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CLARENCE THOMAS AFTER TEN YEARS: SOME REFLECTIONS

STEPHEN J. WERMIEL*

INTRODUCTION

When Justice Clarence Thomas was nominated in 1991 to the United States Supreme Court by the first President George Bush, even sophisticated observers of the judiciary knew relatively little about him beyond the line items on his resume. He had progressed rapidly in conservative political circles, but the details of his thinking on legal issues of the day were not widely known.

My memory is still fresh of how little Thomas revealed of himself in his confirmation hearings before the Senate Judiciary Committee ten years ago.¹ This was even the case in the first phase, before the surfacing of sexual harassment allegations.² My recollection is so vivid that it seems almost impossible that ten years have passed.

It is fair game to muse about what we have learned of Justice Clarence Thomas in his first decade on the Supreme Court. In

* Associate Professor of Law, *American University, Washington College of Law*. This essay is adapted from remarks on a panel discussion entitled "Clarence Thomas After Ten Years," held at American University, Washington College of Law on February 23, 2001. The panel was organized by the Program on Law and Government and the Black Law Students Association. I would like to thank Danielle K. Schonback and Benjamin M. Azoff, students at the Washington College of Law, for their research assistance.

1. The clarity of my memory is due to personal circumstances. As the Supreme Court correspondent for the *Wall Street Journal*, I covered every confirmation from Justice Sandra Day O'Connor through Justice David H. Souter. When Justice Thomas was nominated, I wrote a profile of him, and then left the *Journal* to take a teaching position as a visiting professor at William and Mary Law School. My first class was a seminar on the Supreme Court, which I began with a focus on the nomination and confirmation process. The hearings on the Thomas nomination fit perfectly into my own professional transition.

2. See *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, United States Senate*, 102d Cong. (1991) [hereinafter *Nomination of Judge Clarence Thomas*]. The initial hearings on the nomination were held by the Senate Judiciary Committee with Thomas testifying on September 10-13, 1991. The hearings were resumed on October 11-13, 1991, after allegations surfaced that Thomas engaged in sexual harassment of Anita Hill.

particular, it is worth asking whether the murky image has given way in any respect to a clearer vision of who he is. This essay is intended to reflect briefly on a few aspects of Justice Thomas' tenure. This essay is not intended to be a comprehensive examination of Thomas' record and thus, may raise more questions than it seeks to answer.

I.

From almost his first day on the Supreme Court, Justice Thomas was branded a "Scalia clone," a reference to the frequency with which Thomas votes with his senior conservative colleague, Justice Antonin Scalia.³ The label is unfair to Thomas.

No question exists that the two men see eye-to-eye quite frequently in Supreme Court decisions. For their first nine years together, the *Harvard Law Review* calculated that Scalia and Thomas agreed in 89.5% of the cases they decided.⁴ The total for the decade may be even a bit higher, since the *National Law Journal* puts their agreement at 96% during the last term, which was not included in the *Harvard Law Review* calculation.⁵

These numbers, however, are meaningless when considered in isolation. While the total is the highest level of agreement on the current Court, it is not significantly greater than its closest competitors. Consider that the same *Harvard Law Review* study shows 84.3% agreement between Justice David H. Souter and Justice Stephen Breyer during their first six terms together, and 83.9% between Justice Souter and Justice Ruth Bader Ginsburg in their first seven terms.⁶ No one has suggested that these Justices are simply marching in lockstep together and not thinking for themselves. Additionally, there is an even more telling comparison. During their last decade on the Supreme Court together, Justices William J. Brennan, Jr. and Thurgood Marshall voted together in 94.3% of cases.⁷ Yet, liberal admirers of the two men would surely be appalled

3. See Richard Carelli, *Thomas' Decisions Show Archconservative Bent*, ST. LOUIS POST-DISPATCH, Feb. 27, 1992, at 1C (quoting New York lawyer Cameron Clark, "It looks to me as if he's going to become a clone of Justice Scalia, confirming the worst fears of those who tend to be more liberal"); see also Aaron Epstein, *Conservatives Unhappy with Souter; Bush's Appointee Helped Produce Defeats for President*, ORANGE COUNTY REG., July 1, 1992, at A12 (quoting then University of Minnesota Law School Professor Suzanna Sherry).

