Taking Thomas Seriously: Using the Stigma of Affirmative Action to Advance Wholesale Education Reform- Jonathan Reischl, Education Law, Policy and Practice Spring, 2009

"The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all…Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." *Grutter v. Bollinger* (Thomas, J., dissenting)[1]

It was no surprise to anyone that Justice Thomas opposed the University of Michigan Law School's affirmative action program at issue in *Grutter v. Bollinger.* Justice Thomas, an arch conservative, has voiced his opposition to affirmative action in both previous decisions, and in his autobiography *My Grandfather's Son: A Memoir*.[2] It is clear in his dissent that Justice Thomas believes that the use of affirmative action by universities is an insidious violation of the 14th Amendment. However, the breadth and nuance of his writing reveals that his attack is not just on this particular aspect of higher education, but the larger education system as whole. For Thomas, affirmative action is more than a misguided and illegal policy; it is part of the broken system that has failed to meet the demands of *Brown* and the challenge of those who fight for racial equality. Viewed in this light, the question is: does a public university's use of affirmative action place the whole state education system in violation of the Equal Protection Clause of the 14th Amendment? Taking Justice Thomas' dissent as correct, the use of affirmative action programs in state higher education is a violation of the 14th Amendment which can only be corrected by whole scale education reform at all levels.

The title of this paper is not a swipe at Justice Thomas, though I must admit to rarely agreeing with his opinions. Rather my aim is to take his dissent in *Grutter* and view it both as a dismissal of affirmative action, and as an honest appraisal of a broken

[1] *Grutter v. Bollinger*, 539 U.S. 306, (2003) (Thomas, J., dissenting, p. 5)
[2] *See* Clarence Thomas, My Grandfather's Son: A Memoir (Harper, 2007)

education system that needs much more serious reform. Viewed in this way, Thomas' dissent becomes incredibly powerful. His message is direct; no one should be happy that the legacy of *Brown* and the answer to Fredrick Douglass' pleas to educate racial minorities has become manifested in band-aid solutions, like affirmative action, while the vast majority of education for minority students in this country is sub-standard. In attacking affirmative action, and even in using a parsing of Douglass' passage to do so, Justice Thomas quickly moves beyond boilerplate right-wing opposition and passionately calls the whole education structure to task.[3] It is this larger ambition, and passion, on which this paper is based, and from which my conclusions are drawn.

My analysis will pursue the validity of this equal protection attack of the public school system by focusing on four propositions. This coverage will not be a complete analysis of the challenges of this particular argument, but it will hopefully provide a starting point. First, I will examine Justice Thomas' dissent in depth to distinguish it as a call for broader reform, and not simply a dismissive attack on affirmative action. Then I will briefly argue that state education systems should be viewed as an integrated primary, secondary, and higher education unit, and thus responsible for equal protection violations that occur at any point within the system. Next, I will address how Thomas' dissent fits into the nexus of equal protection arguments that challenge inequalities in the American education system. And finally, I will briefly address how fundamental school reform, at the primary and secondary level, is the necessary platform to address the problems presented by Justice Thomas' dissent. Overall, this is an ambitious task, but one that I think will spark further discussion and analysis of this topic.

[3] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, p. 1)

I

At first blush it may appear odd to fashion a challenge to the American public school system around the dissent of a justice whose most acknowledged attribute is his frequent silence. Yet, a closer examination revels that Justice Thomas' opinion delves deeply into the underlying problems in the American education system and affirmative action's place within it, and by doing so implicitly calls for much broader reform. In *Grutter*, the majority and Justice Thomas have a fundamental agreement; affirmative action programs are inherently problematic, if not unjust.[4] It is for this reason that the majority opinion relies on a 25 year sunset clause to assuage the anxieties of the justices.[5] Justice Thomas' opinion then is a more thorough, though certainly different, explanation of the failures of affirmative action, not only on a constitutional level, but also as a tool for racial equality.

