

## “JUDGE THOMAS IS THE FIRST CHOICE”: THE CASE FOR CLARENCE THOMAS

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### “HOLD FOR GOVERNOR SUNUNU”

Those were the words I heard when the telephone rang at 4:30 p.m. on June 27, 1991, less than three hours after Supreme Court Associate Justice Thurgood Marshall, that “old soldier of liberalism,”<sup>1</sup> announced his retirement.<sup>2</sup> John Sununu, former Governor of New Hampshire and chief of staff to President George Bush, was clear and succinct. The President’s advisors would meet the next morning, he said, to recommend a candidate for filling the Marshall vacancy. He asked me to fax him a memo by 8:00 p.m. listing my top three recommendations and assessing their political pros and cons.

My first choice was then—U.S. Circuit Judge Clarence Thomas, and on July 1, 1991, calling him the “best person for this position,”<sup>3</sup> Bush nominated Thomas to be an Associate Justice of the Supreme Court of the United States. On September 27, 1991, the U.S. Senate Judiciary Committee voted 13–1 to send the nomination to the full Senate without a recommendation,<sup>4</sup> and on October 15, 1991, the U.S. Senate voted 52–48 to consent to his appointment.<sup>5</sup> Justice Thomas is now serving his ninth term on the Court.

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<sup>1</sup> Stephen L. Carter, *An Old Soldier of Liberalism Musters Out*, WALL ST. J., July 1, 1991, at A8.

<sup>2</sup> Justice Marshall’s letter to President George Bush, dated and released on June 27, 1991, read in its entirety:

The strenuous demands of court work and its related duties required or expected of a Justice appear at this time to be incompatible with my advancing age and medical condition. I, therefore, retire as an Associate Justice of the Supreme Court of the United States when my successor is qualified.

Letter from Thurgood Marshall to George Bush (June 27, 1991).

<sup>3</sup> Quoted in Paul Bedard, *Bush Calls Thomas to Highest Court*, WASH. TIMES, July 2, 1991, at 1A.

<sup>4</sup> The committee’s 7–7 vote prevented an affirmative recommendation. See Dawn Ceol, *Panel’s Tie Vote Sends Thomas to Full Senate*, WASH. TIMES, Sept. 28, 1991, at A1.

<sup>5</sup> See 137 CONG. REC. S14,724 (daily ed. Oct. 15, 1991).

Sununu made that call for a very strategic reason. One year earlier, at Sununu's urging,<sup>6</sup> Bush had appointed David Souter to the Supreme Court without consulting or actively involving grassroots conservative organizations. On October 8, 1990, after the White House ceremony marking Souter's appointment, Sununu explained the strategy. It was, of course, true that "in the 1988 campaign Mr. Bush said he would nominate judges who practice 'restraint' and weren't 'liberal activists.'" <sup>7</sup> With different political parties controlling the nomination and confirmation stages of the judicial selection process, however, political reality had to be considered in addition to judicial philosophy. Sununu hoped that Bush's first Supreme Court appointee would be overwhelmingly confirmed without the expenditure of significant political resources.<sup>8</sup> A second nominee, he said, would have a more clearly defined judicial philosophy even though such a nominee would likely provoke a "knock-down, drag-out, bloody-knuckles, grassroots fight."<sup>9</sup>

Sununu called on June 27, 1991, to pursue the second part of that strategy.<sup>10</sup> Legal experts in the Bush administration, particularly White

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<sup>6</sup> As Governor of New Hampshire, Sununu had appointed Souter to the state supreme court in 1983.

<sup>7</sup> Personal conversation with Governor John Sununu, in Washington, D.C. (Oct. 8, 1990). See also Editorial, *Review & Outlook: House of Lords v. Thomas*, WALL ST. J., Sept. 30, 1991, at A12.

<sup>8</sup> The final 90-9 Senate vote confirming Souter's nomination on October 2, 1990, accomplished the first part of Sununu's strategy. As I told Sununu following Souter's confirmation, however, the better strategy would have been to make the first nominee the most philosophically sound since liberal interest groups and Democratic Senators would likely use the first nominee to mark the outer boundary of political acceptability. The all-out campaign to defeat the Thomas nomination just one year later confirmed that judgment.

<sup>9</sup> Personal Conversation with Gov. Sununu, *supra* note 7. See also Paula Schwed, *Hearings Confirmed Worst: Americans Disgusted as Senate's Failings Exposed*, CINCINNATI ENQUIRER, Oct. 16, 1991, at A4.

<sup>10</sup> Writers on both sides of the Thomas nomination have misunderstood or misrepresented Sununu's call to me that day. Their common mistake has been attempting to ascertain whether this step alone determined the nominee to succeed Marshall when, in fact, Sununu was seeking the "outside" political analysis to consider along with the "inside" legal analysis. The decision to nominate Thomas, then, was not made solely on either criterion.

On the one hand, Thomas's critics blow Sununu's call out of proportion. The distortion by Jane Mayer and Jill Abramson, for example, is almost laughable. They first claim that my October 1990 conversation with Sununu following Souter's appointment involved an "unusual IOU" to me. JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 11 (1994). In fact, Sununu merely described the strategy of first appointing a philosophically moderate but politically solid nominee and then appointing a philosophically sound but politically risky nominee, something that would

House counsel C. Boyden Gray, had argued for Thomas's appointment on the merits.<sup>11</sup> Sununu understood, however, that while a philosophically weak nominee such as Souter met relatively little serious opposition from a Democratic Senate or liberal interest groups, a philosophically solid nominee would provoke a pitched political battle. He told me at that White House reception that this would require active involvement by conservative grassroots organizations.

Sununu realized that Coalitions for America was the key to making the nomination happen.<sup>12</sup> Conservative organizations, and the grassroots

need our help. Seeking our involvement in the next appointment was part of his strategy, not an IOU.

Mayer and Abramson then build fantasy on this fiction by describing Sununu's 1991 call as "making good" on that supposed IOU. *Id.* at 13. The truth is that Sununu was following the very strategy he had outlined for me the previous year.

On the other hand, those more supportive of the nomination downplay the significance of Sununu's call. Reviewing Mayer and Abramson's book, David Brock wrote that my memo to Sununu was "likely written in a self-serving manner, designed to foster the impression that . . . [I] am more powerful than [I am]." David Brock, *Strange Lies*, AM. SPECTATOR, Jan. 1995, at 37. He claims the decision to nominate Thomas had already been made based solely on the advice of the "inside" legal advisors by the time "outside" grassroots activists like me offered input. It remains a mystery how a memo written to Sununu at his request could foster any such impression. Beyond such gratuitous stabs, however, Brock's one-dimensional view is as off-base as the false account by the authors he disputes. The decision was not made solely by either the inside legal team or the outside political activists. Instead, Sununu already knew that while being philosophically sound was a necessary condition, the political resources necessary to secure confirmation was the sufficient condition for nomination. Both elements had to be in place.

<sup>11</sup> See TIMOTHY M. PHELPS & HELEN WINTERITZ, *CAPITOL GAMES* 1-3 (1992).

<sup>12</sup> The Free Congress Foundation (FCF) and Coalitions for America, FCF's sister lobbying organization, had for a decade already been the leading conservative grassroots groups active in the judicial selection process. In the 1980s, Patrick B. McGuigan led the effort to appoint controversial nominees such as Alex Kozinski, confirmed in November 1985 on a 54-43 vote to the U.S. Court of Appeals for the Ninth Circuit; Sidney Fitzwater, confirmed in March 1986 on a 52-42 vote to the U.S. District Court for the Northern District of Texas; Daniel Manion, confirmed in June 1986 on a 48-46 vote (a motion to reconsider that confirmation vote failed on a tie 49-49 vote broken against reconsideration by then-Vice President George Bush) to the U.S. Court of Appeals for the Seventh Circuit; William Rehnquist, confirmed in September 1986 on a 65-33 vote to be Chief Justice; and, most notably, Robert Bork, whose Supreme Court nomination was defeated on a 42-58 vote in October 1987. For analysis of the Bork nomination, see PATRICK B. MCGUIGAN & DAWN M. WEYRICH, *NINTH JUSTICE: THE FIGHT FOR BORK* (1990).

In 1992, FCF created the Judicial Selection Monitoring Project to further this work in the new political environment created by a Democratic president with no intention of nominating individuals with a restrained judicial philosophy. The *ABA Journal* reported the results: "But the real attack dog in the movement is Tom Jipping," says an official in the Administrative Office of the U.S. Courts, referring to the Judicial Selection Monitoring Project's criticism of individual judges' decisions." Terry Carter, *A Conservative Juggernaut*, A.B.A. J., June 1997, at 34. The *National Law Journal* reported in 1998 that "[I]f there has been one constant in the judicial battles of the past two years, it has been

activists they could mobilize, would certainly not work to promote someone unless they strongly believed in him. While Souter had arguably met the philosophical test at the time of his appointment,<sup>13</sup> the nominee filling the Marshall vacancy had to meet both the philosophical and political tests to ensure confirmation. He had to be someone grassroots conservative activists could enthusiastically support and defend.

The memo to Sununu, dated July 27, 1991, emphasized the need for a nominee "the *entire* [conservative] movement can *enthusiastically* support from the *start*. The degree to which these factors were present [with the Souter nomination] makes them a premium this time."<sup>14</sup> The most important political factor in Thomas's favor was that "the *entire* conservative movement not only supports him, but *believes* in him. No dissent is likely from anywhere within the movement." The memo ended with these words: "Judge Thomas is the first choice."

A tip at 10:00 a.m. on July 1, 1991, confirmed that Bush would nominate Thomas later that day,<sup>15</sup> and I alerted several key national

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[FCF's] efforts to unmask the liberal judicial activism among Clinton nominees." Marcia Coyle, *Confirmations—At Last?*, NAT'L L.J., Mar. 2, 1998, at A1.

<sup>13</sup> Justice Souter's record on the Supreme Court has clearly demonstrated either the miscalculation of those who had evaluated his record or his "growth" once on the Court. He has been on the activist side of virtually every major constitutional law decision since he joined the Court. In 1992, for example, he was the fifth vote to re-affirm *Roe v. Wade* and to ban clergy-led invocation at public school graduations. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Lee v. Weisman*, 505 U.S. 577 (1992). He dissented from the Court's decision prohibiting discrimination against public university student clubs based on their religious beliefs. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). He joined a dissenting opinion further expanding the meaning of the Constitution's interstate commerce clause that would allow federal regulation of virtually any economic or social activity. See *United States v. Lopez*, 514 U.S. 549 (1995) (Breyer, J., dissenting). He was the fifth vote to ban the states from imposing term limits on congressional representatives. See *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

<sup>14</sup> In a letter dated October 8, 1990, to Kenneth Duberstein, who coordinated White House support for the Souter nomination, Paul Weyrich noted that "[c]onservative discontent with this nomination was far more widespread than you realize." Letter from Paul Weyrich to Kenneth Duberstein (Oct. 8, 1990).

<sup>15</sup> The White House successfully kept the identity of the nominee secret until the public announcement. The July 1, 1991, edition of *The Hotline* political fax recounts that the "guessing gurus of weekend TV" had predicted the nominee would be U.S. Circuit Judge Edith Jones (Dan Goodgame, *Time* magazine) or U.S. District Judges Jose Cabranes (Michael Barone) or Ricardo Hinojosa (John McLaughlin). Norman Ornstein of the American Enterprise Institute said that "political logic . . . leads us more towards a Hispanic nominee than a black nominee." On the morning of the announcement, a CNN reporter called Concerned Women for America for a copy of their earlier report on Judge Jones' record. That reporter had followed the activities of the leading candidates. He said that Judge Hinojosa had returned to Texas, Judge Thomas was scheduled to be on the bench in Washington that afternoon, and concluded Judge Jones would be the nominee because she was "out of the office."

grassroots organizations. At 2:03 p.m., the moment Bush said Thomas's name at the press conference announcing the nomination, fax machines sent the first of many action alerts to 65 grassroots groups and the first of many analyses of Thomas's record to the media. At 5:40 p.m., Sununu called again to remind me that this would be a "grassroots, bare-knuckle brawl."

Ralph Reed wrote in his book *Active Faith*: "Leading the strategy for the pro-family movement during the Thomas battle was Tom Jipping."<sup>16</sup> This Article first outlines the need for restrained judges who will take the law as they find it rather than make it up as they go along. Then, it reviews Thomas's record for evidence about his judicial philosophy. It concludes that Thomas learned principles and character while growing up, as well as during his tenure as chairman of the Equal Employment Opportunity Commission and on the U.S. Court of Appeals, that ensured he would be the kind of judge America needs. Finally, it briefly notes some reasons why Thomas's appointment is one of the most significant in American history.

#### I. WHAT KIND OF JUDGE DOES AMERICA NEED?

The debate over Thomas's appointment was not about his essential qualifications, or about Anita Hill's false allegations, or about any of the other minor distractions his opponents used to create a climate of controversy.<sup>17</sup> Rather, it was about the kind of judge Thomas would be.

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<sup>16</sup> RALPH REED, *ACTIVE FAITH* 134 (1996).

<sup>17</sup> These distractions appeared every few days in the national media. Virginia Governor L. Douglas Wilder, for example, noted that Thomas had previously been a Catholic and suggested he might have too much allegiance to the Pope. *See, e.g., Wilder Urges Scrutiny of Thomas on Abortion*, WASH. POST, July 3, 1991, at A14. A week later, as if exposing some previously held secret, the media reported that Thomas actually attended Truro Episcopal Church, a "charismatic church" that "opposes abortion." *See, e.g., McClain, Thomas Linked to Charismatic Church*, ARLINGTON J., July 10, 1991. The next day, the media reported that Thomas had tried marijuana while a college student. *See Ann Devroy, Thomas Tried Marijuana While a College Student*, WASH. POST, July 11, 1991, at A1. Just days later, the *Dallas Times Herald* reported that the written text of two 1983 Thomas speeches included a single positive reference to Nation of Islam Leader Louis Farrakhan. *See Arvidson, Speeches of Court Nominee Cite Admiration for Farrakhan*, DALLAS TIMES HERALD, July 12, 1991, at A-1. The written reference was to Farrakhan's emphasis on self-help rather than government dependence to solve problems in the black community. This was before Farrakhan became known for anti-Semitic views, and there is no evidence that Thomas actually delivered the speeches as printed. Then the *New York Times* falsely reported that, while serving as Assistant Attorney General of Missouri, Thomas had a Confederate flag on his desk. *See Adam Clymer, About That Flag on the Judge's Desk*, N.Y. TIMES, July 19, 1991, at 13. The flag was, in fact, the state flag of Thomas's home state of Georgia. Groups then claimed that Thomas should have recused himself from an appeals court case involving the Ralston Purina Company, in which his former boss John Danforth owned stock. *See Anne Kornhauser, Activists Prepare to Fire Timely Salvo at Thomas*, LEGAL TIMES, July 29, 1991, at 7. In August, groups opposing his nomination claimed he

Gary McDowell wrote that the “true bone of contention here is thus precisely the same as that which arose over the nomination of Robert Bork. It is an argument over the proper role of the Court in American society, and about the nature and extent of judicial power under a written Constitution.”<sup>18</sup>

Evaluating judges or judicial nominees is impossible in the abstract. Though often cloaked in legal-sounding language, most of what passes for such evaluation merely expresses agreement or disagreement with judges’ decisions or nominees’ expected decisions. Unfortunately, the media,<sup>19</sup> many interest groups, and even social scientists<sup>20</sup> often use this

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had inappropriately taken personal trips at government expense while EEOC chairman. See Roberto Suro, *Thomas’s Foes, Off to a Slow Start, Say Swaying Public Will Be Hard*, N.Y. TIMES, Aug. 9, 1991, at 1; Ruth Marcus, *Thomas’s Travel Records Challenged*, WASH. POST, Aug. 9, 1991, at A19. Other distractions followed.

<sup>18</sup> Gary L. McDowell, *Doubting Thomas: Is Clarence a Real Conservative?*, THE NEW REPUBLIC, July 29, 1991, at 12.

<sup>19</sup> Most reporting on judges or judicial nominees includes an assessment or description of their views or positions on political issues. The day after Thomas’s nomination, for example, major newspapers published lists of Thomas’s “known views” on political issues such as abortion, civil rights, or free speech. See, e.g., *Weighing In*, WASH. TIMES, July 2, 1991, at A1. *Newsweek* tried to list his positions on quotas, abortion, and school prayer. See Evan Thomas, *Where Does He Stand?*, NEWSWEEK, July 15, 1991, at 16.

Even if the description of such views is accurate (and often it is not), such a focus on political issues and outcomes is highly misleading. Unlike politicians or policy makers, judges apply existing law to the facts in deciding legal disputes brought to them by others rather than produce desired results at their own initiative to satisfy particular constituencies.

<sup>20</sup> These researchers, not surprisingly, are *political* scientists and their so-called “research” tries to force a judicial peg into a political hole. Their methodology requires assigning political labels such as “liberal” or “conservative” to case outcomes and, by doing the math, presume to conclude whether judges themselves warrant those labels. Professor Robert Carp, for example, says he studies judicial “output.” Ronald Stidham et al., *The Voting Behavior of Judges Appointed by President Clinton 9* (Mar. 21, 1996) (unpublished manuscript). One analysis concluded: “Such a method of evaluating judges—by counting decisions rather than weighing opinions—is easy and requires little in the way of thought or critical judgment after a classification for decisions has been adopted. Yet, it suffers from a number of shortcomings.” Craig Stern, *Judging the Judges: The First Two Years of the Reagan Bench*, 1 BENCHMARK 1, 3 (July–Oct. 1984).

A second flaw in these political studies is that assigning a particular label to the outcome of a case is entirely the product of the researcher’s personal perceptions and politics. Such a subjective element might make less difference if it were not the core of the method itself. Professor Carp admits that the terms “liberal” and “conservative” are indeed “a bit slippery and arbitrary” but says they are used “in the way they traditionally have been employed by most social commentators.” Robert A. Carp, et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 299 (1993). If there were such an objective category such as “traditional” usage, however, there should be some evidence to establish it. These researchers offer none. Their reference to “traditional” usage is instead a way of casting their own subjective judgments in some sort of objective light. Attribution to a group of unidentified “social commentators” cannot make this endeavor any less subjective or political.

misleading approach to evaluate judges and nominees. An outcome-oriented focus, however, may be suitable in political circles but is inappropriate for evaluating the judiciary. As Professor Eugene Hickok writes, the final result may count in Congress, but "how that decision is reached, the interpretive road followed, is what judging ultimately is all about."<sup>21</sup> This focus is further confirmed by the oath every judge takes to do "equal justice" without regard to the parties before them. Evaluating judges or judicial nominees, then, requires focusing on how they conduct the process of judging rather than the particular results they reach by that process.

Following the maxim that ending in the right place requires starting in the right place, the better course is to begin with the general design and specific prescription of America's founders.

### A. *The Founders' General Design*

America's founders built a system that maximizes ordered liberty by limiting government. They built that system on revolutionary ideas such as self-government and the rule of law and made it concrete in a written Constitution. The Declaration of Independence offered three related principles that naturally and necessarily limited government.<sup>22</sup> First, individuals have "unalienable rights" that come not from government but from God.<sup>23</sup> Second, governments exist to secure these unalienable rights.<sup>24</sup> Third, "governments . . . deriv[e] their just powers from the consent of the governed."<sup>25</sup> These principles put the focus on the people and their power to govern themselves.

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One example of many makes the point. In *United States v. McSwain*, 29 F.3d 558 (10th Cir. 1994), a three-judge panel of the U.S. Court of Appeals ruled that once the purpose of an initial traffic stop is concluded, any further questioning or searching violates the Constitution's Fourth Amendment ban on unreasonable searches and seizures. Judge Deanell Tacha wrote the opinion, which Professor Carp's method would certainly label "liberal." In *United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995) (en banc), the full appeals court addressed the same issue and changed this rule to allow a further search if the initial stop was valid. Judge Tacha joined that decision, which Professor Carp's method would clearly label "conservative." Either Judge Tacha underwent a dramatic judicial transformation, or merely noting the outcomes of decisions is not a valid method for evaluating judicial behavior.

<sup>21</sup> Eugene W. Hickok, *Judicial Selection: The Political Roots of Advice and Consent*, in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 5 (1990).

<sup>22</sup> See THE DECLARATION OF INDEPENDENCE (U.S. 1776)

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> *Id.*

The Constitution, which Thomas himself has called "a logical extension of the principles of the Declaration,"<sup>26</sup> begins by stating: "We the People . . . do ordain and establish this Constitution for the United States of America."<sup>27</sup> While reserving most government power to the states or the people,<sup>28</sup> the Constitution delegates specific powers to the federal government, assigning the "legislative" power to Congress,<sup>29</sup> the "executive" power to the President,<sup>30</sup> and the "judicial" power to the Supreme Court and "such inferior courts as Congress shall . . . ordain."<sup>31</sup> The key question concerns the definition and proper exercise of this judicial power.<sup>32</sup>

First, judicial power may not be exercised in a way that contradicts or undermines the very government system of which it is a part. That is, the nature and, perhaps more importantly, the limits of judicial power derive from its context. In particular, the people translated the Declaration's requirement of consent into the Constitution's guarantee of a republic.<sup>33</sup> Alexander Hamilton wrote of "[t]he superior weight and influence of the legislative body in a free government."<sup>34</sup> James Madison argued that "[t]he legislative department derives a superiority in our governments."<sup>35</sup> Judicial power, then, must be exercised in a way that does not undermine the lawmaking power of the people and their elected representatives.

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<sup>26</sup> Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y. 63 (1989).

<sup>27</sup> U.S. CONST. preamble.

<sup>28</sup> See U.S. CONST. amend. X.

<sup>29</sup> See U.S. CONST. art. I, § 1.

<sup>30</sup> See U.S. CONST. art. II., § 1.

<sup>31</sup> U.S. CONST. art. III, § 1.

<sup>32</sup> This Article discusses judicial power generally to provide an approach for evaluating judges and judicial nominees. It is not intended to be an exhaustive treatment of the many issues relating to judicial power. For such analysis, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989); CHRISTOPHER FAILLE, *THE DECLINE AND FALL OF THE SUPREME COURT: LIVING OUT THE NIGHTMARES OF THE FEDERALISTS* (1995); MATTHEW J. FRANCK, *AGAINST THE IMPERIAL JUDICIARY: THE SUPREME COURT VS. THE SOVEREIGNTY OF THE PEOPLE* (1996); JAMES MCCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* (1971); STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED* (1994); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

<sup>33</sup> See U.S. CONST. art. IV, § 4.

<sup>34</sup> *THE FEDERALIST* No. 74, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>35</sup> *THE FEDERALIST* No. 48, at 310 (James Madison) (Clinton Rossiter ed., 1961).



Second, judicial power must be consistent with the nature of written law. Supreme Court Justice Antonin Scalia has written that "[e]very issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution."<sup>36</sup> Indeed, America's founders believed that the federal judiciary's task is "interpretation."<sup>37</sup> While today it is fashionable to label as interpretation anything judges do, that task actually has a particular definition. Interpretation is the "process of . . . ascertaining the meaning of a . . . written document."<sup>38</sup> The word "ascertaining," in turn, means "to render certain or definite . . . to clear of doubt or obscurity. To insure as a certainty."<sup>39</sup>

Interpretation, or rendering certain the meaning of legal documents, would be an absurd proposition if the words in those documents had no definite meaning. That is, if laws mean whatever judges say they mean, interpretation is useless, the central task of judges rendered meaningless, self-government just a myth, and ordered liberty impossible. Fortunately, a law's meaning comes from the lawmaker; therefore, the act of "interpreting a document *means* to attempt to discern the intent of the author."<sup>40</sup>

Though judges today function in a culture less and less interested in objective truth or meaning, the task of interpretation remains the same.

<sup>36</sup> SCALIA, *supra* note 32, at 13.

