

# CLARENCE THOMAS: THE FIRST TEN YEARS LOOKING FOR CONSISTENCY

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Ten years ago, when George Herbert Walker Bush nominated Clarence Thomas to replace Thurgood Marshall as an Associate Justice of the United States Supreme Court,<sup>1</sup> I, like many Americans and most lawyers, waited with interest to hear information about this soon-to-be-powerful man. I had a vague recollection from my recent law school days of hearing about a young, conservative, black federal judge who might be in line for a nomination to the Court. This vague reference was all that I had heard of Clarence Thomas prior to the Fall of 1991.

When stories about Thomas began to appear in the press,<sup>2</sup> the information supported my tenuous perceptions: Thomas was a young, extremely well educated African-American from a modest background.<sup>3</sup> Thomas had worked in the Reagan and Bush administrations and had publicly denounced affirmative action and other policies generally supported by what was still known as the 'Civil Rights Community.'<sup>4</sup> While I was in no way pleased by what

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1. See Margaret Carlson, *Marching to a Different Drummer*, TIME, July 15, 1991, at 18 (discussing President Bush's selection of Clarence Thomas to succeed Thurgood Marshall on the Supreme Court).

2. See, e.g., *id.* (explaining Thomas' position on affirmative action and the civil rights movement); David A. Kaplan, *Supreme Mystery*, NEWSWEEK, Sept. 1, 1991, at 18 (providing a lengthy profile of Thomas' career, personal history, and political views and highlighting the contradiction that "Thomas is an intense opponent of affirmative action, yet has benefited from it throughout his life").

3. See Carlson, *supra* note 1, at 18 (noting that Thomas grew up in a home without indoor plumbing in "dirt-poor rural Georgia").

4. See Jack W. Germond & Jules Witcover, *Behind Clarence Thomas' Strange Complaint is One Very Angry Man*, BALT. SUN, Aug. 3, 1998, at 11A (noting that Thomas has suggested that affirmative action implies an inferiority to which he does not

these stories indicated about Thomas' political and social views,<sup>5</sup> I was not particularly surprised or upset. After all, we had a Republican president. One of the reasons why I had so fervently hoped that we would not have a Republican president was that I knew he would have the authority to appoint people to the Court that agreed with him and not me. With the rare, wonderful and blindly lucky exception of William Brennan<sup>6</sup> or David Souter,<sup>7</sup> presidents usually do a pretty good job of choosing people with ideologies similar to their own. Thus, I was not surprised that one of President Bush's judicial nominees would share his ideology.

However, I did have a certain amount of discomfort with the fact that this new Justice would be the only African-American on the Court. This discomfort stemmed out of the fact that his views on issues, particularly those with direct impact on and special interest to the African-American community, were quite divergent from the beliefs of my family, friends and most African-Americans that I knew.

Yet even my concern that the only African-American on the Court would not be ideologically representative of the broader African-American community did not cause me significant concern. Although my political views are much closer to what I perceive to be the "mainstream" among African-Americans than Justice Thomas', I do not subscribe to the belief that it is necessary or even preferable, that all or most black people share similar political beliefs. While I acknowledge that the culture, history and experiences that most African-Americans share across relevant social boundaries such as

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subscribe); *Doubts About Thomas: William Gibson of the NAACP Announces Decision to Oppose Clarence Thomas's Nomination for the Supreme Court*, TIME, Aug. 12, 1991, at 32 (discussing how the nation's oldest civil rights organization, while praising Thomas' success in overcoming poverty in rural Georgia, criticized Thomas' "insensitivity to giving those who may not have any bootstraps the opportunity to pull themselves up").

5. I am an ardent supporter of racially-conscious admissions and employment policies, as well as many other kinds of policies that Thomas apparently opposed.

6. See Richard Lacayo, *One Step Down. Who Steps Up?*, TIME, Apr. 18, 1994, at 35 (discussing the "famous mistake of [Republican President] Dwight Eisenhower [who] decided it would help him win the 1956 election if he gave the Court seat to an Irish Catholic: William Brennan, who turned out to be one the century's most effective Court liberals"); Martin Tolchin, *Vacancy on the Court; A Man in Close Touch with People as well as with History*, N.Y. TIMES, July 22, 1990, at A22 (recounting Justice Brennan's appointment to the Supreme Court by President Eisenhower in 1956).

