Clarence Thomas: A Distinctive Justice

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INTRODUCTION

New appointees to the United States Supreme Court often arrive amid great expectations. Their appointing presidents hope that the appointees will support certain legal doctrines and judicial policies, and their partisan opponents fear that they will be too effective in shaping law and policy in undesirable directions.[1] Initially, it is difficult to assess a new Justice's behavior and impact because it may take several years for the newcomer to develop confidence, find his or her "voice," and become integrated into the high court's decision-making processes.[2] Justice William Brennan argued that no experience, including service on another appellate court, can adequately prepare someone for the responsibilities of a Justice on the United States Supreme Court.[3] Thus, scholars feel obliged to wait several terms before evaluating—with any degree of confidence—a new Justice's performance.

The summer of 1996 marked the end of Clarence Thomas's fifth term on the United States Supreme Court—a sufficient span of time to permit Thomas to develop and present his judicial philosophy in his voting behavior and opinions. Thomas came to the Court amid great uncertainty

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[1] *See* Christopher E. Smith & Kimberly A. Beuger, *Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 AKRON L. REV. 115, 115-16 (1993) (some observers feared that new appointee Justice Ruth Bader Ginsburg's friendships with judicial conservatives would lead her to support their views while others believed she would re-energize the Court's liberals).

[2] *See* WILLIAM O. DOUGLAS, THE COURT YEARS 1939-1975, at 45 (1980) ("It is always difficult, and especially so for a newcomer, to withdraw his agreement to one opinion at the last minute and cast his vote for the opposed view. A mature Justice may do just that; a junior is usually too unsure to make a last-minute major shift.").

[3] *See* William J. Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 484 (1973).

about his potential performance as a Justice because of the tremendous controversy surrounding his confirmation hearings.[4] Thomas portrayed himself as an "openminde[d]"[5] and moderate judicial officer, although his prior record as an official in the Reagan Administration indicated that he was likely to be very conservative.[6] Thomas "took pains, under intense and sometimes skeptical questioning by the Senators, to qualify or disavow views that he had forcefully and repeatedly expressed during his years on the lecture circuit as the Reagan Administration's top civil rights official."[7] Thomas's nomination was ultimately confirmed by the narrowest of votes in the Senate after he was accused of sexual harassment by his former assistant, law professor Anita Hill.[8] His nomination may have been one of the most significant in recent decades, in part because the controversy over his appointment mobilized significant political support for female electoral candidates who criticized the Senate's handling of his confirmation.[9] Thus, Thomas's performance and role as a member of the Rehnquist Court may be of greater public interest and curiosity than that of other Justices who are less visible and well-known to the public.

Unlike some Justices who, in even longer careers, fail to establish a clear jurisprudential identity,[10] Thomas has emerged as a distinctive member of the high court. Thomas has not only been a consistent member of the Court's most conservative wing since his first term,[11] he also has articulated themes that distinguish him from all of the other Justices, in-

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[4] *See* JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS (1994); TIMOTHY M. PHELPS & HELEN WINTERNITZ, CAPITOL GAMES: THE INSIDE STORY OF CLARENCE THOMAS, ANITA HILL, AND A SUPREME COURT NOMINATION (1993).

[5] *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. 110 (1991) (statement of Clarence Thomas) ("If confirmed by the Senate, I pledge that I will preserve and protect our Constitution and carry with me the values of my heritage: fairness, integrity, openmindedness, honesty, and hard work.").

[6] *See* Neil Lewis, *High Court Nominee's Testimony Continues to Frustrate Democrats*, N.Y. TIMES, Sept. 13, 1991, at A1, A19.

[7] Linda Greenhouse, *Etching a Portrait of Judge Thomas*, N.Y. TIMES, Sept. 15, 1991, at 28L.

[8] *See* Christopher E. Smith, *Politics and Plausibility: Searching for the Truth About Anita Hill and Clarence Thomas*, 19 OHIO N.U. L. REV. 697, 703 (1993).

[9] *See* CHRISTOPHER E. SMITH, CRITICAL JUDICIAL NOMINATIONS AND POLITICAL CHANGE: THE IMPACT OF CLARENCE THOMAS (1993).

[10] Justice Anthony Kennedy, for example, is cited as a Justice who "does not have a consistent judicial philosophy to guide his decision making," despite serving on the Supreme Court for a decade. THOMAS R. HENSLEY, CHRISTOPHER E. SMITH, & JOYCE A. BAUGH, THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES 75 (1997).

[11] *See* Christopher E. Smith & Scott Patrick Johnson, *The First-Term Performance of Justice Clarence Thomas*, 76 JUDICATURE 172, 174 (1993).

cluding the conservative colleagues who share his preferences in determining case outcomes.

I. OVERALL RECORD AND IMPACT

If judicial liberalism is defined in the traditional fashion as support for individuals' rights in disputes with the government,[12] Thomas stands out as a strong conservative in any analysis. For example, from 1991 to 1995, Thomas had the second most conservative record among Justices in criminal procedure cases, supporting individuals in only nineteen percent of cases, just percentage points above the most conservative Justice, Chief Justice Rehnquist.[13] For civil rights cases, Thomas was the second most conservative at thirty percent—again two percentage points above Rehnquist.[14] In the 1995 Term, Thomas joined Scalia and Rehnquist in supporting the government in nearly ninety-one percent of non-unanimous criminal justice cases.[15] Among Justices who served on the Rehnquist Court at any time prior to the summer of 1993, Thomas had the most conservative voting record on cases concerning the Eighth Amendment, capital punishment, and habeas corpus by supporting the government in more than ninety-four percent of such cases.[16] Thus, as indicated in Table 1, Thomas casts his votes consistently with his most conservative colleagues in civil rights and liberties cases.

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[12] *See* Jeffrey Segal & Harold Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Judicial Data Base Project*, 73 JUDICATURE 103, 103 (1989) ("Liberal decisions in the area of civil liberties are pro-person accused or convicted of a crime, pro-civil liberties or civil rights claimant, pro-indigent, pro-[Native American], and anti-government in due process and privacy.").

[13] *See* HENSLEY, SMITH & BAUGH, *supra* note 10, at 89.

[14] *See id*.

[15] *See* Christopher E. Smith, *The U.S. Supreme Court and Criminal Justice: The 1995-96 Term*, 74 U. DET. MERCY L. REV. 1, 7 (1996).

[16] *See* Christopher E. Smith, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 DRAKE L. REV. 593, 597 (1995).

Table 1—Justice Thomas's Rate of Agreement with Other Justices in the United States Supreme Court's Civil Rights and Liberties Cases, 1991 Term through 1995 Term[17]

Justice	*Agreement%*
Scalia	90.1%
Rehnquist	90.1%
White	76.6%
Kennedy	75.8%
O'Connor	73.5%
Ginsburg	64.7%
Souter	62.8%
Breyer	62.0%
Blackmun	47.4%
Stevens	44.8%

Although Thomas has consistently supported conservative outcomes, questions remain concerning whether his influence and impact on the Supreme Court extend any further than his power to cast simply one of nine votes. Thomas has reportedly bragged that by the time "I step down from the Court in 2034[,] [t]hey can say what they want to say, but I'm going to [have been] making law for a long time."[18] He certainly contributes to "making law" by participating in Supreme Court decision making, but he has failed to place his personal stamp on the law because he is not given opportunities to write majority opinions for the Court in important cases.[19] Table 2 indicates that Thomas usually writes majority opinions only when the Justices share a strong consensus. He wrote for the majority only five times in cases in which there were more than two dissenters and most of his majority opinions came in unanimous cases.