<sup>37</sup> THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>38</sup> BLACK'S LAW DICTIONARY 734 (5th ed. 1979).

<sup>39</sup> *Id.* at 104. See also WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 80 (2d College ed., 1974) ("to find out with certainty").

<sup>40</sup> Lino A. Graglia, "Interpreting" the Constitution: *Posner on Bork*, 44 STAN. L. REV. 1019, 1024 (1992). Justice Scalia makes an important distinction between the objective meaning of a law, as expressed by its text, and the subjective intent of legislators.

[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated . . . Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.

SCALIA, *supra* note 32, at 17. This Article similarly uses "meaning" to refer to the text of a statute or the Constitution rather than the subjective intention behind it:

Original meaning should be distinguished from the subjective intent of the Framers; that subjective intent, as expressed in statements made by the Framers, may be relevant to an understanding of the meaning of the text to their society, but it was the language of the text, not the views of individual Framers, that was ratified as the Constitution.

Stephen J. Markman, *On Interpretation and Non-Interpretation*, 3 BENCHMARK 219, 219 n.1 (1987).

It means judges must ascertain what already exists rather than make it up as they go along. Chief Justice John Marshall put it another way nearly two centuries ago when he wrote in *Marbury v. Madison* that the judiciary's duty is to "say what the law is."<sup>41</sup>

The tool for this task, Hamilton wrote, is legal "judgment" rather than the political "will" used by the legislative branch.<sup>42</sup> Similarly, Professor John Murray wrote that "law . . . ought to be reason and not arbitrary will."<sup>43</sup> Legal judgment ascertains the meaning of law that the political will of the people and their elected representatives has already established. Only by ascertaining the meaning of law made by others and applying it in concrete "cases" or "controversies"<sup>44</sup> can judges be said to exercise judicial, as opposed to legislative or executive, power. So viewed, America's founders believed the judiciary "will always be the least dangerous" and "beyond comparison the weakest" branch of government.<sup>45</sup>

This philosophy of *judicial restraint*<sup>46</sup> has a negative and an affirmative component. On the negative side, judges must refrain from inventing constitutional or statutory provisions that do not exist, or from

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<sup>41</sup> 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>42</sup> THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>43</sup> John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23 (1949).

<sup>44</sup> U.S. CONST. art. III, § 2.

<sup>45</sup> THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>46</sup> Those who believe in these principles disagree about the best labels and vocabulary for using and communicating them. Professor Matthew Franck argues that the term "judicial restraint" describes an approach based on "prudence [rather than one] compelled by constitutional principles." FRANCK, *supra* note 32, at 2-3. That is, judicial restraint has more to do with judges resisting the temptation to make novel or sweeping rulings, observing the traditional rules limiting their jurisdiction, and the like. Thankfully, the vast majority of ordinary citizens remain unencumbered by scholarly semantic hair-splitting. Those citizens will also find cumbersome labels such as "originalism" or "interpretivism" that some commentators believe describe the more substantive approach described in this Article.

Clarence Thomas has used the more user-friendly terms "judicial restraint" and its opposite "judicial activism" in the substantive sense rather than merely in the prudential sense that bothers Professor Franck. See Thomas, *supra* note 26, at 63 ("judicial restraint"), 63 n.2 ("judicial activist"). In the spring of 1997, the U.S. Senate Republican Conference adopted the following resolution:

The Republican Conference opposes judicial activism, whereby life-tenured, unaccountable judges exceed their constitutional role of interpreting already enacted, written law, and instead legislate from the bench by imposing their own personal preferences or views of what is right or just. Such activism threatens the basic democratic values on which our Constitution is founded.

This Article uses the labels "judicial restraint" and "judicial activism" in their proper substantive sense.

changing the meaning of those that do. In this way, they defer to legislatures and the people where the Constitution imposes no clear limitations on them. Speaking with reference to Thomas's Supreme Court nomination, Senator Charles Grassley (R-IA) explained how a restrained judiciary is consistent with the system of government that America's founders established. In a Senate floor speech, he said:

And most importantly, the American people have nothing to fear from a judge who practices judicial restraint. That approach gives deference to the more democratic branches of Government, our own Congress of the United States, and our own 50 State legislatures. We are elected to make the difficult decisions on matters of broad public policy. And, of course, we are accountable to the people when we take a stand, or if we fail to take a stand. In regard to that, judges are not in that sort of position.<sup>47</sup>

A restrained judge applies the law rather than using politics, either liberal or conservative, to decide cases. Someone who desires a particular liberal result, for example, might yet believe that the statehouse rather than the courthouse, that the political process rather than a judge's chambers, is the proper place to achieve that result. When the Supreme Court re-wrote the Constitution's Fourteenth Amendment in 1973 to create a right to abortion,<sup>48</sup> Professor John Hart Ely wrote that though he favored the Court's new abortion policy, *Roe v. Wade* remained "a very bad decision . . . because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be."<sup>49</sup>

Similarly, an activist judge goes beyond the law and uses politics, either liberal or conservative, to decide cases. Many observers have highlighted a decision, also involving abortion, as an example of conservative judicial activism. In *United States v. Lynch*,<sup>50</sup> a federal judge enjoined two men from violating the Freedom of Access to Clinic Entrances Act by "impeding or obstructing automotive or any other form of ingress into, or egress from"<sup>51</sup> an abortion clinic. They were arrested again for physically blocking an abortion clinic driveway and the legal issue was whether they should be held in criminal contempt for violating the injunction. The judge's two conclusions appear based on political will rather than legal judgment.

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<sup>47</sup> 137 CONG. REC. S9295-03 (daily ed. July 9, 1991).

<sup>48</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>49</sup> John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973).

<sup>50</sup> 952 F. Supp. 167 (S.D.N.Y. 1997).

<sup>51</sup> *Id.* at 168.

First, he concluded that the defendants' "sincere, genuine . . . and . . . conscience-driven religious belief"<sup>52</sup> meant that they did not willfully violate the statute. Yet the judge used an unusual definition of willfulness under which the defendants' conduct must not only be deliberate but must also be "done with a bad purpose."<sup>53</sup> The defendants themselves conceded "that they willfully intended to impede and did impede access" to the abortion clinic.<sup>54</sup> They may have done so for a religious *reason*; the judge in this case turned that into a religious *excuse*, something the statute does not include.

Second, the injunction prohibited "impeding or obstructing . . . any . . . form of ingress into, or egress from"<sup>55</sup> the abortion clinic. Yet the judge found the men not guilty, exercising what he called "the prerogative of leniency."<sup>56</sup> He personally felt that that "passive" or "minimally obstructive"<sup>57</sup> activity by "an elderly bishop and a young monk quietly praying with rosary beads"<sup>58</sup> should be excused. Neither the statute nor the injunction distinguishes between passive and active impediments; neither makes any exception for "minimal" obstruction. The judge created those concepts to achieve the result he desired.

On the affirmative side, a judge's duty is to apply existing constitutional and statutory provisions according to their intended meaning. This may make deference to legislatures or the people inappropriate where the Constitution does impose clear limits on them. The Constitution, for example, gives Congress the power to "regulate Commerce . . . among the several States."<sup>59</sup> This is an enumerated, delegated power. "Commerce" is transactional, referring to buying and selling, trading, and transportation for those purposes.<sup>60</sup> In 1995, the Supreme Court correctly decided that Congress' power to regulate interstate commerce could not justify a law banning mere possession of a gun within 1000 feet of a local school. In dissent, Justice Stephen Breyer argued that congressional power should be "defined" as being "commensurate with the national needs" so that Congress may regulate anything "that Congress decrees inimical or destructive of the national economy."<sup>61</sup> This unlimited view of

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<sup>52</sup> *Id.* at 170.

<sup>53</sup> *Id.*

<sup>54</sup> *United States v. Lynch*, 103 F.3d 357 (2d Cir. 1996).

<sup>55</sup> *Lynch*, 952 F. Supp. at 168.

<sup>56</sup> *Id.* at 171.

<sup>57</sup> *Id.* at 172.

<sup>58</sup> *Id.* at 171.

<sup>59</sup> U.S. CONST. art. I, § 8.

<sup>60</sup> *See United States v. Lopez*, 514 U.S. 549, 586–88 (1995) (Thomas, J., concurring).

<sup>61</sup> *Id.* at 625 (Breyer, J., dissenting) (quoting *North Am. Co. v. S.E.C.*, 327 U.S. 686, 705 (1946)).

judicial power presumes that nothing—not even the Constitution's own distribution of government power—is already defined, that every clause is a candidate for judicial redefinition.

Thus a restrained judiciary must not make up law that does not exist, but must apply the law that does exist. Thomas himself wrote of this dual judicial responsibility as "a judiciary active in defending the Constitution but judicious in its moderation and restraint."<sup>62</sup> Two current members of the Supreme Court reflect the difference between activist and restrained judges. One segment of a new film about the Court addresses constitutional interpretation. Expressing the activist view, Justice Kennedy says: "We have 200 years of history, of detachment, in which we can see the folly of some ideas, the wisdom of others."<sup>63</sup> Justice Scalia counters with the restrained view by saying: "Don't sign me up for that one. I don't think the Constitution has become any more clear or means anything different from what it originally meant. And I guess that's just a difference in interpretive philosophy."<sup>64</sup>

### *B. The Founders' Specific Prescription*

In addition to their general design, America's founders specifically prescribed a restrained judiciary. Thomas Jefferson insisted that "instead of trying what meaning may be squeezed out of the text, or invented against it," judges should "conform to the probable one in which it was passed."<sup>65</sup> Otherwise, he warned, the "Constitution [would be] a mere thing of wax in the hands of the Judiciary, which they may twist and shape into any form they please."<sup>66</sup>

America's founders were very concerned about excessive judicial power under the new Constitution.<sup>67</sup> James Madison wrote that if "the

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<sup>62</sup> Thomas, *supra* note 26, at 63–64.

<sup>63</sup> Joan Biskupic, *Supreme Court Film Offers Glimpse Behind Justices' Closed Doors*, WASH. POST, June 17, 1997, at A15.

<sup>64</sup> *Id.*

<sup>65</sup> THE JEFFERSON CYCLOPEDIA 193 (1900). See also SAMUEL JOSEPH KONEFSKY, JOHN MARSHALL AND ALEXANDER HAMILTON: ARCHITECTS OF THE AMERICAN CONSTITUTION 51 (1964).

<sup>66</sup> Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819).

<sup>67</sup> Madison believed that judicial power to "stamp [a law] with its final character . . . makes the judiciary department paramount in fact to the legislature, which was never intended and can never be proper." DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION 255 (1996) (quoting Madison's remarks to Mr. John Brown on Jefferson's "Draught of a Constitution for Virginia," (Oct. 1788), in I JAMES MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON 194 (1884)). Jefferson warned that giving the judiciary "the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the legislature and executive also in their spheres, would make the judiciary a despotic branch." *Id.* (quoting Letter from

sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers."<sup>68</sup> One scholar concluded: "James Madison believed original intentions and meanings could be discovered. Those who did not wish to see constitutional restraints on government would adopt a rule of interpretation which would grant themselves wide latitude . . . by following or creating changes in *language*."<sup>69</sup>

The oath judges take to support and defend "the" Constitution of the United States presupposes there is something definite and identifiable to support and defend. Even liberal Justice William Douglas wrote that "above all else . . . it is the Constitution which [the judge] swore to support and defend, and not the gloss which his predecessors may have put on it."<sup>70</sup> Justice Felix Frankfurter advanced the same position that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."<sup>71</sup> Constitutional historian Charles Warren wrote that "it is still the Constitution which is the law and not the decision of the Court."<sup>72</sup> Professor Lino Graglia put it succinctly: "The real issue is not *how* judges should interpret the Constitution, but *whether* constitutional interpretation should be the only basis for judicial review, that is, whether judges should be permitted to declare laws 'unconstitutional' on extra-constitutional grounds."<sup>73</sup>

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Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in IV THOMAS JEFFERSON, MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 27 (Thomas Jefferson Randolph ed., 1830). Jefferson said that "to consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy." *Id.* (quoting Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in XV THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON 277 (Albert E. Bergh ed., 1904)). Later, Jefferson lamented that

the germ of dissolution of our federal government is in the constitution of the federal judiciary; . . . working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped.

*Id.* at 263 (quoting Letter from Thomas Jefferson to Charles Hammond (Aug. 18, 1821), in XV JEFFERSON, WRITINGS, *supra* at 331-32).

<sup>68</sup> RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 3 (1977) (quoting 9 THE WRITINGS OF JAMES MADISON 191 (Hunt ed., 1900-10)).

<sup>69</sup> Bruce N. Ong, *James Madison on Constitutional Interpretation*, 3 BENCHMARK 17, 21 (Jan.-Apr. 1987).

<sup>70</sup> William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

<sup>71</sup> *Graves v. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

<sup>72</sup> CHARLES WARREN, 3 THE SUPREME COURT IN UNITED STATES HISTORY 470-71 (1922).

<sup>73</sup> Graglia, *supra* note 40, at 1024.

Through most of American history, the judiciary followed this restrained approach.<sup>74</sup> As Professor Jacobus TenBroek observed in the 1930s:

Whenever the United States Supreme Court has felt itself called upon to announce a theory for its conduct in the matter of constitutional interpretation, it has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated an instrument or of the people who adopted it.<sup>75</sup>

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<sup>74</sup> See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (must derive constitutional meaning from what "[t]he Framers" established in the Constitution); *id.* at 723–24 (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (actions of First Congress are "contemporaneous and weighty evidence" of the Constitution's meaning since many of the Members of the First Congress "had taken part in framing that instrument."); *Ingraham v. Wright*, 430 U.S. 651, 664–66 (1977) (the "history of the Eighth Amendment" and its understanding at the time of its ratification); *Gregg v. Georgia*, 428 U.S. 153, 176–77 (1976) (the Constitution's text and what the framers' actions suggest about their intention); *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970) (Brennan, J., concurring) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963)) ("the line we must draw . . . is one which accords with history and faithfully reflects the understanding of the Founding Fathers."); *Duncan v. Louisiana*, 391 U.S. 145, 151, 153 (1968) (understanding at "the time our Constitution was written" and actions by Continental Congress and ratification debates); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting) ("As nearly as possible we should place ourselves in the condition of those who framed and adopted it."); *Near v. Minnesota*, 283 U.S. 697, 713, 714 (1931) (must look at the liberty involved as historically conceived and guaranteed" and consult ratifying conventions); *Ex Parte Grossman*, 267 U.S. 87, 110 (1925) (the understanding of legal terms "[a]t the time of the adoption of the Constitution" and the Constitutional Convention); *Weems v. U.S.*, 217 U.S. 349, 372–73, 375 (1910) (Constitutional Convention debates; "We may rely on the conditions which existed when the Constitution was adopted"); *South Carolina v. United States*, 199 U.S. 437, 456 (1905) ("the condition of things at the time the Constitution was framed" helps answer what "did the framers of the convention intend"); *Pollack v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 619 (1895) (quoting *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838)) ("the words of the Constitution; the meaning and intention of the convention which framed and proposed it for adoption"); *Lake County v. Rollins*, 130 U.S. 662, 670 (1889) ("The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it."); *Boyd v. U.S.*, 116 U.S. 616, 627 (1886) (what was "in the minds of those who framed . . . the Constitution"); *Ex Parte Wells*, 59 U.S. (18 How.) 307, 311 (1856) (meaning "[a]t the time of the adoption of the constitution"); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 303 (1827) (the "intention of the framers of the constitution"); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821) (the "framers of the Constitution"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351 (1816) (the understanding of those "who had acted a principal part in framing, supporting, or opposing that constitution"); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) ("the words and intent" of the provision in question); *Hylton v. U.S.*, 3 U.S. (3 Dall.) 171, 177 (1796) (what "the framers of the Constitution contemplated").

<sup>75</sup> Jacobus TenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CAL. L. REV. 399, 399 (1939).

Consider these expressions made over the course of nearly 150 years:

- **Justice James Wilson**, one of the Constitution's framers, wrote that "[t]he first and governing maxim in the interpretation of a statute is to discover the meaning of those who made it."<sup>76</sup> Concurring in an 1824 case, he wrote that "when [the Constitution's] intent and meaning is discovered, nothing remains but to execute the will of those who made it, in the best manner to effect the purposes intended."<sup>77</sup>
- **Justice Joseph Story** served on the Supreme Court from 1811 to 1845. He wrote: "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and intention of the parties."<sup>78</sup>
- **Justice Felix Frankfurter** wrote in 1947 that "[a]n amendment to the Constitution should be read in a sense most obvious to the common understanding at the time of its adoption."<sup>79</sup>

### *C. High Stakes*

The general design and specific prescription of America's founders were meant to support and protect the system of self-government based on the rule of law under a written Constitution. As Professor Graglia writes: "Representative self-government thus continues to operate only to the extent that judges permit it to do so."<sup>80</sup> The stakes are especially evident when judges exercise judicial review, or "the power . . . to invalidate the acts of government officials as disallowed by the Constitution."<sup>81</sup>

If judges use the law as they find it in exercising judicial review, they can remain consistent with self-government and ordered liberty. If judges make up the law they use in exercising judicial review, they become lawmakers and undermine self-government and ordered liberty. In his first inaugural address on March 4, 1861, Abraham Lincoln warned that "if the policy of the Government upon vital questions

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<sup>76</sup> Dennis J. Horan et al., *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 ST. LOUIS U. PUB. L. REV. 229, 249 (quoting 1 THE WORKS OF JAMES WILSON 75 (R.G. McCloskey ed., 1967)).

<sup>77</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 223 (1824) (Wilson, J., concurring).

<sup>78</sup> Horan et al., *supra* note 76, at 244 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 383 (Da Capo Press ed., 1970)).

<sup>79</sup> *Adamson v. California*, 332 U.S. 46, 63 (1947).

<sup>80</sup> Graglia, *supra* note 40, at 1024.

<sup>81</sup> *Id.* at 1020.



affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."<sup>82</sup>

Americans may already have ceased to be their own rulers, with both specific public policies and more general social and cultural developments determined not by the people but by judges. When retired Supreme Court Justice William Brennan died on July 24, 1997, news reports and eulogies stressed his activist approach to the law. The *Washington Post* said he had led a "social revolution"<sup>83</sup> by finding "the essential meaning of the Constitution not in the past but in contemporary life," an approach that "compelled him to reach out to right perceived wrongs."<sup>84</sup> That activist approach has imposed public policy without the people's consent and undermined the very democracy, both in its direct and representative forms, that is the core of self-government.

### 1. Public Policy Without Consent

The two most striking examples of judicial activism producing public policy without consent are abortion and the relationship between religion and public life. In both cases, the Supreme Court took decisionmaking away from the people, established a new policy, and has continued issuing new regulations in an ongoing attempt to impose its will.

#### *a. Abortion*

When the people determined abortion policy, they restricted the practice. When judges determined abortion policy, they removed all restrictions.

**The People's Policy.** Legislatures determined abortion policy at least since 1716, when the Common Council of New York City enacted a law prohibiting midwives from counseling or helping pregnant women to abort their children.<sup>85</sup> After the Declaration of Independence, "[a]bortion

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<sup>82</sup> Abraham Lincoln, FIRST INAUGURAL ADDRESS, reprinted in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S.Doc.No. 101-10 at 139 (1989).

<sup>83</sup> Joan Biskupic, *Justice Brennan, Voice of Court's Social Revolution, Dies*, WASH. POST, July 25, 1997, at A1.

<sup>84</sup> *Id.*

<sup>85</sup> See Dennis J. Horan & Thomas J. Marzen, *Abortion and Midwifery: A Footnote in Legal History*, in NEW PERSPECTIVES ON HUMAN ABORTION 199 (Thomas Hilgers et al. eds., 1981).

regulation was a matter exclusively for state legislatures.”<sup>86</sup> Connecticut enacted the first statute in 1821.<sup>87</sup> During the 19th century, every state banned abortions except to save the mother’s life.<sup>88</sup> During the 1960s, nearly every state legislature reconsidered its abortion laws and some revised them. Thirty-one states retained their ban on abortions except to save the mother’s life,<sup>89</sup> fifteen states enacted statutes permitting abortions in specific circumstances,<sup>90</sup> and four states allowed abortions for any reason but only during early pregnancy.<sup>91</sup>

**The Judges’ Policy, 1973–92.** The very states that ratified the Fourteenth Amendment had, during the same period, also passed laws making abortion a crime.<sup>92</sup> The people had thus made it clear that the amendment they were adding to their Constitution did not conflict with abortion restrictions. By creating a new right to abortion through its 1973 decision in *Roe v. Wade*,<sup>93</sup> the Court nonetheless, in the same Fourteenth Amendment, rendered “all original and reform laws unconstitutional.”<sup>94</sup> Dissenting in that case, Justice Byron White put it this way: “The upshot is that the people and the legislatures of the 50

<sup>86</sup> B.J. George, *State Legislatures Versus the Supreme Court: Abortion Legislation in the 1980s*, in ABORTION, MEDICINE, AND THE LAW 23 (J. Douglas Butler & David F. Walbert eds., 3d ed. 1986).

<sup>87</sup> See Joseph Dellapenna, *Abortion and the Law: Blackmun’s Distortion of the Historical Record*, in ABORTION AND THE CONSTITUTION 146 (Dennis J. Horan et al. eds., 1987).

<sup>88</sup> See Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 447–520 (1961).

<sup>89</sup> See *Roe v. Wade*, 410 U.S. 113, 118 n.2 (1973).

<sup>90</sup> See *id.* at 140 n.37. These circumstances typically included a threat to the mother’s life or health, likely fetal deformity, rape, or incest. This type of statute was patterned after the American Law Institute’s Model Penal Code section on abortion. See Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 808 n.16 (1973).

<sup>91</sup> See *Roe*, 410 U.S. at 140 n.37.

<sup>92</sup> See, e.g., JAMES C. MOHR, ABORTION IN AMERICA 200 (1978); Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1290 n.205 (1975). As Chief Justice Rehnquist has described it: “At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then–37 States and 8 Territories had statutes banning or limiting abortion.” Planned Parenthood v. Casey, 505 U.S. 833, 952 (1992) (Rehnquist, C.J., dissenting).

Not only is the Court’s decision that abortion is a fundamental right in stark contrast with the people’s decision that abortion should be restricted, it is also in stark contrast with the Court’s own decisions in other cases. One court noted: “The fact that both procreation and abortion have been held to be fundamental rights is understandably confusing.” *Poe v. Gerstein*, 517 F.2d 787, 796 (5th Cir. 1975), *aff’d sub nom.* *Gerstein v. Coe*, 428 U.S. 901 (1976).

<sup>93</sup> 410 U.S. 113 (1973).

<sup>94</sup> BETTY SARVIS & HYMAN RODMAN, THE ABORTION CONTROVERSY 57 (1973).

states are constitutionally disentitled"<sup>95</sup> to make abortion policy. The Court simply claimed that this abortion right was "unenumerated," a code word for non-existent but desirable.<sup>96</sup>

The Court built on this "model statute"<sup>97</sup> a "constitutionally imposed abortion code"<sup>98</sup> that today regulates all aspects of abortion policy.<sup>99</sup> In practice, while the people's abortion statutes had increasingly restricted abortion, the judges' model statute and abortion code made possible few, if any, abortion restrictions.<sup>100</sup> The Court has blocked the people's efforts

<sup>95</sup> *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

<sup>96</sup> The exact source of an unenumerated right is, by definition, unclear and the Court appeared unconcerned about identifying its hiding place. One option is the so-called "right to privacy" the Court had created in 1965 that it said emanated from the penumbras of existing provisions in the Bill of Rights. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). The district court in *Roe* had said the abortion right came from the Ninth Amendment. See *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970). The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Supreme Court has never held that the Ninth Amendment is a repository of unenumerated federal constitutional rights. Indeed, Thomas has criticized this view. See, e.g., Clarence Thomas, *Civil Rights as a Principle Versus Civil Rights as an Interest*, in *ASSESSING THE REAGAN YEARS 398-99* (David Boaz ed., 1988).