7. See Neil A. Lewis, *Sworn in as 105th Justice, Souter Says Shock Recedes*, N.Y. TIMES, Oct. 9, 1990, at A22 (noting that conservatives have long derided Justice Souter as a judicial activist); Vivea Novak, *Off the Bench? Think the Ashcroft Battle was Ugly? The War Over Our Next Supreme Court Justice Could Start Soon*, TIME, Feb. 26, 2001, at 54 (discussing how the right wing is opposed to "more Souters," a phrase used to describe Justices appointed by a Republican President who later vote with the liberals).

class, age and geography, make it likely that there will be relative unanimity on some key issues, I think diversity of opinion in the African-American community would be a significant advantage to our political power and the social and economic standing of African-Americans. If more black people demonstrated a conservative viewpoint on some subjects, or at least indicated a relative openness to some ideas from the right of the political spectrum, perhaps African-Americans would be taken as seriously and paid as much attention as other potential swing voter groups, such as “suburban Moms”<sup>8</sup> or “Reagan Democrats.”<sup>9</sup> These swing votes, at least according to the media, dominate the focus of our current national politics.<sup>10</sup> If more of African-Americans were considered to be potential political free agents, both major parties would be obliged to curry our favor as opposed to ignore us as both parties primarily do now. One party ignores us out of security and the other out of resignation.<sup>11</sup> Thus, even the fact that the only African-American on the Court would be a conservative and not representative of the ideology of most black people, although certainly a disappointment, was something that I thought might, in an odd way, invigorate the political dynamics of Black America in an interesting, if not completely positive, way.

But as the days, weeks and years passed, notwithstanding my early stoicism, serious concerns about the candidate, and later the Justice, began to arise. These concerns were not based on Justice Thomas’ beliefs or ideology, but on a growing set of inconsistencies that began to arise between some of his beliefs and actions. With all due respect to a man who was highly accomplished even before he became a Supreme Court Justice and who has received constant and seemingly heartfelt support from many of his colleagues, I still have serious concerns about these inconsistencies. It is these issues that have dominated my perception of the first ten years of Justice Thomas’

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8. See Parties Woo “Soccer Mom” with Lots of Family Talk, USA TODAY, Aug. 29, 1996, at 14A [hereinafter “Soccer Mom”] (identifying the population of stressed-out suburban moms as a target of political strategists due to their position as swing voters).

9. See Laurence I. Barrett, *Reagan Democrats’ Divided Loyalties (Some Will Vote for Michael Dukakis, Some Will Vote for George Bush)*, TIME, Oct. 31, 1988, at 14 (describing Reagan Democrats as a critical voting group representing twelve percent of the electorate).

10. See “Soccer Mom,” *supra* note 8, at 14A (noting that suburban moms are a critical component of the national class of swing votes).

11. One could even point to the lack of focus of the major third party insurgence of Ralph Nader and the Green party on the issues of the urban poor to support the conclusion that the relative political hegemony of the black community discourages attention even from the far left.

tenure on the Court and that I will address briefly.

The first of these concerns is not focused exclusively on Justice Thomas but on the block of the Court with which he has identified himself from the beginning of his tenure. This block of invariably three Justices (Rehnquist, Scalia and Thomas)<sup>12</sup> and more often than not five Justices (including O'Connor and Kennedy)<sup>13</sup> have been consistently characterized by themselves and others as "judicial conservatives."<sup>14</sup> Justice Thomas has been similarly characterized by himself and others as a "judicial conservative."<sup>15</sup>

Ten years ago, when Justice Thomas was nominated to the Court, I had just graduated from law school and I was very familiar with the late 20th century, post-Warren Court judicial conservative ideology.<sup>16</sup> As expressed by former D.C. Circuit Court Judge Robert Bork, Justice Antonin Scalia and others, judicial conservative theorists argued that the Warren Court and other liberal activist courts had stepped outside the proper bounds of their duty as jurists.<sup>17</sup> These liberal activist courts had ignored the strict construction and original intent of the Constitution in order to impose legal opinions upon the nation that were not in line with the will of the people as expressed

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12. See SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 209-10 (1999) (providing statistical data that Justices Rehnquist, Scalia, and Thomas voted together seventy-seven percent of the time during the 1991-95 terms).

