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“MY ROOKIE YEARS ARE OVER”

CLARENCE THOMAS AFTER TEN YEARS

SCOTT D. GERBER*

I'd like to thank Joe Johns of NBC News for that kind introduction. I'd also like to thank Steve Wermiel with the Program on Law and Government and James Prince with the Black Law Students Association for inviting me here today.

I was asked a couple of years ago to give a talk about what was then a work-in-progress. I still remember the e-mail I received from the person who was asked to introduce me. That particular person—a law student whom I won't name—asked me to provide him information concerning the substance of my talk. He wrote: “Are you supporting Clarence Thomas? Are you against him?” I think the law student's questions nicely capture the reaction to Justice Thomas.

My answer was neither. I simply started following Thomas because of work I had been doing independent of him on the relationship between the Declaration of Independence and the Constitution. I was working on the project as my Ph.D. dissertation at the University of Virginia¹ when then U.S. Court of Appeals Judge Clarence Thomas was nominated to the Supreme Court. At the time, Thomas was making essentially the same argument that I was trying to make in my dissertation. Consequently—given who he was and who he might become—I started following him to see where he might be going

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1. A revised version of my dissertation was published as SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION (1995) [hereinafter GERBER, TO SECURE THESE RIGHTS].

with his theory of constitutional interpretation. Eventually, that led to the book that Joe Johns had kindly held up to the camera. The book, *First Principles: The Jurisprudence of Clarence Thomas*, is a study of Justice Thomas's acclimation period on the Supreme Court.² What I try to do in the book is move beyond Anita Hill and analyze what Justice Thomas has done on the Court—and the reaction to what he has done.

What I found is that people judge *Justice* Thomas as they judged *nominee* Thomas—in almost purely partisan terms. Bluntly stated, the left strongly dislikes his jurisprudence and the right strongly supports it. Indeed, the reviews of my book are consistent with this state-of-affairs: the left likes the book until I agree with Justice Thomas, and the right likes it until I disagree with him.³ I think that proves my point pretty well.

The other conclusions I came to were that Justice Thomas is not merely Justice Scalia's loyal apprentice. He has written many provocative opinions—separate opinions, primarily—many of which Justice Scalia has declined to join. For example, Nancie Marzulla mentioned the *Lopez* concurring opinion⁴ during her remarks. Only Thomas signed off on that opinion: Scalia wouldn't join it. There are a number of other examples.⁵

Most importantly, though, at least in terms of what I discovered about Justice Thomas's jurisprudence, is that on civil rights questions he's what I term a "liberal originalist," while on civil liberties and federalism questions he's a "conservative originalist." To make the point more clearly, Justice Thomas appeals in race cases to the principle of inherent equality at the heart of the Declaration of Independence—the "natural law thing," to quote Senator Biden from the confirmation hearings—while in civil liberties and federalism cases he does what Robert Bork would have done had he been confirmed—he asks how James Madison would have decided the question. The two approaches are different.⁶

Finally, I also found that Justice Thomas, like everyone else on the

2. SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999).

3. See, e.g., Howard Ball, Book Review, *Justice Clarence Thomas's Significance: Much Ado*, . . . BOOKS-ON-LAW, available at <http://jurist.law.pitt.edu/lawbooks/revjun99.htm> (left); John C. Eastman, Book Review, *Taking Justice Thomas Seriously*, 2 GREEN BAG 2D 425 (right).

4. *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

5. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358 (1995) (Thomas, J., concurring in the judgment).

6. For more on the difference between "liberal originalism" and "conservative originalism," see GERBER, *TO SECURE THESE RIGHTS*, *supra* note 1, at Introduction.

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Court, seems to write judicial opinions that read very much like his prior policy speeches—especially in civil rights, the area of the law in which he has the most prior experience. That, I think, is the lesson of American Legal Realism and Critical Legal Studies.

What I would like to talk about now, though, is what has happened since Justice Thomas's acclimation period ended. Justice Thomas himself is on record as saying that his post-acclimation period would be different from his acclimation period. He said in a speech after his fifth term had ended that his "rookie years were over."⁷ However, he also has said that he was "not evolving."⁸ He has made the latter remark in response to criticism he has received.

