Church-state macro-narrative); Michael deHaven Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. CAL. INTERDISC. L.J. 219 (2002) [hereinafter Newsom, *Common School Religion*] (arguing that the refusal of the Supreme Court to embrace the macro-narrative developed by the minority of state courts and state court judges that had struck down or limited—or would have, in the case of judges filing dissenting opinions—the reach of common school religion, compromised the ability of the Court to fashion a workable set of rules to restrain common school religion in an era of increasing religious diversity, thus giving majoritarian religion more sway in the common schools that would be the case if the state court macro-narrative (albeit a minority macro-narrative) had prevailed).

ignored the moral or normative claims of the Narrative, seeking to avoid moral obloquy.

B. The Color-Blindness Macro-Narrative

Another macro-narrative has emerged to challenge the Civil Rights Macro-Narrative. This one, largely fashioned by Justice Thomas, although one his acolytes, Stephen F. Smith, a former clerk of Justice Thomas and now a law professor, has also helped to shape it, is the Color-Blindness Macro-Narrative (Counter-Narrative). The Civil Rights Macro-Narrative embodies a racial consciousness—the struggle of largely, if not exclusively, African-American civil rights lawyers and civil rights organizations to gain equal justice for African-Americans and others oppressed and subordinated by and in this country. The moral claim is that such a consciousness is necessary if one is to further the objective of equal justice for all in America. If race is the defining fact of American history, experience, culture, and tradition, then the race-consciousness of the Civil Rights Macro-Narrative has moral and normative force. If race consciousness led to the oppression of racial minorities, African-Americans in particular, then race consciousness can lead to their liberation.[59] It is this proposition that the Counter-Narrative challenges.

The Counter-Narrative confronts the Civil Rights Macro-Narrative directly. The latter focuses primarily on the works of African-Americans engaged in the struggle for civil rights. Judge Higginbotham called out "Frederick Douglass, Sojourner Truth, Harriet Tubman, Charles Hamilton Houston, A. Philip Randolph, Mary McLeod Bethune, W.E.B. Dubois, Roy Wilkins, Whitney Young, Martin Luther King, Judge William Henry Hastie, [and] Justice[] Thurgood Marshall. . . ."[60] For good measure, he also called out Earl Warren and William Brennan, white Americans who sought to further at least some of the goals and objectives of the moral and physical protest that constitutes the heart and the soul of the struggle for equal rights in America.[61] By contrast, Justice Thomas's pantheon of African-American heroes consisted of Frederick Douglass.[62] The true heroes of his macro-narrative, however,

59. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part, dissenting in part) (declaring that "[i]n order to get beyond racism, we must first take account of race").

60. *Open Letter*, *supra* note 27, at 1026.

61. *See id.*

62. Thomas, *supra* note 28, at 691. Thomas sought to appropriate "the original Civil Rights movement" and John Hope Franklin to his cause. *Id.* at 694. However, Thomas never defined the "original" Civil Rights Movement, and he quoted Franklin out of context, revealing a certain intellectual dishonesty. Franklin did indeed refer to slavery as "the most remarkable anomaly in the history of the country" just as Thomas insisted. John Hope Franklin, *Slavery and the Constitution*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1688, 1695 (Leonard W. Levy et al. eds., 1986). Franklin, however, was not referring to any supposed lofty ideal

were white men: the Founders, Abraham Lincoln, and the first Justice Harlan.[63] In a profoundly ironic way, given Thomas's disdain for playing the "victim card,"[64] Thomas's pantheon turns African-Americans into passive observers, the beneficiaries of grandiloquent ideas and principles allegedly advanced by various and sundry white Americans, most of whom harbored distinctly racist attitudes when it came to African-Americans.[65] Black people are the victims, given Thomas's hagiography, of white racists who rejected the lofty ideals and principals of other white racists. Freedom and liberty arise not from the moral and physical protest and struggle of African-Americans but, somehow, from white racists deciding to honor principles that they had observed in the breach for the entirety of our colonial and national history. Black people's struggles come to naught in a nomos in which the heroes are largely white racists who bore false witness to their exalted ideals. In such a moral universe, the alienation of an African-American from other blacks poses no great problems, for such a moral universe provides a haven and a safe harbor for alienated black people.

Thomas's Counter-Narrative rested on the fundamental abstract proposition that the ideals of the Declaration of Independence constitute "the founding principles of equality and liberty."[66] Referring to Abraham Lincoln, Thomas made the *political* ideological claim that those principles "led to the principle of government by consent, limited government, majority rule, and separation of powers."[67] Moving beyond this self-interested excursus, Thomas maintained that "Lincoln's case against slavery insisted on the principle of equality as fundamental for America."[68] Given Lincoln's well-known belief in the *social* inferiority of African-Americans as against white Americans,[69]

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contained in the Declaration of Independence, or any words or writings of Abraham Lincoln. With regard to the Declaration of Independence, Franklin correctly noted that the signers rejected draft language that would have indicted the King of England for his assent to the slave trade. *Id.* at 1688. Franklin made no high-flown claims about the Declaration of Independence. Similarly, with respect to Abraham Lincoln, Franklin was decidedly cool. *Id.* at 1694–95.

63. *See* Thomas, *supra* note 28, at 693.

64. *See id.* at 698.

65. Abraham Lincoln rejected white-black racial equality. *See* Raoul Berger, *Constitutional Interpretation and Activist Fantasies*, 82 KY. L.J. 1, 20 (1993–1994) (stating that Abraham Lincoln "opposed slavery and racial equality with equal intensity"); C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 81 (1960) (quoting a speech of President Lincoln rejecting racial equality). Thomas Jefferson was even more vicious in his racist views. *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (William Peden ed., 1954). With respect to the first Justice Harlan, Thomas is reduced to trying to explain away his racist remarks in his dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See* Thomas, *supra* note 28, at 701.

66. Thomas, *supra* note 28, at 692.

67. *Id.*

68. *Id.*

69. *See supra* text accompanying note 65.

Thomas's "principle of equality" verges on incoherence. Nonetheless, Thomas took the view that the Declaration of Independence had a "universal meaning" that rejected slavery.[70] Thomas went so far as to argue that the "three-fifths" clause somehow was an anti-slavery text because it reduced "who could be counted among these being represented" in the House of Representatives from the slave states.[71] Thomas's argument makes no sense because African-Americans could not vote and would never, as slaves, be able to vote. Slave owners, therefore, had greater rather than less political power, because, in a functionalist real world sense, they could cast votes for their "three-fifths" slaves no matter what their slaves thought of the political choices of their masters. In the non-slave states, those whites who were counted—at least males—could vote. Whites of low social and economic standing could, depending on the voting eligibility rules, trump the votes of rich and powerful whites, should they deem it in their interest to do so.[72] Such a political dynamic could never play itself out, even in theory, in the slave states. Instead, Thomas again reinforced his reduction of African-Americans to mere observer status, shut out from participation in the political economy, and yet Thomas found something to praise in the constitutional treatment of this depraved and degenerate Eighteenth Century society.[73]

Thomas turned next to *Brown v. Board of Education*.[74] He criticized the Court's opinion because it "made sensitivity the paramount issue."[75] Thomas referred to the infamous remark in *Plessy v. Ferguson* to the effect that "we consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."[76] He argued that "[t]he *Plessy* psychology would have it that laws and social practices have no influence at all over how people, especially those recently released from slavery, view themselves."[77] In contrast, "[t]he *Brown* psychology makes the legal and social environment all-controlling."[78] In lieu of "sensitivity," Thomas offered up the human capacity to reason and choose objectively.[79] Thus, for Thomas, "the *Brown* focus on

70. Thomas, *supra* note 28, at 695.

71. *Id.* at 696.

72. Indeed, it was precisely the fear that naturalized Catholic immigrants, largely a group of low economic standing, could control the outcome of American elections that lay at the heart of one of the great works in defense of a white, Protestant America. *See* LYMAN BEECHER, A PLEA FOR THE WEST 49–50 (1835) (arguing, inter alia, that steps be taken to curb immigration). Lyman Beecher, of course, was the father of Harriet Beecher Stowe. *See infra* Part VI.

73. Thomas, *supra* note 28.

74. 347 U.S. 483 (1954).

75. Thomas, *supra* note 28, at 698.

76. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

77. Thomas, *supra* note 28, at 699.

78. *Id.*

79. *Id*.

environment overlooks the real problem with segregation, its origin in slavery, which was at fundamental odds with the founding principles. Had *Brown* done so, it would have been forced to talk about slavery, which it never mentions."[80] Thomas is, perhaps unwittingly, also making the argument that in a world of "reason" rather than "sensibility" the alienated African-American can find that safe harbor because it might be "reasonable" to be alienated.

All of this led, for Thomas, to the "color-blind Constitution,"[81] the core of his argument, and the heart of the Counter-Narrative. Thomas conceded that the idea failed to attract much support, criticizing both conservatives uninterested in equality and liberals like Justice Brennan.[82] Thomas's argument turned largely on his reading of Justice Harlan's dissent in *Plessy*. He insisted that "Justice Harlan understood, as did Lincoln, that his task was to bring out the best of the Founders' arguments regarding the universal principles of equality and liberty."[83] Thomas argued that those principles give meaning to the idea of a "color-blind Constitution."[84] Thomas excused Harlan's racism, on open display in his *Plessy* dissent, by arguing that Harlan was in fact calling the white race to adhere to the "ultimate American principle . . . that all men are created equal."[85] Thus, given Thomas's rewriting of Harlan's opinion, "[t]he 'superiority' of the white race would appear to depend on its acknowledgement that it is not superior but equal and a 'color-blind Constitution' would insure that this revolutionary principle would be always kept in mind."[86] Thomas totally missed the irony of his suggestion that white superiority was non-superiority, or at least the idea thereof. As noted above, Thomas has reduced African-Americans to mere spectators of a white drama.[87] Everything depends on what white people do. African-Americans are powerless to affect the plot line of the drama. Moral and physical protest, which Frederick Douglass favored, no matter what Thomas believed was

80. *Id*.
81. *Id*. at 700.
82. Thomas, *supra* note 28, at 700.
83. *Id.* at 701.
84. *Id.*
85. *Id*.
86. *Id*.
87. Such reductionism also produces bad political science. *See* Hanes Walton, Jr., *Black Southern Politics: The Influences of Bunche, Martin and Key*, *in* BLACK POLITICS AND BLACK POLITICAL BEHAVIOR: A LINKAGE ANALYSIS 32–38 (Hanes Walton, Jr. ed., 1994). Reducing African-Americans to mere observers overlooks "the purposeful activity of black people to acquire, use, and maintain [political] power." Rickey Hill, *The Study of Black Politics: Notes on Rethinking the Paradigm*, *in* BLACK POLITICS AND BLACK POLITICAL BEHAVIOR: A LINKAGE ANALYSIS, *supra*, at 11. Hill, of course, merely restates the Civil Rights Macro-Narrative as a *political* narrative. *See id.*

Douglass's constitutional jurisprudence,[88] has been reduced to appealing to some notion of reason and objectivity and hoping that white people would figure out that they should pay attention to what Thomas Jefferson wrote, not what he and countless other white slave masters, including a fair number of Thomas's revered Founders, did. It should not matter, therefore, that some blacks are alienated from their own race because racial solidarity has nothing to do with white people coming to their senses.

The foregoing summary of Thomas's views reveals one other fascinating aspect. Not only did he celebrate white racists like Jefferson, Lincoln, and the first Justice Harlan, not only did he invent an "original" Civil Rights Movement and misread John Hope Franklin, but, with regard to the fundamental craft of the construction of narratives, Thomas utterly failed to use micro-narratives. In the construction of his Counter-Narrative, Thomas never bothered to explore the complex and intricate relation between the two major forms of narrative. Perhaps this is so because it turns out that Thomas cares only about one micro-narrative—his own[89]—surely a hallmark of alienation of the narcissistic sort. Thus Thomas would have no interest or desire to contest the Civil Rights Macro-Narrative at the level of micro-narratives as constituent elements of macro-narratives, except with his own personal micro-narrative.[90] For the rest of us, however, Thomas's blindness with respect to micro-narratives, a blindness that has nothing to do with color, calls into question the legitimacy of his Counter-Narrative.

Thomas's disciple, Stephen F. Smith, elaborated on the Justice's efforts in 1987 to construct a macro-narrative that could compete with the Civil Rights Macro-Narrative.[91] Smith must have recognized that Thomas's sterile formalism and reliance on abstractions, not to mention his pantheon of white heroes, leaving African-Americans largely on the sidelines, presented serious problems. He attempted, therefore, to restate the Color-Blindness Macro-Narrative as if it were not the narrative of the isolated, alienated African-American. Smith began by arguing that there has been a diversity of views in

88. Thomas argued that Frederick Douglass agreed with him that the Constitution embodied the color-blind principle found in the Declaration of Independence. Thomas, *supra* note 28, at 703. It suffices to note that Douglass might have believed that the Declaration sits "in the center of the frame formed by the Constitution." *Id.* However, Douglass, unlike Thomas, was smart enough to know that the civil rights struggle called for more than Thomas has been willing to grant or concede. One might have more respect for Thomas's views if he were willing to accept the simple proposition that the struggle for civil rights requires the use of all of the weapons and strategies available to African-Americans at any particular time. Thomas is utterly incapable of adopting this new.

89. *See* Samuel Marcosson, *Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*, 16 LAW & INEQ. 429, 489–90 (1998) (arguing that Thomas will engage his own personal story but ignore the narratives of "faceless, impersonal others").

90. *See* Part V, *infra*.

91. *See* Smith, *supra* note 33.

the black community even on civil rights issues.[92] Smith characterized W.E.B. Dubois as a dissenter, "rejecting the orthodox approach of Booker T. Washington."[93] He continued: "This long tradition of dissent within the black community on civil rights issues continued well after the turn of the century,"[94] referring to Marcus Garvey's stand against integration and for repatriation to Africa, as against others like Thurgood Marshall, to Dr. Martin Luther King, Jr. and Malcolm X and the Black Panther Party, and to Justice Thomas and Shelby Steele in opposition to "many in the black community [who] agitate for race-conscious remedies such as affirmative action in the belief that racism constitutes an insuperable barrier to black progress."[95] Alienation is now merely a matter of dissent.

The difficulty with Smith's argument is that it supposes that dissent is somehow fungible. He failed to confront the claim made by the Civil Rights Macro-Narrative that the moral and physical protest, the struggle for equal justice in America, binds us into a community, a complex web of not only rights, privileges, powers, and immunities, but also "no rights," duties, disabilities, and liabilities.[96] While "rights talk" has dominated the rhetoric of the struggle, [97] perhaps sometimes to its detriment,[98] the truth has always

92. *Id*. at 530.

93. *Id*.

94. *Id*.

95. *Id*. at 530–31.

96. This terminology first appeared in Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

97. *See* William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697, 698–702 (2000) (tracing rights talk back at least as far as the New Deal).

98. *See* Melissa Cole, *The Color-Blind Constitution, Civil Rights-Talk, and a Multicultural Discourse for a Post-Reparations World*, 25 N.Y.U. REV. L. & SOC. CHANGE 127, 128 (1999) (arguing that "[t]he failure of affirmative action . . . results from its roots in 'civil rights-talk'"); Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1477 (2002) (noting that Critical Race Theorists both "acknowledge the limitations of rights talk" but "also believe that rights play a vital role in antiracism"). *But see* Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961–1966*, 34 LAW & SOC'Y. REV. 367 (2000) (arguing that rights talk was essential to political organizing); Daria Roithmayr, *Left Over Rights*, 22 CARDOZO L. REV. 1113, 1129 (2001) (noting that "[w]hile rights talk in a particular moment may well serve to drain political energy through a focus on litigation, in other historical moments rights talk might help inspire political and social movements for change" and "[r]ights talk is not always and inevitably depoliticizing (take, for example, the civil rights movement)").

For a more general criticism of rights talk, see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991) (referring to a rhetoric that "in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground" because "[i]n its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding

remained that rights are not mere abstractions, but that they take their meaning in relations, not only relations between blacks and whites but also between African-Americans. The moral claim of the Civil Rights Macro-Narrative is rooted in the norms of community and reciprocal responsibilities,[99] not in abstract "rights," notwithstanding the rhetoric of the struggle for racial justice in America. Thus, some dissent falls within the contours and ambit of the African-American communitarian norm, and some dissent does not. Even Booker T. Washington's wretched accommodationism fell within it. He constantly pandered to reactionary whites, but Washington secretly financed civil rights litigation.[100] Perhaps one might say that Washington's conservatism derived not from some silly notions about the Declaration of Independence, or, more to the point, the supposed lofty ideals of white men whose actions betrayed a different set of beliefs and priorities, but from an appreciation of the practical inability of African-Americans to engage in a moral and physical protest, given the deeply entrenched racism of the vast majority of American whites of Washington's time.[101] The problem, of course, is that during the years of his hegemony, from 1895, the year of his infamous Atlanta Compromise speech,[102] to 1915, the year of his death, whites took

personal and civic obligations"). As far as she goes, Professor Glendon is probably correct. However, she utterly fails to recognize that African-American communitarianism has so far blocked the degeneration of rights talk by and between African-Americans into the kind of selfish individualism that she decries. Although, it would seem that Clarence Thomas is the exception that proves the rule. The collapse of white American political discourse and the concomitant devaluation of social duty and responsibility results from an extreme individualism foreign to the large majority of African-Americans, not from the struggles and the related rhetoric that lie at the core of the Civil Rights Macro-Narrative. The normative meaning of rights talk is entirely contextual.

However, Professor Glendon's critique of rights talk might have meaning for African-Americans to which we need to pay heed. The problematic feature of rights talk for *any* racial or ethnic group stems from the failure of such rhetoric explicitly to yoke individual rights and communitarian duties. Professor Glendon has described a present reality for white American political discourse that might become a future reality for African-American discourse should black people lose the communitarianism that lies at the heart of the Civil Rights Macro-Narrative and the broader black experience in America. *See* MICHAEL DAWSON, BLACK VISIONS: THE ROOTS OF CONTEMPORARY AFRICAN-AMERCIAN POLITICAL IDEOLOGIES 11 (2001). The deep and profound social, cultural and theological implications of this African-American communitarianism will be the subject of a future essay.

99. And so it is that African-American *political* ideologies, again a subset of macro-narratives, with the exception of black conservatism, reflect a communitarian perspective. *See* Newsom, *supra* note 26 and accompanying text; DAWSON, *supra* note 98, at 31.

100. *See* J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, at 15–16 (1993); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 304–05 (2000).

101. *See* DAWSON, *supra* note 98, at 283.

102. BOOKER T. WASHINGTON, UP FROM SLAVERY 101–02 (William L. Andrews ed., 1996).

Washington's accommodationism as "a signal to squeeze blacks harder."[103] Perhaps one might better say that Washington badly misjudged the situation. However, Washington remained a part of the family, even if not a terribly helpful one.

There is also no doubt but that W.E.B. Dubois, Marcus Garvey, Thurgood Marshall, Dr. Martin Luther King, Jr., Malcolm X, and the Black Panthers remained members of the family, whatever assessment one might make of their respective contributions to its welfare. The question remains whether Justice Thomas has engaged in radical alienation by simply abandoning us and leaving the family. Smith, in his appeal to black dissent, has not shown that Thomas is still with us. Instead, there is good reason to believe that most of the dissenters to whom he referred, Booker T. Washington in particular, accepted, in substantial degree, the communitarian norm. Certainly Smith has not demonstrated, and neither has Thomas, that there is any *institutional* embrace or support of the Counter-Narrative among African-Americans. Given McGary's careful analysis,[104] one might conclude that Thomas and Smith have conceded the point and accepted the moral judgment that they are alienated African-Americans.

Nonetheless, Smith continued his effort to integrate the Counter-Narrative into the fabric of African-American history and experience, trumping the significance or importance of community, by stating that "[b]lack people have struggled too hard and too long in this country to surrender the precious right to read and think for themselves—rights that were denied them in slavery—to *any* orthodoxy, whether black or white."[105] After arguing that if African-Americans insisted that all blacks should think alike, he concluded that we would have to accept the possibility that all whites should think alike and, as a minority group, accept that we would not be able "to win any gains in a democracy based on the principle of majority-rule" and "[t]he most blacks can expect . . . is handouts from kind-hearted whites, who are moved either by a sense of compassion or *noblesse obligee* [sic] to put aside their 'white' way of thinking."[106]

Smith fared no better on this point. He never adequately debated the central assertion of the Civil Rights Macro-Narrative that the African-American community has a moral claim on each one of us. Smith created a false dichotomy between that claim and the "precious right to read and think for [oneself]. . . ."[107] Leaving aside the question of the proper relation between

103. Peter Eisenstadt, *Introduction* to BLACK CONSERVATISM: ESSAYS IN INTELLECTUAL AND POLITICAL HISTORY, at ix, xix (Peter Eisenstadt ed., 1999) [hereinafter BLACK CONSERVATISM].

104. *See supra* notes 17-23 and accompanying text.

105. Smith, *supra* note 33, at 531 (emphasis added).

106. *Id*. at 531–32.

107. *Id.* at 531.

the individual and the nestled communities to which he belongs, the practical issue, of course, concerns not at all how Thomas thinks, but rather how he votes on the Court. Thus Smith had to make a larger claim of autonomous individual right—to read and think for oneself *and to act thereon*. Smith, the acolyte, could, it appears, never quite bring himself to say such a thing. The great insight of the Civil Rights Macro-Narrative is that it treasures creative thought and imagination, but insists that before acting upon those ideas, the thinker sit down and talk things over within the family. Moral and physical protest requires nothing less, if it is to succeed. It calls for organization, consensus, and a willingness to think the problem through from the point of view of the larger African-American community, the community that sanctions and gives form to the protest itself. Put somewhat differently, the struggle that informs the Civil Rights Macro-Narrative does not denigrate the right to think for one's self. What is does do, however, is pass judgment on how one *acts* on those thoughts, with whom one *acts*, and against whom one *acts*. In short, Smith misrepresented the question. He merely seeks to gain acceptance for those alienated from the African-American community and its institutions and structures as "free thinkers," ignoring the inescapable fact that thoughts might or might not do much harm, but actions certainly can. Smith sought to avoid the hard question posed by Geyer and Heinz that sometimes those who are alienated perpetrate and give effect to alienating conditions that harm victims of alienation.[108] Ultimately, those who fashion the Counter-Narrative cannot avoid the conclusion that they stand, to one degree or another, apart from the moral and physical protest that forms the heart of the Narrative, just as they must grant that they stand apart from the community of struggle and protest, and, as far as African-Americans are concerned, that they stand apart from the community and institutions of African-Americans.

Undaunted, Smith reprised Justice Thomas's vision of the color-blind Constitution. Smith wrote:

> Justice Thomas is being true to the principles of the civil rights movement in calling for colorblindness. It was this country's unfortunate willingness to tolerate convenient exceptions from the colorblindness principle embodied in the Declaration of Independence (and, later, in the Thirteenth and Fourteenth Amendments to the U.S. Constitution) that led to slavery in the first place. That is how millions and millions of blacks came to be enslaved and treated as chattel in a Nation whose charter expressly committed it to the "self-evident" principle that "all men are created equal" and "are endowed by their Creator with certain unalienable Rights."[109]

Smith has necessarily accused Thurgood Marshall and other civil rights leaders of abandoning the principles that inform the struggle at the heart of the

108. *See* Geyer & Heinz, *supra* note 11, at xxxii.
109. Smith, *supra* note 33, at 532 (emphasis omitted).

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Civil Rights Macro-Narrative. Indeed, Smith went out of his way to argue that Marshall's appeal to colorblindness as an advocate in *Brown v. Board of Education*[110] reflected the commitment to colorblindness as a legal and moral principle.[111] Smith overlooked the fact that the Narrative has always had a racial consciousness. Colorblindness, therefore, could never guide or shape the struggle as a first principle. Rather, colorblindness has always served as merely an argument employed when civil rights lawyers and civil rights organizations believed that it might advance the struggle, and they left it to one side when it did not advance the struggle. *The objective of the Civil Rights struggle has never been colorblindness. Rather, it has been the elimination of racial oppression*. Therefore, when Smith argued that the principle of colorblindness "freed blacks from the shackles of slavery and lifted the dark veil of segregation,"[112] he had confused means and ends, a serious blunder.

But more serious than even the insult to the integrity of the Civil Rights Movement and to the African-American institutions that nurtured and supported that movement, the failure to recognize candidly the reality of battling macro-narratives, yet further evidence of alienation, is Smith's fatuous assertion that slavery resulted from the country's willingness to abandon the colorblindness principle. The British North American colonists established slavery long before 1776. They established an elaborate system of slavery that ultimately came to rest on a deeply felt belief in the inferiority of Africans (and later African-Americans, as African slaves endured the process over time, of acculturation to a new status and a new country), a bitter and unyielding racism.[113] Slavery "became firmly established in . . . most of the mainland [British North American colonies] . . . by the end of the seventeenth century."[114] Thus, the reality, the context in which the events of 1776 take meaning includes:

> The linkage of . . . [slavery and race] in whites' minds [that] produced a derivative fusion of the two objectives of enslavement: labor coercion and race control. When slavery as a system of labor coercion was abolished by 1865, the race-control element of slavery lingered on, more powerful than before. The fusion is with us even today, as we still debate whether the constitutional and statutory structure that abolished slavery-as-labor-coercion can be used to eradicate the vestiges of slavery-as-race-control.[115]

One must ask in what way did the colorblindness principle inhabit the heart and soul of the British North American colonists in the years leading up

110. 347 U.S. 483 (1954).

111. Smith, *supra* note 33, at 534.

112. *Id*. at 532.

113. *See* William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1712 (1996).

114. *Id*.

115. *Id*. at 1713.

to 1776. A fair reading of history suggests that the search will yield no fruit. The principle simply does not exist. To suppose that the Declaration of Independence overthrows the intense and concentrated history of slavery and racism,[116] yoked together in the minds of most Eighteenth Century whites, including the likes of Thomas Jefferson, not to mention their Seventeenth Century forebears, is to suppose that pigs can fly. Thus Smith's casual reference to slavery as a "convenient exception" cannot bear its own weight.

