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The Call And the Response: The Call, The 1991 Open Letter from Federal Judge A. Leon Higginbotham, Jr., and the 25 Years of Response from Justice Clarence Thomas, 49 J. Marshall L. Rev. 925 (2016)

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THE CALL AND THE RESPONSE: THE
CALL, THE 1991 OPEN LETTER FROM
FEDERAL JUDGE A. LEON
HIGGINBOTHAM, JR.,# AND THE 25 YEARS
OF RESPONSE FROM JUSTICE CLARENCE
THOMAS

ANGELA MAE KUPENDA*

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A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992). The open letter was dated almost 25 years ago, November 29, 1991.

* Professor of Law, Mississippi College School of Law (MC Law). This project benefitted from the educational engagement that occurs when professors enter into extended research and discussions early on with their students. This essay is dedicated to two of my wonderful former students, Attorney Stephen Parks (former librarian at MC Law and recently appointed as Director of our state’s Law Library) and Attorney Carlyn Hicks (MC Law Senior Staff Attorney, Parent Representation Program Director, Mission First Legal Aid Clinic). Stephen, Carlyn and I presented our three separate essays on Justice Clarence Thomas and his 25-year anniversary on the Court, at the Loyola University Chicago School of Law, Sixth Annual Constitutional Law Colloquium, in Chicago, Illinois, November 2015. I gave much thought to Stephen’s and Carlyn’s arguments, especially as we debated and dined looking out over the amazing Chicago view. After considerable thought, I adhere to my positions, as stated in this essay, and take full responsibility for any errors. Perhaps, in the future, Stephen and Carlyn will respond to my essay with their own essays.

Earlier thoughts on this essay were presented by me as an Incubator Paper Presentation, at the 8th Annual Lutie A. Lytle Black Women Law Faculty Writers Workshop, University of Wisconsin Law School, Madison, Wisconsin, in June 2014. My Lutie Sisters were extremely generous in offering their brilliant insights.

In addition to the dedication to my two former students, I dedicate this essay to: my dear sister-friend and a diligent and insightful promoter of diversity and equity at our law school, Ms. Patricia Anderson, MC Law Faculty Assistant; my sister, Dr. Loretta A. Moore, an advocate for equality and the Vice President of Research and Federal Relations, Professor of Computer Science at Jackson State University (JSU), and Principal Investigator of the National Science Foundation funded Institutional Transformation grant for more gender equality, JSU ADVANCE; my “Sistah” Attorney Constance Slaughter-Harvey, an exemplar of commitment to foundations of our constitution and my role model of advocacy and justice; and, my equality and fitness encourager, Ms. Jerlean Price, retired Mississippi public school teacher and tireless advocate and encourager for justice.

I appreciate MC Law and Dean Wendy B. Scott for support of faculty scholarship through the 2015 law school’s summer grant and for the 2014 and 2015 funding of travel connected to this project. Also the insightful comments of my former colleague Professor Randall Johnson were so very helpful.

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I. INTRODUCTION—THE 25TH ANNIVERSARY OF THE CALL

As we approach the 25-year anniversary of the confirmation of Associate Justice Clarence Thomas to the United States Supreme Court in 1991, there is much to say about his confirmation and his time on the Court. To say that the confirmation process for Justice Thomas was contentious is an understatement.¹ To say that the confirmation was a public controversy rooted in seemingly prior personal or closeted topics is an accurate statement.² To say that the confirmation yielded many call outs for inclusivity of the personal lives of the formerly excluded in interpretations of the constitution and heated responses is quite true.³

While the confirmation processes of many justices have now faded from memory, Justice Thomas', even 25 years later, endures still.⁴ Clarence Thomas was nominated to the Court by President

1. See generally A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992); TONI MORRISON, ED., *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* (New York 1992); Kevin Johnson, *An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The Assimilation Demand at Work*, 30 CHICANA/O-LATINA/O L. REV. 97, 104 (2011) (noting that "the confirmation hearings of all three of the Justices of color in U.S. history might well be characterized, to paraphrase Justice Thomas, as 'high-tech lynchings'").

2. See Wendy Brown-Scott, *Anita Hill Meets Godzilla: Confessions of a Horror Movie Fan*, 70 TUL. L. REV. 1921, 1931 (1996).

3. See, e.g., *Judging the Judge*, Transcript, PBS NEWSHOUR.ORG (July 29, 1998), www.pbs.org/newshour/bb/law-july-dec98-thomas_7-29/. Although the video is no longer available, the transcript is available of Professor Elizabeth Farnsworth interviewing then retired Judge Higginbotham and Stephen Smith, former clerk for Justice Thomas, after Justice Thomas's controversial invitation and speech to "the nation's largest organization of African-American attorneys and judges" at the National Bar Association convention in 1998. *Id.* Higginbotham focused on the "devastating consequences" of Thomas's jurisprudence. *Id.* Smith argued that Thomas had a right to speak and that "bullies" who try to silence Thomas "live on keeping black people to think that people are-that white people are racist." *Id.*

4. Hadas Gold, *HBO's 'Confirmation' Film rattles some Washington power players*, POLITICO (Feb. 18, 2016), www.politico.com/story/2016/02/hbo-confirmation-219408#ixzz430LFUBLI; Jamie Stiehm, *Joe Biden's Forgotten Disgrace*, U.S. NEWS (Apr. 16, 2014), www.usnews.com/opinion/blogs/jamie-

George H.W. Bush. Thomas was the rare Black nominee⁵ and one regarded as quite conservative. For him to take the vacated seat of legendary civil rights advocate, renowned Justice Thurgood Marshall⁶ the first Black Justice of the Court, Thomas' nomination was resisted by some from the beginning.

To replace Justice Marshall, the great dissenter⁷ and the conscience of the Court that reminded the privileged justices of the personal lives of those less privileged,⁸ would be a nearly impossible task anyway as Marshall's legacy is momentous.⁹ To others, the opportunity to have a more conservative Court was paramount in the selection process.¹⁰ Thomas would provide not just a conservative voice but such a voice from a Black face, which could become a key in the attempt to persuade Blacks, and others, that affirmative action,¹¹ or even voting rights,¹² was no longer

stiehm/2014/04/16/anita-tells-of-joe-bidens-forgotten-role-in-confirming-clarence-thomas.

5. To date, no Black woman has been nominated as a Supreme Court Justice. See Laura Bilt, *Following death of Supreme Court Justice Antonin Scalia, here's President Obama's short list for his replacement*, N.Y. DAILY NEWS (Feb. 13, 2016), www.nydailynews.com/news/national/obama-shortlist-new-supreme-court-justice-article-1.2530851; Michael D. Shear, Julie Hirschfeld Davis, & Gardner Harris, *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 16, 2016), www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html?_r=0.

6. See, e.g., Linda Greenhouse, *Thurgood Marshall, Civil Rights Hero, Dies at 84*, Obituary, Special to N.Y. TIMES (Jan. 25, 1993), www.nytimes.com/learning/general/onthisday/bday/0702.html. Even the very conservative former Chief Justice William H. Rehnquist recognized this legacy. "In his eulogy of Marshall, Chief Justice William H. Rehnquist referred to the words inscribed above the front entrance to the Supreme Court, 'Equal Justice for All.' Rehnquist stated, 'Surely no one individual did more to make these words a reality than Thurgood Marshall.'" Jane Newhagen, *Thurgood Marshall (1908-1993)*, IN *Mary Cross, Ed., 100 PEOPLE WHO CHANGED 20TH CENTURY AMERICA* 276, 280 (ABC-CLIO 2013).

7. See Owen Fiss, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 49, 52 (1992) (citing Kathleen M. Sullivan, *Marshall, the Great Dissenter*, N.Y. TIMES (June 29, 1991), at A23).

8. According to the sentiment of many scholars, and as expressed in one article, "Justice Marshall often used stories from his life to explain the law's failure to fulfill the Constitution's promised protections for so many Americans. For twenty-four years Marshall was the conscience of the Supreme Court." U.W. Clemon & Bryan K. Fair, *Lawyers, Civil Disobedience, and Equality in the Twenty-First Century: Lessons from Two American Heroes*, 54 ALA. L. REV. 959, 982 (2003); see also Geoffrey R. Stone, *Marshall: He's the Frustrated Conscience of the High Court*, NAT'L L. J., Feb. 18, 1980, at 24.

9. See generally Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 481-89 (2000).

10. See Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257, 1273 (1993).

11. He held his intent on his insistence to eliminate the affirmative action that he himself benefitted from. See *Fischer v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2429 (2013) (Thomas, J., concurring) ("The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced

needed and harmed even Blacks.¹³ Thus, in 1991, Thomas was confirmed as the first Black radical conservative Justice, in spite of opposition including credible allegations of sexual harassment lodged against him.¹⁴ His unprecedented confirmation evoked unprecedented reactions, including written ones.

One such written action is the basis for this article. Our nation is now fast approaching the anniversary, not only of Thomas' 25 ceremonial years¹⁵ on the Court, but also of almost 25 years since an unprecedented, published, pointed, open, publicly and widely circulated correspondence was sent to the newly confirmed Justice Thomas by another Black judge. Esteemed Federal Judge A. Leon Higginbotham, Jr., penned *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*.¹⁶ Higginbotham wrote this personal letter to Thomas, after the bitter confirmation process, to remind the new Justice, and perhaps chastise him, too, about the good, and the harm, Thomas could do toward underrepresented people, many with backgrounds similar to Thomas,¹⁷ from the bench with this life appointment.¹⁸

representations that discrimination helped minorities.”); see also Elizabeth Flock, *Clarence Thomas Suggests Affirmative Action is Like Jim Crow*, US NEWS (June 24, 2013), www.usnews.com/news/articles/2013/06/24/clarence-thomas-suggests-affirmative-action-is-like-jim-crow.

12. Justice Thomas would have gone even further than the Court in curtailing voting protections for minorities. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631-32 (2013) (Thomas, J., concurring). The Court's holding unleashed state led attacks on voting rights of underrepresented groups. See generally Tomas Lopez, *Shelby County: One Year Later*, BRENNAN CTR. FOR JUST. (June 24, 2014), www.brennancenter.org/analysis/shelby-county-one-year-later.

13. Flock, *supra* note 11.

14. See Elizabeth Kolbert, *The Thomas Nomination; Most in National Survey Say Judge Is the More Believable*, N.Y. TIMES (Oct. 15, 1991), www.nytimes.com/1991/10/15/us/the-thomas-nomination-most-in-national-survey-say-judge-is-the-more-believable.html?pagewanted=all.

15. See Linda Greenhouse, *Thomas Sworn in as 106th Justice*, N.Y. TIMES, October 24, 1991, www.nytimes.com/1991/10/24/us/thomas-sworn-in-as-106th-justice.html (the early “swearing-in today had been arranged at the request of Justice Thomas, who wanted to start work immediately and to have his staff on the Supreme Court payroll”). Justice Thomas continues to be carefully watched, even as to how frequently, or infrequently, he orally participates in oral argument. See, e.g., Ariane de Vogue, *Justice Clarence Thomas breaks 10-year streak, asks question in court*, CNN, Feb. 29, 2016, www.cnn.com/2016/02/29/politics/supreme-court-clarence-thomas-10-year-streak-question/.