13. See *The Supreme Court, 1999 Term: The Statistics*, 114 HARV. L. REV. 390, 395 (2000) (noting that during the Court's 1999-2000 term, the majority in eleven of the eighteen 5-4 decisions comprised Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas and that no other block of Justices voted together to create a 5-4 decision more than once); see also *The Supreme Court, 1998 Term: The Statistics*, 113 HARV. L. REV. 400, 405 (1999) (indicating that during the 1998-99 term, seven out of sixteen 5-4 decisions included Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas); *The Supreme Court 1997 Term: Leading Cases*, 112 HARV. L. REV. 355, 371 (1998) (noting that in the 1997-98 term, six out of fifteen 5-4 decisions included Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas).

14. See Frank I. Michelman, *Bush v. Gore: Suspicion or the New Prince*, 68 U. CHI. L. REV. 679, 679-80 (2001) (characterizing Justices Rehnquist, Scalia, Thomas, O'Connor and Kennedy as judicial conservatives who acted suspiciously out-of-character in *Bush v. Gore*, 531 U.S. 98 (2000)); see also Erwin Chemerinsky, *The Crowded Center*, 80 A.B.A. J. 78, 79 (1994) (characterizing Justices Rehnquist, Scalia and Thomas as the Court's conservatives, who are often joined by Justices O'Connor and Kennedy).

15. See Terry Eastland, *Judicial Selection: All Presidential Candidates Should Face Questions on this Important Issue*, DALLAS MORN. NEWS, Feb. 20, 2000, at 5J (characterizing Justice Thomas as a judicial conservative consciously appointed by Republican president).

16. See generally Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747 (1992) (criticizing the liberal constitutional interpretations of the Warren Court).

17. See generally Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379 (1991) (providing a summary of originalist arguments by Bork, Kay and other conservative scholars).

by elected legislatures and were not justified by the language of the Constitution.<sup>18</sup> The argument continued that even if some of these judicially-imposed decisions were “laudable”<sup>19</sup> or “socially desirable,”<sup>20</sup> they were still erroneous and dangerous actions by a non-elected judicial entity with no real basis for their decisions in the law. It was on this basis that Bork and others of his ilk argued that the case of *Brown v. Board of Education of Topeka*,<sup>21</sup> although “laudable,” had been a severe judicial overreach and error.<sup>22</sup>

As a recent law school graduate, still somewhat immersed in the theoretical intricacies as opposed to the practical realities of constitutional theory, I actually found myself somewhat, if not completely, sympathetic to the foundational principles of this judicial conservative theory. Although I thought the application of this theory to argue that cases addressing racially discriminatory laws and practices were wrongly decided, was unjustifiable and strongly suggestive of serious racial bias, I was sympathetic to the idea that the proper role of judges should be to interpret and not make the law. I

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18. See, e.g., *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (arguing that the majority unjustifiably overrode the Colorado state legislature and imposed the will of the liberal law school elite on the people of Colorado by striking down a law denying homosexuals state protection); ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 96 (1996) (arguing that by relaxing their commitment to bedrock legal principles, judges have “slouched” toward a world of moral relativism and diminished society); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990) [hereinafter *THE TEMPTING OF AMERICA*] (explaining Bork’s originalist perspective on the Constitution); Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 N.W. U. L. REV. 226, 283 (1988) (espousing an originalist theory and claiming that the framers intended judges to not have “any role as formulators of some values apart from positive law”).

19. *THE TEMPTING OF AMERICA*, *supra* note 18, at 75 (arguing that although *Brown v. Board of Education of Topeka* was a “great and correct decision,” it was a weak and unsupported interpretation of the law).

20. *THE TEMPTING OF AMERICA*, *supra* note 18, at 76 (explaining how the Warren Court attempted to do what was socially acceptable or wise).

21. 347 U.S. 483 (1954) (holding that the segregation of public schools was unconstitutional).