Smith made one more attempt to downplay the problem of alienation.[117] Recasting the claim of "dissent," he argued that Thomas's conservatism fits in the mainstream of African-American thought, given certain polling data that tends to suggest "that an incredible 70% of blacks nationwide flatly reject liberalism as an overarching political philosophy."[118] Smith then reported on polls that showed blacks favoring the death penalty, supporting the "[denial of] increased welfare payments to welfare recipients who have more children . . . back[ing] mandatory sentences for drug dealers, and . . . feel[ing] black leaders are too quick to cite racism as an excuse for black crime."[119] Still other polling data revealed that varying majorities of blacks favor school choice, "disapprove of mandatory [school] busing," "feel that minorities should not receive preferential treatment to make up for past discrimination (affirmative action)," believe in God, and are pro-life, "flatly opposing abortion under any circumstances."[120] Smith hoped for a political realignment on the horizon, but, even granting that such realignment might not take place, he concluded that "on a whole host of issues, including civil rights, the black community *is* more instinctively conservative than liberal."[121]

As far as it goes, Smith is correct. Other polling data, suggests, however, that whether or not African-Americans reject or support liberalism, they emphatically reject the political conservatism of Clarence Thomas.[122] The structure and logic of the Civil Rights Macro-Narrative explain the apparent discrepancy in the data. If the normative moral predicate of the vast majority of African-Americans is communitarian,[123] then the labels "liberal" and "conservative" may obscure, not illuminate, the reality and meaning of African-American political and social thought.

116. *See* Kevin Mumford, *After Hugh: Statutory Race Segregation in Colonial America, 1630–1725*, 43 AM. J. LEGAL HIST. 280 (1999) (arguing that racial segregation was enforced beginning in 1630).

117. Smith, *supra* note 33, at 534–36.

118. *Id.*

119. *Id*.

120. *Id*.

121. *Id*. at 536.

122. *See infra* note 341 and accompanying text.

123. *See infra* notes 336-42 and accompanying text.

The 2000 presidential election makes the point. A supposedly conservative subset of the American electorate, black folk, if one believes Smith, voted overwhelmingly for Al Gore, the liberal candidate, rejecting George Bush, the "compassionate" conservative. The African-American vote for Gore exceeded ninety percent.[124] An appreciation of the race-conscious and communitarian premise or predicate of the Civil Rights Macro-Narrative would suggest that the *reasons* African-Americans support certain arguably "conservative" positions differ markedly from the reasons advanced by whites in support of those positions.

Take welfare payments, for instance. Black people have their own perfectly good reasons for opposing a system that appears to pay unwed mothers for having more children, reasons having nothing to do with white fears of an African-American population explosion. African-American concern rests on the well-founded belief that the black community cannot easily accommodate large, poor single-parent families because the resources available to African Americans—*as a community*—to raise and care for those children are in perilously short supply. As another example, take belief in God. While expressing that belief in and through the forms of evangelical Protestantism might be problematic for African-Americans,[125] God is a source of strength, courage, comfort, and repose in the ongoing moral and physical protest. The Black Church—whatever the theological problems of the Black Church might be—is one of the few places where African-Americans have been able to express many important aspects of their very humanity in an institutional and communitarian setting. Belief in God inexorably follows.

Of course, from the other side, African-Americans simply do not trust white conservatives because alliances with them have not furthered black interests, a point that Judge Higginbotham placed in the center of the Narrative.[126] African-American understandings of various political, social, and cultural questions turn on how those issues impact the struggle for equal justice and on the health and welfare of the community, whereas white conservatives, if history is any guide, stand opposed to that struggle and wish that community ill.[127] We might agree with white conservatives on many issues, as abstract propositions, but we are not inclined to make alliances with them in order to

124. *See supra* note 24.

125. *See* Newsom, *Protestant Empire*, *supra* note 58, at 266 n.3 (arguing that "the American Protestant Empire has largely been an unmitigated disaster for . . . African Americans").

126. *See supra* notes 53-54 and accompanying text.

127. *See* Eisenstadt, *supra* note 103, at xxvii (arguing that "many so-called conservative African-American voters are really moderates who are (with some reason) suspicious of the motives of the Republicans, and fear that they will be used as stalking horses for an agenda profoundly unsympathetic to the plight of poor, urban African Americans").

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further these issues.[128] Again, Smith has blurred the critical distinction at the heart of the Civil Rights Macro-Narrative between belief and action; black people may *believe* in certain "conservative" ideas, but they are not prepared to *act* upon them in alliance with conservative whites. There is no room in the struggle for such an alliance. Those who make such an alliance, given our experience with white conservatives, are surely alienated from the majority of African-Americans.

The final major element of the Colorblindness Macro-Narrative is the claim that life is so much better for so many African-Americans these days that we just need to pull up our socks and soldier on.[129] Smith acknowledged that we have far too many poor people in our midst and that "black leadership must turn its focus to creating economic opportunity for the poor."[130] But Smith concluded that the problem of black poverty was not a problem of white racism but instead, one of black leadership.[131] Smith pressed on, insisting that there only "have been isolated instances of racially polarized voting in recent years."[132] Black leadership has much to account for, but to lay the entire problem of black poverty at its feet evidences an isolation from and a rejection of that leadership, and therefore, alienation from black people.

C. The Narrative and the Counter-Narrative Compared

The Narrative is the story of the black struggle. The Counter-Narrative is the story of a white struggle.[133] If either narrative generates heroes, a related or cognate set of micro-narratives bearing witness to heroism, the Narrative constructs heroes who are largely, but not exclusively, African-American. The

128. See infra notes 285-91 and accompanying text for a discussion of how two prominent African-American conservatives have flatly refused to make common cause with white conservatives on the question of affirmative action.

129. Smith, *supra* note 33, at 537–38.

130. *Id*. at 538.

131. *Id*.

132. *Id*. at 541.

133. There is a "progressive" colorblindness narrative, one that does not seek to camouflage racial oppression, but rather claims that race consciousness "alienates the individual from his or her 'true' self, a self unmarred by the myth of racial subjectivity." Hutchinson, *supra* note 98, at 1462 (criticizing, inter alia, two colleagues of this author, C. Christi Cunningham and Reginald Leamon Robinson, although Professor Cunningham, in conversations with this author, rejects the charge). Any such "progressive" colorblindness must, however, take into account McGary's perceptive analysis of the role of black institutions in curbing or reining in black alienation from self or from other African-Americans. *See supra* notes 17–23 and accompanying text. Any such narrative must also explore the theory of "self." "Progressive" colorblindness might rest on a model of "self" that is far too individualistic, failing adequately to examine the complex nexus between race, race consciousness, and community. *See* Calmore, *supra* note 3, at 205 (arguing that the gulf between abstract or formal colorblindness and operational or functional colorblindness produces, in most black people in America, "a strong sense of race consciousness").

Counter-Narrative constructs heroes who are, with minor exceptions, white. It is difficult to see how the Counter-Narrative can be anything other than the voice of alienation.

However, several important questions remain. Perhaps the Narrative stands for a pessimistic, defeatist view of the condition of African-Americans, a view that might conveniently preserve a set of ideological beliefs and maintain a set of institutional arrangements, leadership, and leaders—the so-called civil rights community. But perhaps it reflects a cold, harsh, realistic assessment of the situation in which African-Americans find themselves. On the other hand, perhaps the Counter-Narrative captures an optimistic view of that state. But perhaps it makes an opportunistic understatement of the true condition of African-Americans in order to curry favor with reactionary racist whites in an attempt to gain individual advantage and trump the civil rights community.

As in many things, there is some truth in all of these propositions. What matters, however, is *how much* truth they contain. There are many reasons for black people to be wary of the civil rights community. It has not delivered for poor African-Americans. But, white conservatives have not delivered anything for the black poor, and many of us believe that white conservatives wish to retard if not reverse whatever gains the black middle class has made. Disappointment with the civil rights community, however, does not, by its own force, lead to making common cause with white reactionaries. The civil rights community may indeed have to change. But it does not follow that African Americans have to overthrow it. The Counter-Narrative, however, insists that African-Americans should and, furthermore, embrace white reaction. It is the radical, formalist, starkness of the Counter-Narrative that causes it ultimately to fail African-Americans and to mark its adherents as alienated African-Americans.

III. JUDGE HIGGINBOTHAM AND HIS CRITICS

This part will analyze the encounter between Judge Higginbotham and his critics by focusing primarily on how they use—or do not use—the Civil Rights Macro-Narrative and the Color-Blindness Macro-Narrative. It will also examine how they view the structure and logic of macro-narratives by exploring how they see the relation, if any, between macro-narratives and micro-narratives. This part will also shed some light on the position held by African-American law professors[134] on Clarence Thomas.

134. A. Leon Higginbotham was an adjunct law teacher at numerous law schools, and he taught at Harvard following his retirement from the bench. John Q. Barrett, *Teacher, Student, Ticket: John Frank, Leon Higginbotham, and One Afternoon at the Supreme Court—Not a Trifling Thing*, 20 YALE L. & POL'Y REV. 311, 322 (2002). He was also a man of impressive legal scholarship. *See* Anita F. Hill, *The Scholarly Legacy of A. Leon Higginbotham, Jr.: Voice,*

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A. The Letter from the Judge

Shortly after Clarence Thomas became a member of the Court, Judge Higginbotham wrote his now famous letter to Clarence Thomas.[135] The letter takes the form of a lecture and a scolding, as if Judge Higginbotham were trying both to teach and to reprimand a callow and indifferent student. Indeed, at one point Judge Higginbotham flatly declared that he did "not believe that . . . [Clarence Thomas was] indeed the most competent person to be on the Supreme Court."[136] And at another point Judge Higginbotham stated "[c]andidly, I and many other thoughtful Americans are very concerned about your appointment to the Supreme Court."[137] At first blush, such a tone and approach seem presumptuous at best and would seem destined to give offense because they reek of a certain paternalism and arrogance, if not green-eyed envy. But the tone was defensible, given the logic and structure of the Civil Rights Macro-Narrative, even if misguided.[138] Thomas is not merely a pupil, and Judge Higginbotham is not merely a teacher. The relation between black people, as far as the Narrative is concerned, rests in a complex understanding of community. Any community has both teachers and students, to be sure, but one does not think of judges—even African-American judges—merely "teaching" other African-American judges. This suggests that Judge Higginbotham, to some degree or another, views Thomas as outside the relevant community, as a person who has repudiated that community and its governing macro-narrative. Thus Judge Higginbotham wrote not as if he and Thomas were members of the same community, but rather as one within it and the other without. Judge Higginbotham meant either to recall Thomas to the community (hence to teach), to rebuke him for leaving it (hence to reprimand), or both. Judge Higginbotham, therefore, undertook his reprimand on the basis that Clarence Thomas stood alienated from the African-American community.

Judge Higginbotham began with a declaration of purpose: to "write this letter as a public record so that this generation can understand the challenges you face as an Associate Justice to the Supreme Court, and the next can

Storytelling, and Narrative, 53 RUTGERS L.J. 641 (2001); Tanya Kateri Hernandez, *Pioneering the Lens of Comparative Race Relations in Law: A. Leon Higginbotham, Jr. as a Model of Scholarly Activism*, 20 YALE L. & POL'Y REV. 331 (2002).

135. *See Open Letter*, *supra* note 27.

136. *Id*. at 1020. *See also supra* note 1 and accompanying text.

137. *Open Letter*, *supra* note 27, at 1025.

138. On the matter of Clarence Thomas's competence, however, it is difficult to gainsay the claim of "Charles Bowser, a distinguished African-American Philadelphia lawyer, [who] said, 'I'd be willing to bet . . . that not one of the senators who voted to confirm Clarence Thomas would hire him as their lawyer." *Id.* at 1020 (citing Peter Binzer, *Bowser is an Old Hand at Playing the Political Game in Philadelphia*, PHILADELPHIA INQUIRER, Nov. 13, 1991, at A11 (quoting Charles Bowser)).

evaluate the choices you have made or will make."[139] He declared that Thomas had "the option to preserve or dilute the gains this country has made in the struggle for equality."[140] Declaring this to be a "grave responsibility indeed," Judge Higginbotham insisted that Thomas will need to recognize the "force of history" within him and that he will need "to remember how you arrived where you are now, because you did not get there by yourself."[141] Judge Higginbotham argued that the Civil Rights Macro-Narrative applied to Thomas, be he member or renegade.[142] In so doing, he was acknowledging the race consciousness that forms the heart and center of the Narrative.

Judge Higginbotham took Thomas to task for failing to demonstrate "an insightful understanding on your part on how the evolutionary movement of the Constitution[143] and the work of civil rights organizations have benefited you."[144] He continued:

> Like Sharon McPhail, the President of the National Bar Association, I kept asking myself: Will the Real Clarence Thomas Stand Up? Like her, I wondered: "Is Clarence Thomas a 'conservative with a common touch' as Ruth Marcus refers to him . . . or the 'counterfeit hero' he is accused of being by Haywood Burns . . . ?"[145]

He accused Justice Thomas of making unwarranted attacks on civil rights organizations, the Warren Court, and even Justice Thurgood Marshall.[146] Put differently, Judge Higginbotham was accusing Thomas of disrespecting the Narrative and the African-American institutions that supported it. Perhaps Thomas's attacks were designed to discharge political obligations to Reagan and Bush the elder, Judge Higginbotham noted, but he indicated that he hoped that Thomas would now "take time out to carefully evaluate some of these unjustified attacks."[147] He pressed the point, declaring that Thomas's attacks troubled him "because they convey a stunted knowledge of history and an unformed judicial philosophy."[148] As a member of the Court, Judge Higginbotham lectured Thomas that he had an obligation to "reflect more

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139. *Id*. at 1005.

140. *Id.* at 1007.

141. *Id*.

142. *Open Letter*, *supra* note 27, at 1007.

143. Higginbotham is here referring to the jurisprudential views of liberal Supreme Court Justices like Warren, Brennan, Blackmun and Marshall. *Id*. at 1011.

144. *Id*.

145. *Id*. *See generally* Haywood Burns, *Clarence Thomas, A Counterfeit Hero*, N.Y. TIMES, July 9, 1991, at A19; Ruth Marcus, *Self-Made Conservative: Nominee Insists He Be Judged on Merits*, WASH. POST, July 2, 1991, at A1; Sharon McPhail, *Will the Real Clarence Thomas Stand Up?*, NAT'L B. ASS'N MAG., Oct. 1991, at 1.

146. *Open Letter*, *supra* note 27, at 1011.

147. *Id.* at 1012.

148. *Id*. at 1014.

deeply on legal history than you ever have before."[149] He graciously did admit, however, that he believed that Thomas had "the intellectual depth to reflect upon and rethink the great issues the Court has confronted in the past and to become truly your own man."[150]

The Judge then laid out the substance of the Civil Rights Macro-Narrative. The first part of the letter, as noted previously,[151] lies at the core and consists largely of macro-narratives. The remaining three parts, however, by the very way that Judge Higginbotham framed them, sought to relate the works of the civil rights community to Thomas's personal life, his micro-narrative. However, even as to the first part, he understood the complex relation between the two forms of narrative. Judge Higginbotham said:

> As you now start to adjudicate cases involving civil rights, I hope you will have more judicial integrity than to demean those advocates of the disadvantaged who appear before you. If you and I had not gotten many of the positive reinforcements that these [civil rights] organizations fought for and that the post-*Brown* era made possible, probably neither you nor I would be federal judges today.[152]

Civil rights advocates made it possible for Higginbotham and Thomas to become federal judges. Thus the macro-narratives and the micro-narratives reinforce each other.

The letter concluded with an admonishment:

> You, however, must try to remember that the fundamental problems of the disadvantaged, women, minorities, and the powerless have not all been solved simply because you have "moved on up" from Pin Point, Georgia, to the Supreme Court . . . . I have written to tell you that your life today, however, should be not far removed from the visions and struggles of Frederick Douglass, Sojourner Truth, Harriet Tubman, Charles Hamilton Houston, A. Philip Randolph, Mary McLeod Bethune, W.E.B. Dubois, Roy Wilkins, Whitney Young, Martin Luther King, Judge William Henry Hastie, Justices Thurgood Marshall, Earl Warren, and William Brennan, as well as the thousands of others who dedicated much of their lives to create the America that made your opportunities possible. I hope you have the strength of character to exemplify those values so that the sacrifices of all these men and women will not have been in vain.[153]

Judge Higginbotham, rightly concerned that the Court would continue "to retreat from protecting the rights of the poor, women, the disadvantaged,

149. *Id*.

150. *Id*. However gracious Judge Higginbotham might have been on this point, it remains to be determined just how much intellectual depth is necessary to crank out the arid formalist opinions that form the core of Thomas's work on the Court.

151. *See supra* text accompanying note 142.

152. *See Open Letter*, *supra* note 27, at 1018.

153. *Id*. at 1026.

minorities, and the powerless,"[154] ended "with hope to balance my apprehension, I wish you well as a thoughtful and worthy successor to Justice Marshall in the ever ongoing struggle to assure equal justice under law for all persons."[155]

Judge Higginbotham had called on Justice Thomas to recognize and accept the moral force and power of the Civil Rights Macro-Narrative and to rejoin the community from which he came.

B. The Comment from the First Law Professor

Professor Evelyn Wilson responded to Judge Higginbotham's letter.[156] She reacted to its tone:

> I read Judge Higginbotham's letter quickly the first time and felt embarrassed for Justice Thomas. He had just assumed a lifetime position at the top of his career ladder, one of only nine in the nation, a position from which his thoughts, values, perceptions, and priorities will impact not only this country, but all humanity. Before Justice Thomas rendered a single judgment, Judge Higginbotham seemed to suggest that Judge Thomas is immature and not especially bright. My head said: Give the boy a chance. Let him decide what to do with his newly gained power. My heart said: Judge Higginbotham is probably right. I'm glad he expressed our fears.[157]

Her suggestion that we "[g]ive the boy a chance" fails to consider the clearly defined views expressed by Thomas in his seminal law review article.[158] If she had taken Thomas's position into account, perhaps she had also taken into account his confirmation testimony that arguably discarded some or all of the views contained in that article.[159] But perhaps her remarks portend a deeper claim, that there exists a dichotomy between her head and her heart, and that the Civil Rights Macro-Narrative has a claim on her heart but not necessarily on her head. However, she never satisfactorily demonstrated this proposition. If anything, the Civil Rights Macro-Narrative speaks with equal force to both head and heart.[160]

Professor Wilson careened back and forth between shared micro-narratives, rooted in the personal experiences of both Thomas and herself, and

154. *Id.* at 1027.
155. *Id*. at 1028.
156. *See* Wilson, *supra* note 33.
157. *Id*. at 142.
158. *Id.*; *see* Thomas, *supra* note 28.
159. *See* CHRISTOPHER SMITH & JOYCE A. BAUGH, THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY (2000).
160. For a much more useful analysis of head and heart, *see* Wells, *supra* note 1, at 147 (arguing that "Clarence Thomas is his principles; he lacks the flesh and blood of concrete connection to individual context" and "[w]hat I see in Thomas is a man who has suffered many forms of racial abuse and who has tried to avoid the pain of this abuse by 'living in his head'").

a broader macro-narrative that encompasses larger numbers of African-Americans and their experiences and struggles over the preceding four or five decades that mark and measure the lives of both Thomas and herself.[161] For her, the various forms of narrative proceeded on parallel tracks, neither speaking to the other in any meaningful way.

Not surprisingly, Professor Wilson ultimately turned to Thomas's micro-narrative, surely a narrative of racial discrimination, poverty, obstacles in education and employment, and race, but also of an African-American man who "has become talented and well-trained."[162] From the perspective of this micro-narrative, she then posed the following questions: "Are we fair to require him to bear an extra burden of additional personal sacrifice because he was born Black in America? Are we fair to deny him the opportunity to make his contribution in his own way, to live up to his own potential, to be his own person?"[163] Again, she relied on Thomas's micro-narrative, ignoring the Civil Rights Macro-Narrative. "We can only encourage him to be honest to himself now that he no longer needs to please others."[164] When Judge Higginbotham referred to Thomas pleasing others, he had conservative whites in mind.[165] When Wilson referred to pleasing others she had no such limitation in mind.[166] For her, Justice Thomas has no more obligation to please African-Americans than he does to please anybody else. Her translation of the "other" to be "pleased" negates the normative power of the Civil Rights Macro-Narrative.

Unlike Higginbotham, who clearly wanted Thomas to emulate Marshall, Wilson took a different view.

> We cannot expect that his decisions would be those of Justice Marshall. We can expect that he will vote in accordance with his own conscience and experience. We should criticize Justice Thomas when we disagree with his decisions because he is a Supreme Court Justice and ought to do better. We should not criticize him because he did not vote "Black."[167]

Professor Wilson left unanswered, however, the question as to how one determines what amounts to doing "better." Voting "Black" has to mean voting with the Civil Rights Macro-Narrative, the normative expression of the African-American struggle for equal rights, in mind. Perhaps for her, therefore, doing "better" has no referent to the Narrative. Perhaps this is so because the moral power of the Narrative reaches the heart but not the head of Professor Wilson. But she offered up no alternative metaphor, narrative or

161. *See* SMITH & BAUGH, *supra* note 159 at 143–44.
162. *See* Wilson, *supra* note 33, at 145.
163. *Id.*
164. *Id*.
165. *See Open Letter*, *supra* note 27, at 1014.
166. *See* Wilson, *supra* note 33, at 145.
167. Wilson, *supra* note 33, at 146.

other moral, or other referent for measuring whether a particular vote is "good." She provided nothing that speaks to one's head, to her head, or to Clarence Thomas's head.

But the Civil Rights Macro-Narrative is essentially a narrative about the law precisely because of the central role of civil rights lawyers *doing law* in the construction of this particular macro-narrative. To conclude that the Narrative is somehow irrelevant in analyzing judicial opinions, is to impoverish legal analysis to an extraordinary and unacceptable degree. Professor Wilson has not established a normative or jurisprudential formalist position that would warrant the silencing of the Civil Rights Macro-Narrative in the fashion that she supposed. Trying to carve out a disembodied autonomy for Clarence Thomas—for accommodating his alienation—and for micro-narratives, she robbed the law of comprehensibility, not to mention moral authority.[168]

Given her implicit rejection of any moral or normative claim of the Narrative, Wilson criticized Judge Higginbotham for recalling Clarence Thomas to a duty to remember those who helped him along the way, but not for recalling the other eight members of the Court to the same responsibility.[169] Professor Wilson overlooked the fact that Judge Higginbotham was engaging in an African-American discourse—one African-American judge speaking to another African- American judge. The question posed by Judge Higginbotham was whether *black* people who wind up in a position to affect the legal relations of other black people have certain duties to those other black people.[170] Surely one can answer this question, at least in large part, without also deciding what the duties of other people might or might not be.[171]

In any event, Professor Wilson answered the question in the negative. She concluded, "Justice Marshall . . . dedicated his life to creating options for Black Americans. Justice Marshall fought for the right of Justice Thomas to determine his own destiny. Perhaps Justice Thomas is a proper heir to Justice Marshall's seat."[172] It boggles the mind to suppose that Justice Marshall would be satisfied if Clarence Thomas used the options that Marshall had fought to create to undo the legal and other protections necessary to ensure that those options remained available for other African-Americans, the poor, women, other minorities, and the subordinated. It lies beyond belief that Justice Marshall would subscribe to the view that Clarence Thomas's right to

168. *See* Newsom, *Common School Religion*, *supra* note 58 *passim* (arguing that the Supreme Court's macro-narratives regarding religion in the public schools lack moral authority largely because they pay insufficient attention to the psychological harm such religion visits upon religious minorities, and implicitly rejecting the argument that micro-narratives could establish such authority).

169. Wilson, *supra* note 33, at 146–47.

170. *See Open Letter*, *supra* note 27.

171. *See* Newsom, *Common School Religion*, *supra* note 58 and accompanying text.

172. Wilson, *supra* note 33, at 147.

determine his own destiny included the right to constrain the destiny of other African-Americans, the poor, women, other minorities, and the subordinated. Marshall surely believed in the moral force and power of the Civil Rights Macro-Narrative and the duties that it generates. Thus it was folly then, and it is folly now to suppose that Justice Thomas might be a "proper heir to Justice Marshall's seat."[173]

Because Professor Wilson rejected macro-narratives as relevant to judicial decision-making, she did not embrace the Color-Blindness Macro-Narrative. Her position rested largely on empowering Thomas's micro-narrative. Her treatment of the Counter-Narrative constitutes the only saving grace of Professor Wilson's comment, although the rejection of the moral force of macro-narratives in doing law presents great obstacles to any rational analysis of the law. In particular, it enshrines alienation, converting it merely to some expression or species of unbridled individualism.

C. The Tobriner Lecture by the Judge

Judge Higginbotham resumed his attack on Clarence Thomas in 1994,[174] prompted in part by the public response to his letter.[175] He reiterated that his purpose in writing the letter was to state "what I felt his personal obligations were, both as a Justice on the Supreme Court and as an African-American."[176] He then referred to the responses that questioned his authority to speak for black people on the character and qualifications of Justice Thomas. Judge Higginbotham concluded that his authority came from his wife.[177] Turning to Professor Wilson's comments, Judge Higginbotham teased her for characterizing Thomas as a "boy."[178] He responded:

> Justice Thomas is not a mere boy. Boys play marbles and little league baseball. Men and women sit on the United States Supreme Court . . . . It is because Justice Thomas has the power to determine the plight of all

173. *Id.* It is difficult to follow Professor Wilson's argument that Clarence Thomas might be an heir to Justice Marshall's seat on the Court. On the one hand, she insisted that the seat never belonged to African-Americans. *Id.* at 145. But apparently it "belonged" to Justice Marshall because it must have in order for there to be a possibility that Thomas was "a proper heir to Justice Marshall's seat." Perhaps this merely furnishes further evidence of Professor Wilson's rejection of macro-narratives. If the seat were a "Black" seat, then it would take a macro-narrative to make it so. If it were merely Justice Marshall's seat—and now Clarence Thomas's seat—then it would only take random, autonomous, and disconnected micro-narratives to support the latter claim. Her rejection of the normative claims of macro-narratives might explain in part her inability to construct a good macro-narrative, even when she arguably wanted to construct them. *See supra* notes 156-60 and accompanying text.

174. *See Retrospect*, *supra* note 31.

175. *Id*. at 1407.

176. *Id*. at 1408.

177. *Id*. at 1410.

178. *Id*. at 1411.

> Americans, and particularly the disadvantaged, women, minorities, and the powerless, that I wrote to him. If he were a mere boy, I would have sent him a bag of marbles or a blank pad with crayons on which he could draw fantasies. I would not have feared that the destiny of our nation might in some instances rest on his decisive vote when the Court was evenly divided.[179]

Professor Wilson undoubtedly meant to use the word "boy" in a jocular, if not flippant way, as Judge Higginbotham recognized.[180] Higginbotham used her choice of words against her, correctly noting that the word "boy" connotes membership in the African-American family and thus, for him, a binding link to the shared experiences and thus the macro-narratives of that family, including the Civil Rights Macro-Narrative.[181] The metaphor or figure of "family" led Judge Higginbotham to pose the question whether Clarence Thomas had the moral right to become hostile to the very opportunities "that made his success possible" being seen as viable options for "the present generation of African-Americans, many of whom have found barriers to entry as high and impenetrable as any he encountered."[182] The answer to the Judge's question turns largely on the recognition of the moral or normative claim of the Narrative. For Professor Wilson, who rejected such a claim at least with regard to the "head," Thomas presumably has such a moral right. For Judge Higginbotham, who accepted such claims, Thomas does not. The issue was clearly joined.