[17] Extrapolated from HENSLEY, SMITH & BAUGH, *supra* note 10, at 87-88, and THOMAS R. HENSLEY, CHRISTOPHER E. SMITH, & JOYCE A. BAUGH, SUPREME COURT UPDATE: 1996 4-6 (1997). Original data was drawn from the Supreme Court Judicial Data Base. *See* Segal & Spaeth, *supra* note 12, at 103.

[18] Jeffrey Rosen, *Moving On*, NEW YORKER, Apr. 29-May 6, 1996, at 66, 73.

[19] When the Chief Justice is in the majority, he chooses which member of the majority will write the opinion on behalf of the Court. Otherwise the senior Justice in majority makes the assignment. *See* LAWRENCE BAUM, THE SUPREME COURT 153 (3d ed. 1989).

Table 2—The United States Supreme Court's Vote Breakdowns in Thomas-Authored Majority Opinions, 1991 Term through 1995 Term

Vote	*Number of Majority Opinions*
9-0	21
8-1	4
7-2	10
6-3	4
5-4	1

Even more revealing, perhaps, are the kinds of cases in which Thomas is selected—usually by Chief Justice Rehnquist—to write on behalf of the Court. As indicated by Table 3, Thomas receives majority assignments most frequently in cases concerning statutes, especially economic issues such as bankruptcy and taxation. He seldom receives assignments for civil rights and liberties cases, and even those that he handled are not among the notable, important decisions of recent terms. Thomas has had a number of majority opinions on criminal justice issues, but only in cases with a relatively high degree of consensus. Thomas's failure to garner choice assignments raises questions about how Chief Justice Rehnquist (and other senior Justices) view Thomas. It may very well be that Thomas's distinctiveness—with respect to the themes evident in his concurring and dissenting opinions—serves to deter Rehnquist and others from assigning important and controversial case opinions to Thomas.

Table 3—Majority Opinions by Justice Thomas, by Subject Matter, 1991 Term through 1995 Term[20]

Issue/Area	Number/Vote
Economic Issues - Statutory	*16*
(Tax, bankruptcy, ERISA, antitrust, etc.)	
Criminal Justice	*11*
1. *Melendez v. United States* (1996) [sentencing guidelines]	7-2
2. *Wilson v. Arkansas* (1995) ["knock and announce" for searches]	9-0
3. *United States v. Mezzanatto* (1995) [admissibility of statement]	7-2

[20] *Economic Issues*: United States v. IBM, 116 S. Ct. 1793 (1996); Lockheed Corp. v. Spink, 116 S. Ct. 1783 (1996); Peacock v. Thomas, 116 S. Ct. 862 (1996); Things Remembered v. Petrarca, 116 S. Ct. 494 (1995); National Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582 (1995); Nebraska Revenue Dept. v. Loewenstein, 513 U.S. 123 (1994); Associated Indus. of Missouri v. Lohman, 511 U.S. 641 (1994); Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993); PREI, Inc. v. Columbia Pictures, 508 U.S. 49 (1993); Rake v. Wade, 508 U.S. 464 (1993); Nobelmen v. American Sav. Bank, 508 U.S. 324 (1993); Delaware v. New York, 507 U.S. 490 (1993); District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992); Holywell Corp. v. Smith, 503 U.S. 47 (1992); Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992); Taylor v. Freeland & Kronz, 503 U.S. 638 (1992).

Criminal Justice: Melendez v. United States, 116 S. Ct. 2057 (1996); Wilson v. Arkansas, 514 U.S. 927 (1995); California Dept. of Corrections v. Morales, 514 U.S. 499 (1995); United States v. Mezzanatto, 513 U.S. 196 (1995); Shannon v. United States, 512 U.S. 573 (1994); United States v. Alvarez-Sanchez, 511 U.S. 350 (1994); Staples v. United States, 511 U.S. 600 (1994); Godinez v. Moran, 509 U.S. 389 (1993); United States v. Salerno, 505 U.S. 317 (1992); Wright v. West, 505 U.S. 277 (1992); United States v. Wilson, 503 U.S. 329 (1992).

Labor/Worker Safety Statutes: Norfolk & Western Ry. v. Hiles, 116 S. Ct. 890 (1996); Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994); United States Dep't of Defense v. FLRA, 510 U.S. 487 (1994); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

Other Statutory: Exxon v. Sofec, 116 S. Ct. 1813 (1996); Freightliner Corp. v. Myrick, 514 U.S. 280 (1995); Anderson v. Edwards, 514 U.S. 143 (1995); FDIC v. Meyer, 510 U.S. 471 (1994); FCC v. Beach Communications, 508 U.S. 307 (1993); Robertson v. Seattle Audobon Soc'y, 503 U.S. 429 (1992).

Civil Rights Related: Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993); Farrar v. Hobby, 506 U.S. 103 (1992).

Native American Treaty: South Dakota v. Bourland, 508 U.S. 679 (1993).

Full Faith and Credit: Matsushita Elec. v. Epstein, 116 S. Ct. 873 (1996).

Commerce Clause: Oregon Waste Sys. v. Environmental Quality Comm'n, 511 U.S. 93 (1994).

First Amendment: Rubin v. Coors Brewing, 514 U.S. 476 (1995).

4. *California Department of Corrections v. Morales* (1995) [due process]	7-2
5. *Shannon v. United States* (1994) [jury instructions-insanity]	7-2
6. *United States v. Alvarez-Sanchez* (1994) [admissibility of confession]	9-0
7. *Staples v. United States* (1994) [firearms criminal statute]	7-2
8. *Godinez v. Moran* (1993) [competence to stand trial]	7-2
9. *United States v. Salerno* (1992) [rules of evidence]	8-1
10. *Wright v. West* (1992) [habeas corpus-plurality opinion]	9-0
11. *United States v. Wilson* (1992) [calculate credit for time served]	7-2
Labor/Worker Safety Statutes (FELA, NLRA, etc.)	*4*
Other Statutory	*7*
Civil Rights Related	*2*
1. *Associated General Contractors v. Jacksonville* (1993) [standing, affirmative action]	7-2
2. *Farrar v. Hobby* (1992) [civil rights attorneys' fees]	5-4
Native American Treaty	*1*
Full Faith and Credit	*1*
Commerce Clause	*1*
1. *Oregon Waste Systems v. Environmental Quality Commission (1994)* [taxation of solid waste from out of state]	7-2
First Amendment	*1*

1. *Rubin v. Coors Brewing* (1995) 9-0
[advertising alcohol content of beer]

II. THOMAS'S DISTINCTIVENESS

Over the course of his brief career on the Supreme Court, Thomas has become increasingly assertive—relative to his colleagues—in expressing his views through concurring and dissenting opinions.[21] In his first three terms, Thomas ranked sixth or seventh among the Justices in taking the initiative to present his own views outside of majority opinions. During his most recent two terms, however, Thomas ranked fourth and then third in writing non-majority opinions.[22] It is through these concurring and dissenting opinions that Thomas has created his own opportunities to express himself concerning the Court's most controversial issues. It is also through these opinions that Thomas has revealed to observers the central themes of his judicial philosophy.