22. See Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 364-66, 373, 376 (1981) (criticizing *Brown v. Board of Education of Topeka* as being wrongly decided). While Judge Bork has actually publicly defended the results in *Brown*, he has criticized the Court’s decision in *Shelley v. Kramer*, 334 U.S. 1 (1948), which struck down racially restrictive covenants under the Fourth Amendment. Bork has also attacked the principle of “one man, one vote,” calling it “counter to the text of the Fourteenth Amendment.” Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1-15, 18 (1971) [hereinafter *Neutral Principles*]. Chief Justice Rehnquist, who was a law clerk to Justice Jackson while the Court was considering *Brown*, notoriously urged Jackson to uphold racially segregated schools in a memo later found in Judge Jackson’s file on the case. See David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES, Oct. 6, 1996, at 65 (noting that Justice Rehnquist later claimed the memo represented Justice Jackson’s views and not his own).

had been convinced of at least this much by my law school professor John Hart Ely. Ely had argued eloquently, both in print and in class, that the very basis of our democratic system is threatened when judges are not constrained by an objective limiting principle to form the basis for their decisions, particularly decisions that overturn democratically enacted law.<sup>23</sup> Although I did not agree with most of the applications of this concept to past and current legal disputes, I saw it as a reasonable and seemingly ascendant judicial philosophy.

The way that this supposed orthodoxy of judicial conservatism has further developed over the past ten years has left me severely disillusioned and suspicious of the true motivations of its proponents. What was characterized as a doctrine of judicial restraint has morphed into a new, aggressive, and repressive judicial activism.<sup>24</sup> The current Supreme Court has spent much of the last ten years restructuring the balance of power between the federal and the state governments.<sup>25</sup> They have done so with open disregard to what had supposedly been the immovable pillars of judicial conservatism: the plain language of the Constitution; the original intent of the framers; and controlling legal precedent.<sup>26</sup> In the two key areas of the Commerce Clause<sup>27</sup> and the Eleventh Amendment,<sup>28</sup> this Court, with

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23. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 7-8 (1980).

Our constitutional development over the past century has therefore substantially strengthened the original commitment to control by a majority of the governed. Neither has there existed among theorists or among Americans generally any serious challenge to the general notion of majoritarian control. Rule by an aristocracy, even in modern dress, is not what Americans have ever wanted . . . whatever the explanation, and granting the qualifications, rule in accord with the consent of a majority of those governed is the core of the American governmental system . . . [A]n untrammelled majority is indeed a dangerous thing, but it will require a heroic inference to get from that realization to the conclusion that the enforcement be unelected officials of an 'unwritten constitution' is an appropriate response in a democratic republic.

*Id.*

24. See Alexandria Jones, *The Rehnquist Court's Activism and the Risk of Injustice*, 26 CONN. L. REV. 53, 63 (1993) (discussing how the Rehnquist Court utilized judicial activism to limit and reform the habeas corpus procedures available to inmates after the Court was unsuccessful in urging Congress to alter the habeas corpus statutes).

25. See John J. Dinan, *The Rehnquist Court's Federalism Decisions in Perspective*, 15 J.L. & POL. 127, 193 (1999) (explaining that "[w]hat is distinctive about the Rehnquist Court is that a majority has, for the first time, confronted federalism directly and made the case that the defense of federalism ought to be an explicit responsibility of the Supreme Court").

26. See Kathleen M. Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 741, 758 (1998) (discussing the tenants of judicial conservatism).

27. See *United States v. Morrison*, 529 U.S. 598, 601-02 (2000) (holding that the portion of the Violence Against Women Act which granted a federal civil remedy to victims of gender-motivated violence occurring within one state's boundaries was

the faithful vote of Justice Thomas, has expressly and repeatedly interpreted constitutional provisions contrary to their language<sup>29</sup> and willingly (even enthusiastically) rolled back precedent in support of their view that the federal government has too much power in our society and that more of it should be given to the States.<sup>30</sup> Just recently, Justice Thomas and his four conservative colleagues, decided that the Eleventh Amendment prohibits private citizens from suing a State who discriminated against them.<sup>31</sup> The Court arrived at this holding even though, as the Court has expressly acknowledged repeatedly during the course of its decade long state sovereign immunity campaign, the Eleventh Amendment by its terms does nothing to preclude the kind of law suit at issue in the case.<sup>32</sup>

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outside Congress' Commerce Clause power); *United States v. Lopez*, 514 U.S. 549, 553-68 (1995) (holding that Congress exceeded its Commerce Clause power when it enacted the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a firearm in a school zone).