The Supreme Court itself finally settled on a different source, declaring that "a woman's decision whether or not to terminate her pregnancy" is a fundamental constitutional right protected by the due process clause of the Fourteenth Amendment. *Roe*, 410 U.S. at 153.

<sup>97</sup> ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 28 (1975); see also JOHN THOMAS NOONAN, *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* 27 (1979).

<sup>98</sup> *Casey*, 505 U.S. at 953 (Rehnquist, C.J., dissenting).

<sup>99</sup> The Court said, for example, that protecting maternal health or fetal life was "important" but had to be "compelling" to justify abortion restrictions. See *Roe*, 410 U.S. at 162, 163. The Court decided that protecting maternal health became compelling by the second trimester and concern about preborn life became compelling by the third trimester. See *id.* at 163.

<sup>100</sup> A state may, even potentially, proscribe abortion only during the third trimester of pregnancy, or after the preborn child is viable. See *Roe*, 410 U.S. at 164-65. Yet even this determination is entirely up to the abortionist; the state may do nothing to better, or more objectively, determine viability. See *Colautti v. Franklin*, 439 U.S. 379, 388 (1979) (holding that a Pennsylvania statute that imposed a strict standard of care on a physician if the preborn child "may be viable" was unconstitutional because it deviated from the standard established in *Roe*); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (holding a provision of a Missouri, which required the physician to preserve the preborn child's life and health regardless of the stage of pregnancy, to be unconstitutional). Even if viability is established, however, a state may not prohibit abortions "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 165 (emphasis added). That is, the abortionist determines both when the state has an opportunity to protect the preborn child's life at all and whether, in any case, it may exercise that opportunity.

In *Roe*'s companion case, the Supreme Court construed "health," as a reason justifying abortion, to mean anything "relevant to the well-being of the patient." *Doe v. Bolton*, 410 U.S. 179, 192 (1973). Since the reason a woman would seek an abortion itself

to determine when, why, and how abortions may take place, striking down laws banning abortion throughout pregnancy,<sup>101</sup> for certain reasons,<sup>102</sup> by a specific abortion method,<sup>103</sup> or more generally regulating the method used

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relates to her well-being, even during the third trimester a state is effectively prevented from ever proscribing abortion. See R. ADAMEK, ABORTION AND PUBLIC OPINION IN THE UNITED STATES 5 (1982) ("Given this broad definition of the components of health, the Court in effect legalized abortion in the third trimester as well."); NOONAN, *supra* note 97, at 12 ("The restriction on the [abortion] liberty appeared to be illusory. For the nine months of life within the womb the child was at the mother's disposal—with two restrictions: She must find a licensed clinic after months three; and after her child was viable, she must find an abortionist who believed that she needed an abortion."); Alan A. Stone, *Judges as Medical Decision Makers: Is the Cure Worse Than the Disease?*, 33 CLEV. ST. L. REV. 579, 580 (1984–85) (footnote omitted) ("As Justice White correctly interpreted the decision, 'any woman is entitled to an abortion at her request if she is able to find a medical adviser willing to undertake the procedure.'").

The U.S. Court of Appeals struck down an Ohio statute that prohibited post-viability abortions because it did not contain "a health exception that includes situations where a woman is faced with the risk to severe psychological or emotional injury which may be irreversible." *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 197, 210 (6th Cir. 1997). Dissenting from the Supreme Court's refusal to review this decision, Justice Thomas noted that the "vast majority of the 38 States that have enacted postviability abortion restrictions have not specified whether such abortions must be permitted on mental health grounds." *Voinovich v. Women's Med. Prof'l Corp.*, 118 S. Ct. 1347, 1349 (1998) (Thomas J., dissenting). For this reason, he thought the Court should clarify the rules for post-viability abortions.

<sup>101</sup> See *Roe*, 410 U.S. 113 *passim*.

<sup>102</sup> See *Doe*, 410 U.S. 179 *passim*.

<sup>103</sup> In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Court struck down a ban on the saline amniocentesis method. In 1995, Ohio enacted a statute banning, among other things, abortion "by purposely inserting a suction device into the skull of a fetus to remove the brain." OHIO REV. CODE ANN. § 2919.15(A) (Anderson 1996). The U.S. Court of Appeals found this provision unconstitutionally vague. See *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997). The Supreme Court refused to review this decision. See *Voinovich v. Women's Med. Prof'l Corp.*, 523 U.S. 1036 (1998). The appeals court stated, "We express no opinion on the constitutionality of . . . the federal legislation" that prohibits partial-birth abortion, defined as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before the killing the fetus and completing the delivery." *Women's Med. Prof'l Corp.*, 130 F.3d at 199 n.9; see also Partial-Birth Abortion Ban Act of 1997, H.R.1122, 105th Cong., 1st Sess. (1997). Several federal courts have declared unconstitutional state statutes banning partial-birth abortion modeled after the federal statute. See, e.g., *Eubanks v. Stengel*, 28 F. Supp. 2d 1024 (W.D. Ken. 1998); *Planned Parenthood v. Doyle*, 9 F. Supp. 2d 1033 (W.D. Wis. 1998); *Planned Parenthood v. Miller*, 1 F. Supp. 2d 958 (S.D. Iowa 1998); *Hope Clinic v. Ryan*, 995 F. Supp. 847 (N.D. Ill. 1998); *Planned Parenthood v. Woods*, 982 F. Supp. 1369 (D. Ariz. 1997); *Evans v. Kelly*, 977 F. Supp. 1283 (E.D. Mich. 1997); *Carhart v. Stenberg*, 972 F. Supp. 507 (D. Neb. 1997), *aff'd*, 192 F.3d 1142 (8th Cir. 1999). On April 25, 2000, the Court heard oral arguments in *Stenberg v. Carhart*, No. 99–830, reviewing the Eighth Circuit's decision declaring unconstitutional Nebraska's ban on partial-birth abortion.

in late-term abortions.<sup>104</sup> The Court has struck down laws requiring that married women obtain consent of their spouse<sup>105</sup> or children obtain the consent of their parents before having an abortion.<sup>106</sup>

**The Judges' Policy, 1992–Today.** After nearly two decades of wrestling with abortion regulation, a majority of the Court decided its "model statute" was not working well but could not agree on how to change it. In *Planned Parenthood v. Casey*,<sup>107</sup> two Justices argued for retaining the rules created in *Roe*,<sup>108</sup> three Justices offered a new set of regulations that might be somewhat more tolerant of abortion restrictions,<sup>109</sup> and the remaining four Justices argued for the Court to

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<sup>104</sup> In *Colautti v. Franklin*, 439 U.S. 379 (1979), the Court struck down a requirement that abortionists use the method that would most enhance the baby's chance of survival in abortions performed after viability.

<sup>105</sup> See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

<sup>106</sup> See *id.*; *Bellotti v. Baird*, 443 U.S. 622 (1979). The Court's regulations are sometimes very specific. In *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983), the Court upheld one parental consent requirement accompanied by a mechanism for judges to bypass the parents but in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), decided the same day, struck down another parental consent requirement because the judicial bypass provision was inadequate. The Court has upheld a requirement that minors notify one parent before they obtain an abortion, as in *H.L. v. Matheson*, 450 U.S. 398 (1981), but struck down a requirement that they notify both parents. See *Hodgson v. Minnesota*, 497 U.S. 417 (1990). The Court has upheld a requirement that women obtaining abortions sign a consent form. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). But, the Court struck down requirements that those women be given information to ensure such consent is informed. See *Thornburgh v. ACOG*, 476 U.S. 747 (1986); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). The Court has upheld a requirement that second-trimester abortions be performed in outpatient clinics, see *Simopoulos v. Virginia*, 462 U.S. 506 (1983), but struck down a requirement that they be performed in hospitals. See *Ashcroft*, 462 U.S. 476 *passim*; *Akron*, 462 U.S. 416 *passim*. The Court has upheld a requirement that only doctors may perform abortions, see *Planned Parenthood v. Casey*, 505 U.S. 833, 885 (1992), but struck down a requirement that only doctors counsel abortion patients. See *Akron*, 462 U.S. 416 *passim*.

<sup>107</sup> 505 U.S. 833 (1992).

<sup>108</sup> "My disagreement with the joint opinion begins with its understanding of the trimester framework established in *Roe*." *Id.* at 914 (Stevens, J., concurring in part and dissenting in part). "[T]he joint opinion and I disagree on the appropriate standard of review for abortion regulations." *Id.* at 925 n.1 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>109</sup> Justices O'Connor, Kennedy, and Souter drafted what would be called "the joint opinion" that stated: "We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*." *Casey*, 505 U.S. at 873. The joint opinion offered instead a set of regulations applying "the undue burden standard." *Id.* at 876. "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. As Chief Justice Rehnquist put it, however, under this new approach "this Court will still impart its own preferences on the States in the form of a complex abortion code." *Id.* at 966 (Rehnquist, C.J., concurring in part and dissenting in part).

reject the idea that abortion is a constitutional right<sup>110</sup> and get out of the abortion regulation business altogether.<sup>111</sup> From a constitutional point of view, of course, neither a standard supported by a majority that strikes down nearly all of the people's abortion restrictions nor a standard supported only by a plurality that strikes down only some of them is consistent with representative self-government.

*b. Religion And Public Life*

While the Supreme Court regulated abortion policy by creating a new constitutional provision, the Court has regulated the relationship between religion and public life by re-writing an existing constitutional provision. The First Amendment states in part that "Congress shall make no law respecting an establishment of religion." By this amendment, America's founders sought to prevent the federal government from establishing religion at all and from interfering with the states' religion policies.<sup>112</sup>

When the people determined the relationship between religion and public life, they made it strong and visible yet neither coercive nor discriminatory. When judges determined the relationship between religion and public life, they made it weak and invisible.

**The People's Policy.** American colonies during the Revolution<sup>113</sup> and states following independence<sup>114</sup> had government-established churches; only two states actually prohibited establishment of religion.<sup>115</sup> Examples of "quasi-establishment"<sup>116</sup> of religion existed throughout the

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<sup>110</sup> See *id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part) ("We believe that Roe was wrongly decided, and that it can and should be overruled . . ."). Justices White, Scalia, and Thomas joined this opinion.

<sup>111</sup> See *id.* at 1002 (Scalia, J., concurring in part and dissenting in part) ("We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining."). Chief Justice Rehnquist and Justices White and Thomas joined this opinion.

<sup>112</sup> See generally THOMAS JIPPING, DOES THE FIRST AMENDMENT VIOLATE ITSELF? REFLECTIONS ON THE CONSTITUTION AND JUDICIAL REVIEW 19-52 (1997).

<sup>113</sup> See A BLUEPRINT FOR JUDICIAL REFORM 300 (Patrick McGuigan & Randall R. Rader eds., 1981).

<sup>114</sup> See TERESA L. DONOVAN ET AL., VOLUNTARY SCHOOL PRAYER: JUDICIAL DILEMMA, PROPOSED SOLUTIONS 10 (1984).

<sup>115</sup> See PETER J. FERRARA, RELIGION AND THE CONSTITUTION: A REINTERPRETATION 11 (1983).

<sup>116</sup> DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT 78 (1987).

states including taxation for religion,<sup>117</sup> an oath for office-holders professing certain religious doctrines,<sup>118</sup> and prohibitions on blasphemy.<sup>119</sup>

The Supreme Court has noted: "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."<sup>120</sup> The first Congress urged President George Washington to declare "a day of public Thanksgiving and prayer."<sup>121</sup> Benjamin Franklin and Thomas Jefferson recommended that the Great Seal of the United States should depict the Old Testament story of God leading the Israelites out of Egypt.<sup>122</sup> John Jay, the first Chief Justice, invited clergy to open sessions of the New England circuit court with prayer<sup>123</sup> and the invocation "God save the United States and this Honorable Court" has opened each session of the Supreme Court at least since the time of Chief Justice John Marshall.<sup>124</sup>

The first few Congresses created chaplaincies for the House of Representatives and Senate<sup>125</sup> as well as for the Army and Navy.<sup>126</sup>

<sup>117</sup> See DONOVAN, *supra* note 114, at 10; Phillip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 853 (1986) ("Most states also provided for support of the clergy by taxation.").

<sup>118</sup> See MCCLELLAN, *supra* note 113, at 303, 304; DAVID BARTON, *THE MYTH OF SEPARATION: WHAT IS THE CORRECT RELATIONSHIP BETWEEN CHURCH AND STATE?* 23, 34 (1989).

<sup>119</sup> "Pennsylvania prohibited blasphemy against the Trinity at least through 1824." JOHN EIDSMOE, *THE CHRISTIAN LEGAL ADVISOR* 135 (1984). In Connecticut, "cursing or reproaching the true God" could receive "whipping on the naked body." See GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 22 (1987). "Massachusetts added rejection of the Last Judgment or exposing any of the books of the Bible to 'contempt or ridicule' to its definition of blasphemy and authorized a maximum of sixteen months in jail, shipping, fitting in the pillory, or the gallows as penalties." *Id.*

<sup>120</sup> *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984).

<sup>121</sup> FERRARA, *supra* note 115, at 28; see also *Lynch*, 465 U.S. at 675. President Washington declared a day of Thanksgiving. See ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 51-52 (1982). President James Madison issued four similar proclamations. See JOHN EIDSMOE, *CHRISTIANITY AND THE CONSTITUTION* 111 (1987).

<sup>122</sup> See JAMES T. HUTSON, *RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC* 51 (1998).

<sup>123</sup> See 2 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUSTICES ON CIRCUIT, 1789-1800* 13-14 (Maeva Marcus ed. 1988).

<sup>124</sup> CHARLES WARREN, 3 *THE SUPREME COURT IN UNITED STATES HISTORY* 469 (1922).

<sup>125</sup> See *Lynch*, 465 U.S. at 674.

<sup>126</sup> See BARTON, *supra* note 118, at 103; CORD, *supra* note 121, at 54. "In the Articles of War, governing the conduct of the Continental Army, adopted on June 30, 1775, and revised and expanded on September 20, 1776, Congress devoted three of the four articles in the first section to the religious nurture of the troops." HUTSON, *supra* note 122, at 54.

"[T]he House of Representatives authorized the use of its hall for religious services. The Capitol was also regularly used for religious services during Jefferson's presidency."<sup>127</sup> For more than a century, Congress appropriated public funds to pay missionaries working among various Indian tribes.<sup>128</sup> Presidents from George Washington to Martin Van Buren signed treaties with Indian tribes under which the federal government paid for building churches and parsonages and paid missionaries.<sup>129</sup> "In 1777, the Continental Congress imported 20,000 Bibles, and in 1782, Congress supported 'the pious and laudable undertaking' of having a printer print an American edition of the Scriptures."<sup>130</sup>

The Northwest Ordinance states: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."<sup>131</sup> Congress made adherence to the Northwest Ordinance a condition of statehood. Territories including Indiana, Michigan, Illinois, and Missouri were organized by application of the Northwest Ordinance<sup>132</sup> and many states including Ohio,<sup>133</sup> Mississippi,<sup>134</sup> and Nebraska<sup>135</sup> all had provisions paralleling the Northwest Ordinance's religion and morality clause in their constitutions. These practices were the public policy the people thought consistent with the First Amendment that the Constitution says they had "ordained and established."

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<sup>127</sup> Rodney K. Smith, *Getting Off On the Wrong Foot and Back On Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569, 626 (1984).

<sup>128</sup> See Robert L. Cord, *Church-State Separation: Restoring the 'No Preference' Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y. 130, 146 (1986). Professor Cord documents that more than a dozen private religious groups received federal funds for religious teaching among the Indians between 1824 and 1831 alone. *Id.*

<sup>129</sup> See FERRARA, *supra* note 115, at 29-30; EIDSMOE, *supra* note 119, at 244; BRADLEY, *supra* note 119, at 100; CORD, *supra* note 121, at 30, 38-39, 59-60; Kurland, *supra* note 117, at 628; DONOVAN, *supra* note 114, at 12; John Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools*, 16 PEPP. L. REV. 229, 235 n.34 (1989).

<sup>130</sup> Smith, *supra* note 127, at 600; see also HUTSON, *supra* note 122, at 56-57.

<sup>131</sup> Ordinance of 1787: The Northwest Territorial Government, Pub. L. No. 106-23, Article III, 1 Stat. XLIX (1998).

<sup>132</sup> See BRADLEY, *supra* note 119, at 101.

<sup>133</sup> See THE CONSTITUTIONS OF ALL THE UNITED STATES ACCORDING TO THE LATEST AMENDMENTS 343 (1817).

<sup>134</sup> See *id.* at 389.

<sup>135</sup> See M. B. TRUE, A MANUAL OF THE HISTORY AND CIVIL GOVERNMENT OF THE STATE OF NEBRASKA 34 (1885).



In short, "no voices were raised by a notoriously jealous citizenry about Congress's broad program to promote religion."<sup>136</sup>

**The Judges' Policy, 1947–71.** In *Everson v. Board of Education*,<sup>137</sup> the Court re-wrote the First Amendment, saying that it "was intended to erect a wall of separation between Church and State"<sup>138</sup> that is "high and impregnable. We could not approve the slightest breach."<sup>139</sup> In 1952, the Court retreated: "The First Amendment, however, does not say that in every and all respects there shall be a separation of church and state."<sup>140</sup> In 1963, the Court forged ahead again, insisting that the First Amendment requires a "complete and permanent separation . . . comprehensively forbidding every form of public aid or support for religion."<sup>141</sup> Chief Justice Rehnquist described these fits and starts this way: "The wall has done what walls usually do: it has obscured the view. It . . . has caused confusion whenever it has been invoked. Far from helping decide cases, it has made opinions and decisions unintelligible."<sup>142</sup>

**The Judges' Policy, 1971–89.** While *Everson's* separation between church and state had once been a "high and impregnable"<sup>143</sup> wall, the Court grew tired of using it and by 1971 said it was only "a blurred, indistinct, and variable barrier."<sup>144</sup> That year, the Court re-wrote the First Amendment again, concluding that a statute must have "a secular legislative purpose," that its "principal or primary effect must be one that neither advances nor inhibits religion" and that "the statute may not foster 'an excessive government entanglement with religion.'"<sup>145</sup> As Professor Douglas Laycock has written however, this new version of the First Amendment is "so elastic in its application that it means everything and nothing."<sup>146</sup>

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<sup>136</sup> HUTSON, *supra* note 122, at 58.

<sup>137</sup> 330 U.S. 1 (1947).

<sup>138</sup> *Id.* at 16.

<sup>139</sup> *Id.* at 18.

<sup>140</sup> *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

<sup>141</sup> *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 217 (1963).

<sup>142</sup> THE WALL BETWEEN CHURCH AND STATE 19 (D. Oaks ed., 1963) (citation omitted).

<sup>143</sup> *Everson*, 330 U.S. at 18.

<sup>144</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

<sup>145</sup> *Id.* at 612–13 (1971) (citations omitted).

<sup>146</sup> Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 450 (1986). Justice Scalia agreed: "When we wish to strike down a practice it forbids, we invoke it . . . when we wish to uphold a practice it forbids, we ignore it entirely. . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him." *Lamb's Chapel v. Center Moriches*

In 1982, the wall of separation was “a useful figurative illustration”<sup>147</sup> and two years later it was but “a useful figure of speech.”<sup>148</sup> The Court had, by its own confusing exercise in policy making, validated Justice Stanley Reed’s 1948 warning that “[a] rule of law should not be drawn from a figure of speech.”<sup>149</sup>

**The Judges’ Policy, 1989–Today.** Though she called it a mere “clarification,”<sup>150</sup> Justice Sandra Day O’Connor forged another re-write of the First Amendment, this time prohibiting “government endorsement or disapproval of religion.”<sup>151</sup>

One case demonstrated just how flexible and confusing these different versions have become. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,<sup>152</sup> the district court had used the 1971 test and said neither a privately owned Nativity scene on a county courthouse stairway nor a privately owned menorah outside a city-county building were establishments of religion.<sup>153</sup> The appeals court used the new “endorsement test” and said both displays were establishments of religion.<sup>154</sup> The Supreme Court also used the endorsement test and split the difference by rejecting the creche and approving the menorah.<sup>155</sup>

## 2. Undermining Representative Democracy

Activist judges undermine self-government in three related ways. First, they block the people or their elected representatives—the only true lawmakers in a republic—from exercising their rightful lawmaking power. Second, activist judges themselves exercise lawmaking power, something they have no legitimate authority to do. The third impact of judicial activism is a dynamic mixture of the first two. Anticipating that judges may block or change legislation, legislators shirk their duty by avoiding legislation altogether or legislating in a vague or incomplete way because they know judges will finish the job.<sup>156</sup>

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Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in part and concurring in the judgment).

<sup>147</sup> *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 123 (1982).

<sup>148</sup> *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

<sup>149</sup> *McCollum v. Board of Educ.*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting).

<sup>150</sup> *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring).

<sup>151</sup> *Id.* at 688.

<sup>152</sup> 492 U.S. 573, 592 (1989).

<sup>153</sup> *See id.* at 588.

<sup>154</sup> *Id.* at 578–79.

<sup>155</sup> *See id.*

<sup>156</sup> *See* Judith Havemann & Barbara Vobejda, *Advocacy Groups Across U.S. Preparing to Challenge Welfare Law*, WASH. POST, Sept. 30, 1996, at A8.

With activist judges on the bench, the people have little influence over public policy and those who do establish public policy are not accountable, leaving a serious mis-match between what the people's elected representatives say and how the people are eventually governed. A few examples make the point.

- In 1993, President Clinton signed into law the current policy excluding open homosexuals from the military. In 1994, his appointee to the U.S. Court of Appeals for the D.C. Circuit voted to strike down the pre-1993 exclusion policy,<sup>157</sup> and in 1996, both of his appointees to the U.S. Court of Appeals for the Fourth Circuit voted to strike down the very policy he signed into law.<sup>158</sup>
- In his 1996 State of the Union address, President Clinton expressed concern about the content of television programming readily accessible to children. Yet in *Action for Children's Television v. FCC*, both of his appointees to the D.C. Circuit voted to strike down the FCC's authority to restrict indecent programming to hours when few children would be watching.<sup>159</sup> Mr. Clinton later nominated to the U.S. Court of Appeals for the Federal Circuit the lawyer who argued that case and who urged the court to eliminate any restrictions on indecent programming. The only difference between the votes of Mr. Clinton's Supreme Court appointees in *Denver Area Educational Telecommunications Consortium v. FCC*<sup>160</sup> was whether to eliminate most or all of the FCC's authority to restrict indecent programming on cable television.
- President Clinton has endorsed teen curfews. In one case, a Clinton district judge struck down the District of Columbia's curfew<sup>161</sup> and two Clinton appeals court judges upheld that decision.<sup>162</sup> In another case, a Clinton appeals court judge dissented from a decision upholding another city's teen curfew.<sup>163</sup>
- Mr. Clinton has endorsed the involvement of faith-based organizations in the provision of public services. Yet his appointees to the U.S. Courts of Appeals for the Seventh and Second Circuits have written opinions prohibiting judges from requiring convicts to

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<sup>157</sup> See *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

<sup>158</sup> See *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc).

<sup>159</sup> 58 F.3d 654 (D.C. Cir. 1995) (en banc).

<sup>160</sup> 518 U.S. 727 (1996).

<sup>161</sup> See *Hutchins v. District of Columbia*, 942 F. Supp. 665 (D.D.C. 1996).

<sup>162</sup> See *Hutchins v. District of Columbia*, 144 F.3d 798 (D.C. Cir. 1998).