If one were asked to select a few words to describe Thomas based on his judicial opinions, several specific adjectives would quickly come to mind: originalist, formal, rigid, legalistic, and aggressive. I have argued elsewhere that Thomas, more so than other Justices, aspires to a coherent vision of the Constitution and the role of the judiciary.[23] This is not to say, however, that Thomas's judicial philosophy lacks obvious flaws—its questionable aspects are easy to see—or that Thomas is consistent in his reasoning and decision making. Rather, it merely recognizes that Thomas seeks to avoid the *ad hoc* decision making that is characteristic of some other Justices.[24] He is attempting to articulate a coherent and consistent view of constitutional law, and he seeks (not always successfully) to stick to his conception of this vision, despite its controversial implications and potential consequences. Thomas's judicial philosophy and its implications can be illuminated by examining the important themes that he emphasizes in his opinions.

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[21] *See* David A. Kaplan, *This Court's Not on TV*, NEWSWEEK, Oct. 9, 1995, at 64 ("Thomas can lay claim to being the most aggressive conservative Justice since the 1930s.").

[22] *See* Christopher E. Smith, *Bent on Original Intent: Justice Thomas Is Asserting a Distinct and Cohesive Vision*, 82 A.B.A. J. 48, 51 (Oct. 1996).

[23] *See id*. at 48.

[24] For example, Justice Sandra Day O'Connor has been described as "very willing to build consensus on opinions," thus implying an inclination to accommodate and compromise rather than consistently assert the universal correctness of a particular interpretive approach. *See* David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES, Oct. 6, 1996, (Magazine) at 65, 69.

A. Original Intent and Judicial Restraint

Thomas seeks to base his opinions on the original intent of the Framers of the Constitution, Bill of Rights, and subsequent constitutional amendments. His opinions are replete with references to the primacy of the Framers' intentions. He treats these intentions as the compelling directives that dictate the outcomes and reasoning in cases. And, like other advocates of interpretation by original intent,[25] Thomas's stated purpose in following the Framers is to limit the power of judges to impose their own values and policy preferences upon the law. For example, Thomas 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.[26]

Thomas has gone so far as to mischaracterize constitutional interpretation by original intent as being the standard approach in the United States Supreme Court's decision making:

> When interpreting other provisions of the Constitution, this Court has believed itself bound by the text of the Constitution and by the intent of those who drafted and ratified it. It should hold itself to no less a standard with interpreting the Speech and Press Clauses.[27]

In fact, of course, the Supreme Court has *not* used original intent as *the* guiding principle,[28] and this is why critics of the Court, such as Robert Bork[29] and Edwin Meese,[30] have railed against the Court for its failure to follow the "true" approach to constitutional interpretation. This is also why the Court's contemporary advocates of originalism, Thomas and Antonin Scalia, write so many concurring and dissenting—as opposed to majority—opinions[31] and attract keen attention from scholars for their distinctive views.[32]

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[25] *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW (1990).

[26] Lewis v. Casey, 116 S. Ct. 2174, 2188 (1996) (Thomas, J., concurring).

[27] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 370-71 (1995) (Thomas, J., concurring in judgment).

[28] For example, since 1958, the Supreme Court has consistently defined the Eighth Amendment's Cruel and Unusual Punishments Clause according to "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958), a flexible, changing standard that is the virtual antithesis of original intent.

[29] *See* BORK, *supra* note 25, at 9.

[30] *See* Edwin Meese, *The Battle for the Constitution*, POL. REV. 32 (1985); Debra Cassens Moss, *The Policy and Rhetoric of Ed Meese*, 73 A.B.A. J. 64 (Feb. 1987).

[31] Thomas has become increasingly assertive relative to other Justices in asserting his views through concurring and dissenting opinions. *See* Smith, *Bent on Original Intent*, *su-*

When Thomas concedes that the Framers' original intentions are not clear regarding a particular constitutional provision, he emphasizes Anglo-American history and long-standing principles as the source of guidance to prevent judges from imposing their own views. For example, when Thomas concluded that "[t]here is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean,"[33] he began his own analysis of the issue by looking to the judicial practices in sixteenth-century English legal proceedings.[34] Thomas's reliance on history demonstrates that he avoids relying—explicitly anyway—on an assessment of a legal principle's applicability to the contexts of contemporary society.

Although Thomas may concede that original intent is not clear with respect to certain constitutional provisions, he manifests great confidence in his ability to "know" the Framers' intentions for most issues. He evinces similar confidence in his ability to identify guiding historical traditions in the absence of clear original intent. For example, Thomas asserted himself as a kind of guardian of constitutional history when he wrote a concurring opinion in *Rosenberger v. University of Virginia* simply to attack the dissent's historical analysis of the Establishment Clause.[35] While acknowledging early in the opinion that scholarly analyses disagree about the original intent of the Establishment Clause, Thomas confidently concluded his opinion by declaring that "history provides an answer for the constitutional question posed by this case, but it is not the one given by the dissent."[36]

Thomas's confident posture belies evident "blind spots" in his understanding of constitutional history and original intent. For example, Thomas's categorical denunciation of race-based affirmative action as violating his vision of an originally-intended, color-blind Constitution conveniently sidesteps any confrontation with the manifestly *un*-color-blind policies of racial segregation perpetuated by the Framers of the Fourteenth Amendment[37] and the government assistance designed for the

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pra note 22, at 51. Scalia has consistently been one of the Court's most prolific authors of concurring and dissenting opinions. *See* Christopher E. Smith et al., *The First-Term Performance of Justice Stephen Breyer*, 79 JUDICATURE 74, 76 (1995); Christopher E. Smith et al., *The First-Term Performance of Justice Ruth Bader Ginsburg*, 78 JUDICATURE 74, 78 (1994); Christopher E. Smith & Scott Patrick Johnson, *The First-Term Performance of Justice Clarence Thomas*, 76 JUDICATURE 172, 177 (1993).

[32] *See* DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 36-37 (1996).

[33] White v. Illinois, 502 U.S. 346, 359 (1992) (Thomas, J., concurring in part and concurring in the judgment).

[34] *See id*. at 361 (Thomas, J., concurring in part and concurring in the judgment).

[35] *See* Rosenberger v. University of Virginia, 115 S. Ct. 2510, 2528 (1995) (Thomas, J., concurring).

[36] *Id*. at 2533 (Thomas, J., concurring).

[37] For example, "Congress had permitted segregated schools in the District of Columbia

benefit of African Americans by those same Framers.[38] As one analyst has observed,

> [Thomas] has shown little familiarity with the most recent scholarship about the Reconstruction Republicans and the limited scope of their color-blind vision. This scholarship, embraced by liberal and conservative legal historians, suggests that Thomas is wrong to insist that the Fourteenth Amendment to the Constitution was intended to forbid racial discrimination in all circumstances . . . . [I]n 1868, when the Fourteenth Amendment was ratified, [the rights it included] were *not* clearly understood to include the right to attend desegregated schools, or the right to receive federal contracts, or the right to vote. Thomas is trapped, in short, between his moral commitment to a color-blind Constitution and an interpretive methodology that compels him to reject it.[39]

Indeed, in stretching to manufacture originalist support for his views, Thomas has gone so far as to cite the Declaration of Independence as the source of "the principle of inherent equality that underlies and infuses our Constitution."[40] Reliance on such authority ought to be highly problematic for an originalist, because the Declaration of Independence was written by an eighteenth-century slaveowner ninety years before the Fourteenth Amendment's Equal Protection Clause was drafted to address the problems faced by freed slaves. Moreover, the Declaration's author, Thomas Jefferson, was *not* one of the drafters of the Constitution's protections for individual rights[41] and was long dead by the time the Fourteenth Amendment was written.

