



Clarence Thomas and the Constitutional Stories that Define Him

Monday, June 19, 2023

Visit our media library at constitutioncenter.org/media-library to see a list of resources mentioned throughout this program, watch the video, and more.

[00:00:00] Lana Ulrich: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the center in-person and online. I'm Lana Ulrich, VP of content and senior counsel. In this episode, Judge Amul Thapar and former Judge Bernice Donald, both of the United States Court of Appeal for the Sixth Circuit, discuss Thapar's new book, *The People's Justice: Clarence Thomas and the Constitutional Stories that Define Him*. Jeffrey Rosen, president and CEO of the National Constitution Center moderates. This program was streamed live on June 19th, 2023. Here's Jeff to get the conversation started.

[00:00:44] Jeffrey Rosen: Hello, friends. Welcome to the National Constitution Center, and to today's convening of America's Town Hall. I'm Jeffrey Rosen, the president and CEO of this wonderful institution. Let's inspire ourselves as always for the discussion ahead by reciting together the National Constitution Center's mission statement. Here we go, and you can do it at home, I know you can, by heart. The National Constitution Center's the only institution in America chartered by Congress to increase awareness and understanding of the US Constitution among the American people on a nonpartisan basis. It's now our great pleasure to introduce our panel. Judge Amul Thapar is a judge on the United States Court of Appeals for the Sixth Circuit. He was previously US attorney and a district court judge. And his new book, which we're here to discuss today, is *The People's Justice: Clarence Thomas and the Constitutional Stories that Define Him*. And joining Judge Thapar to discuss his new book is Judge Bernice Donald. She is a judge on the United States Court of Appeals and served from 2011 to 2023. Before joining the Court of Appeals, she was on the US District Court. And she is an incredibly distinguished jurist and a great friend of the NCC.

[00:02:01] Jeffrey Rosen: And I'm so honored to convene these two great judges. Thank you so much for joining, Judge Thapar and Judge Donald. And Judge

Thapar, we'll start with you, why did you choose to write this book about Justice Thomas, and what do you hope that readers will take from it?

[00:02:19] Judge Amul Thapar: Yeah. So thank you for having me, Jeff. And it's such a pleasure to be here with my great friend Bernice Donald. We used to be colleagues together and have a ton of fun. I was always getting her coffee because I was her junior judge, but when she retired, I moved one spot up the totem pole and was very sad about it. I did not wanna move up the totem pole and lose Bernice. It was a great loss to our court and to the country, frankly.

[00:02:46] Judge Amul Thapar: As to the book, I wanted... Justice Scalia always talked about flying the flag of originalism. And my goal was to try and explain originalism to the American people in terms they could understand, and also show its surprising results. In other words, often when you look at Justice Thomas's separate writings, I think you can see as now the ultimate originalist on the court, or at least the longest serving, and one of the principal originalists on the court. He tries always to interpret the original meaning, and I thought that would allow me to take a stab at not only explaining the original meaning, but also explaining the stories of the cases that come before the court. Because as I say in the acknowledgements, while Justice Thomas is one of the originalists on the court, the real heroes in the cases are the parties and litigants who brought the cases and whose lives were suspended during those cases. And I hope the book captures all of that.

[00:03:47] Jeffrey Rosen: Judge Donald, as Judge Thapar says, he inspires to show how originalism can favor ordinary people, and to bring to life the human stories behind the cases. What did you think of the book?

[00:04:00] Judge Bernice Donald: Well, Jeff, thank you so much for allowing us to be in this space on this incredibly important historic day, Juneteenth. I so much appreciate the work that the center does. I appreciate the contributions of Americans across this great land. And I appreciate my friend, Amul Thapar for this wonderful contribution to our law and history. I wanna start by saying, first of all, Amul Thapar is a brilliant writer. He's a wonderful jurist, but he's also a brilliant writer. And the book is one that I think does a tremendous service because as he said, he does bring forth the stories. You know, we all know, but sometimes I think we tend not to focus on it, that law does not exist in a vacuum, and law is to serve the needs and enrich the lives of the people by making certain that they are able to consume the justice that the constitution speaks to.

[00:05:12] **Judge Bernice Donald:** I mention this historic day, and I know that it's important for us to talk about originalism expansively. And you know, Justice Thomas talks about wanting to try and interpret that law based on what the people wanted at the time the laws were passed. And because we're here on Juneteenth, I think as we talk about this, it's important to remember the backdrop, that when we talk about the people and their desires at the time the Constitution was written, it was a very different land than we occupy today. And much of our journey making that law a reality in the lives of people today is filled with struggle, it's filled with controversy and indifference. And I say at the outset that law does not exist in a vacuum, but when we are looking at these laws, it is so important to have those stories. And many of those stories that Amul talks about in the book are stories where people are suffering, they're people who are in conflict, their lives are in a place where they really need intervention. And that is so often the case. But when we distill the principles, the holdings, and we look at the analysis in the actual opinions, we very frequently get those stories.

[00:06:30] **Judge Bernice Donald:** And I hope that we will, as people, pick up Amul's work and read it. We'll remember that behind all of those legal principles, behind all of those legal pronouncements, they're real lives and real stories. But I want us to also remember that over the years we've traversed since the founding and the ratification of the constitution to today, the landscape looks very different, because when those founding fathers as we know wrote that document, and it is a magnificent document, but so much of our land, we're not in a position to have real influence in that. Women, African Americans, Native Americans, the unlanded. And so we have, I think, in this great land, this great democracy, we have taken that tremendous document and through interpretation and application, we have really moved to try to continue the greatness that is, I believe uniquely American, but that's just my own personal bias because of the pride I have for this great country.