4. See *The Supreme Court, 1999 Term: The Statistics*, Table II(B), 114 HARV. L. REV. 390, 406 (Table II(B)) (2000) [hereinafter *1999 Term*].

5. See Marcia Coyle, *Voting Alignments on the Supreme Court*, NAT'L L.J., Aug. 6, 2001, at C3.

6. See *1999 Term*, supra note 4, at 406.

7. See *The Supreme Court 1989 Term: Leading Cases: The Supreme Court in the Eighties*:

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at, and quick to reject, suggestions that Marshall was just a Brennan clone.

This essay will discuss that there are numerous constitutional questions on which Thomas has expressed his own views, or at least views in which he was speaking for himself rather than simply following the lead of Justice Scalia.⁸

II.

After ten years, it is only fair to examine Justice Thomas as an independent thinker by looking at the jurisprudential territory he has staked out for himself. Several themes emerge when Justice Thomas is analyzed in this manner.

A.

First, Clarence Thomas would have been more comfortable as a justice nominated in 1791 or 1891, instead of 1991. What he seems to hold most dear is the original intent of the Framers of the Constitution. He seems most comfortable quoting Alexander Hamilton and James Madison, rather than the decisions that have shaped the modern jurisprudence of the Supreme Court in the last fifty years.⁹ He seems like a man out of place in many ways who would have fit better into the doctrine of another time.

However, there is more to Justice Thomas than a compulsive devotion to the original intent of the Constitution. His opinions reflect a strong respect for the organizational order that the Constitution created, which leads him to be concerned—perhaps more than anything else—with maintaining and preserving the power and authority of the States. His view emphasizes the theory of Federalism, that all powers were intended to be given to the States by the Constitution, unless expressly given to the Federal government.¹⁰ Thomas writes about these views repeatedly, mostly as concurring or dissenting opinions.¹¹

A Statistical Retrospective, 104 HARV. L. REV. 367, 370 (Table II(B)) (1990).

8. See discussion *infra* Part II.A-C (discussing Thomas' views on federalism, abortion and state's rights).

9. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 126-31 (1995) (Thomas, J., concurring) (engaging in a lengthy examination of the limits the Framers intended to place on the equitable powers of the federal courts).

10. See *id.* at 131 (arguing that federal courts should first examine their role before infringing on state powers).

11. See *infra* notes 14, 19, 21, 45, 51 and 55 (discussing Thomas's concurring or dissenting opinions in *United States Term Limits v. Thornton*, *Missouri v. Jenkins*, *Hudson v. McMillian*, *Stenberg v. Carhart*, *United States v. Lopez*, *United States v. Morrison*, and *Printz v. United States*).

A major example of Thomas' belief in the preeminence of the States is his stance on the term limits debate. In *United States Term Limits v. Thornton*,¹² where the Court held that the States could not impose term limits on Congressional members, Thomas dissented.¹³ Thomas argued that where the Constitution is textually silent on an issue, it does not bar action by the States or the people, since all power comes from the States unless it is expressly given to the Federal Government.¹⁴ Thomas wrote:

As far as the Federal Constitution is concerned, then, the States can exercise all powers that the Constitution does not withhold from them. The Federal Government and the States thus face different default rules: where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it.¹⁵

In *Missouri v. Jenkins*,¹⁶ Thomas, in a concurring opinion, criticized Federal courts for overreaching in their use of equitable powers to remedy desegregation.¹⁷ He cited *The Federalist Papers* and the nation's early history for his reasoning.¹⁸ He also defended the Constitutional prerogatives of the States by arguing that local government is the best way to defeat institutionalized desegregation:

Federal courts do not possess the capabilities of state and local governments in addressing difficult educational problems. State and local school officials not only bear the responsibility for educational decisions, they also are better equipped than a single federal judge to make the day-to-day policy, curricular, and funding choices necessary to bring a school district into compliance with the Constitution.¹⁹

Sometimes, Justice Thomas rises to the defense of the States in strange contexts, where one might not expect this to be the principal argument. He raised the state authority argument in his dissent from

12. 514 U.S. 779 (1995).