Judge Higginbotham then responded to Wilson's objection that he sought to impose a double standard, demanding of Thomas what he would not demand of the other members of the Court. Higginbotham made a moral claim, one resting on the Narrative.

> I believe all Justices of the Supreme Court should be fair to everyone, and particularly in the "defense of the weak, the poor, minorities, women, the disabled, and the powerless." However, I do believe that it is a *tragic irony* when a Black Justice adopts the anti-minority position advocated by the most conservative and racially uninformed Justice on the Court, and when even many of his White colleagues demonstrate a far greater insight and concern about the history of the plight of African-Americans in this country.[183]

The assertion of "tragic irony" makes sense only if one supposes that the history of the struggle, the story of the struggle, as it constitutes a macro-narrative, makes demands on those who belong to the community engaged in the struggle.

179. *Retrospect*, *supra* note 31, at 1411–12.

180. *Id*. at 1411, n.16.

181. *Id*. Of some importance, Judge Higginbotham did not accuse Professor Wilson of using the word "boy" so as to call up or implicate the racist tendency of some whites to refer to African-American men as "boys."

182. *Id*. at 1412.

183. *Id.* at 1413 (emphasis added).

Judge Higginbotham zeroed in on Professor Wilson, arguing that "her writing suggests some confusion about the unavoidable obligation and status in life one has as an African-American—an obligation and status attributable to historic policies that have at various times been invoked by the overall American society."[184] He argued that the duty arises out of the "twoness" that Dubois described, being both an American and a Negro.[185] Perhaps he meant to suggest that in African-Americans, Professor Wilson's "head" of the American is conjoined with Professor Wilson's "heart" of the Negro, the African. But in any event, Judge Higginbotham placed the subject of moral duty squarely in the realm of psychology, linking not only head and heart, but also history or narrative and the psyche. "The first sign of *emotional maturity*[186] in all African-American public officials is the recognition of this duality that we all confront daily."[187] Judge Higginbotham had clearly ratcheted up his critique of Justice Thomas.

Having introduced the subject of psychology and having declared that the Civil Rights Macro-Narrative contains a psychological dimension, Higginbotham bided his time. He began a careful and cautious development of the subject by rephrasing or restating the theme of "tragic irony," and at the same time, moving beyond it. He said:

> I would hope that no African-American in high public office would become a major voice in the intentional destruction of the potential of his own people. No judge, whatever his race, should do that. And if the person who engages in *destructive conduct* against a minority is also a member of a minority group that has been historically discriminated against, what is its special significance?[188]

Judge Higginbotham had now yoked the idea of ironic tragedy with the idea of destructive conduct, a conduct having special significance. He explored that significance by considering what the consequences might have been if African-American judges had joined in the majority opinions in *Dred Scott v. Sanford*,[189] and *Plessy v. Ferguson*.[190] Those dire consequences only reinforced his harsh judgment on the works of Clarence Thomas as evidence of

184. *Retrospect*, *supra* note 31, at 1413.

185. *Id*. at 1414.

186. Perhaps the contretemps on the use of the word "boy" should be revisited. *See supra* notes 178-81 and accompanying text (emphasis added). In a sense Judge Higginbotham accused Clarence Thomas of immaturity. Perhaps Clarence Thomas *is* a "boy" after all.

187. *Retrospect*, *supra* note 31, at 1414–15 (emphasis added). In support of this claim, Judge Higginbotham gave examples of how even the most distinguished African-American public officials, including himself, are, in this day and age, subjected to the indignities of racial bigotry and prejudice. *Id*. at 1415–18.

188. *Id*. at 1418 (emphasis added).

189. 60 U.S. 393 (1857).

190. 163 U.S. 537 (1896).

destructive conduct. "[A]t times, in his opinions, [Justice Thomas] is as conservative for this generation of the Supreme Court as were the majority of Justices who acted so hostilely to Blacks in *Dred Scott* and *Plessy*. I think such extreme conservatism is a compounded irony when advocated by an African-American."[191] The complex dynamics of alienation are evident in Judge Higginbotham's criticism of Thomas. Whether or not Thomas might be a victim, he surely acts like a perpetrator.

Judge Higginbotham was highly critical of Thomas's dissent in *Hudson v. McMillian*, the case in which a black prisoner was severely beaten by prison guards and the question was whether such a beating constituted cruel and unusual punishment in violation of the Eighth Amendment.[192] In light of Thomas's view that there was no violation, Judge Higginbotham asked "[w]hy is he no different or probably even worse than many of the most conservative Supreme Court Justices of this century?"[193]

By the time he delivered this lecture, unlike the case with the letter, Judge Higginbotham had Supreme Court opinions of Justice Thomas to scrutinize. His judgment of them was harsh, as his treatment of *Hudson v. McMillian* shows. But the judge pressed ahead, developing and articulating not only a critique based on the moral meaning and significance of the Civil Rights Macro-Narrative, but also a critique that challenged the psyche of Justice Thomas.[194] Judge Higginbotham concluded that Clarence Thomas might well be "entangled with racial self-hatred."[195] It was as if there could be no other explanation for the harsh, mean-spirited and reactionary views expressed by Clarence Thomas in his votes and opinions on the Court, and no other explanation for his destructive conduct.

However, the two elements of Judge Higginbotham's critique are linked together. Rejection of the moral claims of the Narrative, a macro-narrative generated by the struggles, history, experience, hopes, and dreams of one's own race, might be evidence of racial self-hatred and might give rise to destructive conduct. This linkage in large part turns on the anterior assertion that the Narrative in fact carries with it binding moral and normative force on African-Americans, including Clarence Thomas, but also on the new assertion that acceptance of the normative power of the Narrative is evidence of a healthy racial self-identity.

If Professor Wilson was right, then perhaps one could say that Thomas's work on the Court merely reflects Thomas's determination of his own

191. *Retrospect*, *supra* note 31, at 1423.
192. 503 U.S. 1, 4 (1992).
193. *Retrospect*, *supra* note 31, at 1426.
194. *Id.* at 1427–29.
195. *Id*. at 1429.

destiny,[196] a destiny that is nowise connected to the destiny of other African-Americans because there is no macro-narrative that can make a moral claim on African-Americans of the sort contended for by Judge Higginbotham. One could also say that determining one's own destiny in such a fashion does not necessarily evidence either racial self-hatred or racial self-identity or acceptance because macro-narratives bear no relation to psychological development. Put differently, one could suppose that Clarence Thomas has discharged any duty that he might owe other blacks by determining his destiny according to his best lights, even while in doing so he harms black interests. However, history, this paper warrants, will cast a harsh judgment on those who view reality primarily through the lens of unconnected micro-narratives.[197] Equally telling, the notion that Justice Thomas is free to work out his own destiny entirely on his terms and entirely without reference to the Civil Rights Macro-Narrative overlooks the stubborn fact that the issue is not what one believes, but what one does and with whom one does it. Clarence Thomas, the academic thinker, can hold whatever views he might want to, academic freedom guarantees this result. However, Clarence Thomas, the Supreme Court Justice, presents an entirely different situation. The Court, the third branch of our national government, is no ivory tower.[198] Any proper analysis of Judge Higginbotham's critique of Justice Thomas must take into account the functional difference between academia and the judiciary.

D. The New York University Law School Speech by the Judge

On November 21, 1995, Judge Higginbotham weighed in yet one more time.[199] In a speech, he largely reprised his letter and his lecture. But he pressed ahead with his attack on Clarence Thomas.[200] First he sought to contrast Clarence Thomas and Colin Powell.[201] Higginbotham was exploring the complex relation between macro-narratives and micro-narratives, demonstrating that one micro-narrative can reflect the Civil Rights Macro-Narrative, Powell, whereas another can repudiate it, Thomas.[202] He went

196. *See* Wilson, *supra* note 33, at 147.

197. *See supra* notes 161-64 and accompanying text.

198. Robert Bork was denied Senate confirmation of his nomination to the Court in part because he described the role of a judge as an abstract, barren, and disembodied intellectual feast. *See The Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 100th Cong. 854 (1987) [hereinafter *Hearings*]. *See generally* Frank Guliuzza, et al., *Character, Competency, and Constitutionalism: Did the Bork Nomination Represent a Fundamental Shift in Confirmation Criteria?*, 75 MARQ. L. REV. 409 (1992) (summarizing the commentary on the meaning of the Bork nomination).

199. *See Speech*, *supra* note 32.

200. *Id.*

201. *Id.*

202. *Id.*

further to suggest that the former lacked the moral integrity or claim of the latter.[203] He saw Powell leading America to a state of "greater justice and opportunity for all Americans," whereas he saw Thomas as "dragging African-Americans back to a past of oppression and inequality," bemoaning how much worse off African-Americans and others are because of Thomas's presence on the Court.[204] Judge Higginbotham insisted that Thomas's rise to power and influence was perhaps "less deserving" than Powell's.[205] He attacked, as he had done before, Thomas's background, experience, and qualifications, but found Powell's to be outstanding.[206] He described both of them as social conservatives, but insisted that they have "profound philosophical differences" and quite different feelings about African-Americans.[207]

On the nettlesome subject of affirmative action, Judge Higginbotham noted that Powell did not attack it even though doing so would have improved or enhanced his standing with whites.[208] He declared that Powell was not like "an earlier generation of Uncle Toms." Instead, Powell acknowledged that he was helped by affirmative action, but was not shown preference.[209] The judge reminded us that in 1983 Thomas acknowledged that he had benefited from affirmative action, but he concluded that Thomas was "impacted by the Reagan-Bush revolution" such that by 1988, Thomas was attacking affirmative action.[210] He was particularly critical of Thomas' brief concurring opinion in *Adarand Constructors, Inc. v. Peña*, an opinion that restated the basic premise of the Color-Blindness Macro-Narrative that the Declaration of Independence is the governing source of meaning for the Equal Protection Clause.[211]

Returning to the theme of racial self-hatred, which increasingly had come to dominate his attack, Judge Higginbotham insisted that something had happened to the core of Justice Thomas's soul; that he had forgotten from whence he had come.[212] He declared that Thomas's self-hatred was clinically observable. Judge Higginbotham mocked Thomas, stating that Thomas must think that he would have been a confidant of Thomas Jefferson, the author of the Declaration of Independence, when in reality he would have been the

203. *Id.*

204. *Speech*, *supra* note 32.

205. *Id.*

206. *Id*. At a later point in the speech, Judge Higginbotham insisted that Colin Powell was clearly deserving of the position as chairman of the Joint Chiefs of Staff, but that Clarence Thomas would probably not have been considered for any other seat on the Court except that of Justice Marshall. *Id.* He referred to then-dean Guido Calabresi's testimony in the confirmation hearings, offering up only the faint praise that Thomas had "capacity for growth." *Id.*

207. *Id*.

208. *Id*.

209. *Speech*, *supra* note 32.

210. *Id*.

211. 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring).

212. *Retrospect*, *supra* note 31, at 1428–29.

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person "who fed his hogs, hoed his tobacco, and planted his corn."[213] However, as Part VI of this paper will demonstrate, Thomas might have thought that Jefferson, like the vile Simon Legree, would have had a small number of black henchmen of the order of Quimbo and Sambo, and that he, Thomas, would have been one of them, a view that this author finds to be entirely plausible. Thus Judge Higginbotham might have been wrong on this point. But given his view, Judge Higginbotham wondered why Thomas would quote Jefferson, the slave master, as authority on the matter of affirmative action. Judge Higginbotham, drawing on his lecture, repeated his criticism of Thomas's attack on the very civil rights groups whose works had benefited Thomas.[214]

Attesting again to the contemporary relevance of the Civil Rights Macro-Narrative, the judge made use of then-recent developments. He compared Thomas's rejection of affirmative action with the September 1995 decision of Newt Gingrich, then the new Republican Speaker of the House of Representatives, to hire 64 pages, none of whom was an African-American and only one of whom was a racial minority. In contrast, under the previous leadership in the House, twenty percent of the pages were minorities.[215] Judge Higginbotham continued on with a somber assessment of the Congressional redistricting cases and the impact that those cases would, in his opinion, have on the number of African-Americans in the House of Representatives.[216]

Given the structure of the Narrative, the story of the struggle for civil rights for African-Americans, Judge Higginbotham relished the fact that Colin Powell had attended the installation of a new head of the National Association for the Advancement of Colored People (NAACP) at an overly long meeting in a black church in Washington, D.C. The NAACP, of course, is one of the nation's premier African-American civil rights organizations. He argued that Thomas would never have attended such an event.[217] Judge Higginbotham concluded his lengthy speech with the charge that Clarence Thomas was "the black clone," an invention of racist, reactionary whites.[218] He claimed that their strategy entailed finding someone who: (1) had been involved in the struggle, coming from a background of poverty; (2) would disregard his roots; (3) would be totally confused about self-identity, and (4) would exhibit some hostility to black women (Judge Higginbotham having Professor Anita Hill in mind).[219] The reactionary whites found Clarence Thomas in the view of Judge Higginbotham.

213. *Speech*, *supra* note 32.
214. *Id*.
215. *Id*.
216. *Id*.
217. *Id*.
218. *Speech*, *supra* note 32.
219. *Id.*

E. *The Article by a Second Law Professor*

Professor Wilson found an ally in Professor Randall Kennedy. He joined the lists to attack the idea that a moral predicate exists for the claim of racial loyalty, the predicate for Judge Higginbotham's criticism of Clarence Thomas.[220] Professor Kennedy made the categorical assertion that the argument for racial loyalty is internal to black elite circles.[221] Concededly, the Civil Rights Macro-Narrative demands racial loyalty, or at least, Judge Higginbotham would avow that it does. Professor Kennedy, however, offered no evidence that only black elites react to or contemplate the meaning of the Narrative. Indeed, there is good reason to think black people generally pay attention to and are influenced by the Narrative.[222] It is clear Professor Kennedy sought to limit the reach and scope of the Narrative, claiming it to be the plaything of the black elite. He did not resort to the "head-heart" dichotomy of Professor Wilson.[223]

He did, however, correctly note that the racial disloyalty charge aims most powerfully at African-American lawyers in general and at Clarence Thomas in particular,[224] a tribute to the elemental power and force of the work of civil rights lawyers and civil rights organizations in the African-American struggle for equal justice and a testimony to the central components of the Narrative. Thus, "in the eyes of his most bitter detractors, Thomas is worse than a [George] Wallace [at his white supremacist worst] since Thomas is a race traitor and not simply an enemy."[225] Professor Kennedy failed, apparently, to consider the logic behind the relative intensity of the attacks on Clarence Thomas. The other racial disloyalty targets—all lawyers, specifically, Vernon Jordan, Jr., Christopher Darden, and Anthony Griffin—lack the power to impact the lives of African-Americans that Clarence Thomas (lawyer and now Supreme Court Justice) possesses. [226]

Kennedy insisted the racial disloyalty critique exhibited "a tendency to homogenize blacks, woefully minimizing the complex, contentious diversity that marks the African-American population."[227] In Part IV, this article will demonstrate that Professor Kennedy is simply wrong on the facts—African-

220. *See* Kennedy, *supra* note 33.
221. *Id.*
222. *See* DAWSON, *supra* note 98, at 11 (stating "the black media, the black family, and religious and community-based organizations . . . have been largely responsible for crystallizing the shared historical experiences of African Americans into a sense of collective identity, and they have also played a key role in shaping the development of black political ideologies"). *See also* McGary, *supra* note 7.
223. *See supra* notes 157–60 and accompanying text.
224. *See* Kennedy, *supra* note 33.
225. *Id.*
226. *See generally id.*
227. *Id.*

Americans from a variety of ideological perspectives condemn and reject the conservatism of Clarence Thomas.[228] Furthermore, while there is an African-American conservative ideological tradition, today it claims the allegiance of only a handful of African-Americans,[229] and it has no institutional or structural support or presence in and with African-Americans.[230] The racial disloyalty critique neither homogenizes blacks nor does it minimize "the complex, contentious diversity that marks the African-American population"[231] because the overwhelming majority of African-Americans, perhaps as great as ninety-nine percent, do not accept Clarence Thomas's conservative ideology, and a sizeable minority dislikes it.[232] Thus Kennedy's claim that "Thomas's brand of conservatism, though by no means dominant, is by no means scarce in black America"[233] goes against the evidence, unless one were to grant that a political ideology adhered to by one percent of the African-American population was not "scarce," or that a ninety-nine to one split constituted a "division."[234]

Professor Kennedy stood on surer ground when he noted, with respect to *social* conservatism, that Thomas had soul mates in the African-American communities.[235] However, Part IV of this article will show *social* conservatism enjoys far more support among African-Americans than either *economic* or *racial* conservatism.[236] It comes as no surprise that the criticism of Clarence Thomas focuses largely on *race* questions, as it surely did in the hands of Judge Higginbotham. Therefore, Kennedy's argument regarding *social* conservatism is of no avail.

Because African-American critics of Clarence Thomas can embrace a wide range of political ideologies, Professor Kennedy's argument that "[t]he racial disloyalty critique makes the erroneous assumption that it is clear what policies best serve the interests of black communities" cannot stand.[237] But Professor Kennedy continued:

> It is becoming increasingly difficult to discern what effect policies will have on blacks across regions, classes, genders, and other significant social stratifications. Making wise decisions is not simply a matter of wanting to be loyal to one's people. It is a matter of knowing facts, interpreting trends, making use of proper values, comparing arguments, and sometimes reaching

228. *See infra* notes 337-74 and accompanying text.

229. *See infra* note 357 and accompanying text.

230. *See* Calmore, *supra* note 3, at 195–96 (noting Thomas lacks "affirmation from a black constituency" and "black conservatives lack a constituency among other blacks").

231. Kennedy, *supra* note 33.

232. *See infra* note 357 and accompanying text.

233. *See* Kennedy, *supra* note 33.

234. *Id.*

235. *Id*.

236. *See infra* notes 357-58 and accompanying text.

237. *Kennedy*, *supra* note 33.

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> counterintuitive conclusions that are at odds with conventional understandings. Arbiters of racial loyalty err when they suggest that affirmative action, racial gerrymandering, and similar strategies are obviously and unquestionably the best policies for blacks to pursue. Perhaps they are the best available. But one cannot be confident of that conclusion absent reconsideration and experimentation with alternatives—just the sort of open-minded testing that is inhibited when a failure to embrace these strategies gives rise to charges of "selling out," "forgetting where you came from," or "turning your back on your people."[238]

Professor Kennedy here has posed a fair challenge to the civil rights community, and thus to those—elites or otherwise—who control and shape the Civil Rights Macro-Narrative. But, given Clarence Thomas's rigid formalism and commitment to "original intent," [239] it is difficult to see just how Thomas's narrative-pathic jurisprudence[240] responds to or bears any relation to Kennedy's call for a functionalist approach to working on large social and racial legal problems.

If anything, Professor Kennedy gave us yet one more reason to criticize Clarence Thomas. Thomas makes no effort "to discern what effect policies will have on blacks across regions, classes, genders, and other significant social stratifications."[241] He makes precious little effort to "know[] facts, interpret[] trends, mak[e] use of proper values, [or] compar[e] arguments."[242] It will not do to suggest that Thomas might reach "counterintuitive conclusions that are at odds with conventional understandings" when the very methods he uses to reach those conclusions are highly suspect.[243] With Thomas we do not get "open-minded testing."[244] Three examples, all involving affirmative action, which Thomas opposes, will suffice.

In *Adarand Constructors, Inc v. Peña*,[245] Thomas's concurring opinion is terse, rigid, and formalist in the extreme. It makes no effort to connect his views with empirical social reality. He made nothing more than the following

238. *See id.*

239. *See* Jared A. Levy, *Blinking at Reality: The Implications of Justice Clarence Thomas's Influential Approach to Race and Education*, 78 B.U. L. REV. 575 (1998) (criticizing Thomas's views in *Missouri v. Jenkins*, 515 U.S. 70 (1995)).

240. *See* Marcosson, *supra* note 89.

241. Kennedy, *supra* note 33.

242. *Id.*

243. *See* Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 8 (1997) (stating, "[i]f one were asked to select a few words to describe Thomas based on his judicial opinions, several specific adjectives would quickly come to mind: originalist, formal, rigid, legalistic, and aggressive").

244. For an example of a critic of affirmative action being moved by the evidence to stake out a different position, see Nathan Glazer, *A Place for Racial Preferences*, WASH. POST, Nov. 24, 1998, at A19.

245. 515 U.S. 200 (1995).

series of categorical claims: (1) "[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law;"[246] (2) "[t]hat these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race;"[247] (3) "[t]here can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution;"[248] (4) "[t]hese programs . . . undermine the moral basis of the equal protection principle . . . [a] principle [that] reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society;"[249] (5) "there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination;"[250] (6) this paternalism "teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence" and "[i]nevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race,"[251] and (7) "[t]hese programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."[252] Thomas cited no empirical social research to buttress any of these highly contestable categorical claims that he makes. To take just one of these claims, there is solid evidence that the stigma to which Thomas referred in claim seven is largely a figment of his imagination.[253]

Thomas fared no better in *Missouri v. Jenkins*, where he made a series of claims that are abstract and not rooted in anything other than Thomas's view of the world. [254] He began with the remarkable statement that "[i]t never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."[255] Unfortunately, he never bothered to

246. *Id.* at 240.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Adarand*, 515 U.S. at 241 (Thomas, J., concurring).

251. *Id.*

252. *Id.*

253. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE & UNIVERSITY ADMISSIONS (1998). *See also* Charles R. Lawrence, III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 951–52 (2001) (arguing affirmative action is a black communitarian response to white structural or institutional oppression of the African-American community).

254. 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

255. *Id.*

explain just what that "anything" might be. The only "thing" we know for sure is that a majority of the students in the Kansas City, Missouri public schools were African-Americans.[256] We do not know the racial make-up of the faculty, the administrators, or those who determine how much money the school district would receive in any fiscal year.

Undaunted, Thomas charged ahead, arguing that the District Court had "read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority."[257] Thomas thus made it perfectly clear that he rejected empirical research, preferring instead to rely on what he supposed to be "constitutional principle." He went so far as to state, "assumptions [of racial inferiority in situations of de facto segregation] and any social science research upon which they rely certainly cannot form the basis upon which we decide matters of constitutional principle."[258] However, when it suited his purposes, Thomas was prepared to rely on his private untutored intuition: "The continuing 'racial isolation' of schools after *de jure* segregation has ended may well reflect voluntary housing choices or other private decisions."[259] There is too much hard evidence of continuing residential racial apartheid in this country, a state of affairs resulting from concerted action to restrict housing choices for African-Americans,[260] for anybody to take Thomas's intuition or hunch seriously. Nonetheless, Thomas concluded "massive demographic shifts" lay "beyond the authority and . . . the practical ability of the federal courts to try to counteract."[261] Again, Thomas indulged in armchair psychiatry when he declared that the Kansas City public schools "can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement."[262] Here too, Thomas chose not to back up this claim with any empirical research or support. Finally Thomas trumpeted the unsubstantiated and unsupported claim that "'[r]acial isolation'

256. *Id.* at 76 (Rehnquist, J.).

257. *Id.* at 114 (Thomas, J., concurring).

258. *Id.* at 119-20.

259. *Jenkins*, 515 U.S. at 116 (Thomas, J., concurring).

260. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); Jennifer C. Chang, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969 (2002); Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 741 (2001) (noting "[a] high degree of residential segregation persists for African Americans in all income brackets").

261. *Jenkins*, 515 U.S. at 117–18 (Thomas, J., concurring) (quoting Freeman v. Pitts, 503 U.S. 467, 495 (1992)).

262. *Id.* at 122.

itself is not a harm; only state-enforced segregation is . . . . [Because otherwise one would have to insist that] there must be something inferior about blacks."[263] This claim is highly debatable because there is good evidence that racial isolation does in fact harm African-Americans.[264]

Finally, in *Grutter v. Bollinger*,[265] Thomas appeared to depart from the arid formalism of *Adarand* and *Jenkins*. In his lengthy dissenting opinion, he appears to rely on some statistical data and other forms of empirical data to support his arguments against affirmative action.[266] Accordingly, he appeared to have moved in the direction Professor Kennedy supposed, however, the Justice did not. Thomas argued that because some states do not have a public law school then a presumption arises "that the enterprise itself is not a compelling state interest."[267] However, Thomas never explained why State A could not, as a practical matter, meet its need for lawyers through the public law schools of State B. Thomas forged ahead and argued the fact that "[l]ess than 16% of the [University of Michigan] Law School's graduating class elects to stay in Michigan after law school"[268] militates against any claim that the law school serves a compelling state interest. Thomas utterly failed to consider, however, what percentage of the *minority* graduates of the law school elected to stay in Michigan. He also relied on the statistical fact that only a few states maintain elite public law schools to "raise[] a strong inference that there is nothing compelling about elite status."[269] Thomas, again, failed to consider that some states might not feel the need to benefit from the prestige that an elite public law school might confer upon it. He never established the general proposition that a compelling state interest must find expression in *every* state in order to be compelling. If this were not bad enough, Thomas never connected elitism with affirmative action. The hard fact is that non-elite law schools practice affirmative action too. So far, Thomas has not handled spotty, empirical data particularly well.

Thomas would appear to be on firmer methodological ground when he argued that there is growing social evidence "that racial (and other sorts) of heterogeneity actually impairs learning among black students."[270] The thrust of the argument Thomas constructed was that African-Americans do better

263. *Id.*

264. *See* Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63, 120 n.325 (2002) (collecting the research establishing the harmful effects of racial isolation). *See also* Levy, *supra* note 239, at 607–16.

265. 123 S. Ct. 2325 (2003).

266. *Id.* (Thomas, J., dissenting in part, concurring in part).

267. *Id.* at 2354.

268. *Id.* at 2355.

269. *Id*.

270. *Grutter*, 123 S.Ct. at 2358 (Thomas, J., dissenting in part, concurring in part).

academically in black schools than they do in white schools.[271] What Thomas failed to consider, whether or not studies on which he relied do, is the life histories and the numerical credentials of the black students analyzed in these reports and the academic environments of the schools they attend. For example, one has to consider whether white racism contributes to African-American underachievement in some white schools. Thomas's failure to appreciate the need to contextualize the findings on academic achievement suggests either an inability or an unwillingness on his part to do good social science. Thomas insisted that Boalt Hall has an underrepresented minority student enrollment that "now exceeds 1996 levels."[272] But the relevant question is, but for California Proposition 209, what would that enrollment be? One way to think about the question is to ask why 171 American law deans supported the University of Michigan Law School's position on affirmative action?[273] This suggests that Thomas failed to appreciate the reality of the situation at Berkeley, a reality that was more apparent to virtually all of the deans of American law schools, elite or otherwise.