28. U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.").

29. See, e.g., *Board of Trustees v. Garrett*, 531 U.S. 356, 357-58 (2001) (explaining that although "by its terms" the Eleventh Amendment restricts only suits against a state by citizens of another state, the Court has expanded the amendment's applicability to also restrict suits by citizens against their own states); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000) (discussing the limitations the Eleventh Amendment places on citizen suits against states); *Coll. Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 627, 659-60 (1999) (discussing the Court's various interpretations of the Eleventh Amendment including the doctrine of sovereign immunity); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (restating the sovereign immunity doctrine); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

*Id.*

30. See, e.g., *Morrison*, 529 U.S. at 614-15 (rejecting the reasoning in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and other related cases, which reasoned that burdens on interstate travel can substantially effect interstate commerce.); *Lopez*, 514 U.S. at 556-60 (confining precedent such as *Katzenbach v. McClung*, 379 U.S. 294 (1964) and *Wickard v. Filburn*, 317 U.S. 111 (1942), which accepted aggregate effects on interstate commerce as sufficiently substantial to justify federal legislation under the Commerce Clause, to their particular facts).

31. See *Alexander v. Sandoval*, 531 U.S. 1049, 1523 (2001) (holding that a State whose driving license policies disparately impacted non-English speakers could not be sued by private citizens due to the Eleventh Amendment).

32. See *Garrett*, 531 U.S. at 363 (stating that "[a]lthough by its terms the Amendment applies only to suits against a state by citizens of another state, our cases have extended the Amendment's applicability to suits by citizens against their own states").

These decisions regarding the Eleventh Amendment and the Commerce Clause have defined the Court over the past ten years and have been subjected to broad and diverse criticism.<sup>33</sup> In my opinion, the most disturbing aspect of these cases is their clear demonstration of the emptiness of the supposed conservative judicial ideology and the invidious basis for the criticism by the political right of the groundbreaking Supreme Court decisions of the middle of the past century. If this Court and these five conservative Justices are willing to ignore the language of the Constitution, original intent, and precedent while serving their political or ideological agenda, then what was the real basis of their passionate criticism of Warren Court decisions<sup>34</sup> such as *Brown v. Board of Education*,<sup>35</sup> *Miranda v. Arizona*,<sup>36</sup> and *Gideon v. Wainwright*?<sup>37</sup> Was it really that the Justices were stepping beyond their proper role within our system when they decided that schools should not be segregated based on race,<sup>38</sup> that in order for our constitutional protections to have real significance citizens must be made aware of their rights,<sup>39</sup> or that due process requires that criminal defendants be provided with legal counsel that

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33. See, e.g., Kenneth W. Hartman, *Lochner's Cousin: Demonstrating Originalism's Failure and Its Disingenuous Nature*, 34 CREIGHTON L. REV. 517, 545-46 (2001) (criticizing the doctrine of state sovereign immunity as a nonoriginalist element of the Rehnquist Court's "new federalism"); Molly E. Homan, *United States v. Lopez: The Supreme Court Guns Down the Commerce Clause*, 73 DENV. U. L. REV. 237, 240 (1995) (criticizing the Supreme Court in *United States v. Lopez* for "effectively resuscitat[ing] an era of judicial policymaking and arbitrary decisions"); John Randolph Prince, *Caught in a Trap: The Romantic Reading of the Eleventh Amendment*, 48 BUFF. L. REV. 411, 504-07 (2000) (criticizing the Court for abandoning the text of the Eleventh Amendment in pursuit of a vague and unjust concept of state sovereign immunity).

34. See, e.g., THE TEMPTING OF AMERICA, *supra* note 18, at 99 (criticizing the Warren Court for creating a right of privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965), which struck down a state anti-contraceptive); *Neutral Principles*, *supra* note 22, at 7-18 (attacking various Warren Court decisions such as *Shelley v. Kraemer*, 334 U.S. 1 (1948), which struck down racially restrictive covenants under the Fourteenth Amendment); Monaghan, *supra* note 22, at 364-66 (providing a conservative criticism of *Brown* and other Warren Court decisions).

35. 347 U.S. 483, 495 (1954) (holding that segregation of school children on the basis of race deprives non-white children of equal educational opportunities).