13. See *id.* at 837-38 (Thomas, J., dissenting) (finding that allowing states to adopt term limits for Members of Congress would "erode the structure envisioned by the Framers.").

14. See *id.* at 845-46 (noting that the majority "fundamentally misunderstands the notion of 'reserved' powers").

15. *Id.* at 847-48.

16. 515 U.S. 70 (1995).

17. See *id.* at 114.

18. See *id.* at 129-31 (Thomas, J., concurring) (arguing that federal powers were never meant to infringe upon state sovereignty).

19. *Id.* at 131-32.

the Court's decision in *Hudson v. McMillian*²⁰ that certain beatings of prison inmates amounted to a violation of the Eighth Amendment's "cruel and unusual punishment" clause.²¹ Thomas argued that the "Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation," and maintained that the Court failed "to recognize that primary responsibility for preventing and punishing such conduct rests not with the Federal Constitution, but with the laws and regulations of the various States."²²

B.

As the aforementioned examples illustrate, there is little evidence that Justice Thomas is concerned about the jurisprudence of the last fifty years, which has elevated the importance of humanity and individual dignity as constitutional values. His concern for the prerogatives of the States often leaves little room to be solicitous of the rights of individuals.

One example of Thomas' concern for the prerogatives of the States is his dissenting opinion in the "partial-birth" abortion case, *Stenberg v. Carhart*.²³ In his dissent, Thomas went into graphic and gruesome detail, describing so-called "partial-birth" abortion procedures with the effect, and perhaps intent, to shock the reader.²⁴ His opinion reflects concern for the fetus,²⁵ for possible health risks to the woman having the abortion,²⁶ and for the States.²⁷ Nowhere in his discussion did Thomas pay attention to the impact of an unwanted pregnancy on the mother, who might not be able to get the late-term abortion. He described abortion simply as a matter to be regulated by the States and argued that courts should not be second-guessing the value judgments of state legislatures.²⁸ He wrote, "[t]he question whether States have a legitimate interest in banning the procedure does not require additional authority. In a civilized society, the

20. 503 U.S. 1 (1992).

21. *Id.* at 9-11.

22. *Id.* at 28 (Thomas, J., dissenting) (arguing that the Federal government does not have the authority to set standards for the beatings of prison inmates).

23. 530 U.S. 914 (2000) (holding a Nebraska statute banning partial birth abortions unconstitutional because it failed to consider the mother's individual health).

24. *Id.* at 984-89 (Thomas, J., dissenting) (providing graphic details of three different late-term abortion procedures).

25. *See id.* at 983-90 (describing the harm to the fetus).

26. *See id.* at 1015-18 (discussing the detrimental effects to a woman's health).

27. *See id.* at 1006-08 (noting possible problems for the States).

28. *Id.* at 1007.

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answer is too obvious, and the contrary arguments too offensive, to merit further discussion.”²⁹

The dissenting opinion in *Stenberg* was the first time Thomas expressed his own views on abortion.³⁰ However, in *Planned Parenthood v. Casey*,³¹ he joined the partial dissenting opinions of Chief Justice William H. Rehnquist³² and Justice Antonin Scalia.³³ The stridency of Thomas’ rejection of a constitutional right to abortion should not be overlooked, recalling that he told the Senate Judiciary Committee during his confirmation hearing in 1991, that “I did not and do not have a position on the outcome”³⁴ of *Roe v. Wade*,³⁵ the original decision recognizing a right to abortion. In his dissenting opinion in *Stenberg*, Thomas made clear what he really thought of the abortion right:

Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so.³⁶

In cases where there is a claim of individual rights, a plea for the Constitution to recognize the individual dignity of all, Thomas’ view of the Constitution is just plain stingy. Consistently, his passion is on the side of Federalism,³⁷ and any sign of compassion, as a prism through which to read and interpret the Constitution, is lacking.³⁸

29. *Stenberg*, 530 U.S. at 1007-08.