16. Higginbotham, *supra* note 1. The open letter was dated almost 25 years ago, November 29, 1991.

17. Higginbotham, *supra* note 1, at 1006 (reminding Thomas that he likely will be the only Justice on the court who has been called nigger), see *id.* at 1010 (reminding Thomas of his experiences as Black and poor in Georgia), see *id.* at 1026 (“try to remember that the fundamental problems of the disadvantaged, women, minorities, and powerless have not all been solved simply because you have ‘moved on up’ from Pin Point, Georgia, to the Supreme Court”).

For one seasoned federal judge to write personally to another federal judge is not odd, hence not momentous itself.¹⁹ A personal letter, however, is generally regarded as intimately private, between two people. What was notable between Higginbotham and Thomas, though, is that this personal letter was communicated in a highly public way, extensively circulated and widely read.²⁰ Writing about national but personal matters in such a public way was gutsy and potentially harmful to both the writer and the recipient.²¹ Even Judge Higginbotham admitted that he sent the letter openly and publicly, rather than privately, only after much consternation.²² Judge Higginbotham's open letter following the confirmation was subsequently published in the University of Pennsylvania Law Review,²³ and reproduced in other sources.²⁴

18. Federal judges are appointed for life, with good behavior. Justice Thomas could be removed only by impeachment, resignation, retirement, or death. Thomas, who was appointed at age 43, is determined to have a long term on the Court. He worked diligently to have the Court's gym renovated. According to several writers, "[H]e loved telling people that he planned to work out vigorously so that he could live a long life, stay on the Court for forty or fifty years, and outlast his critics." Kevin Merida and Michael Fletcher, *First Chapter, 'Supreme Discomfort: The Divided Soul of Clarence Thomas'* (June 17, 2007), N.Y. TIMES, www.nytimes.com/2007/06/17/books/chapters/0617-1st-meri.html?page. Justice Thomas, who is approaching his 25th year anniversary on the Court, is now in his late sixties. He may just realize his plan and break the record of the longest serving Justice, William O. Douglas who served for over 36 years, and the oldest Justice to serve, Oliver Wendell Holmes who retired at 90 years old. *Frequently Asked Questions-Justices*, SUPREME COURT OF THE UNITED STATES, www.supremecourt.gov/faq_justices.aspx (last visited Dec. 21, 2015).

19. During my own federal clerkships on the Fifth Circuit Court of Appeals with Chief Judge Charles Clark and the Eleventh Circuit Court of Appeals with former Chief Judge and then Senior Judge Paul H. Roney, I frequently observed the correspondence both judges exchanged with each other. They also regularly shared news clippings and other reading materials with other judges, former law clerks, and friends generally. When I received several news clippings and personal letters from the judges, I realized it was not all casual. Rather, their correspondence to me, too, was flavored with their constitutional perceptions and also occasional fervent urgings to try to persuade me to alter my positions on issues related to race, gender, class, and inclusion.

20. It is reported that the "University of Pennsylvania received more than seventeen thousand requests for reprints." Merida & Fletcher, *supra* note 18. Plus, many photocopies were distributed around the country. *Id.*

21. The continuing controversy was revealed in the dispute over Thomas speaking at the 1998 National Bar Association, with Thomas complaining about the criticism, and Higginbotham likening Thomas's invitation to the organization inviting a segregationist who blocked school house doors. Merida & Fletcher, *supra* note 18.

22. Higginbotham, *supra* note 1, at 1005. "As he wrote this article, Judge Higginbotham knew that many people in the legal profession would regard his criticisms of a judicial colleague as inappropriate. Nevertheless, he concluded that concerns for judicial etiquette and his own reputation must be cast aside." Charles J. Ogletree, Jr., *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1801, 1807 (1999).

23. Higginbotham, *supra* note 1.

Some called the broadly circulated and pointed Higginbotham letter “unprecedented” or even “blunt.”²⁵ Such an unprecedented challenge, even in a letter, certainly called out for a response. Even more ordinary letters call out for responses.²⁶ Therefore, with such a famously published letter from Higginbotham, one would expect an equally awaited and noted personal, and perhaps public, response from Thomas. Higginbotham’s publicly challenging letter, calling out Justice Thomas, was certainly deserving of a response. Likely, Judge Higginbotham did earnestly and impatiently await a written response from Justice Thomas.

Any wait, however, was in vain. For over these 25 years, there is no evidence Justice Thomas ever wrote in response and, during this time, Judge Higginbotham has passed away.²⁷ Therefore, unfortunately, there will be no written 25 year response,²⁸ for Thomas to pen to Higginbotham, with our hearing, even in written words, Thomas’ frequent quiet seriousness,²⁹ his infrequently heard oral judicial “deep, booming voice, shaking with emotion,”³⁰

24. Merida & Fletcher, *supra* note 18.

25. Henry Weinstein, “‘Unprecedented’ Letter to Clarence Thomas—Black Judge Issues Rights Challenges—See Not Only the Result of Your Own Ambition, But also the Culmination of Years of Heartbreaking Work by Thousands. . . Your Life is Very Different from what it would have been had these Men and Women Never Lived” (Feb. 14, 1992), L.A. TIMES, <http://community.seattletimes.nwsour.com/archive/?date=19920214&slug=1475710>.

26. From my younger years, I remember the days of more frequent letter-writing and postal mailing. Whether love letters or mailed job applications, the seemingly prolonged time waiting for a response could be filled with anxiety as the initial sender awaited and wondered about what the recipient’s response would be. The angst was heightened especially when the letter potentially would elicit a disagreeable response or solicited an immediate response in words or deeds. *See generally* Malcolm Jones, *The History and Lost Art of Letter Writing*, NEWSWEEK (Jan. 17, 2009), www.newsweek.com/history-and-lost-art-letter-writing-78365.

27. Merida & Fletcher, *supra* note 18. *See also* William Glaberson, *A. Leon Higginbotham Jr., Federal Judge, Is Dead at 70*, N.Y. TIMES, Dec. 15, 1998, www.nytimes.com/1998/12/15/us/a-leon-higginbotham-jr-federal-judge-is-dead-at-70.html?pagewanted=all.

28. Interestingly, “[n]early 20 years after Anita Hill accused Clarence Thomas of sexual harassment during his contentious Supreme Court confirmation hearings, Justice Thomas’s wife has called Ms. Hill, seeking an apology.” Charlie Savage, *Clarence Thomas’s Wife Asks Anita Hill for Apology*, N.Y. TIMES (Oct. 19, 2010), www.nytimes.com/2010/10/20/us/politics/20thomas.html.

29. Thomas’s demeanor on the bench is often labeled with various terms, including: silent, demeaning, petulant, spiteful, and disgraceful. Mark Walsh, *Experts sound off once again on Justice Thomas’s silence*, ABA J. (May 1, 2014), www.abajournal.com/magazine/article/experts_sound_off_once_again_on_justice_thomas_silence/; Ron Elving, *Clarence Thomas Speaks: After a Decade, Questions from the Quiet Justice*, NPR (Feb. 29, 2016), www.npr.org/2016/02/29/468600863/after-a-decade-questions-emerge-from-the-quiet-justice.

30. *See* Rod Smolla, *Cross Burning: Virginia v. Black*, IN NEAL DEVINS AND

or his characterized loud and gut laughter,³¹ as he explains openly or privately to Higginbotham and envisions Higginbotham's expected reaction. Neither will we get to ask Higginbotham what he thinks about Thomas' response, nor will we get to await another round of letter writing.

Using a cultural analogy, Higginbotham's letter was a call out to Thomas for some response. The call and response is rooted in the African American tradition. In the tradition of a call and response, a "call" invites, or even demands, a response.³² Higginbotham issued a call out to Thomas for Thomas to consider as he ruled on cases of utmost importance to the entire country, and especially to the underrepresented.³³ While there is no letter response that we know of, I surmise that, over these 25 years, Thomas has indeed implicitly responded to Higginbotham's call. Therefore, this essay is a construction of Thomas' implicit "response" to Higginbotham's call in his open letter.

This essay construes such by examining Thomas' response from the bench. Thomas' response, though not addressed in a return letter to Higginbotham, is directed to all who, like Higginbotham, are concerned with Thomas' views as to his role on the Court. This essay is based on the premise that the best evidence³⁴ of Thomas' response is seen in the opinions he has

DAVIDSON M. DOUGLAS, *A YEAR AT THE SUPREME COURT* 151, 164 (Durham 2004).

31. His loud laughter was even discussed at his confirmation hearings. See MORRISON, *supra* note 1, at xii-xiii.

32. The African American call and response tradition has been addressed in case law and in legal scholarship. I was a federal law clerk for Judge Raul Roney who was on the panel when the Eleventh Circuit issued a per curiam opinion in *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992), reversing the trial court and holding that the sheriff had failed to meet his burden that a rap recording was legally obscene. The sheriff only put the recording into evidence. The rap group offered expert testimony from a Rhodes Scholar, including evidence that the recording, "As Nasty As They Wanna Be" contain[ed] three oral traditions, or musical conventions, known as call and response, doing the dozens, and boasting. . . . [and] that these oral traditions derive their roots from certain segments of Afro-American culture." *Id.* at 137. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1288 (1991) (disagreeing with district court's dismissive attitude toward African American call and response tradition in *Luke Records*; fortunately, the district court's ruling was subsequently reversed by Eleventh Circuit); Ronald Garet, *Proclaim Liberty*, 74 S. CAL. L. REV. 145, 148 n.7, 159 n.46 (2000) (discussing call and response traditions during civil rights movement); see also *Call and Response Within the Black Church*, THE OLD BLACK CHURCH, Aug. 26, 2009, <http://theoldblackchurch.blogspot.com/2009/08/call-and-response-with-in-black-church.html> (last visited Dec. 26, 2015) (discussing call and response tradition of the Black church).

33. Higginbotham, *supra* note 1, at 1007.

34. As to the best evidence rule generally, see John E. Murray, Jr., *The Judicial Vision of Contract—The "Constructed Circle of Assent" and Printed Terms*, 26 ST. THOMAS L. REV. 386 (2014).

written and the sides he has taken in constitutional disputes or, as his late judicial comrade may say, cultural wars³⁵ over the constitutional meaning of equality in this country. My method of determining Thomas' response to the Higginbotham letter admittedly is lacking as it will not bear Thomas' official cursive signature found in letters in the closing. But a signature is broader than one's standard way of cursively signing one's name. One's unique signature may be indicated by one's mark,³⁶ or one's signature way of acting or being,³⁷ or, yet here, Thomas' signed opinions.

Therefore, the method utilized here in this essay of evaluating Justice Thomas' answering response, to the Higginbotham open letter, by examining some of Thomas's rulings is quite fitting. Judge Higginbotham issued an open and public challenge. And,

35. Justice Scalia has argued for the constitutional legitimization of discriminatory cultural wars. See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). Scalia's encouragement of cultural wars has been countered by seminal scholars:

The German notion of *Kulturkampf* or "culture wars" was originally adopted by Bismarck to describe his coercive policies against the Catholic clergy's efforts to control various domestic institutions during the 1870s. At the time, local Catholic clerics, presumably under the control of the Vatican, a foreign force, sought ideological hegemony over government institutions such as public education. As Francisco Valdes expounds in this symposium's Afterword, while the notion of "cultural wars" has been present in the U.S. legal and political landscape for more than three decades, it would not be until the 1992 Republican National Convention when Patrick J. Buchanan coined the notion of "cultural war" to describe his bid for the "Soul of America." It would not be until 1996, however, that Justice Antonin Scalia formally used the term *Kulturkampf* to describe his dissenting opinion in *Romer v. Evans*. Ironically, while the original notion of *Kulturkampf* was adopted by Bismarck to describe his challenge to the efforts by non-state actors such as the Catholic Church to take control of governmental institutions, conservatives and neo-conservatives in the United States have invoked this term in an effort to undermine and "rollback" progressive and civil rights oriented law and policy. These conservatives seek to carry on an agenda that employs a narrative of culture aimed at transforming the core democratic and egalitarian principles of the United States.