[00:07:39] **Judge Bernice Donald:** But I, to get back to your question, I think it is an incredible book, it is one that I hope all Americans will pick up and read. And remember whether you agree or disagree with a certain case, when we take a snapshot of the body of any one person's work, there're gonna be places of agreement and places where we would have made a different decision.

[00:08:03] **Jeffrey Rosen:** Thank you so much Judge Donald for that inspiring series of reflections and for introducing an important theme that we'll address throughout our discussion today, which is originalism against its alternatives.

Should the Constitution simply be interpreted in light of its original understanding? Or is the entire scope of American history relevant to Constitutional interpretation? As well as questions you raised about whether or not originalism in particular cases does or doesn't favor ordinary Americans and the plaintiffs in these cases. So Judge Thapar, you begin with the Kelo case, a dramatic case involving a woman whose little pink house was taken in Connecticut and she objected. What happened to her and why did you write about Susette Kelo? And what was Justice Thomas's view of the case's disposition?

[00:08:58] Judge Amul Thapar: Susette Kelo is an incredible woman who bought a dilapidated house in a blue collar area of New London, Connecticut, and through getting a second job and blood, sweat and tears, she refurbished the house. And she had this beautiful view of the river, and she loved the house, and she loved the community she was in. And what happened in that case is the Pfizer Corporation partnered with the City of New London and the State of Connecticut and wanted to take the house for a redevelopment project. What they wanted to do is put Pfizer, locate Pfizer plant in the neighborhood, or Pfizer offices, and then next to it they wanted to take this neighborhood and knock it down, clear it out and then build malls and stores and a high rise apartment building and other things. And so to accomplish what they wanted, they used a principle called eminent domain. And the 5th Amendment allows the government to take it for a public use, take the property for a public use. And Susette wasn't willing to give up her property. She didn't believe they were taking it for a public use, she thought Pfizer Corporation was really the one taking it, and she got the Institute for Justice to litigate the case on her and her neighbors' behalf.

[00:10:22] Judge Amul Thapar: For example, one of her neighbors was the Dairies, and the Dairies had lived there 105 years or more and had bought, they loved the neighborhood so much when their kids got married, they'd buy a house for them in the neighborhood. In chapter one, it talks about how the litigation proceeded and how they fought to keep their houses. This community was important to them, the neighborhood was important to them. And it ends up in the United States Supreme Court. And hundreds of amicus briefs are filed. And one brief in particular struck out to me, and that was the NAACP's brief. And the NAACP asked the Supreme Court to return to the original meaning. Why? Because there was a predecessor case called Berman out of the District of Columbia. And in Berman, the District of Columbia took what it called blighted housing away for a public purpose. And the question in that case was, in the Kelo case, to move back to Kelo, was whether this was a public purpose. And the NAACP in a very thoughtful brief pointed out that the public purpose was not consistent with the

terminology in what was originally passed, which was public use. And ultimately, the Supreme Court in a five to four decision held that the City of New London in partnership with Pfizer could take her house and the Dairy's house and all those houses.

[00:11:53] Judge Amul Thapar: And Justice Thomas's dissent, he said that the court should return to the public use. And what public use means basically, as Justice Thomas explains, is that the government should only be able to take someone's property if it's for something like a sidewalk or a road or something that is truly the public's use and not for a public purpose. And if I may take a step back to the oral argument, Justice Scalia asked this question, and on the book's Twitter site, the question and answer are posted along with the audio, and you can really hear the surprise in his voice, he asked the question, "So," to the city, "you're arguing that you can take from A, meaning the poor, and give to B, the rich, because it would serve a public purpose of higher taxes." And their answer is yes. And so what Justice Thomas pointed out is eminent domain is often used to prey on the poor and minorities when it's beyond public use, and the NAACP agreed with that. And he quoted the statistics. In Berman, for example, 97% of the property that was taken was from blacks. He also includes some quotes I won't repeat on the air that were quotes from government officials in the past about eminent domain that are especially compelling. I'm happy to go on, but I'm sure Bernice has amazing views about this as well.

[00:13:16] Judge Bernice Donald: Well thank you. I would say this, when I think about government's use of eminent domain and really the exercise of government power, I think about water. You know, water will always go in the path of least resistance left without any other externally applied force. And I think when we talk about the use of eminent domain, it is always going to be taking the path of least resistance. What is that path? It is going to be those who either have a limited voice or no voice, or whose voice is and whose power is marginalized. And I think that's what you bring out in the Kelo case. So this dynamic about public use and public purpose, it's really elucidating, and in that case I think the Thomas dissent was, as you said, a powerful dissent, but I think throughout history, we're always going to see that power exercised in the way that there is going to be least resistance. Now, the government thought in this case that there was gonna be limited resistance, but Susette Kelo and others put up quite a fight. And we can look at that.