Thomas returned to his large theme that affirmative action is bad for African-Americans, that black students are better off if they are not "overmatched" in white schools.[274] He relied on Stephan and Abigail Thernstrom's *Reflections on the Shape of the River* as authority for the proposition that the beneficiaries of affirmative action are underperforming in the classroom.[275] He also referred to Thomas Sowell,[276] but Thomas essentially struck out on his own without any real need for either the Thernstroms or Sowell. He had it all figured out; he accused law schools of "seek[ing] only a facade" of "tantaliz[ing] unprepared students . . . [who] take the bait, only to find that they cannot succeed in the cauldron of competition."[277] There is evidence, of course, that this is flatly wrong.[278] And on the question of stigma,

271. *Id.*

272. *Id.* at 2359.

273. Brief of American Law Deans Association as Amicus Curiae in Support of Respondents at 1, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02–241).

274. *Grutter*, 123 S. Ct. at 2361-62 (Thomas, J., dissenting in part, concurring in part).

275. Stephan Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. REV. 1583, 1605–08 (1999).

276. *See* THOMAS SOWELL, RACE AND CULTURE: A WORLD VIEW 177 (1994) (arguing black students are "generally overmatched throughout all levels of higher education" in white schools).

277. *Grutter*, 123 S. Ct. at 2362 (Thomas, J., dissenting in part, concurring in part).

278. *See* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admssion Decisions*, 72 N.Y.U. L. REV. 1 (1997). Wightman reports on a bar passage study that demonstrated that almost approximately eighty percent of the African-American students covered by the study graduated from law school, and that more than seventy-five percent of the African-American graduates ultimately passed the bar examination. *Id.* at 35–37. The Thernstroms tackle the conclusions reached by Wightman. *See* Thernstrom & Thernstrom, *supra* note 275, at 1611–

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Thomas reverted to the same sort of barren, sterile, and self-serving categorical claims that he advanced in *Adarand* and *Jenkins*, citing no social science whatsoever in support of his claim that blacks admitted to law school, whether or not because of affirmative action (what Thomas calls "discrimination"), are "tarred as undeserving."[279] Nothing in Thomas's dissent in *Grutter*, therefore, demonstrates any real change in the methodological approach first displayed in *Adarand*.

Even if this analysis of three of Thomas's anti-affirmative action opinions fails to settle the matter, Professor Kennedy did not explain how adopting the agenda of the most reactionary whites, whites who, demonstrably throughout our nation's history, have stood athwart the goals and objectives of the vast majority of African-Americans, is merely "counterintuitive."[280] The burden lies on those whites to demonstrate a commitment to the African-American agenda, the struggle for equal justice, a commitment that they have utterly failed to make. In the event some of them have made such a commitment, Professor Kennedy should have demonstrated that fact.

Professor Kennedy contended that critique "takes the form of alleging that [Thomas] mouths conservative opinions to curry favor with powerful whites or out of a mere habit of following such conservative ideologues as his colleague Antonin Scalia."[281] The point, however, is trivial. If Thomas is guilty of racial disloyalty, then it would stand to reason that he might wish to curry favor with powerful whites *if* he were to curry favor with anybody. Kennedy continued by arguing that the critique negates "[t]he one possibility . . . that a thoughtful black person could, on his own, with sincerity, believe what Clarence Thomas

12. But it is far from clear that they succeed in undermining them. Wightman was reporting on a study that asked the question whether the African-Americans admitted to law school in 1991 should have been. *See generally* Wightman, *supra* at 1-2. The Thernstroms were seemingly intent on reducing the number of African-Americans at elite law schools. *See* Thernstrom & Thernstrom, *supra* note 275, at 1599, 1626–27 (not flinching at the prospect that black enrollment at elite schools might drop forty-nine percent if race-neutral academic admissions criteria were employed; also noting with equanimity, if not outright approval, the "post-Proposition 209" "redistribution" of African-American students away from the elite Berkeley and UCLA campuses to the more proletarian Davis, Santa Cruz, Riverside, and Irvine campuses of the University of California system, not to mention the less prestigious California State University campuses). In effect they are asking a rather different question: that is whether African-Americans have been admitted to the "right" law schools.

279. *Grutter*, 123 S. Ct. at 2362 (Thomas J., dissenting in part, concurring in part).

280. *See* Martin Kilson, *The Washington and Du Bois Leadership Paradigms Reconsidered*, 568 ANNALS AM. ACAD. POL. & SOC. SCI. 298, 309, 312 (2000). *See also* Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 19 (1997) (arguing "[b]y formally rejecting the value and utility of social knowledge and asserting that rigid legal principles can solve all issues, Thomas is not merely blinding himself to the relationship between law and society, he is also revealing his ignorance of society").

281. *See* Kennedy, *supra* note 33.

says that he believes."[282] But this point is equally trivial. Clarence Thomas, as a member of the Court, does more than merely "believe," sincerely or not. He also acts, and he does so with a great deal of power and authority in league with the most reactionary members of the Court, and it is his actions, his exercise of power, and his alliances that outrage many African-Americans, not merely his beliefs.

Kennedy saw that micro-narratives could not carry the weight that Professor Wilson thought that they could. He tried, therefore, to create another macro-narrative to function either as a correction to or a limitation on the Civil Rights Macro-Narrative. Kennedy, however, did not seek to use the Counter-Narrative. He attempted to link Thomas to "such figures as Booker T. Washington, Kelly Miller, George Schuyler, Zora Neale Hurston, and Thomas Sowell."[283] Black conservatives do in fact have "deep roots in Afro-American history," as Kennedy argued,[284] but the point is trivial. Not only is their political ideology embraced by only a small number of African-Americans, it is by no means evident that the thinkers Kennedy identified would agree with Thomas's acts, votes, opinions, and alliances on the Court.[285]

One need not merely speculate on the matter. As Judge Higginbotham demonstrated in his speech, Colin Powell has made the case for affirmative action, understood as equal opportunity without preferential treatment.[286] On this point, Colin Powell and Thurgood Marshall stand as one. Justice Marshall never referred to affirmative action as a "preference." Instead, he invariably characterized it as a remedy to correct past racial injustice.[287] J. C. Watts, the reliably conservative former Republican Congressman from Oklahoma,[288] began his career in the House of Representatives wanting to "slow down the

282. *Id.*

283. *Id.*

284. *Id.*

285. In all fairness, however, Zora Neale Hurston might have agreed. She was highly critical of *Brown*. *See* Zora Neale Hurston, *Court Order Can't Make Races Mix*, *in* FOLKLORE, MEMOIRS, AND OTHER WRITINGS 956–58 (1995).

286. COLIN L. POWELL, MY AMERICAN JOURNEY 608 (1995).

287. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 398 (1978) (Marshall, J., concurring in part, dissenting in part) (describing affirmative action as action to remedy the effects of past racial discrimination as "race-conscious remedial measures"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 296 (1986) (Marshall, J., dissenting) (referring to a "race-conscious provision that purports to serve a remedial purpose"); City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 529, 552 (1989) (Marshall, J., dissenting) (referring to "race-conscious measures designed to remedy past discrimination" and "governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism").

288. *See* Americans for Democratic Action, *Voting Records*, *at* http://www.adaction.org/HouseVR2002.htm (last visited Nov. 14, 2003).

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Republican train" designed to end or derail affirmative action.[289] Watts agreed philosophically with conservative critics of affirmative action, but wanted to avoid a "war between men and women, black and white."[290] Watts's views have remained largely the same over time. Thus, while still opposed to affirmative action, he continued to oppose its abolition. He joined with the liberal African-American Democratic Congressman John Lewis of Georgia, thus echoing the nexus or link between Colin Powell and Thurgood Marshall, to declare that "[t]his is not the time to eliminate the one tool we have—imperfect though it may be—to help level the playing field for many minority youth."[291] Watts "has flatly criticized affirmative action in public forums . . . . But he also is unsparing in his assessment of GOP leaders, arguing that they cannot afford to abolish affirmative action without first taking substantive steps to reach out to blacks."[292] On the other hand, Clarence Thomas has been unsparing in his criticism of affirmative action and has consistently voted to strike it down in the cases coming before the Court.[293] Given the position of conservatives like Powell and Watts, it does not follow that Booker T. Washington, Kelly Miller, George Schuyler, Zora Neale Hurston, and Thomas Sowell—all African-American conservatives—would agree with Justice Thomas on the question of affirmative action.[294] Most of them died, after all, before affirmative action emerged. Professor Kennedy's attempt to link Clarence Thomas with other African-American conservatives to construct a competing macro-narrative collapses.

The flaw in Professor Kennedy's analysis on this point is both large and deep. One could oppose affirmative action and seek to have Congress eliminate it—a position more extreme than Congressman Watts's view—and still not agree with Justice Thomas's votes to abolish affirmative action. One could object to affirmative action on *prudential* grounds but still uphold it in

289. Kevin Merida, *Within GOP, Conflicts on Affirmative Action*, WASH. POST, July 29, 1995, at A4.

290. *Id.*

291. Juliet Eilperin, *Watts Walks a Tightrope on Affirmative Action, and the House GOP Follows*, WASH. POST, May 12, 1998, at A17.

292. *Id.*

293. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring). *See also* Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); and Shaw v. Reno, 509 U.S. 630 (1993).

294. Thomas Sowell criticizes affirmative action as much as Clarence Thomas does and would undoubtedly vote, were he on the Court, the same way that Justice Thomas does. *See* THOMAS SOWELL, BLACK EDUCATION: MYTHS AND TRAGEDIES (1972); THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? (1984); THOMAS SOWELL, PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE (1990). One cannot say the same about any of the other previously mentioned African-American conservatives. Indeed, in the case of Booker T. Washington, he secretly supported civil rights litigation seeking remedies and outcomes that Clarence Thomas presumably would oppose. *See supra* note 100 and accompanying text.

the face of a judicial challenge raising *constitutional* objections to affirmative action.[295] One could object to affirmative action on philosophical grounds but still uphold it in the face of judicial challenges on the ground that the Constitution gives *Congress* the right to be wrong on affirmative action, and thus the *courts* should not interfere with Congressional decision-making regarding affirmative action because the separation of powers gives Congress the right to find the social facts on which affirmative action arguably rests.[296] Principled conservatives, African-American or otherwise, could take either or both of these positions.[297]

Professor Kennedy then argued that the racial disloyalty claim fuels "the suspicion that a successful black person obtained his or her success necessarily through opportunism or the indulgence of white folks or by serving as a front for white puppeteers who call the shots."[298] Part VI of this article will demonstrate that Professor Kennedy overreached. Black people are able to distinguish between those members of the race who succeeded by selling out the race and those who did not, as the world of *Uncle Tom's Cabin* illustrates.

295. *See* Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 3 (2002) (opposing affirmative action on claimed prudential grounds while granting that Congress could constitutionally adopt affirmative actions programs, at least in some circumstances).

296. *Cf.* Girardeau A. Spann, *The Constitution Under Clinton: A Critical Assessment: Writing Off Race*, 63 LAW & CONTEMP. PROBS. 467, 475 (2000) (urging President Clinton to challenge the Court's anti-affirmative action decisions through a policy of political action, non-acquiescence, and retaliatory legislation designed to "strip the Court of appellate jurisdiction to invalidate affirmative action programs adopted by the political branches"). *But see* Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1170, 1200–05 (2001) (challenging, inter alia, on the basis of the author's opposition to affirmative action, the traditionalist model regarding Congressional fact finding, arguing that Congress never found the social facts on which affirmative action could rest). Professor Spann's desire to see President Clinton box in the Court, while commendable, presupposes that an abiding and stable pro-affirmative action political majority exists or that a President determined to create such a majority will successfully do so. Professor Devins fails to justify adequately his opposition to affirmative action. He makes large unsubstantiated claims about the supposed costs of affirmative action borne by "nonminorities," and, more importantly, he seeks to rationalize judicial hegemony. *See id.* at 1200–05. After *Bush v. Gore*, 531 U.S. 98 (2000), one might reasonably ask whether such hegemony serves any purpose, other than the perpetuation of right-wing Republicanism.

297. For a slightly different perspective, see Robert F. Nagel, *Affirmative Action: Diversity of Opinions: Utilitarianism Left and Right: A Response to Professor Armour*, 68 U. COLO. L. REV. 1201, 1207 (1997) (arguing that "affirmative action policies should be decided as far as possible at the local level," and "because courts do not easily reverse direction, it means such policies should not be decided by the courts" for "[i]t makes no difference to this analysis whether a liberal judge is striking down the California Civil Rights Initiative or a conservative judge is striking down the Texas Law School's admissions program" because "[i]n either case, judges are writing on constitutional stone when they quite literally do not know what they are doing").

298. *See* Kennedy, *supra* note 33.

He also insisted that the racial disloyalty critique runs the risk of a boomerang, driving the targets into precisely the beliefs and actions complained of.[299] But whatever the merits of the claim might be, it does not apply to Clarence Thomas. His "reflexive conservatism"[300] was on display both before and after his nomination and confirmation.[301] Professor Kennedy failed to show that, somehow, attacks leveled on Clarence Thomas in the 1980s produced any supposed "boomerang."

Finally, Professor Kennedy expressed his admiration for the courage of Justice Thomas in confronting his African-American critics at the 1998 annual meeting of the National Bar Association.[302] Kennedy reminded us that Thomas declared on that occasion that "I am . . . a black man" with the "right to think for myself," refusing "to have my ideas assigned to me as though I was an intellectual slave because I'm black."[303] At least the Justice joined the issue. The moral claim of the Civil Rights Macro-Narrative does not make "intellectual slaves." Like Thomas's assertion that the Senate hearings addressing the charges filed by Professor Anita Hill amounted to a "high-tech lynching,"[304] the rhetorical flourish and flair of a supposed "intellectual slavery" is flashy, but it misleads. Just as the only lynching that took place during the confirmation hearings happened to Professor Hill, so too the only slavery at issue here is the condition of the black inmate who was beaten by prison guards, or of the innumerable qualified African-American prospective students, employees and contractors, vendors and suppliers, and political leaders who will find their life choices diminished by the views of a narrow reactionary majority on the Court that is bent on turning the racial progress clock back—a majority in which Thomas is a member in good standing. Justice Thomas might have had a passable argument if his jurisprudence was functionalist, that is, a theory of law that placed maximum emphasis on the myriad of facts and narratives that are the sum and substance of a law case. He might have had a passable argument if he could have demonstrated that he has engaged in precisely the complex balancing and weighing process called for by Professor Kennedy, and having done so, concluded that the approach of the most reactionary whites would nonetheless benefit African-Americans in their

299. *Id*.

300. *See* DAVID BROCK, BLINDED BY THE RIGHT: THE CONSCIENCE OF AN EX-CONSERVATIVE 88 (2002).

301. *See supra* Part IIB.

302. *See* Kennedy, *supra* note 33, at 91. On this point, Judge Higginbotham was simply wrong. Justice Thomas perhaps would never attend an NAACP meeting. However, he did attend a meeting of the premiere organization of African-American lawyers, a group which, given the importance of African-American lawyers, has as much of a claim on the Civil Rights Macro-Narrative as does the NAACP.

303. *Id*.

304. *See infra* note 332 and accompanying text.

quest for equal justice. But of course Justice Thomas has no credible argument on this score, and neither does Professor Kennedy.

F. The Tribute by the Law Clerk (now Himself a Law Professor)

Unlike Professors Wilson and Kennedy, Stephen F. Smith enthusiastically embraced and embellished the Color-Blindness Macro-Narrative.[305] He took the fight to Judge Higginbotham with fury and gusto.[306] He pointed out that "some in the civil rights community had hoped [that Judge Higginbotham] would succeed the late Justice Thurgood Marshall,"[307] a hard, but fair comment. Smith wrote:

> [T]he relentless assaults on the Justice are part and parcel of a larger struggle for the hearts and minds of black America, a veritable last gasp of those who have traditionally viewed themselves as leaders of the black community to maintain their hold on power and of the liberal Democrats to maintain control over their core constituency.[308]

Smith accused Judge Higginbotham of unleashing in the speech "a bitter and intensely personal attack on the Justice,"[309] and a savage attack on "the Justice's status as a black man."[310] Thomas, by contrast "personifies the rise of black conservatism in America."[311] Furthermore, [Thomas] should be a source of great pride to black Americans and also a source of hope that the failed policies of the past will be replaced by a future in which black Americans, freed from the restraints of victimology and poverty, will be able to realize their full potential in America.[312] Smith had made his *political* agenda quite clear.

But he did engage Judge Higginbotham on the question of macro-narratives, burnishing, as noted above,[313] the Color-Blindness Macro-Narrative. He also invested it with a supposed moral force, stating that "it was the legal and moral principle of colorblindness that freed blacks from the shackles of slavery and lifted the dark veil of segregation."[314] But this is a silly argument, given the fact that the very black people who struggled to free and lift people like Thurgood Marshall, never elevated colorblindness to the level of first principle.[315]

305. *See supra* notes 91-132 and accompanying text.
306. *See* Smith, *supra* note 33.
307. *Id*. at 513.
308. *Id*.
309. *Id*. at 528.
310. *Id*. at 529.
311. *See* Smith, *supra* note 33, at 513.
312. *Id*. at 514.
313. *See supra* notes 91-132 and accompanying text.
314. *See* Smith, *supra* note 33, at 532.
315. *See supra* notes 110-11 and accompanying text.

Smith made common cause with Professor Kennedy in arguing that some of Thomas's most controversial opinions either did not in fact harm black interests, or in fact furthered those interests.[316] In so doing, Smith unsuccessfully sought to locate the Color-Blindness Macro-Narrative in the African-American community.

With regard to *Hudson v. McMillian*,[317] Smith insisted that the record of the case does not establish that the prisoner who was beaten was black.[318] However, because a disproportionate percentage of prisoners in America are African-Americans, Smith's point falls to the ground. With respect to the voting rights cases, Smith made the argument that there have been only "isolated instances of racially polarized voting in recent years,"[319] surely a debatable proposition.[320] Indeed the 2000 presidential election stands as a monument to persistent racially-polarized voting.[321] On the matter of affirmative action, Smith made the stock conservative argument that affirmative action is bad because it stigmatizes the supposed beneficiaries of the program.[322] This is a particularly egregious argument for Smith to offer up because Smith claimed that "[p]sychological injury or benefit is irrelevant"[323] in the context of *Brown v. Board of Education*,[324] but, *mirabile dictu*, becomes relevant in analyzing the impact of affirmative action. Finally, in connection with school desegregation, Smith argued that coerced busing "has arguably hurt black students in their formative years by taking them out of the very schools that 'can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement.'"[325] Leaving aside Smith's and Thomas's disingenuous appeals to psychology here, this argument fares no better because black people were

316. *See supra* notes 118-21 and accompanying text.

317. 503 U.S. 1 (1992).

318. *See* Smith, *supra* note 33, at 540.

319. *Id*. at 541.

320. *See* Jamin B. Raskin, *Burton D. Wechsler, Scholar of Struggle*, 52 AM. U. L. REV. 9, 9 (2002) (referring to "votes in racially polarized Florida"); *Equal Protection After the Rational Basis Era: Is it Time to Reassess the Current Standards of Review? Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4. U. PA. J. CONST. L. 281, 306 (2002) (noting that "[t]he politics of the contemporary South continue to be saturated by . . . racially polarized bloc voting"). *But see* Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1524, 1530 (2002) (stating that "[r]acially polarized voting . . . was a pervasive fact of political life" in the 1980s, but calling into question the extent of it today, suggesting that a substantial minority of whites, roughly one-third, will support black candidates).

321. *See supra* notes 24, 124 and accompanying text.

322. *See* Smith, *supra* note 33, at 545–46.

323. *Id*. at 544.

324. 347 U.S. 483 (1954).

325. *See* Smith, *supra* note 33, at 546 (quoting Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (Thomas, J., dissenting)).

not in charge of the school system at issue in any meaningful sense of the word. The role of the State of Missouri in *Missouri v. Jenkins*[326] in presiding over a racially biased school system, not that of black people, constituted the central issue in that protracted litigation. One need only ask whether African-Americans in fact control urban school systems, have access to adequate financial resources, and are free to choose the teachers and to design programs and policies that take the circumstances of urban black students into account.[327] So much for "independent black leadership, success, and achievement."

G. Some Concluding Thoughts

Judge Higginbotham and Smith represent the extremes in the encounter discussed previously. Each one sought to have his preferred macro-narrative control the discourse. Few macro-narratives could be as diametrically opposed as the Civil Rights Macro-Narrative and the Color-Blindness Macro-Narrative, hence the debate became, for want of a better word, intense. This left some room for Professors Wilson and Kennedy to maneuver. Each sought to limit the reach of the Civil Rights Macro-Narrative without embracing the Counter-Narrative. They sought to take a more moderate position than had Judge Higginbotham. They also sought to minimize, or downplay, Thomas's alienation from black people. Their strategies failed largely because their limiting principles do not hold up under close scrutiny.

The central problem concerns the relation between black conservatism, a subject that Part IV of this article addresses, and alienation from black people. Judge Higginbotham sought to define black conservatism with reference to the relative moderation of Colin Powell on the question of affirmative action. He sought to place Powell squarely in the civil rights tradition as it now exists, to place him in the Narrative. Smith sought to place black conservatism in a different macro-narrative, one radically opposed to the macro-narratives of the civil rights community. While he sought to place the Counter-Narrative in the African-American political and philosophical traditions, he, like Thomas himself, could not come to grips with its contextualism and could not show that identifiable black conservatives in African-American history would agree

326. 515 U.S. 70 (1995).

327. *See* Pamela J. Smith, *Looking Beyond Traditional Educational Paradigms: When Old Victims Become New Victimizers*, 23 HAMLINE L. REV. 101, 119–24 (1999) (arguing that today black children are taught primarily by white female teachers, even in predominantly black urban schools, and that "it appears that white women, as teachers, are using their power and authority to solidify age-old racial hierarchies," particularly to the detriment of black male students). *See also* Alicia L. Mioli, *Sheff v. O'Neill: The Consequence of Educational Table-Scraps for Poor Urban Minority Schools*, 27 FORDHAM URB. L.J. 1903, 1930–41 (2000) (challenging the notion that black people control the schools that their children attend or that urban schools provide a quality education for black children).

with Thomas's votes. Smith also sought to draft the civil rights community itself into the service of the Counter-Narrative, the mirror image, one supposes, of Judge Higginbotham's attempt to draft Colin Powell into the service of the Civil Rights Macro-Narrative. At least with respect to affirmative action, however, Higginbotham's draft succeeded and Smith's failed. Powell has made it clear that he supports at least one vision, or version, of affirmative action, a view that Marshall embraced.[328] Smith could not explain how Thurgood Marshall could make the arguments he did in *Brown v. Board of Education*,[329] and yet vote the way that he did in the affirmative action cases. Indeed, Smith did not even try.

Wilson and Kennedy also sought to place black conservatism in the African-American community but did so in ways that might leave black conservatism more firmly connected to the views of others in the community, to make it part of the family, so to speak, and thus less the domain of the alienated. They eschewed the attempt to turn Thurgood Marshall into a onetime apostle of colorblindness. But they sought to add Thomas into the company of black conservatism as they had constructed it. Wilson argued for the autonomy of the "head" even as the "heart" was dominated by the Narrative. Her approach defines conservatism as a "head" matter, a difficult proposition to defend in the abstract, and maybe not even in more concrete, historical terms. Kennedy sought to tie, or link, Thomas to a number of historical personages who populate the small world of black conservatism, but his efforts failed because he could not show, as Smith could not, that the black conservatives to whom he referred would have agreed with Thomas's votes on the Court. Black conservatism, obviously, is problematic for a variety of reasons. This article takes them up in Part IV.

Law professors—both the full-time and the part-time variety—have shaped the foregoing discourse. Of some interest, law professors continue to protest and to struggle against Clarence Thomas and his works. For example, Clarence Thomas had been invited to spend a day with students and faculty at the University of North Carolina School of Law at Chapel Hill.[330] However, the African-American faculty of the school boycotted the appearance. In a statement dated February 28, 2002, they reaffirmed the salience of race in American life, and thus disavowed the Color-Blindness Macro-Narrative.[331] They pointed out that Thomas appealed to race when he "declared himself the victim of a 'high-tech lynching' during the heated opposition to his

328. *See supra* note 287 and accompanying text.

329. 347 U.S. 483 (1954).

330. Tony Mauro, *Clarence Thomas' Law School Visit Brings Professors' Boycott*, MIAMI DAILY BUS. REV., Mar. 19, 2002, at A7.

331. Statement by the African-American Faculty of the UNC School of Law Regarding the Visit of Justice Clarence Thomas (Feb. 28, 2002).

appointment to the Supreme Court."[332] They argued that the problem with Thomas is not merely his beliefs, but his votes, votes "inevitably linked to those of Chief Justice Rehnquist and Associate Justices Scalia, O'Connor, and Kennedy. . . . [H]e has provided the critical fifth vote in a number of decisions that set back the quest for racial equality and social justice in this country."[333] They declared that "we know that society is now more closed, more hateful, less democratic, and less just than it could be if only Justice Thomas's deciding fifth vote were cast, even some of the time, with the four justices who generally dissent from his majority colleagues."[334] They concluded by stating that they would "not participate in any institutional gesture that honors and endorses what Justice Thomas does. We cannot delight in such a day. Therefore, while away from the day's events that will honor Justice Thomas, we will re-read Judge Higginbotham's letter . . . ."[335]

Alienation is surely abroad in the land, as the spectacle of such a boycott clearly demonstrates. One cannot seriously argue that Charles E. Daye, Marilyn V. Yarbrough, John O. Calmore, Adrienne D. Davis, and Kevin V. Haynes are alienated from the African-American community. But one could say, as "the UNC Five" suggest, and as I suspect, the vast majority of African-American law professors might say, that it is Clarence Thomas who stands apart from that community.[336]

IV. AFRICAN-AMERICAN POLITICAL IDEOLOGIES: MICHAEL G. DAWSON'S BLACK VISIONS

Professor Dawson has written the definitive work on the nature, character, and substantive content of African-American political ideologies.[337] His major conclusion is that "six distinct political ideologies . . . have evolved as a result of the continued ideological conflict which has been a constant feature of black politics since at least the early nineteenth century."[338] But these ideologies grew out of "an African-American world view in which the moral, spiritual, and material development of the community is at least as important as the development of the individual."[339] And "[a] communal approach to politics continues to influence African-American political life."[340] But "[n]either the

332. *Id*.

333. *Id*.

334. *Id*.

335. *Id*. (referring to *Open Letter*, *supra* note 27).

336. For a thoughtful treatment of the boycott, and an analysis of Clarence Thomas that shares many themes with this paper, see Calmore, *supra* note 3.

337. *See* DAWSON, *supra* note 98.

338. *Id*. at 10.