Charles R. Venator Santiago, *Countering Kulturkampf Politics through Critique and Justice Pedagogy*, 50 VILL. L. REV. 749, 750-51 (2005) (footnotes omitted) (commenting on Francisco Valdes, *Culture by Law: Backlash as Jurisprudence*, 50 VILL. L. REV. 1135 (2005)). Justice Scalia recently passed away. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 14, 2016), www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0.

36. See *Notarizing a Signature by Mark*, NAT'L NOTARY ASS'N, www.nationalnotary.org/file%20library/nna/webinars/signature-by-mark.pdf (last visited Dec. 26, 2015).

37. See *Signature Strengths*, VIA INST. ON CHARACTER, www.viacharacter.org/www/Research/What-the-Research-Says-About-Character-Strengths-Signature-Strengths (last visited Dec. 25, 2015).

Thomas's response, too, is open and public, for all to read, through the opinions Thomas has authored or concurred in or dissented from, perhaps even using these opinions as a method of Thomas issuing his own challenge. Thomas has left his signature mark on the constitutional and civil rights issues Higginbotham wrote to him regarding. The role of this essay is to decipher Thomas's mark of his response to the Higginbotham call.

I remember where I was on the day I received a copy and first read the Higginbotham open letter.³⁸ I, even then, imagined and awaited the Thomas response. For years, I considered what if anything was his response. Each time I would reread Higginbotham's letter, I would place this "project" to the side to ponder some more the Thomas non-response. After many years of ruminations alone and with my law students,³⁹ I present this essay as we approach this 25 year anniversary.

38. A friend from law school had briefly called me long distance (when long distance was more expensive than today) to tell me he was mailing something phenomenal to me. I remember tearing open the envelope and standing at my mailbox reading the letter with amazement and joy at the challenge.

39. Over five years ago, I shared my tattered copy of the Higginbotham letter with two of my then third year law students. I explained my thesis that Thomas has responded through his opinions. As students who had taken my Constitutional Law course and other courses and who were looking for a research project for credit, I invited them to join me in my ongoing study of the Higginbotham letter and the Thomas response.

Initially, we envisioned one day possibly writing one co-authored article about Justice Thomas' response to the Higginbotham letter. Not surprisingly along the way, we realized that not only do we disagree about Thomas' response, but we also disagree as to the call that Higginbotham is issuing in his letter. Further, we disagree over the value of and intent of Higginbotham's open letter. Our disagreements about Higginbotham's letter and Thomas' response led to many lively lunch visits over the past five years as we have followed Justice Thomas' opinions and Thomas in the news. Soon, we realized the huge obstacles to writing a single piece with one voice as our voices are so divergent.

Our voices on Higginbotham's call and Thomas' response intersected at times, but varied tremendously. Sometimes we were not even on a parallel plane, and rarely did we coexist on a point. I think our disagreement was partially rooted in, not only our legal perspectives, but also: our varied lived past experiences, our present racial, gender and class realities and privileges, or lack thereof, in America; our diverse dreams for future generations; our varied personal or societal ordering of altruistic dreams; and our various views of the appropriate role of the Court in furthering the American dream for all its people.

More specifically, while we all three read the same words in Higginbotham's letter or call, (1) we disagreed as to the value of an open or public call by Higginbotham, (2) we disagreed as to the meaning or framing of the call being issued by Higginbotham to Thomas, and, (3) since we disagreed as to the framing of the call, we inevitably disagreed as to Thomas' response and whether his response fully meets the cry out of the call. Accordingly, our disagreements could not be reduced to one co-authored piece. Thus, here, I alone pen this particular essay, with hopes that one day responding essays will follow on those three points as mine does below.

My essay is presented simply in three parts. I will start this essay by arguing the benefits of Higginbotham issuing of an open, public call out to Justice Thomas. Here, I first explore how the personal was made public with Thomas' nomination. The personalization of constitutional interpretation, in my view more commonly referred to as the spirit of the constitution, is at the core of my examination of Higginbotham's call.

Then in Part Two, I examine the letter and explain my justifications, in both the words and the spirit of the letter, for my interpretation of Higginbotham's call out. My essay considers the Higginbotham letter as calling Thomas to a more sympathetic or personally empathetic reading of the constitution. Higginbotham urged Thomas to consider a more realistic read that considers the personal and real lives of underrepresented people in America and urged him to interpret the constitution in a way that includes them (and even Thomas himself)⁴⁰ in the necessary reach of the constitution. My essay reads the letter as calling Thomas to a more personal read of the constitution, i.e., for Thomas to personally see how various constitutional interpretations impact him, as a Black person in America, and other nonwhites and dispossessed groups as desiring, and certainly deserving beneficiaries of, the promises of a living constitution.

In Part Three, I examine several of Thomas' responding opinions that I believe illustrate that he occasionally understands the call that is of benefit to him personally. Here, Thomas surprises me and, perhaps, surprised Judge Higginbotham, too. If Thomas can occasionally, even emotionally and painfully, personally see the exclusion that other justices make of the personal experiences of those historically excluded, then there is hope for so many personal realities like mine who have suffered under rigid interpretations of the text of the constitution in some ways, and the unexplained rejection of literal rigid interpretations in other ways.⁴¹ If Thomas just fails to understand the full call and perhaps accepts it later, he would not be the first Supreme Court justice who switched some positions as the Justice aged, or sadly after he or she retired. Sadly and dreadfully often this was too late to make a difference in the Court's tally for the vote in favor of personal protections for the dispossessed.⁴²

40. See, e.g., Higginbotham, *supra* note 1, at 1023-25.

41. Once in a constitutional law class I was teaching, a self-proclaimed conservative student kept arguing for a literal meaning of the constitution taking its text to the full meaning. I asked him, then, what does the word "equal" mean, and under his theory what did the "Equal Protection" clause demand from government. He paused a long time as he thought about my question; and, then he said he would have to reconsider his argument as he did not want to argue for full equality; he admitted, though, the word equal should literally mean equal.

42. Several justices rethought certain positions. See Emily Bazelon, *Sandra Day Late*, SLATE, www.slate.com/articles/news_and_politics

In my conclusion, with this essay, I call out for a fuller response from Thomas, on this 25 year anniversary, and from all of us that want ourselves finally included in the promises of America. America, as the land of the free, and the Court, through its Justices as a protector of constitutional liberty and justice for all, must see this personal inclusion for all persons in America in both the amorphous spirit of the constitution and the letter of its rulings. Judge Higginbotham issued the call. Now along with Justice Thomas, we must see his call as demanding the only appropriate response: recognition of personal inclusion of constitutional liberties for us all.

II. THE PUBLIC NATURE OF THE CALL—AN OPEN LETTER AS PERSONALLY VALUABLE

Perhaps the public nature of the personal letter from Higginbotham to Thomas was prognosticated from the earlier signs in the confirmation process that matters seemingly private would go public. Even in offering him the nomination, President Bush selected a place regarded as intimately private. President Bush took Thomas into Bush's private bedroom to offer the opportunity to Thomas.⁴³ Thomas's Black body, and allegedly his voiced choices on how he wanted to use his body, became part of the discourse during the public confirmation hearings.⁴⁴ Thomas' sexuality became an issue as to the law and Thomas' marriage to his wife, a White female,⁴⁵ and as to the allegations of sexual harassment of a former employee, Professor Anita Hill, a Black female.⁴⁶

So Judge Higginbotham's making a private communication public may be regarded as essential, given the themes of the hearings, and may be regarded as relatively mild as compared to these earlier public discourses on matters that Thomas likely would have preferred to keep private or not have discussed at all. This section will focus on the inevitability of the personal made

/jurisprudence/2013/05/justice_sandra_day_o_connor_s_bush_v_gore_regrets_s_he_shouldn_t_have_retired.html (last visited Dec. 26, 2015); Andrew Cohen, *Why don't Supreme Court Justices ever change their minds in Favor of the Death Penalty?*, THE ATLANTIC (Dec. 10, 2013), www.theatlantic.com/national/archive/2013/12/why-dont-supreme-court-justices-ever-change-their-minds-in-em-favor-em-of-the-death-penalty/282100/.

43. MORRISON, *supra* note 1, at xiv.

44. *Id.* at xiii-xiv.

45. See, e.g., Femi Redwood and Julie Compton, *An Open Letter to Clarence Thomas from an Interracial Lesbian Couple*, ADVOCATE (June 30, 2015), www.advocate.com/commentary/2015/06/30/open-letter-clarence-thomas-interracial-lesbian-couple.

46. See generally Nellie Y. McKay, *Remembering Anita Hill and Clarence Thomas: What Really Happened When One Black Women Spoke Out*, in MORRISON, *supra* note 1, at 269-89.

public through the letter and the intrinsic value of open personal letters as seen in Judge Higginbotham's letter and in other public letters through history.

A. *The Personal Made Public was Inevitable*

The personalized and sexualized nature of the hearings begs the question as to why Higginbotham would send Thomas a public letter and what value there is in making the personal public. Likely, Higginbotham did not think: well, since the Senate is already in Clarence Thomas's behind closed doors, covert activities, I will do so, too. Of course, some speculate that Higginbotham went public out of jealousy that Thomas, and not he, received the nomination.⁴⁷ Putting any speculation of jealousy of Thomas to the side, Higginbotham's letter serves more nuanced values for the public nature of his personal call issued by letter to Thomas. Higginbotham stated a reason for the public call. He wrote, "In short, Justice Thomas, I 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 evaluate the choices you have made or will make."⁴⁸ Given that the letter call was issued 25 years ago, this essay focuses more on the record of the letter to evaluate the choices Thomas has made. The overriding choice, and hence purpose of the public letter, was to emphasize the importance of making the personal a part of the public law. Thus, it was inevitable that the call was issued publicly.

The letter, making the seemingly personal public, was important as it reflects the nature of the call for Thomas to make the constitutional promises publicly personalized or personified for all in the Court's rulings and particularly in Thomas' opinions. As Higginbotham later explained, Justice Marshall, who was Justice Thomas' predecessor and as recognized by Justice O'Connor, imparted "his life experiences, pushing and prodding us to respond not only to the persuasiveness of legal arguments but also to the power of moral truth."⁴⁹ Without these stories, all the Court would have to rely on would be its own privileged and, perhaps, prejudiced lives.⁵⁰ The public record, hence, provides a record, if needed, to remind us of what we may have lost with Thomas' confirmation. We may have lost a Justice on the Court willing to

47. Merida & Fletcher, *supra* note 18. There is some indication that Higginbotham was also passed over when Thurgood Marshall was nominated earlier. See Glaberson, *supra* note 27.