Thomas's self-professed fealty to original intent jurisprudence makes him the Court's strongest proponent of this controversial approach to constitutional interpretation. His pronouncements about the primacy of the Framers' intentions are presented with fervor and faith akin to religious proselytization. By contrast, despite a reputation for self-righteous confi-

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from 1864 onward—and . . . though the matter was debated thoroughly between 1871 and 1875, Congress had declined to include a prohibition against segregated schools in the Civil Rights Act of 1875." RICHARD KLUGER, SIMPLE JUSTICE 635 (1975). In addition, the Framers of the Fourteenth Amendment also imposed racial segregation in the visitors' galleries at Congress. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 125 (1977).

[38] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 144 (1988) ("To the extent that [the Freedman's Bureau] prohibited coercive labor discipline, took up the burden of black education, sought to protect blacks against violence, and promoted the removal of legal barriers to blacks' advancement, the Bureau reinforced the freedmen's aspirations.").

[39] Rosen, *supra* note 18, at 73.

[40] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

[41] Jefferson was the ambassador to France when the Constitution's original protections for individuals were being drafted. *See* HENSLEY, SMITH, & BAUGH, *supra* note 10, at 135.

dence and a didactic style,[42] the Court's other strong advocate of originalism, Justice Scalia, has expressed misgivings about applying the Framers' intentions to all constitutional issues.[43] Thomas does not appear inclined to express misgivings or self-doubt, especially about originalism, and thus he positions himself to collide blindly with the many documented impediments that make it difficult, if not impossible, to adhere actually and consistently to an originalist approach to constitutional interpretation.[44]

Although Thomas espouses original intent jurisprudence as a means to restrain judges, his behavior with respect to several issues constitutes judicial activism of the sort that he might claim to oppose. With respect to the issues of voting rights and affirmative action, Thomas's opinions are unquestionably "activist" according to three of the six dimensions of judicial activism:[45] 1) Majoritarianism—the degree to which policies adopted through democratic processes are judicially negated; 2) Interpretive Stability—the degree to which earlier court decisions, doctrines, or interpretations are altered; 3) Availability of an Alternate Policymaker—the degree to which a judicial decision supersedes serious consideration of the same problem by other governmental institutions.[46] Thomas has written opinions concerning voting rights[47] and affirmative action[48] that have sought to

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[42] *See* CHRISTOPHER E. SMITH, JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOVEMENT 55-75 (1993) (describing Scalia's strident language and use of hyperbole, condemnation, and sarcasm directed at his colleagues).

[43] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

> What if some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses? Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an eighth amendment challenge . . . . I am confident that public flogging and handbranding would not be sustained by our courts, and any espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality . . . . I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.

Id. at 861, 864.

[44] *See* STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION (1987); Judith A. Baer, *The Fruitless Search for Original Intent*, *in* JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING 49-71 (M. McCann & G. Houseman eds. 1989); Christopher E. Smith, *Jurisprudential Politics and the Manipulation of History*, 13 W. J. BLACK STUD. 156 (1989).

[45] *See* Bradley Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236, 239 (1983).

[46] *See* Christopher E. Smith, *The Supreme Court's Emerging Majority: Restraining the High Court or Transforming Its Role*, 24 AKRON L. REV. 393, 397 (1990).

[47] *See* Holder v. Hall, 512 U.S. 874, 891-946 (1994) (Thomas, J., concurring).

[48] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., con-

narrow or invalidate actions by elected branches of government (Majoritarianism dimension), alter established precedents (Interpretive Stability dimension), and use judicial power to decide issues that could be left to other branches of government (Availability of Alternative dimension).[49] Thus, according to one observer, "[Justice Thomas] wants to use his unelected office to short-circuit the political debate about whether to end affirmative action or to abolish voting districts that have been constructed on the basis of race."[50]

B. Federalism

Thomas employs originalism not only to restrain judges, but also to restrain the federal government from interfering with his vision of the states' substantial autonomy to handle their own affairs.[51] For example, in his critique of judicially-ordered school desegregation remedies, Thomas declared, "Usurpation of the traditionally local control over education not only takes the judiciary beyond its proper sphere, it also deprives the States and their elected officials of their constitutional powers."[52] Thomas provided a detailed explanation of his belief in the primacy of the states within the constitutional governing system in an opinion supporting the states' authority to impose term limits on members of Congress.[53]

With respect to judicial federalism, Thomas also would allow state courts to have significant autonomy, even if it means clashing with a federal court's interpretation of federal law. According to Thomas,

> The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal circuit court of appeals in whose circuit the trial court is located.[54]

Thomas has sought to advance judicial federalism in the area of habeas corpus through his effort to require federal court deference to state

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curring in part and concurring in judgment).

[49] *See* Joyce A. Baugh & Christopher E. Smith, *Doubting Thomas: Confirmation Veracity Meets Performance Reality*, 19 SEATTLE U. L. REV. 455, 480-90 (1996).

[50] Rosen, *supra* note 18, at 67.

[51] *See* Kaplan, *supra* note 21, at 64 ("[Thomas's] dissenting opinion in the term-limits case . . . would have turned the federal system on its head. States would have become the real sovereigns in the constitutional framework.").

[52] Missouri v. Jenkins, 515 U.S. 70, 138 (1995) (Thomas, J., concurring).

[53] *See* United States Term Limits v. Thornton, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting).

[54] Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring).

court decisions.[55] By supporting the Rehnquist Court's efforts to limit convicted offenders' access to habeas corpus review in the federal courts,[56] Thomas appears to contradict his confirmation testimony in which he said that "we should be most concerned about providing all the rights and all the due process that can be provided and should be provided to individuals who may face [the death penalty]."[57]

In *United States v. Lopez*,[58] the blockbuster Commerce Clause case in which "for the first time in 58 years a court majority restricted Congress's ability to expand Federal [commerce-power] authority after [Congress] enacted an anti-gun possession law,"[59] Thomas articulated his originalist views in a concurring opinion. As in the *Rosenberger* case,[60] Thomas's preferred outcome prevailed and he agreed with the majority opinion. Thus, his opinion seemed motivated by his self-appointed role as guardian of constitutional history because its sole purpose was to educate the dissenters about the Constitution's original intent on the issue.

Thomas's opinion argued that the Supreme Court's Commerce Clause doctrines had deviated from the Framers' intentions ever since the New Deal. He quoted approvingly from long-rejected precedents such as *United States v. E.C. Knight*[61] and *Carter v. Carter Coal Co.*[62] that distinguished "commerce"—which was subject to regulation by Congress—from manufacturing and mining that, according to these opinions, were not. Thomas opposed the Supreme Court's emphasis during the past sixty years on the "substantial effects" of activities on commerce in favor of a very narrow view of interstate commerce. According to Thomas, "despite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, the founding generation did not cede authority over all these activities to Congress."[63] Thus, Thomas concluded that "[t]he Founding Fathers confirmed that most areas of life (even many matters that

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[55] *See* Wright v. West, 505 U.S. 277 (1992); *see also* Larry Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2394 (1993) ("Parsing the opinions in *West*, one concludes that the Chief Justice and Justices Thomas and Scalia would now adopt a deference rule for all the issues in habeas corpus cases . . . .").

[56] *See* J. Thomas Sullivan, *A Practical Guide to Recent Developments in Federal Habeas Corpus for Practicing Attorneys*, 25 ARIZ. ST. L.J. 317 (1993) (describing judicially-created procedural barriers to federal habeas corpus review).