339. *Id*. at 11.

340. *Id*. *See also* WILSON JEREMIAH MOSES, BLACK MESSIAHS AND UNCLE TOMS: SOCIAL AND LITERARY MANIPULATIONS OF A RELIGIOUS MYTH, at vii (rev. ed. 1993) (stating that "[o]ne

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communal nature of black politics nor the strong sense of the majority of blacks that their fate is linked to that of the race prevent political conflict from raging within black communities."[341] Dawson identifies six ideological groupings: "the radical egalitarian, disillusioned liberal, black Marxist, black nationalist, black feminist, and black conservative[342] ideologies."[343] Radical egalitarianism, one of three strands of black liberalism,[344] calls for:

> [A] strong central state which promotes equality combined with respect for individual liberty and self-reliance. Capitalism is criticized but considered reformable. Racism is seen as a vile ideology that will disappear after vigorous debate and social action demonstrate the untruthfulness and moral bankruptcy of its basic principles and assumptions. Alliances with all other people of good will, including white Americans, are considered vital to the quest for racial justice and achievable through a variety of mechanisms, including scientific explanation and moral suasion. The use of violence, except in self-defense, is rejected.[345]

Radical egalitarianism demands "equality," not "liberty," as the central goal or objective, of its activism and protest.[346] Notwithstanding its assimilationist ethic, radical egalitarianism recognizes the need for black autonomy and that black institutions are "necessary for self-development."[347]

Disillusioned liberalism, the second strand of black liberalism, constitutes an unstable[348] political ideology, a temporary refuge for formerly optimistic radical egalitarians who have since lost hope in the ability of white America to accept or move towards racial justice and equality.[349] Notable examples of African-Americans who moved from radical egalitarianism to disillusioned liberalism include Ralph Bunche, Dr. Martin Luther King, Jr., and Student Nonviolent Coordinating Committee activists.[350] The doctrinal or

of the more convincing arguments that black Americans are not a mere amorphous group bound together solely by negative racial experiences is that we have been able to sustain a myth of our history and destiny"). Moses uses the term "myth" to mean or refer to a form of macro-narrative that this author has called "ideology." *See* Newsom, *supra* note 26.

341. DAWSON, *supra* note 98, at 11.

342. One commentator suggests that black conservatism is more of a mood or an impulse that finds expression "within the diversity of opinion that has always been characteristic of African-American thought" rather than a separate ideology. Eisenstadt, *supra* note 103, at x.

343. DAWSON, *supra* note 98, at 14–15.

344. *Black* liberalism differs markedly from *white* liberalism, and is highly critical of it. *See id.* at 29–42 (discussing African-American criticism of hegemonic individualism in favor of a communitarian perspective, the institution of private property in favor of a redistributionist ethic, and the minimalist, laissez-faire state in favor of a strong central state).

345. *Id*. at 17.

346. *Id*. at 267.

347. *Id*. at 273.

348. DAWSON, *supra* note 98, at 279.

349. *Id*. at 275.

350. *Id*. at 275–78.

programmatic difference between radical egalitarianism and disillusioned liberalism lies primarily in the focus or emphasis of the latter "on building the political and economic power of the black community as part of the strategy for gaining equality and admission into American society."[351] The former, consistent with its optimism, places great weight on building alliances with non-African-Americans.[352]

Black Marxism, an anti-liberal ideology, has in recent years "moved to the right toward a more social democratic orientation."[353] It is a radical ideology that, like other forms of Marxism, emphasizes "the central role of the capitalist system."[354] But "*black* Marxism also emphasizes *race* as a fundamental [analytical] category and *spirituality* to a degree not found in traditional Euro-American Marxism."[355] Whatever importance this ideology might have had in the past, it is no longer "a mass force."[356]

Black conservatism, the last of the three strands of black liberalism, has "remarkably little mass support."[357] There is some evidence of support on social issues,[358] but not on racial or economic issues. Black conservatives are staunch advocates of libertarian capitalism,[359] denigrate the older generation of black leadership,[360] and seek to replace it with conservative moral leadership.[361] On the matter of race, black conservatives stress the theme of black uplift, or self-improvement, but do not link it to white racism as other African-American political ideologies do. Thus, "[t]he problem, argues [Glenn] Loury, is not the racist attitudes of whites, for 'blacks' problems lie not in the heads of white people but rather in the wasted and incompletely fulfilled lives of too many black people."[362] In a similar vein, they tend to downplay the legacy of racism, arguing that blacks should stop acting like victims.[363] African-American conservatives rail against the evil state, preferring self-reliance and taking advantage of the market.[364] They rebel against black communitarian norms of authenticity,[365] and following their

351. *Id.* at 18.
352. *Id.* at 17.
353. DAWSON, *supra* note 98, at 221.
354. *Id.* at 18.
355. *Id*. (emphasis in original).
356. *Id*. at 236.
357. *Id*. at 281.
358. DAWSON, *supra* note 98, at 281.
359. *Id.* at 281–82.
360. *Id*. at 286.
361. *Id*. at 296–98.
362. *Id*. at 287.
363. DAWSON, *supra* note 98, at 289–93.
364. *Id.* at 293.
365. *Id*. at 294–96.

views regarding racial uplift and legacy, argue that blacks should conform to white opinions and sensibilities.[366]

Black feminism focuses on "the *intersection* of gender with race and class" as the normative analytical construct for understanding the situation of African-American women.[367] Black feminists "see themselves as struggling against both patriarchy and white supremacy. . . . [They] are especially critical of ideologies which include as core elements claims about the 'natural' leadership role of black men and contain essentialized views of gender roles."[368]

Black nationalism emphasizes "African-American autonomy and various degrees of cultural, social, economic, and political separation from white America. Race is seen as *the* fundamental category for analyzing society, and America is seen as fundamentally racist."[369] Community nationalism, now the most prevalent form of black nationalism, stresses both equality and "nation."[370] However, it "is not attached to integrationism, and rejects assimilation."[371] Community nationalism emphasizes black economic development, but does not altogether dismiss black politics.[372] It supports "affirmative action and antidiscrimination programs."[373] It limits, however, the leading roles to men, never defining the role of African-American women.[374]

The six ideologies overlap in complex ways. Dawson mapped the linkages between them, showing that radical egalitarianism, the oldest of the six, maintains strong ties with disillusioned liberalism and black social democracy (the successor to black Marxism), a moderate tie with black feminism, a weak tie with community nationalism, and no tie at all with black conservatism. Disillusioned liberalism has a strong connection with community nationalism and a moderate linkage with black social democracy. It has no connections with black feminism or with black conservatism. Black social democracy has a moderate tie with black feminism and a weak one with community nationalism. It maintains no linkages with black conservatism. Black conservatism has a moderate tie with community nationalism. It has no connections with black feminism. Black feminism maintains a weak tie with community nationalism. Community nationalism has ties of varying strength or degree with all of the other African-American political ideologies. Radical

366. *Id*. at 299.
367. *Id*. at 20 (emphasis in original).
368. DAWSON, *supra* note 98, at 21.
369. *Id.* (emphasis in original).
370. *Id*. at 101.
371. *Id*. at 102.
372. *Id*. at 120.
373. DAWSON, *supra* note 98, at 122.
374. *Id.* at 121.

egalitarianism, disillusioned liberalism, black social democracy, and black feminism have linkage of varying cohesion with the other African-American ideologies save black conservatism. Black conservatism, the most isolated of the six, has only a moderate linkage with community nationalism. By contrast, community nationalism is the least isolated, having linkages of varying strength with the other five black ideologies. Radical egalitarianism and black social democracy have ties of varying strength with all other ideological groups save black conservatism, and black feminism and disillusioned liberalism have connections with three of the black political ideologies, but do not have ties with each other or with black conservatism.[375]

At the level of community support, Dawson reports that disillusioned liberalism and black nationalism, followed by black Marxism, have the greatest number of true believers. Black conservatism has the least. On the other hand, black conservatism has far and away the largest number of "true haters."[376] These results largely mirror the degree to which a particular ideology has links, or ties, to other black political ideologies. Black conservatism has the fewest links and the lowest level of black popular support.[377]

It is now possible to evaluate the encounter between Judge Higginbotham and his three critics as a *political* discourse. The Civil Rights Macro-Narrative clearly falls within the parameters of radical egalitarianism, as Parts II and III of this article hinted. The Narrative emphasizes struggle and protest, as does the activism of radical egalitarians. Judge Higginbotham flayed Thomas for having a pinched and narrow conception of equality, for forgetting where he came from, and for hurting black interests.[378] Radical egalitarianism has fallen on hard times, however. "The 'victory' of radical egalitarians in public opinion polls, while substantial, misrepresents their ability to shape the contours of black politics. . . . Liberalism has become a weak force in shaping the politics of the black community, even though a large percentage of blacks support the radical egalitarian program."[379] Nonetheless, the struggle for civil rights matters for black people. It is noteworthy that community nationalism, perhaps now the dominant African-American political ideology, supports affirmative action and other antidiscrimination programs.[380]

By contrast, the Color-Blindness Macro-Narrative expresses the core principles and tenets of black conservatism. However, black conservatism has subdivided into two groups, one that has criticized white conservatives for

375. *Id*. at 317 fig. 7.1.
376. *Id*. at 83 tbl. 2.8.
377. *Id*. at 281 (stating that black conservatives "have remarkably little mass support").
378. *See generally Open Letter*, *supra* note 27.
379. DAWSON, *supra* note 98, at 309.
380. *See supra* note 373 and accompanying text.

taking a "harsh, antiblack turn," and one that remains "staunchly libertarian," with nary a complaint about white conservatives.[381] Of this second group, Dawson writes: "Of the latter we can reasonably ask if there is anything distinguishably 'black' about their conservatism."[382] Given its extravagant praise of Jefferson, Lincoln, and the first Justice Harlan, the Counter-Narrative more properly reflects the second subgroup, not the first. One can only imagine how few African-Americans support the political ideology that gives meaning and shape to the Color-Blindness Macro-Narrative.[383]

Thus, Higginbotham has the numbers on his side. He also has the weight of history and tradition with him. Whatever the present difficulties besetting radical egalitarianism might be, it sits at or near the middle of black experience. It is outflanked, to one degree or another, by disillusioned liberalism, black social democracy, and some forms of black nationalism, black feminism, and, of course, it is outflanked on the right by African-American conservatism. Thus, Judge Higginbotham also has the philosophical core, or center, of black thought on his side.[384]

Dawson provides critical insight into the constituent elements of that core, or center. As noted above, for blacks, the community counts as much as the individual.[385] Thus, "[g]roup-based racial politics have developed historically to such a degree that many African Americans' political preferences are shaped by the belief that their individual life chances are linked to the fate of the race."[386] The core, or center, also holds no brief for American democracy; "with the exception of black conservatism, all black ideologies contest the view that democracy in America, while flawed, is fundamentally good."[387] The larger principle that generates the foregoing views is that unlike white American political ideologies, black ideologies "all claim to have been developed out of the historical experiences of African Americans."[388] The point cannot be overemphasized, black political ideologies do not rest in

381. *See* DAWSON, *supra* note 98, at 312.

382. *Id*.

383. The subdivision of black conservatism into two camps reflects one view. Others subdivide it into three subgroups: antistatists, organics, and neoconservatives. Clarence Thomas falls into the last category. *See* Gayle T. Tate & Lewis A. Randolph, *Introduction* to DIMENSIONS OF BLACK CONSERVATISM IN THE UNITED STATES: MADE IN AMERICA 1, 2–4 (Gayle T. Tate & Lewis A. Randolph eds., 2002). The common thread in the two taxonomies of black conservatism is that Clarence Thomas falls into the most radical of the subdivisions, be they two or three.

384. It is important to note that Judge Higginbotham transcended the tendency of most black political ideologies to downplay or denigrate the role of women. In his summoning of the heroes of the struggle, he called out several women. *See supra* note 153 and accompanying text.

385. *See supra* notes 339-40 and accompanying text.

386. DAWSON, *supra* note 98, at 11.

387. *Id*. at 14.

388. *Id*. at 22.

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sterile, formalistic abstractions but rather in concrete experience. They link "theory and practice."[389] Thus, "[c]oncepts such as equality, freedom, self-determination, integration, and nationalism have all developed as part of attempts by various segments of the African-American community to propose strategies for the advancement of black racial interests."[390] Black political ideologies, save black conservatism, often parallel or reinforce each other, each giving a different emphasis to or stress on particular elements of their macro-narratives, and thus they have the complex interrelationships discussed previously.[391]

The fundamental weaknesses of the Color-Blindness Macro-Narrative now appear in stunning fashion. It is a macro-narrative that rests on sterile, formalistic abstractions having nothing whatsoever to do with the historical experience of African-Americans. It fails to link theory and practice if only because it reduces African-Americans to mere spectators of a white drama that portrays the struggles of white Americans to decide whether their grandiose and lofty ideas should in any meaningful way guide their behavior with regard to blacks. While the Counter-Narrative may be a "black" macro-narrative, it fails miserably to show that its origins lie in the experience of the black community. It is "black" only because black people—and only a very small number or percentage, at that—hold to it. But that marks the extent, or outer limit, of the claim. It forfeits the core, or center, of black political thought, and there are virtually no African-American institutions that adopt, or embrace, Thomas's radical conservatism. It may represent, therefore, nothing more than the cry of an alienated minority of African-Americans, a minority that, at some level, simply cannot—or will not—connect with the core, or center, of black political thought.[392]

Professors Wilson and Kennedy and Thomas's former law clerk Smith overcome neither the numbers nor the force of gravity. Professor Wilson asked us to let Justice Thomas decide for himself what he would make of his tenure on the Court.[393] None of the black political ideologies, save for black

389. *Id*.

390. *Id*. at 23.

391. *See supra* note 375 and accompanying text.

392. Tate & Randolph make the point vividly, arguing that neoconservatives like Thomas "are not recognized as a part of the long legacy of conservative thought among blacks, but rather as a separate entity that has been 'grafted on' to black political and social thought." Tate & Randolph, *supra* note 383, at 5. They go even further, declaring that while black neoconservatives preach "'self-reliance,' . . . in reality, their heavy financial dependence on conservative funding for jobs, media exposure, research monies, publications, and other 'self-help initiatives' points to what Hanes Walton, Jr., Robert Smith, and Deborah Toler view as 'patron-client' politics, namely, being bought and paid for by the Republican Party." *Id*. *See also* Edward Ashbee, *The Republican Party and the African-American Vote Since 1964*, *in* BLACK CONSERVATISM, *supra* note 103, at 252.

393. *See supra* note 157 and accompanying text.

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conservatism, would agree that his decision was entirely his affair. Thus Dawson writes, "[p]erhaps the most obvious example of a nonliberal (some would say antiliberal) political tradition within black politics has been the consistent demand that *individual* African Americans take political stands that are perceived by the *community* as not harming the black community."[394] Professor Wilson finds herself, therefore, apart from the center, or core, of black political thought.

Professor Kennedy tries to make more out of the tradition of black conservatism than the facts would appear to warrant.[395] He cannot move it into the core, or center, of black political thought because black people, past and present, and probably future as well, simply will not let him do so. The reaction of the former law clerk, now law professor, to Judge Higginbotham's relentless pummeling of Thomas does nothing more than map the sub-strand of black conservatism about which Dawson was moved to inquire whether there was "anything distinguishably 'black.'"[396]

The political isolation of black conservatives gives one pause. However, every society or culture has its rebels, its misfits, its nonconformists.[397] Judge Higginbotham accused Justice Thomas of "racial self-hatred."[398] The location of black conservatism in African-American political thought suggests that at the very least, some black conservatives might find themselves, for whatever reason, alienated from the mainstream of black thought, and perhaps even from the community itself. The subdivision in black conservative thought that Dawson describes[399] might reflect a difference in degree or extent of such alienation, with the second group, the one to which Thomas apparently belongs, being more removed from the mainstream than the former, less libertarian strand of black conservatism.

Racial self-hatred, of course, can be a reason for alienation. But alienation, rebellion, and nonconformity might have their origins elsewhere in the human character, personality, and psyche. Judge Higginbotham may have been correct in his assessment of the source of Justice Thomas's nonconformity. Certainly Thomas's defenders fail utterly to show that Higginbotham was wrong. However, it suffices merely to show the fact of alienation, rebellion, and nonconformity. The intellectual dishonesty of the Counter-Narrative and the isolation of Thomas's radical libertarian black conservatism make the case.

394. DAWSON, *supra* note 98, at 31 (emphasis in original).

395. *See supra* notes 233-34 and accompanying text.

396. *See supra* note 382 and accompanying text.

397. *See* J.C.H. AVELING, THE HANDLE AND THE AXE: THE CATHOLIC RECUSANTS IN ENGLAND FROM REFORMATION TO EMANCIPATION 21 (1976) (arguing that Roman Catholicism, whatever its merits might be as a *religion*, became "a haven for the nonconformist conscience" in Elizabethan England).

398. *See supra* note 195 and accompanying text.

399. *See supra* notes 381-83 and accompanying text.

The question remains, however, whether misfits can become heroes and not merely pariahs, and, if so, to whom. More specifically, the question at hand is whether Clarence Thomas is or can be a hero to African-Americans. It is to this issue that this article now turns in the next two Parts.

V. CLARENCE THOMAS IN HIS OWN WORDS: A FURTHER EXPLORATION OF NONCONFORMITY, IDEOLOGY, AND MYTH

We first encountered Justice Thomas's voice as he gave expression to the Color-Blindness Macro-Narrative. It was an impersonal voice, offering up no explicit linkages, or connections, to his personal micro-narrative. It was also a voice uttered before he became a member of the Court. In the years since Thomas has been on the Court, he has spoken his story. He relates his narrative differently, however, depending on the race of the audience.

A. Speaking to African-Americans

Justice Thomas delivered his most famous speech at the annual meeting of the National Bar Association ("NBA") in the summer of 1998. The invitation to address the NBA generated much controversy, reflecting the negative feelings that many African-American lawyers have towards Thomas.[400] That said, Thomas took the occasion to lay down the gauntlet to his detractors; he was going to think for himself, even if his ideas were not "assigned" to him.[401] He was a member of the Court and it was time to move on, for being angry with him did not solve any problems.[402] He sounded what appeared to be a conciliatory note when he said that, because "the problem of race has defied simple solutions and that not one of us, not a single one of us can lay claim to *the* solution,"[403] it was time for African-Americans to respect themselves and each other and "to continue diligently to search for lasting solutions" to the problems that confront black people.[404] The problem with this proposition is that nothing in the Color-Blindness Macro-Narrative admits the possibility of experimentation, of trial and error, or of compromise.[405] Indeed one commentator has flatly stated that Thomas is unable "to open his heart, to

400. *See* Calmore, *supra* note 3, at 177–78 (describing the palpable tension at the 1998 annual meeting of the National Bar Association and the mixed reaction to Clarence Thomas's speech made before the Association); Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 8 n.25 (2000) (noting that "[m]any NBA members had protested the fact that Justice Thomas had been invited to speak").

401. Clarence Thomas, *I Am a Man, a Black Man, an American: Searching for Real Solutions to Racial Hatred*, *in* 64 VITAL SPEECHES OF THE DAY 708, Sept. 15, 1998, at 709 [hereinafter Thomas, *I Am a Man, a Black Man, an American*].

402. *Id.* at 712.

403. *Id.* (emphasis added).

404. *Id.*

405. *See supra* notes 238-80 and accompanying text.

listen to evidence."[406] The only "search" that Thomas could recognize, therefore, would be one leading to the discovery that his macro-narrative and the jurisprudential ideas that it comprehends are the only correct ones.

The speech is suffused with this arrogant cockiness. Regarding the work of the Court, Thomas stated that some of the criticism "is profoundly uninformed and unhelpful. And all too often, uncivil second-guessing is not encumbered by the constraints of facts, logic or reasoned analysis."[407] He granted the possibility of "thoughtful analytical criticism,"[408] but said that the nature of the Court's work "plac[es] a premium on outside scholarship"[409] and not on personalized, uncivil attacks on the Court or its members that amount to little more than "unilateral pronouncements and glib but quotable cliches [sic]."[410] In other words, his critics should quit carping unless they are prepared to engage in outside scholarship that passes Thomas's muster.

On the sensitive question of racial identity, Thomas fired back at his detractors. He said:

> I knew who I was [in the early 1970s] and needed no gimmicks to affirm my identity. Nor, might I add, do I need anyone telling me who I am today. This is especially true of the psycho-silliness about forgetting my roots or self-hatred. If anything, this shows that some people have too much time on their hands.[411]

He made the point a second time: "Despite some of the nonsense that has been said about me by those who should know better, and so much nonsense, or some of which subtracts from the sum total of human knowledge, despite this all, I am a man, a black man, an American."[412] And yet again, "what hurts more, much more is the amount of time and attention spent on manufactured controversies and media sideshows when so many problems cry out for constructive attention."[413]

Side by side with the cockiness of a man who knows that he has a lifetime appointment to the Court and can say and think whatever he wants and vote however he wants, Thomas also displayed a remarkable sense of self-pity. He declared that the controversy surrounding his invitation to speak before the NBA was both customary and wearisome, although Thomas quickly rejoined that the controversy, although unfortunate, "added little value in the calculus of

406. Wells, *supra* note 1, at 146 (footnote omitted).
407. Thomas, *I Am a Man, a Black Man, an America*, *supra* note 401, at 709.
408. *Id.*
409. *Id.*
410. *Id*. at 710.
411. *Id.* at 711.
412. Thomas, *I Am a Man, a Black Man, an American*, *supra* note 401, at 711.
413. *Id.* at 712.

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my decision to be here."[414] In commenting on criticism of the Court, Thomas stated:

> I, for one, have been singled out for particularly bilious and venomous assaults. These criticisms, as near as I can tell, and I admit that it is rare that I take notice of this calumny, have little to do with any particular opinion, though each opinion does provide one more occasion to criticize. Rather, the principal problem seems to be a deeper antecedent offense. I have no right to think the way I do because I'm black.[415]

Thomas tried to defend his dissenting opinion in *Hudson v. McMillian*,[416] relying largely on a disingenuous argument that the injuries sustained by the prisoner in that case were not "significant."[417] The self-pity reemerged. "It should be obvious that the criticism of this opinion serves not to present counter-arguments, but to discredit and attack me because I've deviated from the prescribed path."[418] Thomas recounted how, in his earlier days, he had been highly critical of two black conservatives. He continued that "[i]n a twist of fate, they are both dear friends today, and the youthful wrath I visited upon them is now being visited upon me, though without the youth."[419] Thomas stated that he understood "the comforts and security of racial solidarity, defensive or otherwise. Only those who have not been set upon by hatred and repelled by rejection fail to understand its attraction. As I have suggested, I have been there."[420] Finally, he declared that it pained him "deeply, or more deeply than any of you can imagine to be perceived by so many members of my race as doing them harm."[421]

Thomas sought to justify this admixture of arrogance and self-pity by an appeal to race and a rejection of racial consciousness or solidarity at the same time. However, he failed in the attempt. Thomas's appeal to race centered on the assassination of Dr. Martin Luther King, Jr. He argued that his death "was the final straw in the struggle to retain my vocation to become a Catholic priest. Suddenly, this cataclysmic event ripped me from the moorings of my grandparents, my youth and my faith, and catapulted me headlong into the abyss that Richard Wright seemed to describe years earlier."[422] He described the murder of Dr. King as the "event that shattered my faith in my religion and

414. Clarence Thomas, I Am a Man, a Black Man, and American: Searching for Real Solutions to Racial Hatred, Address before the National Bar Association Convention (July 19, 1998), *at* http://www.douglassarchives.org/thom_b30.htm (last updated Aug. 15, 1998).

415. Thomas, *I Am a Man, a Black Man, an American*, *supra* note 401, at 710.

416. 503 U.S. 1 (1992).

417. Thomas, *supra* note 401, *I Am a Man, a Black Man, an American*, at 710.

418. *Id.*

419. *Id.* at 711.

420. *Id.*

421. *Id.* at 711–12.

422. Thomas, *I Am a Man, a Black Man, an American*, *supra* note 401, at 708–09.

my country."[423] Many of us were crushed by the death of Dr. King, and the Justice has managed to strike a note of solidarity. Thomas explained that:

> [He,] along with many blacks, found ways to protest and try to change the treatment we received in this country. Perhaps my passion for Richard Wright novels was affecting me. Perhaps it was listening too intently to Nina Simone. Perhaps, like Bigger Thomas, I was being consumed by the circumstances in which I found myself, circumstances that I saw as responding only to race.[424]

The Justice continued, stating that his "feelings were reaffirmed during the summer of 1968."[425] Thomas explained:

> [He] closed out the '60s as one angry young man waiting on the revolution that I was certain would soon come. I saw no way out. I . . . felt the deep chronic agony of anomie and alienation. All seemed to be defined by race. We became a reaction to the "man," his ominous reflection.[426]

Thomas described his role in the struggle. "In college . . . [w]e[427] started the Black Students Union. We protested. We worked in the Free Breakfast Program. We would walk out of school in the winter of 1969 in protest."[428] However, a demonstration in 1970 "to 'free the political prisoners'"[429] jolted Thomas. It shattered his worldview because he now saw not a struggle for freedom, but a struggle between intellect and "fighting much like a brute,"[430] a "battle between passion and reason."[431] He did not then embrace black conservatism,[432] but listening to Marvin Gaye's *What's Going On?*, Thomas struggled with what he saw as a "road to destruction [that] was paved with anger, resentment and rage."[433]

Thomas never seems to have understood that one could resist struggle given over to opportunistic, immoral, and illegitimate purposes without resisting struggle. The misdirection of the struggle for the rights of African-Americans that so jolted the Justice did not mean that one needed to abandon struggle altogether. Similarly, alienation from bad struggle does not necessarily warrant alienation from struggle altogether. It is as if Thomas could only see that to "relieve[] . . . the anger and the animosity that ate at [his]

423. *Id.* at 709.
424. *Id.* at 710.
425. *Id.*
426. *Id.*
427. It would be nice to know who the "we" are. The others had names. His failure to name them betrays a profound alteration.
428. Thomas, *I Am a Man, a Black Man, an American*, *supra* note 401, at 710.
429. *Id.*
430. *Id.*
431. *Id.*
432. *Id.* at 710–11.
433. Thomas, *I Am a Man, a Black Man, an American*, *supra* note 401, at 711.