[00:14:30] Judge Bernice Donald: I look at that case because it's a powerful principle, but when you look at that eminent domain applied broadly, we now

know that we have bustling cities and societies all over the place, but when we decided in the '60s to build massive highways and freeways we didn't go to well established affluent communities, we went, again, to the path of least resistance. And in my city, Memphis, Tennessee there was an effort to bring the expressway through a very popular part, and again, celebrating many of the wonderful lawyers that we see in the book and lawyers who are not mentioned. But our citizens and lawyers organized, and through citizen force, they stopped the freeway from going through and disturbing that park that is smack dab in the middle of the city of Memphis. And there is power in people, but government oftentimes will, to serve whatever that purpose is—and I guess we're now saying that anytime there's economic development that that is a public purpose. But communities, and we'll hear of this later on in the book in other cases, that those who are in the poor, oppressed and marginalized group are all, are gonna have to have their antenna raised. And in many instances, we're gonna see outcomes that disturb us.

[00:15:56] Judge Amul Thapar: Jeff, can I just...

[00:15:57] Jeffrey Rosen: Please.

[00:15:58] Judge Amul Thapar: Yeah. I think Bernice raises a really good point, as always. And one of the things I think that is important, and I hope people read the book and read this chapter, because it shows just how difficult it was to get a lawyer like Scott Bullock from the Institute for Justice to take on a case like this, 'cause Scott gets thousands of requests. And I think the difference, and this is why Bernice's point's so insightful, is that what happens when you expand the original Constitution beyond its meaning is often it's used to prey on the most vulnerable. And this was an example of that in my mind. And the eminent domain as a practice, as Bernice pointed out, where the least resistance often is from communities that can't afford or get lawyers. And so Scott obviously did this case pro bono, it's Institute for Justice, I think, although I couldn't be 100% certain, takes most of their cases for free. But the reality is, and the book points out, he gets thousands of requests all the time. And I think just to finish the summary on Justice Thomas's words himself, Justice Thomas in the dissent says, "Something has gone seriously awry with this court's interpretation of the Constitution, when although the citizens are safe from the government in their homes, the homes themselves are not safe."

[00:17:27] Judge Amul Thapar: And the ultimate punchline, which is included in the chapter, is that after Pfizer built its plant, for eight years they were there, and

then they left. And the place where Susette's neighborhood once was is now barren. And I took, I went there and took a picture of it and included it in the book. And so now New London has nothing there. And that community where people lived for 100 years was lost. And so I think people shouldn't forget Bernice's point, that it really is like water sometimes. And the court's responsibility is to stand in the way when the Constitution commands it and not to distort the Constitution so that governments can get what they want at the expense of the people.

[00:18:17] Judge Bernice Donald: You know, Amul, when we talk about not forgetting the Constitution, I want us always to be cognizant of where we are now and where the founders were in 17 e- well, where the ratifiers were in 1788, because these cases are Constitutional interpretation. And the point I wanna make, the point I make when I'm doing lectures on inclusion, lectures on diversity, all of us, no matter how brilliant we are, we read the same black letter law, we read the same statutes, and the interpretation becomes altered, because all of us are viewing this through the lens, rather, of our lived and learned experiences, and we're interpreting. And those interpretations are not always gonna be the same. If they were, we wouldn't need appellate courts and we certainly wouldn't need a Supreme Court. So when we look at this, some of this we're not gonna find necessarily unvarnished in the language of the Constitution. It's gonna take an interpretive lens. And I believe that's where some of the tension is.

[00:19:31] Judge Bernice Donald: We can look at this and you have it all through the book where you talk about 5-4 cases and which judges did this and which... There are these differences, and we can agree with them sometimes and we can disagree. I think none of us are ever gonna totally agree every time with what a justice said, no matter what we think of that justice. So I just want to remind everybody that none of us have a clear lens, and we as the courts are vested with the judicial review of these statutes and laws, and interpreting sometimes where we are now. And I know there's a raging debate about living Constitution, or originalism and textualism and purposivism and all of those things, but I just wanna remind us that we're talking about the interpretive lens of judges and justices as they view those statutes and laws, and the power of citizens applied to help shape those, all of those things are important.

[00:20:29] Judge Amul Thapar: I wanna point out one thing that Bernice and I agree on. She threw out we don't need appellate and Supreme Court if the documents were clear. You know who we always need, and Bernice and I agree, is district judges.

[00:20:46] Judge Bernice Donald: [laughs]

[00:20:46] Judge Amul Thapar: And we're both former district judges, Jeff, just to let you in a little secret, or maybe it's publicly known. [laughs] And so no, but I, I think Bernice is of course right, that we all are trying our best. And I think that's one thing that I just wanna put in a plug for the courts, at a time in society when we see a lot of back and forth and fight- you know, disagreement, I think the courts are remarkable, because we all respect each other in trying to do our best. Bernice and I disagreed without being disagreeable, and we'd go out to dinner, we had a lot of fun together. In fact, Bernice just came up, I insisted she eat lunch with all of us. And of course she was the life of the lunch table, as all the judges would attest.

[00:21:30] Judge Amul Thapar: But we, I ha- and Bernice knows this, I have the most wonderful colleagues. And while you may see how we disagree on paper, I can assure you behind closed doors we're good friends. It's like brothers and sisters. And to me, that is one of the unique things about the court is we all bring our experiences, we all are trying to get it right, and we might just have different approaches. And I think often that's lost, and I frankly wish everyone operated like our court does, the sixth, like our courts do. The Sixth Circuit is a wonderful place, and I think Bernice and I are both lucky to be there and lucky to have all the colleagues we have.