> The Court will not even deign to make the Law School try other methods, however, preferring instead to grant a 25-year license to violate the Constitution. And the same Court that had the courage to order the desegregation of all public schools in the South now fears, on the basis of platitudes rather than principle, to force the Law School to abandon a decidedly imperfect admissions regime that provides the basis for racial discrimination.[6]

This forceful rebuke of the practice of affirmative action and the temerity of present measures aimed at addressing the racial achievement gap in America is echoed through out the opinion as Justice Thomas systematically examines the practices of American higher education. In taking a broader swipe at affirmative action, beyond a narrow constitutional argument against racial classification, Justice Thomas demonstrates that the problems in education go beyond Michigan's practices. It is here that one can see a desire for larger reform.

---

[4] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, p. 2)
[5] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, p. 2)
[6] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, p. 23)

Building off this general critique, Justice Thomas articulates particular problems with the education system, both in higher education at the primary and secondary level. In exposing the Michigan Law School program, Thomas positions it in a larger historical account of the racist admissions programs employed to gerrymander student bodies.

> Since its inception, selective admissions has been the vehicle for racial, ethnic, and religious tinkering and experimentation by university administrators. The initial driving force for the relocation of the selective function from the high school to the universities was the same desire to select racial winners and losers that the Law School exhibits today… Columbia employed intelligence tests precisely because Jewish applicants, who were predominantly immigrants, scored worse on such tests… In other words, the tests were adopted with full knowledge of their disparate impact. [7]

The program at Michigan is thus not only constitutionally invalid, but part of a legacy of decisions aimed at controlling the racial character of student bodies. In touching on this subject Thomas reveals both his skepticism of Michigan's intentions, and also of the idea that any solution reached in the present education structure, now or in 25 years, would not be similarly laden with racist intentions.

Similarly, Thomas is highly skeptical of claims advanced by Michigan and its *amicus curie*, that those students admitted under the program actually benefit by being in the law school.

> [N]owhere in any of the filings in this Court is any evidence that the purported "beneficiaries" of this racial discrimination prove themselves by performing at (or even near) the same level as those students who receive no preferences… These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition… "Even if most minority students are able to meet the normal standards at the 'average' range of colleges and universities, the systematic mismatching of minority students begun at the top can mean that such students are generally overmatched throughout all levels of higher education".[8]

Again, Thomas' challenge to affirmative action goes beyond constitutional arguments and even general talking points, to describe how toxic and senseless the programs are in

---

[7] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, pp. 21-22)
[8] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, p. 24)

light of an education system that leaves most minority students thoroughly unprepared for higher education. In his view, the gap between minority student achievement at the secondary level, and the expectations of higher education, cannot be bridged by transplantation programs. In Thomas' opinion such an assumption is the product of willful ignorance of the education background of most minority students.[9]

Beyond being ill-suited to bridge the achievement gap in American education, Thomas presents affirmative action programs as being distractions from real reform and as disincentives for greater achievement among minority students.

> No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years. Nor is the Court's holding that racial discrimination will be unconstitutional in 25 years made contingent on the gap closing in that time.[15]… As admission prospects approach certainty, there is no incentive for the black applicant to continue to prepare for the LSAT once he is reasonably assured of achieving the requisite score. ..[T]his racial discrimination will help fulfill the bigot's prophecy about black underperformance–just as it confirms the conspiracy theorist's belief that "institutional racism" is at fault for every racial disparity in our society.[10]

For Thomas, affirmative action is a perverse "solution" to the achievement gap in American education, it does nothing to address the underlying problems, and exacerbates the discrimination that it is employed to negate. Thus, any serious effort at change, in the next 25 years and beyond, must go beyond simply gaming the present system.

In addition to the failure of affirmative action to address the problems in minority education, Thomas sees these attempts at racial gerrymandering as adding a new and costly stigma that blacks and other groups must overcome.

> The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving… When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma–because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.[11]

---

[9] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, p. 25)
[10] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, pp. 29-30)
[11] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, p. 26)

Not only does affirmative action fail to meet the needs of minorities, but it goes further and adds a new stigma that impedes race relations in America. The unconstitutionality of the programs is thus two-fold, they engage in race-based categorization and they erect undue barriers to the success of minorities in society. In making this connection, Justice Thomas moves the locus of injury from the localized harms to those that are denied entry and projects it outward and forward on the whole of society and the futures of all racial minorities that come of age in this system. Again, Thomas' dissent pushes the reader to look farther a field in analyzing both affirmative action and the solutions to disparate racial achievement.

