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## BOOK NOTE

### JUSTICE THOMAS'S INCONSISTENT ORIGINALISM

MY GRANDFATHER'S SON: A MEMOIR. By Clarence Thomas.<sup>1</sup> New York: HarperCollins Publishers. 2007. Pp. xii, 289. \$26.95.

Since his infamous confirmation hearings, several of Justice Thomas's biographers<sup>2</sup> have struggled to understand and explain the apparent conflicts in the life and jurisprudence of a man who acknowledges that his conservative views do not comport with the traditional viewpoints of African Americans<sup>3</sup> and who advocates an originalist interpretation of the Constitution.<sup>4</sup> Justice Thomas has received harsh criticism from some of these biographers, and the debate surrounding his adequacy as a Supreme Court Justice has strong political underpinnings.<sup>5</sup> Seeking to correct other accounts of his life, which Justice Thomas views as partly "untrue, at times grossly so" (p. x), *My Grandfather's Son* sheds new light on his personal history — especially the key roles race and religion played therein — but generally eschews direct discussion of his jurisprudential philosophy. Even so, Justice Thomas's memoir illuminates his judicial philosophy, because that philosophy stems from the experiences and principles discussed in his book.

*My Grandfather's Son* begins with a description of Justice Thomas's West African ancestry (p. 2) and early childhood. Born in a shanty in Pinpoint, Georgia, on June 23, 1948 (pp. 3–4), Thomas spent his early years fatherless, alongside his mother, Leola; aunt, Annie; and siblings, Emma Mae and Myers (pp. 1, 3). In 1954, Myers accidentally burned down their home (p. 6), and Leola took her sons to live in a de-

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<sup>1</sup> Associate Justice, Supreme Court of the United States.

<sup>2</sup> See, e.g., KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* (2004); SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999); KEVIN MERIDA & MICHAEL A. FLETCHER, *SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS* (2007); ANDREW PEYTON THOMAS, *CLARENCE THOMAS: A BIOGRAPHY* (2001).

<sup>3</sup> "The black people I knew came from different places and backgrounds — social, economic, even ethnic — yet the color of our skin was somehow supposed to make us identical in spite of our differences. I didn't buy it" (p. 62). Interestingly, some scholars maintain that Justice Thomas's ideology is in line with a tradition of black conservative thought. See, e.g., Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 946–52 (2005); Mark Tushnet, Essay, *Clarence Thomas's Black Nationalism*, 47 HOW. L.J. 323, 339 (2004).

<sup>4</sup> See generally GERBER, *supra* note 2.

<sup>5</sup> The 52–48 senatorial vote that ensured his seat on the Supreme Court reflected this political divide. See FOSKETT, *supra* note 2, at 253. Critiques of Justice Thomas's jurisprudence also generally fall along political lines. See GERBER, *supra* note 2, at 162.

crepit house in urban Savannah.<sup>6</sup> After a year of living in squalor (pp. 6–7), Leola sent her sons to live with their grandparents, Myers and Christine Anderson (pp. 8–10), who were better off and lived on a nicer block in Savannah (p. 11). From then on, Thomas split time between a farmhouse and a city home; life with his grandfather was highly regimented, but his grandfather was also protective and nurturing and took care of the boys' basic needs (pp. 13–28). Thomas was required to perform well in school (p. 13) and to undertake a series of chores, including helping his grandfather in his home-run fuel oil distributing business (p. 21). Despite his frugality (p. 18), Thomas's grandfather, a devout Roman Catholic (p. 13), sent Thomas to a series of Catholic schools (pp. 14, 29, 37–38, 40, 49–51).