[00:22:09] Judge Bernice Donald: Absolutely. Amul, I wanna make this comment, and then certainly get back to the book. Judicial collegiality is so critical because we, while we may come from different backgrounds, we are there for a common purpose, and that is to interpret and apply the law and to give guidance. And I know one of the people who is in the audience and who is actively listening and thinking is Denise Neary who's with the Berkeley Judicial Institute. But she mentioned in her chat comment about collegiality, and I think that's what you've alluded to, as long as we respect each other and respect difference we can bring ourselves from a principled position to these very difficult issues. And make no mistake about it, while there are well written opinions at issue, these are difficult issues that courts are grappling with, and there's always going to be some differences in the way they are received in the public, but as long as judges come together from a position of respect and principle and do the work, hopefully our nation can benefit from that and recognize that the judges are simply doing what they believe the law requires, and they're going to—not an outcome based decision, but going where the law leads.

[00:23:27] Judge Bernice Donald: I'll make one other point, last year in September, Don Willett from the Fifth Circuit and I wrote a piece, an editorial in the, an opinion piece rather in The Washington Post, and we talked about the very things that Amul just talked about, the need for judges who are different, come from different backgrounds but who share a common purpose, that is the law, to help the public understand not only the law but the purpose of judging and the importance of collegiality. So Amul, it is my pleasure to have served with you for the years you've been there, and I do miss you providing the coffee.

[00:24:05] Jeffrey Rosen: Thank you both so much for this wonderful discussion, and you are providing a model of the collegiality that Denise Neary asks about with this thoughtful conversation. My role is to, just to tee up the broad topics in Judge Thapar's book. So the next one I'll put on the table is religion. And Judge Thapar you discuss the Zelman case, and I want you to talk about this, it involves the constitutionality of school vouchers, who the parties were, but also one big question that's arisen here is does originalism honestly applied really favor the individual or not? And in this Zelman case, Justice Thomas took the rather strong position that the establishment clause of the First Amendment, which prohibits Congress from making an establishment of religion, shouldn't apply against the states at all, because originally understood it was a federalism provision. What would the effects of that be if it were adopted, and is it consistent with your notion of favoring the little guy?

[00:25:07] Judge Amul Thapar: Yeah. So I think in Zelman what he's in particular talking about, and you can go back, it's chapter two of the book, and what happens in Zelman is the schools in Cleveland are in disrepair, and so in a bipartisan bill, in a bipartisan way, Ohio passes a voucher program. And just to give you an example of how bad the schools were, between 14 and 25 of the buildings had been condemned. Students were complaining there was no toilet paper or soap in the schools. And there're statistics of about 9% I think of the students passed the ninth grade proficiency test if I recall it accurately, it's in the book. And so the schools are in total disrepair. What happens is o- State of Ohio passes a first in kind voucher program that allows students in these schools to use a voucher and go to a school of their choosing. It could be a magnet school. It could be, they had community schools and they had the Catholic schools were involved and a few other private schools.

[00:26:18] Judge Amul Thapar: And the way it worked is if you went to the magnet or the community school, the State of Ohio would send money to those

schools. But if you chose to go to... The parents would get to choose. If you chose to send your child to a Catholic school, you would get a voucher, or any private school, and you could use that at any private school and a portion of it you would have to pay. So if it was 2,500 dollars, you would get 20... the voucher was for 2,250 dollars and you would pay 250 dollars for your child to go there. And what happened, the children started going there and having success, and then there was a lawsuit over the program. And the argument was the parent's choice of sending a kid to a Catholic school because the money was coming from the state, that if they went to a Catholic school or other religious school that would violate the establishment clause.

[00:27:12] Judge Amul Thapar: And that issue, in an emergency fashion made its way to the Supreme Court. And then ultimately, the ultimate question made its way to the Supreme Court. And Justice Thomas, as you know, writes separately, and he points out all of this, and he points out how important it was that children be able to go to schools where they would succeed. And the quote you're referring to is this, "There would be a tragic irony in converting the 14th Amendment guarantee of individual liberty into a prohibition on the exercise of educational choice." And he quoted Frederick Douglass in that extensively and talked about something his grandfather had taught him, that education means emancipation. To quote Frederick Douglass, "No greater benefit can be bestowed upon a long benighted people than giving to them, as we are here earnestly this day endeavoring to do, the means of an education." And so his point was that the establishment clause did not prohibit the states from, in essence, enacting what's similar to the GI Bill for education, where the parents would get the voucher, and they could choose where to send their kids, which included magnet schools, included community schools, and included private schools.

[00:28:36] Judge Bernice Donald: Well I would say that in this country, we have had a long history of law and a- around education, and unequal education and denial. You know, with the Simmons case, and I'm not gonna get into Justice Thomas's jurisprudence, but I would say that I don't want us to get the notion that vouchers are the answers to all of these education issues, and I know that's not what you said, Amul, but I believe that in many instances around the country, we are still struggling with how to address this, because there is a limited pot of money. What always, I guess, concerns me is will there be a public education shell with no resources for people who don't go to the voucher choice to educate their children? And that's beyond what you're talking about there, but that's a policy issue that I think we cannot just pitch to the side. The education initiatives that are discussed in *Zelman v. Simmons* are important, and people around this country

will have views one way or another about them but I do believe that education is tremendously important.