48. Higginbotham, *supra* note 1, at 1005.

49. See A. Leon Higginbotham, *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028, 1041 (1993) (citations omitted).

50. *Id.* at 1042.

bring a personal truth to the Court that will accentuate the moral truth of the Court by including experiences and stories too easily disregarded by the privileged elite.

When persons or communities are left out of the general discourse, a public letter of reminder is priceless. A public letter is priceless for left out communities, especially when related to areas where many from dominant and privileged places would prefer to keep silent and unaddressed. The ignoring and sweeping under the rug the plights based in the dehumanization and exclusion of dispossessed persons has been an unfortunate part of our constitutional heritage, even with our founders refusing to use the words slaves or slavery in the constitutional text, while still promoting such a savage and peculiar institution as in line with American virtues.⁵¹ Thus, while an oppressor has reasons for maintaining systems privately although the impact is publicly felt by many dispossessed, even the oppressed may be motivated to keep dirty laundry and personal matters hidden.

A public letter is priceless for left out communities, even if those communities would rather not have the public disclosure of their private unclean, secretive matters. Particularly in the Black community, airing dirty laundry, though essential for ventilation, is often frowned upon.⁵² This may be rooted in the slavery experience which denied Blacks personal privacy. Perhaps as a result of historical de jure abuse and exploitation, particular pressure seems to be put on Blacks, particularly on Black women and by other Blacks on Blacks, to not expose private or sexual matters or report Black men even when abused.⁵³ The Thomas confirmation, with sexual harassment allegations by Professor Anita Hill, brought publicly taboo topics about Black bodies to the forefront in an already politically charged process of judicial appointments.⁵⁴ Notably, a public letter was needed notwithstanding the Hill testimony. Thomas' confirmation was already publicly about seemingly personal topics and newsworthy even prior to Hill's testimony and the manner of the sexual

51. See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

52. See John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to “The Law School Five,”* 46 HOW. L.J. 175, 179-80 (2003). When I was a girl growing up in Mississippi, many people did not have a clothes dryer. We hung our laundry on clotheslines outside to dry. It was considered improper to hang adult underwear stretched out to dry, even though they were clean. For an interesting comedy about airing laundry, literally and figuratively, in the Black community. See *Dirty Laundry* (2006), directed by Maurice Jamal.

53. See Feminista Jones, *Why Black Women Struggle More With Domestic Violence*, TIME (Sept. 10, 2014), <http://time.com/3313343/ray-rice-black-women-domestic-violence/>.

54. This process can be still quite charged. See, e.g., Maya Rhodan, *President Obama Says He Will Nominate Justice Scalia's Replacement*, TIME (Feb. 13, 2016), <http://time.com/4220790/president-obama-justice-scalia-replacement/>.

questioning by some of the senators.⁵⁵ Thomas' conservative positions against affirmative action, called personally hypocritical by some, and his positions against other constitutional or statutory protections for Blacks in the midst of the effects of historical and continuing racial discrimination in this country, were newsworthy and personal.⁵⁶

A public letter denouncing personal exclusions was essential, especially given that so many were taking the Thomas nomination personally. Over the past twenty five years and as a Black first generation attorney in my family, I have thought a lot about Thomas's positions.⁵⁷ Thomas may say not to take it personally, but I feel many of his rulings personally in my life and the lives of future generations of people like me, and interestingly like him, too.⁵⁸ Having just completed law school when he was nominated, I shared many conversations with community members who were watching the televised broadcast of his hearings. Thomas' nomination, hearing, confirmation, and aftermath were highly personal and extremely public at the same time. From his sex drive, to his manhood, to his interracial marriage, once considered private or taboo topics were publicly exposed and probed. In recent years, Thomas' wife kept their interracial marriage in public view by statements she made and telephone calls she placed to Anita Hill.⁵⁹

Even without the allegations of sexual misconduct, it was inevitable that Thomas' confirmation would be taken so very personal, necessitating a public call as to this personal nature. The rights that Thomas' predecessor fought so valiantly for were personal rights to many descendants of former slaves and others of the dispossessed. Their exclusion throughout the country's history

55. Irin Carmon, *Did Arlen Specter ever Apologize to Anita Hill?*, SALON (Oct. 15, 2012), www.salon.com/2012/10/15/did_arlen_specter_ever_apologize_to_anita_hill/. Also see the documentary *Anita: Speaking Truth to Power* (New York 2014).

56. See generally Michael deHaven Newsom, *Clarence Thomas, Victim? Perhaps, and Victimizer? Yes—A Study in Social and Racial Alienation from African Americans*, 48 ST. LOUIS U. L.J. 327 (2004).

57. Angela Mae Kupenda, Remarks, *Law School Professors Comment on the Campus Boycott of Justice Clarence Thomas: Did they Do the Right Thing?*, 37 J. OF BLACKS IN HIGHER EDUC. 115, 118 (2002).

58. See Dahlia Lithwick, *Pre-Racial Justice Clarence Thomas says blacks didn't think about race in the 1950s South*, SLATE (Feb. 25, 2014), www.slate.com/articles/news_and_politics/jurisprudence/2014/02/clarence_thomas_childhood_in_georgia_images_and_video_of_the_south_show.html (Thomas "argued that Americans are oversensitive and thin-skinned about race" and that people did not think about race in the 1950s); but see *Civil Rights Movement Timeline From 1951 to 1959*, ABOUT EDUC., <http://afroamhistory.about.com/od/timelines/a/50sCVTimeline.htm> (last visited Mar. 7, 2016).

59. See Charlie Savage, *Clarence Thomas's Wife Asks Anita Hill for Apology*, N.Y. TIMES (Oct. 20, 2010), www.nytimes.com/2010/10/20/us/politics/20thomas.html.

from the guarantees of equality and justice for all were not just academic issues to be debated. This historic exclusion in America impacted many, like me, as to where and how to dine, stand in line, use the restroom, get a swallow of water on a hot day, ride on an un-crowded bus, spend the night, walk, live, shop, enjoy some barbecue, marry, sit, travel, go to school, be born, be buried, go to church, read in a library, or call for governmental help when injured often by the government its own self.⁶⁰

And, racialized exclusion was quite personal to my lived experiences, although I was born after *Brown v. Bd. of Education* was decided in 1954.⁶¹ It is no wonder I read Higginbotham's letter as a personal call, and Thomas's response as failing to personally sufficiently respond by seeing those who look like me (and Thomas, too!) as deserving, personal beneficiaries of constitutional protections. After all, Thomas replaced Thurgood Marshall, and Marshall had an effect on the personal lives of so many. Marshall's legacy, as to his civil rights litigation and his being the reminding conscience of the Court, was famous, but it was more importantly personal. Justice Marshall with other civil rights lawyers, succeeded in cases that helped pry open academic doors, which had been locked shut to keep out those with color like me because we are not White. As a first generation law student in my family, my exposure to lawyers of any race had been limited. Growing up, I was in awe of civil rights attorney R. Jess Brown,⁶² who had lived in a nice but modest home with his family in my neighborhood. Later, as a Black law student at a predominantly White law school in Mississippi that did not hire a Black female professor until around 1989 and a Black male professor until 2014, I found in Justice Marshall's arguments, and even his dissenting opinions, my voice and inclusion. I regarded Justice Thurgood Marshall as my beloved "Father" in the law.

60. Although we are post de jure Jim Crow, for an excellent discussion of how racism is now so still and deeply embedded in the structures of America, see DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (New York University Press 2014); Angela Mae Kupenda, *Breaking Cartels to Stymie the Reproduction of Racism and Breaking them in Time*, Book review of DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (New York University Press 2014), *The JOTWELL Online Law Journal*, Legal Scholarship We Like (2015).

61. See generally Angela Mae Kupenda, *Loss of Innocence (essay)*, in *LAW TOUCHED OUR HEARTS: A GENERATION REMEMBERS BROWN V. BD. OF EDUCATION*, EDS. MILDRED WIGFALL ROBINSON AND RICHARD J. BONNIE 36 (Vanderbilt 2009); Angela Mae Kupenda, *The Struggling Class: Replacing an Insider White Female Middle Class Dream with a Struggling Black Female Reality*, 18 AM. U. J. GENDER, SOCIAL POL'Y & L. 725 (2010).

62. See Associated Press, *Obituary: R. Jess Brown, 77, Civil Rights Lawyer In Mississippi Cases*, N.Y. TIMES (Jan. 3, 1990), www.nytimes.com/1990/01/03/obituaries/r-jess-brown-77-civil-rights-lawyer-in-mississippi-cases.html.

For my readers here who were included in the constitution at its inception, it may be hard for you to understand the personal injuries of the personal exclusion of others. It may be hard for insiders to the American dream to see how personal it is--the failing to gain full access to the lived American dream--for outsiders. And, it did not just recently become personal. Many Americans a generation ahead of me can say they can personally remember where they were when they heard of President John F. Kennedy's assassination in November 1963.⁶³ I remember too, although I was a child in an elementary school classroom in a separate and unequally funded school house. I remember the despairing and sorrowful reactions of my teachers at our all Black segregated public school, and the grief I witnessed in both of my parents once I arrived home. Kennedy had been one of their hopes.⁶⁴ Now he was gone.

But I also personally remember quite painfully and sorrowfully myself when I heard the news of Justice Thurgood Marshall's retirement from the Court and later where I was and becoming so distraught in an airport with my colleagues when we heard of his passing away. Justice Marshall retired from the Court in 1991, less than two years prior to his passing away.⁶⁵ His passing was earth shaking for the still dispossessed and those who cared about them, but so had been his retirement. So Marshall's life, legacy, retirement, and passing away were personal for me, as the impact would be felt in not just laws and rulings, but in how those laws limit my own personal life and those younger family and community members who follow me. It should be obvious then, that Justice Clarence Thomas's nomination was personal to me, too, but personal and alarming.⁶⁶

63. See, e.g., Maureen King Cassidy, *50 Years Later: Where Were You When JFK Was Assassinated?*, US NEWS (Nov. 11, 2013), www.usnews.com/news/articles/2013/11/11/jfk-50-years-later--where-were-you-when-jfk-was-assassinated.

64. See, e.g., Richard Prince, *Why Blacks Loved John F. Kennedy*, THE ROOT (Nov. 19, 2013), www.theroot.com/blogs/journalisms/2013/11/why_black_americans_loved_president_john_f_kennedy.html.

65. Linda Greenhouse, *OBITUARY, Thurgood Marshall, Civil Rights Hero, Dies at 84*, N.Y. TIMES (Jan. 25, 1993), www.nytimes.com/learning/general/onthisday/bday/0702.html; Andrew Rosenthal, *Marshall Retires from High Court; Blow to Liberals*, N.Y. TIMES (June 28, 1991), www.nytimes.com/1991/06/28/us/marshall-retires-from-high-court-blow-to-liberals.html?pagewanted=all.