Thomas's social experiences were marked by racial tension, the result of a combination of white- and black-on-black prejudice. Thomas recalls his black high school classmates calling him "ABC — America's Blackest Child" (p. 30).<sup>7</sup> Thomas became a stellar student in high school, but he continued to face racial prejudice despite his academic achievements (pp. 37–38). At Immaculate Conception Seminary, where he began his undergraduate studies, Thomas was one of few black students (p. 42); he overheard expressions of racial hatred (p. 43), and he believed that the school's failure to award him the "super-jock trophy" for his athletic achievements was racially motivated (p. 41). Disillusioned by the Catholic Church's silence on racial bigotry (pp. 42, 51), Thomas abandoned the priesthood track and dropped out of Immaculate Conception (p. 44). In doing so, he broke a promise he had made to his grandfather (p. 31), for which, he believed, his grandfather ousted him from his home (p. 45). After transferring to Holy Cross College, Thomas — now an English major — became increasingly enraged at the situation of blacks in America, and a "beast" within him was unleashed (p. 47): "Racism had become the answer to all my questions, the trump card that won every argument" (pp. 51–52). Thomas explains that this inner anger drew him to leftist ideology and student demonstrations (pp. 52–60). However, during his time as correspondence coordinator for the Black Students' Union at Holy Cross (pp. 50–51), Thomas evaluated his experiences and those of his black friends and came to believe that integrative university efforts that accepted unprepared black students were not in the students' best interests (pp. 54–57).

Thomas's experience working with welfare recipients (pp. 71–72) and the difficulty he faced in landing a job after graduating from Yale

<sup>6</sup> This move marked the end of Thomas's living with his sister, who remained in Pinpoint and was later a welfare recipient (pp. 6, 132–34). His brother died unexpectedly in January 2000. Clarence Thomas, *The Judiciary and Civility*, FED. LAW., June 2001, at 21, 22.

<sup>7</sup> Internal quotation marks have been omitted.

Law School (pp. 86–88) moved him toward a “heterodox” view of racial issues (pp. 54–57).<sup>8</sup> Pointing to several law firm rejections he received after graduating from Yale, Thomas maintains that “a law degree from Yale meant one thing for white graduates and another for blacks” (p. 99). This differential treatment caused Thomas to oppose affirmative action, which he thought was like “free” welfare handouts because it stigmatized blacks and gave them false hope without resolving their real problems. He states, “[Y]ou don’t need to sit next to a white person to learn how to read and write” (pp. 163–64).<sup>9</sup> This stigmatizing effect of affirmative action is why he now views his time at Yale as a mistake (p. 75), the value of which is indicated by the fifteen-cent price sticker he placed on his diploma (pp. 99–100). Around this time, realizing that his views were more conservative than liberal, Thomas distanced himself from the “pandering and paternalism of the Democratic Party” (p. 111) and eventually came to identify as a Republican (p. 130).

After graduating from Yale, Thomas held a series of positions in the public sector. He first worked as an Assistant Attorney General for Missouri Attorney General John Danforth, who became Thomas’s lifelong friend and supporter. In this capacity, Thomas wrote briefs and tried cases (p. 108). Significantly, his exposure to black-on-black violence changed his view that blacks were oppressed within the criminal justice system (pp. 94–95). Before following Danforth to Washington, Thomas spent a brief period with Monsanto, a multinational chemical company (pp. 109–10). Despite the higher salary, Thomas found the work unchallenging and disliked the corporation’s unwillingness to promote talented black managers (pp. 113–14). In Washington, Thomas worked as an aide for Danforth (then a Senator) and received several employment opportunities as he became increasingly involved in the Republican Party (pp. 123–24). Thomas became Assistant Secretary for Civil Rights in the Department of Education (pp. 137–38) and then chairman of the Equal Employment Opportunity Commission (EEOC) (p. 149). Thomas provides a detailed account of his time at the EEOC, recounting as his major successes “[t]oughening EEOC’s approach to enforcement [of antidiscrimination laws], improving its management, . . . automating its data processing” (p. 187), and moving the agency to a much-needed new building (pp. 194–95). Although Thomas enjoyed success at work, he faced many difficulties in his personal life. Trapped in debt (p. 122) and an unhappy marriage, Thomas continued the heavy drinking that had

<sup>8</sup> Black writers, such as Richard Wright, Ralph Ellison (p. 63), and Thomas Sowell (p. 107), and individualist thinkers, such as Ayn Rand (p. 62), also influenced Justice Thomas’s ideology.