[57] *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary,* 102d Cong. 133 (1991) (statement of Clarence Thomas).

[58] 514 U.S. 549 (1995).

[59] Garrow, *The Rehnquist Reins*, *supra* note 24, at 65.

[60] *See supra* notes 35-36 and accompanying text.

[61] 156 U.S. 1 (1895).

[62] 298 U.S. 238 (1936).

[63] *Lopez*, 514 U.S. at 591 (Thomas, J., concurring).

would have substantial effects on commerce) would remain outside the reach of the Federal Government. Such affairs would continue to be under the exclusive control of the states."[64]

Thomas may be perfectly correct in his reading of history for original intent purposes on this issue, but the implications of his desire to return to the distribution of governmental powers during the nineteenth century (and earlier) is staggering. American history would be completely different if Thomas's views had been dominant throughout the twentieth century. Thomas's views, for example, would seem to preclude federal child labor laws and other laws protecting workers' health and safety, thus returning constitutional law to the doctrines of *Hammer v. Dagenhart*.[65] Thomas could respond that the people of a state could pressure their own legislatures to regulate child labor and other matters, but without national legislation, there would be significant countervailing economic pressures. The questions posed by constitutional scholars concerning the aftermath of *Hammer v. Dagenhart* raise significant questions about the implications of Thomas's position: "Without the support of federal [child labor laws] could New York or Massachusetts protect their textile industries from the competition of child labor mills in North Carolina? Could New York protect its home market by forbidding the sale in New York of the products of child labor?"[66] Moreover, if Thomas's approach would invalidate *NLRB v. Jones & Laughlin Steel Corp*.[67] and thereby diminish the ability of workers to form unions and engage in collective bargaining, corporations might have unchallenged dominance over policy making at the state level.

If employed in the 1960s, Thomas's approach would also have blocked the passage of Title II of the Civil Rights Act of 1964, which barred racial discrimination in public accommodations.[68] The Supreme Court stretched congressional commerce power authority in a manner clearly impermissible to Thomas when it approved Title II in *Katzenbach v. McClung*.[69] What path would racial segregation and discrimination have taken if the federal government had been barred from attacking it in the private sector? What impact would there be on other aspects of civil rights law, such as Title VII[70] and the Age Discrimination in Employment Act[71] barring various categories of employment discrimination, if the country

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[64] *Id*.

[65] 247 U.S. 251 (1918).

[66] WILLIAM B. LOCKHART ET AL., THE AMERICAN CONSTITUTION: CASES, COMMENTS, QUESTIONS 80 (6th ed. 1986).

[67] 301 U.S. 1 (1937).

[68] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq*. (1981).

[69] 379 U.S. 294 (1964).

[70] 42 U.S.C. § 2000e *et seq*. (1981).

[71] 29 U.S.C. §§ 621-631 (1982).

followed Thomas's view that the nation must recognize that "[a]t the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering as well as transporting for these purposes?"[72]

In deciding Commerce Clause issues since the 1930s, the Supreme Court has generally taken into account social developments within society and developed constitutional doctrine in response to the recognition of social problems. The Court's expansion of congressional regulatory power to cover manufacturing and mining, for example, reflected a recognition that these activities were inseparable from, and had a substantial impact on, a national economy that, in the 1930s, was beset by monumental difficulties.[73] In the 1960s, as the national governing institution that had taken the lead in combating discrimination, the Supreme Court finally saw other government institutions joining its effort through the Civil Rights Act:

> The Supreme Court's symbolic statement in *Brown* [*v. Board of Education*] in 1954 helped to mobilize and encourage various actors in the political system to push for racial equality. The Civil Rights Act of 1964 represented the moment when the other branches of government finally acted to endorse unambiguously the racial equality goals espoused by the Supreme Court one decade earlier. At that historical moment, could the Supreme Court have decided [*Katzenbach v. McClung*] any other way?[74]

Thomas does not necessarily look to the United States Constitution to protect citizens from improper government action. When Thomas joined the Court's decision in *Bennis v. Michigan*, approving forfeiture of property by an innocent co-owner in conjunction with a criminal case, Thomas noted that "[t]his case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable."[75] According to Thomas, despite the serious potential risks posed to the public by a misuse of forfeiture, the courts and the Constitution have no role in providing protection. In Thomas's words,

> Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice. When the property sought to be forfeited has been entrusted by its owner to one who uses it for crime, however, the Constitution appar-

[72] United States v. Lopez, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring).

[73] *See* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 811 (1993).

[74] CHRISTOPHER E. SMITH, POLITICS IN CONSTITUTIONAL LAW 78 (1992).

[75] Bennis v. Michigan, 116 S. Ct. 994, 1001-02 (1996) (Thomas, J., concurring).

> ently assigns to the States and to the political branches of the Federal Government the primary responsibility for avoiding that result.[76]

C. Rejection of Empirical Evidence and Social Context

Unlike the mid-twentieth-century Justices who responded to social developments in their Commerce Clause jurisprudence, Thomas believes that he should follow his perceptions of the Framers' intentions without regard for the social problems of American society. Thomas has been described as "a voice for a formal, even rigid approach to constitutional interpretation, a rejection of the idea that modern influences might cast a new light on the intentions of the Framers."[77] Thomas's rigid adherence to his legal theory, without regard to the social context in which law will impact people's lives, extends beyond Commerce Clause cases to other issues as well. This rejection of social knowledge as an influence on legal decision making is evident in several circumstances.

Thomas opposes the use of social science evidence as a basis for constitutional decision making. In criticizing judicial decisions ordering school desegregation, Thomas asserted that "[t]he lower courts should not be swayed by the easy answers of social science, nor should they accept the findings, and the assumptions, of sociology and psychology at the price of constitutional principle."[78] Thomas further announced that "[t]he judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of the social sciences."[79]

One source of his hostility to social science apparently stems from his vehement opposition to studies of psychological harms experienced by African American students who are victims of racial segregation, such as Kenneth Clarke's famous "dolls" study that was cited in *Brown v. Board of Education*.[80] Thomas defensively regards such research findings as resting on an assumption that African Americans are inferior to whites. In Thomas's words,

> [T]he [lower] court has read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies upon questionable social science research rather than con-

[76] *Id.* at 1003 (Thomas, J., concurring).
[77] David J. Garrow, *On Race, It's Thomas v. an Old Ideal*, N.Y. TIMES, July 2, 1995, at E1.
[78] Missouri v. Jenkins, 515 U.S. 70, 122-23 (1995) (Thomas, J., concurring).
[79] *Id*. at 121 (Thomas, J., concurring).
[80] *See* KLUGER, *supra* note 37, at 315-20, 706 (1975).

stitutional principle, but it also rests on an assumption of black inferiority.[81]

Ironically, Thomas's rejection of social science in favor of claimed adherence to the constitutional principles of originalism appears to rest on his own assumptions about social reality. Thomas's defensive rejection of empirical research underlying reasoning in school desegregation cases seems based on his own observations and conclusions that racial segregation *per se* does *not* have a harmful impact on African American students. This is not Thomas's only visible instance of relying on his own perceptions of social reality. For example, in discussing racial discrimination in peremptory challenges applied to potential jurors, Thomas remarked that it can be "reasonably surmised, without direct evidence in any particular case, that all-white juries might judge black defendants unfairly."[82] Thomas's vehement rejection of empirical research while incorporating his own views of social reality clashes with his espoused reliance on original intent, legal history, and judicial traditions as the sole determinants of judicial outcomes and reasoning.