36. 384 U.S. 436, 478-79 (1966) (holding that the Fifth Amendment right against self-incrimination requires the police notify an individual of their constitutional rights upon being taken into custody).

37. 372 U.S. 335, 343-44 (1963) (holding that indigent criminal defendants have a constitutional due process right to counsel).

38. See *Brown*, 349 U.S. at 298 (declaring that "racial discrimination in public education is unconstitutional").

39. See *Miranda*, 384 U.S. at 444 (holding that before a person in custody is interrogated by the police "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed").

gave rise to the critiques?<sup>40</sup> Or was it more *what* they were doing, rather than *how* they did it, that led to the dispute? The willingness of the current Court's majority to employ the same devices that they and their intellectual brethren have so roundly criticized when used by others, in the service of their own ideological goals strongly suggests that it was the substance of the challenged decisions that was the real point of contention.

While I cannot read minds and I am genuinely loath to assume malevolent motives, there are serious inconsistencies embodied in the current mission of the Supreme Court. It is Justice Thomas' enthusiastic participation in this mission that has caused me the most serious concern and that will have the broadest impact.

The other two major concerns that I have about the first ten years of Justice Thomas' tenure relate directly to inconsistencies created by some of his statements and actions. The first of these concerns arose during his confirmation hearings with his response to Anita Hill's allegations of sexual harassment. Notwithstanding the difficult position in which he found himself (or placed himself, depending on which of the various stories one believes),<sup>41</sup> I was stunned by Justice Thomas' public and passionate contention that he believed that the attacks upon him were racially motivated.<sup>42</sup> Indeed, he referred to the attacks and the process surrounding them as a "high-tech lynching for uppity blacks" in his statement to the Senate Judiciary Committee.<sup>43</sup>

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40. See *Gideon*, 372 U.S. at 344 (holding that our country's system of justice requires that a lawyer must be provided for those criminal defendants who cannot afford one is fundamental to).

41. See generally DAVID BROCK, *THE REAL ANITA HILL: THE UNTOLD STORY* (1994) (describing Anita Hill as "a little bit nutty and a little bit slutty" but later renounced the 1992 best-selling book, in which this statement was made); Jonathan Alter, *From Cold War to Steamy Sex: Conservative Turncoat David Brock is an Ideal Poster Child for the Debased Politics of the '90's*, NEWSWEEK, July 9, 2001, at 36 (discussing how the media, including David Brock's book, depicts public figures).

42. See, e.g., Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: The Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367, 1380 (1992) (explaining how Clarence Thomas had accused the Senate Judiciary Committee of racial discrimination in regard to the Anita Hill allegations). But see 137 CONG. REC. S15117-02 (daily ed. Oct. 24, 1991) (statement of Sen. Leahy) ("Race played no role in the Senate's decision to investigate, and it was unworthy for those who supported Judge Thomas to claim that it did. It was even more unworthy for Judge Thomas to endorse such claims.").

43. Mortimer B. Zuckerman, *Black and White in America*, U.S. NEWS & WORLD REP., Oct. 28, 1991, at 92 (quoting Thomas' "impassioned reference to a 'high-tech lynching for uppity blacks'"); see also 137 CONG. REC. S14622-01 (daily ed. Oct. 15, 1991) (statement of Sen. Exon) (commenting that Thomas' statements that the Senate Hearing had occurred "in a manner equivalent to . . . a lynch mob" was a statement that was "well orchestrated and employed" by Thomas and his supporters).

In retrospect one can only assume that Thomas would have regretted comparing his odyssey, painful as it must have been, to the deaths and brutal mutilations of thousands of other African-Americans over the past 200 years. But even with the rhetoric somewhat toned down, it seemed like an odd and inconsistent charge to be made by Thomas for at least two reasons. First, he had distinguished himself as one of the few African-Americans who demonstrated an almost enthusiastic willingness to reject allegations of discrimination raised by other racial minorities in his position as head of the United States Equal Employment Opportunity Commission ("EEOC")<sup>44</sup> and elsewhere.<sup>45</sup> It is ironic that during Thomas' most serious personal and professional crisis, a man who had built his career on a belief (one can only assume that it was a sincerely held one) that too many of the difficulties that African-Americans have experienced since the civil rights movement have been attributed to racial bias, would fall back on this same explanation to describe his situation. Thomas used the now legendary "race card" in a more profound and significant way than Johnny Cochran or anyone else has ever used it.

