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The African-American Interest in Higher Law in the Supreme Court: Justices Marshall and Thomas

D. A. Jeremy Telman

THE AFRICAN-AMERICAN INTEREST IN HIGHER LAW IN THE SUPREME COURT: JUSTICES MARSHALL AND THOMAS

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I: INTRODUCTION: TWO AXES OF LEGAL REASONING

For decades now, Professor Richardson has pursued the provocative position that there is a centuries-old tradition of an African-American interest in international law. This tradition is a subset of a broader category, "outside law," to which African-Americans appeal to highlight the injustices to which they are subjected under municipal law.[1] Professor Richardson's invocation of international law upsets suppositions of international legal realism and rationalism.[2] Consistent with international law teachings at Yale School of Law, Professor Richardson rejects the notion that only states can be the agents and subjects of international law, nor does he think that one must have some sort of title or letters (such as J.D.) after one's name in order to hold views on the nature of transnational law.[3]

Over the years, Professor Richardson has defined the African-American interest in international law in various ways, and he treats the African-American interest in international law in the context of a broader Black International Tradition.[4] In the early 1990s, Professor Richardson identified various international law doctrines that intersected with African-American interests in self-determination,[5] human rights,[6] and limitations on the right of states to use force in self-defense.[7]

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1. *See, e.g.*, HENRY J. RICHARDSON III, THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW (2008) [hereinafter RICHARDSON, ORIGINS]; Henry J. Richardson III, *The Black International Tradition and African American Business in Africa*, 34 N. CAR. CENT. L. REV. 170 (2012) [hereinafter Richardson, *Black International Tradition*]; Henry J. Richardson III, *Two Treaties, and Global Influences of the American Civil Rights Movement, through the Black International Tradition*, 18 VA. J. SOC POL'Y & L. 59 (2010) [hereinafter Richardson, *Two Treaties*]; Henry J. Richardson III, *The Gulf Crisis and African-American Interests under International Law*, 87 AM. J. INT'L L. 42 (1993) [hereinafter Richardson, *Gulf Crisis*].

2. *See* Henry J. Richardson III, *Mitchell Lecture, October 27, 2010*, 17 BUFF. HUM. RTS. L. REV. 1, 5 (2011) (asserting that because international law has traditionally been viewed as something that occurs between sovereign states, actions and communications between subordinated national groups go ignored by scholars, officials, or observers of international law).

3. *Id*.

4. Richardson, *Black International Tradition*, *supra* note 1, at 171; Richardson, *Two Treaties*, *supra* note 1, at 60.

5. Richardson, *Gulf Crisis*, *supra* note 1, at 68.

6. *Id*. at 73.

7. *Id*. at 70.

In Professor Richardson's book, *The Gulf Crisis and African-American Interests under International Law,* the African-American interest in international law is complex, but its history runs alongside the mainstream tradition of international law, intersecting with that tradition largely in the realms in which international law derives from natural law. The international law that Professor Richardson invokes is largely not positive law but that part of customary international law that serves as a repository for mechanisms and rubrics necessary for the preservation of what I will call, for want of a better term, human dignity.

The narrative of Professor Richardson's book ends in the early nineteenth century. However, in subsequent articles, Professor Richardson has continued into the twentieth century. In invoking the Black International Tradition, Professor Richardson moves beyond law to international relations and beyond the African-American experience to sketch out African-American attitudes towards and responses to the plight of Blacks in the Caribbean, South America, and Africa. In so doing, he is attentive to the links between international human rights and civil rights and between the U.S. civil rights movements and both foreign and international liberation movements, some grounded in opposition to racism and some grounded in the right of self-determination.[8]

Elsewhere, I have expressed my positivist prejudices and my skeptical assessment of "higher" law as a font of international law protections of rights or attributes associated with human dignity.[9] I have described Professor Richardson's invocation of an African-American interest in international law as an ideal-typical reconstruction of what protections international law might offer—or what rights it might convey—upon enslaved Africans or African-Americans subject to Jim Crow laws and their various institutionalized legacies.[10]