<sup>163</sup> See *Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998).

participate in Alcoholics Anonymous, one of the most effective treatment programs in the country.<sup>164</sup>

- Congress enacted, and President Clinton signed, the Military Honor and Decency Act banning sale of pornography on military bases. A Clinton judge struck it down.<sup>165</sup>

### 3. Undermining Direct Democracy

In addition to actions by legislators, the Supreme Court has recently reviewed the constitutionality of state legislation or constitutional provisions enacted directly by the people through the initiative process. The Court upheld Washington State's ban on assisted suicide<sup>166</sup> after the U.S. Court of Appeals for the Ninth Circuit struck it down.<sup>167</sup> The Court dismissed a constitutional challenge to Arizona's requirement that government business be conducted in English<sup>168</sup> after the same Ninth Circuit struck it down.<sup>169</sup> In previous terms, the Court struck down Colorado's prohibition on special civil rights protection for homosexuals<sup>170</sup> and struck down Arkansas' imposition of term limits on federal legislators.<sup>171</sup>

Within days of the November 1998 election, lawyers filed suit to challenge Montana voters' ban on using cyanide in mining; California voters' expansion of gambling; and Alaska and Hawaii voters' ban on homosexual marriage.<sup>172</sup>

Both a U.S. District Judge and a three-judge panel of the U.S. Court of Appeals declared unconstitutional a ballot measure adopted by Californians that would end racial preferences in employment, housing, and education.<sup>173</sup> A district judge struck down, and an appeals court upheld, another ballot measure imposing term limits on state

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<sup>164</sup> See *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996); *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068 (2d Cir. 1997).

<sup>165</sup> See *General Media Communications, Inc. v. Perry*, 952 F. Supp. 1072 (S.D.N.Y. 1997).

<sup>166</sup> See *Washington v. Glucksburg*, 521 U.S. 702 (1997).

<sup>167</sup> See *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996).

<sup>168</sup> See *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

<sup>169</sup> See *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1994).

<sup>170</sup> See *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>171</sup> See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

<sup>172</sup> See *Victoria Slind-Flor, Election Result: Litigation Over Propositions*, NAT'L L.J., Nov. 16, 1998, at A1.

<sup>173</sup> See *Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997).

legislators.<sup>174</sup> Another district judge recently struck down Proposition 187, a ballot measure enacted by California voters to limit illegal immigration.<sup>175</sup> Californians enacted Proposition 227 to eliminate bilingual education programs. Though 70% of California voters—including 61% of Hispanics, 63% of blacks, and 75% of Asians—support it,<sup>176</sup> the chances of it being challenged in court are significant. Frank Murray calls California voters “the world’s largest legislature”<sup>177</sup> when they vote on ballot measures; yet they can be, and frequently are, defeated by the world’s smallest legislature, a single federal judge.

This discussion highlights two kinds of judges, restrained judges who take the law as they find it and activist judges who believe they can make it up as they go along. Justice Brennan was the quintessential activist judge, making the Constitution and statutes mean whatever he needed them to mean so he could achieve whatever goals or results he wished. Activist judges inevitably look to the political culture for the meaning of the Constitution and statutes. “A judicial activist is a judge who interprets the Constitution to mean what it would have said if he instead of the Founding Fathers had written it.”<sup>178</sup>

Though often the subject of extended scholarly analysis, this issue is not difficult to understand. Liberal politicians sometimes let slip the fact that they understand the issue as well. In 1991, Senator Joseph Biden (D-DE), then-chairman of the Judiciary Committee, criticized the Supreme Court’s 1990–91 term, saying that it had been taking “a proactive stand in changing the laws.”<sup>179</sup> Humpty Dumpty would have been the textbook example of an activist judge. He said: “When I use a word, it means what I choose it to mean—neither more nor less.”<sup>180</sup> Even Hollywood understands what this issue is all about. In an episode of the ABC series *The Practice*, the judicial character played by Ed Asner

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<sup>174</sup> See *Bates v. Jones*, 958 F. Supp. 1446 (N.D. Cal. 1997); David S. Broder, *Judges Deciding Whether Political Reform Will Fly; Many State Capitals Await Three Rulings in California*, WASH. POST, Aug. 10, 1997, at A1.

<sup>175</sup> See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

<sup>176</sup> See K.L. Billingsley, *Anti-Bilingual Plan Gains Poll Support*, WASH. TIMES, Mar. 22, 1998, at A4.

<sup>177</sup> Frank J. Murray, *California Voters Take the Initiative for Self-Government*, WASH. TIMES, Aug. 15, 1997, at A10.

<sup>178</sup> A BLUEPRINT FOR JUDICIAL REFORM 7–8 (Patrick McGuigan & Randall R. Rader eds., 1981) (citation omitted).

<sup>179</sup> Joan Biskupic, *1990–91 Term Marked By Surge In Conservative Activism*, CONG. Q., July 6, 1991, at 1829 (quoting Senator Joseph Biden).

<sup>180</sup> LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* 186 (1960).

asked: "Do you really think I should leave legislative policy to the legislature?"<sup>181</sup>

America's founders would have said that, by definition, judges have no choice but to leave legislative policy to the legislature. Judges may exercise only judicial power, not legislative power. America's founders believed America needs restrained judges, those who take the law as they find it and, in so doing, respect the political process of representative and direct democracy. The restrained judge can identify the Constitution he takes an oath to support and defend and that Constitution will look essentially the same tomorrow as it did yesterday.

More importantly, the restrained judge is unwilling to change the Constitution or statutes even when he thinks they could be improved. Justice Scalia has correctly said: "The system is really garbage in, garbage out."<sup>182</sup> If "the Constitution is law," then its "words constrain judgment."<sup>183</sup> As such, "any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges."<sup>184</sup> Simply put, if judges control the meaning, they control the Constitution. If the lawmaker controls the meaning, the Constitution controls the judges.

Dissenting from the Supreme Court's decision in *Dred Scott v. Sanford*,<sup>185</sup> Justice Benjamin Curtis provided one of the most succinct descriptions of judicial activism and its consequences:

[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretations of law, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.<sup>186</sup>

## II. WHAT KIND OF JUDGE WOULD CLARENCE THOMAS BE?

### A. *Staying Focused on Judicial Philosophy*

Both the general design and the specific prescription of America's founders, as well as the consequences for both representative and direct

<sup>181</sup> *The Practice* (ABC television broadcast, Sept. 27, 1997).

<sup>182</sup> Glen Johnson, *Deciding Abortion, Suicide Issues Is Duty of Congress, Scalia Says*, WASH. POST, Mar. 10, 1998, at A7.

<sup>183</sup> Robert H. Bork, Speech at the University of San Diego Law School, in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 43, 44 (Paul G. Cassell ed., 1986).

<sup>184</sup> *Id.* at 45.

<sup>185</sup> 60 U.S. (19 How.) 393 (1857).

<sup>186</sup> *Id.* at 621 (Curtis, J., dissenting).

democracy, leave no doubt that America needs judges who will take the law as they find it and not make it up. They must apply the law in the cases before them in a way consistent with self-government and written law. This yardstick of judicial philosophy is the best and most appropriate tool for evaluating both judges and judicial nominees and Thomas's supporters used these principles in recommending his nomination and working for his confirmation.

Determining criteria, however, is easier than applying them. Judicial selection is hardly mathematics or laboratory science, and no matter what the initial intention, many factors can lead to appointment of activist judges. For two important and related reasons, therefore, consistent application of clear criteria is critical in this area. First, while the central question in judicial selection is the kind of judge a nominee is likely to be, information reliably answering that question may not exist for a particular nominee. Each nominee is different and different kinds of experience in the legal field—from judicial or litigation to academic or government—provide different clues to a nominee's judicial philosophy. Only a clear set of criteria will help interpret the facts about each nominee's record and help determine whether he should be confirmed.<sup>187</sup>

Second, even when seemingly relevant evidence does exist, as the *Washington Post* editorialized when Souter was nominated to the Supreme Court, "little is predictable" about what a nominee will do on the bench.<sup>188</sup> Indeed, though Sununu had once assured conservatives that Souter would be a "home run,"<sup>189</sup> he has been an activist Supreme Court justice. Abortion advocates had opposed Souter's nomination, testifying at his hearing that he would be the fifth vote to overturn *Roe*

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<sup>187</sup> Current or past appointees and nominees by President Clinton, for example, have different professional backgrounds, each offering different evidence relevant to their likely judicial philosophy. Margaret Morrow, appointed to the U.S. District Court for the Central District of California, had been a partner in a large law firm and president of the California Bar Association; Lynn Adelman, appointed to the U.S. District Court for the Eastern District of Wisconsin, had been a state senator; Ann Aiken, appointed to the U.S. District Court for the District of Oregon, had been a state court judge; Robert Chambers, appointed to the U.S. District Court for the Southern District of West Virginia, had been a trial lawyer and Speaker of the West Virginia House of Representatives; Merrick Garland, appointed to the U.S. Court of Appeals for the D.C. Circuit, had been Principal Associate Deputy Attorney General; William Fletcher, appointed to the U.S. Court of Appeals for the Ninth Circuit, had been a law professor at the University of California at Berkeley and had no courtroom experience; James Beaty, nominated to the U.S. Court of Appeals for the Fourth Circuit, is currently a U.S. District Judge for the Middle District of North Carolina; Clarence Sundram, nominated to the U.S. District Court for the Northern District of New York, currently heads the state mental health agency in New York and has no courtroom experience.

<sup>188</sup> Editorial, *Predicting a Justice's Future*, WASH. POST, Aug. 1, 1990, at A18.

<sup>189</sup> Murray Waas, *The Trojan Horse Strategy*, THE VILLAGE VOICE, Aug. 28, 1990, at 19.

*v. Wade*.<sup>190</sup> In fact, just two years later Souter was part of the plurality that reaffirmed the right to abortion and re-wrote national abortion policy.<sup>191</sup> Similarly, after Souter's appointment it was "commonly expected that the Court [would] say no"<sup>192</sup> to the argument that invocations at public school graduations are an "establishment of religion." Yet in 1992, Souter was the fifth vote for that very conclusion.<sup>193</sup>

Senator Alan Dixon, Illinois Democrat, even remarked that "should Mr. Thomas be confirmed . . . he might surprise a good many people in the administration with respect to a good many of the decisions he will render."<sup>194</sup> Conservatives hoped that, with President Bush's second appointment opportunity, Sununu would keep his word and focus solely on judicial philosophy in choosing Marshall's replacement. Souter had been dubbed a "stealth" nominee<sup>195</sup> because his public record consisted only of judicial opinions on non-controversial issues. Thomas, on the other hand, was at best a "semi-stealth" choice.<sup>196</sup> One columnist said that Thomas "is not likely to prove a Stealth nominee a la David Souter or a tangle of Borkian knots."<sup>197</sup> One reporter correctly noted that "Judge Thomas has left an extensive paper trail."<sup>198</sup> By the time of his Supreme Court nomination, that paper trail included both a non-judicial and a judicial record.

Staying focused on judicial philosophy could keep these uncertainties to a minimum. The media, however, used their typically inappropriate political approach and had a more difficult time answering the critical questions. Just as Sununu's failure to focus on judicial

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<sup>190</sup> The author personally attended the hearing on Souter's Supreme Court nomination before the Senate Judiciary Committee.

<sup>191</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); see also *supra* notes 107-11 and accompanying text.

<sup>192</sup> W. John Moore, *Court's Right Turn Shakes Congress*, NAT'L J., July 6, 1991, at 1708.

<sup>193</sup> See *Lee v. Weisman*, 505 U.S. 577 (1992). Indeed, some analysts thought that even Thomas's appointment was "not likely to alter the court's voting trend on church-state issues" and that "a majority on the court already [was] . . . becoming more lenient toward religious expression in public places." Larry Whitham, *Thomas Not Apt to Shift Church-State Decisions*, WASH. TIMES, July 10, 1991, at A4.

<sup>194</sup> 137 CONG. REC. S13,628-02 (daily ed. Sept. 25, 1991) (Nomination of Clarence Thomas).

<sup>195</sup> See, e.g., Ruth Marcus, *Souter Lessons Guide Thomas Game Plan*, WASH. POST, Sept. 15, 1991, at A10.

<sup>196</sup> Marcia Coyle & Marianne Lavelle, *The 'Semi-Stealth' Choice*, NAT'L L.J., July 15, 1991, at 1.

<sup>197</sup> Paul Greenberg, *Misjudging the Judge*, CHI. TRIB., July 12, 1991, at 19.

<sup>198</sup> Dawn Ceol, *Bush Calls Thomas to Highest Court: This Candidate Has Paper Trail*, WASH. TIMES, July 2, 1991, at A1.



philosophy in 1990 resulted in appointment of an activist Justice Souter, the media's failure to understand judicial philosophy in 1991 hampered their analysis of Thomas's nomination. The nominee had judicial views they did not understand and political views they did not expect and their discomfort was evident in their attempts to label him. They described him as "Marching to a Different Drummer"<sup>199</sup> or "Fitting No Mold."<sup>200</sup> They called him a "Conundrum,"<sup>201</sup> an "Enigmatic Nominee,"<sup>202</sup> and even a "paradox."<sup>203</sup>

### *B. Evaluating the Nominee*

#### 1. Thomas's Appeals Court Nomination

Thomas's supporters used the single criterion of judicial philosophy to evaluate his nomination. Fortunately, there already existed a significant body of information and analysis. Most Americans remember the intense controversy surrounding Thomas's Supreme Court nomination but forget the earlier controversy surrounding his appeals court nomination the year before. Though the Senate would eventually confirm Thomas to the U.S. Court of Appeals for the D.C. Circuit, the debate over that nomination was protracted and fierce.

Though not nominated until October 30, 1989, Thomas's name had been mentioned as a likely nominee six months earlier. President Bush "delayed his actual nomination until months after his name had been floated, giving Thomas's enemies time to gear up."<sup>204</sup> Those enemies sought to make the case against Thomas early, anticipating that confirmation to the appeals court would enhance Thomas's prospects for a later Supreme Court appointment.

Thomas had not made any Democratic congressional friends during his tenure as chairman of the Equal Employment Opportunity Commission (EEOC). In a letter dated July 17, 1989, for example, the Democratic chairmen of fourteen House committees and subcommittees with EEOC oversight wrote the president "to express concern about the possible nomination of Clarence Thomas to the U.S. Court of Appeals for

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<sup>199</sup> Margaret Carlson, *Marching to a Different Drummer*, TIME, July 15, 1991, at 18.

<sup>200</sup> Terence Moran, *Clarence Thomas: Fitting No Mold*, LEGAL TIMES, Oct. 16, 1989, at 1.

<sup>201</sup> Tim Smart, *A Conundrum Named Clarence Thomas*, BUS. WEEK, July 15, 1991, at 27.

<sup>202</sup> Mary McGrory, *Bush's Enigmatic Nominee*, WASH. POST, July 9, 1991, at A2.

<sup>203</sup> Sandy Grady, *Confirmation Fight Will Test Thomas' Mettle*, THE RECORD, July 8, 1991, at A9.

<sup>204</sup> *Off the Record*, NAT'L REV., Mar. 19, 1990, at 64.

the District of Columbia.”<sup>205</sup> Releasing this letter to the news media helped create controversy over a nomination that had yet to be made. Those enemies also included the same left-wing coalition that had defeated the Supreme Court nomination of Robert Bork in 1987. As a result, the *Detroit News* said Thomas was “the next target.”<sup>206</sup>

There would not have been any archive on Thomas had conservatives not learned some hard lessons in confirmation politics. From 1981 to 1986, Republicans in the White House and Senate controlled both the nomination and confirmation phases of the judicial selection process. As such, there had been only a few political battles over judicial nominees in the 1980s<sup>207</sup> and conservatives had seen no need to develop tools for mobilizing and educating grassroots Americans, the media, or the Senate. Their wake-up call came in 1987 as the newly Democratic Senate and their liberal interest group allies effectively used such tools to defeat the Supreme Court nomination of Judge Robert Bork.

On November 14, 1989,<sup>208</sup> determined not to make the same mistake again, I met with Thomas at his EEOC office to discuss the issues likely to come up in the months ahead. He showed me an editorial from that day’s edition of the *St. Louis Post-Dispatch*. Though it was

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<sup>205</sup> Two days later, 52 House members released a letter expressing “strong support for the nomination of Clarence Thomas.”

<sup>206</sup> Editorial Title, *Thomas: The Next Target*, THE DETROIT NEWS, Aug. 1, 1989. See also *Washington Outlook: Capital Wrapup: The Courts*, BUS. WEEK, Oct. 9, 1989, at 57. Nonetheless, Thomas’s race worked to his political advantage by preventing rapid consolidation of the opposition. Leftist groups were so consumed with race that, though they would have quickly campaigned against a white nominee with the same record, they hesitated opposing Thomas. One paper reported that “the Leadership Conference [on Civil Rights] does not appear to have arrived at a consensus.” *Debate Over Judicial Post for EEOC Chief Begins*, BALTIMORE SUN, Sept. 10, 1989. The Associated Press later reported that the Leadership Conference “has not adopted a position thus far.” *Liberals Ready ‘To Do Job’ on Nominee, Senator Says*, WASH. TIMES, Nov. 1, 1989, at A3. Another paper concluded that “[c]ivil rights groups are not united in opposition.” Dawn M. Weyrich, *Conservatives Mobilize Behind Court Nominee*, WASH. TIMES, Nov. 3, 1990, at A11. This was no doubt because of support in the black community for Thomas’s nomination. After his Supreme Court nomination, support among blacks grew from 54% in early July (USA Today poll) to 61% in mid-September (ABC poll) and 70% just before the final Senate vote in mid-October (ABC poll). See Thomas L. Jipping & Phyllis Berry Myers, *Declaration of Independence: Justice Clarence Thomas, One Year Later*, in ESSAYS ON OUR TIMES No. 21, 8 (Oct. 1992).

<sup>207</sup> Only 11 of the 449 judges confirmed from 1981 to 1990 had even been the subject of a roll call vote. Four of these were unanimous and two others received fewer than a dozen negative votes. There were serious political battles over five successful nominees and one, Robert Bork, whose nomination was defeated.

<sup>208</sup> The author was executive director of the Save America’s Youth Foundation at this time, joining the Free Congress Foundation and Coalitions for America in February 1990.

critical of his nomination, the paper insisted that the debate should focus on "Thomas's record."<sup>209</sup> Thus, the first report about Thomas's qualifications for the appeals court was titled *The Thomas Record*.<sup>210</sup> Citing that study, *USA Today* reported within three weeks of Thomas's nomination: "Conservative groups are rallying for Clarence Thomas, Bush nominee to a federal appeals judgeship in Washington, D.C."<sup>211</sup> This was the first time conservatives utilized such a tool and its utility was obvious on the day of the Senate Judiciary Committee's hearing on Thomas's appeals court nomination. *National Review* described it this way:

Ironically, one of the more creative tools was the bar charts produced by Tom Jipping . . . Mr. Jipping took statistics from the Equal Employment Opportunity Commission and produced charts showing the number of cases filed and resolved under Mr. Thomas's stint as chief. As his source he listed the EEOC, whence the figures had come. What a nice surprise it must have been to see these same charts appear months later in a *Washington Post* curtain-raiser just before the hearings were to begin—faithfully attributed to the EEOC.<sup>212</sup>

Minutes before that Judiciary Committee hearing, as he walked toward the witness table, Thomas stopped and said to me: "The hearing today will be different because of that report." The committee voted 13–1 to approve the nomination on February 22, 1990, and the Senate finally voted 98–2 to confirm him two weeks later. *National Review* said "the difference this time was that the Right got out front and stayed out front, setting the terms of the debate."<sup>213</sup>

Many political activists, journalists, and others had seen for some time the potential for Thomas to replace Thurgood Marshall on the Supreme Court. *National Review* said that Thomas's appeals court appointment "moved him a step closer to a Supreme Court nomination that will doubtless come when Justice Marshall's body goes the way of his mind."<sup>214</sup> In October 1990, while he was an appeals court judge, Thomas and I walked from the federal courthouse in Washington, D.C., to have lunch at Union Station. We met my assistant from FCF on the sidewalk and, only half jokingly, I introduced Thomas as "the next Justice of the Supreme Court."

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<sup>209</sup> Editorial, *Stick to the Facts in Thomas Debate*, ST. LOUIS POST-DISPATCH, Nov. 14, 1989, at 2C.

<sup>210</sup> Thomas Jipping, *The Thomas Record*, Nov. 17, 1989 (Save America's Youth).

<sup>211</sup> Steve Davis & Sam Meddis, *Capital Line*, USA TODAY, Nov. 21, 1989, at 4A.

<sup>212</sup> *Off the Record*, *supra* note 204, at 64.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

Conservatives' work evaluating and supporting Thomas's appointment to the appeals court became critical upon his nomination to the Supreme Court in two ways. First, the information and analysis about Thomas was recent and extensive. Second, conservatives finally had some experience in developing and using educational tools in a political fight over a controversial judicial nominee.

The case for appointing Thomas to the appeals court rested on his non-judicial record, including his personal history and record as chairman of the EEOC. His record on the U.S. Court of Appeals provided an additional category of information for analysis when he was nominated to the Supreme Court.

## 2. Thomas's Non-Judicial Record

Every judicial nominee has a non-judicial record. Such information, however, may be irrelevant because it reveals nothing about the individual's perspective or thinking about the law or the role of a judge. Other information, however, can be very helpful. Each nominee can only be judged on his own merits.

Thomas's non-judicial record provided three categories of evidence about the kind of judge he would be. First, his personal history and tenure as chairman of the EEOC revealed that he embraced some of the principles that informed the founding of America and the framing of her Constitution. Second, his articles and speeches further demonstrated that Thomas understood properly the limited role that unelected judges should play in a republic under a written Constitution. Third, at each stage in his life Thomas developed and strengthened the character necessary to remain faithful to the principles he believes in, even in the face of intense criticism.

### *a. Thomas's Personal History*

Some political supporters believed Thomas's personal history was useful for its own sake, lending itself to politically compelling and dramatic portrayals. Others searched for anecdotes and clues to help predict how he would rule once on the bench. One reporter wrote: "As interest groups choose sides and Senate staffers pore over the nominee's public and private record, the search to capture the essential character of the man, to limn the mind of Clarence Thomas, has begun in earnest. It won't be easy. Willfully iconoclastic, gleefully eclectic, Thomas defies categorization."<sup>215</sup> His vice chairman at the EEOC wrote shortly after Thomas's Supreme Court nomination that Thomas "does not uncritically

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<sup>215</sup> Terence Moran, *Clarence Thomas: Mind and Matter*, LEGAL TIMES, July 8, 1991, at 1.

accept orthodoxy of any stripe."<sup>216</sup> Columnist Chris Matthews cited Thomas's "intellectual independence."<sup>217</sup>

Thomas himself offered the best reason to consider his personal history, saying in one revealing interview that his professional career is "a vindication of the way I was raised."<sup>218</sup> Rather than specific predictors, Thomas's personal history offered general themes and a pattern of basic principles he would likely use and apply in the process of judging. Significantly, these principles paralleled those motivating America's founders and placed him in a much larger and more important continuum at a critical point in American history. He was more than the "man of the moment"<sup>219</sup> that one magazine called him.

Clarence Thomas was born on June 23, 1948, in a small house in Pinpoint, Georgia, to Leola and M.C. Thomas.<sup>220</sup> That house, Thomas's home until he was nearly seven years old, had no indoor plumbing and shared an outhouse and water pump with several other homes. Thomas began the first grade at the segregated Haven Home School in 1954, the year the Supreme Court declared segregated public schools unconstitutional.<sup>221</sup>

Thomas's father had left the family when Thomas was a small child and he saw his father only once during his childhood. In the summer of 1955, Thomas went to live with his maternal grandparents, Myers and Christine Anderson. Myers Anderson had virtually no education and had himself been raised by his grandmother and, after she died, by his uncle. Anderson's hard life greatly affected the way he, in turn, raised his grandsons. Most importantly, he taught them that they had to work to survive despite any opposition, including the segregation that dominated Georgia during Thomas's youth. Anderson chastised his grandsons for saying they could not accomplish a task and taught them respect for their elders. His consistent themes were the necessity of hard, honest work that one must "do for oneself" no matter what the circumstances, the priority of education, and strong religious faith.