[00:30:02] Judge Bernice Donald: I don't think that it is the answer to everything, because we have found ways for really educated people, and this is for another day, people who stand with the same education may be treated differently in the marketplace when it comes to the ultimate aim, and that is getting jobs and opportunities to create lives for themselves and their families. But that's beyond this case and is for another day.

[00:30:29] Jeffrey Rosen: The consequence of Justice Thomas's view that the establishment clause, as originally understood, shouldn't apply against the states. Would that be to allow states to resurrect the establishments that they had at the time of the founding, like congregationalism in Massachusetts or Unitarianism? And to that degree, does this case show that originalism honestly applied can have rather strong results?

[00:30:56] Judge Amul Thapar: Well, I think in this case what it shows is that originalism honestly applied would allow vouchers. I don't think it shows anything more. I think Justice Thomas's view that the establishment clause as originally understood does not apply to the states through the 14th Amendment doesn't mean you wouldn't have the free exercise of religion, which he does think would be applied. And could states resurrect and would states resurrect are two different questions, and those are policy questions that obviously we can't get into, but that's a different question than what this case is about, which is all Justice Thomas was talking about in this case, and I think you would agree, is vouchers. And I would point out, just if I may add one thing, I agree with Bernice that, look, vouchers pr-w- I can't speak as to the policy, but it might not, I mean, it, it would seem pretty obvious that they're not the only solution or the panacea for everything that ails us, but rather I think what Justice Thomas was saying is vouchers give these kids a chance.

[00:32:03] Judge Amul Thapar: And I would point to Fannie Lewis in the book. Fannie Lewis was the city council member from Cleveland, from the worst ward in Cleveland. And she was a huge supporter of public schools, but she wasn't gonna, in her views, sacrifice the current kids to achieve fixing the public schools. She believed both things needed to be done side by side. And then I'd point to Patrick Sweeney, the ranking democrat who pointed out that, "For those who opposed vouchers," and I'm quoting, "they never send their children to public schools but

come out foursquare against vouchers. People who have an opportunity to write a check have a voucher in their pocket. What they don't want are children who are in this neighborhood and in this inner city to have a checkbook." And so that's what the case was about. And what Justice Thomas was saying is it would be a perverse result if the reality of the establishment clause as presently understood prevented children from having this choice to go to both private schools and magnet and community schools.

[00:33:11] Judge Bernice Donald: One of the thoughts was why shouldn't it be the first province of government to try and do something to enhance the quality of education through resources and all in the schools so the kids in the community did not have to leave their community to get a better education? But again, I know that's a policy argument but I just wanted to make certain that we don't just assume that, as you say, vouchers are the panacea. But we're not talking about the voucher policy, but about Justice Thomas's position in this case. And I know that we are, we are way behind on our cases, so probably we should move.

[00:33:53] Jeffrey Rosen: I think so. Well the next big case in this wonderful discussion is Grutter and Bollinger. This is the affirmative action case Justice Thomas wrote a powerful dissenting opinion. Judge Thapar, tell us what Justice Thomas said and why he thinks affirmative action is inconsistent with the original understanding of the Constitution.

[00:34:12] Judge Amul Thapar: Yeah, so, again, Jeff, would you prefer I skip the facts here since we're running short on time? 'Cause I-

[00:34:19] Jeffrey Rosen: I think on this one, yes, because it's such a big topic, that'd be great.

[00:34:22] Judge Amul Thapar: Yeah. I mean, I think one thing that's important in the book, before I skip the facts, is just the history of the University of Michigan, and it does have this remarkable history, and hopefully I accurately captured it as someone who might not be a Michigan football fan and I should disclose that. But Justice Thomas goes through, in the Grutter case, his view of what the Constitution compels.

[00:34:46] Judge Amul Thapar: And again, he's talking about... And it's interesting because in Zelman, if I may tie back to that, he points out that there's a constitutional way in his mind and an unconstitutional way to fix the educational

system. And the constitutional way is through choice and competition. And the, he views this as a bandaid. In other words, he understands that affirmative action, that there is something necessary to diversify the schools, he and Justice Scalia point out Michigan doesn't have to have such elite standards if it wants to diversify its school, if it views that as one of the ultimate goals. He also points out that in his mind, the 14th Amendment forbids this discrimination. To quote Martin Luther King he says, "We should judge people," and he doesn't quote directly, but, "on the content of their character, the content of their application, and not the color of their skin." And this is very important, it seems to me, to Justice Thomas, as he points out, and he quotes again Frederick Douglass in that chapter, or in the decision, I'm sorry, and goes through how if we're doing this, we are solving aesthetics in these schools, but not really changing how the kids succeed.

[00:36:07] Judge Amul Thapar: The final thing I'll point out, and I don't wanna take up all the time, is he talks about historically black colleges and the importance of HBCUs. And he talks about this often in his decisions, and I include some of the quotes in there, and he really wants to make sure that HBCUs are not changed in their ways through some sort of affirmative action program. And the chapter talks about an Alabama case that had in effect what was a whites only scholarship program to allow whites to go to HBCUs, but they were taking away from black students who were getting graduate degrees and who were going to undergrad at Alabama State. And I think these types of things are the things that bother Justice Thomas about it, when you get away from the original meaning of the 14th Amendment, and in his mind allow programs like this, you're putting a bandaid on a much bigger problem that Bernice described when we were discussing the last chapter.