Upon continued reflection, I see the need to add a third modality to the mix. The axis of legal reasoning that runs from natural law to positivism intersects with an axis that runs from idealism to practicality. When we consider the role of appeals to positive law and to higher law in the jurisprudence of the U.S' two African-American Supreme Court Justices, Thurgood Marshall and Clarence Thomas, the evidence is equivocal. One could argue that both decide cases based on deep ethical convictions grounded in personal morality. Both appeal, in very different ways, to sources of positive law. Where they differ, I contend, is that Justice Marshall's jurisprudence is always grounded in his rich and detailed understanding of the impact of law on people who reside at the intersection of race and poverty. Justice Thomas, in the recent opinions that I will discuss, has supplemented his natural law instincts with a rigid formalism that leaves no room for a richly contextual jurisprudence like that of Justice Marshall. In what follows, I will sketch out my reasons for concluding that his jurisprudence is the more hopeful avenue than is Justice Thomas's for the protection and realization of African-Americans' legal interests.

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8. *Id*. at 61–67.

9. D.A. Jeremy Telman, *Henry J. Richardson, III, The Origins of African-American Interests in International Law*, 26 S. AFR. J. HUM. RTS. 395, 397–410 (2010) (book review).

10. *Id*. at 399.

II: JUSTICE MARSHALL: HIGHER LAW AND SUBSTANTIVE JUSTICE

In most of his constitutional opinions, Justice Marshall relied not on evocations of higher law but on the text of the Constitution and on case precedent. This is not the place to undertake a comprehensive review of Justice Marshall's jurisprudence; a summation of representative opinions will have to suffice.

When interpreting the Constitution's "majestic generalities,"[11] Justice Marshall was inclined to something akin to Jack Balkin's "text and principle" approach.[12] It would be folly to deny that a "higher law" sensibility informed Justice Marshall's opinions. Still, he enforced only those principles embraced in the constitutional text.[13]

In addition, he applied constitutional principles with a keen eye to empirical evidence of discrimination and to socioeconomic realities. On race issues, Justice Marshall recounted how a Porter pullman told Justice Marshall that "he had never been in any city in the United States where he had to put his hand up in front of his face to find out he was a Negro."[14] Justice Marshall shared such stories with his fellow Justices so that they would not lose sight of the fact that "there is another world out there" on the other side of the racial divide.[15]

Justice Marshall approved of race-conscious classifications only where designed to achieve remedial goals, necessary to important government purposes, and substantially related to those purposes.[16] Beginning with *City of Richmond*, the Court's conservative majority has subjected remedial race-conscious classifications to something akin to strict scrutiny,[17] which Justice Marshall

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11. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

12. *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 428 (2007) (characterizing the text and principle approach as a form of redemptive constitutionalism); *see* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–311 (2007) (elaborating on "text and principle" approach to constitutional interpretation).

13. Justice Marshall followed the constitutional text, where it was clear, even if doing so led to an outcome that was at odds with his own ethical-political perspective. *See* ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL 209 (1992) (characterizing Marshall's opinions in *Curtis* and *Loretto* as evidencing Marshall's tendency to follow the constitutional text, where it is clear, "even if the results seem inconsistent with his personal views"). In Curtis v. Loether, 415 U.S. 189 (1974), he found that the Seventh Amendment entitled a white landlord facing a racial discrimination suit to a jury trial, even though a bench trial would have better suited the plaintiff, with whom one can assume Justice Marshall was sympathetic. In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), he gave a broad reading of the Takings Clause and found that it entitled a property owner to compensation even for very small physical invasions of property, in this case for the installation of a cable box.

14. MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991 4 (1997).

15. *Id*.

16. City of Richmond v. J.A. Croson, 488 U.S. 469, 535–36 (1989) (Marshall, J., dissenting); Fullilove v. Klutznick, 448 U.S. 448, 517–19 (1980) (Marshall, J., concurring); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 359 (1978) (joint opinion of Brennan, White, Marshall, and Blackmun, JJ).