In terms of the opinions he has written recently, his jurisprudential framework remains what it was during his acclimation period. He is still very individualistic on civil rights questions—as compared to the more group-oriented approach of the traditional civil rights community—and he is still very Borkian on civil liberties and federalism. And he remains in terms of influence limited primarily to separate opinions—*i.e.*, to concurring and dissenting opinions.

However, in those separate opinions Justice Thomas seems even more willing now than he was during his acclimation period to say that well-established precedents and/or entire areas of the law should be rethought. I'll give you a couple of examples. In the Fifth Amendment self-incrimination context he wrote in a concurring opinion in *U.S. v. Hubbell* (2000) that he would be willing to reconsider whether the right against self-incrimination is limited only to testimony against oneself.⁹ He appears to think that the Fifth Amendment covers *all* evidence against oneself—which is a fairly liberal view.

On the other end of the spectrum, in *Mitchell v. United States* in 1999—for himself alone, Justice Scalia wasn't with him on it—he said that he might be willing to permit comment by the state on a defendant's failure to testify in a criminal trial.¹⁰ That's quite a dramatic thing to say—he essentially called for the overruling of *Griffin v. California* (1965).¹¹

In the Commerce Clause area, Justice Thomas has continued to

7. Clarence Thomas, Address to the National Center for Policy Analysis (Sept. 6, 1996) (C-SPAN broadcast Oct. 19-20, 1996).

8. As quoted in Clarence Page, *Extending An Olive Branch (With Pits) to Justice Thomas*, CHI. TRIB., June 3, 1998, at 19.

9. 530 U.S. 27, 49 (2000) (Thomas, J., concurring).

10. 526 U.S. 314, 341 (1999) (Thomas, J., dissenting).

11. 380 U.S. 609 (1965).

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reaffirm his commitment to the fairly narrow states' rights view he articulated at length in *Lopez*. His separate opinion in *U.S. v. Morrison* (2000)¹²—again not joined by anyone else, not even by Justice Scalia—is an example of this fact. Basically, he wants to overrule the “substantial effects” test, which is still the prevailing test.

Justice Thomas issued an equally dramatic statement in the area of political speech. In a dissenting opinion in *Nixon v. Shrink Missouri Government PAC* (2000)¹³ he said that it was time to overrule *Buckley v. Valeo* (1976), the landmark campaign spending case.¹⁴

He also reaffirmed his earlier position in the commercial speech area. In *Greater New Orleans Broadcasting Association v. United States*,¹⁵ a 1999 case, and *Glickman v. Wileman Bros. & Elliot*,¹⁶ a 1997 case—again only for himself, Scalia not with him—he wrote that we should stop treating commercial speech as a separate category inferior to political speech—that commercial speech, like political speech, deserves substantial protection under the First Amendment.¹⁷

Then, there's the Privileges or Immunities Clause. I'm sure those of you who have taken Constitutional Law are well aware that, traditionally, that clause has been meaningless.¹⁸ However, Justice Thomas stated in a separate opinion in *Saenz v. Roe* (1999) that he's willing to revisit the Privileges or Immunities Clause, although he also said that he doesn't want to turn that clause into another mechanism for “inventing new rights.”¹⁹

Justice Thomas is also willing—and this struck me quite dramatically—to reconsider *Calder v. Bull*, which was decided in 1798.²⁰ He wrote in a separate opinion in *Eastern Enterprises v. Apfel* in 1998²¹ that perhaps the *Ex Post Facto* Clause should be applied to the civil context and not simply to the criminal context, which *Calder* had held.

He also wrote about abortion—actually wrote an opinion about

12. 529 U.S. 598, 627 (2000) (Thomas, J., concurring).

13. 528 U.S. 377, 410 (2000) (Thomas, J., dissenting).

14. 424 U.S. 1 (1976).

15. 527 U.S. 173, 197 (1999) (Thomas, J., concurring in the judgment).

16. 521 U.S. 457, 504 (1997) (Thomas, J., dissenting).