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<sup>216</sup> R. Gaull Silberman, *Personal Perspective: 'He's Nothing If Not an Independent Thinker'*, L.A. TIMES, July 7, 1991, at M1.

<sup>217</sup> Chris Matthews, *A Double Dare . . . and a New Judicial Era*, WASH. TIMES, July 9, 1991, at G4.

<sup>218</sup> Interview by Bill Kauffmann with Clarence Thomas (Nov. 1987) in REASON, Nov. 1987, at 29.

<sup>219</sup> David A. Kaplan, *Where Are the Giants?*, NEWSWEEK, July 15, 1991, at 20.

<sup>220</sup> This information comes from a biography prepared and distributed by the White House at the time of his nomination and from conversations with Thomas. See also *The Good, the Bad and the Judges*, FAM. L. & DEMOCRACY REP., Oct. 1989, at 12-15.

<sup>221</sup> See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

Thomas's attendance at St. Benedict's Grammar School and St. Pius X High School, both segregated Catholic institutions,<sup>222</sup> reinforced these values. The nuns who taught him stressed the inherent created equality of all people. His first regular contact with whites came when he attended St. John Vianney Minor Seminary near Savannah, from which he graduated in 1967.

Thomas graduated with honors in 1971 from Holy Cross College and in 1974 from Yale Law School. While in law school, he learned first-hand the obstacle created by race-based assumptions. During interviews with law firms, it seemed that, no matter what his credentials, employers assumed he was simply less qualified than whites. During the summer of 1974, while studying to take the Missouri bar exam, Thomas lived with Margaret Bush Wilson, who would serve as Chairman of the NAACP National Board from 1975 to 1984.<sup>223</sup>

In 1974, Thomas began the first of two periods of public service working for John Danforth. From 1974 to 1977, Thomas was Assistant Attorney General under Missouri Attorney General Danforth<sup>224</sup> and argued his first case before the Supreme Court of Missouri three days after admission to the state bar. Thomas's only private sector legal employment was in the law department of the Monsanto Company, where he worked on general corporate legal matters including antitrust and governmental regulation issues.

In 1979, Thomas went to Washington as a legislative assistant to U.S. Senator Danforth. Less than two years later President Ronald Reagan nominated Thomas to be Assistant Secretary of Education for Civil Rights. On May 17, 1982, Thomas became the eighth Chairman of the EEOC, the federal agency primarily responsible for enforcing the nation's civil rights laws. President Reagan re-appointed him in 1986, and Thomas remains the EEOC's longest-serving chairman. President Bush nominated Thomas to the U.S. Court of Appeals for the D.C. Circuit on October 30, 1989, and the Senate consented to his appointment on March 6, 1990.

This personal history reveals some important information about the nominee. "Under the stern eye of his grandfather, young Clarence began

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<sup>222</sup> Thomas attended St. Benedict's Catholic Church with his grandfather while his grandmother attended a Baptist church.

<sup>223</sup> Wilson defended Thomas's nomination when the NAACP announced its opposition, writing that "the Clarence Thomas I have been reading about often bears little resemblance to the thoughtful and caring man I have known over these years." Wilson, *Memo to My NAACP Friends: You're Wrong About Thomas*, VIRGINIAN PILOT & LEDGER-STAR, August 9, 1991.

<sup>224</sup> One of his fellow assistant attorneys general was John Ashcroft, later himself attorney general and governor of Missouri and now a United States Senator representing that state.

to develop the drive and the personal values that today mark his view of life and the law."<sup>225</sup> First, Thomas learned to view people as individuals, created equal by God and standing equal before the law, primarily responsible for their own success or failure. In a 1985 commencement address at Savannah State College, Thomas spoke of taking "responsibility for our own destiny" and warned the students: "Unlike me, you must not only overcome the repressiveness of racism, you must also overcome the lure of excuses. You have twice the job I had . . . Do not succumb to this temptation of always blaming others."<sup>226</sup> He concluded: "You must choose. The lure of the highway is seductive and enticing. But the destruction is certain. To travel the road of hope and opportunity is hard and difficult, but there is a chance that you might somehow, some way, with the help of God, make it."<sup>227</sup>

One reporter correctly noted that Thomas "discovered that he could excel by carving out an identity for himself as an individual."<sup>228</sup> Thinking back on his education in Catholic schools, Thomas wrote in a 1986 article: "There were strict rules, discipline, and demanding teachers. There was a great emphasis on learning what was right—then doing it. Very few of us liked it then. I would dare say *all* of us want it for our children today in this confused and confusing world."<sup>229</sup>

Second, Thomas developed a very important trait of personal character that would serve him well in maintaining these and other principles. He wrote that the nuns "taught me to be unsubmitive and unyielding in my beliefs."<sup>230</sup> He summed up the contribution of his personal history this way: "But my training by the nuns and my grandparents paid off. I decided then, at the ripe old age of 16, that it was better to be respected than liked. Popularity is unpredictable and vacillating. *Respect* is a constant and may lead to popularity but it is not dependent upon it."<sup>231</sup>

## 2. Thomas's Record At The EEOC

Some in the media characterized Thomas's leadership of the EEOC as "highly controversial"<sup>232</sup> yet conceded he is "[c]onservative, perhaps,

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<sup>225</sup> Karen Tumulty, *Court Path Started in the Ashes*, L.A. TIMES, July 7, 1991, at 1.

<sup>226</sup> Reprinted as Thomas, *Climb the Jagged Mountain*, N.Y. TIMES, July 17, 1991.

<sup>227</sup> *Id.*

<sup>228</sup> Tumulty, *supra* note 225, at 1.

<sup>229</sup> Clarence Thomas, *Remembering an Island of Hope*, THE ST. CROIX REV., Dec. 1986, at 9.

<sup>230</sup> *Id.* at 10.

<sup>231</sup> *Id.*

<sup>232</sup> William Schneider, *Playing Games With the Court*, L. A. TIMES, July 7, 1991, at M1.

but certainly not extremist.”<sup>233</sup> Thomas had learned from growing up with his grandparents the value of seeing people as individuals. Thomas’s record while EEOC chairman also reflected this emphasis on the individual and his personal willingness to advance his views in the face of intense criticism.

Thomas’s EEOC record has both qualitative and quantitative dimensions. On the qualitative side, Thomas implemented a fundamental shift of focus in the agency’s enforcement philosophy. The previous “rapid charge” approach had been geared toward negotiated no-fault settlement of discrimination charges. It did not actually enforce the discrimination laws at all, because it involved no effort to determine the merits of discrimination charges and determine whether an employer had actually discriminated.<sup>234</sup>

Thomas drafted, and prompted the full Commission to adopt, new policies on enforcement and remedies.<sup>235</sup> He believed that each discrimination charge should be investigated and, if necessary, litigated. “Thomas pursued policies that sought to investigate thoroughly and vindicate fully every genuine, individual discrimination complaint.”<sup>236</sup> This approach sought to maximize for the victim the relief available under the applicable statutes and to eliminate discrimination from the workplace.

Thomas’s tenure as EEOC chairman reflected his emphasis on the individual. “He always claimed he wanted the agency to focus more precisely on the individual victims, rather than look for abstract patterns or seek numeric victories.”<sup>237</sup> Columnist Juan Williams had interviewed Thomas several times and put it this way in 1987: “Above all—and perhaps this is the main reason why he is regarded with such disdain by so many blacks, and so many Hispanics and women as well—

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<sup>233</sup> *Id.* The “e-word” had become a political and public relations club during the nomination. Senator Howell Heflin, a moderate Democrat and former chief justice of the Alabama Supreme Court, announced his opposition to Thomas’s Supreme Court nomination on September 26, 1991. In a Senate floor speech, he said that “I support a conservative court” but “I am not for an extremist right wing court.” He concluded: “My review of [Thomas’s] writings and speeches raised questions in my mind that he might be part of the right wing extremist movement.” 137 CONG. REC., S13,738–01 (daily ed. Sept. 26, 1991) (statement of Sen. Heflin).

<sup>234</sup> See Clarence Thomas, *The Equal Employment Opportunity Commission: Reflections on a New Philosophy*, 15 STETSON L. REV. 29, 30–32 (1985).

<sup>235</sup> The 1984 Enforcement Policy required that all discrimination charges that failed conciliation were to be forwarded to the full Commission rather than given to the staff. The 1985 Remedies Policy required seeking maximum statutory remedies rather than minimum negotiated settlements. The 1987 No Cause Review Policy allowed independent review of initial decisions that a charge of discrimination would not be pursued through litigation.

<sup>236</sup> Moran, *supra* note 215, at 1.

<sup>237</sup> Terence Moran, *Getting a Read on Thomas*, LEGAL TIMES, Feb. 12, 1990, at 1.



Thomas refuses to see civil rights as a matter of corporate struggle and group equity."<sup>238</sup>

The change Thomas implemented was geared primarily toward identifying and eliminating actual discrimination and identifying and compensating actual victims of discrimination. It did not, however, mean completely abandoning the use of class-action lawsuits. Thomas himself had to repeatedly refute the charge "that the EEOC is timid about filing class-action suits." In a 1988 letter to the editor of *Management Review*, for example, he wrote: "Class actions have proven to be very effective and make up almost one-half of the Commission's suits filed since 1982."<sup>239</sup>

While growing up, Thomas had learned to view people as individuals and sought to be respected rather than liked. Similarly, while EEOC chairman, Thomas made clear he would implement his principles despite intense criticism. He described the previous system that had emphasized the quick disposition of cases as

unfair to both the charging party and the employer . . . [making] a sham of the notion that our ultimate goal was, and is, to address and remedy discrimination . . . . The bottom line is that we intend to obtain the maximum relief available under the statute to make the charging party whole and to eradicate the discriminatory conduct.<sup>240</sup>

In a 1987 article, he outlined the Commission's shift from an approach geared toward making "quick statistical progress" through class action suits to

a new stage in its enforcement work . . . . Now, for the first time, the Commission has the luxury and freedom to fight to vindicate the Title VII rights of every individual victim of discrimination. The Commission has committed itself to a policy of seeking full relief for every victim of discrimination who files a charge.<sup>241</sup>

Thomas regularly and publicly defended his principles and his EEOC leadership. In 1986, Eleanor Holmes Norton, Thomas's predecessor as EEOC chairman who the Office of Personnel Management had found poorly managed the agency,<sup>242</sup> claimed there

<sup>238</sup> Juan Williams, *A Question of Fairness*, ATLANTIC MONTHLY, Feb. 1987, at 70, 73.

<sup>239</sup> Clarence Thomas, Letter to the Editor, MGMT. REV., Apr. 1988, at 8.

<sup>240</sup> Thomas, *supra* note 229, at 31-32.

<sup>241</sup> Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 404-05 (1987).

<sup>242</sup> See Thomas, *supra* note 229, at 29-30. Shortly before Thomas became EEOC chairman, the Office of Personnel Management issued a report describing the agency as "beset by acrimony, improper employee conduct, poor performance and favoritism." *Id.* However, audits conducted during Thomas's tenure as EEOC chairman found that

Thomas had instituted management and personnel changes and that major problems had been resolved. Federal records show that from 1982 through 1988, EEOC netted more than \$865 million for victims of discrimination

had been a fifty percent drop in the number of discrimination cases filed. Thomas wrote in response: "This Commission's commitment to eradicating discrimination in the work place is resulting in more thorough investigations, improved court cases, more vigorous litigation and far better remedies for victims than ever before."<sup>243</sup> In 1987, Norton again claimed "declining federal enforcement . . . at the [EEOC]." Thomas wrote back that 1986 had seen "the highest number of legal actions filed in this agency's 21-year history."<sup>244</sup> Thomas went around the same block in 1988<sup>245</sup> and 1989.<sup>246</sup>

During Thomas's chairmanship, the number of charges considered for litigation rose from 401 in fiscal year 1982 to approximately 800 in 1989. The number of cases actually granted that authorization more than doubled in the same period. While simple settlements and conciliations declined, the percentage of cases resolved on the merits after full investigation rose from thirty-eight percent in 1982 to nearly sixty percent by 1988. Even the liberal *Washington Post* praised "the quiet but persistent leadership of Chairman Clarence Thomas."<sup>247</sup> Thomas himself summarized the agency's record under his leadership this way: "This commission's record stands on its own merits. We have investigated more charges, filed more lawsuits and obtained more tangible benefits for victims of unlawful discrimination than any previous commission. We have buttressed our strengths. We have

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through settlements, conciliations and litigations. During the same period, more than 2,760 legal actions were filed in District Courts nationwide. Court filings rose from 241 in 1982 to 554 in 1988.

Jerry Seper & Michael Hedges, *Thomas Spurred EEOC Output, Accountability*, WASH. TIMES, July 4, 1991, at E2.

<sup>243</sup> Clarence Thomas, Letter to the Editor, TOLEDO J., Mar. 26, 1986.

<sup>244</sup> Clarence Thomas, Letter to the Editor, WASH. POST, Feb. 27, 1987, at A26.

<sup>245</sup> Thomas responded to criticism of EEOC enforcement and policy whether it appeared in papers with circulation in the hundreds of thousands, see Letter to the Editor, THE DETROIT NEWS, Nov. 27, 1988, or with fewer than 2000 subscribers, see Letter to the Editor, DAILY RECORDER, Nov. 23, 1988. See also *Against Discrimination*, ST. LOUIS POST-DISPATCH, Nov. 19, 1988; *EEOC Counters the GAO*, MIAMI NEWS WEEKENDER, Nov. 19, 1988; Letter to the Editor, RICHMOND AFRO-AMERICAN, Apr. 23, 1988; READER FORUM, 29 AARP NEWS BULLETIN, Nov. 1988; Letter to the Editor, *Clearwater EEOC Responds*, ST. PETERSBURG TIMES, Nov. 17, 1988, at 25A; Letter to the Editor, THE DENVER POST, Nov. 20, 1988. When one critic again claimed lax EEOC enforcement, Thomas provided the correct statistics and wrote that if the critic had "bothered to check his facts, he might have foregone such a blanket accusation." Clarence Thomas, Letter to the Editor, WASH. AFRO-AMERICAN, Mar. 21, 1988.

<sup>246</sup> This time, Thomas could again report that the number of legal actions for the previous year had hit another agency record. Clarence Thomas, Letter to the Editor, MIAMI HERALD, Mar. 22, 1989.

<sup>247</sup> Editorial, *The EEOC Is Thriving*, WASH. POST, Aug. 1, 1987, at A22.

acknowledged our weaknesses and taken steps to correct them. Our program is working."<sup>248</sup>

"The headquarters building of the EEOC has since been named the Clarence Thomas Building. A plaque honoring him is fixed to the lobby wall, its words composed, not by members of the Commission, but by the employees." The plaque honors Thomas for his "personal integrity and unwavering commitment to freedom, justice, equality of opportunity and to the highest standards of Government service."<sup>249</sup>

Thomas's tenure as EEOC chairman revealed the same insight as had his personal history. First, he saw people as individuals rather than merely as members of some group. Second, he implemented his principles and defended his actions in the face of criticism.

### 3. Thomas's Writings And Speeches

A consistent focus on judicial philosophy means that different parts of a nominee's record may not be equally relevant. When a nominee's background is in the field of politics or policy, many of his writings or speeches may concern those issues. As such, they can be a double-edged sword. On the one hand, they may provide no insight into a nominee's judicial philosophy and, therefore, be essentially useless to those whose evaluation is properly focused. On the other hand, they may provide ammunition for those advocates of judicial activism whose approach is inappropriately political.

Thomas's articles contain four themes which, especially when considered together, provided useful insight into the kind of judge he would be. First, they emphasize the same principle of the created equality of individuals that Thomas learned while growing up and implemented at the EEOC. Second, they reflect Thomas's determination to remain faithful to his principles even in the face of intense criticism. Third, they address Thomas's view of the proper role of a judge in a republic under a written constitution. Fourth, they discuss Thomas's belief in what has loosely been called "natural law."

#### *a. Emphasis On The Individual*

Justice Thomas wrote in 1983:

One of the essential functions of the federal government is to ensure that the civil rights of all Americans be protected . . . . Under our statutes and the Constitution, every individual is entitled to be judged

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<sup>248</sup> Letter to the Editor, CAL. LAW., May 1989.

<sup>249</sup> 137 CONG. REC. S10,086 (daily ed. July 16, 1991) (statement of Sen. Danforth).

on the basis of individual merit without consideration of group characteristics such as race, sex, national origin, or religion.<sup>250</sup>

In 1987, Thomas said that "the most vulnerable unit in our society is the individual."<sup>251</sup> He must have put that belief into practice because one reporter observed that "Thomas's defining trait may be his commitment to the individual."<sup>252</sup>

This commitment parallels an important tradition in American constitutional and political history. The principle from the Declaration of Independence that "all men are created equal" became a constitutional guarantee of equality and a statutory prohibition on discrimination. Thomas's emphasis on the individual led him to reject the notion that membership in a class could automatically designate someone as either a victim or a perpetrator of racism or discrimination. In a 1989 interview reprinted shortly after his Supreme Court nomination, he said that "there are *individuals* today who feel as strongly racist as they ever did. The difference is that now they don't have the overall moral sanction of society."<sup>253</sup>

#### *b. Independence of Thought*

Second, Thomas refined and applied the general lesson he had learned by "the ripe old age of 16, that it was better to be respected than liked."<sup>254</sup> As he traveled more in political circles and, as EEOC chairman, addressed civil rights issues, Thomas focused this lesson on what it means to be black in America. In a 1983 article, for example, he wrote: "You must not be afraid of being disliked and must resist functioning in lockstep with others simply because doing so is more convenient."<sup>255</sup> Similarly, in 1985 he wrote that

the real issue is why, unlike other individuals in this country, black individuals are not entitled to have and express points of view that differ from the collective hodgepodge of ideas that we supposedly share because we are members of the same race. There seems to be an obsession with painting blacks as an unthinking group of automatons, with a common set of views, opinions, and ideas . . . . By insisting on one point of view, this new orthodoxy stifles serious debate and the

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<sup>250</sup> Clarence Thomas, *Current Litigation Trends and Goals at the EEOC*, 34 LAB. L. J. 208, 211 (1983).

<sup>251</sup> Williams, *supra* note 238, at 72.

<sup>252</sup> Russell W. Galloway, *Perspective on the Supreme Court; Bush May Have Drawn Wildcard; Thomas's Dedication to Individual Rights May Indicate a Streak of Independence*, L.A. TIMES, July 3, 1991, at B7.

<sup>253</sup> Interview with Clarence Thomas, CATHOLIC TWIN CIRCLE, July 28, 1991, at 10.

<sup>254</sup> Thomas, *supra* note 229, at 10.

<sup>255</sup> Clarence Thomas, *Discrimination and Its Effects*, 21 INTEGRATED EDUC. 204, 255 (1983).

possibility of any meaningful discussion of the countless problems facing blacks today.<sup>256</sup>

Thomas demonstrated this independence in many interesting ways. On the one hand, he opposed the group-based racial preference policies favored by leaders of the civil rights establishment. On the other hand, while serving as Assistant Secretary of Education, "he ended federal efforts to force Southern states to eliminate historically black colleges and universities and create a unified system for educating white and black students."<sup>257</sup> Some in the media said simply that Thomas "is a bunch of seeming contradictions"<sup>258</sup> but his thinking is actually quite consistent. He believed that the government should neither perpetuate racial separation by basing benefits and burdens on race nor force an artificial integration by eliminating opportunities for expressing and communicating cultural heritage.

Even the liberal *Washington Post* concluded after Thomas's Judiciary Committee hearing: "There seems also to be a streak of individualism in him, a turn of mind that will not easily accede to the prejudices and popular passions that sweep the day."<sup>259</sup>

### c. A Judge's Proper Role

Third, Thomas's paper trail of articles and speeches provided specific relevant evidence about his view of a federal judge's role. In one article, for example, he wrote about "the judicial restraint that flows from the commitment to limited government."<sup>260</sup> One reporter observed: "Like Rehnquist, Thomas believes the power of federal judges should be limited."<sup>261</sup> In a 1987 article, Thomas wrote that the most important principles for black Americans are found in "the founding documents themselves—in particular the link between the Constitution and the Declaration of Independence." Citing Abraham Lincoln, Thomas wrote that "equality led to the principle of government by consent, limited government, majority rule, and separation of powers."<sup>262</sup> It is out of those very principles that America crafted a restrained judiciary.

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<sup>256</sup> Clarence Thomas, *Pluralism Lives: Blacks Don't All Think Alike*, L.A. TIMES, Nov. 15, 1985, (Metro), Part 2, at 9.

<sup>257</sup> George Archibald, *ABA OKs Appeals Court Nominee*, WASH. TIMES, Oct. 31, 1989, at B1.

<sup>258</sup> Carlson, *supra* note 199, at 19.

<sup>259</sup> Editorial, *The Thomas Hearings*, WASH. POST, Sept. 15, 1991, at C6.

<sup>260</sup> Thomas, *supra* note 26, at 63.

<sup>261</sup> Tumulty, *supra* note 225, at 1.

<sup>262</sup> Clarence Thomas, *Toward a 'Plain Reading' of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 983–84 (1987).

Thomas drew a deliberate distinction between the function of Congress and the function of the Supreme Court. While Congress has "the principal task of general lawmaking," he said, "the founders purposely insulated the courts from popular pressures, on the assumption that they should not make policy decisions."<sup>263</sup> He criticized "rather creative interpretations" that ignore statutory language.<sup>264</sup> He specifically criticized the creation of unenumerated constitutional rights as "a blank check. The Court could designate something to be a right and then strike down any law it thought violated that right."<sup>265</sup>

#### *d. Natural Rights*

Perhaps the most intriguing subject in Thomas's articles and speeches, and one of the most contentious issues during the debates on his two judicial nominations, was his embrace of what has loosely been called "natural law." Thomas had for years written and spoken about the American tradition recognizing that certain principles and values transcend individuals, societies, and even constitutions. Principal among these is equality. The Declaration of Independence itself opens by asserting that "all men are created equal, that they are endowed by their Creator with certain unalienable rights."<sup>266</sup> Thomas thus joined a long line of patriots, philosophers, politicians, and pundits who believed this transcendent view enhanced the worth of each individual, made them equal before the law, and required limited government by the consent of the governed.

Thomas's writings address what his critics call "natural law" not as theology but as political philosophy. In fact, he rarely used the label "natural law" and some analysts have argued that this more controversial label "is not essential to the content of Judge Thomas's position."<sup>267</sup> When talking of these principles he most often referred to them instead as "higher law,"<sup>268</sup> sometimes called them "natural rights

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<sup>263</sup> Thomas, *supra* note 96, at 394.

<sup>264</sup> *Id.* at 395.

<sup>265</sup> *Id.* at 399.

<sup>266</sup> THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>267</sup> Rule et al., *Judge Clarence Thomas's Professional Background, Judicial Opinions, and Statements on Natural Law*, Report Prepared for the Washington Legal Foundation, Sept. 10, 1991, at 63 n.112 [hereinafter WLF Report].

<sup>268</sup> See, e.g., Clarence Thomas, *The Calling of the Higher Law* (Jan. 16, 1987), in 133 CONG. REC. E339 (daily ed. Feb. 3, 1987).

and higher law,"<sup>269</sup> and sometimes even called them "public philosophy."<sup>270</sup>

As this Article has already explained, the purpose for reviewing or analyzing a judicial nominee's record is to determine his judicial philosophy, that is, whether he will be an activist or a restrained judge. Thus Thomas's discussions of natural rights, while interesting, would be irrelevant except to help answer this question: would he use natural rights or higher law—whatever the definition of this construct—as an explicit tool for interpreting the Constitution, construing statutes, and deciding cases?