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soul,"[434] he had to strike out in a radically different direction.[435] That new direction for Thomas pointed him toward the Color-Blindness Macro-Narrative. "I did not want to hate any more, and I had to stop before it totally consumed me. I had to make a fundamental choice. Do I believe in the principles of this country or not? After such angst, I concluded that I did."[436] Thomas thus abandoned any racial solidarity or consciousness whatsoever. Nevertheless, he insisted that his "history is not unlike that of many blacks from the deep South,"[437] as if to claim that his journey was not a solitary one, and as if to insist that he was not alienated from black people as such. This article strongly suggests that if his journey were not solitary, he had precious little company along the way.[438]

Thomas's rejection of racial consciousness might have its origins in his struggle with the content of his soul, as he suggested. But he persistently overstated and misstated the meaning and content of racial consciousness. He set the stage for the inquiry into the legitimacy of the idea of racial consciousness with an interesting use of pronouns. He stated in his address to the NBA:

> While *we* once celebrated those things that *we* had in common with *our* fellow citizens who did not share *our* race, so *many* now are triumphal about *our* differences, finding little, if anything, in common. Indeed, *some* go so far as to all but define each of *us* by *our* race and establish the range of *our* thinking and *our* opinions, if not *our* deeds by *our* color.[439]

Thomas avoided the need to indicate just how many African-Americans are comprehended in "many" and "some." In any event, Thomas failed to consider the possibility that if black people see his votes on the Court as doing harm to black people, that they, rather than he, might be right, and that one might reasonably take offense to such gratuitous injuries. Nowhere did Thomas engage the question in a serious, thoughtful and "connected" way. He merely declaimed that he is "confident that the individual approach, not the group approach, is the better, more acceptable, more supportable, and less dangerous one. This approach is also consistent with the underlying principles

434. *Id*. at 710.

435. Thomas's remarkable failure to name the members of the "community" in which he claims to have participated suggests that the "new direction" was highly individualistic and disconnected from this "community." But Thomas has consistently shown no interest in the micro-narratives of other people.

436. *Id.*

437. *Id.* at 711.

438. The Justice must have sensed that fact because he tried to connect notable African-Americans with his journey to the Color-Blindness Macro-Narrative. He enlisted Ralph Ellison, Randall Kennedy, and even poor Frederick Douglass. *Id.* at 710–11.

439. Thomas, *I Am a Man, a Black Man, an American*, *supra* note 401, at 709 (emphasis added).

of this country and the guarantees of freedom through government by consent."[440] Thomas had insisted that critics of the Court should proceed in "a thoughtful analytical" fashion.[441] However, he saw no need to respond to his critics in the black community in such a manner. Apparently, it is enough merely for him to declare what he believes is better for black people and move on. So speaks one with power who is alienated from those to whom he speaks. So speaks the alienated victim who perpetuates the alienation of others by lending support to the environment that harms them.[442]

Thomas came closest to the truth of the African-American existential reality when he correctly observed that "[w]e were all black. But that similarity did not mask the richness of our differences."[443] Nonetheless, he got it all wrong when he declared that "[t]oday . . . it is customary to collapse, if not overwrite, our individual characteristics into new, but now acceptable stereotypes."[444] The moral claim made by the Civil Rights Macro-Narrative is not that black people fit some stereotype, but rather that black people recognize that they have obligations to each other, as members of a community engaged in a struggle, to gain for themselves and for others who have been left out, ignored, or otherwise dismissed, the promises made to all Americans. Thomas made a categorical mistake, therefore, when he confused obligation with stereotype. Thomas sought to conflate alienation with mere difference. It was enough for him to declare that he was a different kind of black man and leave it at that.

Given Thomas's position as an Associate Justice on the Supreme Court, the large theme of alienation running through Thomas's remarks received an interesting treatment in his discussion of the interpersonal dynamics within the Court, as he saw them, and he then used them to rationalize his alienation from black people. Justice Thomas referred to the Court as "a model of civility."[445] Unkind words are not spoken there, even though the Court has had "many contentious issues" come before it.[446] This civility is remarkably impersonal, however, drenched in alienation. He stated:

> One of the interesting surprises is the virtual isolation, even within the court. It is quite rare that the members of the court see each other during those periods when we're not sitting or when we're not in conference. And the most regular contact beyond those two formal events are the lunches we have on conference and court days.[447]

440. *Id.* at 711.
441. *Id.* at 709.
442. *See supra* note 12 and accompanying text.
443. Thomas, *I Am a Man, a Black Man, an American*, *supra* note 401, at 711.
444. *Id.*
445. *Id.* at 709.
446. *Id.*
447. *Id.*

Thomas then shifted to a discussion of his own views as a Justice. The impersonal isolation that he had just described forms a backdrop to his claim that given that isolation, he is perfectly free to follow his own ideas and to think for himself. The Justice bridled at the notion that he "couldn't possibly think for [himself]."[448] He dismissed the suggestion that he was being led by the white reactionaries on the Court because some believed, apparently, that nothing else "could possibly be the explanation when [he] fail[ed] to follow the jurisprudential, ideological and intellectual, if not anti-intellectual, prescription assigned to blacks."[449]

B. *Speaking to Others*

Michael Dawson notes that black conservatives characteristically hold up white norms while denigrating black norms.[450] Thomas's speech before the National Bar Association trashed black norms. The articles and speeches that he prepared for white audiences reveal the kowtowing to whites that Dawson describes. The Justice's speeches and articles express two major themes, both of which play to the goals and sensitivities of the most reactionary whites. The first is the ascription to both himself and his grandfather of the status of heroes. The second concerns a theory of responsibility. Thomas expressed four subsidiary themes that build to one degree or another on the first two. The first subsidiary theme is his reaffirmation of the Color-Blindness Macro-Narrative. The second subsidiary theme constitutes a criticism of American law schools. The third and fourth subsidiary themes, mirroring elements of his speech to the National Bar Association, are his overwrought self-pity and his notion of the "civility" at the High Court.

Thomas repeatedly makes the audacious claim that both he and his grandfather are heroes, and if that were not enough, he resents the fact that the world today does not view them as such. With regard to his grandfather, Thomas does so explicitly.[451] As to himself, the Justice is a bit more circumspect, but one cannot mistake his meaning and intention as he ties himself to the virtues that, in Thomas's mind, made his grandfather a hero. He stated:

448. Thomas, *I Am a Man, a Black Man, an American*, *supra* note 401, at 709.

449. *Id.*

450. *See supra* notes 357-66 and accompanying text.

451. *See* Clarence Thomas, *Freedom: A Responsibility, Not a Right*, 21 OHIO N.U. L. REV. 5, 11 (1994) [hereinafter Thomas, *Freedom*]; Clarence Thomas, *Justice Thomas: On Heroes and Victims*, 142 N.J. L.J. 292 (1995) [hereinafter Thomas, *On Heroes and Victims*]; Clarence Thomas, *The James McClure Memorial Lecture in Law Delivered by the Honorable Clarence Thomas*, 65 MISS. L.J. 463, 473 (1996) [hereinafter Thomas, *McClure Memorial Lecture*]; Clarence Thomas, *Personal Responsibility*, 12 REGENT U. L. REV. 317, 325 (1999-2000) [hereinafter Thomas, *Personal Responsibility*].

> My grandfather would be an anachronism in today's world. He would be looked upon as an insensitive brute. I know that many view me that way. This is quite odd since, without groveling or begging, he maintained his dignity even in a world that was hell bent on denying it. And, he did all he could to preserve his freedom and to provide the tools for his family and those around him to secure and maintain theirs. . . . It would seem to me that those are the things of legends and heroes. . . .[452]

In speeches to children, Thomas offers himself "as living proof that hardships can be overcome without the help of government,"[453] again linking himself to the virtues that lead him to call his grandfather a hero.[454]

Thomas ties this non-recognition of his true nature and that of his grandfather to "the rise of radical egalitarianism."[455] The second theme picks up the thread. Thomas often referred to the following saying of his grandfather's: "Old man can't is dead; I helped bury him."[456] By this his grandfather rejected victimhood, no matter how hard his life might have been. "[T]here was much that my family and my community did to reinforce this message of self-determination and self-worth, thereby inoculating us against the victim plague that was highly contagious in the hot, humid climate of segregation."[457] "But today," Thomas complained, "our culture is far less likely to raise up heroes than it is to exalt victims,"[458] all because of the emergence of a new political ideology "[b]etween the New Deal and the 1960s"[459] that held that the role of the state was to eliminate want, and thus, encourage those who were in need to "identify themselves as victims and make demands on the political systems for special status and entitlements."[460] By contrast, the methodology and structure of the common law, a system of which Thomas approves, "traditionally required that redress for grievances only be granted after very exacting standards had been met. There had to be, for example, very distinct, individualized harm."[461] Thus, "[v]ery generalized claims of misfortune or oppression or neglect—the kinds of assertions made in

452. Thomas, *Freedom*, *supra* note 451, at 11.

453. Tony Mauro, *The Education of Clarence Thomas*, 23 AM. LAW. 77, 125 (2001).

454. Thomas, *On Heroes and Victims*, *supra* note 451 (stating that "[t]he word 'hero' refers to people of great strength, integrity, or courage who are recognized and admired for their accomplishments and achievements"); Thomas, *Personal Responsibility*, *supra* note 451, at 322 (characterizing as heroes, in a circular fashion, "those who achieve success as a result of personal effort and character traits that we traditionally would consider heroic").

455. Thomas, *McClure Memorial Lecture*, *supra* note 451, at 470.

456. *Id.* at 464.

457. *Id.*

458. Thomas, *Personal Responsibility*, *supra* note 451, at 318.

459. *Id.* at 319.

460. *Id.*

461. *Id.* at 320.

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the political system—would not easily fit into this common mold of court activity."[462]

With these two themes, Thomas has touched all of the bases with conservative and reactionary whites. Even the bold assertion of heroism essentially tells his audience that they were right to trust him to be a reliable, dependable, right-wing reactionary Supreme Court Justice. He was not going to let them down, not at the cost or risk of losing his self-proclaimed status of being a hero. He let it be known that he would not look with favor on government welfare programs that cut against what he understood to be the grain of the common law.[463] He might just as well have said that he subscribed to the agenda of the right wing, Republican Party. No alienation here—at least not from reactionary whites.

At least two difficulties arise from Thomas's assertions, however. First, in these speeches and articles, Thomas chooses to minimize, if not outright ignore, the role that his grandfather played in bankrolling the local chapter of the NAACP during a particularly troubling time in the early 1960s.[464] That would put the Justice's audience on edge.[465] Second, given the relegation of African-Americans by the Color-Blindness Macro-Narrative to the mere role of passive onlookers, Thomas's declaration that he and his grandfather are heroes suggests either that the Counter-Narrative is false, or that the Justice and his grandfather were rather special black people, not connected to the mass of African-Americans, who, after all are mere spectators, not the stuff out of which heroes are made. Of course his grandfather was more connected than the Justice was prepared to allow. Thomas, on the other hand, was not, and Thomas, not his grandfather, sits on the Court. The ultimate irony, of course, is that the Civil Rights Macro-Narrative would reckon Thomas's grandfather a hero, his rugged individualism notwithstanding. His grandfather's support of the Civil Rights struggle at a time when it was dangerous to do so guarantees that result. This calls into question Thomas's silly claim that the black community, or at least large chunks of it, seek to enforce a rigid ideological purity. Finally, one must ask why Thomas chose not to share his views on

462. *Id.*

463. *See* Thomas, *On Heroes and Victims*, *supra* note 451, at 292; Thomas, *McClure Memorial Lecture*, *supra* note 451, at 468; Thomas, *Personal Responsibility*, *supra* note 451, at 321.

464. *See* ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 78–80 (2001).

465. It would be the height of rudeness to white conservatives, one supposes, to mention (something that black conservatives would not be wont to do) that Chief Justice Rehnquist's great contributions to the Civil Rights struggle were "a memorandum he had written as a Supreme Court law clerk that appeared to support segregated schools." *See* Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1344 (2001). He allegedly made efforts to keep black people from voting in Arizona in 1964, and opposed to a variety of civil rights in Arizona in the 1960s. *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 433–35 (2000).

heroism in his family with the National Bar Association. Perhaps too many in *that* audience knew or might have known of his grandfather's role in the Civil Rights struggle, thus undermining what little credibility Thomas has with African-Americans.

The subsidiary themes elaborate on the fundamental premise of the two major themes: Clarence Thomas is a hero, the grandson of a hero, and one who elevates the concept of individual accountability and responsibility to the level of first principle, thus accounting the Justice as a faithful, reliable, and durable acolyte of a white reactionary agenda.

Thomas first stated the Color-Blindness Macro-Narrative as a disciplined intellectual proposition in an article in the *Howard University Law Journal*.[466] In his speech to the National Bar Association, he laid out the ultimate conclusion of the Counter-Narrative—that racial consciousness was unacceptable and contrary to the ideals of the founders of the nation.[467] He did not, on that latter occasion, lay out the argument in support of his conclusion. Since his accession to the Court, Thomas has, however, restated the intellectual premises of the Counter-Narrative in a speech later published in a law review.[468] In another speech, also later published, Thomas mounted an attack on some of the top or elite law schools, arguing that they "neglect to teach that law is an art, a craft, and not an adjunct to fancy theories or a means for political and social revolution."[469] He continued to charge that law school graduates "are often shocked to learn that much of the law is already settled, and that it is their job only to apply it to the new set of facts before them. In other words, law practice requires the common law method our law schools once emphasized."[470] Here, Thomas is building on his accountability theme in which he argued that the radical individualism of the common law, and its emphasis on the particular case, was the normatively proper conception of the role of the law in adjudicating disputes.[471] Not surprisingly, he concluded that "scholarship has grown far distant from the needs and concerns of the Bar and the Bench."[472] Thomas framed the problem in such a way so as to make it perfectly clear that law as social engineering, the jurisprudence of Charles Hamilton Houston,[473] and the jurisprudence of the Civil Rights Macro-

466. *See* Thomas, *supra* note 28 and accompanying text.

467. *See supra* notes 434-42 and accompanying text.

468. Clarence Thomas, *Why Federalism Matters*, 48 DRAKE L. REV. 231, 231–33 (2000).

469. Clarence Thomas, Speech Delivered at the Cordell Hull Speakers Forum (Nov. 17, 1994), *in* 25 CUMB. L. REV. 611, 612 (1994–1995).

470. *Id.* at 614.

471. *See supra* notes 459-60 and accompanying text.

472. Thomas, *supra* note 469, at 614.

473. *See generally* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

Narrative,[474] is simply misguided. His view is evidenced by the following statement:

> I believe that the decline in American legal education has occurred due to a loss of mission, a loss of purpose among lawyers, judges and professors alike. We have come to see law as a means and not as an end. Some among us see law only as a tool to achieve various political and social goals, whether they be redistribution of income or the emancipation of certain groups that have allegedly been oppressed by the rich and the powerful. Others view the law as a tool to achieve a client's goals, as a weapon with which to win at any cost. And many, no doubt, look upon the law as a vehicle for personal wealth and power or as a way to make money—at least as much money as an investment banker without taking as many risks.[475]

Civil rights lawyers, like Charles Hamilton Houston and Thurgood Marshall, are, for the Justice, merely a variation on the theme of radical, unprincipled, money-grubbing lawyers, while, presumably, conservatives and reactionaries understand that "[c]entral to [the] vision of law and democracy is a rule of law as a set of clear rules that are neutral and applicable to all."[476] The claim that there is any such thing as "neutrality" is, in and of itself, anything but neutral.[477] Thomas has done nothing more than recast, in somewhat different form, his colorblindness principle, putting a more explicitly formalist spin on it. Making sure that he appeals to the sensibilities of white reactionaries, Thomas is quick to claim that "[a]s lawyers, we cannot constantly question and attempt to modify legal rules in order to allow the underdog or the overdog to win."[478] One is irresistibly reminded of Anatole France's dictum that the law in its majestic equality forbids both rich man and poor man alike to sleep under bridges.[479] Thomas's mission is to bring aid and comfort to the reactionary forces, and here he has admirably succeeded.

With regard to self-pity, Thomas outdoes himself when speaking to whites. He even compares himself to Jesus in the Garden of Gethsemane, as the Justice resisted the promptings, presumably from African-Americans, to change his now reactionary views.[480] How his white audience might react to this outrageous remark is perhaps unclear. It is my sense, however, that black people would have booed him off the stage if he had attempted that comparison in a black setting. Self-pity seems so deeply ingrained in

474. *See supra* notes 36-58 and accompanying text.

475. Thomas, *supra* note 469, at 615.

476. *Id.* at 616.

477. *See, e.g.*, Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) (discussing various meanings of the word "neutrality").

478. Thomas, *supra* note 469, at 617.

479. ANATOLE FRANCE, THE RED LILY 95 (Winifred Stephens trans., Frederic Chapman ed., 1908) (1894).

480. Thomas, *supra* note 469, at 620.

Thomas's character, that he will use it in speeches aimed at both blacks and reactionary whites. Perhaps he clings to the image of heroism as much as he does to counteract or compensate for his deeply etched sense of victimhood, even as he seeks continually to deny the legitimacy of victimology.[481] The fuller implications of heroism and victimhood in the African-American experience will be explored more fully in the next section of this article.

In his remarks before the National Bar Association, Thomas used his conception of the civility that he found on the Court, in part, to justify his radical individualism and alienation from the large majority of African-Americans.[482] In his earliest remarks to white audiences, Thomas stated that "[s]ix of the nine of us enjoy lunch together during the term."[483] By 1998, Thomas painted the picture of civility rather differently, one much colder and impersonal: "[W]e simply do not see each other on a frequent basis . . . . For the most part, we will only see each other when we have conferences, a formal event, or when we sit. There is rarely contact beyond that."[484] Again, Thomas used this description of life at the Court to reassure his audience that he will not be contaminated by the views of any Justices who might march to a more moderate, not to say liberal, or progressive, drummer. He has gotten to his position on his own, he has no intention of abandoning it, and he will continue to vote in accordance with his reactionary ideology while on the Court. Here, the point is not to challenge or taunt, as was the case in his remarks before the National Bar Association, but to reassure and empathize with reactionary whites.

Thomas's ideological allegiance lies with reactionary whites. Black people need to get used to that fact. Whatever form alienation might take for Thomas regarding his fellow Justices on the Court, there will be no ideological alienation from reactionary whites. As for African-Americans, there is alienation, not only ideological, but more profoundly psychological.

We see, therefore, in Thomas's remarks to both African-Americans and to non-African-Americans, two forms of alienation. The one that pertains to African-Americans, however, is far more serious, severe, and total. Thomas fits the profile of black conservatives in that he seeks, in spite of his deeply ingrained sense of alienation, to make common cause with reactionary whites at the level of ideology and public policy, and through his voice and votes on the Court. He will do the work of white reactionaries, no matter the nature, character, and form of his alienation, and he wants to ensure that nobody

481. *See supra* notes 454-58 and accompanying text.

482. *See supra* notes 443-47 and accompanying text.

483. Deborah Pines, *Thomas Describes Year in Speech to Second Circuit*, 52 N.Y. L.J. 1 (1992).

484. Clarence Thomas, Civility, Speech Delivered to Students at Washington and Lee University School of Law (Mar. 10, 1998), *in* 4 RACE & ETHNIC ANC. L.J. 1, 1–2 (1998).

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misses that fact. No other reading of his articles and speeches as a Justice is plausible.

Dramatic evidence of the foregoing was reported recently. In a speech before the Savannah Bar Association, Thomas broke down and wept while talking about his decision to take custody of his grandnephew. "It was an awkward few minutes before Thomas could continue. As Thomas wept, a lawyer from the back of the dining room called out to him, 'You're home.' Applause broke out . . . . It was an extraordinary moment . . . [because of] the mainly white Savannah establishment's embrace of its hometown hero."[485] Forget Pin Point, Georgia, that poor black town down the road from Savannah. In every meaningful sense of the word, Thomas was "home" in the company of a white, conservative, if not reactionary, small-town, southern bar.

VI. LOCATING CLARENCE THOMAS IN THE WORLD OF HARRIET BEECHER STOWE'S UNCLE TOM'S CABIN

The initial reaction of antebellum African-Americans to *Uncle Tom's Cabin* was, on the surface, enthusiastic, because the novel served as an important antislavery weapon.[486] However, enthusiasm quickly gave way to dismay, anger, and rage.[487] African-American criticism of the novel has remained unrelenting and severe. Almost a century after the novel appeared, James Baldwin wrote the definitive African-American critique of *Uncle Tom's Cabin*. He called it "a very bad novel, having, in its self-righteous, virtuous sentimentality, much in common with *Little Women*. Sentimentality, the ostentatious parading of excessive and spurious emotion, is the mark of dishonesty, the inability to feel. . . ."[488] He reflected earlier black unhappiness with the novel, stating that the "book was not intended to do anything more than prove that slavery was wrong; was, in fact, perfectly horrible."[489] Regarding the title character, Uncle Tom, Baldwin, in what surely must be seen as overstatement, declared him to be the only black man in the novel, but, closer to the mark, stated that he "has been robbed of his humanity and

485. Mauro, *supra* note 453, at 78.

486. Marva Banks, Uncle Tom's Cabin *and Antebellum Black Response*, *in* READERS IN HISTORY: NINETEENTH-CENTURY AMERICAN LITERATURE AND THE CONTEXTS OF RESPONSE 209, 212–13 (James L. Machor ed., 1993). *But see infra* notes 513-15 and accompanying text.

487. Banks, *supra*, at 225 (stating that "as blacks became increasingly aware that Stowe's novel had an equivalent power to foster certain images of black inferiority and could therefore be used to bolster the proslavery argument, their early enthusiasm often changed to skepticism and then to anger").

488. JAMES BALDWIN, *Notes of a Native Son: Everybody's Protest Novel*, *in* COLLECTED ESSAYS 11, 11–12 (1998).

489. *Id*. at 12.

divested of his sex.[490] It is the price for that darkness with which he has been branded."[491] Because Stowe was driven, on account of the institution of slavery, by a "panic of being hurled into the flames, of being caught in traffic with the devil,"[492] the book, in Baldwin's view, was "activated by what might be called a theological terror, the terror of damnation."[493] As a literary work, a protest novel, the failure of the book "lies in its rejection of life, the human being, the denial of his beauty, dread, power, in its insistence that it is his categorization alone which is real and which cannot be transcended."[494] Uncle Tom, therefore, was not a human being, a flesh and blood figure, but merely a formal category.

As stunning as Baldwin's attack on *Uncle Tom's Cabin* may be, Sarah Smith Ducksworth went him one better. She attended, in much more icy, clinical detail, to the racism that suffuses the novel. She noted, as Baldwin and others before him had correctly observed, that Harriet Beecher Stowe's motives, her real concern, involved *white* salvation.[495] Again, following Baldwin, Ducksworth argued that "[s]lave types appear in the novel just as stiffly drawn as their white counterparts, but unlike those of the white stereotypes, their roles are functional rather than prescriptive."[496] Thus, she continued, "[d]epictions of blacks' faults create for whites a greater understanding of and appreciation for the innate good qualities of their race, which they must nurture to a level of excellence in preparation for the hour of manifest destiny."[497] She now ratcheted up the attack on the novel. The slave characters were merely "stick figures,"[498] and were "figments of a white cultural imagination."[499] She stated that "Stowe does, in fact, use African types to model 'alien' behavior that flies in the face of 'civilized' white behavior."[500] The flaw in the novel, as it relates to the African-American characters, went beyond the denial of Uncle Tom's humanity and the divestment of his sex, as Baldwin had argued, but "reveal[ed] slaves as both

490. One commentator has described Uncle Tom as the ultimate White Mother. *See* LESLIE A. FIEDLER, THE INADVERTENT EPIC: FROM UNCLE TOM'S CABIN TO ROOTS 33 (1979) (describing Uncle Tom as "a secret self-portrait of the author").

491. BALDWIN, *supra* note 488, at 14 (footnote added).

492. *Id*.

493. *Id*.

494. *Id*. at 18.

495. Sarah Smith Ducksworth, *Stowe's Construction of an African Persona and the Creation of White Identity for a New World Order*, *in* THE STOWE DEBATE: RHETORICAL STRATEGIES IN *UNCLE TOM'S CABIN* 205 (Mason I. Lowance, Jr. et al. eds., 1994) [hereinafter THE STOWE DEBATE].

496. *Id*. at 213.

497. *Id*.

498. *Id*.

499. *Id*. at 214.

500. Ducksworth, *supra* note 495, at 214.

foils for and inversions of their white counterparts. They appear as distorted mirror images of whites, painted in various shades of bronze and ebony, acting black according to their degree of tint."[501]

Ducksworth then offered a particularly devastating example of her thesis, a comparison of Pete and Mose, Uncle Tom's two boys, with the two white boys in the Bird family of southern Ohio. Stowe depicted Pete and Mose as boisterous and incorrigible.[502] But "[m]ore indicative of [their] inferior natures than their irrational behavior is their inability to reason abstractly and to project into the future. Stowe reveals their mental and emotional shallowness by juxtaposing their father's forced departure from home against the boys' preoccupation with breakfast."[503] They "remain dry-eyed until they actually see their father being led away by the slave trader. Only at that moment do they cling to Chloe's skirts, 'sobbing and groaning vehemently.'"[504] Too little, too late, Ducksworth declared.[505] The two white boys, by contrast, demonstrated all of the morally and culturally proper responses, processed information, and showed proper remorse and mending of their ways in the face of the great tragedy of the escaped slave, Eliza, and her son, Harry.[506]

Ducksworth analyzed the nature and character of Harriet Beecher Stowe's racism. While Uncle Tom may have been a Christ figure,[507] "Stowe sees no contradiction to her theory that even though racial inequality is real in the secular sphere, perfect racial equality is not impossible in the spiritual sphere."[508] Thus Stowe, an evangelical Protestant, had merely recast or reshaped the dualist theology that so dominates her religion,[509] in contrast with another, undoubtedly more popular, dualist construct that would use race—white versus black—as the sole criterion for judging status and worth both on earth and in heaven. But, neither construct offered anything for African-Americans in this world. The only difference was whether there is anything for African-Americans in the next world.

Ducksworth then showed that Stowe treated her mulattoes differently from her black characters like Uncle Tom. "The mulattoes' dilemma in America, as Stowe conceives it, is to be superior to unmixed blacks, but always to be doomed by 'the impress of the despised race upon [their] . . . face[s].'"[510]

501. *Id*.

502. *Id*. at 215.

503. *Id*.

504. *Id*. at 216.

505. Ducksworth, *supra* note 495, at 215.

506. *Id*. at 216–19.

507. *Id*. at 226. One observer described Uncle Tom rather as "the Blessed Male Mother of a virgin Female Christ." FIEDLER, *supra* note 490, at 36.

508. Ducksworth, *supra* note 495, at 226.

509. *See* Newsom, *Protestant Empire*, *supra* note 58, at 196 n.65 and accompanying text.