In light of Thomas' far ranging critiques of the education system in which affirmative action operates, using his dissent as a basis for a broad challenge to the current system becomes more apparent. Yet, any challenge, constitutional or otherwise, would need to overcome a number of hurdles before being viable. In the next sections I will look at how to begin to construct an argument based on Thomas' dissent that overcomes some of the major hurdles to achieving court mandated school reform.

II

As Justice Thomas implies, overcoming racial disparities takes more than remedial measures in higher education. However, it is a bit of leap to take injustices in higher education and turn around and demand reforms at the elementary and secondary level. Taking action in elementary and secondary education for harms done in higher education requires subverting the legal fiction that the two are separate entities. In reality they are very much integrated. States administer, and are responsible for, both aspects of public education even while their governance is devolved to independent overseers.

States choose the types of systems that exist within their borders. Furthermore, many state constitutions speak broadly of an obligation to provide education services to the fullest extent possible.[12] Likewise, the two parts are conditioned to be integrated, a necessity for schools to perform their public function of preparing citizens for economic and political participation. Public school curriculum, even at the elementary level is geared toward college preparation. Educators, and politicians tout programs that are designed to further the transition to higher education. Thus philosophically and practically the two elements are part of an integrated state level education plan.

As part of an integrated state education plan, the responsibility to correct the harm perpetrated by one part can rightfully be placed on another. A major concern in this area is the mandate, from the court, that the solution to constitutional violations be narrowly tailored to the harms addressed.[13] At first blush this would seem to confine any remedy to higher education. However, the particularities of affirmative action, especially as they are framed by Thomas, allow action in a broader arena. Because the violation occurs during the admissions process, a bridge between the two elements of the education system, even a narrowly tailored solution could span both sides. Second, as Thomas identifies, the harm in allowing affirmative action goes well beyond college campuses and the students there, and places a stigma on minorities through out society.[14] Thus, a remedial action should also have a broad reach, which aims at eradicating the perception of inferiority of minority education at all levels; elementary, secondary and higher education.

---

[12] See Illinois Constitution, article 10, section 1
[13] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, p. 3)
[14] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, p. 26)

III

Reform schemes relying on large scale judicial intervention must contend with the decision in *San Antonio Independent School District v. Rodriguez*, wherein the court declared that there was no constitutional right to education.[15] Yet, a solution based on Thomas' dissent is uniquely suited to align with other arguments that oppose or distinguish *Rodriguez*, and advocate for judicial intervention. Adding Thomas' equal protection attack would certainly be a mishmash of ideologies, but the dissent certainly hints at support for more sweeping change, a view that many liberals have endorsed for years. Such a coalition would be very advantageous for any action aiming at reform.

Thomas's voice would be an odd addition to those that have sought to limit the effect of *Rodriguez*, but his critique holds numerous parallels with other arguments. *Rodriguez* was met with an immediate backlash, including a strong dissent by Justice Marshall.[16] There to, Marshall focused on the creation of classifications by the education system and the impact that they would have on the identifiable group, creating distinctions fundamentally inconsistent with the Equal Protection Clause.

> [W]hen the State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with …the Equal Protection Clause.[17]

For Marshall, the underlying action of disproportionate funding was a violation of the Equal Protection Clause. For Thomas, it is the solution offered by the state for this class distinction, affirmative action, which is the violation of equal protection.[18] Yet, at their heart the two arguments agree on a central element, the state action in response to education disparities violates the 14th Amendment.

---

[15] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973)
[16] *Rodriguez*, 411 U.S. (1973) (Marshall, J., dissenting, p. 1)
[17] *Rodriguez*, 411 U.S. (1973) (Marshall, J., dissenting, n. 74)
[18] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, p. 5)

In addition to these arguments, subsequent decisions have distinguished *Rodriguez* and have applied 14th Amendment protections to states' education decisions. In *Plyer v. Doe*, the court acknowledged that while public education is not a right, it is more than a mere government benefit indistinguishable from other forms of social welfare.[19] For the court, it is the lasting mark that deprivation leaves on the child that distinguishes it from other forms of social welfare. Additionally, the court stated "[D]enial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[20] Thus, *Plyer v. Doe* shares two close similarities with Justice Thomas' dissent. First, that education programs have a lasting, and at times devastating, effect on students and thus must be rigorously scrutinized. And second, both decisions make plain that the Equal Protection Clause is rightly used to abolish state created barriers to individual achievement. At these points of commonality, Thomas' dissent joins the strongest statement by the court to date in favor of an equal protection argument for education equality.