In light of Thomas's denunciations of social science, one can wonder what he would have done if presented with statistical evidence on racial discrimination in the death penalty, such as the pre-Thomas Supreme Court considered in *McCleskey v. Kemp*.[83] The majority opinion in *McCleskey* did not reject the use of social science evidence. Indeed, Justice Powell defended the use of statistical proof in employment discrimination and jury selection cases.[84] The majority did, however, reject the use of statistics to prove systemic discrimination in capital sentencing, and apparently Thomas would likely agree with that conclusion in light of his view that courts can do without "the unnecessary and misleading assistance of the social sciences."[85] By contrast, a memorandum in the *Thurgood Marshall Papers* at the Library of Congress revealed that Thomas's closest ideological cousin, Justice Scalia, accepted the statistics in *McCleskey* but rejected the notion that the Court should act against racial biases in the criminal justice process because he regarded those biases as "ineradicable."[86]

By formally rejecting the value and utility of social knowledge and asserting that rigid legal principles can solve all issues, Thomas is not merely blinding himself to the relationship between law and society, he is

[81] *Jenkins*, 515 U.S. at 114.
[82] Georgia v. McCullom, 505 U.S. 42, 61 (1992) (Thomas, J., concurring).
[83] 481 U.S. 279 (1987).
[84] *See id.* at 294-96.
[85] *Jenkins*, 515 U.S. at 121.
[86] Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies From the Perspective of Justice Antonin Scalia's* McCleskey *Memorandum*, 45 MERCER L. REV. 1035, 1038 (1994).

also revealing his ignorance of society. Perhaps this is not entirely surprising for a man who reportedly stopped reading newspapers or watching television news after his controversial confirmation hearings in 1991.[87] For example, in questioning the continuing need for judicial remedies for school segregation, Thomas observed that contemporary racial separation in housing and schools stems from people's voluntary choices that create *de facto* segregation that is beyond the reach of judicial remedies: "The continuing 'racial isolation' of schools after *de jure* segregation has ended may well reflect voluntary housing choices or other private decisions."[88] Such a statement ignores the history of government-sponsored, discriminatory real estate practices that helped to establish race-based housing patterns.[89]

In another example, Thomas naively asserted that mandatory death sentences would eliminate racial discrimination and capriciousness in capital sentencing.[90] According to Thomas, "One would think, however, that by eliminating explicit jury discretion and treating all defendants equally, a mandatory death penalty scheme was a perfectly reasonable legislative response to the concerns expressed in *Furman* [*v. Georgia*]."[91] Thomas's statement, however, shows a complete lack of understanding about how the criminal justice system really works. Thomas's formal focus on a single decision point—the sentencing decision—ignores how cumulative discretionary decisions actually determine death sentences, decisions that could still operate on a discriminatory basis even in a mandatory death penalty scheme. In the social reality that Thomas does not recognize and understand,

> Prosecutors make subjective decisions, based on a complex variety of factors, about whether to seek the death penalty. Likewise, jurors make comparable subjective decisions [about whether to convict and which charge to convict on]. . . . If they deliberately apply discriminatory criteria, the defendant cannot challenge their decision unless the decision makers openly express their biases. Moreover, in this complex, multi-step decisional process, decision makers may unconsciously apply their prejudices, thus precluding any possibility of proving the existence of discrimination.[92]

[87] *See* James Vicini, *Thomas' Conservative Bent Still Angers Many*, DET. NEWS, Oct. 17, 1996, at 6A; Rosen, *supra* note 18, at 69.

[88] *Jenkins*, 515 U.S. at 116 (Thomas, J., concurring).

[89] *See* OLIVER C. COX, RACE RELATIONS: ELEMENTS AND SOCIAL DYNAMICS 132-37 (1976); THOMAS F. PETTIGREW, RACIAL DISCRIMINATION IN THE UNITED STATES 38 (1975).

[90] *See* Paul M. Barrett, *On the Right: Thomas Is Emerging as Strong Conservative Out to Prove Himself*, WALL. ST. J., Apr. 26, 1993, at A1.

[91] Graham v. Collins, 506 U.S. 461, 487 (1993) (Thomas, J., concurring) (discussing Furman v. Georgia, 408 U.S. 238 (1972)).

[92] Christopher E. Smith, *The Supreme Court and Ethnicity*, 69 OR. L. REV. 797, 830

D. The Color-Blind Constitution

As indicated by the discussions of the foregoing themes, Thomas argues strongly for his conception of a color-blind Constitution. This vision is not necessarily supported by his original intent jurisprudence.[93] In addition, Thomas does not accurately examine the intentions of the Fourteenth Amendment's Framers. With respect to the Fourteenth Amendment, Thomas observes the "fundamental truth that the Government cannot discriminate among its citizens on the basis of race,"[94] and "[a]t the heart of this interpretation of the Equal Protection Clause lies the principle that the Government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups."[95] Unlike his decisions concerning other issues, Thomas does not devote himself to a discussion of original intent but instead assumes that the Fourteenth Amendment's principles create a color-blind Constitution.

Thomas appears insulted by school desegregation decisions. Although he reportedly recognizes that racial segregation in schools perpetuates inequality by providing unequal resources for students,[96] the language of his opinions makes it appear that he believes that judges are misguided when they seek to remedy segregation. For example, Thomas stated that "[i]t never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."[97] Such a statement implies no understanding of the historical reality that all-black schools have consistently been short-changed in the allocation of resources and that those resource disparities were the source of inferior opportunities and services for African American students. By contrast, Thomas's opinions emphasize his defensive viewpoint that:

> if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.[98]

Do such racist notions underlie the well-intentioned efforts of judges who ordered school desegregation remedies or has Thomas distorted the basis for such opinions? Clearly, Thomas is inferring this conclusion from his own reaction to such cases because it would be difficult to find evi-

(1990).

[93] *See supra* notes 37-38 and accompanying text.

[94] Missouri v. Jenkins, 515 U.S. 70, 120 (1995) (Thomas, J., concurring).

[95] *Id*.

[96] *See* Rosen, *supra* note 18, at 66.

[97] *Jenkins*, 515 U.S. at 114 (Thomas, J., concurring).

[98] *Id.* at 122 (Thomas, J., concurring).

dence that any cases rely on such a theory rather than on a concern about unequal resources and concomitant negative impacts on opportunities for African American students.

Moreover, Thomas appears to be the first Justice to criticize implicitly the premise of *Brown v. Board of Education*, both for its reliance on social science and for its condemnation of racial segregation. A commentator once observed that "[a]nybody who opposed [*Brown*] today would be assailed as a segregationist crank."[99] It seems ironic that the successor to Thurgood Marshall's seat on the Supreme Court should become the first potential "crank" by criticizing *Brown*.

Thomas is also vehement in his opposition to race-based affirmative action, in part, because he is offended by what he regards as the stigmatizing effects of such policies upon minority group members. According to Thomas,

> Inevitably, such programs engender attitudes of superiority or, alternatively provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.[100]

Thomas's views are consistent with his admiration for the self-help philosophy of Booker T. Washington.[101] However, in light of his faith in formal legal doctrine and his ignorance about the social reality underlying the intersection of law and society, Thomas is open to criticism on two counts. First, he can be criticized about the clash between originalism and his vision of a color-blind Constitution as well as his lack of recognition of that clash.[102] Second, he might be criticized for an implicit underestimation of the pervasiveness of racial discrimination and his arguably too-optimistic view of minority group members' opportunities to shape their own destinies in light of continuing racial barriers.[103] Moreover, Thomas's position seems to presume that the agencies responsible for enforcing anti-discrimination laws can effectively handle the task of combating discrimination. This presumption is probably not accurate.[104]

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[99] Stuart Taylor, *Meese v. Brennan: Who's Right About the Constitution?*, NEW REPUBLIC, Jan. 6 & 13, 1986, at 21.