66. When Justice Thomas was invited to speak at the University of North Carolina School of Law in 2002, five Black law professors declined to participate and instead held a teach in and reread the Higginbotham letter at this event. They too, took his appointment personally as they stated in their public statement:

In closing, we recall that shortly after Clarence Thomas became the 106th justice of the United States Supreme Court, Judge A. Leon Higginbotham, Jr. wrote An Open Letter to Justice Clarence Thomas

Actually, Clarence Thomas's nomination by President Bush was personally disturbing for many, and led to much confusion for others.⁶⁷ Though the Anita Hill testimony to me was most believable, my opposition, as a recent law graduate, to the Thomas appointment was formed on other grounds prior to her testimony. I was particularly dismayed that Thomas, though he benefitted personally from affirmative action, wanted it dismantled for others.⁶⁸ Further, he rejected the notions of constitutionally protected privacy rights, yet enjoyed that right in his interracial marriage and requested personal privacy of his personal life

from a Federal Judicial Colleague. In explaining the reasons for writing the letter, Judge Higginbotham observed, "By elevating you to the Supreme Court, President Bush has suddenly vested in you the option to preserve or dilute the gains this country has made in the struggle for equality." Over the past decade, Justice Thomas has time and again exercised the wrong option. While the political right does not need Justice Thomas to push its agenda against social justice and equality, it does need him to put a black face on that agenda. Justice Thomas operates as powerfully on a symbolic register as on a jurisprudential one. For all its talk of colorblindness, the political right realizes that Justice Thomas will not be an effective icon of racial conservatism until African Americans ourselves accept and embrace him. We cannot.

We will 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, which we have attached to this statement. We will re-read it to secure some of the hope and pride in our nation's history, not just black history. We will re-read it to summon inspiration to add our voice and presence to the struggle for justice and equality that Justice Thomas is so intent on reversing. We invite others to read the letter as well.

With regret,

Charles E. Daye

Marilyn V. Yarbrough

John O. Calmore

Adrienne D. Davis

Kevin V. Haynes

See John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks—From Clarence Thomas to "The Law School Five,"* 46 How. L.J. 175, appendix (2003); Angela Mae Kupenda, *Law School Professors Comment on the Campus Boycott of Justice Clarence Thomas,* J. OF BLACKS IN HIGHER EDUC., n. 37, Autumn 2002, 115, 118.

67. Bryant Gumbel, *African American Groups Oppose Supreme Court Nomination of Clarence Thomas,* NBC TODAY SHOW (Sept. 10, 1991), <http://indiana.nbclearn.com/portal/site/k-12/flatview?cuecard=3782>.

68. Earl Ofari Hutchinson, *Clarence Thomas: Affirmative Action's Biggest Beneficiary and Biggest Hypocrite,* THE HUFFINGTON POST, June 10, 2013, www.huffingtonpost.com/earl-ofari-hutchinson/clarence-thomas_b_3412953.html.

during and after the hearings.⁶⁹ And later, though complaining when others addressed race, himself personally complained that his hearing was a “high tech lynching for uppity Blacks.”⁷⁰

So, Thomas benefitted from others’ personal interpretations of the constitution to include him, but he has rejected the needed personal constitutional inclusion of others like him. Thus, the airing of this dirty laundry in the Higginbotham letter was essential, to provide a record for the future evaluators of Thomas’ record.⁷¹ In a later article, further explaining his open letter and responding to some of the responses he had received, Judge Higginbotham pointed to the “tragic irony when a Black Justice adopts the anti-minority position advocated by the most conservative and racially uninformed Justice on the court.”⁷² In other words, in many of his rulings Thomas seems to forget that he, too, will suffer systemically and personally under his own rulings.

This anticipated irony of Thomas’ appointment led many to question what Thomas’ confirmation would personally mean for nonwhites and other underrepresented groups. Yet, Thomas was confirmed with a Senate vote of 52-48, with even several Democrats supporting the vote. At the time of Thomas’ confirmation vote, the racial composition of the Senate was all White and the gender composition was 98 men and two women.⁷³

69. His pleas were somewhat inconsistent. As explained by one writer:

The week he took his seat, photographs of Thomas and his wife, Virginia, graced the cover and seven inside pages of the magazine *People*. After refusing indignantly to discuss any aspect of his personal life with the Senate Judiciary Committee, he posed with his wife for a series of astonishingly intimate portraits: grinning cheek to cheek, holding hands on the plush carpet, curled up on the sofa reading the Bible. “A lot of people on the Court couldn’t believe it,” one former clerk says. “The whole *People* thing was so far off the wall that a number of them thought the issue was a parody.” Near the end of Thomas’s first term, Virginia Thomas organized a party at the Court for his forty-fourth birthday, and that, too, raised eyebrows. “Some of the Justices were not comfortable with how political a crowd it was,” another former clerk says, “Inviting the post-disgrace Ed Meese to the Court was viewed as being in questionable taste.”

Jeffrey Toobin, *The Burden of Clarence Thomas*, THE NEW YORKER (Sept. 27, 1993), www.newyorker.com/magazine/1993/09/27/the-burden-of-clarence-thomas.

70. Ian C. Friedman, *Words Matter*, www.iancfriedman.com/?p=2595 (last visited March 7, 2016).

71. Higginbotham, *supra* note 1, at 1005. Higginbotham wrote, “I 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 evaluate the choices you have made or will make.” *Id.*

72. A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1413 (1994).

73. See R.W. Apple, Jr., *The Thomas Confirmation; Senate confirms Thomas, 52-48, Ending Week of Bitter Battle; Time for healing, Judge Says*,

Thus, essentially Thomas was handpicked by, and confirmed by, many who were personally included in the constitution and policies over the years. Some of them had seemed to support the notion that we should never overcome.⁷⁴ Interestingly though, support for Thomas' overall approval was not neatly divided on racial or gender lines.⁷⁵

The public nature of the letter was critical for Thomas' supporters, too. Thomas' confirmation was personal for his conservative supporters, too, in the sense that he was expected to continue the notions that personally included them, and did not include others.⁷⁶ And when national decisions impact people in personal ways, persons do not let go easily. Thus, the debate and scrutiny around Thomas' fitness for office did not end with this confirmation, but has lingered over his 25 years on the Court.⁷⁷

The African American jurist Federal Judge A. Leon Higginbotham, Jr., echoed in his open letter that the Thomas confirmation was personal. And, as a scholar, he eloquently took his concerns about the personal to the public. Airing personal dirty laundry publicly, though frowned upon, can be beneficial when the personal is at the heart of the public debate. Then, openness can be priceless. For example, and as discussed below, significant value is seen in other historical and personal open letters.

B. The Priceless Value of other Personal and Publicly Open Letters

Through the years, many publicly open letters on personal matters have been shared. In other words, public calls for personal responses have been issued. Famous public calls have varied from the Apostle Paul's letters to Christian churches protesting their treatment of the poor, to Ralph Waldo Emerson's letter protesting the immoral treatment of Native Americans by the government

N.Y. TIMES (Oct. 16, 1991), www.nytimes.com/1991/10/16/us/thomas-confirmation-senate-confirms-thomas-52-48-ending-week-bitter-battle-time.html?pagewanted=all.

74. See, e.g., Deborah Stone, *Race, Gender at the Supreme Court*, PROSPECT (Winter 1992), <http://prospect.org/article/race-gender-supreme-court>.

75. Merida & Fletcher, *supra* note 18 ("initially, at least, more than twice as many African Americans, according to polls, believed him as believed Anita Hill").

76. See, e.g., Nadine Cohodas, *The Evolution Of Strom Thurmond*, CHI. TRIB. (Sept. 27, 1991), http://articles.chicagotribune.com/1991-09-27/news/9103130554_1_clarence-thomas-supreme-court-thurgood-marshall.

77. See, e.g., Garrett Epps, *Clarence Thomas Unusual Evolution*, THE ATLANTIC (July 14, 2015), www.theatlantic.com/politics/archive/2015/07/clarence-thomas-unusual-evolution/398471/; Elizabeth Slattery, *Why does America love Ruth Bader Ginsburg and Loathe Clarence Thomas*, THE DAILY SIGNAL (June 24, 2015), <http://dailysignal.com/2015/06/24/why-does-america-love-ruth-bader-ginsburg-and-loathe-clarence-thomas/>.

and settlers, to Rev. Dr. Martin Luther King's letter from jail appealing to a higher calling for White Christian ministers in the treatment of nonviolent and peaceful Blacks.

Many people, especially those in the Southern Bible Belt in which I live and work,⁷⁸ are familiar with perhaps, from the Bible, the Apostle Paul's letters to the Christian churches at Rome, Corinth, Galatia, Ephesus, Phillipi, Colosse, and Thessalonica.⁷⁹ Paul frequently used these ecclesiastical letters to the congregations personally "to admonish, praise, instruct, or inform."⁸⁰ Yet, the public nature of Paul's letters serves a continuing purpose and a broader call to the church today.

It is interesting that, most of the public letters I read, including those of Apostle Paul, were used to call individuals to a higher moral self and for us to recognize the humanity of others. As an example, the great poet and essayist Ralph Waldo Emerson⁸¹ wrote an open letter to President Martin Van Buren against the Cherokee removal before the Civil War.⁸² The Cherokee Removal by the federal government, in complicity with the claims of White Americans to Indian lands as a forced removal of Indians from their land, led to the deaths of thousands of Indians in this removal which has been called "the trail of tears."⁸³ Ralph Waldo Emerson sent an open letter in 1836 to President Martin Van Buren, appealing to his civility and his beliefs in God. Emerson asked whether the American citizens, or settlers, were savage or mad as to the horrible plans crafted against the Indians. Emerson then pled, "to pray with one voice more that you, whose hands are strong with the delegated power of fifteen millions of men, will avert with that might the terrific injury which threatens the Cherokee tribe."⁸⁴ Emerson's pleas did not change the president's mind and did not stop the tragic circumstances inflicted upon the Cherokee tribe; however, the open letter served a purpose. Emerson's letter let the Indians know his voice, and some others, were on their side. Thus, Emerson's letter serves as a

78. See generally Angela Mae Kupenda, *Challenging Presumed (Im)Morality: A Personal Narrative*, 29 BERKELEY J. OF GENDER & JUST. 295 (2013-14).

79. The Holy Bible, King James Version, The ORIGINAL AFRICAN HERITAGE STUDY BIBLE, ED. CAIN HOPE FELDER, Revised Standard Version. Valley Forge, PA: Judson Press, 2007.

80. FELDER, *supra* note 79, at 1625.

81. *Ralph Waldo Emerson*, DICTIONARY OF UNITARIAN & UNIVERSALIST BIOGRAPHY, <http://uudb.org/articles/ralphwaldoemerson.html> (last visited Mar. 10, 2016) (Emerson was also opposed to slavery).

82. *Ralph Waldo Emerson's Letter*, CHEROKEE NATION, www.cherokee.org/AboutTheNation/History/TrailofTears/RalphWaldoEmersonsLetter.aspx (last visited Mar. 8, 2016).

83. *Id.*

84. *Id.*

voice and a reminder for those who may choose to rewrite history, and depict the removal as the “happiest” of times for all.⁸⁵

Similarly, Rev. Dr. Martin Luther King, Jr., sent an open letter appealing to the moral compass of others in 1963. In King’s, *Letter from Birmingham Jail*,⁸⁶ King answered the criticism of White southern ministers directed to King about the nonviolent movement for racial justice. Patiently and pointedly explaining the urgency of the movement, King explained his disappointment with the White moderate and with the organized church and its failure to seek justice for all. The letter was critical not just to call White Christians to an agape love for justice, but also for those oppressed to distinguish in their hearts religion that is love in action from religion that merely supports an oppressive status quo.