Both advocates of a restrained and an activist judiciary were very concerned about this question. The advocate of judicial restraint believes judges must always derive the meaning of laws, including the Constitution and statutes, from the lawmakers. Imposing upon our laws meaning drawn from any other source, whether something called natural law or a public opinion poll, is illegitimate. Gary McDowell summarized those concerns this way: "Although [Thomas] has at times claimed to be a defender of judicial restraint, at others he has referred to natural law and natural rights, which cannot be found in the Constitution any more than liberals' right to privacy."<sup>271</sup>

A focus on natural rights or higher law, then, suggests that judges might use extra-constitutional principles rather than the intended meaning of the Constitution in deciding cases. In this view, using natural law as a tool for directly interpreting the Constitution would be "just one more way of suggesting there is an 'unwritten constitution' of fundamental rights that both antedates and transcends the written Constitution."<sup>272</sup> It would accept "the principle that cases are properly decided on the basis of what a judge thinks is right or true or just, and are not confined to as literal a reading of the Constitution as possible."<sup>273</sup> This approach would be properly condemned as judicial activism, even if based on something as noble as natural rights or higher law.

Recognition of natural rights or higher law, however, need not result in judicial activism. One of Professor Charles Rice's *50 Questions on the Natural Law* was this: "Isn't the job of a judge to apply the Constitution, as written, according to the intent of those who adopted it

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<sup>269</sup> Thomas, *supra* note 26, at 67.

<sup>270</sup> Clarence Thomas, Address at California State University (Apr. 25, 1988) ("At the heart of the American public philosophy, I have come to conclude, is the 'self-evident truth' of the equality of all men which lies at the center of the Declaration of Independence.").

<sup>271</sup> McDowell, *supra* note 18, at 14.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 15.

rather than according to his own view of what is useful or just?"<sup>274</sup> He answered by affirming that

a legal document ought to be interpreted according to the intent of its authors . . . . If judges in constitutional cases are not bound to construe the Constitution according to the intent of those who drafted and adopted it, then it is difficult to see the purpose of having a constitution at all.<sup>275</sup>

Thomas's record on this question was clear. The core of his position is that the Constitution already reflects or incorporates these principles because the Constitution's framers put them there. Interpreting that document properly, then, may involve acknowledging this fact but it cannot involve imposing upon the Constitution meaning that is not already there. Natural rights or higher law, then, might help one *understand* the Constitution, but for Thomas it was not a tool for *interpreting* the Constitution.

An important example of how Thomas utilized natural rights or higher law is the issue of racial segregation and discrimination. The Declaration of Independence asserts that "all men are created equal." Thomas has written that "the Constitution is a logical extension of the principles of the Declaration of Independence."<sup>276</sup> The Constitution, in turn, guarantees equal protection of the laws.<sup>277</sup> Thomas has, therefore, argued that "the Declaration's promise of the equality of all men must be the guiding principle of the regime established by the Constitution and therefore that slavery and racial discrimination are illegitimate."<sup>278</sup> This approach, however, does not pluck some ephemeral value out of thin air and impose it upon the Constitution. Rather, it utilizes the traditional approach to determine the meaning the Constitution's framers gave it and recognizes that the natural right of equality in which the framers believed informs that meaning.

Thomas responded directly to conservatives' concern that recognition of natural rights or higher law might lead to judicial activism, writing that it is not "a license for . . . a roving judiciary" or "a justification of the worst type of judicial activism" but rather "the only alternative to the willfulness of . . . run-amok judges."<sup>279</sup> One can easily see the consistency in his judicial philosophy. A judiciary "active in

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<sup>274</sup> CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT 87 (1995).

<sup>275</sup> *Id.*

<sup>276</sup> Thomas, *supra* note 26, at 64.

<sup>277</sup> See U.S. CONST. amend. XIV.

<sup>278</sup> WLF Report, *supra* note 267, at 65 n.116; see Thomas, *supra* note 262, at 984.

<sup>279</sup> Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, HARV. J.L. & PUB. POL'Y 63, 63-64 (1989).



defending the Constitution"<sup>280</sup> will be a hedge against "run-amok majorities"<sup>281</sup> while a judiciary "judicious in its restraint and moderation"<sup>282</sup> will guard against "run-amok judges."<sup>283</sup>

Thomas specifically disclaimed libertarian arguments that might well have produced results he politically favored. Those arguments, which would support an activist judiciary in the area of economic rights,<sup>284</sup> "overlook[] the place of the Supreme Court in a scheme of separation of powers. One does not strengthen self-government and the rule of law by having the non-democratic branch of the government make policy."<sup>285</sup> Thus, while recognizing that America's founders believed in and relied on natural law principles, Thomas consistently reaffirmed that the proper role of a federal judge requires him to take the law as the lawmaker made it rather than impose his own values or ideas upon the law.

"Clarence Thomas's reflections on the subject of natural law are confined to the unremarkable proposition that in trying to understand the meaning of the Constitution's words, one must be aware of and understand the natural law principles that in large part guided the drafting of the Constitution."<sup>286</sup> His embrace of the same principles as America's founders led him similarly to a stronger commitment to "limited government . . . the separation of powers, and . . . judicial restraint."<sup>287</sup>

Another analysis of this issue called a "fallacy" the claim that Thomas "will use the American natural rights tradition not as a means to understand the Constitution but as a tool to interpret the Constitution . . . . Judge Thomas has discussed the American natural rights tradition as political philosophy, not a blueprint for judicial review."<sup>288</sup> These are two very different things. To suggest that the Constitution sprang from and rests upon the natural law teachings of the Declaration of Independence is one thing; but to argue that it is appropriate for judges to claim recourse to that body of law in deciding the cases before them is quite a different matter.<sup>289</sup>

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<sup>280</sup> Thomas, *supra* note 26, at 63.

<sup>281</sup> *Id.* at 64.

<sup>282</sup> *Id.* at 63-64.

<sup>283</sup> *Id.* at 64.

<sup>284</sup> See WLF Report, *supra* note 267, at 74.

<sup>285</sup> *Id.* at 132-33.

<sup>286</sup> *Id.* at 64.

<sup>287</sup> *Id.* at 68 n.119.

<sup>288</sup> Thomas Jipping, *A Response to Judge Thomas' Critics*, COALITIONS FOR AMERICA, Sept. 1991, at 16-17.

<sup>289</sup> McDowell, *supra* note 18, at 15.

This approach led Thomas to agree with the Supreme Court's conclusion in *Brown v. Board of Education*<sup>290</sup> that racial segregation in government schools is unconstitutional but to criticize the foundation or rationale for that conclusion. The Court in *Brown* relied primarily on sociological arguments about how black children feel inferior when prevented from attending school with white children. While believing that the Court was acting "in a good cause,"<sup>291</sup> Thomas nevertheless believed that its opinion in *Brown* was "a missed opportunity"<sup>292</sup> because it was not based on a more fundamental constitutional principle. He wrote:

The main problem with the Court's opinions in the area of race is that it never had an adequate principle in the great *Brown* precedent to proceed from. Psychological evidence, compassion, and a failure to connect segregation with the evil of slavery prevented the Court from the end segregation as a matter of simple justice.<sup>293</sup>

Significantly, Thurgood Marshall—the Justice that Thomas would later replace on the Supreme Court—made the same argument when, as a lawyer for the NAACP, he argued *Brown*. In the brief he filed with the Court, he argued that the Declaration's expression of inalienable rights was the "central rallying cry" for the drive to abolish slavery and that the "first Section of the Fourteenth Amendment is the legal capstone of the revolutionary dream of the Abolitionists to reach the true goal of equality."<sup>294</sup> Marshall called this natural law doctrine "the marrow of the Constitution itself."<sup>295</sup>

When the Supreme Court earlier held that a statute requiring "separate but equal accommodations" for blacks and whites did not violate the Fourteenth Amendment, only Justice John Harlan dissented. He wrote: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."<sup>296</sup> Thurgood Marshall later argued to the Court in *Brown* that "it is the dissenting opinion of Justice Harlan, rather than the majority opinion in *Plessy v. Ferguson*, that is in keeping with the scope and meaning of the Fourteenth Amendment."<sup>297</sup>

After the Court failed to base its decision on that principled foundation, Thomas wrote that "[t]he great flaw of *Brown* is that it did not rely on Justice Harlan's dissent in *Plessy*, which understood well

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<sup>290</sup> 347 U.S. 483 (1954).

<sup>291</sup> Thomas, *supra* note 96, at 392.

<sup>292</sup> Thomas, *supra* note 262, at 699.

<sup>293</sup> Thomas, *supra* 96, at 392–93.

<sup>294</sup> Brief for Appellants at 69, *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>295</sup> *Id.* at 203.

<sup>296</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>297</sup> Brief for Appellants, *supra* note 294, at 41.

that the fundamental issue of guidance by the Founders' constitutional principles lay at the heart of the segregation issue."<sup>298</sup> Thomas has called that dissent "one of our best examples of natural rights or higher law jurisprudence."<sup>299</sup> Echoing Justice Harlan, Thomas has said: "I firmly insist that the Constitution be interpreted in a colorblind fashion. It is futile to talk of a colorblind society unless this constitutional principle is first established."<sup>300</sup> One legal analyst's review of this controversy was titled: "On *Brown v. Board of Education*, Call Him Thurgood Thomas."<sup>301</sup>

Advocates of judicial activism had a very different concern. They have no fundamental problem with judges departing from the Constitution in deciding cases; their main concern is that judges provide the politically correct result in doing so. They feared that Thomas's reliance on natural rights or higher law might interfere with the political agenda they were pursuing in the courts. The problem was that defending a judiciary with the power to make up the law is a very difficult task. The solution was a creative mutation of their previous attack on Robert Bork. While they had argued that Bork's focus within the Constitution would produce politically incorrect results, they now argued that Thomas's alleged willingness to look outside the Constitution would do the same.

Ignoring the evidence of Thomas's views on this subject, these leftists simply asserted that natural rights are "central to Judge Thomas's . . . approach to constitutional interpretation,"<sup>302</sup> that Thomas "will interpret the U.S. Constitution on the basis of natural law,"<sup>303</sup> and that Thomas believes that "natural law . . . [is] a necessary part of constitutional interpretation."<sup>304</sup> Senator Joe Biden, who chaired the Judiciary Committee during the Thomas nomination, wrote shortly before the hearing opened that "natural-law arguments have been used to support conflicting conclusions."<sup>305</sup> He was not concerned with judges looking outside the Constitution but only with the particular conclusions

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<sup>298</sup> Thomas, *supra* note 96, at 698.

<sup>299</sup> Thomas, *supra* note 26, at 66–67.

<sup>300</sup> Clarence Thomas, "I Emphasize Black Self-Help"; *Thomas's Thoughts on Quotas, the Work Ethic and Conservatism*, WASH. POST, July 2, 1991, at A7.

<sup>301</sup> L. Gordon Crovitz, *On Brown v. Board of Education, Call Him Thurgood Thomas*, WALL ST. J., July 31, 1991, at A11.

<sup>302</sup> NAT'L ABORTION RIGHTS ACTION LEAGUE, *JUDGE CLARENCE THOMAS' RECORD ON THE FUNDAMENTAL RIGHT TO PRIVACY 2* (1991).

<sup>303</sup> AMERICANS FOR DEMOCRATIC ACTION, *NOMINATION OF JUDGE CLARENCE THOMAS TO THE SUPREME COURT OF THE UNITED STATES: A LEGAL ANALYSIS 9* (1991).

<sup>304</sup> PEOPLE FOR THE AM. WAY ACTION FUND, *JUDGE CLARENCE THOMAS: "AN OVERALL DISDAIN FOR THE RULE OF LAW" 3* (1991).

<sup>305</sup> Joseph R. Biden, *Law and Natural Law: Questions for Judge Thomas*, WASH. POST, Sept. 8, 1991, at C1.

that judges reached by doing so. Not surprisingly, he and other advocates of judicial activism only approve of activist judges producing results consistent with their political agenda.

People for the American Way (PAW) was probably the leading leftist organization opposing Thomas's nomination. The group strongly supports the Supreme Court's decision creating a right to abortion. As Professor John Hart Ely later wrote, *Roe v. Wade* was "a very bad decision . . . because . . . it is not constitutional law and gives almost no sense of an obligation to try to be."<sup>306</sup> Groups such as PAW have no quarrel with judges who go outside the Constitution with bad decisions that are not constitutional law so long as they reach results that parallel the liberal political agenda.

Significantly, PAW said Thomas would use natural law to undercut the unenumerated right to privacy.<sup>307</sup> Leftist academics such as Professor Erwin Chemerinsky, who worked on behalf of PAW during the Thomas nomination, said that reference to natural law would lead Thomas to create unenumerated rights such as a right to life for preborn children or economic rights.<sup>308</sup> Thus, these groups have no general quarrel with judges creating unenumerated rights; they simply demand that judges create the politically correct ones.

Senator Biden was even more hypocritical. The most basic question about a judge's thinking about natural law is whether he will use it as a rule of decision. Biden appeared to agree with this. He wrote: "In our system, the sole obligation of a Supreme Court justice is to the Constitution. Natural justice can supply one of the important means of understanding the Constitution, but natural law can *never* be used to reach a decision contrary to the fair reading of the Constitution itself."<sup>309</sup> Biden already knew that Thomas agreed with this basic principle. Indeed, Thomas had under oath explained his support for this very view before Biden in the Judiciary Committee hearing on his appeals court nomination. Thomas had testified:

In writing on natural law, as I have, I was speaking more to the philosophy of the founders of our country and the drafters of our Constitution . . . . But recognizing that natural rights is a philosophical, historical context of the Constitution is not to say that I have abandoned the methodology of constitutional interpretation used by the Supreme Court. In applying the Constitution, I think I would

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<sup>306</sup> John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 947 (1973).

<sup>307</sup> PEOPLE FOR THE AM. WAY ACTION FUND, *supra* note 304, at 20–22.

<sup>308</sup> See Chemerinsky, Clarence Thomas' Natural Law Philosophy (undated study prepared for People for the American Way).

<sup>309</sup> *Id.* at C4.

have to resort to the approaches that the Supreme Court has used. I would have to look at the text of the Constitution, the structure. I would have to look at the prior Supreme Court precedents on those matters.<sup>310</sup>

The *Legal Times* dated the day before his hearing quoted Thomas as saying: "Martin Luther King talked about natural law. The founders of our country, the drafters of our Constitution—they all were influenced by it."<sup>311</sup> On September 10, 1991, as the hearing opened, Thomas repeated the view that natural rights principles are important as a matter of political philosophy but have no place as a direct method of constitutional interpretation. One commentator concluded that "Mr. Thomas's response this week on natural law was virtually word-for-word the same as the one he delivered 18 months ago at his Senate hearing for the federal appeals court."<sup>312</sup>

Once it is established that a judge gives reference to natural law only as means of understanding the Constitution, and not as a tool for interpreting the Constitution, there is nothing left to discuss. Biden's other questions, though couched in terms of natural law, were actually about the particular results Thomas would reach on issues of particular political significance. On abortion, for example, Biden did not really care what path or approach Thomas followed, he cared only where Thomas would end up—whether he would maintain the myth that the Constitution guarantees a right to privacy and abortion. When Biden asked whether Thomas's "vision of natural law [is] a static one or an evolving one,"<sup>313</sup> then, he was not really inquiring about the fine-grained specifics of Thomas's thinking about natural rights or higher law at all. Indeed, that question is really one about constitutional interpretation itself, whether or not it incorporates any recognition of natural law.

Biden claimed instead that "a static conception of natural rights and of the meanings of our constitutional language is emphatically *not* the

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<sup>310</sup> Transcript of Proceedings, United States Senate, Committee on the Judiciary, Nomination Hearing for Clarence Thomas to be a Judge on the United States Court of the Appeals for the District of Columbia, Feb. 6, 1990, at 52–53; Confirmation Hearing on Clarence Thomas to be a Judge on the U.S. Court of Appeals for the District of Columbia: Hearings before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990), at 30.

<sup>311</sup> Terence Moran, *Clarence Thomas: Calm Before the Storm; Kicking Back, Previewing Responses on Eve of Senate Hearings*, LEGAL TIMES, Sept. 9, 1991, at 9 (quoting a statement made by Thomas during a Sept. 4, 1991 interview). See also Ruth Marcus, *For Thomas, Biggest Test Begins Today; Court Nominee's Policy Roles, Philosophy Face Scrutiny in Hearings*, WASH. POST, Sept. 10, 1991, at A14.

<sup>312</sup> Paul Gigot, *Dixie Senators Play It Safe With Thomas*, WALL ST. J., Sept. 13, 1991, at A10.

<sup>313</sup> *Id.*

view held by such founders as Jefferson and Madison.”<sup>314</sup> The evidence reviewed earlier in this Article,<sup>315</sup> of course, shows that while Biden may have wished that America’s founders agreed with him about the need for a flexible and changing Constitution, they “emphatically” did not. How, for example, can Biden attribute to Jefferson the belief that constitutional meaning should evolve and change when Jefferson himself wrote: “Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.”<sup>316</sup>

Biden’s discussion of natural law contradicted itself. On the one hand, he approved of a greater recognition of individual liberties but criticized the Supreme Court for striking down legislation that restricted how long individuals could work.<sup>317</sup> As many liberals do today, Biden apparently separates economic liberty from social or moral liberty, thinking it appropriate for government to control the former but inappropriate for government to control the latter. Thus, he condemns the Court’s amendment of the Constitution in *Lochner v. New York*,<sup>318</sup> by which judges prohibited certain economic regulations but supports the Court’s amendment of the Constitution in *Griswold v. Connecticut*<sup>319</sup> and *Roe v. Wade*,<sup>320</sup> by which judges prohibited certain social and moral regulations. This schizophrenic approach has more to do with Biden’s politics than with any principled approach to constitutional interpretation. Were he a Supreme Court Justice, it appears Biden would be the worst kind of activist, one quite willing to abandon the Constitution, but who would condemn any departure inconsistent with his personal political fancy.

It was Biden, after all, who said, after he opposed Robert Bork’s Supreme Court nomination in 1987, that “I have certain inalienable rights because I exist, [not] . . . because my government confers them on me.”<sup>321</sup> The real question, however, is whether natural rights become constitutional rights that can be enforced. Both Thomas and Biden would answer in the affirmative. The difference, however, is that Thomas thinks the Constitution’s framers already decided which natural rights become constitutional rights and Biden think judges can continue

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<sup>314</sup> *Id.*

<sup>315</sup> See *supra* notes 22–74 and accompanying text.

<sup>316</sup> Letter from Thomas Jefferson to Wilson C. Nicholas, in *THE JEFFERSON CYCLOPEDIA* 190 (1900).

<sup>317</sup> See *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>318</sup> *Id.*

<sup>319</sup> 381 U.S. 479 (1965).

<sup>320</sup> 410 U.S. 113 (1973).

<sup>321</sup> See Thomas, *supra* note 26, at 68 n.31.

adding to that list—as long as they choose the rights that agree with Biden's politics, that is. Thomas is clearly not that kind of judge.

Thomas's other critics took a similarly disingenuous approach to this topic. Professor Laurence Tribe claimed that Thomas "is the first Supreme Court nominee in 50 years to maintain that natural law should be readily consulted in constitutional interpretation."<sup>322</sup> How could Tribe make this claim in July 1991 when Thomas had testified under oath in February 1990 that "recognizing that natural rights is a philosophical, historical context of the Constitution is not to say that I have abandoned the methodology of constitutional interpretation used by the Supreme Court"?<sup>323</sup> Unless Tribe is claiming that "readily consult[ing]" natural law is "the methodology of constitutional interpretation used by the Supreme Court," which he most certainly is not, then he could only be intentionally misrepresenting Thomas's actual position on this issue.

Tribe also argued that Thomas would bring "theological" views into constitutional decisionmaking and promote "moralistic intrusions on personal choice."<sup>324</sup> As even the mainstream media knew, however, "natural law is not a religious doctrine."<sup>325</sup> Tribe's comments had more to do with his own politics and how he wanted the Supreme Court to rule on his favorite issues than about either Thomas's real approach to judging or a principled approach to constitutional interpretation. No matter how they dress up the argument, these advocates of unrestrained judicial power simply want courts to rule their way.

Tribe's mischaracterization could only have been deliberate. A liberal legal analyst also concluded that Thomas's views on this issue had

been not only caricatured but turned on their head. Far from being a judicial activist, Thomas has repeatedly criticized the idea that judges should strike down laws based on their personal understanding of natural rights . . . . Like many liberals, Thomas believes in natural rights as a philosophical matter, but unlike many liberals, he does not

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<sup>322</sup> Lawrence H. Tribe, *Clarence Thomas and Natural Law*, N.Y. TIMES, July 15, 1991, at A15.

<sup>323</sup> Transcript of Proceedings, United States Senate, Committee on the Judiciary, Nomination Hearing for Clarence Thomas to be a Judge on the United States Court of the Appeals for the District of Columbia, Feb. 6, 1990, at 52-53; Confirmation Hearing on Clarence Thomas to be a Judge on the U.S. Court of Appeals for the District of Columbia: Hearings before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990), at 30.

<sup>324</sup> Tribe, *supra* note 322, at A15.

<sup>325</sup> Ted Gest & Jeffrey L. Sheler, *A Higher Law for the High Court*, U.S. NEWS & WORLD REP., July 22, 1991, at 50. See also Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539, 555 (1989) ("The idea of a natural law, knowable to the intellect, which determine the validity of human law, is not only not a sectarian Catholic teaching. It is not even a Christian invention.").

see natural law as an independent source of rights for judges to discover and enforce.<sup>326</sup>

Though Thomas is the one who supposedly embraces natural law, he has written: "I continue to doubt the legitimacy of this mode of constitutional decisionmaking."<sup>327</sup> He has expressed willingness to overrule the Supreme Court case ushering in the "evolving standards of decency" standard, an example of imposing natural law on the Constitution.<sup>328</sup>

The answer is that Thomas's critics support judicial activism when its results parallel their political agenda. Three prominent examples are the death penalty, abortion, and welfare rights. The Supreme Court claims that the Eighth Amendment's ban on cruel and unusual punishment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'"<sup>329</sup> In deciding death penalty cases, the Court resorts to "evolving standards of decency that mark the progress of a maturing society."<sup>330</sup> In *Planned Parenthood v. Casey*,<sup>331</sup> the Court reaffirmed the so-called constitutional right to abortion by first asserting: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>332</sup> Similarly, in *Goldberg v. Kelly*<sup>333</sup> the Court created a constitutional right to maintain welfare benefits by first claiming: "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."<sup>334</sup> All of these are appeals to values or concepts outside the Constitution and must be the sort of "evolving" concept of natural law that Biden supports.

Thomas's true position, however, was that judges should recognize the natural rights or higher law principles already embodied in the Constitution and having their roots in the Declaration of Independence. This, he believed, naturally supported judicial restraint. In one article, he wrote: "But 'the jurisprudence of original intention' cannot be understood as sympathetic with the *Dred Scott* reasoning, if we regard the 'original intention' of the Constitution to be the fulfillment of the ideals of the Declaration of

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<sup>326</sup> Jeff Rosen, *Thomas's Promise: Liberals Should Think Again; Judge Clarence Thomas and Natural Law Theory*, NEW REPUBLIC, Sept. 9, 1991, at 18.

<sup>327</sup> *Farmer v. Brennan*, 511 U.S. 825, 859 (1994) (Thomas, J., dissenting).

<sup>328</sup> *Id.*

<sup>329</sup> *Gray v. Lucas*, 710 F.2d 1048, 1058 (5th Cir. 1983) (citing *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

<sup>330</sup> *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

<sup>331</sup> 505 U.S. 833 (1992).

<sup>332</sup> *Id.* at 851.

<sup>333</sup> 397 U.S. 254 (1970).

<sup>334</sup> *Id.* at 264-65.