[100] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995).

[101] *See* Rosen, *supra* note 18, at 69.

[102] *See supra* notes 37-38 and accompanying text.

[103] *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992) (examining continuing problems of racial inequality in the United States).

[104] *See* TOM WICKER, TRAGIC FAILURE: RACIAL INTEGRATION IN AMERICA 105 (1996).

> [Shelby] Steele was eloquent on his view of affirmative action as an indignity to blacks and a cause of hypocrisy in whites. But neither he nor Bob Dole,

E. Diminution of Constitutional Protections for Prisoners

In applying his vision of originalism, Thomas has been especially outspoken in arguing that the Eighth Amendment's prohibition on cruel and unusual punishments does not apply to protect prisoners inside correctional institutions. In a dissenting opinion in a case concerning a shackled prisoner who was beaten by two corrections officers, Thomas argued that "for generations, judges and commentators regarded the Eighth Amendment as applying only to tortuous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration."[105] He noted that the United States Supreme Court did not apply the Eighth Amendment to prison conditions and practices "until 1976—185 years after the Eighth Amendment was adopted."[106] Turning to the intent of the Framers, Thomas asserted that

> [s]urely prison was not a more congenial place in the early years of the Republic than it is today; nor were judges and commentators so naive as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment.[107]

He reiterated his view in a later case by relying, again, on his interpretation of the Framers' intent.[108]

Thomas's assessment of history is probably accurate, but also incomplete with respect to the Framers' views of prisons. The concept of the prison as an institution for serving significant criminal sentences was essentially born in the nineteenth century—after the Eighth Amendment had been drafted and ratified. The Eighth Amendment was written in 1789. Walnut Street Jail, the country's initial experiment with incarceration as punishment, was established in 1790, the same year the State of Connecticut turned "Newgate," a series of copper mines, into a state prison.[109] Most states did not establish prisons as a mode of punishment until the

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> who also demanded tough enforcement of antidiscrimination laws, noted that the Equal Employment Opportunit[y] Commission, which is charged with that duty, has an overwhelming backlog of cases, so many that it may never be able to decide them all. If enforcement of antidiscrimination laws is the alternative to affirmative action, race, sex, and ethnic discrimination will be with us for a long time.

Id.

105 Hudson v. McMillian, 503 U.S. 1, 19-20 (1992) (Thomas, J., dissenting).

106 *Id*. at 20 (Thomas, J., dissenting).

107 *Id*.

108 *See* Helling v. McKinney, 509 U.S. 25, 42 (1993) (Thomas, J., dissenting) ("The text and history of the Eighth Amendment, together with pre- *Estelle* [*v. Gamble* (1976)] precedent, raise substantial doubt in my mind that the Eighth Amendment proscribes a prison deprivation that is not inflicted as part of the sentence.").

109 *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 78 (1993).

nineteenth century.[110] Prior to that time—up to and including the drafting of the Eighth Amendment—criminal punishment emphasized whipping, branding, stocks, execution, and other forms of non-incarcerative physical punishments.[111] In fact, one study found that only nineteen criminal offenders were sentenced to jail as a form of punishment in New York during the entire period from 1691 to 1776.[112]

During the Framers' era, jails were used to house prisoners waiting for trial. They also housed debtors, who were often allowed to come and go as they pleased, as long as they returned to sleep in the jail at night.[113] Vagrants, paupers, and others were sent to workhouse jails where they could be supplied with food and clothes by friends and relatives, if they had any.[114]

In light of this history of punishment in early America, Thomas misstates the Framers' views on prison conditions in the sense that the Framers could not have had opinions concerning prisons, as such institutions were yet to develop. Although Thomas can claim accurately that the Framers did not intend for the Eighth Amendment to apply to conditions in detention facilities, his argument is more correctly understood as pointing to the problem of using originalism with respect to issues about which the Framers had no knowledge. Certainly, the authors of the Eighth Amendment could never have imagined the contemporary situation in which more than one million Americans are serving prison terms for various offenses.[115] However, Thomas's rigid and formal approach to constitutional interpretation precludes him from taking account of changing social developments since the eighteenth century.

Thomas has carried his rejection of prisoners' rights beyond the Eighth Amendment and into other areas. For example, the United States Supreme Court developed a "right of access to the courts" for prisoners in a series of cases in the 1960s and 1970s.[116] The right of access is regarded as "perhaps the most basic of rights possessed by inmates; certainly it is the foundation for every other right an inmate has. . . . Without access [to the courts], inmates have no way of vindicating their rights through judi-

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[110] *See id*. at 79-82.

[111] *See id.* at 48.

[112] *See id*.

[113] *See id*. at 49.

[114] *See id*. at 50.

[115] *See* Darrell K. Gilliard & Allen J. Beck, *Prison and Jail Inmates, 1995 in* BUREAU OF JUSTICE STATISTICS BULLETIN 2 (Aug. 1996).

[116] *See* Bounds v. Smith, 430 U.S. 817, 817 (1977) (right to use prison law libraries if other forms of legal assistance are not provided); Johnson v. Avery, 393 U.S. 483, 487, 490 (1969) (right to assistance from jailhouse lawyers if prisons do not provide other forms of legal assistance).

cial action."[117] If abusive practices occur behind prison walls, there might be no way for prisoners to gain protection if they cannot raise legal claims in court. Thomas, however, has advocated the narrowest possible interpretation of the right of access. According to Thomas, "That right . . . is a right not to be arbitrarily prevented from lodging a claimed violation of a federal right in a federal court . . . . There is no basis in history or tradition for the proposition that the State's constitutional obligation is any broader."[118] In other words, Thomas believes that prison officials cannot prevent prisoners from mailing legal papers to the courthouse, but, he argues, there is no obligation to provide legal materials or even the envelopes and stamps that would enable prisoners to file legal claims.

Because prisoners have no right to counsel for habeas corpus actions and civil rights lawsuits,[119] they must prepare their own cases as *pro se* actions. Under current doctrine, even access to a prison law library does not assure access to the courts because so many prisoners are illiterate, mentally ill, not fluent in English, and otherwise unable to make use of legal research materials.[120] Even prisoners who are not handicapped in some way usually cannot prepare legal actions effectively because they have no training in the law.[121] Thomas's interpretation of the right of access would significantly weaken an already unreliable right and, in addition, diminish all other rights possessed by prisoners that depend on judicial supervision and vindication. Of course, since Thomas does not believe originalism provides a basis for recognizing rights for prisoners, this result would advance his preference for a near absence of prisoners' rights.

With the issue of prisoners' rights, Thomas's reliance on his interpretation of originalism helps to support his other predominant themes of federalism and judicial restraint. As Thomas argued in his dissent in *Hudson v. McMillian*,

> Today's expansion of the Cruel and Unusual Punishment Clause beyond all bounds of history and precedent is, I suspect, yet another manifestation of the pervasive view that the Federal Constitution must address all ills in our society. Abusive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt. But that does not mean that it is invariably unconstitutional. The Eighth

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[117] MICHAEL MUSHLIN, RIGHTS OF PRISONERS 3-4 (2d ed. 1993).