King’s call out to these ministers was a handwritten open letter response written from his jail cell, smuggled out in bits and pieces written on scraps of paper, written in response to a public statement issued to him by eight southern White ministers.⁸⁷ While King’s letter did not overwhelmingly garner the response he called for, to get the eight White ministers to reconsider their moral compass and join the fight for inclusion of all in the promises of our country, King’s open letter has had an enduring effect. As reported by one site:

Today, 50 years after it was written, King’s powerful message continues to resonate around the world—the letter is part of many American school curriculums, has been included in more than 50 published anthologies and has been translated in to more than 40 languages. In April 2013, a group of Protestant clergy released an official—albeit considerably delayed—response to King’s letter. Published in *The Christian Century*, one of the first publications to carry King’s own words, the letter continues King’s call to religious leaders around the world to intervene in matters of racial, social and economic justice.⁸⁸

Thus, while the movement for racial justice and equality rages on, King’s open letter has served as a source of inspiration and challenge for many.

85. “President Van Buren, apparently unmoved by Emerson’s letter, reported to Congress in December 1838: ‘It affords sincere pleasure to apprise Congress of the entire removal of the Cherokee Nation of Indians to their new homes west of the Mississippi. The measures, authorized by Congress at its last session have had the happiest effects.’” T.S. Twibell, *Rethinking Johnson v. McIntosh (1823): The Root of the Continued Forced Displacement of American Indians Despite Cobell v. Norton (2001)*, 23 GEO. IMMIGR. L.J. 129, 197 (2008) (citations omitted).

86. MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 64 (Signet Classic 1963, 2000).

87. *Id.* at 64.

88. Barbara Maranzani, *King’s Letter from Birmingham Jail, 50 Years Later*, HISTORY (Apr. 16, 2013), www.history.com/news/kings-letter-from-birmingham-jail-50-years-later.

Over the past 25 years since Higginbotham's open letter, other open letters have been sent.⁸⁹ In 1994 Professor Jerome McCristal Culp, Jr., penned an open letter to another justice.⁹⁰ Culp urged Justice Ruth Bader Ginsburg to reject "the middle course" of Justice Sandra Day O'Connor that "is not likely to achieve racial justice."⁹¹ Culp argued that Ginsburg should give judicial voice to the voices that have not been heard on the Court, and to understand voices of people of color, too, and not just White women like herself.⁹² Ginsburg has evidently heeded the call of Culp's letter.⁹³ As to Justice Thomas, well I believe he has not heeded the call, however further examination of Higginbotham's call would first be helpful.

III. THE CALL OF THE HIGGINBOTHAM LETTER

After Judge Higginbotham's passing away, his nephew Professor F. Michael Higginbotham actually drafted an imagined letter from his uncle Judge Higginbotham, titled, *An Open Letter from Heaven to Barack Obama*.⁹⁴ Before raising particular matters with the President, nephew Higginbotham, writing as his uncle, stated, "I believe [my risky letter to Justice Thomas] sparked valuable public discourse"⁹⁵ and was written as a reminder to Justice Thomas about Justice Marshall's great legacy."⁹⁶ I agree with the Judge's nephew about the meaning of the letter and also with his ultimate view that Justice Thomas did not heed the letter's call.⁹⁷

89. An interesting letter was also sent from one Black minister to others pleading that they do not abandon President Obama. See Rev. Otis Moss, III, *Rev. Otis Moss III to Black Clergy: Vote Regardless*, DOMINION OF N.Y. (May 15, 2012), www.dominionofnewyork.com/2012/05/15/an-open-letter-from-reverend-otis-moss-iii-to-the-black-clergy/#.VuCK6kAi6Ck.

90. See Jerome McCristal Culp, Jr., *An Open Letter from One Black Scholar to Justice Ruth Bader Ginsburg: Or, How not to Become Justice Sandra Day O'Connor*, 1 DUKE J. OF GENDER, L., & POL'Y 21 (1994).

91. *Id.* at 24.

92. *Id.* at 34.

93. "During an interview with MSNBC's Irin Carmon, Justice Ruth Bader Ginsburg commented on race relations in America saying, 'people who think you could wave a magic wand, and the legacy of the past is over, are blind.'" *Ginsburg on race relations in the US*, MSNBC LIVE (Feb. 16, 2015), www.msnbc.com/msnbc/watch/ginsburg-on-race-relations-in-the-us-399816259700. Her rulings have been consistent.

94. F. Michael Higginbotham, *An Open Letter from Heaven to Barack Obama*, 32 U. HAW. L. REV. 1 (2009) (Michael is biologically Judge Higginbotham's cousin, but family (and perhaps African American custom) led to his referring to his cousin as Uncle Leon, *Id.* at 1 N. a1).

95. *Id.* at 2.

96. *Id.*

97. *Id.* at 2 & n. 7; see also Michael Higginbotham, *An Open letter from Heaven to Justice Samuel Alito*, 23 HARV. BLACK LETTER L.J. 9, 19 (2007) ("As part of these personal values, you stressed at your confirmation hearing the

Higginbotham's letter was appropriately a personal call out for Thomas to transcend framers intent arguments and original constitution limitations. In my view, the fuller spirit of the constitution preceded the limitations of the words. In the beginning was the spirit, not the letter of the constitution limited by racial compromises. In the beginning was the spirit of the constitution that should transcend a literal limiting interpretation fixed on equality extended only to some.

In other words, Higginbotham is calling Thomas to remember the forgotten persons whose essence appears in the preamble of the constitution,⁹⁸ yet whose plight is often discounted or ignored in the Court's rulings. Higginbotham stated:

And I have seen the brave and courageous people, black and white, give their lives for the civil rights cause. My memory of them has always been without bitterness or nostalgia. But today it is sometimes without hope; for I wonder whether their magnificent achievements are in jeopardy. I wonder whether (and how far) the majority of the Supreme Court will continue to retreat from protecting the rights of the poor, women, the disadvantaged, minorities, and the powerless. And if, tragically, a majority of the Court continues to retreat, I wonder whether you, Justice Thomas, an African-American, will be part of that majority.⁹⁹

In other words, Higginbotham called Thomas to include Thomas himself and others personally in the promises of the constitution.¹⁰⁰ In a later article, Higginbotham quoted Justice Hugo Black, reminding, "Courts stand . . . as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or . . . are nonconforming victims of prejudice and public excitement."¹⁰¹ Thurgood Marshall's opinions, often

struggles of your parents in the early twentieth century as members of poor immigrant families from Italy.....What you and I will discuss in the future when you join me in Heaven is how generations to come evaluate your attempts to reconcile these liberal and moderate personal views with your conservative judicial philosophy.").

98. The Preamble to the Constitution reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl.

99. Higginbotham, *supra* note 1, at 1026.

100. "We the people,' it's a very eloquent beginning. But when that document was completed on the 17th of September in 1787, I was not included in that 'we the people.'" *See, e.g., Barbara Jordan Remembered*, NPR (Jan. 17, 1996), www.pbs.org/newshour/bb/remember-jan-june96-jordan_01-17/.

101. A. Leon Higginbotham, *Dedication to the Honorable Nathaniel R. Jones*, 63 U. CIN. L. REV. 1519, 1521 (1995) (citing *Chambers v. FL*, 309 U.S. 227, 241 (1940)).

dissenting, embraced this spirit. He was the conscience of the Court, a gadfly for justice, and encouraged a constitutional spirit to include the forgotten ones and to perpetuate social engineering for justice. It is to this spirit's personification to appear in Justice Thomas' rulings that Higginbotham called out in the letter.

While I am in agreement with Higginbotham's open call to Justice Thomas, I found it perplexing that Higginbotham's letter did not expressly address Professor Anita Hill's testimony at the Thomas hearing. Initially, I wondered if his silence in the letter on this point was yet another example of silencing women of color.¹⁰² Later, I discovered some evidence that Higginbotham supported Hill.¹⁰³ While I still wonder about that Hill is not mentioned specifically in the open letter, I honestly recall my own reaction as to the Hill testimony when the hearings were taking place.

In 1991, I was clerking on the Fifth Circuit Court of Appeals for Chief Judge Charles Clark. I clerked in his final term on the court and I was his first, and thus his only, nonwhite law clerk. Judge Clark was regarded as a moderate judge, by many of my White southern law professors, and as a conservative, by me. My co-clerks were both White females. One day during the Thomas confirmation hearings, Judge Clark wanted us to all come into his chambers library to discuss the hearings and the nomination of Thomas. I was quite hesitant, knowing my experiences and viewpoints were much different from Judge Clark and also different, to some degree, from my White liberal and privileged co-clerks. I experienced race, and even gender, in America quite different from them. After we settled down at the beautiful mahogany table with the Judge, he explained to us that he was in favor of the Thomas nomination. Then, Judge Clark wanted each of us to each explain our positions on Thomas. My co-clerks mentioned their disagreement with Thomas on privacy rights and also the Anita Hill testimony.

When the Judge focused on me, I recall saying that I believe Hill, but that I do not even have to rely only on that issue. I replied that I was opposed to Thomas' confirmation even before the Hill testimony. So, I think here, I cannot fault Higginbotham too much for not mentioning Hill in his open letter, though I continue to ponder the exclusion.

102. See, e.g., Maritza I. Reyes, *Professional Women Silenced by Men-Made Norms*, 47 AKRON L. REV. 897, 942-51 (2015).

103. See, e.g., Mike Wiser, *Anita Hill pays Tribute to Judge Higginbotham*, Nov. 30, 2002, THE HARVARD L. RECORD; A. Leon Higginbotham, Jr., *Chapter One: The Hill-Thomas Hearings, What took Place and What Happened: White Male Domination, Black Male Domination, and the Denigration of Black Women*, in *Race, Gender and Power in America; The Legacy of the Hill-Thomas Hearings*, Anita Faye Hill and Emma Jordan, Eds. (1995), in THE WASH. POST, www.washingtonpost.com/wp-srv/style/longterm/books/chap1/race.htm (last visited December 26, 2015).

I want to mention here that the entire conversation with Judge Clark was quite engaging. Eventually, only the two of us were debating in the chambers that fall afternoon. His secretary even came in to make sure all was well, as our voices were elevated. After a long discussion, I remember saying that it comes down to whether one trusts state government to protect their personal interests, or whether one must seek help from the federal government, including the Court, to protect one from oppressive laws, policies, and practices of one's state. Judge Clark said he did trust the state of Mississippi to protect him and people generally. I said I do not, as sadly our state has been on the opposite side too frequently¹⁰⁴ of the protection of rights of Black citizens. Since he trusted the state, he trusted states to be free to experiment in state laboratories even with certain precious constitutional dignities and liberties. My state's track record as to my own liberties and dignities, and those of my family and ancestors, did not realistically afford me the trust that the state does the right thing. Judge Clark, as a White male in Mississippi, could rely on that state as to his own life and that of his family. I concluded, then, that Judge Clark and I then will never agree, once tracing back the source of the disagreement. To that point he agreed, and we both lowered our voices and took a deep breath.¹⁰⁵

While my former Judge did not experience life as a Black person, for example, Justice Thomas did or does. Higginbotham called Justice Thomas to a more "sensitive understanding" of the Constitution and how it, with its defective interpretations, impacts the lives of so many without privilege in America.¹⁰⁶ Higginbotham urged:

104. As one example, just recently, instead of removing the confederate State Flag, our Mississippi Republican governor declared April Confederate Heritage month. The governor made this announcement during Black History Month. Steve Almasy, *Mississippi governor defends Confederate Heritage Month decree*, CNN POLITICS (Feb. 25, 2016), www.cnn.com/2016/02/25/politics/mississippi-confederate-heritage-month/.