17. *See J.A. Croson*, 488 U.S. at 520 (Scalia, J., concurring) (agreeing with the majority that

rejected based on history and logic: the fact that Whites constitute a minority group in Richmond, Virginia does not make them automatically a suspect class that needs the Court's protection in order to safeguard its rights.[18]

Justice Marshall did not read the Fourteenth Amendment's Equal Protection Clause in the light of its framers' narrow intent to protect African-Americans against racial classifications. Rather, he believed that the intent of the Equal Protection Clause was to abolish all caste legislation. He accordingly applied heightened scrutiny to cases that burden important interests (such as education or access to the courts) of disadvantaged persons, whether the source of that disadvantage sounded in race, gender, alienage, or economics, openly avowing a sliding scale and abandoning the increasingly opaque rhetoric about levels of scrutiny.

In *Dandridge v. Williams*,[19] plaintiffs challenged Maryland's $250 per month limit on the funds a family could receive under the federal Aid to Families with Dependent Children Act. The $250 ceiling applied regardless of the size of the family.[20] The majority rejected plaintiffs' statutory and constitutional challenges, but Justice Marshall dissented, pointing out that the $250 ceiling was "fundamentally in conflict with the basic structure and purposes of the Social Security Act."[21] Justice Marshall also characterized the majority's opinion as an "emasculation of the Equal Protection Clause" in the area of social welfare administration.[22]

The dissent begins with a close reading of the Social Security Act, its legislative history and relevant case law, and concludes that Maryland's regulation is inconsistent with the purposes of the Act.[23] Justice Marshall then turns his attention to the Equal Protection Clause and has no difficulty concluding that there is no rational basis for treating children differently depending on the size of their families.[24] Although grounded in a sense of social justice, Justice Marshall's jurisprudence is positivist throughout. The main thrust of his argument appeals to legal authority and good old-fashioned common sense, in which his opinions abound.

A moral foundation underlies Justice Marshall's approach to the Equal Protection Clause. A broad view of our constitutional system's interest in promoting justice and equality inform Justice Marshall's dissent in *San Antonio Independent School District v. Rodriguez*:

> [T]he majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years

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strict scrutiny should apply to all classifications based on race).

18. *Id*. at 554 (Marshall, J., dissenting).
19. Dandridge v. Williams, 397 U.S. 471, 472–74 (1970).
20. *Id*. at 474–75.
21. *Id*. at 508 (Marshall, J., dissenting).
22. *Id*.
23. *Id*. at 510–17.
24. *Id*. at 517–18.

> of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district.[25]

But Justice Marshall quickly segues from his moral foundation to a detailed analysis of the mechanisms through which Texas discriminated against poor children in the public education system. In comparison to property-poor school districts, property-rich school districts were able to allocate ten times the funds per pupil to public schools.[26] Justice Marshall agreed with the District Court's assessment that Texas distributed state funds so as to "subsidize the rich at the expense of the poor."[27]

The remainder of the opinion supports Justice Marshall's thesis: "When the Texas financing scheme is taken as a whole . . . it produces a discriminatory impact on substantial numbers of the school age children of the State of Texas."[28] For Justice Marshall, no stranger to Equal Protection litigation, "inequality in education facilities provided to students may be discriminatory state action" prohibited by the Equal Protection Clause.[29] While one might think that Equal Protection analysis is reserved for protected classes or fundamental rights, Justice Marshall, good positivist that he is, shows that there is no basis, both in the constitutional text or in case precedent, for a demand that the protected group be precisely defined. He points to a recent precedent (*Bullock v. Carter*)[30] in which the Court applied Equal Protection analysis without being able to specify a suspect class.[31]

Justice Marshall's approach is similar in cases that do not arise under the Equal Protection Clause. In *Furman v. Georgia*, Justice Marshall again begins his concurring opinion with what appears to be a moral claim, when he opines that the American people, if they were fully informed about the death penalty, would reject it on moral grounds.[32] But even here, what seems like a moral claim is grounded in intuitions, drawn from experience, about human nature. He is not arguing about our moral intuitions in the abstract—he just assumes that reasonable people, were they aware of how our death penalty operates, would not be willing to accept it.[33] But his main argument against the death penalty was empirical—it is not an

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25. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 70–71 (1973) (Marshall, J., dissenting).