30. See *id.* at 983 (describing “partial-birth” abortions as “gruesome,” “traumatic,” and “border(ing) infanticide”); see also *Nomination of Judge Clarence Thomas*, *supra* note 2, at Part I, 222-23 (responding to questions noting that Thomas has never debated the issues and merits of *Roe v. Wade*).

31. 505 U.S. 833 (1992).

32. *Id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (arguing that *Roe* was decided wrongly according to *stare decisis*).

33. *Id.* at 979 (Scalia, J., concurring in the judgment in part and dissenting in part) (stating that although the States are constitutionally allowed to permit abortions whenever a citizen so chooses, each state is not constitutionally required to provide such abortions to its citizens).

34. *Nomination of Judge Clarence Thomas*, *supra* note 2, at Part I, 223 (answering questions about his actions indicating disagreement with the Court’s ruling in *Roe* including contributing articles, columns, and workgroups). See also Anton Bell, *Clarence Thomas: Evasive or Deceptive*, 21 N.C. CENT. L.J. 194, 207 (1995) (commenting that Thomas refused to give a definitive answer on abortion).

35. 410 U.S. 113 (1973).

36. *Stenberg*, 530 U.S. at 980 (Thomas, J., dissenting).

37. See Laura A. Till, *Justice Clarence Thomas: The Emerging “New Federalist” on the Rehnquist Court*, 12 REGENT U. L. REV. 585, 588-89 (1999-2000) (asserting that Justice Thomas is the most ardent supporter of Federalism on the Supreme Court).

38. See Catharine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L.

C.

There is another hallmark of Thomas' tenure on the Supreme Court. He is engaging in his own brand of judicial activism.³⁹ Thomas is gradually building up, in concurring and dissenting opinions, an impressive array of invitations to litigants to bring cases to the Supreme Court and raise specific Constitutional issues he would like an opportunity to decide. Typically, these invitations raise issues that would allow Thomas to advance his belief in Federalism and the power of the States.⁴⁰

Thomas hardly promotes the image of a classic conservative justice who sticks to the issues raised in the cases before him and does not go roaming over the landscape of the Constitution. Of course, Thomas is not the first justice to give in to the temptation of wanderlust.⁴¹ However, it is somewhat surprising to see Thomas profess a form of constitutional restraint, through Federalism limitations on the power of Congress and the courts, and meanwhile, reach out beyond the issues presented to the Supreme Court for opportunities to advance his views of the Constitution.⁴²

The Commerce Clause is a favorite target for these Thomas excursions. In the Gun-Free Schools Zone Act case, *United States v. Lopez*,⁴³ where the Court struck down a Federal law penalizing possession of a handgun within one thousand feet of a school, Thomas wrote the lone concurring opinion.⁴⁴ He put the Court and future litigants on notice that he is ready, given the right case, to reconsider the "substantial effects" test under the Commerce Clause⁴⁵ because it is inconsistent with the original intent of the

REV. 117, 146 (1993) (describing Justice Thomas as a man who does not open his heart to individual cases of wrongdoing).

39. See Thomas L. Jipping, *Judge Thomas is the First Choice: The Case for Clarence Thomas*, 12 REGENT U. L. REV. 397, 470 (1999-2000) (discussing Thomas' use of judicial restraint as a form of judicial activism).

40. See Till, *supra* note 37, at 588-90 (explaining that Thomas' opinions advocate returning power to the States).

41. See generally Earl M. Maltz, *The Prospects for a Rival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 648-68 (1990) (discussing conservative judicial activism in the area of affirmative action programs).

42. See, e.g., *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (stating that in a future case the Supreme Court should temper its Commerce Clause jurisprudence in a way that is more faithful to the original understanding of the Commerce Clause).