105. I want to comment here how worried I was after this discussion that Judge Clark would hold it against me. I was Judge Clark's first Black law clerk and his only Black law clerk as he retired before the next term. Judge Clark had earlier planned on that day to write my letters of reference for a United States Supreme Court clerkship. After our discussion that day, he did. One day later, his secretary (who knew I was worried about what those letters would say, especially after our debate) called me into her office and quietly showed me the letters of reference. Although I did not land the clerkship, the Judge's references were amazing as he ranked me at the top of his long history of law clerks and gave me, in grades, an A+++ . While I greatly appreciated the letters and the Judge's respect for what he called my "innate legal ability", the Judge's later personal letters to me after my term ended suggested to me that I had not succeeded in altering his view of the constitution to include those personally disenfranchised and to understand that not all citizens in America could trust my state of Mississippi.

106. Higginbotham, *supra* note 1, at 1012-13.

I think of Justice Hugo Black. I am impressed by the fact that at the very beginning of his illustrious career he articulated his vision of the responsibility of the Supreme Court. In one of his early major opinions he wrote, “courts stand . . . as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or . . . are non-conforming victims of prejudice and public excitement.”

While there are many other equally important issues that you must consider and on which I have not commented, none will determine your place in history as much as your defense of the weak, the poor, minorities, women, the disabled and the powerless. I trust that you will ponder often the significance of the statement.¹⁰⁷

While it may have been difficult for my White southern born federal Judge to really feel what Blacks felt in the Deep South, the Higginbotham call out to Thomas is for him to exhibit sensitivity, sympathy, and even empathy based on his admission of a common history on issues of race, housing discrimination, poverty, educational denials, other racial discrimination.

In some ways, I think I understand Justice Thomas’ desire to leave his personal experiences out of his judging, to divorce his judging from the personal. I think he wants to fit, to assimilate, to not always be the outsider trying to make space for others to enter. Yet, we are still called to recover and continue, and Judge Higginbotham called Thomas to respond to this crucial purpose.

Justice Thomas has said he views his experiences of blackness and poverty as “far removed in space and time.”¹⁰⁸ Still some of the opinions discussed in the next section, and Thomas’ own claim that he was being lynched by the Senate, suggests that he is aware, when he chooses to be.

In my next section, I talk more about how Thomas has responded to the letter, and his reluctance to read the personally excluded into the promises of the constitution, though they are in the unrealized spirit of the constitution. Higginbotham urged Thomas to, “be part of what Chief Justice Warren, Justice Brennan, Justice Blackmun, and Justice Marshall and others have called the evolutionary movement of the Constitution—an evolutionary movement that has benefitted you greatly.”¹⁰⁹ I remain hopeful that Thomas will evolve, as glimpses of his evolution are seen at least in one opinion where he visibly exhibited a shaking reaction to racial oppression in America.¹¹⁰ This opinion and several others will be discussed below.

107. *Id.* at 1025.

108. *Id.* at 1026.

109. *Id.* at 1011.

110. See Smolla, *supra* note 30, at 164.

IV. THOMAS' "SOMETIMEY" RESPONSE

I agree with the overall criticism of Justice Thomas' rulings, and especially those as lodged by Judge Higginbotham in his subsequent article.¹¹¹ After some of Thomas' rulings, Higginbotham determined that "it would be futile for anyone to write another open letter to Justice Thomas, asking him to be fair,"¹¹² to the weak, to minorities, to the disadvantaged, to those in need of, and certainly deserving of, personal inclusion in the American dream and its constitutional promises.

So in this part, I will not go back through those many opinions, breaching constitutional promises, at Thomas' hand. Rather, I plan to take a different approach. I will examine several of Thomas' responding opinions that I believe illustrate that he is "sometimey." You likely will not find the word "sometimey" in a dictionary, but it has been described as acting inconsistently.¹¹³ One day Thomas is using analogies to lynching, then the next he is suggesting racism is all in the past, removed by time. Justice Thomas sometimes seems to understand the Higginbotham call and sometimes responds in a way that is of benefit to him personally and others personally dispossessed. His sometimey displays of understanding surprises me and, perhaps, surprised Judge Higginbotham, too. If Thomas can occasionally and painfully see the exclusion that other justices make of the personal experiences of those historically excluded, then there is hope that maybe, like some other Justices, he may in the future alter his position more consistently and vote in favor of personal protections and inclusion of the dispossessed.¹¹⁴

Thomas' primary error occurs when he tries to eliminate his past poverty, his Blackness, his exclusion from the American constitutional dream when he rules. As stated earlier, Justice Thomas has said he views his experiences of blackness and poverty as "far removed in space and time."¹¹⁵ He does not carry

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

112. *Id.* at 1433.

113. Nicholl McGuire, *African American View on You*, AFRICAN AMERICAN PLANET, <http://africanamericanplanet.blogspot.com/2011/10/on-acting-some-timey.html> (last visited March 21, 2016).

114. Several justices rethought certain positions. Justice O'Connor later regretted some of her votes with the radical conservatives. See Emily Bazelon, *Sandra Day Late*, SLATE, www.slate.com/articles/news_and_politics/jurisprudence/2013/05/justice_sandra_day_o_connor_s_bush_v_gore_regrets_s_he_shouldn_t_have_retired.html (last visited Dec. 26, 2015); see also Andrew Cohen, *Why don't Supreme Court Justices ever change their minds in Favor of the Death Penalty?*, THE ATLANTIC (Dec. 10, 2013), www.theatlantic.com/national/archive/2013/12/why-dont-supreme-court-justices-ever-change-their-minds-in-em-favor-em-of-the-death-penalty/282100/.

115. Higginbotham, *supra* note 1, at 1026.

the legacy of the excluded or the movements for justice with him when he rules.¹¹⁶ Thomas has explained this, his approach to judging. He apparently eliminates from his mind his experiences in America as one who is Black, was poor, or is in a marriage once condemned by many states. Thomas says he “strip[s] down, like a runner” eliminating his ideologies and any agendas.¹¹⁷ Perhaps a topic for a different paper is whether by stripping down he then becomes one with a legacy of whiteness, wealth, and privilege in this country. In that case he is not actually stripped down, just pretending to be re-clothed. I will leave those points for another day, perhaps on his 50th anniversary on the Court.¹¹⁸

Regardless, while he aims to strip down as a runner from his past experiences as a poor Black man in the south, at times he has forgotten his principle. At his hearing, for example, he used the “race card” when he referred to questioning as “a high tech lynching,” reminding the listeners of the country’s legacy of lynching, especially of Black people. Generally though, he does seem to strip down, and leave his heritage, he shares with the forgotten of America’s heritage, outside of his constitutional interpretation.

In examining Thomas’ sometime responses, this section will focus first on the case where he certainly does not strip down, *Virginia v. Black*, with Thomas writing a dissent that no other Justice joins. Next, this section will look at several other rulings where Thomas’ attempt to strip down perhaps results in the unstripped down agendas of the conservative vocal¹¹⁹ majority whose personal lives are already included in the American dream.

A. *Unstripped Down?*

The case of *Virginia v. Black*,¹²⁰ involving hate symbols evoking fear, was not in itself an unusual one. What was unusual, though, was Justice Thomas’ judicial personal reaction. The state of Virginia, to its credit, had a law banning Ku Klux Klan like crosses and other symbols displayed with intent to intimidate.¹²¹ This law had an additional provision that made cross burning

116. Thomas is unimpressed with the legacy of civil rights figures and movements, crediting only his grandfather for his opportunities. Merida & Fletcher, *supra* note 18.

117. See SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 39 (New York 1999).

118. Remember, he is working out in the gym in hopes of outlasting the records of all previous Justices on the Court. See Merida & Fletcher, *supra* note 18.

119. I use the term conservative vocal majority, not conservative majority. Actually many conservatives who go along with conservative theories are actually poor White people who are excluded, too, but for their whiteness.

120. *Virginia v. Black*, 538 U.S. 343 (2003).

121. *Id.* at 348.

prima facie evidence of intent to intimidate.¹²² The presumption, though, was rebuttable.

Two different incidents of cross burning were at issue. In one, a group of individuals had a cross burning rally, on private property, with the permission of the property owners. However, the cross could be seen from the highway.¹²³ There was no testimony that the rally was conducted to intimidate any particular individuals, but some people who witnessed the cross burning and heard the speeches at the rally became fearful.¹²⁴ In the second instance, a Black family had complained about their White neighbors shooting in close proximity to their home.¹²⁵ After these complaints, some of the White neighbors burned a cross, “to get back” at them, in the yard of the Black family, at night, and without their permission.

Justice Thomas rarely asks questions or comments in oral argument. But, when this case reached the Court and in oral argument, Justice Thomas broke silence and in his opinion parted ways with the majority of the Court, including his conservative counterparts. In oral argument, Thomas pressed the attorneys that they were making light of the effect and terror evoked by the KKK. Justice Thomas called KKK violence “a reign of terror.”¹²⁶ Some say he was shaking at argument.¹²⁷

The Court held that while cross burning done with the intent to intimidate can be banned as unprotected speech,¹²⁸ a presumption, even rebuttable, that cross burning is done with the intent to intimidate is unacceptable and an affront to the First Amendment.¹²⁹ Justice Thomas vehemently dissented.¹³⁰ He argued that there are some things outsiders who have not suffered racial hatred will never understand. In his powerful words, “In every culture, certain things acquire meaning well beyond what outsiders can comprehend.”¹³¹ His opinion documents the legacy of violence and intimidation of the KKK as an organization designed to inflict terror.¹³² Thomas would have upheld the Virginia law in its entirety to protect law abiding minority citizens.

Thomas’ breaking silence held great meaning, although some do not see the meaning. Some mischaracterize Thomas’ impact

122. *Id.*

123. *Id.*

124. *Id.* at 348-49.

125. *Id.* at 350.

126. Mike Sacks, *Clarence’s Questions, Part 1: the Case of the Burning Cross*, HUFFINGTON POST (Oct. 7. 2011), www.huffingtonpost.com/2011/10/07/clarence-thomas-questions-cross-burning-case_n_1000569.html.

127. *See* Smolla, *supra* note 30, at 164.

128. *Black*, 538 U.S. at 363.

129. *Id.* at 364.

130. *Black*, 538 U.S. at 388 (Thomas, J., dissenting).

131. *Id.* (Thomas, J., dissenting).