26. *Id*. at 74–75.

27. *Id*. at 81.

28. *Id*. at 72.

29. *Id*. at 84.

30. 405 U.S. 134 (1972).

31. San Antonio Indep. Sch. Dist., 411 U.S. at 92–94.

32. Furman v. Georgia, 408 U.S. 238, 362–64 (1972) (Marshall, J., concurring)*; see also* Gregg v. Georgia, 428 U.S. 228, 232 (1976) (Marshall, J., dissenting).

33. *See* Gregg, 428 U.S. at 232 (reiterating Justice Marshall's view that the constitutionality of the death penalty should turn on the views of an informed citizenry).

effective deterrent and is therefore an excessive punishment.[34] Indeed, Justice Marshall rejects moral arguments that seek to justify the death penalty as a retributive expression of communal outrage. For Justice Marshall, such appeals to communal morality are insufficient to overcome the Eighth Amendment's protections of human dignity.[35]

Justice Marshall's principled approach to constitutional interpretation takes, as its point of departure, an abiding sense of fairness and justice. In the end, however, Justice Marshall's opinions are grounded, not in higher law, but in the realities of litigants who live at one of the many intersections of discrimination and poverty.

III: JUSTICE THOMAS: HIGHER LAW AND PROCEDURAL FORMALISM

Justice Thomas has established himself as one of the most unusual thinkers the Supreme Court has ever seen. He is the most consistently originalist Justice the Court has seen, with the possible exception of Justice Black.[36] Like Justice Black, Justice Thomas is not intimidated by the existence of legal precedent, no matter how well-established or long-standing, if he thinks that precedent is inconsistent with the Constitution's original meaning. Like Justice Black, Justice Thomas writes a lot of opinions in which no other Justices join.[37] His positions are principled, consistent, intellectually rigorous, and historically informed. Through his legal opinions, Justice Thomas, together with Justice Scalia, has inspired a jurisprudential movement with which other Justices, judges, and legal thinkers must contend. There is much to admire in Justice Thomas's approach to constitutional adjudication. However, as I contend below, it is not a jurisprudence that furthers the African-American interest in higher law, as articulated in Professor Richardson's work.

Two prominent examples will serve to illustrate Justice Thomas's willingness to appeal to a higher law context for interpreting the U.S. Constitution. First, there is his concurring opinion in *McDonald*, in which he invoked the Fourteenth Amendment's Privileges or Immunities Clause as a basis for substantive individual rights not expressly granted in the Constitution's text.[38] Justice Thomas joined his four conservative colleagues in *Heller* in finding that the Constitution's Second

34. *See id*. at 233–36 (reviewing the Ehrlich study, which purported to show that the death penalty has a deterrent effect, and finding it unpersuasive).

35. *Id*. at 237–40.

36. *See* D. A. Jeremy Telman, *Originalism: A Thing Worth Doing . . .*, 42 OHIO N. U. L. REV. 529, 552–66 (2016) (comparing Justice Thomas's originalism with that of Justice Scalia).

37. *See id*. at 535 (calling Justice Black an outlier on the Court whose originalism did not sway others).

38. McDonald v. City of Chicago, 561 U.S. 742, 806 (2010) (Thomas, J., concurring); *see also* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J. L. & PUB. POL'Y 63, 63 (1988) [hereinafter Thomas, *Higher Law*] ("The best defense of limited government, of the separation of powers, and of the judicial restraint that flows from the commitment to limited government, is the higher law political philosophy of the Founding Fathers.").