Independence, as Lincoln, Frederick Douglass, and the Founders understood it."<sup>335</sup>

The first principles of equality and liberty should inspire our political and constitutional thinking . . . . Such a principled jurisprudence would pose a major alternative to the cynical rejection of 'the laws of nature and of nature's God' from jurisprudence, and esoteric hermeneutics rationalizing expansive powers for the government especially the judiciary.<sup>336</sup>

In a speech at the U.S. Department of Justice on January 16, 1987, Thomas echoed the same theme:

American politics and the American Constitution are unintelligible without the Declaration of Independence, and the Declaration of Independence is unintelligible without the notion of a higher law by which we fallible men and women can take our bearings. So when we use the standard of "original intention," we must take this to mean the Constitution in light of the Declaration.<sup>337</sup>

He argued this must result in a "color-blind reading of the Constitution."<sup>338</sup>

In perhaps the most telling explanation of his judicial philosophy, Thomas argued:

natural rights and higher law arguments are the best defense of liberty and of limited government. Moreover, without recourse to higher law, we abandon our best defense of judicial review—a judiciary active in defending the Constitution, but judicious in its restraint and moderation. Rather than being a justification of the worst type of judicial activism, higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges.<sup>339</sup>

Thomas argued, however, that reference to or reliance upon natural law should be implicit rather than explicit when interpreting the Constitution. That is, natural law principles provide a backdrop, a way of understanding the Constitution, rather than a tool for interpreting the Constitution. "The higher-law background of the American Constitution, whether explicitly invoked or not, provides the only firm basis for a just, wise, and *constitutional* decision."<sup>340</sup>

Again, the question is whether natural law serves as background that helps a judge understand more fully the meaning given to the Constitution by its framers or is a separate device that directly helps a judge give new meaning to the Constitution. The former view is simply a

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<sup>335</sup> Thomas, *supra* note 96, at 693.

<sup>336</sup> Thomas, *supra* note 262, at 703.

<sup>337</sup> Thomas, *supra* note 268, at E340.

<sup>338</sup> *Id.*

<sup>339</sup> Thomas, *supra* note 26, at 63–64.

<sup>340</sup> *Id.* at 68.

deeper and richer version of judicial restraint, the latter a philosophized version of judicial activism. There is no question that Thomas has consistently been squarely on the side of judicial restraint, even in his discussions and views about natural law.

There exists not a single piece of evidence that Thomas has ever seen the natural rights view of the Declaration as giving judges license to ignore the express language of the Constitution, or even the Constitution's silence, in favor of unenumerated rights derived from higher law.

*e. Sticking to Principles in the Face of Criticism*

Thomas demonstrated that he was willing to stick to these principles, even when doing so would invite criticism. That is, he demonstrated his earlier observation that it is "better to be respected than liked"<sup>341</sup> and his admonition to "not be afraid of being disliked."<sup>342</sup>

Thomas made some very important distinctions that many leaders in the black community did not. In a 1985 article, for example, he wrote:

But the most devastating form of racism is the feeling that blacks are inferior, so let's help them. What we had in Georgia under Jim Crow was not as bad as this. This racism based on sympathy says that because of your race, we will give you excuses for not preparing yourself and not being as good as you can be. White parents tell their kids to study hard and get into college, and black kids are told they don't have to worry about their SAT scores. That's wrong.<sup>343</sup>

Thomas not only distinguished between a colorblind Constitution and a colorblind society but he believed that society developed later. He believed it was futile to argue, as leaders of liberal civil rights groups do, that we should only interpret the Constitution in a colorblind fashion after society becomes colorblind. Thomas argued this was an inherent contradiction. He wrote in 1987:

I firmly insist that the Constitution be interpreted in a colorblind fashion. It is futile to talk of a colorblind society unless this constitutional principle is first established. Hence, I emphasize black self-help, as opposed to racial quotas and other race-conscious legal devices that only further and deepen the original problem.<sup>344</sup>

In another article, he "insisted that the Constitution be interpreted as colorblind, so that society may someday be colorblind."<sup>345</sup>

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<sup>341</sup> Tumulty, *supra* note 226, at 10.

<sup>342</sup> Thomas, *supra* note 255, at 207.

<sup>343</sup> Symposium, *Black Americans Under the Reagan Administration*, POL'Y REV. 27, 41 (Fall 1985).

<sup>344</sup> Letter to the editor, *Colorblindness*, WALL ST. J., Feb. 20, 1987, at 21.

<sup>345</sup> Letter to the editor, *EEOC Chief Responds to Eagle View*, MUSKOGEE-OKMULGEE EAGLE, Mar. 19, 1987.

Similarly, in a book review, he wrote: "Much of the current thinking on civil rights has been crippled by the constitution between a 'colorblind society' and a 'colorblind Constitution.' The Constitution, by protecting the rights of individuals, is colorblind. But a society cannot be colorblind."<sup>346</sup> Thomas saw as a goal getting beyond race and believed the principles of the Declaration and the Constitution the way to get there. "A nation that is not based on race, that takes its bearings by standards that transcend race and apply to all humanity, is what our fundamental ideals demand."<sup>347</sup>

He put these themes together in a June 1987 speech at the Heritage Foundation. Insisting that "a connection exists between natural law standards and constitutional government," Thomas argued that "[a]ccording to our higher law tradition, men must acknowledge each other's freedom, and govern only by the consent of others. All our political institutions presuppose this truth."<sup>348</sup>

Thomas directly confronted Thurgood Marshall's activist view in a 1987 column. He wrote: "I find exasperating and incomprehensible the assault on the Bicentennial, the Founding, and the Constitution itself by Justice Thurgood Marshall."<sup>349</sup> One writer noted: "Supreme Court nominee Clarence Thomas's demonstrated ability to survive adversity and beat the odds will help him when he's grilled before the Senate Judiciary Committee."<sup>350</sup>

### *B. Thomas's Judicial Record*

President Bush nominated Clarence Thomas to the U.S. Court of Appeals for the District of Columbia Circuit October 30, 1989. The Senate Judiciary Committee voted 13-1 on February 22, 1990, to approve the nomination and the full Senate confirmed Thomas on March 6, 1990, filling the seat left vacant by the resignation of Judge Robert Bork.

The civil rights establishment did not oppose the nomination. One news report noted that "the Leadership Conference [on Civil Rights] does

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<sup>346</sup> Clarence Thomas, *The Black Experience: Rage and Reality*, WALL ST. J., Oct. 12, 1987, at 18.

<sup>347</sup> Letter to the editor, *American Blacks*, COMMENTARY, Apr. 1987, at 2.

<sup>348</sup> Clarence Thomas, *Why Black Americans Should Look to Conservative Policies*, THE HERITAGE LECTURES No. 119, 9 (June 18, 1987).

<sup>349</sup> Clarence Thomas, *Justice Marshall's Assault on the Constitution 'Exasperating'*, SAVANNAH MORNING NEWS, Sept. 18, 1987, at 6A.

<sup>350</sup> Eicher, *Against the Odds: Bush Nominee Overcame Racism and Segregation*, WORLD, July 13, 1991, at 5.

not appear to have arrived at a consensus.”<sup>351</sup> Another reported that “[c]ivil rights groups are not united in opposition.”<sup>352</sup> The Associated Press similarly reported that the Leadership Conference, a powerful coalition of liberal organizations, “has not adopted a position thus far.”<sup>353</sup> There was “acknowledgement from both sides of Mr. Thomas’s keen intellect,”<sup>354</sup> and “Mr. Thomas . . . is commonly described as brilliant.”<sup>355</sup>

Thomas served on the appeals court for nineteen months which, though limited, was more prior judicial experience than some other recent Supreme Court Justices.<sup>356</sup> Justice Felix Frankfurter once wrote that “the correlation between prior judicial experience and fitness for the Supreme Court is zero.”<sup>357</sup>

Significantly, opponents of Thomas’s Supreme Court appointment simply ignored his appeals court record. The Mexican American Legal Defense and Educational Fund based its opposition solely on the nominee’s “extrajudicial writings and speeches.”<sup>358</sup> Similarly, the NAACP Legal Defense and Educational Fund based its opposition on Thomas’s “writings and speeches.”<sup>359</sup> People for the American Way Action Fund’s report cited only the brevity of Thomas’s judicial record.<sup>360</sup>

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<sup>351</sup> Parsons, *Debate Over Judicial Post for EEOC Chief Begins*, BALTIMORE SUN, Sept. 10, 1989.

<sup>352</sup> Dawn M. Weyrich, *Conservatives Mobilize Behind Court Nominee*, WASH. TIMES, Nov. 3, 1990, at A11.

<sup>353</sup> *Liberals Ready ‘To Do Job’ on Nominee, Senator Says*, WASH. TIMES, Nov. 1, 1989, at A3.

<sup>354</sup> Weyrich, *supra* note 352, at A11.

<sup>355</sup> Parsons, *supra* note 351.

<sup>356</sup> Chief Justice William Rehnquist, for example, had been Assistant Attorney General when he was first appointed an Associate Justice in 1972. *See 1996 Judicial Staff Directory*, at 861. Retired Justice Lewis Powell had been in private practice when he was appointed in 1971. *See id.* at 854. Retired Justice Byron White had been Deputy Attorney General when he was appointed in 1962. *See id.* at 916. Similarly, Chief Justice Earl Warren and Justices Arthur Goldberg and Abe Fortas had no judicial experience when they were appointed. More than half of the 25 Justices appointed before Thomas had less than five years of prior judicial experience. *See HENRY ABRAHAM, JUSTICES AND PRESIDENTS* 52, 54–56 (2d ed., 1985). Professor Henry Abraham has “found that ‘the justices regarded as failures had the most judicial experience.’ Some of the court’s most distinguished justices—such as Harlan Fiske Stone, Charles Evans Hughes and Earl Warren—had no previous experience as judges, he said.” Tony Mauro, *U.S. Appeals Court Is a Stepping Stone for Many Justices*, USA TODAY, July 9, 1991, at 5A.

<sup>357</sup> Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 784 (1957).

<sup>358</sup> *Natural Law: Not On Our Supreme Court*, MEXICAN AM. LEGAL DEF. AND EDUC. FUND, Aug. 14, 1991, at 6.

<sup>359</sup> *An Analysis of Judge Clarence Thomas*, NAACP LEGAL DEF. AND EDUC. FUND Aug. 13, 1991, at 1.

<sup>360</sup> *See PEOPLE FOR THE AM. WAY ACTION FUND, supra* note 304, at 3–4.

Americans for Democratic Action,<sup>361</sup> Women's Legal Defense Fund,<sup>362</sup> National Women's Law Center,<sup>363</sup> American Association of University Women,<sup>364</sup> and National Abortion Rights Action League<sup>365</sup> each completely ignored that record. The AFL-CIO focused exclusively on the nominee's "public statements" and non-judicial writings.<sup>366</sup>

An analysis of Thomas's judicial record published by the Washington Legal Foundation (WLF), in contrast, stated correctly that "Judge Thomas's judicial record provides the clearest picture of his qualities as a jurist."<sup>367</sup> Reviews of Thomas's appeals court decisions clearly demonstrate why his critics ignored the most relevant part of his record. Legal analyst Gordon Crovitz concluded that Judge Thomas's opinions "are textbook examples of judicial restraint."<sup>368</sup> The WLF study found that his opinions "are squarely in the mainstream of American law, and do not reflect any ideological or other biases."<sup>369</sup> Significantly, the leftist Alliance for Justice, which would later vigorously oppose Thomas's Supreme Court nomination, echoed this same view by concluding that "[h]is decisions overall do not indicate an overly ideological [sic] tilt."<sup>370</sup> His decisions on the appeals court, across a range of subject areas, provided important insight into his judicial philosophy and reflected several characteristics of judicial restraint.

Judge Thomas, for example, avoided addressing issues unnecessary for deciding the particular case before the court. In *Otis Elevator Co. v. Secretary of Labor*,<sup>371</sup> an elevator service company challenged safety violation citations from the Mine Safety and Health Administration. In this complicated case, Judge Thomas resisted three opportunities to answer unnecessary questions or to apply rules to circumstances outside

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<sup>361</sup> AM. FOR DEMOCRATIC ACTION, *supra* note 303.

<sup>362</sup> See WOMEN'S LEGAL DEF. FUND, ENDANGERED LIBERTIES: WHAT JUDGE CLARENCE THOMAS' RECORD PORTENDS FOR WOMEN (1991).

<sup>363</sup> See NAT'L WOMEN'S LAW CENTER, JUDGE CLARENCE THOMAS: A RECORD LACKING IN SUPPORT OF WOMEN'S LEGAL RIGHTS (1991).

<sup>364</sup> See AM. ASS'N OF U. WOMEN, FIVE REASONS AAUW OPPOSES THE NOMINATION OF CLARENCE THOMAS TO THE U.S. SUPREME COURT (1991).

<sup>365</sup> See NAT'L ABORTION RIGHTS ACTION LEAGUE, *supra* note 302.

<sup>366</sup> See AFL-CIO, BACKGROUND PAPER ON JUDGE CLARENCE THOMAS, July 31, 1991, at 1 (manuscript on file with the author).

<sup>367</sup> WLF Report, *supra* note 267, at 1.

<sup>368</sup> Crovitz, *supra* note 301, at A11.

<sup>369</sup> WLF Report, *supra* note 267, at 2.

<sup>370</sup> ALLIANCE FOR JUST., PRELIMINARY REPORT ON CLARENCE THOMAS 1 (1991).

<sup>371</sup> 921 F.2d 1285 (D.C. Cir. 1990).

the facts of that case.<sup>372</sup> In *National Treasury Employees Union v. United States*,<sup>373</sup> federal employees argued that a statutory ban on honoraria violated their First Amendment free speech rights. Judge Thomas concluded only that the lawsuit could continue. An activist judge would likely have addressed the underlying constitutional questions as well.

The WLF analysis concluded on this point:

Judge Thomas has promoted the careful and orderly development of the law. His adherence to these goals is most evident in his principled efforts to resolve each case without deciding issues that need not be addressed and the refrain from announcing rules of law broader than necessary to decide the case at hand.<sup>374</sup>

Judge Thomas also declined the invitation to decide cases on purely policy grounds. In *Otis Elevator*, he wrote: "This court is ill-equipped to make the kind of expert policy judgment necessary to evaluate the relative merit of these competing accounts."<sup>375</sup> In *Citizens Against Burlington, Inc. v. Busey*,<sup>376</sup> citizens challenged the Federal Aviation Administration's approval of Toledo's planned airport extension, arguing the agency had complied with the National Environmental Policy Act. Judge Thomas cautioned that "federal judges . . . enforce the statute by ensuring that agencies comply with [its] procedures, and not by trying to coax agency decisionmakers to reach certain results."<sup>377</sup> The WLF study also found that "Judge Thomas has expressly rejected the notion that judges should substitute their policy preferences for the choices made by democratically elected branches of the government—the Congress and the Executive."<sup>378</sup>

Judge Thomas also paid close attention to issues affecting the court's jurisdiction. In *United States v. Long*,<sup>379</sup> he held that late filing of a notice of appeal deprived the court of jurisdiction. In *Doe v. Sullivan*,<sup>380</sup> he argued in dissent that "the . . . dispute . . . is purely hypothetical"<sup>381</sup> and, therefore, "[b]ecause I believe that we have no power to decide this

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<sup>372</sup> See also *United States v. Halliman*, 923 F.2d 873 (D.C. Cir. 1991). Judge Thomas wrote that "we need not decide whether the district court erred in predicating its probable cause determination on the collective knowledge of the police force as a whole." *Id.* at 881 n.5.

<sup>373</sup> 927 F.2d 1253 (D.C. Cir. 1991).

<sup>374</sup> WLF Report, *supra* note 267, at 2.

<sup>375</sup> *Otis Elevator Co.*, 921 F.2d at 1291.

<sup>376</sup> *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991).

<sup>377</sup> *Id.* at 194.

<sup>378</sup> WLF Report, *supra* note 267, at 3.

<sup>379</sup> 905 F.2d 1572 (D.C. Cir. 1990).

<sup>380</sup> 938 F.2d 1370 (D.C. Cir. 1991).

<sup>381</sup> *Id.* at 1384.

lawsuit, I express no view of the merits."<sup>382</sup> In *Cross-Sound Ferry Services, Inc. v. Interstate Commerce Commission*,<sup>383</sup> he argued in dissent that the plaintiff lacked standing to challenge an agency decision.

Judge Thomas also emphasized a narrow role for an appellate court. In *United States v. Poston*,<sup>384</sup> for example, he wrote that "[t]his court's role in assessing a sufficiency of the evidence claim on appeal is sharply circumscribed."<sup>385</sup>

Finally, Judge Thomas consistently utilized traditional standards of interpretation or construction. In *United States v. Rogers*,<sup>386</sup> for example, Judge Thomas used "traditional tools" to construe the Federal Rules of Evidence and began his analysis, "as we do with any statute, with the language of the rules themselves."<sup>387</sup> In *United States v. Long*, Judge Thomas again outlined the limited role of an appellate court and construed the relevant statute using a concrete and logical definition rather than a "loose, transitive" one.<sup>388</sup> In *Buogiorno v. Sullivan*,<sup>389</sup> Judge Thomas used traditional canons of construction to determine whether a National Health Service Corps regulation was reasonable, looking first at the text of the rule itself.<sup>390</sup> And in *United States v. Shabazz*,<sup>391</sup> he began his analysis with the most natural reading of the federal sentencing guidelines text in order to determine the "intent of Congress."<sup>392</sup>

So what does all this evidence suggest about the kind of justice Clarence Thomas would be on the Supreme Court? Thomas himself "insistently denie[d] any intent to bring an activist mentality to his work on the court or to impose his own philosophy on the law."<sup>393</sup> One writer noted that former Supreme Court Chief Justice Earl Warren "was thought to be a conservative" but "in a position of independence where he could shape his own course without having to be reelected or reappointed" he turned out very differently.<sup>394</sup> Early in his tenure on the

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<sup>382</sup> *Id.* at 1385.

<sup>383</sup> 934 F.2d 327 (D.C. Cir. 1991).

<sup>384</sup> 902 F.2d 90 (D.C. Cir. 1990).

<sup>385</sup> *Id.* at 94.

<sup>386</sup> 918 F.2d 207 (D.C. Cir. 1990).

<sup>387</sup> *Id.* at 209.

<sup>388</sup> *United States v. Long*, 905 F.2d 1572, 1576 (D.C. Cir. 1991).

<sup>389</sup> 912 F.2d 504 (D.C. Cir. 1990).

<sup>390</sup> *See id.* at 509-10.

<sup>391</sup> 933 F.2d 1029 (D.C. Cir. 1991).

<sup>392</sup> *Id.* at 1034.

<sup>393</sup> David S. Broder, *A Justice with No Agenda*, WASH. POST, Sept. 15, 1991, at C7.

<sup>394</sup> Godfrey Sperling, *Whatever Thomas's Views, the Court's Course Is Set*, THE CHRISTIAN SCI. MONITOR, July 9, 1991, at 19.

U.S. Court of Appeals, Thomas described to me the great temptation to "do justice or whatever you want, once you put on that robe." He said he had to remind himself every day that he was a judge and not a policymaker.

This body of evidence, then, provided the basis for deciding whether Thomas would be the kind of Supreme Court Justice that America needs. Gordon Crovitz summarized the evidence this way: "Judge Thomas is a conservative judge, if this means that he views his job as interpreting the law and not making it up or ruling for or against parties based on who they are."<sup>395</sup>

### III. WHAT KIND OF JUSTICE IS CLARENCE THOMAS?

This Article is primarily focused on the case for Thomas's appointment in 1991. The body of scholarship and analysis about his Supreme Court tenure is already growing<sup>396</sup> and should provide fodder for much debate and commentary. This brief sketch only shows that Thomas is a productive member of the Court who seeks to follow the very principles that made his appointment so valuable in the first place.

Justice Thomas has written majority opinions in cases decided unanimously<sup>397</sup> as well as by 8-1,<sup>398</sup> 7-2,<sup>399</sup> 6-3,<sup>400</sup> and 5-4<sup>401</sup> margins.

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<sup>395</sup> L. Gordon Crovitz, *The Views of Justice Thomas, According to Judge Thomas*, WALL ST. J., July 3, 1991, at A7.

<sup>396</sup> See, e.g., SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999).

<sup>397</sup> See, e.g., *Dooley v. Korean Air Lines*, 524 U.S. 116 (1998); *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998); *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997); *Young v. Harper*, 520 U.S. 143 (1997); *Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17 (1997); *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830 (1996); *Norfolk and W. Ry. Co. v. Hiles*, 516 U.S. 400 (1996); *Wilson v. Arkansas*, 514 U.S. 927 (1995); *Anderson v. Edwards*, 514 U.S. 143 (1995); *Nebraska Dept. of Revenue v. Loewenstein*, 513 U.S. 123 (1994); *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994); *Rake v. Wade*, 508 U.S. 464 (1993); *Robertson v. Seattle Audobon Soc'y*, 503 U.S. 429 (1992); *Holywell Corp. v. Smith*, 503 U.S. 47 (1992); *Molzof v. United States*, 502 U.S. 301 (1992) (Justice Thomas's first opinion).

<sup>398</sup> See, e.g., *Hopkins v. Reeves*, 524 U.S. 88 (1998); *Peacock v. Thomas*, 516 U.S. 349 (1996); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992); *United States v. Salerno*, 505 U.S. 317 (1992); *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). Justice Stevens dissented in each of these cases.

<sup>399</sup> See, e.g., *California Dep't. of Corrections v. Morales*, 514 U.S. 499 (1995) (Justice Stevens wrote the dissent, joined by Justice Souter); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (Justice Blackmun dissenting, joined by Justice Souter); *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993) (Justice O'Connor dissenting, joined by Justice Blackmun); *United States v. Wilson*, 503 U.S. 329 (1992) (Justice Stevens authored the dissent, joined by Justice Blackmun).

<sup>400</sup> See, e.g., *United States v. LaBonte*, 520 U.S. 751 (1997) (Justice Breyer dissenting, joined by Justices Stevens and Ginsburg); *Delaware v. New York*, 507 U.S. 490



Chief Justice Rehnquist,<sup>402</sup> as well as Justices Stevens,<sup>403</sup> O'Connor,<sup>404</sup> Kennedy,<sup>405</sup> Souter,<sup>406</sup> Ginsburg,<sup>407</sup> and Breyer<sup>408</sup> have authored dissents from his majority opinions. Justice Thomas has written dissents from majority opinions written by Justices Stevens,<sup>409</sup> O'Connor,<sup>410</sup> Scalia,<sup>411</sup> Kennedy,<sup>412</sup> Souter,<sup>413</sup> and Ginsburg.<sup>414</sup>

Some critics have tried to diminish the significance of Justice Thomas's work on the Court using a variety of tactics. One is the suggestion that Thomas's views really are not his own, that he is simply "taking cues from [Justice] Scalia"<sup>415</sup> and that Justice Scalia is Thomas's

(1993) (Justice White dissenting, joined by Justices Stevens and Blackmun); *Lechmere v. NLRB*, 502 U.S. 527 (1992) (Justices Stevens and White dissenting; Justice Blackmun joined the White dissent).

<sup>401</sup> See, e.g., *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357 (1998) (Justice Stevens dissenting; Justice Souter dissenting, joined by Justices Ginsburg and Breyer); *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998) (Justice O'Connor dissenting, joined by Justices Stevens, Souter, and Breyer); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (Justice Breyer dissenting, joined by Justices Stevens, Souter, and Ginsburg in part).

<sup>402</sup> See, e.g., *Oregon Waste Systems, Inc. v. Department of Env'tl. Quality*, 511 U.S. 93 (1994) (Justice Blackmun joined the dissent).

<sup>403</sup> See, e.g., *O'Dell v. Netherland*, 521 U.S. 151 (1997) (Justices Souter, Ginsburg, and Breyer joined the dissent).

<sup>404</sup> See, e.g., *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998) (Justices Stevens, Souter, and Breyer joined the dissent).

<sup>405</sup> See, e.g., *United States v. IBM Corp.*, 517 U.S. 843 (1996) (Justice Ginsburg joined the dissent).