132. *Id.* at 389 (Thomas, J., dissenting).

when he spoke up in this argument and his opinion. One reporter said, “[W]hen looking for a reason why [Thomas] has ceased asking questions from the bench, *Virginia v. Black* may hold the seeds of an answer. There the issue was not just an abstract point of law. It was personal. And, *no one listened*.”¹³³

The reporter thinks “no one” listened as Thomas ended up the lone one in his dissent. However, the reporter is in error: people did listen. We the people, who have been excluded, personally excluded from the protections of the constitution, should not be labeled as “no one.” Those minorities, and those who have struggled alongside as we tried to get the government to stop participating in complicity with the KKK, and to protect us rather, heard Thomas’ voice and he gave voice to our personal lives. Those of us who have been historically excluded are not “no one.” We exist and it is our personal lives, and Thomas’ personal lives, that Higginbotham urged Thomas to give voice to. Here in this case, Thomas did.¹³⁴

Thomas brought his personal life into this work, though he has said that in ruling he wants to strip down as a runner. Thomas misses that even stripped down, and especially stripped down; he is Black and dark complexioned too, with a Gullah accent, and an upbringing in poverty.¹³⁵ Judge Higginbotham had forewarned Justice Thomas that this time would come as it did in *Virginia v. Black*. In his public call out to Thomas, Higginbotham wrote:

The Supreme Court can be a lonely and insular environment. Eight of the present Justices’ lives would not have been very different if the Brown case had never been decided as it was. Four attended Harvard Law School, which did not accept women law students until 1950. Two attended Stanford Law School prior to the time when the first Black matriculated there. None has been called a “nigger” or suffered the acute deprivations of poverty.¹³⁶

While Thomas’ response such as in *Virginia v. Black* is rare, Thomas is arguably partially un-stripped in other ways. While many justices only hire law clerks from a few certain schools, Thomas seeks to provide opportunity to a wider group. He hires as

133. Sacks, *supra* note 26. Interestingly, Thurgood Marshall was described as “a man who knew the anguish of the silenced and gave them a voice.” A. Leon Higginbotham, Jr., *Public Address, Justice Thurgood Marshall: He Knew the Anguish of the Silenced and Gave Them a Voice*, 3 GEO. J. ON FIGHTING POVERTY 163, 164 (1998) (quoting Justice O’Connor).

134. Justice Thomas recently voted with liberal Justices who held that the state of Texas could constitutionally refuse to issue a vanity tag with a Confederate flag. *Walker v. Texas Div., Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015) (J. Breyer delivered the opinion with Justices Thomas, Ginsburg, Sotomayor, and Kagan joining).

135. Orlando Patterson, *Thomas Agonistes*, N.Y. TIMES (June 17, 2007), www.nytimes.com/2007/06/17/books/review/Patterson-t.html?_r=0.

136. Higginbotham, *supra* note 1, at 1005-07 (footnotes omitted).

law clerks individuals who are not from typical Ivy League schools. Thomas demands, however, their assimilation to a great degree. While many Justices hire law clerks with viewpoints different from their own, Thomas “hires only law clerks who share his basic constitutional views.”¹³⁷ Thomas explained that “[d]oing otherwise would be ‘like trying to train a pig.’”¹³⁸ Some think this has “harden[ed] his point of view,”¹³⁹ and reduced the possibility that the Thomas from *Virginia v. Black* will be one whose voice we hear more often. So while Thomas seems to reject in many ways the personal reach of the constitution, in other ways he shows it. Or perhaps, he just uses the poverty or race card for his advantage, such as when in his confirmation hearings he suggested empathy for criminal defendants, but does not rule in that way.¹⁴⁰

A frequent debate I share with students, though, is whether Thomas is stripped down, or just partially stripped down, in some of the rulings discussed below.

B. Partially Stripped Down, or Not?

Thomas’ own marriage to his White wife is one that would not have been allowed widely before the case of *Loving v. Virginia*, which held that a state could not ban interracial marriages.¹⁴¹ Higginbotham warned Thomas, stating in his letter, “You will need to recognize that both your public life and your private life reflect this country’s history in the area of racial discrimination and civil rights.”¹⁴²

Thomas’s constitutional view, though, is that states must be given such leeway and that it is not the role of the Court to intervene in protection of privacy rights. In several privacy rights cases Thomas, did not vote to protect privacy rights; however he argued that the laws restricting privacy rights were “uncommonly silly.”¹⁴³ He explained, that if he were “a member of the Texas Legislature, [he] would vote to repeal it.”¹⁴⁴ Still, he felt he lacked power to help as a judge. He does not see his role as bringing in the personal lives of the excluded into the reach of the constitution. I explained this as a co-author in another article:

137. Nina Tottenberg, *Thomas Confirmation Hearings had Ripple Effect*, NPR (Oct. 11, 2011), www.npr.org/2011/10/11/141213260/thomas-confirmation-hearings-had-ripple-effect.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Loving v. Virginia*, 388 U.S. 1 (1967).

142. Higginbotham, *supra* note 1, at 1007.

143. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)).

144. *Lawrence*, 539 U.S. at 605.

Former Dean of Howard University School of Law Charles Hamilton Houston once stated, “[a] lawyer’s either a social engineer or . . . a parasite on society . . . A social engineer [is] a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in the solving of problems of local communities in bettering conditions of the underprivileged citizens.” On the other hand, sadly, legal professionals do not always answer the call to be that social engineer, even in the face of mounting racial tensions. In a case where a school district attempted to address racial segregation in public education, even Justice Clarence Thomas, the only Black Justice presently on the U.S. Supreme Court, thought that the district’s steps to integrate were unconstitutional and suggested that legal professionals have little, if any, role in reengineering society. More specifically, Justice Thomas stated, “[T]his Court does not sit to ‘create a society that includes all Americans’ or to solve the problems of ‘troubled inner city schooling.’ We are not social engineers.”¹⁴⁵

Perhaps the excluded are better off when Thomas is not being a social engineer as some of his social engineering may lead to further exclusion of their personal realities. Thomas’ opinions in the second amendment cases are also telling. In *D.C. v. Heller*¹⁴⁶ and *McDonald v. Chicago*,¹⁴⁷ the Court dismantles several gun regulations, even given the level of gun violence in this country and especially as affecting nonwhites.¹⁴⁸

In protecting second amendment rights, Thomas argues that gun related constitutional rights were denied slave and free Blacks in order to control slave and free Blacks. He seems to suggest that finding a general second amendment right applicable to the states therefore furthers constitutional protections for Blacks and is a privilege and immunity of national citizenship.¹⁴⁹ Thomas suggests his ruling protecting second amendment rights is in the interest of former slaves.¹⁵⁰

145. Michelle D. Deardorff and Angela Mae Kupenda, *Negotiating Social Mobility and Critical Citizenship: Institutions at a Crossroads*, 22 U. FLA. J.L. & PUB. POL’Y 335, 365-66 (2011) (internal citations and footnotes omitted).

146. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

147. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

148. See generally Michael Planty & Jennifer L. Truman, U.S. DEP’T OF JUST. (May 2013), *Firearm Violence, 1993-2011-Bureau of Justice Statistics*, www.bjs.gov/content/pub/pdf/fv9311.pdf.

149. *McDonald*, 561 U.S. at 805-06 (Thomas, J., dissenting).

150. The dissenters carefully noted how city living is different from the lives of rural hunters and how the city must be allowed to take these factors into consideration. Specifically, the dissent noted:

Firearms cause well over 60,000 deaths and injuries in the United States each year. Those who live in urban areas, police officers, women, and children, all may be particularly at risk. And gun regulation may save their lives. Some experts have calculated, for example, that Chicago’s handgun ban has saved several hundred lives, perhaps close to 1,000, since it was enacted in 1983. Other experts argue that

Thomas misses however the full impact of his ruling. First, heavily Black populations are generally in favor of more gun regulations.¹⁵¹ Secondly, statistics suggest that fewer Blacks than Whites seem to want more guns in their homes and on the streets.¹⁵² So while Thomas argues he is protecting personal Black interests, the effect is more support for conservative endorsed gun carrying, with gun violence rates higher for people of color. Thomas is, thus, sometime or inconsistent in his response. And, he falls far short of the personal inclusion of the dispossessed that is called for in Higginbotham's letter.

Just like Thomas' claim that questioning him about the allegations of sexual harassment was a high tech lynching, Thomas seems to use the race card sometime merely to further an agenda to benefit those already with privilege. President Bush handpicked Thomas, and only Thomas. It is worth noting that in his 8 years in office, Bush made 32 appellate appointments, and only one Black, Clarence Thomas.¹⁵³ So, perhaps it is expecting too much from Justice Thomas, given that he was handpicked by a retrogressive president. And, he was the only Black that Bush found who met his desired qualifications. Hence, his response to Higginbotham's call is stripped of racial inclusion and inclusion of their personal lives of those who look like Thomas and have been eliminated, frequently from the letter of the Court's rulings and only present in the amorphous spirit and hoped for reality of our constitution and American dream.

V. CONCLUSION

Any reader here who has not read Judge Higginbotham's open letter recently, or ever, is encouraged to read the 25-year-old Higginbotham letter for yourself, and to consider: why do you

stringent gun regulations "can help protect police officers operating on the front lines against gun violence," have reduced homicide rates in Washington, D. C., and Baltimore, and have helped to lower New York's crime and homicide rates.

McDonald, 561 U.S. at 922 (Breyer, J., dissenting, joined by JJ. Ginsburg and Sotomayor); see also *id.* at 902 (Stevens, J., dissenting).

151. See, e.g., *Number of households with guns on the decline, study shows*, CBS NEWS (Mar. 10, 2015), www.cbsnews.com/news/number-of-households-with-guns-on-the-decline-study-shows/ (fewer Blacks and Hispanics with gun in home than Whites).

152. See generally Planty and Truman, *supra* note 148.

153. F. Michael Higginbotham, *Speaking Truth to Power: A Tribute to A. Leon Higginbotham, Jr.*, 20 YALE L. & POL'Y REV. 341, 347 (2002) (As to President Ronald Regan, who selected 83 appellate judges, he found only one Black, too). Thomas was also championed by the late Senator Strom Thurmond, who had likened the 1954 civil rights bill to enslaving Whites. See A. Leon Higginbotham, *Open Letter to Arthur Liman*, 17 YALE L. & POL'Y REV. 593, 598 (1998).

think he wrote a public letter; what was his call out to Justice Thomas; what is Thomas' response; and, also, what is your own response to the call out from Higginbotham that the constitution personally includes the lives of all of us. I believe the Higginbotham letter does not just call out to Justice Thomas; it is a call out to us all who live today in America, and especially law students, lawyers, judges, and government leaders entrusted with the protections of, we hope one day, all Americans.

We must all respond to Higginbotham's call out for equality and justice so that every individual may personally be included, not just in the amorphous spirit of the constitution, but in the Court recognized and enforced promises of our constitution. If we hope to live in a more just America where the spirit of the constitution moves the Court to personally include us all as deserving the constitution's promises, then Higginbotham's call demands a more personally inclusive response by Justice Clarence Thomas and by our beloved, promised land of the free,¹⁵⁴ America. In one article, Higginbotham quoted Langston Hughes and said this best, that Justice Thomas and all of us should all pursue the dream for everyone, "To save the dream for one, It must be saved for ALL."¹⁵⁵

154. See, e.g., President John F. Kennedy, *Civil Rights Announcement, 1963* (June 11, 1963), www.pbs.org/wgbh/americanexperience/features/primary-resources/jfk-civilrights/.

155. A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1433 (1994) (quoting Langston Hughes, *Dream of Freedom*, in GOOD MORNING REVOLUTION: UNCOLLECTED WRITINGS OF SOCIAL PROTEST BY LANGSTON HUGHES 170 (Faith Berry ed. 1992)).