Amendment protects an individual right to bear arms.[39] In *McDonald*, Justice Thomas's lone concurring opinion found the individual right to bear arms to be a "privilege" of citizens guaranteed by the Privileges or Immunities Clause.[40] Thomas understands the privileges of citizens to derive from higher law, that is, from natural law.[41] *McDonald* was the first time that he identified a particular right protected as a "privilege" guaranteed by the Privileges or Immunities Clause.

Justice Thomas's defense of the "privilege" of the individual right to bear arms is grounded both in a natural rights tradition and in a version of the realities of African-American lives in post-bellum America.[42] It is a reading of the significance of the Fourteenth Amendment's Privileges or Immunities Clause that has not garnered much support outside of the academy.[43] Even within the academy, Justice Thomas's suggestion that the Framers of the Fourteenth Amendment intended that the Constitution's first eight Amendments would be made applicable to the States through the Privileges or Immunities Clause seems to be the minority view.[44] Justice Thomas's attempt to establish that the Constitution embraces *sub silentio* particular rights derived from natural law principles seems unlikely to succeed.

The second example of Justice Thomas's appeal to higher law is his recent invocation of the principles articulated in the Declaration of Independence as informing his originalist reading of the Constitution:

> When the Framers proclaimed in the Declaration of Independence that "all men are created equal" and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth.

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

40. McDonald, 561 U.S. at 813–49.

41. *See id*. at 817 (citing to various seventeenth and eighteenth century American documents that describe the privileges of citizens in terms of natural law).

42. *See id*. at 829–50 (reviewing nineteenth-century sources and concluding that the Privileges or Immunities Clause was originally intended to protect citizens of the several states against encroachments of rights protected under the first eight Amendments to the Constitution).

43. *See* Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J. L. & POL. 273, 292 (2011) (arguing that Justices on both sides of the political spectrum have their own reasons for keeping "Privileges or Immunities moribund"); *see also* Jeffrey D. Jackson, *Be Careful What You Wish For: Why McDonald v. City Of Chicago's Rejection of the Privileges or Immunities Clause May Not Be Such a Bad Thing for Rights*, 115 PENN. ST. L. REV. 561, 576 (2011) ("[T]he decision in *McDonald* seems to clearly indicate that the Clause will indeed remain dormant for the foreseeable future[.]").

44. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 521 (4th ed. 2013) (concluding that while some members of the Congress that passed the Fourteenth Amendment believed that the Privileges or Immunities Clause was intended to extend the application of the Bill of Rights to the States, others did not think so and others never considered the question); *see also* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 STAN. L. REV. 132, 137 (1949) ("Congress would not have attempted such a thing, the country would not have stood for it, the legislatures would not have ratified [incorporation through the Privileges or Immunities Clause].").

> That vision is the foundation upon which this Nation was built.[45]

Even before Justice Thomas was appointed to the federal bench, he articulated his version of originalism in which the Constitution is understood as "the fulfillment of the ideals of the Declaration of Independence."[46] On rare occasions, Justices have appealed to the Declaration as an interpretive key to unlock the mysteries on constitutional protections.[47] Justice Thomas did not fully deploy his Declaration-based reading of the Constitution until *Obergefell*.[48] Critics have suggested that, even granting that "the foundations of rights in the Constitution are predicated on the innate human dignity asserted in the Declaration,"[49] a right of all people to marry as they choose might well be protected under the Declaration's understanding of inalienable rights.[50]

I break no new ground here in contending that Justice Thomas appeals to higher law, nor do I think it should come as a surprise to anyone to hear that moral *Weltanschauungen* inform the constitutional jurisprudence of both African-American Supreme Court Justices. The more significant methodological divergence between the two Justices transpires along the idealism/pragmatism axis.