<sup>9</sup> Thomas quotes an interview in which he expressed his “view of the race debate” (p. 163). An internal quotation mark has been omitted.

started at Holy Cross (pp. 67, 134), and left his first wife, Kathy, the mother of his only son, Jamal (p. 135). After Thomas finally overcame his drinking problem (p. 158), he had to cope with the deaths of his grandparents (pp. 165–70).

In 1989, soon after Thomas remarried (p. 189), President George H.W. Bush nominated him to the D.C. Circuit (pp. 195–97). Thomas says little about his time on the D.C. Circuit beyond commenting that he learned from Judge Laurence Silberman to interpret law instead of trying to make policy from the bench (p. 204). Just fifteen months later (p. 210), after a brief meeting in which Thomas assured President Bush that he would “call them as [he saw] them,” the President appointed him to the Supreme Court (p. 213).<sup>10</sup>

Thomas’s account provides few specifics on his confirmation hearings. He quotes his controversial “high-tech lynching” speech (p. 271) and says that he came “to see the campaign against [his] confirmation as evil” (p. 278), an effort to undermine a black man who “refused to bow to the superior wisdom of . . . white liberals” (p. 250). Thomas’s language remains racially charged throughout this section:

I’d grown up fearing the lynch mobs of the Ku Klux Klan; as an adult, I was starting to wonder if I had been afraid of the wrong white people all along. . . . [I]n Washington . . . I was being pursued not by bigots in white robes but by left-wing zealots draped in flowing sanctimony. (p. 257)

With regard to Anita Hill, Thomas says only that she asked to follow him to the EEOC (p. 152), where he had employed her as a favor to a friend (p. 140), and that they maintained an amicable relationship until her unexpected accusations (pp. 243–44). After his confirmation (p. 280), Thomas worried for several years that he had been appointed because he was black, but a Bush advisor later told him that his race had actually counted against him because the Administration had not wanted to appoint him to the Court’s supposed “black seat” (p. 216). Without any mention of jurisprudence, the experience of being a Supreme Court Justice, or relations with the other Justices, the book closes with the image of a newly sworn-in Justice Thomas, filled with thoughts about his grandparents, walking out of the Supreme Court alongside Chief Justice William Rehnquist (pp. 288–89).

The stark criticism Justice Thomas’s jurisprudence has received begs a personal response, yet Thomas forwent the opportunity to provide one in *My Grandfather’s Son*. Despite this omission, the autobiography offers interesting insights into the personal views and history that have had a marked impact on Justice Thomas’s jurisprudence. Professor Scott Gerber has aptly observed a dichotomy in Justice Thomas’s jurisprudence. He notes that Justice Thomas takes a “lib-

<sup>10</sup> Thomas quotes President Bush.

eral originalist” approach to civil rights issues, particularly affirmative action, and a “conservative originalist” approach to civil liberties issues, such as abortion.<sup>11</sup> Liberal originalism embraces the broad principles of the Declaration of Independence, such as the natural law ideal of equality; conservative originalism relies on the Framers’ specific language and intent.<sup>12</sup> The compartmentalized black/white world Justice Thomas describes in *My Grandfather’s Son* may expose the source of this dichotomy: Thomas’s racial experiences may have driven him to craft a jurisprudence with respect to racial issues that deviates from his generally conservative originalist approach.<sup>13</sup> Justice Thomas’s inconsistent approach elicits strong criticism because this framework appears results-driven, a sort of racial exception to his generally conservative originalism, seeming to reflect little more than Justice Thomas’s policy preferences and his desire to remain true to his view of racial equality.<sup>14</sup>