[00:37:10] Judge Bernice Donald: As I said before, this whole issue of education has always been huge. But when we talk about originalism there, I'll go back again to where we were at that time, and keep in mind that when we're talking about, he's talking about affirmative action and the admissions program there, I think it's kind of cynical to say, "Well, the University could change the standards," because then you're saying that a group of people cannot meet those standards. There are many people in universities across the country who get into universities because of legacy, because of a whole range of things. But there was a focus here on, by Justice Thomas on race, the assumption being that people could not meet those qualifications. I do think that, as Justice O'Connor said, there's a value in diversity, but it's not just about having people of different colors sitting in the room together, it is about people learning experiences and stories and understanding, getting people's view of issues as they're discussing the great issues of the day, because it

prepares them, as I think they said, to live in a world that is going to be diverse, where people are gonna be making different contributions.

[00:38:27] Judge Bernice Donald: So I kind of, when I read this, this notion about, "Well, they're just doing, engaging in window dressing, I would disagree, and I know that this case in particular had a, kind of a devastating effect on our court. Neither you nor I were there at the time, Amul, but it was a very heated issue, as these cases often are. But I do believe that there is an important place for historically black colleges, where we know that historically black colleges came about because of the discrimination and the exclusion that existed when African Americans, no matter how bright they were, could not go to certain schools. In my own state of Tennessee, there were people who sought to go to law school, for example, at state supported schools, and they were denied. The school would say, "You can't go to, you know, Tennessee school X, but we'll pay for you to go to Harvard or Michigan or some other place." But it was just rank racial discrimination, which was the cause for decisions that universities were making. I understand that you said Justice Thomas does not want to go back there, but I do believe that there is a little bit of cynicism in some of this.

[00:39:43] Judge Amul Thapar: I think, if I could respond, Justice Thomas points out that racial discrimination and things like that are a big problem, and there's multiple ways to solve it, constitutional ways, in his mind, and unconstitutional ways. And he points out, as Bernice just alluded to, that the differences in LSAT scores, for example, between white students and Asian students and black students, and he says, "If we hold black students to lower standards," and I'm quoting, "this racial discrimination will have helped fulfill the biggest prophecy about black under-performance, just as it confirms the conspiracy theorist's belief that institutional racism is at fault for every racial disparity in our society." And then Justice Thomas goes on to talk about other programs that exist that end up with much more or equally diverse classes. And the kicker about this is after this case, the State of Michigan passed, through its people, an overwhelming bill to ban the use of these practices. And today, Michigan Law School, notwithstanding that, because it's changed its way, apparently, it does admissions, 42 per... touts that it's got its most diverse class ever.

[00:41:03] Judge Amul Thapar: And so whether it's Texas where they use the top 10% or something else, I agree with Bernice that it's important we have people with different points of view, that all points of view are shared, that people will listen and learn, just like on the courts from them. And I agree with Bernice, our

court doesn't have a great history. Luckily, neither of us were there, Bernice and I handled a race in- several race cases. And as everyone hopefully can see, we're very dear friends. We might've disagreed without being disagreeable, as I mentioned at the beginning. And so I think our court in that regard, Bernice, I hope has improved a lot.

[00:41:41] Judge Bernice Donald: Yeah, no question about it, we've certainly improved. I just wanna make this one quick point too. When we're talking about standards and qualifications, you know, what is the baseline measurement that we're using to see who's qualified and who's not? And I know there's a lot of jurisprudence out there about whether or not the LSAT is really an appropriate measurement, whether it really measures people's ability to succeed or not succeed. And so we have gross variances, but I am not willing to concede that African Americans cannot or will not do well on the LSATs. So we, you know, we've got 15 minutes maybe, so perhaps we should move.

[00:42:16] Judge Amul Thapar: Yeah. And one thing on the LSAT Justice Thomas pointed out, and I think Justice Scalia, is they could get rid of the LSAT, the Michigan or any school.

[00:42:25] Judge Bernice Donald: And some universities have.

[00:42:26] Judge Amul Thapar: Right. And some universities have followed their lead. But I agree with Bernice as well that, and this was Justice Thomas's point, if you hold everyone to the same standard, blacks will accomplish it just as well as whites, if not better. And I think one of the things in the book that was remarkable to me that I didn't go in expecting is his very strong v- black voice that comes through. Not only, he's first and foremost an originalist, of course, but he quotes Frederick Douglass often. He has a very strong black voice, that whether it comes through in the first three chapters, and it comes through later in the book as well.

[00:43:03] Jeffrey Rosen: I do wanna ask this question, Judge Thapar, that the objections to Justice Thomas's originalism range from the claim that it might lead to radical results, like not incorporating the establishment clause, or as one of the questioners suggests, overturning *Griswold v. Connecticut*. And the second claim is that at times it's inconsistent originalism. What is Justice Thomas's response or your response to the claim of some, such as Justice Ketanji Brown Jackson, that the original understanding of the 14th Amendment allowed for race conscious aid

to blacks that didn't go to whites, and that the framers did not intend to impose a color blindness requirement across the entire range of state action?