Justice Thomas's recent opinions have been characterized by a procedural formalism that fetishizes finality and rule of law principles while ignoring the substantive fairness issues that inform Justice Marshall's more practical approach. This formalism is a form of idealism, as it applies regardless of context. Formalist approaches tolerate unjust results in individual cases if necessary to promote the

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45. Obergefell v. Hodges, 135 U.S. 2584, 2639 (2015) (Thomas, J., dissenting); *see also* Thomas, *Higher Law*, *supra* note 38, at 64 (characterizing the Constitution as "a logical extension of the principles of the Declaration of Independence"); Clarence Thomas, *Toward a "Plain Reading" of the Constitution – The Declaration of Independence in Constitutional Interpretation*, 30 How. L. J. 983, 983–84 (1987) [hereinafter Thomas, *Toward a "Plain Reading"*] (contending that the Civil War Amendments must be understood in light of the principles of equality and liberty embodied in the Declaration of Independence and the Constitution).

46. Thomas, *Toward a "Plain Reading"*, *supra* note 45, at 985.

47. *See* Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation*, 89 S. CAL. L. REV. 369, 384 (2016) (calling Supreme Court references to the Declaration uncommon and irregular); *see also* Frank I. Michelman, *The Ghost of the Declaration Present: The Legal Force of the Declaration of Independence Regarding Acts of Congress*, 89 S. CAL. L. REV. 585 (2016) (contending that the Declaration is not a source of law but is and should remain a symbol of the national commitment to social justice); Darrell A. H. Miller, *Continuity and the Declaration of Independence*, 89 S. CAL. L. REV. 601, 602–04 (2016) (arguing that the Declaration is not law, was not intended to be law, and is not treated by courts as law); Lee S. Strang, *Originalism's Subject Matter: Why the Declaration of Independence Is Not Part of the Constitution*, 89 S. CAL. L. REV. 637, 638 (2016) (arguing that the Declaration is not subject to constitutional interpretation).

48. *See* Scott Gerber, *Clarence Thomas, Fisher v. University of Texas, and the Future of Affirmative Action in Higher Education*, 50 U. Rich. L. Rev. 1169, 1191–92 (2016) (noting that *Obergefell* marked the first time that Justice Thomas had invoked the Declaration of Independence in a case that did not involve race).

49. Tsesis, s*upra* note 47, at 383–84.; s*ee also* Frank Michelman, *The Ghost of the Declaration Present: The Legal Force of the Declaration of Independence Regarding Acts of Congress*, 89 S. CAL. L. REV. 575, 596 (2016) (hypothesizing that Justice Thomas may regard the Declaration as standing on equal footing with the Constitution as a source of positive law).

50. Tsesis, *supra* note 47, at 384.

parsimonious allocation of legal resources and to strengthen the rule of law.

In *Foster v. Chatman*, Petitioner raised a *Batson* challenge to his 1987 conviction for capital murder.[51] As Justice Kagan observed during oral argument, the case presented "as clear a *Batson* violation as a court is ever going to see."[52] Chief Justice Roberts wrote the majority opinion, finding "clearly erroneous" the state court's ruling that the Petitioner had failed to show purposeful discrimination when state prosecutors used peremptory challenges to remove all African-Americans from the jury pool.[53] Justice Thomas wrote a lone dissent.[54]

Tellingly, Justice Thomas began his dissent with the argument that Petitioner's claim was procedurally barred.[55] That is, even if Petitioner's trial was tainted by racial prejudice in the selection of the jury pool, his execution should proceed. Justice Thomas also faulted his seven colleagues for failing to give the requisite "great deference" to the trial court's finding that the prosecution had race-neutral reasons for excluding the African-American veniremen.[56] That argument is also doubly procedural, because the "great deference" standard impedes careful consideration of the merits of a claim and because Justice Thomas discounts, on procedural grounds, the probative value of Petitioner's new evidence (the prosecutor's files), which highlighted the prosecution's determination to exclude all African-Americans from the jury.[57] Justice Thomas focuses on procedural rules and on the thirty years that have passed since the trial, while refusing to consider that Georgia courts might have been unreliable gauges of the merits of *Batson* challenges in the first few years after the Supreme Court decided *Batson*.

Green v. Brennan,[58] decided the same day as *Foster v. Chatman*, produced a similar 7-1 decision, with Justice Thomas writing another lone dissent. In *Green*,

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51. Foster v. Chatman, 136 U.S. 1737, 1743 (2016).