Justice Thomas’s Supreme Court opinions confirm that under the same general originalist framework, the endorsement of originalism infused with natural law in some instances and strict originalism in others may lead to different results.<sup>15</sup> His opinions on the civil rights and civil liberties issues that Justice Thomas discusses in his autobiography, namely affirmative action and abortion, demonstrate his dual approach. For example, Justice Thomas took a liberal originalist approach in his famous opposition to the affirmative action policy that the majority upheld in *Grutter v. Bollinger*,<sup>16</sup> and a conservative

<sup>11</sup> GERBER, *supra* note 2, at 193. Although Professor Gerber notes that Justice Thomas also addresses questions of federalism under the conservative originalist framework, *see id.*, the discussion that follows does not touch on Justice Thomas’s federalism jurisprudence because the life experiences chronicled in his book do not shed light on that subject.

<sup>12</sup> *Id.* at 47 n.\*, 193.

<sup>13</sup> *Cf. id.* at 193 (“Thomas approaches legal questions pertaining to race *differently* than he approaches legal questions pertaining to other matters.”).

<sup>14</sup> See Jeffrey Toobin, *Unforgiven: Why Is Clarence Thomas So Angry?*, NEW YORKER, Nov. 12, 2007, at 86, 90 (asserting that Justice Thomas “has sought to enshrine in the Constitution his own policy preferences — the ones he learned from his grandfather”); *cf.* Doug Kendall & Jim Ryan, *Originalist Sins: The Faux Originalism of Justice Clarence Thomas*, SLATE, Aug. 1, 2007, <http://www.slate.com/id/2171508/> (arguing that Justice Thomas invokes originalism inconsistently in order to reach politically conservative results).

<sup>15</sup> Justice Thomas may reach different results based on which approach he applies because the two approaches feature distinct modes of reasoning. The discussion that follows focuses on the differences between these modes of reasoning rather than on a comparison of the cases’ substance.

<sup>16</sup> 539 U.S. 306 (2003). In *Grutter*, Justice Thomas adamantly opposed the majority’s endorsement of what he called the University of Michigan Law School’s “racial discrimination” policy favoring blacks in the admissions process, *id.* at 351 (Thomas, J., concurring in part and dissenting in part), and argued that the Constitution’s principle of equality called for colorblindness: “[T]he majority has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause. ‘Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.’” *Id.* at 378 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). The same rea-

originalist approach in his opposition to the state partial-birth abortion ban the majority struck down in *Stenberg v. Carhart*.<sup>17</sup> Arguably, a liberal construction of the Constitution in *Stenberg* that took into account general Founding-era principles rather than the Framers' specific intent and language — a construction like the one Justice Thomas gave the Equal Protection Clause in *Grutter* — could have led to recognition of a woman's right to privacy.<sup>18</sup> But in *Stenberg*, Justice Thomas deviated from reliance on broad principles and opted for a strict construction to assert that the right to have an abortion has no basis in the Constitution: "[T]he Court's abortion jurisprudence is a particularly virulent strain of constitutional exegesis."<sup>19</sup> Justice Thomas takes the same conservative originalist approach in other civil liberties cases,<sup>20</sup> often pointing to historical evidence to support his contentions.<sup>21</sup> But when race comes to the forefront, Thomas sticks to a liberal originalist construction.<sup>22</sup> Thus, the different standards Justice Thomas uses to interpret the Constitution in the civil rights and civil liberties arenas may account for his divergent positions on those issues.

The reasoning behind the different treatment is clear: Justice Thomas has stronger views about issues that involve race than he does

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soning is found in Justice Thomas's earlier affirmative action opinions. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

<sup>17</sup> 530 U.S. 914, 982 (2000) (Thomas, J., dissenting) (contending that the "undue burden" standard created in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), "is a product of its authors' own philosophical views about abortion, and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the standard it purported to replace").