[118] Lewis v. Casey, 116 S. Ct. 2174, 2195 (1996) (Thomas, J., concurring).

[119] *See* MUSHLIN, *supra* note 117, at 41-42.

[120] *See* Christopher E. Smith, *Examining the Boundaries of* Bounds*: Prison Law Libraries and Access to the Courts*, 30 HOW. L.J. 27, 34-35 (1987).

[121] *See* Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982) ("Access to full law libraries [to provide access to the courts for prisoners] makes about as much sense as furnishing medical services through books like: 'Brain Surgery Self-Taught,' or 'How to Remove Your Own Appendix,' along with scalpels, drills, hemostats, sponges, and sutures.").

> Amendment is not, and should not be turned into, a National Code of Prison Regulation.[122]

When Thomas concludes that "primary responsibility for preventing and punishing [abusive practices and misconduct by prison officials] rests not with the Federal Constitution but with the laws and regulations of the various States,"[123] he highlights the myopic vision and use of history attendant to his fealty to originalism. Although Thomas accurately surmises that the Framers of the Constitution did not anticipate heavy reliance on incarceration as the means for criminal punishment, he effectively ignores the actual history of corrections in seeking to withdraw the judiciary from involvement in such issues.[124] Thomas's approach would place the prevention of abusive practices directly into the hands of the state legislatures and executive branch officials who fostered and tolerated such practices throughout most of American history.[125] Again, Thomas's unwillingness to recognize the social history and contexts of problems posed in the law leads him to produce formalistic "answers" that disconnect constitutional law from the human beings within American society.

CONCLUSION

When Thomas testified before the Senate Judiciary Committee at his confirmation hearings, he asserted that one of his desirable attributes and qualifications for the position of Supreme Court Justice was his empathic understanding of the burdens faced by the people at the bottom of American society. For example, Thomas claimed that he felt a connection to people drawn into the criminal justice system:

> You know, on my current court [the United States Court of Appeals for the District of Columbia Circuit] I have occasion to look out the window that faces C Street, and there are converted buses that bring in the criminal defendants to our criminal justice system, busload after busload. And you look out, and you say to yourself, and I say to myself almost every day, But for the grace of God there go I.
>
> So you feel that you have the same fate, or could have, as those individuals. So I can walk in their shoes, and I can bring something different to the Court. And I think it is a tremendous responsibility, and it

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[122] Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting).

[123] *Id.*

[124] There are many examples of prisons in which inmates were starved, beaten, exposed to infectious diseases, and denied facilities for personal hygiene. *See* LYNN S. BRAHAM & SHELDON KRANTZ, CASES AND MATERIALS ON THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 514-16 (6th ed. 1997).

[125] *See* Christopher E. Smith, *Federal Judges' Role in Prisoner Litigation: What's Necessary? What's Proper?*, 70 JUDICATURE 144, 149 (1986).

> is a humbling responsibility; and it is one that, if confirmed, I will carry out to the best of my ability.[126]

One searches in vain, however, for clear evidence in Thomas's opinions that he has brought his empathic understanding of social reality to the Supreme Court (with the exception of his defensiveness about desegregation and affirmative action). Instead, Thomas has explicitly rejected and denigrated considerations of social reality in judicial decision making, and he has repeatedly asserted that formal adherence to the original intentions of the Constitution's Framers is the only legitimate approach to constitutional interpretation. Thomas supposedly felt a connection to the people drawn into the criminal justice system, yet he is the Court's foremost advocate of virtually eliminating constitutional protections for incarcerated people. His themes of originalism, federalism, judicial restraint, and rejection of social context considerations seem to negate directly his confirmation testimony regarding his approach to judicial decision making. The jarring contrast between his testimony and his performance raises disturbing questions about his veracity at the time of his nomination.[127]

The one situation in which Thomas's empathic understanding seems to surface is with respect to school desegregation and affirmative action. Thomas appears to project his feelings and perceptions onto all African Americans by defensively viewing many judges' concerns about racial separation in schools as based on a theory of black inferiority[128] and by characterizing the consequences of affirmative action as harmful.[129] However, Thomas's experiences as a highly motivated student taught by devoted nuns in segregated Catholic schools and guided by a strong parental figure (his grandfather) may not be representative of the experiences of less strongly supported students in resource-starved, conflict-laden public schools.[130] Similarly, the sting of the stigmatizing effects of affirmative

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[126] *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. 260 (1991) (statement of Clarence Thomas).

[127] *See* Baugh & Smith, *supra* note 49, at 495-96.

[128] *See supra* notes 97-98 and accompanying text.

[129] *See supra* note 100 and accompanying text.

[130] In Thomas's parochial school, "the sisters devoted themselves to their pupils, drilling into them a sense of purpose and academic rigor rarely found in the segregated black public schools . . . . [A] schoolmate of Thomas's, Lester Johnson . . . noted that 'we were taught that we were smarter than the other blacks.'" MAYER & ABRAMSON, *supra* note 4, at 42. This supportive environment that encouraged self-esteem may differ greatly from the environments affecting other African American students. *See* WICKER, *supra* note 104, at 160-61.

> Surveying some Texas school districts, Ferguson found repeated patterns of black student behavior: boys' academic performance falling off by the seventh grade and falling farther by ninth; girls' performance slipping to the level of the boys' in ninth grade; after that, the girls "leveling off" and the

action that he felt as a student at Yale Law School[131] may not be applicable to the experiences of other African Americans who see and experience the effects of affirmative action in other contexts.[132]

After completing five terms on the Supreme Court, Justice Thomas has established a consistent and predictable voting record as a dependable member of the Court's most conservative wing. In addition, he articulates and aspires to follow a vision of constitutional interpretation by original intent that simultaneously advances his preferences for federalism, judicial restraint, and the diminution of constitutional protections for individuals. Relative to other Justices, Thomas has achieved a degree of coherence and consistency in his opinions. The missing element for Thomas, however, is influence. He is not given opportunities to write majority opinions on important issues and except for Scalia and Rehnquist, Thomas seldom persuades other Justices to endorse his increasingly assertive articulation of originalism or other themes. Thomas's ultimate influence as a Justice is likely to depend on future changes in the Court's composition. Unless like-minded appointees support or adopt Thomas's approach in the future, Thomas's ultimate legacy on the Court is likely to be one of a notable voice that attracted attention but never succeeded in determining the direction of the law.

> boys falling farther behind. Teachers tended to see these black learning patterns as fitting their stereotypes of less capable black pupils . . . . An "antiachievement" pressure is thus at work, and even gifted black pupils, as responsive to peer pressures as any other young people, sometimes succumb rather than be accused of acting white . . . . But black youths, like most adolescents, often prefer the approval of street-talking peers to that of their parents or teachers or some vague idea of a future employer.

Id.

[131] *See* Rosen, *supra* note 18, at 69 ("Thomas told the *Washington Post* that he opposed affirmative action in law school because it was inherently stigmatizing: 'Every time you walked into a law class at Yale it was like having a monkey jump down on your back from the Gothic arches.'").

[132] For example, an alternative viewpoint—from an African American's perspective—is presented by Professor Cornel West:

> Given the history of this country, it is a virtual certainty that without affirmative action racial and sexual discrimination would return with a vengeance. Even if affirmative action fails significantly to reduce black poverty or contributes to the persistence of racist perceptions in the workplace, without affirmative action black access to America's prosperity would be even more difficult to obtain and racism in the workplace would persist anyway.

CORNEL WEST, RACE MATTERS 64 (1993).