52. Dahlia Lithwick, *Peremptory Prejudice*, SLATE (May 23, 2016, 2:26 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/05/john_roberts_s_court_sees_racism_in_foster_v_chatman.html.

53. *See Foster*, 136 U.S. at 1747–55 ("An 'N' was also noted next to the name of each black prospective juror on the list of the 42 qualified prospective jurors; each of those names also appeared on the 'definite NO's' list.").

54. *See id*. at 1761 ("[T]he Court rules in Foster's favor . . . without adequately grappling with the possibility that we lack jurisdiction. Moreover, the Court's ruling on the merits, based, in part, on new evidence that Foster procured decades after his conviction, distorts the deferential *Batson* inquiry.").

55. *See id*. at 1761–65 ("Georgia law prohibits Foster from raising the same claim anew in his state habeas petition . . . Without such procedural bars, state prisoners could raise old claims again and again until they are declared victorious, and finality would mean nothing.").

56. *See id*. at 1765 ("Because the adjudication of his *Batson* claim is, at bottom, a credibility determination, we owe 'great deference' to the state court's initial finding that the prosecution's race-neutral reasons for striking veniremen . . . were credible.").

57. *See id*. at 1765–66 ("By allowing Foster to relitigate his *Batson* claim by bringing this newly discovered evidence to the fore, the Court upends *Batson* 's deferential framework. Foster's new evidence does not justify this Court's reassessment of who was telling the truth nearly three decades removed from *voir dire*.").

58. Green v. Brennan, 136 U.S. 1769 (2016).

Justice Thomas, the former head of the Equal Employment Opportunity Commission, was the sole Justice who would have rejected Petitioner's constructive termination claim as time-barred.[59] The case involved a Black man who had worked for the Postal Service for 35 years. After he was passed over for a promotion, he complained that he was denied the promotion on racial grounds. Shortly thereafter, his supervisors accused him of delaying the mail in violation of federal law.[60] They offered him the choice between an unattractive transfer involving a pay cut and resignation. After some time, Petitioner resigned and then filed a discrimination suit based on his constructive termination.[61]

While the Majority found that constructive discharge claims run from the time the employee gives notice,[62] Justice Thomas would not permit Petitioner to trigger the alleged discriminatory matter that gives rise to his own claim.[63] His dissent did not acknowledge Justice Alito's concurrence, which argued that intolerable working conditions led to Petitioner's decision to resign, and thus the timing of the claim still turned on the employer's conduct.[64] By ignoring Justice Alito's middle ground, Justice Thomas opted for a purely procedural rule that would enable employers to force employees to quit on discriminatory grounds and yet escape any legal accountability for discriminatory conduct. In *Green*, as in *Chatman*, Justice Thomas's approach highlights procedural bars to substantive adjudication and shows a remarkable reluctance to explore in detail the circumstances in which employment discrimination claims arise.

The same valuation of idealism over pragmatism colors Justice Thomas's *McDonald* concurrence. The opinion offers a highly selective review of the experience of African-Americans with guns. The problem that African-Americans faced in the post-bellum period was not, as the Colfax Massacre illustrates, that nobody recognized African-Americans' right to bear arms or that they lacked access to guns. The problem was that they were outgunned and courts offered no protection or vindication for African-Americans who were hunted down and slaughtered by White militiamen.[65]

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59. *See id*. at 1790 ("Because the only employer action alleged to be discriminatory here took place more than 45 days before petitioner Marvin Green contacted EEOC, his claims are untimely. I therefore respectfully dissent.").

60. *See id*. at 1774–75 ("We address here when the limitations period begins to run for an employee who was not fired, but resigns in the face of intolerable discrimination—a 'constructive' discharge.").

61. *See id*. at 1774 ("[in constructive discharge cases] the 'matter alleged to be discriminatory' includes the employee's resignation, and that the 45-day clock for a constructive discharge begins running only after the employee resigns.").