<sup>18</sup> Colorblindness is not explicitly required by the Constitution, but Justice Thomas maintains that it is implicit in the Fourteenth Amendment's Equal Protection Clause. One could plausibly argue that the right to privacy is equally implicit in that Amendment's principle of liberty. In fact, the majority used this reasoning at least in part in *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) ("The Constitution does not explicitly mention any right of privacy. . . . This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."). Yet Justice Thomas endorses colorblindness and rejects the right to privacy, asserting that *Roe* "was wrongly decided" (p. 224 n.\*) and that "the Court's abortion jurisprudence . . . has no basis in the Constitution," *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007) (Thomas, J., concurring).

<sup>19</sup> *Stenberg*, 530 U.S. at 1020 (Thomas, J., dissenting).

<sup>20</sup> See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 18–20 (1992) (Thomas, J., dissenting) (using a conservative originalist approach to reject the notion that the Eighth Amendment protects prisoners from harsh treatment). See generally Editorial, *The Youngest, Cruellest Justice*, N.Y. TIMES, Feb. 27, 1992, at A24 (criticizing Justice Thomas's opinion in *Hudson*).

<sup>21</sup> See *Hudson*, 503 U.S. at 18–20 (Thomas, J., dissenting); cf. *Missouri v. Jenkins*, 515 U.S. 70, 126–31 (1995) (Thomas, J., concurring) (relying on historical evidence to show that federal courts should "exercise the power to impose equitable remedies only sparingly").

<sup>22</sup> See *supra* note 16; see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2770–71 (2007) (Thomas, J., concurring) ("[A]s a general rule, all race-based government decisionmaking — regardless of context — is unconstitutional.").

about other constitutional issues due to his more personal experience with the former.<sup>23</sup> In *My Grandfather's Son*, Justice Thomas repeatedly draws on racial images and language to contrast his experiences and opportunities as a black man with those of whites. This is clearest in his account of his failure to land a law firm job despite his Ivy League law school education and in what he views as the abuses of his confirmation hearings. Justice Thomas's strong position on racial issues likely causes him to use a looser construction of the Constitution to address racial issues and to reject affirmative action.<sup>24</sup>

Justice Thomas's life experiences and the values he learned from his grandfather also underlie the dichotomy in his jurisprudential philosophy. Critics suggest at least two reasons why Justice Thomas appeals to the natural law principle of inherent equality to answer racial questions: first, that he does so to avoid the inevitable endorsement of racism he would face in a constitutional interpretation that relied solely on the Framers' intent,<sup>25</sup> and second, that he appeals to natural law because a conservative originalist approach would have to recognize that the Congress that approved the Fourteenth Amendment also endorsed affirmative action policies.<sup>26</sup> While either reason may partially drive Justice Thomas's liberal originalist interpretation, natural law also echoes the ideals of inherent morality and equality with which

<sup>23</sup> In fact, Justice Thomas has even deviated from his generally pro-free speech stance, see Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2000*, 48 UCLA L. REV. 1191, 1193–94 (2001), when freedom of speech would permit whites to terrorize blacks. See *Virginia v. Black*, 538 U.S. 343, 388–95 (2003) (Thomas, J., dissenting).

<sup>24</sup> Probably in part because of his experiences at Yale, Justice Thomas believes affirmative action hurts blacks instead of helping them because it brands blacks as inferior. See *Grutter v. Bollinger*, 539 U.S. 306, 364–65, 372–73 (2003) (Thomas, J., concurring in part and dissenting in part); see also *Jenkins*, 515 U.S. at 114–16 (Thomas, J., concurring) (criticizing the lower court's conclusion that there was unconstitutional racial segregation just because the schools were predominantly black and maintaining that an assumption "that anything that is predominantly black must be inferior" generally underlies such findings).

<sup>25</sup> See, e.g., THOMAS, *supra* note 2, at 517 ("Applying originalism to the Fourteenth Amendment would have required Thomas to admit that the Constitution was . . . racist in conception.").