43. 514 U.S. 549 (1995).

44. *Id.* at 584 (Thomas, J., concurring) (distinguishing his view from the majority opinion by noting that Commerce Clause jurisprudence must return to the original intent of the Framers).

45. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 190-91 (1997) (discussing the application of the "substantial effects" test to the Commerce Clause).

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Framers.⁴⁶

Similarly, in the Violence Against Women Act case, *United States v. Morrison*,⁴⁷ Thomas concurred briefly, stating that he had no quarrel with the decision invalidating the part of the federal statute that gave victims of gender-motivated violence the right to sue for damages.⁴⁸ This, Thomas noted, was a correct application of existing precedent.⁴⁹ However, Thomas again invited litigants to bring forth actions to abandon the “substantial effects” test and return to the Framers’ original intent when dealing with the Commerce Clause.⁵⁰ If he could find the right case and muster a majority, Thomas would return Commerce Clause jurisprudence to the days before the Great Depression, ignoring the Court’s opinions over the last sixty-plus years.

Traditional notions of Federalism are not the only fare promised in Thomas’ invitations. In the “Brady Act” (Handgun Violence Protection Act) case, *Printz v. United States*,⁵¹ Thomas accepted the Court’s decision to strike down the obligation of local law enforcement officials to conduct background checks on handgun purchases, based on Federalism.⁵² In his brief concurring opinion, however, he expressed the hope that the Court will have a chance to discourse on the meaning of the Second Amendment⁵³ as a separate and untapped source of limitation on the power of Congress.⁵⁴ Thomas even used the occasion to join in the contemporary debate among legal historians and constitutional theorists over the meaning of the Second Amendment.⁵⁵

46. See *Lopez*, 514 U.S. at 585 (calling for a “re-examination” of the application of the Commerce Clause in Supreme Court jurisprudence).

47. 529 U.S. 598 (2000).

48. *Id.* at 627 (Thomas, J., concurring).

49. *Id.* (consenting with the majority’s application of *Lopez*).

50. See *id.* (stating that until the Court replaces its existing Commerce Clause jurisprudence, Congress will be appropriating state police powers under the guise of regulating commerce); see generally CHRISTOPHER E. SMITH & JOYCE A. BAUGH, THE REAL CLARENCE THOMAS 186-88 (2000) (noting that Thomas is the sole justice to reject the “substantial effects” test).

51. 521 U.S. 898 (1997).

52. *Id.* at 936-37 (Thomas, J., concurring) (noting specifically the limited powers of the Federal government).

53. U.S. CONST. amend. II (stating “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

54. See *Printz*, 521 U.S. at 938-39 (Thomas, J., concurring) (welcoming a discussion on the breadth of the Second Amendment limiting Congressional action on the matter).

55. See *id.* at 938 n.2 (citing numerous authors and sources that have analyzed and critiqued the application of the Second Amendment).

Thomas has outlined an ambitious agenda for himself and the Court. It is a strange trademark for a Justice who consistently tells audiences that an important limitation on the power of the Supreme Court is that it cannot reach out to decide issues not properly presented before the Court.⁵⁶

III.

There are more curious aspects of Justice Thomas' tenure that stand out. It has long occupied the attention of lawyers and journalists watching the Supreme Court that Thomas almost never asks questions during oral argument, even though he sits among colleagues who are very active questioners.⁵⁷ This is not, in itself, remarkable. Justice Brennan rarely asked questions in his later years on the bench, and he was never criticized or ridiculed for it.⁵⁸

What is curious is that after saying little about the matter for years, Thomas gave a rather strange explanation to a group of high school students in December 2000.⁵⁹ He explained that when he was growing up, he spoke a dialect called "Geechee," or "Gullah," which comes from the area of southeast Georgia where he was born.⁶⁰ He said he developed the habit of listening in school, rather than asking questions, because he had a hard time mixing standard English with the dialect.⁶¹