62. *Id*.

63. *See id*. at 1791 (Thomas, J., dissenting) ("I would hold that only an employer's actions may constitute a 'matter alleged to be discriminatory.'").

64. *See id*. at 1783 (Alito, J., concurring) (proposing a rule that an employee's resignation should be considered a discriminatory act of the employer when an employer subjects an employee to intolerable working conditions with the discriminatory intent to force the employee to resign).

65. *See* CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2009) (recounting the Colfax

In a racially divided society, it is not possible for the subordinate group to enjoy their rights and privileges on the same terms as the dominant group. Even if Justice Thomas rooted his opinion in the lives and experiences of those most likely to be subject to gun violence in the nineteenth century, it was wholly blind to the role guns play in the lives of urban African-Americans and the economically disadvantaged today. In the summer of 2016, in one week, police officers shot two African-American men, allegedly because they were armed, even though they made no attempt to reach for or use their weapons which, at least in one case, they were legally permitted to carry.[66] The "privilege" of bearing arms is not worth much if racial injustice translates it into a privilege to be targeted as a threat. Under such conditions, something like Justice Marshall's pragmatism (and traditional judicial humility) should have kicked in, upholding a city's decision to regulate private gun ownership in the way best suited to that locality's particular needs.

These cases highlight the contrast between Justice Thomas' use of higher law with that of Justice Marshall's. Justice Thomas decides these cases based on abstract principles and refuses to consider the real-world consequences of procedural bars or abstract principles. As a result, higher law can stand as a barrier to the vindication of the African-American interest in higher law.

IV: THE FUTURE OF THE HISTORY OF THE AFRICAN-AMERICAN INTEREST IN HIGHER LAW

Professor Richardson's research explores the African-American tradition of appealing to higher law. In addition, his scholarship, like Justice Marshall's jurisprudence, is also grounded in the realities of African-American life. The interests that he identifies in international law are rooted in experience, and that grounds his work not only in abstract principles but also in the realities of the struggle for social justice. Still, it is hard not to read a rueful irony back into the sources that Professor Richardson mines to establish the history of African-American interests in international law. Abstract principles, such as inalienable rights and human dignity, must have seemed to enslaved Africans and African-Americans as akin to Sasquatch – often invoked but rarely actually experienced.

Professor Richardson's work is grounded in the tradition of Thurgood Marshall and not in the tradition of Clarence Thomas. He does not leave us with abstractions. Rather, he enriches our understanding of the African-American

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Massacre, in which hundreds of armed white militiamen killed scores of armed African-Americans on April 13, 1873, most of whom had surrendered or were attempting to flee the violence).

66. *See* Richard Faussett, *Baton Rouge is Passionate, and Peaceful, after Shooting of Alton Sterling*, N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/08/us/alton-sterling-police-shooting-baton-rouge.html (recounting how police shot Mr. Sterling after a struggle and upon discovering that he was carrying a gun); Mitch Smith, *Minnesota Officer Was 'Reacting to the Presence of a Gun,' Lawyer Says*, N.Y. TIMES (July 9, 2016), http://www.nytimes.com/2016/07/10/us/minnesota-officer-was-reacting-to-the-presence-of-a-gun-lawyer-says.html (recounting the shooting of Philando Castile whom police pulled over for a broken tail light in Falcon Heights, Minnesota).

experience and its interaction with law through rich excavation of the historical remains of that often elusive past. After reading his book, I encouraged Professor Richardson to continue his narrative forward into the twentieth century. I think that narrative would show that appeals to higher law take us only so far.

The arc of moral universe bends towards justice.[67] It only *bends* towards justice because societies do not suddenly realize the error of their ways and mend themselves. Rather, each stretch along that arc contains major and minor victories, as well as major and minor setbacks. Appeals to higher law can bend the arc towards or away from justice, but the victories are more likely to occur when higher law informs positive law grounded in social realities.

67. Martin Luther King, Jr., Sermon at Temple Israel of Hollywood (Feb. 26, 1965).