17. Justice Thomas first articulated this position in a concurring opinion in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment).

18. See *Slaughter-House Cases*, 83 U.S. 36 (1873).

19. 526 U.S. 489, 521, 528 (1999) (Thomas, J., dissenting).

20. 3 U.S. 386 (1798).

21. 524 U.S. 498, 538 (1998) (Thomas, J., concurring).

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it—a strong dissent in the *Stenberg v. Carhart* case in 2000.²² I know that Steve Wermiel's Constitutional Law class has been talking about abortion recently, so I'm sure you're quite well-versed in the case doctrine in this area. *Stenberg* was the partial birth abortion case of last year. In that case Justice Thomas called partial birth abortion "infanticide,"²³ which is a fairly strong word, and he also called *Roe v. Wade* (1973)²⁴ "grievously wrong,"²⁵ which is also quite a strong statement.

Finally, in terms of doctrine, Justice Thomas has written a couple of opinions about sexual harassment. He has written both ways on it. For example, he said in a separate opinion in *Burlington Industries, Inc. v. Ellerth* (1998) that "sexual harassment is not a free-standing federal tort."²⁶ That seems to cut against him having a very strong commitment to anti-sexual harassment law. Yet in another 1998 case, he agreed with the Court that anti-sexual harassment laws protect males from sexual harassment by other males.²⁷

Equally intriguing, I think, is the reaction to Justice Thomas. I would like to spend a few minutes on that. The right still loves him. For example, in 1999-2000, Regent University Law School—a conservative law school in Virginia founded by religious broadcaster Pat Robertson—devoted an issue of its law review to Justice Thomas. The symposium was titled "A Tribute to Justice Clarence Thomas,"²⁸ and all of the articles were very favorable towards him. In fact, I don't think there was a single article in the symposium that had anything bad to say about him. Similarly, in 1999, *The Weekly Standard*—a conservative news-magazine edited by William Kristol—ran a cover story that called Justice Thomas "America's leading conservative."²⁹ This, again, is evidence of how much the right is committed to him.

Many on the left still despise him, however. In 1998, for example, Jack Germond and Jules Witcover, two prominent columnists for *The Baltimore Sun*, wrote that Justice Thomas was an angry man who doesn't have the "temperament to function as a judge at the very

22. 530 U.S. 914, 980 (Thomas, J., dissenting).

23. *Id.* at 982.

24. 410 U.S. 113 (1973).

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

26. 524 U.S. 742, 766, 774 (1998) (Thomas, J., dissenting).

27. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (Thomas, J., concurring).

28. Symposium, *A Tribute to Clarence Thomas*, 12 REGENT U. L. REV. (1999-2000).

29. Andrew Peyton Thomas, *America's Leading Conservative*, THE WKLY. STANDARD, Sept. 6, 1999, at 23.

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highest level.”³⁰

The Anita Hill controversy isn’t dead, either. Jeffrey Rosen, a liberal law professor who teaches at George Washington University, recently wrote: “After nearly a decade on the Supreme Court, [Clarence Thomas] has developed into a provocative, fiercely independent, and interestingly radical justice, willing to rethink entire areas of constitutional law from the ground up. But in the public mind, he remains nothing more than a dirty joke.”³¹ Indeed, new Anita Hill-Clarence Thomas confirmation books continue to be published, even though I don’t think there’s anything more to say about that particular controversy. When I wrote *First Principles* I literally counted about fifteen of these things—and the number keeps increasing. In fact, I’ve been asked to review one that was published recently.³² I’ll be curious to see if it adds anything to the debate.

Perhaps most importantly, though, there has been some change in attitude on the left towards Justice Thomas. Some liberals are now willing to admit that he has many interesting things to say—and that he has a right to say them. This fact was most in evidence during the controversy over whether Justice Thomas should be allowed to speak at the National Bar Association meeting in 1998. As you might recall, the late Judge Leon Higginbotham—perhaps Justice Thomas’s most vocal critic—had tried to get the nation’s highest-ranking black judge dis-invited from the nation’s largest black-lawyers’ meeting. Higginbotham was unsuccessful, and at the time a number of leading columnists of African-American descent criticized the efforts to silence Justice Thomas.