[00:43:45] Judge Amul Thapar: Yeah. I mean, I think they're gonna decide, right, I think Justice Jackson and Just- all that, that's a case that should come out in the next week or two, answering some of those questions. So I don't wanna get ahead of them. What I would say is, and I think the book at least shows this in part, is when you go through *The People's Justice*, the book, what you'll see is we have these views of what should be, like *New York Times v. Sullivan*, where in chapter six, Justice Thomas has a very strong view on that case as to whether it should be revisited. He points out that while the original intention of the court might've been good, it's resulted in such a way that Bill Cosby's accusers couldn't sue him, because when they accused him of rape, they became limited public figures. And I don't think anyone envisioned that at the time. And he writes alone, and I think he does it constantly, to point out that by returning to the original meaning, it will actually protect people like Kathy McKee, who accused Bill Cosby of rape, and so... and stop Bill Cosby and his lawyers from, in her mind, defaming her. She never... All she wanted was her day in court, and she never got her day in court. And I think it's important that you can always pick certain things out.

[00:45:10] Judge Amul Thapar: The other thing I would remind everyone is just because the document doesn't protect a certain right doesn't mean the American people, whether legislatively or otherwise, amend- amending the Constitution or legislatively can't change that. Title VII is on the books, that is separate and distinct from the Constitution itself.

[00:45:31] Jeffrey Rosen: Judge Donald, Judge Thapar does have several cases where Justice Thomas ruled in favor of criminal defendants. So what's your response to those chapters?

[00:45:40] Judge Bernice Donald: I think one can look at any justice's body of work, as I said before, and find things that one can agree with and things that one can't. When we talk about *The People's Justice*, I think we all have to ask ourselves, you know, "Which people are we talking about? And how are we defining the people?" in the limited time, I don't wanna talk necessarily about one of the criminal cases in the book, but I wanna talk about one of the cases that troubled me where Justice Thomas was the lead writer, and there was a dissent by Justice Ginsburg, and that's *Thompson v. Connick* out of Louisiana where an African American man who was accused of the armed robbery and then later

accused of murder. The cases were structured so that they were tried, they were tried the robbery first and then the murder. And in that case, the prosecutors withheld Brady evidence, DNA evidence, blood work that would've shown in the robbery that he was not the person in the armed robbery, nor was he the person in the murder.

[00:46:46] Judge Bernice Donald: That man spent 14 years on death row, 16 years total in prison. And when it was sent back for retrial after the investigators got the evidence, he was acquitted or the case was dismissed, I've forgotten which [inaudible 00:48:23] had, but he brought a civil suit, a 1983 action. The jury awarded 14 million dollars for damages. And I don't know how much 16 years of one's life that's been taken unlawfully, I don't know what that's worth, but the people, the jury said 14 million dollars. That verdict was upheld by the Fifth Circuit, and it went to the Supreme Court.

[00:47:21] Judge Bernice Donald: And Justice Thomas, in his case said that prosecutors are assumed to have and presumed to have gone to law school and to acquire legal training and knowledge and understand their rights in discharging their job. And where there is a single, I guess isolated instance of abuse or violation one cannot hold the DA liable. And so that case, that verdict rather was snatched away from Mr. Thompson. Now while the 14 million dollar verdict was snatched away, we could not give him back the 16 years of his life. You might say, "That's one case," but I wanna make sure that when we talk about the people, we look at people, injuries occur, and not all injuries are gonna be redressable, but in this case the jurisprudence said that you can't hold the DA liable. But the DA is the elected supervisory agent of the people in that office. And that case troubled me.

[00:48:25] Judge Bernice Donald: I can't talk about the history of Justice Thomas's works. And I wanted to say this, that what I'm saying today is not an indictment against Justice Thomas. I neither condemn him nor praise him. But he is a Justice properly nominated by a president and confirmed by the Senate. And the book that Judge Thapar has written is a well-written, wonderful book with the stories. But I do have to say that there are cases that trouble me, there are cases where I've cited Justice Thomas in my opinions. So I don't think anybody can be defined solely by, you know, 11 or 12 or even 20 of their cases. And I just wanna make sure the audience is clear on that.

[00:49:10] Jeffrey Rosen: Thank you so much for that. Well, we just have a few minutes left. And before asking for closing statements, Judge Thapar, there have

been so many questions in the chat about the ethics charges that are surrounding several of the Supreme Court justices now. I'll just ask you to respond. Our first questioner says, "Should we be normalizing Justice Thomas's lack of ethics?" Well, what is your response to those charges?

[00:49:36] Judge Amul Thapar: Yeah, I think I need to... Obviously what's been referred to the judicial council probably Bernice could comment on, but I can't. But what I can say is that I think there's a couple things. First and foremost, it's important we look at the financial disclosure rules and whether they were consistent with the rules. And I think that's being lost whether it's Justice Sotomayor or Justice Thomas or the others, wherever, Justice Ginsburg in the past. I think that that is number one. Number two is the ethics rules for Bernice and I are different than the ethics rules for them, and I think a lot of people are applying the ethics rules we have to them. And they have their own internal way of dealing with things, whereas ours is much different. Bernice, maybe you can comment on the specifics in a way that I can't.

[00:50:29] Judge Bernice Donald: Perhaps I could, but I won't. But I will say this, is that as judges, whether we are elected or whether we are appointed, judges must always comport themselves in a manner that instills confidence in the judicial institution. If we're not willing to do that, then we should think twice about assuming these roles. You know, judges don't have an army to enforce judgements. Judges don't have the power of the purse. What judges have, hopefully, is the respect and confidence that we are going to do the job that we have been sworn to do. And in doing that job, we must comport ourselves in a manner that requires us to forego some things, make difficult decisions. But if we comport ourselves properly, letting the public know that we are impartial and fair and that we have no regard for race, color, financial position, of poverty, then people will have respect for those judgements. And it makes it easier for people to swallow a difficult decision that the court has to make, because the court, I mean the public, will understand that the court has not made that because of any personal gain or benefit, but because the judge believes, even though others may differ, that that is what the law dictates. And I think we should strive for that as an African American.