510. Ducksworth, *supra* note 495, at 230.

White blood created a "better" breed of black people, but black blood, nonetheless, doomed it. Stowe's view bears a marked similarity to the Afrikaner view of Africans and Coloreds.[511] Ducksworth concluded by placing Stowe's racist views in a broad historical context. She stated:

> By linking her antislavery position to her conviction of racial inequality, Stowe articulated the hope and belief of great numbers of whites who evidently felt as burdened as the writer by the sinful weight of slavery. Stowe's vision of a new world order offered them a perfect way to attain their manifest destiny and to control the host of lowly Africans in their midst.[512]

Ducksworth had carefully traced the nature and character of black objections to *Uncle Tom's Cabin*. She noted, of particular relevance here, that "history shows that even in the wake of appreciation for Stowe's antislavery support, the portrayal of a passive Uncle Tom was problematic for blacks who believed that every human being's highest duty is to resist the tyranny of oppression."[513] She had placed the persistent and enduring black criticism of *Uncle Tom's Cabin* squarely in the matrix of the Civil Rights Macro-Narrative, a narrative that places heavy emphasis on black moral and physical protest.[514] She stated:

> As blacks moved further away from the days of chains and shackles, and as they became more empowered by their hard-won social and political gains, the seething disdain for Uncle Tom as a character grew into open declarations of hostility against Stowe's entire novel and its whole cast of darky stereotypes.[515]

One can reasonably ask whether any good, then, can possibly come from a bad, dishonest, and racist novel, its antislavery position notwithstanding. Ducksworth offered one answer:

> [The book], viewed as a cultural product, may be useful as a cautionary tale to help students recognize not only how truly self-deceiving the concept of a

511. Unfortunately, far too many African-Americans internalized this racist bilge and drew invidious distinctions within the black community on the basis of skin color, a distraction and a disaster that is still all too much with the African-American Community. *See* Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1715–24 (2000) (describing "colorism" in the black community); Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131, 140–46 (1997) (discussing African-American colorism).

512. Ducksworth, *supra* note 495, at 233–34.

513. *Id*. at 233.

514. *See supra* notes 46-49 and accompanying text.

515. Ducksworth, *supra* note 495, at 233. It has been noted that Frederick Douglass and others objected to Stowe's embrace of colonization, even as they "supported both Stowe and her book." Susan Belasco, *The Writing, Reception, and Reputation of* Uncle Tom's Cabin, *in* APPROACHES TO TEACHING STOWE'S *UNCLE TOM'S CABIN* 33 (Elizabeth Ammons & Susan Belasco eds., 2000).

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> "degraded other" can be, but also, on a larger scale, how collective self-images enhanced beyond reason and laws of nature perpetrate social injustice against those with the least power to protect themselves.[516]

She was, one fears, too generous and kind. She begged the question to be decided, whether collective self-images have, in fact, been "enhanced beyond reason and laws of nature." It may not be possible to teach the novel in the way that she would like, given the self-deception of far too many Americans when it comes to the matter of race.

Another use of *Uncle Tom's Cabin*, both more limited and more radical—although far less harmful to black interests, however—does present itself. African-Americans can "revise, renarrate, correct, speak back to the novel in order to restore the dignity and humanity that the novel so often denies . . . [African-Americans]."[517] To see it, the analysis of Pete and Mose has to be revisited. They certainly come across as unlikable characters but for one important fact. Their insouciance, their self-centeredness, and their lack of feeling in the face of their father's impending departure have a sad and sorrowful explanation, having nothing to do with the supposedly innate, essentialist characteristic or qualities of African-Americans that Pete and Mose embodied. Mr. Shelby, the supposedly "good" Kentucky owner of Uncle Tom and his family, including the two little boys, Pete and Mose, sold Uncle Tom. This is one of those stubborn facts that will not go away. The comparison of Uncle Tom's two sons with the Birds' sons collapses if one takes into account the evil inherent in Mr. Shelby's ownership of other human beings. The two white boys had no Mr. Shelby in their lives. Stowe repeatedly railed against the institution of slavery,[518] so surely she must have intended for her readers to recognize this fact. Her emphasis, of course, lay with white feelings, white sensibilities, and white salvation.[519] However, *that* stubborn fact does not keep readers from reconstructing the text in ways that will allow for a more comprehensive understanding of the African-American characters, whether or not Stowe meant for readers to. Stick characters, mere formalist characterizations, can be reconstituted as flesh and blood human beings, complete with the beauty, dread, and power to which Baldwin summoned us.[520] Readers have merely but to use their powers to make it happen.

If one turns to the stubborn fact of the "good" Mr. Shelby, the truth emerges. Given the reality of the forced separation of black families because of the financial or other exigencies or whims of white slave owners, it made

516. Ducksworth, *supra* note 495, at 234.

517. R. C. De Prospo, *Afterword/Afterward: Auntie Harriet and Uncle Ike—Prophesying a Final Stowe Debate*, *in* THE STOWE DEBATE, *supra* note 495, at 283.

518. HARRIET BEECHER STOWE, UNCLE TOM'S CABIN 8, 33 (Bantam Classic ed., Bantam Books 1981) (1851–1852).

519. *See id*. at 440–44.

520. *See supra* notes 492-94 and accompanying text.

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perfect sense for Uncle Tom and his wife, Chloe, to teach their sons that the continued existence of their African-American family was beyond their control, that separation at any time was always a possibility, and that survivorship required Pete and Mose to steel their emotions and to cope with fortuitous disaster. It is reasonable to assume that the parents so instructed their children. We now understand perfectly their behavior at the forced departure of their father. One need not care for the lesson—and one should not—in order to appreciate its practical power. It has something of the quality of Sophie's choice.[521] Uncle Tom and Chloe were dealt a very bad hand and they played it the best way that they could, under the circumstances. African-Americans might still be recovering from the lesson, from a constricted range of choices that robbed them of too much of their beauty, dread, and power. But, the cure requires African-Americans to understand the lessons of history and to understand the practical problems that confronted Uncle Tom, Chloe, and all of their African-American slave ancestors. One need not have to celebrate the lesson taught to Pete and Mose to understand it, to assess it, and to swear never to have to teach it again. Indeed, the sad story of Pete and Mose provides a justification for the struggle that lies at the heart of the Civil Rights Macro-Narrative—save the children!

The adherents of the Color-Blindness Macro-Narrative would point to Shelby's son, George, the "color blind" white man who, having succeeded to his father, offered to manumit his slaves. There are problems with this position, however. As an initial matter, he could not save Uncle Tom. He could not save him or his family, *as* family. He tried, but it was too late. Furthermore, George could only offer a kind of serfdom, a system of free labor as opposed to unfree labor, but menial labor nonetheless.[522] He cannot liberate his black slaves—former slaves-to-be—from the shackles of peasantry. Whether George believed in the racial equality that Harriet Beecher Stowe so stoutly resisted, remains an interesting but open question. George Shelby was swimming against the tide. Not only did Stowe prove the point, but so did history.

Pete and Mose might, as literary characters, evince Stowe's racism. But a deeper truth about those two characters, mined and shaped through the prism of the black struggle, is that the Civil Rights Macro-Narrative stands. There are other truths in *Uncle Tom's Cabin* about black people whether or not Harriet Beecher Stowe had any interest in them. Those truths help us understand the relation of Justice Clarence Thomas to African-American communities, and it is to them that this article now turns.

521. WILLIAM STYRON, SOPHIE'S CHOICE (Random House 1979) (1925).
522. STOWE, *supra* note 518, at 435–37.

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A. Uncle Tom

Judge Higginbotham contemptuously referred to Justice Clarence Thomas as an Uncle Tom.[523] But in this regard, he was surely wrong, if one means the character drawn by Harriet Beecher Stowe. Following is the first introduction to Uncle Tom through the words of his owner, Shelby:

> Tom is a good, steady, sensible, pious fellow. He got religion at a camp-meeting, four years ago; and I believe he really *did* get it. I've trusted him, since then, with everything I have,—money, house horses,—and let him come and go round the country; and I always found him true and square in everything.[524]

Notwithstanding such high praise, Shelby agreed to sell Uncle Tom, who is married to Aunt Chloe and has three children, including Pete and Mose, to a slave trader in order to settle a debt.[525] Haley, the slave trader, wants more, and Shelby agrees to let him have Harry, the child of Eliza, another slave on Shelby's farm.[526]

Eliza overhears a conversation between Shelby and his wife in which he describes his transaction with the slave trader. Eliza promptly decides to take Harry and escape. Before she leaves the farm, she lets Uncle Tom and Aunt Chloe know of her plans. His wife encourages Uncle Tom to flee as well,[527] but he rejects her advice. His reasoning matters; it was better that he be sold off than all of the slaves on the farm be sold off. He has not let his master down before and he will not do so now even to save himself.[528] One can read this to say that Uncle Tom has set the agenda of his white owner over that of his own people, not to mention himself. However, the moral calculus points in another direction, Tom declines to flee in order to save other black people in general, and his wife and children in particular, even at the cost of his own position, indeed, as it turns out, his life. Thus, Uncle Tom was a "selfless, stoical, fatalistic martyr" and not a racial traitor.[529] When he later remonstrates with his wife and fellow slaves, who were speculating or hoping that Haley would go to Hell, and says that they ought to pray for him,[530] Tom was not abandoning his people, but merely trying to understand the world through the prism, or lens, of a suffering servant.[531]

523. *See supra* notes 208-11 and accompanying text.
524. STOWE, *supra* note 518, at 2.
525. *Id.* at 2–3.
526. *Id.* at 32.
527. *Id.* at 37.
528. *Id.*
529. MOSES, *supra* note 340, at xii–xiii.
530. STOWE, *supra* note 518, at 52–53.
531. *See* MOSES, *supra* note 340, at 5.

Again, in the parting scene with Aunt Chloe when he is turned over to the slave trader, Tom again makes the point that everything is in the Lord's hands and that it is only he that has been sold, not her or their children. She does not see things that way, and Uncle Tom chides her.[532] And so, "Tom rose up meekly, to follow his new master, and raised up his heavy box on his shoulder. His wife took the baby in her arms to go with him to the wagon, and the children, still crying, trailed on behind."[533] Tom left a rather strong impression, he "had been looked up to, both as a head servant and a Christian teacher, . . . and there was much honest sympathy and grief about him, particularly among the women."[534]

But the suffering servant, this Christ figure,[535] was not wholly self-emptying. He had a powerful sense of what was realistic and practical. Shortly after Tom begins his trip South to his final destiny, Shelby's son, George, happens by chance upon the slave trader's party. George declares to Uncle Tom that he wants to "blow [Haley] up! it would do me good!"[536] To which Tom replied, "No, don't, Mas'r George, for it won't do *me* any good.'"[537] Uncle Tom's decision not to escape with Eliza and Harry was rooted in a communitarian ethic of the sort described by Michael Dawson as typical of African-Americans.[538] Now, Tom revealed something of an individualistic streak—he was concerned with what was best for *him*, not his wife or the other slaves on Shelby's farm. However, time and time again, Tom's sense of what was best for him largely involved the hereafter, the next world, as his desperate condition as a slave on Legree's forlorn Louisiana plantation, far away from his family and his native Kentucky, ineluctably took hold.

As the novel unfolds, we see Uncle Tom, the suffering servant, befriending the lonely and the outcast, bringing aid and comfort whenever he could. We also see him cultivating relationships with powerful whites, including the saccharine Evangeline St. Clare. But these relationships enable him to pursue his objectives, both communitarian and individualistic, the conversion of African-Americans to his evangelical Protestant faith.[539]

532. STOWE, *supra* note 518, at 92–93.

533. *Id.* at 95.

534. *Id.* at 96.

535. *See supra* note 507 and accompanying text.

536. STOWE, *supra* note 518, at 98.

537. *Id.*

538. *See* DAWSON, *supra* note 98, at 11.

539. In this respect, Uncle Tom emerges as a pious activist, but one deeply connected to the African-American experience. *See* MOSES, *supra* note 340, at ix (declaring that "black Americans have been immersed in mainstream Protestant American traditions since the revolutionary period").

All of this comes to a head at the end of the novel. Uncle Tom has been sold by the racist and self-absorbed widow of Augustine St. Clare, the dandy and fop who betrayed Uncle Tom by failing to manumit him, when he had the chance to do so, to the brutish Simon Legree.[540] Arriving at Legree's plantation, deep in Louisiana bayou country, Tom discovers his mission, and his doom. Legree's slaves were a brutalized lot.[541] But, Uncle Tom's character is too strongly formed for him to give in, performing acts of charity,[542] much to the consternation and displeasure of the ever-watchful Legree.[543] Tom refuses Legree's order to flog an elderly slave woman.[544] In response, Legree beats Uncle Tom, then turns the job of beating Tom over to Sambo and Quimbo, Legree's black henchmen.[545]

Tom explains his actions to Cassy, a slave and former mistress of Legree's, who comes to Tom's aid after the brutal assault by Legree, Quimbo, and Sambo. Uncle Tom tells her that he does not want to lose heaven, having lost everything on earth.[546] Legree's field hands come under Tom's sway as Uncle Tom continued his conversion work in earnest. They would gather to hear him speak of Jesus.[547] Meanwhile Cassy wants Tom to kill Legree, whom she has drugged, and make his escape with her and another young slave girl, Emmeline. Tom, the suffering servant refuses, but he does encourage Cassy and Emmeline to escape. He, once again, refuses to join in an escape. He has found his final work among Legree's field hands and thus will stay until the dreadful end.[548]

Tom refused to run away with Eliza and Harry because Shelby would have to sell off many if not most of the slaves on his farm. Such an eventuality would cause great damage and harm to other black people—in this world. Now, Tom refuses to run away with Cassy and Emmeline because his work of conversion on Legree's plantation has not yet been finished. If he did make his escape this would cause great damage and harm to other black people—this time in the next world. The end comes swiftly. Cassy and Emmeline make

540. *See* Ducksworth, *supra* note 495, at 209–10 (describing with supreme irony, Legree, as Stowe meant or intended him to be, as "the most brutish and debased sort of white man . . . who has been utterly ruined by his total immersion in the dark world of slave culture" so that "[b]y cutting himself off from the beneficent influence of the white race, Legree has sunk into an abyss of iniquity that, in Stowe's estimate, is about as low as a white man can go" as "[h]is almost exclusive dealings in black flesh have blunted all of his original racially inherited sensitivities"). The truth, of course, is that Legree invented his hellish world, not black people.

541. STOWE, *supra* note 518, at 345–46.

542. *Id.* at 346–47.

543. *Id.* at 349.

544. *Id.* at 354–55.

545. *Id.* at 355–56.

546. STOWE, *supra* note 518, at 358.

547. *Id.* at 392.

548. *Id.* at 394–95.

good their escape, plotting and executing a particularly ingenious plan. Legree correctly surmises that Tom knew of the plan. He confronts Uncle Tom and Tom defies Legree one last time, admitting that he knew of the plans but refuses to divulge them.[549] Tom's destruction swiftly follows at the hands of Legree, Quimbo, and Sambo.[550]

Uncle Tom's rejections of offers of escape form the two bookends, or brackets, of a personal agenda and commitment to black people, even at the cost of his own life. The suffering servant surely does not battle like the avenging angel, the other important figure or icon in a larger metaphor.[551] But the suffering servant and the avenging angel are but two sides of the same coin: the ideology of messianism,[552] a macro-narrative, a belief that a group (Africans-Americans in this instance) has "a manifest destiny or a God-given role to assert the providential goals of history and to bring about the kingdom of God on earth."[553] The suffering servant, Uncle Tom, and the avenging angel, Nat Turner, are the conjoined micro-narratives of black messianism.[554]

Black messianism finds powerful expression in the Civil Rights Macro-Narrative. It makes sense to see movement lawyers like Charles Hamilton Houston and Thurgood Marshall as both suffering servants and avenging angels operating within the confines of an institutional legal system that seeks to wring passion and emotion out of conflicts and battles, making them cases and controversies instead.[555] But black messianism does not operate in the Color-Blindness Macro-Narrative, celebrating, as it does, various and sundry white racists. And by reducing African-Americans to mere observers, Justice Clarence Thomas has denied both the African-American suffering servant and the black avenging angel even as, in his grandiose self-pity, he offers himself as both.

549. *Id.* at 410.

550. *Id*. at 411.

551. *See* MOSES, *supra* note 340, at 5.

552. *Id.*

553. *Id.* at 4.

554. *Id.* at 49–66.

555. Whether bracketing passion and emotion is a good thing is beyond the scope of this paper. One commentator put it this way:

> Law has always stood in an uneasy relationship to emotion. . . . Morality, efficiency, democratic processes—these are the abstractions that ostensibly guide the law. While concessions are made to human nature, law is particularly artful at disguising its relationship to the capacity for love, hate, fear, sympathy, and all the other myriad feelings that make us human. Law is a special mask that we have collectively made, one that mutes the "true face" of power and subordination, of conformity and deviance, of acceptance and ostracism.

Rachel F. Moran, *Law and Emotion, Love and Hate*, 11 J. CONTEMP. LEGAL ISSUES 747, 747 (2001).

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At the level of micro-narratives, it is difficult to see Justice Clarence Thomas as a suffering servant.[556] The only advantage or benefit that he has given up in pursuit of what he sees as good for African-Americans is popularity in the black community,[557] a mere trifle in comparison with the sacrifices made by Uncle Tom. Furthermore, the Justice appears to have complained more about this supposed burden than Uncle Tom ever complained about his far more substantial cross. Indeed, Justice Clarence Thomas, possessed of an arrogance that perhaps knows no meaningful limitation, resorts to an entirely different metaphor to describe himself—the hero,[558] not the suffering servant. It remains eerily possible, however, that the Justice sees himself as an avenging angel bent on wreaking destruction not on errant whites, but on black people. The avenging angel is merely an expression of the victimized victimizer.

B. Sam and Sambo

Judge Higginbotham, therefore, made a categorical error in denouncing Justice Clarence Thomas as an Uncle Tom. But the mistake is understandable. The suffering servant macro-narrative became distorted. It became an element in a macro-narrative in which black people were "naturally servile."[559] But, when the suffering servant is wrenched away from a creative dynamic with the avenging angel, and thus with messianism, distortion inevitably follows.[560] If Justice Clarence Thomas is no Uncle Tom, no suffering servant, the question remains whether the Justice might still be found in Stowe's sprawling novel. On this point, two slave characters warrant examination: Sam and Sambo. One writer has noted Stowe's use of names to describe both reflective and refractive interracial images.[561] Thus, there are two characters named Tom, two named George, and two named Henry, one black and one white. However, Stowe's choice of the names "Sam" and "Sambo" might suggest that Stowe had some rather different structural or literary relation in mind between the two slaves. Because "Sam" and "Sambo" are not exactly the same name,

556. It is equally difficult to see Clarence Thomas as an avenging angel. He has not boldly challenged powerful whites, either within or without the minuet that is our legal system. Rather he has kowtowed to them, telling them that some of their most racist forebears are his ideological heroes. *See supra* note 63 and accompanying text.

557. *See supra* notes 414-21 and accompanying text.

558. *See supra* notes 451-54 and accompanying text.

559. MOSES, *supra* note 340, at 53–54.

560. *See id.* at xii–xiii (stating that black people did not want to be the white man's suffering servant, and accordingly, the ideology of Uncle Tom became distorted in the early twentieth century because it no longer enjoyed a dynamic relation with the ideology of the black avenging angel).

561. Michael J. Meyer, *Toward a Rhetoric of Equality: Reflective and Refractive Images in Stowe's Language*, *in* THE STOWE DEBATE, *supra* note 495, at 236–54.

and because both characters are African-American, the relation between the two necessarily differs from the linkages between the Toms, the Georges, and the Henrys. Stowe does compare and contrast Sam and Sambo, and it is in the comparison, a study in alienation and social isolation and in conservatism, that we can see the proper location of Clarence Thomas in the world of *Uncle Tom's Cabin*.

When Eliza flees with her son, Harry, Shelby is faced with a dilemma. His improvident business decisions had necessitated the sale of Uncle Tom and Harry to the loathsome slave trader, Haley. But Shelby has to show his good faith with Haley by helping Haley capture the escaped slaves. Shelby's wife, however, has no such compunctions, having no involvement in her husband's poor business decisions and having quite an attachment to Eliza. And thereby hangs the tale.

The sale of Uncle Tom and the escape of Eliza and Harry become the talk of the farm. Sam, a slave given to "a strict lookout to his own personal well-being,"[562] entertained thoughts of succeeding Tom as Shelby's head slave. He had little time to mourn the sale of Uncle Tom.[563] Sam, and another slave, Andy, are asked by Shelby to accompany Haley on the chase, as Andy puts it, "to look arter" Eliza.[564] Sam immediately pops off at the mouth, bragging about how he is the man to catch Eliza and Harry.[565] Andy, whose role or function, is to keep Sam honest, points out that Mrs. Shelby does not want them caught.[566] Sam appreciates the reality of the situation, and he and Andy manage to thwart Haley by a string of clever ruses and stratagems. Eliza and Harry make it across the Ohio River, but just barely.[567]

Sam and Andy return to the Shelby farm, their story to relate. Mrs. Shelby hears them approach and Sam tells her that Eliza is "clar 'cross Jordan."[568] Shelby joins his wife, and Sam describes the desperate flight across the ice floes in the river.[569] Sam makes sure to tell the Shelbys that the escape would have failed but for his efforts. In effect, he seeks to establish his value to his owner.[570] Of Sam, Stowe wrote, "Master Sam had a native talent that might,

562. STOWE, *supra* note 518, at 41.
563. *Id*.
564. *Id*. at 42.
565. *Id.*
566. *Id.*
567. STOWE, *supra* note 518, at 57–58.
568. *Id*. at 69.
569. *Id*. at 70.
570. In establishing his value to his owner, it has been suggested that Sam trumped certain negative stereotypes. James Bense, *Myths and Rhetoric of the Slavery Debate and Stowe's Comic Vision of Slavery*, *in* THE STOWE DEBATE, *supra* note 495, at 189 (finding value in Stowe's work, on its own ideological and racial terms, describing Sam not just as a "bumptious, giggling, outsized adolescent[]" but as "a shape-shifting, encompassing figure who would, through his

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undoubtedly, have raised him to eminence in political life,—a talent of making capital out of everything that turned up, to be invested for his own especial praise and glory. . . ."[571] Taking his leave upon Mrs. Shelby's orders for him to go to the kitchen to get something to eat, Sam declares, "I'll speechify these yer niggers . . . now I've got a chance. Lord, I'll reel it off to make 'em stare!"[572] The scene shifts to the kitchen, which by now was full of Sam's fellow slaves. "Now was Sam's hour of glory. The story of the day was rehearsed, with all kinds of ornament and varnishing which might be necessary to heighten its effect. . . ."[573] Sam, like any good politician, concludes with a ringing declaration of his intention to stand for the rights of his fellow slaves.[574] Andy, Sam's conscience, reminds him, in the presence of the others, that only that morning Sam had said that he would help catch Eliza.[575] Sam responds with the best piece of rhetoric in the entire novel. In a masterful display of doubletalk and gobbledygook, Sam proceeds to convert his hypocrisy, which Andy had perhaps not so innocently unmasked, into a claim of conscience and principle—persistence.[576]

The striking feature of Sam's *tour de force* is his deeply felt need to stay in the good graces of the community of slaves on Shelby's farm. Sam is a hypocrite and a self-promoter, as Andy and Aunt Chloe (who does not much care for Sam)[577] well know, and his principle of "persistence" betrays the truth of his character to any perceptive listener. But he knows that he has no future apart from that community. Given the reality and the constraints of the institution of slavery, he cannot survive alienated or socially isolated from black people. He has to make his peace with both Andy and Aunt Chloe, and he makes an effort to do so. At the end of the novel Shelby's son, George, now the owner of the farm, manumits his slaves.[578] Sam does not make an appearance in this scene, however. One is left to wonder whether Sam, with freedom papers in hand, would have left the farm and the slave community to make his own way in the world. But it is equally likely that Sam would have remained on the farm as a worker, not a slave, and continued to cast his lot with the black community there.

Not so with Justice Clarence Thomas. He is a hypocrite—an "affirmative action baby" who opposes affirmative action. On this score he matches up

words and enactments, deflate major tenets of American ideology that had made his 'creation' possible").

571. STOWE, *supra* note 518, at 71.

572. *Id.*

573. *Id*. at 73.

574. *Id.*

575. *Id.*

576. STOWE, *supra* note 518, at 73–74.

577. *Id.* at 72.

578. *Id.* at 435–37.

rather nicely with Sam. Similarly, like Sam and even like Uncle Tom, the Justice seeks to cultivate good relations with powerful whites. But he parts company with both Sam and Uncle Tom in his rejection of community with African-Americans. His remarks to the National Bar Association bear no resemblance to Sam's spiel in the kitchen on the night of his triumphal return from a mission to thwart the slave trader. For Justice Thomas, the struggles of the black community for equal rights justify his decision to abandon that community and its norms in order to pursue his highly idiosyncratic and dubious notions of what is good for African-Americans, if, indeed, that good is a matter of concern at all for the Justice. Justice Clarence Thomas certainly stands for the principle of persistence, but for Thomas, the principle operates to alienate and separate, not to reconcile or bring together. In his speech, Justice Thomas essentially said that he was who he was and his listeners had better get used to that fact. An African-American wielding a considerable amount of power as a sitting Justice on the Court tells other African-Americans to take it or leave it.

In Sambo and in his mirror and foil, Quimbo, we find precisely the same dynamic: African-American henchmen, or overseers, for an evil slave owner telling their fellow slaves to take it or leave it. We first meet Sambo as Legree returns to his plantation with a new batch of slaves, Uncle Tom among them. Harriet Beecher Stowe wasted little time in setting out the fundamental social dynamic between Sambo, Quimbo, the other slaves on Legree's plantation, and Legree. Sambo and Quimbo "were the two principal hands on the plantation. Legree had trained them in savageness and brutality as systematically as he had his bull-dogs; and, by long practice in hardness and cruelty, brought their whole nature to about the same range of capacities."[579] The novelist continued:

> Legree, . . . governed his plantation by a sort of resolution of forces. Sambo and Quimbo cordially hated each other; the plantation hands, one and all, cordially hated them; and, by playing off one against another, he was pretty sure, through one or the other of the three parties, to get informed of whatever was on foot in the place.
>
> Nobody can live entirely without social intercourse; and Legree encouraged his two black satellites to a kind of coarse familiarity with him,—a familiarity, however, at any moment liable to get one or the other of them into trouble; for, on the slightest provocation, one of them always stood ready, at a nod, to be a minister of his vengeance on the other.[580]

What transpires, ending with the death of Uncle Tom, is the working out of this cruel minuet of alienation and social isolation. In the midst of this utter

579. *Id.* at 344.
580. *Id.*

desolation, Uncle Tom does his work, seeking to build community through conversion and good works.