Clarence Page, for example, who writes for *The Chicago Tribune*, wrote:

I, too, would rather have an African-American on the Supreme Court who was closer to the views and stature of the late Thurgood Marshall, whom Thomas replaced. But, as one black person who believes black people are as diverse as any other people, it rankles me to hear black professionals attempt to banish Thomas, merely because his views disagree with the majority of his peers.³³

30. Jack W. Germond and Jules Witcover, *Behind Clarence Thomas’ Strange Complaint Is One Very Angry Man*, BALT. SUN, Aug. 3, 1998, at 11A.

31. Jeffrey Rosen, *Privacy in Public Places*, 12 CARDOZO STUD. IN L. & LITERATURE 167, 178 (2000).

32. See CHRISTOPHER E. SMITH AND JOYCE A. BAUGH, *THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY* (2000). My review of the Smith and Baugh book will appear in the *American Journal of Legal History*.

33. Page, *supra* note 8, at 19.

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Similarly, Cynthia Tucker, the editor of *The Atlanta Constitution's* editorial page, wrote:

Thomas is no less "black" because he is ultraconservative. The notion that all blacks should think alike is ridiculous, stereotypical, and demeaning The petty insults and sophomoric name calling—"Uncle Tom Justice," etc.—with which Thomas' critics greeted him, did not diminish his arguments, but rather cast doubt on their own.³⁴

And finally, the *Washington Post*—if ever there was a liberal bellwether it's the *Post*—editorialized:

Justice Thomas's views on issues such as affirmative action are, though certainly conservative, well within the range of accepted American discourse. White people who advocate similar positions are not similarly shunned This notion that Justice Thomas's proper role on the court is as a representative of an ethnic constituency is nonsense. His job is to interpret the law and the Constitution as faithfully as he can, not to represent anybody. It should be no concession at all to hear his interpretations.³⁵

Relatedly, it appears, at least to me, that Justice Thomas is more comfortable now with stepping forward than he was in the past. The National Bar Association convention certainly wasn't a friendly audience for him, but he went and spoke anyway. Also, recall the *Bush v. Gore* decision in December of 2000.³⁶ *The very next day*, Justice Thomas was willing to hold a question-and-answer session with students that C-SPAN broadcast—and he did so in a very composed and articulate way. He also explained for the first time on record why he doesn't ask many questions during oral argument. It's not because he's dumb—that's simply ridiculous. But that was the argument that many on the left were trying to make. For example, there was a guest speaker at Roger Williams Law School about two or three weeks ago—a Critical Race Theorist from Fordham named Terry Smith—and I asked him what the Critical Race twist is on why Justice Thomas doesn't ask many questions at oral argument. Professor Smith said that what they are trying to say about Justice Thomas is that he's dumb. But that's not why he doesn't ask many questions. In case you missed it, Justice Thomas stated during the question-and-answer session that the reason he doesn't ask many questions during oral argument is that he grew up speaking a dialect—Geechie Gullah—that makes him a little less comfortable

34. Cynthia Tucker, *Ask Clarence Thomas: Not All Blacks Think Alike*, ATLANTA J. & CONST., Aug. 2, 1998, at 5E.

35. Editorial, *Let Clarence Thomas Speak*, WASH. POST, June 20, 1998, at A18.

36. 531 U.S. 98 (2000).

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than maybe some of the rest of us might be with speaking publicly. Other people of significance have suffered that same history, including James Earl Jones. If anyone is articulate and eloquent, it's James Earl Jones.

I'd like to close by mentioning that Justice Thomas is still committed to the Declaration of Independence, which is why I started following him in the first place. He's on record on a number of occasions—especially with the Claremont Institute—as reaffirming his position that the founding principles of the American regime are those articulated in our founding document, the Declaration of Independence.³⁷

Thank you.

37. See, e.g., Clarence Thomas, The Virtue of Practical Wisdom, Address to the Claremont Institute, Feb. 9, 1999, available at <http://www.claremont.org/publications/thomas2.cfm> (last visited Nov. 11, 2001).