Though this is a moving story, it is an odd explanation for a person who has been in public life almost continuously since 1974, including: giving many public speeches, some broadcast live on C-SPAN; testifying on live television and radio for days before the Senate Judiciary Committee; presiding over public meetings of government agencies; and engaging in a variety of public speaking opportunities.⁶² Indeed, it is hard to imagine a more commanding

56. See Address by Justice Clarence Thomas, Fifteenth Annual Ashbrook Memorial Dinner 4, 11 (Feb. 5, 1999) (commenting on Article III restraints on his power as a Justice), available at <http://www.ashbrook.org/events/memdin/thomas/speech.html>.

57. See generally Ken Foskett, *Thomas Building Conservative Judicial Legacy*, PALM BEACH POST, July 6, 2001, at 1A (remarking that Thomas is the only one of the nine justices that does not ask questions from the bench); David G. Savage, *Say the Right Thing*, 83 A.B.A. J. 54, 55-56 (1997) (asserting that Thomas' silence prompts a good amount of speculation, especially in comparison to his engaged colleagues); Calvin Trillin, *Doubting Thomas*, TIME, Jan. 8, 2001, at 16 (questioning whether Thomas' silence is an admirable value).

58. Savage, *supra* note 57, at 55.

59. See *Thomas Explains Silence*, FLA. TIMES-UNION, Dec. 14, 2000, at A8.

60. *Id.*

61. *Id.*

62. See generally *Clarence Thomas Biographical Data*, available at

voice than the deep baritone of Thomas. Perhaps it would have been better to leave his reasoning a mystery, rather than to explain it.

The speeches delivered by Thomas can also be curious at times, especially when they fail to acknowledge that they contradict each other. In February 1998, he spoke at a meeting of the American Inns of Court in Houston, Texas, and allowed the South Texas Law Review to publish a copy of his remarks, titled *Civility*.⁶³ The speech addressed the problems caused by the decline of civility in public discourse in American life, and particularly how the loss of civility makes self-governance more difficult.⁶⁴ This is certainly a much-discussed topic and one that seems a safe ground for a Supreme Court Justice seeking to avoid speaking on contemporary political or legal controversies.

Remarkably, however, in February 2001, Thomas delivered the important Francis Boyer lecture at the American Enterprise Institute in Washington, D.C.,⁶⁵ decrying the failure of many people to stand up for important principles and defend their beliefs. Without any reference to the earlier speech, he blamed this failure on “an overemphasis on civility” and claimed that “the insistence on civility in the form of our debates has the perverse effect of cannibalizing our principles, the very essence of a civil society.”⁶⁶ To be sure, in the Boyer Lecture, he was warning that too much civility can lead to political correctness and excessive self-censorship, which are not virtues Thomas values.⁶⁷ It is bizarre that Thomas gave the second speech without some acknowledgment that it takes a somewhat different tack than the first, or at least that it seeks to build on views he has already expressed.

IV.

Justice Clarence Thomas reached the milestone of ten years on the Supreme Court at a comparatively young age. Born on July 28, 1948,

<http://supct.law.cornell.edu/supct/justices/thomas.bio.html> (last visited Oct. 29, 2001).

63. See Clarence Thomas, *Civility*, 39 S. TEX. L. REV. 655 (1998) (critiquing America for its modern day lack of civility).

64. *Id.* at 658-59.

65. See Clarence Thomas, Francis Boyer Lecture, American Enterprise Institute for Public Policy Research (Feb. 13, 2001) (speaking on his observations in his role as a citizen of the United States), available at <http://www.aei.org/boyer/thomas/htm>.

66. *Id.* at 5.

67. *Id.* at 6.

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he passed the ten year mark at only fifty-three years old.⁶⁸ He is likely to have a long, record-breaking tenure on the Court. There will be many more opportunities to assess his performance in the years ahead and to look back at the durability of these preliminary observations.

68. See SMITH & BAUGH, *supra* note 50, at 15-18 (describing Clarence Thomas' background).