<sup>26</sup> To support their claim, these critics point to the creation of the Freedmen's Bureau, which assisted the transition of recently freed slaves by establishing a series of work and educational programs, by the same Congress that passed the Fourteenth Amendment. See Paul R. Baier, *Of Bakke's Balance, Gratz and Grutter: The Voice of Justice Powell*, 78 TUL. L. REV. 1955, 1997–98 (2004) ("Justice Thomas's claim that 'the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society' gives me pause. The Thirty-Ninth Congress, which adopted the Fourteenth Amendment and the race-based affirmative action programs of the Freedmen's Bureau Act, 'cannot have intended the amendment to forbid the adoption of such remedies by itself or the states' . . ." (footnote omitted) (quoting *Grutter*, 539 U.S. at 348 (Thomas, J., dissenting); and Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 785 (1985)); Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 10–11 (1997). See generally Toni Lester, *Contention, Context and the Constitution: Riding the Waves of the Affirmative Action Debate*, 39 SUFFOLK U. L. REV. 67, 88–94 (2005) (providing a historical context for affirmative action, particularly considering the Freedmen's Bureau).

he was raised.<sup>27</sup> Finally, the combined use of natural law and originalism to address civil rights issues allows Justice Thomas to appeal to the Declaration of Independence, thus lending patriotic support to his view of inherent equality.<sup>28</sup>

Justice Thomas's opinions are a reflection of his experience and vision, and thus also of his policy preferences.<sup>29</sup> The core belief in racial equality is more important to Justice Thomas than an absolutely consistent jurisprudential framework. In fact, Justice Thomas rejects extrinsic judicial philosophies:

A philosophy that is imposed from without instead of arising organically from day-to-day engagement with the law isn't worth having. Such a philosophy runs the risk of becoming an ideology, and I'd spent much of my adult life shying away from abstract ideological theories that served only to obscure the reality of life as it's lived. (p. 238)

While the different ways Justice Thomas approaches constitutional questions are understandable in light of his life experiences, the inconsistent originalism that results is itself a policy choice: the approach ensures that Justice Thomas will not go against his personal belief in inherent equality in racial cases but causes him to apply strict originalism systematically to other issues.<sup>30</sup>

The framework and methodology Justice Thomas applies to his jurisprudence evinces a judicial philosophy that is remarkably complex because of its inconsistent approach to interpreting the Constitution, but that is also predictable within categories. The brief examination of Justice Thomas's jurisprudence undertaken here suggests that similar ideals drive Clarence Thomas *the person* and Clarence Thomas *the jurist*: the principled man depicted in *My Grandfather's Son* has constructed a judicial framework that permits him to stay true to his belief in racial equality. Even so, Justice Thomas's failure to address the tensions in his judicial philosophy directly in *My Grandfather's Son* leaves one to conclude that his divergent approaches to constitutional questions are built on the Justice's personal policy preferences.

<sup>27</sup> Justice Thomas praises the Franciscan nuns who taught him that "God made all men equal" (p. 15).

<sup>28</sup> Professor Ogletree criticizes Justice Thomas's reliance on the Declaration of Independence to argue for colorblindness because the document was thought to be inapplicable to blacks at the time it was drafted. CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 197–98 (2004).

<sup>29</sup> See GERBER, *supra* note 2, at 198 (maintaining that Justice Thomas's jurisprudence demonstrates the principle that judges read their policy preferences into the law).

<sup>30</sup> Justice Thomas's affirmative action and prisoners' rights jurisprudence also suggests that he may have endorsed a hard-line judicial framework at least in part to distance himself from the legacy of Justice Thurgood Marshall and accusations of hypocrisy for turning on affirmative action after being a recipient of the same. See Note, *Lasting Stigma: Affirmative Action and Clarence Thomas's Prisoners' Rights Jurisprudence*, 112 HARV. L. REV. 1331, 1331–33 (1999).