<sup>406</sup> See, e.g., *United States v. Mezzanatto*, 513 U.S. 196 (1995) (Justice Stevens joined the dissent).

<sup>407</sup> See, e.g., *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) (Justices Stevens and Blackmun joined the dissent).

<sup>408</sup> See, e.g., *Godinez v. Moran*, 509 U.S. 389 (1993) (Justice Stevens joined the dissent).

<sup>409</sup> See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564 (1997) (Justice Scalia joined the dissent and authored a dissent that Chief Justice Rehnquist and Justices Thomas and Ginsburg joined).

<sup>410</sup> See, e.g., *Commissioner v. Lundy*, 516 U.S. 235 (1996) (Justice Stevens joined the dissent).

<sup>411</sup> See, e.g., *United States v. McDermott*, 507 U.S. 447 (1993).

<sup>412</sup> See, e.g., *Oubre v. Energy Operations, Inc.*, 522 U.S. 422 (1998) (Chief Justice Rehnquist joined the dissent).

<sup>413</sup> See, e.g., *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194 (1993) (Justices Stevens and Kennedy joined the dissent).

<sup>414</sup> See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (Chief Justice Rehnquist joined the dissent in part, and Justice Scalia joined in full).

<sup>415</sup> Thomas Sancton, *Judging Thomas*, TIME, July 18, 1992, at 30. Another reporter said Thomas is nothing more than "Justice Antonin Scalia's second vote." Bob Cohn, *Hunkering Down for Battle*, NEWSWEEK, Nov. 1994, at 54.

“ideological mentor”<sup>416</sup> or “mentor–apparent.”<sup>417</sup> Thomas has, of course, written or joined<sup>418</sup> opinions dissenting from Scalia’s majority opinions. In addition, many cases have found the two on opposite sides, with either Scalia<sup>419</sup> or Thomas<sup>420</sup> in the majority.

While in recent Supreme Court terms, Thomas and Scalia have voted together about ninety percent of the time, the justice Thomas replaced eclipsed even that level of solidarity. Justice Marshall voted with Justice Brennan more than ninety-four percent of the time during the entire decade of the 1980s.<sup>421</sup> Needless to say, Thomas’s liberal critics never voiced any concern that one of these activists was taking cues from the other.

Thomas got off to a strong start, authoring nearly twice as many opinions in his first term as had Souter. While Souter had “the dubious distinction as the least productive first–year justice in 20 years,”<sup>422</sup> one reporter observed that “[a]fter one term on the bench, Clarence Thomas is emerging as a strong–willed and prolific justice . . . . He was the only first–term justice in a decade to write a lone dissent.”<sup>423</sup> Indeed, more than half of Thomas’s twenty-one opinions he authored during his first term were separate concurrences or dissents in which he explained his own views rather than simply going along with those of others.

Thomas will need the character and ability to resist the criticism that he gained while growing up and serving at the EEOC. Leaders of establishment organizations in the black community attacked him from the start. Within a week of the nomination, Haywood Burns, dean of the City University of New York Law School and former chairman of National Conference of Black Lawyers called Thomas a “counterfeit hero” that “no civil rights group ought to endorse”<sup>424</sup> and Jesse Jackson

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<sup>416</sup> Stuart Taylor, *Thomas’ Tortuous History Lessons*, LEGAL TIMES, Mar. 9, 1992, at 21.

<sup>417</sup> Page, *Dissent Driven By Cruelty?*, WASH. TIMES, Mar. 2, 1992, at E3.

<sup>418</sup> See, e.g., *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *U.S. v. Williams*, 504 U.S. 36 (1992).

<sup>419</sup> See, e.g., *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1998); *Henderson v. United States*, 517 U.S. 654 (1996); *Gade v. National Solid Waste Management Ass’n*, 505 U.S. 88 (1992).

<sup>420</sup> See, e.g., *Muscarello v. United States*, 524 U.S. 125 (1998); *Almendarez–Torres v. United States*, 523 U.S. 224 (1998); *Richmond v. Lewis*, 506 U.S. 40 (1992).

<sup>421</sup> See Price, *Twisting Thomas*, FORBES MEDIA CRITIC, Winter 1996, at 37.

<sup>422</sup> Tony Mauro, *Souter’s Slow Pen Earns Him Dubious Distinction*, USA TODAY, June 18, 1991, at 11A.

<sup>423</sup> Nancy E. Roman, *Thomas Makes Early Mark on Court*, WASH. TIMES, July 5, 1992, at A5.

<sup>424</sup> Haywood Burns, *Clarence Thomas, A Counterfeit Hero*, N.Y. TIMES, July 9, 1991, at A19.

called the nomination "an act of calculated contempt."<sup>425</sup> Derrick Bell said Thomas's appointment "will be a tragedy as well as a travesty."<sup>426</sup> Another leftist repeated Bell's attack in an article titled "Uncle Justice Thomas."<sup>427</sup> Columnist Carl Rowan said "If you gave Clarence Thomas a little flour on his face, you'd think you had David Duke talking."<sup>428</sup> Political activist Flo Kennedy said: "I'm embarrassed as a black person that they even found this little creep."<sup>429</sup> Less than two weeks after Thomas's nomination, the Congressional Black Caucus announced its opposition without any explanation for its position.<sup>430</sup>

On the other hand, opinion within the broader black community was decidedly mixed. Fletcher Smith, a member of the Greenville County Council in South Carolina, announced his support and sought the support of the council.<sup>431</sup> Key newspapers in the black community editorialized about breaking the stereotype that blacks must necessarily be liberal Democrats.<sup>432</sup> James Clyburn, then-South Carolina Human Affairs Commissioner and now a member of Congress, endorsed the nomination within days of the announcement.<sup>433</sup> Thomas was on the cover of *Jet* magazine and the cover story noted his "journey from the painful poverty in Pinpoint, Ga. . . . to stand near the pinnacle of progress in the legal profession—a nomination to the U.S. Supreme Court."<sup>434</sup> *Jet* magazine continued covering the nomination, noting that while the NAACP and Congressional Black Caucus opposed Thomas, the nominee "maintains wide and varied support."<sup>435</sup> A *Jet* magazine readers poll,

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<sup>425</sup> Jesse Jackson, *An Act of Calculated Contempt; Bush's Choice for the Supreme Court Dims the Light of Justice*, L.A. TIMES, July 8, 1991, at B5.

<sup>426</sup> Derrick Bell, *Choice of Thomas Insults Blacks*, NEWSDAY, July 10, 1991, at 85. The pettiness of the opposition can be seen in the fact that Thomas had once given a negative review of Bell's book. (#21 in articles memo)

<sup>427</sup> Benjamin, *Uncle Justice Thomas*, VILLAGE VOICE, July 16, 1991, at 27.

<sup>428</sup> *Inside Washington* (television broadcast, July 6, 1991).

<sup>429</sup> *Thomas Nomination: Weekend TV*, THE HOTLINE (Fax Service of The American Political Network, Inc.), July 8, 1991, at 12.

<sup>430</sup> See Tom Kenworthy & Ruth Marcus, *Blacks Vow to Oppose Nomination; Caucus Plans Effort to Reject Thomas*, WASH. TIMES, July 12, 1991, at A1.

<sup>431</sup> See Gerber, *Councilman to Seek Backing for Nominee*, THE GREENVILLE NEWS, Aug. 2, 1991, at 3C.

<sup>432</sup> See, e.g., Green, *What Is a Black Conservative?*, CHICAGO INDEP. BULL., July 11, 1991, at 4.

<sup>433</sup> See Ernest L. Wiggins, *Friends in South Carolina Say Thomas Is His Own Man*, THE STATE, July 5, 1991, at 14A.

<sup>434</sup> *Clarence Thomas Rises From Poverty to Supreme Court Nominee*, JET, July 22, 1991, at 5.

<sup>435</sup> *Though Nixed by NAACP, AFL-CIO, Thomas Maintains Wide and Varied Support*, JET, Aug. 19, 1991, at 4.

published as the hearings began, showed that blacks favored Thomas's confirmation by a 59–41 percent margin.<sup>436</sup>

The media has not been kind to Thomas since his appointment either, calling him everything from a “confident, aggressive revisionist,”<sup>437</sup> “truly bizarre,”<sup>438</sup> someone who has “failed the test of judiciousness,”<sup>439</sup> and even the “youngest, cruelest Justice.”<sup>440</sup> Thus, Americans see unfolding Thomas's two most important characteristics: his principles and his ability to hold up under pressure or criticism.

While still EEOC chairman, Thomas wrote about “a judiciary active in defending the Constitution, but judicious in its restraint and moderation.”<sup>441</sup> Accomplishing both tasks requires the judiciary to derive constitutional meaning from the appropriate source and to apply it faithfully in individual cases. Thomas has clearly stated his commitment to this principle. In one case, for example, he cited as a “bedrock principle of judicial restraint” that the Court not create constitutional rights but only recognize those that are “lodged firmly in the text or tradition of a specific constitutional provision.”<sup>442</sup>

He wrote further:

But judges occupy a unique and limited role, one that does not allow them to substitute their views for those in the executive and legislative branch of the various States, who have the constitutional authority and institutional expertise to make these uniquely nonjudicial decisions and who are ultimately accountable for these decisions. Though the temptation may be great, we must not succumb. The Constitution is not a license for federal judges to further social policy goals . . . .<sup>443</sup>

While Thomas faithfully follows this approach generally on the Supreme Court, his opinions in individual cases may be placed on a continuum. Thomas seems to argue for as significant a shift toward a more faithful application of the Constitution's original meaning as it seems the jurisprudential traffic can bear. One writer said that in some

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<sup>436</sup> See *Readers Poll Supports Thomas Nomination to U.S. Supreme Court*, JET, Sept. 16, 1991, at 4.

<sup>437</sup> Paul M. Barrett, *Thomas Confirms Fears of Liberal Critics*, WALL ST. J., July 1, 1992, at B8.

<sup>438</sup> William Raspberry, *Confounding One's Supporters*, WASH. POST, Feb. 28, 1992, at A23.

<sup>439</sup> Editorial, *Justice Thomas, the Freshman*, N.Y. TIMES, July 5, 1992.

<sup>440</sup> Editorial, *The Youngest, Cruellest Justice*, N.Y. TIMES, Feb. 27, 1992, at 24.

<sup>441</sup> Thomas, *supra* note 26, at 63–64.

<sup>442</sup> *Lewis v. Casey*, 518 U.S. 343, 367 (1996) (Thomas, J., concurring).

<sup>443</sup> *Id.* at 388 (Thomas, J., concurring).

cases, "Justice Thomas tweaked his new colleagues for failing to adhere closely enough to the Constitution."<sup>444</sup>

In some cases, Thomas takes issue with an opinion—whether majority or not—that claims to be using the proper interpretive approach but does so improperly. In *Rosenberger v. Rector & Visitors of the University of Virginia*,<sup>445</sup> the Court held that the University's refusal to fund the same activities for a Christian student group that it funds for other student groups violated the First Amendment's guarantee of free speech. Thomas agreed with the result but wrote a separate opinion

to express my disagreement with the historical analysis put forward by the dissent [written by Justice Souter]. Although the dissent starts down the right path in consulting the original meaning of the Establishment Clause, its misleading application of history yields a principle that is inconsistent with our Nation's long tradition of allowing religious adherents to participate on equal terms in neutral government programs.<sup>446</sup>

In other cases, Thomas has agreed with a result reached through the wrong interpretive method but argued the majority should have used a rationale based clearly on what the Constitution's framers intended the provision at issue to mean. In *McIntyre v. Ohio Elections Commission*,<sup>447</sup> the Court applied a standard from its past cases and held that an Ohio law prohibiting anonymous leafleting violated the First Amendment's guarantee of free speech. Thomas agreed with the result but wrote a separate opinion to explain that he

would apply, however, a different methodology to this case. Instead of asking whether "an honorable tradition" of anonymous speech as existed throughout American history, or what the "value" of anonymous speech might be, we should determine whether the phrase "freedom of speech, or of the press," as originally understood, protected anonymous political leafleting.<sup>448</sup>

Similarly, in *Lewis v. Casey*,<sup>449</sup> the Court concluded that a district judge's mandate of detailed regulations regarding prison law libraries and assistance in filing inmate lawsuits exceeded even the Court's precedent creating a loosely-styled "right of access to the courts."<sup>450</sup> Thomas joined the majority but wrote a concurring opinion to suggest

<sup>444</sup> L. Gordon Crovitz, *Justice Thomas's Opinions: No Wonder They Wanted to Stop Him*, WALL ST. J., Jan. 29, 1991, at A13.

<sup>445</sup> 515 U.S. 819 (1995).

<sup>446</sup> *Id.* at 852–53 (Thomas, J., concurring).

<sup>447</sup> 514 U.S. 334 (1995).

<sup>448</sup> *Id.* at 358–59 (Thomas, J., concurring in the judgment).

<sup>449</sup> 518 U.S. 343 (1996).

<sup>450</sup> *Bounds v. Smith*, 430 U.S. 817 (1977).

that the Court's precedent itself might not have been consistent with the Constitution by creating a new constitutional right. He wrote:

It is a bedrock principle of judicial restraint that a right be lodged firmly in the text or tradition of a specific constitutional provision before we will recognize it as fundamental. Strict adherence to this approach is essential if we are to fulfill our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views.<sup>451</sup>

In other cases, Thomas has urged a wholesale reappraisal of the Court's jurisprudence on a particular issue to bring it in line with what the Constitution's framers intended. In *United States v. Lopez*,<sup>452</sup> the Court held that Congress' enumerated power to regulate interstate commerce did not justify its enactment of the Gun-Free School Zones Act. That statute prohibited possession of a gun within 1000 feet of a local school. The Court had steadily expanded the meaning and scope of the interstate commerce clause to allow Congress the power to regulate not only interstate commerce but also virtually anything that affects the national economy. Thomas agreed with the result but wrote a separate opinion

to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause . . . . In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause.<sup>453</sup>

Thomas continued to emphasize the basic principle underlying America's founding and the drafting of her Constitution. In *Lopez*, he wrote a concurring opinion about the enumeration of federal legislative powers. He rejected the notion that "whatever Congress believes is a national matter becomes an object of federal control." Instead, he insisted that "matters of national concern are enumerated in the Constitution."<sup>454</sup> "From the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause."<sup>455</sup> He looked to see whether the Court's decisions had "any

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<sup>451</sup> *Lewis*, 518 U.S. at 367.

<sup>452</sup> 514 U.S. 549 (1995).

<sup>453</sup> *Id.* at 584-85.

<sup>454</sup> *Id.* at 596.

<sup>455</sup> *Id.* at 599.

grounding in the original understanding of the Constitution."<sup>456</sup> Thomas is, however, not a blind revolutionary. He wrote in *Lopez*:

Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean.<sup>457</sup>

Just as he had criticized the Court's decision in *Brown* for lacking a sound constitutional foundation,<sup>458</sup> Thomas has pointed out where the Court could have used a more sound constitutional theory for a case that would have placed its conclusion on firmer ground and prevented on-going judicial regulation. In 1956, the Court struck down a state rule requiring a trial transcript for appealing a criminal conviction.<sup>459</sup> Rather than basing its decision on the Constitution's requirement of due process, however, the Court further expanded the equal protection clause by ruling that the transcript requirement treated indigent defendants differently from those who could pay for the transcript. This reasoning naturally leads to an affirmative obligation for the government to level the playing field by subsidizing legal assistance.

In 1977, the Court went further down this road by creating a "fundamental constitutional right" for prison inmates to have the government "assist [them] in the preparation and filing of meaningful legal papers."<sup>460</sup> In *Lewis v. Casey*,<sup>461</sup> the Court attempted to limit the growth of this unenumerated right by rejecting a district judge's orders mandating detailed changes in Arizona's prison libraries and legal assistance programs. Thomas concurred, but wrote a separate opinion "to make clear my doubts about the validity of *Bounds*."<sup>462</sup> He criticized the "unjustified transformation of the right to nondiscriminatory access to the courts into the broader, untethered right to legal assistance generally"<sup>463</sup> and concluded: "Quite simply, there is no basis in constitutional text, pre-*Bounds* precedent, history, or tradition for the conclusion that the constitutional right of access imposes affirmative obligations on the States to finance and support prisoner litigation."<sup>464</sup>

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<sup>456</sup> *Id.*

<sup>457</sup> *Id.* at 599 n.8.

<sup>458</sup> See *supra* notes 289–300 and accompanying text.

<sup>459</sup> See *Griffin v. Illinois*, 351 U.S. 12 (1956).

<sup>460</sup> *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

<sup>461</sup> 518 U.S. 343 (1996).

<sup>462</sup> *Id.* at 365.

<sup>463</sup> *Id.* at 373.

<sup>464</sup> *Id.* at 384–85.

Then in *M.L.B. v. S.L.J.*, the Court again surged ahead by creating a “new-found right to free transcripts in civil appeals.”<sup>465</sup> Thomas again argued against the Court utilizing in this area “an equalizing notion of the Equal Protection Clause that would, I think, have startled the Fourteenth Amendment’s Framers.”<sup>466</sup> By basing its conclusion on the wrong constitutional foundation, and crossing the line between criminal and civil cases, the Court had created a “free-floating right to appellate assistance.”<sup>467</sup>

On the Supreme Court, Thomas’s tenure has been consistent with both the general design and specific prescription of America’s founders. He has been the kind of judge America, as a republic under a written Constitution, needs most. His approach to judging reflects this fundamental maxim: “Judicial restraint means that judges or even justices sometimes must admit that they don’t have the authority to resolve a dispute.”<sup>468</sup>

#### IV. THE SIGNIFICANCE OF THOMAS’S APPOINTMENT

After President Bush nominated Clarence Thomas on July 1, 1991, Coalitions for America faxed a memorandum to grassroots organizations that stated: “If we are to preserve an independent judiciary, respect the Constitution, and protect the right of the people to govern themselves, the Senate must approve Judge Thomas’s nomination.” A press release on the nomination dated July 1, 1991, also said the nomination will contribute to “a judiciary that plays a vital but defined role in our political system. All Americans will benefit from this appointment since all Americans will have a more effective voice in determining how to govern themselves.”

Thus the greatest significance of Thomas’s appointment is his consistent example of the kind of judge America so desperately needs. His nomination raised the same critical issue as the 1987 nomination of Robert Bork, the man Thomas replaced on the U.S. Court of Appeals. It is “an argument over the proper role of the Court in American society, and about the nature and extent of judicial power under a written Constitution.”<sup>469</sup>

Second, his appointment further exposed the entirely political approach to the courts that Thomas’s leftist critics continue to use. Not only were the issues the same, but the tactics of the left were the same

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<sup>465</sup> 519 U.S. 102, 129 (1996).

<sup>466</sup> *Id.* at 138.

<sup>467</sup> *Id.* at 144.

<sup>468</sup> Crovitz, *supra* note 444, at A13.

<sup>469</sup> McDowell, *supra* note 18, at 12.



as well. "We're going to Bork him," said an attorney with the National Organization for Women.<sup>470</sup> Other reporters also noted that "the stakes in the Thomas nomination were too high for an easy confirmation."<sup>471</sup> Because he learned while growing up to refuse to abandon his principles, however, "his lifelong career on the Supreme Court will be a constant reminder to his critics of why they went to such lengths to try to block his nomination."<sup>472</sup>

Third, black conservatives became much more visible and their opinions and participation in public policy and cultural debates more prominent.<sup>473</sup> One writer pointed to "a new generation of black leadership" and called Thomas "the common man's hero."<sup>474</sup> An editorial noted that "the truth is that there are scads of American blacks who are conservatives and the emergence of conservative ideas among blacks is a major challenge to current social policies."<sup>475</sup>

Indeed, Thomas himself suggested the significance of his own appointment nearly a decade before it happened. He wrote in 1983 that blacks

cannot accept the implications of the new orthodoxy which exists in America today—an orthodoxy which says that we must be intellectual clones. We fought too long and too hard to make people stop saying Blacks all looked alike—but I say it is a far greater evil that many say Blacks think alike.<sup>476</sup>

Six years later, arguing on behalf of Thomas's appeals court nomination, Danforth would echo this theme. He urged his colleagues not to "attack Clarence Thomas because of some stereotype of what they think a black lawyer should believe."<sup>477</sup>

Fourth, Thomas's appointment also demonstrates that a consistent and singular focus on judicial philosophy can result in appointees who reflect judicial restraint. Thomas's concurrence and Souter's dissent in *Lopez* demonstrates the difference between them. Souter argued that the Court should "defer to what is often a merely implicit congressional

<sup>470</sup> Clarence Page, *Is Clarence Thomas In Imminent Danger of Getting Borked?*, CHI. TRIB., July 10, 1991, at C 21 (quoting Attorney Flo Kennedy of NOW).

<sup>471</sup> Gloria Berger et al., *The Untold Story*, U.S. NEWS & WORLD REP., Oct. 12, 1992, at 28, 29.

<sup>472</sup> Crovitz, *supra* note 444, at A13.

<sup>473</sup> See, e.g., Sowell, *Confused Ideas About Black Conservatives*, WASH. TIMES, July 29, 1991, at D3.

<sup>474</sup> Palmer, *One Man's Threat to Old Ideas of Black Leadership*, INDIANAPOLIS STAR, July 24, 1991, at A-11.

<sup>475</sup> Editorial, *Mr. Thomas and Black Conservatives*, WASH. TIMES, July 10, 1991, at G2.

<sup>476</sup> Thomas, *supra* note 255, at 207.

<sup>477</sup> 135 CONG. REC. S14,388 (1989) (statement of Sen. Danforth).

judgment that its regulation addresses a subject substantially affecting interstate commerce 'if there is any rational basis for such a finding.'<sup>478</sup> Though he called this "a paradigm of judicial restraint",<sup>479</sup> it really is a two-fold exercise in judicial activism. The Court's rational-basis test may be seen as a procedural mechanism; as such, by definition it does not answer the necessary substantive question. That is, the rational-basis test does not address the substance of what is being deferred to. Souter's approach in *Lopez* is truly form over substance because he applies only the procedural test without evaluating the substance of what that test would leave undisturbed. Second, compounding the problem is Souter's acknowledgment that Congress often does not even make an explicit judgment that its power to regulate interstate commerce justifies the action at hand. Thus Souter's approach is the opposite of Thomas's, whose concurrence was a judicial application of his earlier writing about "a judiciary active in defending the Constitution, but judicious in its restraint and moderation."<sup>480</sup>

At the same time, from Sununu's call at the nomination stage all the way to final confirmation, Thomas's appointment demonstrated that outside political support is constantly necessary to achieve appointment of judges committed to judicial restraint. While one news report was headlined "White House Ready to Fight,"<sup>481</sup> another reported three weeks after the nomination: "One Bush aide mused, privately, about the uses of a Thomas defeat. It would, he said, allow the GOP to woo more blacks—and appeal to another voting bloc by appointing a Hispanic to the court."<sup>482</sup> Similarly, then-Representative Susan Molinari said that the Bush administration "would not be that disappointed if he went down and they got an opportunity the next time around to nominate an Hispanic."<sup>483</sup>

Only by a singular focus on judicial philosophy will America get judges who will take the law as it is and refuse to make it up. Clarence Thomas's supporters knew that he was that kind of judge, one who believed in judicial restraint and would not change or compromise his principles under pressure.

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<sup>478</sup> *United States v. Lopez*, 514 U.S. 549, 603 (Souter, J., dissenting) (citations omitted).

<sup>479</sup> *Id.* at 604 (Souter, J., dissenting) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993)).

<sup>480</sup> Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 64 (1989).

<sup>481</sup> Paul Bedard & Dawn Ceol, *White House Ready to Fight*, WASH. TIMES, July 22, 1991, at A1.

<sup>482</sup> *Thomas: The 'Water Torture' Test*, NEWSWEEK, July 22, 1991, at 19.

<sup>483</sup> *The Hotline*, July 8, 1991, at 11.