Sambo is, at least for the nonce, untouched. He continues to treat the other slaves owned by Legree with an admixture of cruelty and callous disregard. In one particularly brutal scene, Sambo kicked a slave woman named Lucy that Uncle Tom had helped by taking cotton from his sack and transferring it to hers. The woman fainted from the blow and Sambo revived her by sticking a pin in her flesh. The woman came to and resumed work as best she could.[581] Uncle Tom continued to add cotton to her sack, much to the consternation of Sambo who complained to Legree of Uncle Tom's acts of kindness towards Lucy.[582] Legree came up with the idea of having Uncle Tom whip Lucy, causing Sambo and Quimbo to break out laughing.[583] Later on, he refuses Legree's orders, defiantly telling Legree that Legree does not own the suffering servant's soul. Legree immediately orders Sambo and Quimbo to give him a beating. Stowe writes, "The two gigantic negroes that now laid hold of Tom, with fiendish exultation in their faces, might have formed no unapt personification of the powers of darkness. . . . [T]hey dragged [Uncle Tom] unresisting from the place."[584]

While beating Uncle Tom, Sambo discovered that Uncle Tom had, among other mementos, a lock of the hair of Evangeline, the doomed daughter of his previous owner in New Orleans, Augustine St. Clare. Sambo promptly takes the hair to Legree, claiming that it was "a witch thing."[585] Legree reacts with fear and alarm, asking Sambo why he had brought the hair to him. Admonished, Sambo dutifully takes his leave of Legree.[586] Still upset about the hair because it reminded him of his own mother, Legree first seeks relief and solace from his dogs. Then he decides to have Sambo and Quimbo sing and dance for him. Stowe writes, "Legree was often wont, when in a gracious humor, to get these two worthies into his sitting-room, and, after warming them up with whiskey, amuse himself by setting them to singing, dancing, or fighting, as the humor took him."[587] And so it goes with the three of them carousing "in a state of furious intoxication" into the wee hours of the morning.[588]

Legree notices a change in Uncle Tom. Sambo wonders if he is going to run away. Sambo is quick to assure Legree, in much the same way that Sam

581. STOWE, *supra* note 518, at 351.
582. *Id*. at 353.
583. *Id*.
584. *Id*. at 356.
585. *Id*. at 369.
586. STOWE, *supra* note 518, at 369.
587. *Id*. at 372.
588. *Id.*

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had assured Shelby, that he would catch Uncle Tom if he tried to run away.[589] Matters come to a head, Cassy and Emmeline have escaped, and Uncle Tom admits to Legree that he knew of the plans but refuses to tell anything.[590] The destruction of Uncle Tom commences at the hand of Legree, and Sambo and Quimbo join in.[591] The two slaves come to regret their role in the mortal beating of Uncle Tom and he forgives them.[592] Sambo is converted, asking Jesus to have mercy on him. Uncle Tom asks God to give him the souls of Sambo and Quimbo, and his prayer was answered.[593]

Unfortunately, Justice Clarence Thomas and unregenerate Sambo have much in common. No one could accuse the Justice of being physically brutal to black people or to anybody else, for that matter. But he seems to have condoned physical brutality when visited upon prison inmates.[594] The prison systems in more than a few American jurisdictions bear an uncanny resemblance to Legree's plantation in that they are monuments to alienation and social isolation. Not surprisingly, violence seems to accompany that state,[595] and Justice Thomas is markedly insensitive to it. It is not enough to claim that inmates have violated the moral duty to take responsibility for their actions, as Justice Thomas does,[596] because the right question is whether it satisfies the goals and objectives of the criminal law to deprive criminals of their freedom and to subject them to a harsh—but not violent—prison regime.

Beyond the question of violence, the similarities are striking. The unsaved Sambo has no community with Quimbo, the other slaves, or Legree. Unlike Sam, the rascal and hypocrite, Sambo sees no need to form one. Here the literary relation between Sam and Sambo now becomes clear. Both are studies

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589. *Id*. at 390.

590. *Id*. at 410.

591. STOWE, *supra* note 518, at 411.

592. *Id.* at 412.

593. *Id*.

594. *See* Hudson v. McMillian, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting) (arguing that "a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortuous, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not cruel and unusual punishment"). Thomas is tone deaf to the reality of prison brutality and to the fact that declaring brutality visited upon a prisoner by prison authorities is sufficiently offensive to warrant the appellation "cruel and unusual." Thomas necessarily trivialized the harm done to the inmate in this case, although he tried to avoid this implication. *See* Thomas, *I Am a Man, a Black Man, an American*, *supra* note 401, at 710 (insisting on maintaining a rigid distinction between law and morality). He just does not get it. Robbing the Constitution of moral content undermines not only the Constitution itself, but it also undermines the claim of the Color-Blindness Macro-Narrative that certain value-laden principles of equality informed the Constitution. If these principles have no moral content, then it is hard to see just how they can mean very much, at least in the face of, or in opposition to, the overtly moral claims of the Civil Rights Macro-Narrative.

595. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (Harvest Books 1973) (1951).

596. *See* Thomas, *Freedom*, *supra* note 451 *passim*.

in alienation, the difference being that Sam recognizes, in ways that Sambo does not, or cannot, that alienation from other blacks is dear. Sam seeks to make community, notwithstanding his hypocrisy, whereas Sambo makes no such attempt before his conversion to Christ by the mortally wounded Uncle Tom.

Justice Clarence Thomas makes efforts at being in community with other African- Americans. But he seems almost invariably to come up short.[597] And the reason has everything to do with his exaltation of white racists like Thomas Jefferson and Abraham Lincoln and his put-down of blacks who have fought for civil rights.[598] The unsaved Sambo cannot make community with his fellow slaves on Legree's plantation because of the nature of his relations with Legree.[599] Indeed, he cannot even make community with Quimbo, his foil, mirror, conscience, rival, and nemesis. Thomas cannot make community because of the nature of his relations with racist whites, both living and dead.[600]

597. For a stunning and damning discussion of Clarence Thomas's relations with black people, see Kevin Merida & Michael A. Fletcher, *Supreme Discomfort*, WASH. POST MAG., Aug. 4, 2002, at 8, 8–12, 24, 26–28 (describing a man who: (1) causes black people to call him an "Uncle Tom" to his face; (2) the "mere mention of [his name] often prompts emotional reactions at barbershops, cocktail receptions, gyms, anywhere African Americans congregate;" (3) leads essayist Debra Dickerson to describe him as a "lonely guy;" (4) dares to address the outgoing president of the National Bar Association, a black man, as "bruh" only to generate a negative response that Thomas was being hypocritical; (5) hangs with the white guys, ignoring a group of black men at an event at the Greenbrier Resort in West Virginia; (6) gets omitted from *Ebony* magazine's annual list of the 100 most influential blacks; (7) leads black members of the American Civil Liberties Union of Hawaii to resign because Thomas had been invited to participate in a debate on affirmative action; (8) leads black people to suggest that he "suffers from a twisted hatred of his own blackness;" (9) generates a sustained hostile reaction to a gift from a white real estate developer to name a public library after Justice Thomas, resulting in a compromise solution of a gift of $150,000 "in exchange for naming a wing of the library" after Thomas because the black leaders in Savannah, Georgia, did not want to have Thomas "held up as a role model;" (10) becomes estranged even from his "heroic" grandfather because Thomas did not return "to Savannah to practice law and use his good education to help other blacks;" (11) turns a meeting with the then president of the National Bar Association into a social disaster when Thomas declares "that he often advises students not to take African American and women's studies courses" and proceeds to suggest that "the dearth of black law clerks was attributable less to race and more to class, a point that bothered [the NBA president];" (12) even obliges his friend, Donna Brazile, to concede that Thomas "is not looking to be a black leader;" (13) leads a friend from childhood days to call Thomas "a turncoat who has forgotten where he came from," and (14) has done nothing to help his all-black hometown of Pin Point, Georgia).

598. *See supra* notes 63-90 and accompanying text.

599. One is left to wonder whether the saved Sambo can continue his relations with Legree or whether they must come to a violent and even deadly end. Clarence Thomas, of course, has not been saved at all, at least not in the sense that Harriet Beecher Stowe intends.

600. Clarence Thomas made a spectacle of himself when he presided at Rush Limbaugh's wedding. *See* Tony Mauro, *High Court Highs and Lows*, LEGAL TIMES, Dec. 26, 1994, at 9.

Many black conservatives have managed to maintain relations with the African-American community.[601] Therefore, the question is not whether Justice Clarence Thomas is a conservative of one sort or another, but whether he is socially isolated from black people, and if so, to what extent or degree. Both Sam and Sambo are black conservatives,[602] but they relate entirely differently to the African-American communities in which they find themselves. Tension clearly exists between black conservatism, particularly in the form espoused by Sambo, and the black community,[603] and undoubtedly always will. Again, what matters is how the tension is worked out through interpersonal dynamics, and whether alienation and social isolation become the dominant characteristics or traits of those dynamics.

This conclusion necessarily follows: In the world of Harriet Beecher Stowe's *Uncle Tom's Cabin*, Clarence Thomas is no Uncle Tom. He is no Sam. But surely he is an unredeemed Sambo.

VII. CONCLUSION: A BRIEF NOTE ON THE WORK OF THE UNITED STATES SUPREME COURT

This paper has shown why Justice Clarence Thomas is a pariah in the African-American community. "Justice Thomas, it seems, is trying to run away from his own biography and history—in a word, from 'himself.'"[604] Certain large implications follow from this fact, not the least of which is that one must concede that the black man sitting on the Court is deeply and profoundly alienated from large numbers of, if not the vast majority of, African-Americans.[605] One cannot honestly claim, therefore, that black people

Unfortunately for Clarence Thomas, Limbaugh's racist credentials have been exposed. *See* PATRICIA J. WILLIAMS, THE ROOSTER'S EGG 42–56 (1995) (describing Limbaugh as a racist hatemonger). One sees an uncanny similarity between this sorry spectacle and the sight of Legree, Sambo, and Quimbo carousing in a drunken stupor.

601. *See generally* Eisenstadt, *supra* note 103.

602. Sam and Sambo exhibit the fundamental traits or characteristics of black conservatism. *See id.* at x–xi (stating that black conservatives show a "deep-seated respect for the culture and institutions of American society and Western civilization, and the related conviction and insistence that blacks, through their own resources, can make it within American society," they "place their focus on individual achievement," and noting that "[m]ost black conservatives are anti-Utopian, less interested in constructing an ideal society, than in getting by in the society in which they find themselves"). *See also* DAWSON, *supra* note 98, at 282–99.

603. *See supra* notes 375-77 and accompanying text.

604. Calmore, *supra* note 3, at 200.

605. A particularly biting and pungent attack on Justice Thomas for his lone, solitary dissent in *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1048–57 (2003) (Thomas, J., dissenting) nonetheless concluded with a powerful reaffirmation of black community, even in the face of Thomas's war on his own people. Calmore, *supra* note 3, at 202. "It would never occur to Thomas that, in the end, his Black political enemies and victims have more empathy for him in his sickness than his white racist 'friends' could ever claim. They don't even know him." *All About Clarence: Self-loathing on the High Court*, BLACK COMMENTATOR, Mar. 6, 2003, *at*

have a representative on the Court, that is to say, a person with whom they feel any real sense of community.

It does not follow that black people are entitled to any such representation, although clearly the same could be said of every other ethnic or racial group, including white Americans. But apart from any consideration or analysis of group representation political theory, having a Justice of the United States Supreme Court who is as alienated and socially isolated from his own people as Justice Clarence Thomas is, assuredly raises serious questions about the fundamental nature and role of the Court.

Throughout its history, the Court has largely served as a conservative fly-wheel, or counterweight, particularly on the question of race. *Dred Scott v. Sandford*[606] and *Plessy v. Ferguson*,[607] horrible decisions though they may be, typify the work of the Court. *Brown v. Board of Education*,[608] to the extent that the decision in that case in fact represents a commitment to racial justice, equality, and inclusion,[609] is a sport, an exception. The Warren Court has come and gone. A fairly stable conservative majority, of which Justice Clarence Thomas is an important part, guarantees that the Court will largely continue to function as a counterweight to racial progress and will continue to ensure that white hegemony continues in one fashion or another. Indeed, this majority engineered a *coup d'état* in *Bush v. Gore*[610] in large part to ensure its continued existence as the majority on the Court, even though the decision clearly harms African-Americans.[611] Other futures are possible—the Court could come to understand its fundamental purpose differently. But it is ironic that Justice Clarence Thomas's tenure on the Court will do much to deny those futures.

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http://www.blackcommentator.com/32/32_commentary_pr.html. A full treatment of the case is beyond the reach of this paper. However, Thomas clearly assigned less weight or value to the undeniably racist practices of the Dallas County District Attorney's office, inter alia, in manipulating the racial composition of juries in the past, and the substantial evidence that such practices continued in the instant case. But Thomas's dissent is all of a piece with the regrettable tendency of black conservatives to celebrate white norms and to denigrate African-American norms. *See* Eisenstadt, *supra* note 103, at x–xiii; Tate & Randolph, *supra* note 383, at 2.

606. 60 U.S. 393 (19 How.) (1856).

607. 163 U.S. 537 (1896).

608. 347 U.S. 483 (1954).

609. For an argument that *Brown* does not, see Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

610. 531 U.S. 98 (2000).

611. *See* Spencer Overton, *A Place at the Table:* Bush v. Gore *Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469, 474 (2001) (arguing that the case harms blacks and others through its merit-based vision of democracy as opposed to a more "inclusionary vision of democracy [that] values widespread participation and looks to remove criteria or conditions that act as barriers to such participation").

Nothing in *Grutter v. Bollinger*[612] changes this basic conclusion that the Court is an impediment to racial progress and justice, including the fact that a member of the conservative majority, Justice O'Connor, joined the four moderates on the Court to save at least something of affirmative action, finding in doctrinal terms, "a compelling state interest in student body diversity."[613] Undergirding that finding was Justice O'Connor's reluctance to challenge the views of "major American businesses" and "high-ranking retired officers and civilian leaders of the United States military" that affirmative action in college and university admissions was necessary for business and for national security.[614] The point of affirmative action, for Justice O'Connor, is not social justice, not remediation for past racial discrimination,[615] but rather an imperative for the ruling classes, which, of course, are overwhelmingly white, to perpetuate themselves in a time of growing racial and ethnic diversity. The Court stated:

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.[616]

Thus white hegemony continues after *Grutter*, even if it would appear that the interests of racial minorities are incidentally helped and not harmed by the decision.[617] Justice O'Connor concluded with a silly remark that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[618] She has clearly signaled an intention to rein in affirmative action, to get rid of it, just not now, not while a war is raging in Iraq, a war being fought disproportionately by American soldiers who are not white.

In assessing the cultural or institutional racial views of the Court, it is a matter of no small concern that the four moderates on the Court found little to object to in Justice O'Connor's pinched construction of affirmative action. The fact that she essentially elaborated upon Justice Powell's views in *Regents*

612. 123 S. Ct. 2325 (2003).

613. *Id.* at 2338.

614. *Id.* at 2340.

615. *See* Lawrence, *supra* note 253.

616. *Grutter*, 123 S. Ct. at 2341.

617. *See* Bell, *supra* note 609. Black people tend to support affirmative action, regardless of political ideology. *See* DAWSON, *supra* note 98, at 122, 277, 295, 301 (both Black Nationalists and Dr. Martin Luther King, the prototypical radical egalitarian/disillusioned liberal, supported affirmative action, and only Black conservatives appear to oppose it, and not even all of them do so). Justice Thomas, of course disagrees that there is any benefit to African-Americans, incidental or otherwise, from affirmative action. *See supra* notes 245-79 and accompanying text.

618. *Grutter*, 123 S. Ct. at 2347.

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of the University of California v. Bakke[619] does not improve the situation, for Justice Powell was no progressive on racial issues. Justices Marshall, Brennan, Blackmun, and White were made of stronger stuff, articulating a more powerful defense of affirmative action as a remedy for racial oppression.[620] Justices Ginsburg and Breyer, at least, had the presence of mind to distance themselves from Justice O'Connor's inane twenty-five year sunset rule. They stated:

> It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land. . . .
>
> . . . [I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. . . . From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.[621]

And yet, the eight white Justices tend to split evenly most of the time on the matter of white hegemony because the four white moderates, more often than not, tend to get the race question right. It is the non-white Justice, the alienated black man, Justice Clarence Thomas, who more often than not provides the key fifth vote in the cases that defend and maintain white hegemony,[622] and thus keeps the Court anchored to its large historical mission. Justice Clarence Thomas's narratives of alienation from black people—the micro-narrative of his own personal history and experience and the Color-Blindness Macro-Narrative—become the instruments for the reinforcement, if not the reconstruction, of a macro-narrative of white alienation from black people, a macro-narrative that has fueled and propelled the Court from the beginning, producing micro-narratives—decisions in individual cases—that repeatedly trample black interests and concerns.[623] Thus, again, it can be fairly said that a major goal or function of the Court is alienation of African-Americans,[624] and Justice Clarence Thomas, more often than not, ensures that that goal is maintained, enforced, or achieved.

619. 438 U.S. 265 (1978).

620. *See id.* at 324–408.

621. *Grutter*, 123 S. Ct. at 2347–48 (Ginsburg, J., concurring).

622. *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000) (electing George W. Bush, a candidate who received a pittance of black votes, President of the United States); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (striking down an affirmative action program); Shaw v. Reno, 509 U.S. 630 (1993) (striking down a congressional districting plan that produced a majority minority district).

623. *Bush*, 531 U.S. 98; *Adarand Constructors*, 515 U.S. 200; *Shaw*, 509 U.S. 630.

624. *See* Geyer, *supra* note 4, at xxvii (stating that "objectively alienating conditions remain fairly pervasive, especially under the, often, both politically and economically oppressive situations . . . among the disadvantaged minorities in the West").

The genius, if such it be, of the first President Bush, was to install on the Court an alienated African-American to do the work of reactionary, racist whites. Indeed it is worthy of note that the second Bush in the White House might have intended a similar coup, this time with Miguel Estrada, a conservative lawyer and immigrant from Honduras. How stunning it would be to have not only an African-American, but also a Latino ensconced on the Court, both dedicated to white racial hegemony. The memory of the first great act of duplicity might explain the strong resistance of most of the Democrats in the United States Senate to the nomination of Estrada to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), a court often seen as a stepping stone to the United States Supreme Court. It is no small irony that this U.S. Circuit Court functioned as a stepping stone for Justice Clarence Thomas. Democrats found the courage to filibuster the nomination of Estrada to the D.C. Circuit Court, something that they lacked in connection with Justice Thomas's nomination to the Supreme Court, and, after several unsuccessful attempts to end the filibuster, Estrada withdrew his nomination. The memory of the great act of duplicity by the first President Bush might explain why many Latino groups were not blindsided by Estrada's ethnic identity in ways that many African-American groups were blindsided, or even duped, in 1991 by Justice Thomas's ethnic identity.[625] Thus the failure of the Estrada gambit, might not necessarily produce political benefits for Bush among Latino voters.

And yet, depending upon the circumstances, alienation can be a force for good in the world.[626] Some people love better from a detached distance than in a deep personal relationship, or in less extreme terms, better observe and analyze from a distance than from up close. But alienation too often leads to less happy results.[627] In an age of culture wars, of close divisions on difficult and important social questions, alienation as an ideology or as a personal narrative is unhealthy.

Reconciliation, power sharing, and a search for common ground strike this author to be what the country needs. Justice Clarence Thomas cannot provide leadership, guidance, or insight into any of these. Neither can the other four members of the conservative majority on the Court, not even Justice O'Connor. Justices Scalia, Rehnquist, Kennedy, and of course Thomas, were

625. The question whether Estrada is alienated from Latinos, or at least from substantial groups or numbers of Americans of Hispanic origin, the way that Thomas is alienated from African-Americans lies beyond the reach of this article. However, a full and complete analysis of Miguel Estrada should include the question whether he is an alienated man, both victim and victimizer.

626. *See* MONROE, *supra* note 9, at 2–3 (discussing the virtues of alienation).

627. *Id.* at 3 (distinguishing between strategies of alienation that are antidotes and those that are "loveless, paranoid, and pathological"); Bryce-Laporte & Thomas, *supra* note 10, at 384–85 (discussing positive and negative alienation).

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prepared to countenance a virtually all-white leadership class, or elite, because racial diversity— and therefore reconciliation—is of no value to them. The Court, therefore, becomes—as it has tended to do throughout our history—a large part of the problem, not the solution, even as the presence of Thomas on the Court muddies the waters and tends to obscure the racist agenda of the conservative majority of the Court, an agenda that traces back to the beginnings of this nation.

The alienation of Justice Clarence Thomas from African-Americans is a tragedy and a disaster, both from the macro-narrative perspective of the Court and its work, and from the more intimate and personal micro-narrative of Justice Thomas's life. Surmounting the breach bids fair to be a long and difficult process, as this article makes clear, assuming that it can even get started. But the alienation-driven ideology of the Court in matters of race is even worse. If any value can be found in having a latter-day Sambo on the Court in the person of Justice Clarence Thomas, if one can see clearly in muddied waters, it lies in the deeper realization that Sambo and Simon Legree's heirs on the Court, Justices Scalia[628] and Rehnquist[629] as well as Kennedy[630] and even O'Connor,[631] are still in charge of the racial business of the Court just as Sambo, Quimbo, and Legree combined and conspired to degrade, defile, and defame African-Americans. Harriet Beecher Stowe thus exposed and illuminated a terrible truth—the unholy alliance of reactionary, racist whites and alienated blacks—the full dimensions of which she could not

628. *See* Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism*, *in* Bostick v. Florida, 67 TUL. L. REV. 1979, 1981, 2061 (1993) (stating that "Justice Scalia and some of his colleagues aim to achieve the *Plessy* majority's adjudicative result: absolving America of its racism without changing it" and that "Justice Scalia and others attempt to force color-based oppression into white-immigrant models"); Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 MERCER L. REV. 1035, 1079 (1994) (declaring that "Justice Scalia has frequently been accused of a marked insensitivity to the rights of African-Americans"); Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1530 (1998) (stating that "[t]he sole source of support for Scalia's turning a set-aside contract program [in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)] into Bull Connor racism is White racial ideology of individualism and racial distancing").

629. *See supra* note 465.

630. Justice Kennedy, concurring in *Croson*, praised Scalia's racist approach. *See Croson*, 488 U.S. at 518–19 (Kennedy, J., concurring).

631. *See* Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 407 (1989) (stating that Justice "Marshall's charge that [Justice] O'Connor and others have expressed 'insulting judgments' about black elected officials is a story of racism on the Court" practiced or evinced by those Justices). Justice O'Connor seems to alternate between being an heir of Simon Legree and an heir of Augustine St. Clare, the New Orleans dandy who masks his participation in an evil *régime* with a curious admixture of fecklessness, cynicism, and insouciance. Put differently, she sometimes appears to be a kinder, gentler Legree.

have foreseen, not because of the future abolition of slavery, but because of her own deeply ingrained racism. At the present, it is precisely that unholy alliance that keeps the Court aligned with the ugly tradition of *Dred Scott*.

Immeasurably aided by Justice Clarence Thomas, the Court, properly understood, therefore, is one of the central loci of an alienating environment, particularly on the matter of race. It is not, in any *direct physical* sense, as violent as Legree and his black henchmen were, although one might point to the Court's support of the death penalty[632] while at the same time rejecting any and all evidence showing the racially disparate impact of that penalty.[633] But the decisions of the Court on race, over the course of the nation's history, have encouraged the violence of the state, the unofficial militia such as the Ku Klux Klan, and most devastatingly, relatively unorganized white racists who, secure in the knowledge that the Court supports and endorses their racial views, work so hard and effectively to alienate and oppress African-Americans in a myriad of ways, day in and day out.

When Justice Clarence Thomas tells us that his epiphany occurred when he realized that he had to accept the views of the nation's founders,[634] Justice Thomas established, in a supremely ironic way, his qualifications to sit on a Court *understood as a source of racial alienation*. Justice Thomas's alienation from African-Americans, in other words, makes him particularly suited to do the historical work of the Court on matters of race.[635] Justice Clarence Thomas is living proof of the claim that an alienated man may be both victim, which this author is willing to concede for the sake of argument he may well be, and victimizer,[636] which Justice Thomas's record on the Court, resting on rigid adherence to the Color-Blindness Macro-Narrative and an estrangement from and social isolation regarding black people, sadly demonstrates. He is guilty of

632. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

633. *See* McCleskey v. Kemp, 481 U.S. 279 (1987). *See also* Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1742 (1987) (arguing that "[t]he belief that our society is gripped by barely constrained, relentless [racial and class] warfare. . . has been an underlying theme of the Supreme Court's work on the death penalty"). Indeed, Justice Scalia's infamous one-paragraph memorandum in which he states his intention to uphold the death penalty in the face of the truth that it is administered in a racial manner says it all: Better that innocent black people die at the hand of the State than none so die at all. *See* Dorin, *supra* note 628. Scalia's monstrous evil surely places him on the same plane or level as Simon Legree.

634. *See supra* notes 435-38 and accompanying text.

635. *See* Calmore, *supra* note 3, at 202, 205 (noting that Thomas's "formal blackness lacks social connection and any sense of how racism really operates to frustrate his quixotic gestures of black self-sufficiency" and thus he "lives a terribly conflicted life, with blackness and judging virtually at war with each other" and that race in a functional sense, is a dominant element in identity and race, and as such, "invites 'crisis' in Justice Thomas" and has "created social distance between him and most other blacks").

636. *See* Geyer & Heinz, *supra* note 11, at xxxii.

spiritual murder, a crime at least as evil as that of Sambo.[637] And sadder still, time will tell if this sorry, a sad tale of perfidy, betrayal, ambition, and dishonesty will play itself out yet again, in this instance involving other racial minority groups, as those bent on maintaining white hegemony seek to draw others into a tangled web of deceit and manipulation.

But ultimately, it is the work of the Court that matters. A Court that alienates, even as it feeds and sustains itself on the victimizing alienation of Justice Clarence Thomas, is not a pretty thing to behold. Neither is Justice Clarence Thomas. But he and the Court form a perfect fit, and "twas more the pity." Will there ever by a majority on the Court dedicated to a different agenda, one that does not seek to maintain white hegemony? One should not hold one's breath waiting for such a development. Will righteousness ever fall like the rain and will justice ever move like that rolling river?

637. *See* CHARLES R. LAWRENCE, III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 139 (1997) (referring to "the material and spiritual injuries that Clarence Thomas has inflicted on Blacks"); Calmore *supra* note 3, at 201–02 (stating that "Justice Thomas's jurisprudence and value orientation fail to incorporate the human touch that connects humanity" and that "[t]his appears to lead him to engage, perhaps unwittingly, in the very form of spirit murder—the generic disregard for others whose lives qualitatively depend on our regard—that private racists adopt" and worse, that "Thomas does not simply provide cover for these racists, but he complements them," for "[r]ather than simply insulating their behavior, he advances it" and therefore "[t]his spirit murder is manifested in a variety of ways and the hidden costs are great").