[00:51:53] Judge Bernice Donald: And I would say I've been an African American all of my life, and there have been times when I have greatly benefited from justice. You know, I was one who spent the first 10 years of my life, the first 10 years of my school life, in woefully inadequate schools due to segregated schools. The... Brown was decided in '54, but when I began school in '57, I began

school in a two room cinder block school with grades one and two in one room and grade three in the others, and the other grades were in a single room black church with no facilities. And the State of Mississippi said, "That's okay." Even though my white counterparts went to a fully functioning resourced school, that satisfied in the mind of the state the separate but equal doctrine. So the courts ultimately stepped in, and the federal government stepped in and said to the state, "If you don't do something, I you don't comply with the law, you're not gonna get anymore federal money." And that was a powerful incentive. We cannot turn a blind eye to history. We cannot turn a blind eye to power. We cannot turn a blind eye to difference. We have not yet accomplished that ideal that our laws espouse and that we hopefully all aspire to.

[00:53:12] Jeffrey Rosen: Powerfully said. Well, we are just about out of time, but I'd love you to sum up, Judge Thapar, the powerful argument of your book. In your conclusion, you say that whenever a student asks Justice Thomas to sign a copy of the Constitution, he says, "This is your Constitution, and that's the point of the Constitution, it's the people's law, not anybody else's." Tell us what Justice Thomas's jurisprudence represents in your view.

[00:53:39] Judge Amul Thapar: So let me say one other thing on the question you asked before, and then I'll finish with that, which is I would point out also what his colleagues say about him. Justice Breyer, who didn't agree with Justice Thomas all the time, said he's a man of integrity, and someone that has never said or done anything underhanded in his 28 years of interacting with him. Justice Sotomayor says he's the one justice in the building that knows everyone's name. And so I think like Bernice and I the justices themselves have amazing and great relationships behind closed door, and they really do, all nine of them, do a remarkable job in my mind, and I think Bernice agrees with that. The, and I think Bernice's experience is important, that's why I always respected and admired her as a colleague. And it's been a true honor to do this with her. Bernice and I hope to go to some law schools together and talk about things like civility, because we are such good friends. And I think the students and us would have a lot of fun together.

[00:54:45] Judge Amul Thapar: I'll finish with this on Justice Thomas. I think what the book tries to do is, in the intro and conclusion, obviously I believe in originalism, I talk about that, I lay my chips on the table, but the 12 chapters in between, if you'll notice, Jeff, I don't talk about, I don't try to sway the reader one way or another, I just tell the stories of the cases. Of course, the stories are very compelling, and as Bernice said, you can pick—you're gonna agree and disagree

with any justice, or any judge for that matter, that you sit with. And Bernice and I have had that experience, we don't always agree with our colleagues, but we do our best nonetheless to work it out, and that's why I think what's remarkable about the courts is we reach unanimity so often. And I think that's rarely talked about. And I believe that Justice Thomas works hard to do that, but at the same time, he's never gonna compromise his, what he believes the Constitution compels, because it is the American people's Constitution, they ratify it, they pass the document, they approve the document, they amended the document.

[00:55:49] Judge Amul Thapar: And it's just like in chapter, I believe, nine, he talks about the privileges or immunities clause, and the history of taking away privileges and immunities from black people in the South, and to tie back to Bernice's former point. And I think that chapter is really compelling when you read his words. And I think one of the things, and I'll finish with this, I hope the book accomplishes, is it gets people talking about this and gets people talking about Justice Thomas's own words versus what people say about him and about his words.

[00:56:23] Jeffrey Rosen: Thank you so much, Judge Thapar. It would be wonderful if you and Judge Donald took this important show on the road to model civil dialogue. It's been an honor for the National Constitution Center to convene both of you. And Judge Donald, we will give you the last word about Judge Thapar's book and the jurisprudence of Justice Thomas.

[00:56:42] Judge Bernice Donald: Just wanted to thank Judge Thapar for taking the laboring oar and shepherding this work to its fruition. And I am just proud to be a part of this dialogue about great constitutional principles. Thank you.

[00:56:57] Jeffrey Rosen: Thank you again, Judge Thapar, Judge Donald, for casting light on this crucially important topic of Justice Thomas and originalism. Thanks to all of you friends for tuning in in the middle of your day and learning about the Constitution and listening to these thoughtful arguments. And we look forward to reconvening again very soon.

[00:57:22] Lana Ulrich: This episode was produced by John Guerra, Bill Pollock, Tanaya Tauber, and me, Lana Ulrich. Research was provided by Yara Daraiseh. Check out our full line up of exciting programs and register to join us virtually at constitutioncenter.org. As always, we'll publish those programs on the podcast, so stay tuned here as well, or watch the videos available in our media library at

constitutioncenter.org/constitution. Please rate, review and subscribe to Live at the National Constitution Center on Apple Podcasts, or follow us on Spotify. On behalf of the National Constitution Center, I'm Lana Ulrich.