The combination of these three arguments creates a strong demonstration of how the public school system violates students' 14th Amendment rights. The system unequally distributes the resources of the state creating class distinctions in opportunity and achievement.[21] It places barriers to the progress of identifiable classes of individuals, who are singled out for disparate treatment based on residency patters and choices beyond their control.[22] And finally, the inequality in the public school system necessitates the

[19] *Plyer v. Doe*, 457 U.S. 202, 220 (1982)
[20] *Plyer*, 457 U.S., 220 (1982)
[21] *Rodriguez*, 411 U.S. (1973) (Marshall, J., dissenting, n. 74)
[22] *Plyer v. Doe*, 457 U.S. 202 (1982)

stigma of affirmative action, which harms students and society as a whole.[23] Individually these arguments have not been enough to overcome *Rodriguez*, but taken together they may provide a basis for judicial mandated systemic reform.

IV

Only an ambitious project can address the fundamental failing elucidated by Justice Thomas' dissent. By pushing beyond the prima facie argument against affirmative action, Thomas exposed particular failings that must be remedied to fulfill the demands and promise of the Constitution. There is clearly a desire for reform, but the question remains, what would be its scope and structure? The intimated reform has a particular shape. Transformations would have to take place at the elementary and secondary level. Minority students would have to be better prepared for success in college, and not just positioned to get into elite institutions.[24] Additionally, any reforms would have to have an aesthetic element aimed at making minority education "look" like education received by the affluent. Such a solution would be incredibly ambitious for any court to announce, but Thomas' opinion, in its structure and coverage, calls for bold action and admonishes the court for assuming that something better than the status quo cannot be achieved.[25]

To meet the challenge Thomas lays out, early reform is key. The harm of affirmative action, in Thomas' opinion, is not just that it classifies individuals by race and demeans society as whole, but also that it does not benefit the minority students. Acknowledging that basic education for most minorities is substandard, Thomas implies that any program that actually aided minority students would help them achieve in college, not just place them there. Students that are placed in the programs by affirmative

---

[23] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, p. 5)
[24] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, pp. 29-30)
[25] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, p. 23)

action are over whelmed by the requirements and the environment that they are placed in. Minority high schools no longer do the job of preparing students to achieve.[26] Thus, schools with high minority populations must be equipped, by whatever means, to prepare students for success in higher education.

Simply removing affirmative action only addresses part of the problem identified in Thomas' dissent, the present harm of the programs. Affirmative action stigmatizes individuals, and it also stigmatizes minority education, framing it as incapable of producing productive members of society. Reform then would not just be aimed at placing more minority students in higher education, but also repairing the damage done by affirmative action; undoing the stigma. It is in this sense that reform would also have to aesthetic. Minorities, not only have to be allowed to achieve on their own, but must also achieve in environments that would be recognized by others as capable of producing qualified individuals. Reform must then have substance and form. To compensate for the harms rendered by affirmative action, bold steps must indeed be taken.

Conclusion

The bottom line would be a massive investment in inner-city and minority schools, or a wholesale revision of the present system that eliminated district to district disparities and unequal opportunities. The goal would be equality of opportunity, not just equality of placement. This would be the bold action that would take the success of minority students out of the hands admissions officers, and remove the stigma of affirmative action and systemic neglect.

Justice Thomas' dissent, taken as a whole, taken seriously, calls for dramatic action across the whole education landscape to produce genuine equality. Such a notion is

[26] *Grutter*, 539 U.S. (2003) (Thomas, J., dissenting, p. 21)

an old argument, but when it is made in this venue, from this viewpoint, with this strength of conviction, it is clear that it deserves a renewed dialogue and further investigation. For if the argument for education equality leaps even from Justice Thomas' dissent, then it is much more universal than we ever thought.