Second, Thomas' claim of racial discrimination had such a remarkably weak basis. Thomas' allegation appears to have been that the allegations of sexual harassment were not only erroneous, but were only raised against him because he was a black person who was also a conservative by people who had a particular animus to black

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44. See Bruce Shapiro, *Good Reasons for Doubting Thomas*, THE NATION, Sept. 23, 1991, at 336 (discussing how, as head of the EEOC, Thomas initially defended some affirmative action policies; however, in 1984, he opposed all affirmative action and began blocking enforcement of anti-discrimination laws. In fact, he told the Heritage Foundation in 1987 that "I believe firmly that I should have taken a more aggressive stand against affirmative action in earlier years."); see also Carlson, *supra* note 1, at 18 (stating that Thomas rejected the use of minority-hiring statistics to prove discrimination and once asked a congressional committee whether anyone would ever suggest that Georgetown University was discriminating against white basketball players because its team was all black); Kaplan, *supra* note 2, at 18 (quoting Thomas as stating that those civil rights leaders who opposed him when he was appointed to a second term as chair of the EEOC did little more than "bitch, bitch, bitch, moan and whine"); Tim Smart, *A Conundrum Named Clarence Thomas*, BUS. WK., July 15, 1991, at 27 (noting that Thomas angered civil rights organizations by shifting the EEOC's focus from class-action cases and hiring goals for minority groups to specific acts of discrimination); Kenneth T. Walsh et al., *Scouting Thomas: Bush's Court Nominee Sparks Renewed Debate Over Race and Abortion*, U.S. NEWS & WORLD REP., July 15, 1991, at 22 (noting that in 1982, the EEOC filed ninety-five cases in court on behalf of individuals, but by 1989, after Thomas changed direction, the EEOC filed 392 such actions).

45. See Kaplan, *supra* note 2, at 18 (discussing how during his brief stint as head of the Office of Civil Rights in the U.S. Department of Education, Thomas clashed with Department employees who accused him of refusing to enforce anti-discrimination laws in school athletic programs).

conservatives (as opposed, I assume, to black liberals and/or white conservatives). So even if one accepts Thomas' factual assertion — that there was an organized attempt to smear his good name orchestrated by people who wanted to harm him because of the combination of his race and his ideology — as true, it is difficult to see how such an act, as despicable as it may be, would constitute racial discrimination. Again, according to Thomas, it was his willingness to express his beliefs that resulted in the attacks on him. If another black man had expressed other beliefs, under this theory, he would not have been attacked in the same way. Although one can imagine a subtle and nuanced argument that explains the ways how the intersection of race with other factors such as gender, class, or ideology can lead to a wholly independent experience of discrimination other than the commonplace form of overt racial bias, it is easy to imagine how Thomas and other judicial conservatives would respond to such a textured and subtle legal construction. Suffice it to say, the EEOC under Thomas' leadership was not at the forefront of groundbreaking new causes of action for new kinds of racial discrimination.<sup>46</sup> While on the Court, Justice Thomas has expressed a willingness to support such expansions if they extend to actionable instances of racial discrimination.<sup>47</sup>

While I am again reluctant to claim knowledge of the motivations of others, the inherent inconsistency of Justice Thomas' beliefs and actions caused me great concern. The inconsistency arose from the willingness of Thomas, who had raised serious and indeed compelling arguments about the negative impact of frivolously using the "race card" and the impact such assertions have on those who

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46. *See supra* note 44.

47. For example, Thomas has refused to accept political district gerrymandering that entrenches white incumbents as discrimination against minorities and has ruled with the other conservative Justices that creation of remedial majority-minority voting districts violates the Equal Protection clause. *See Hunt v. Cromartie*, 526 U.S. 541, 548-49 (1999) (finding that summary judgement in racial gerrymander case is not appropriate where "evidence tends to support an inference that the State drew its district lines with an impermissible racial motive — even [with] no direct evidence of intent"); *Miller v. Johnson*, 515 U.S. 900, 924 (1995) (holding that Georgia's congressional redistricting plan that attempted to create majority-minority voting districts violated the Equal Protection clause because it did not advance a compelling state interest); *Shaw v. Reno*, 509 U.S. 630, 649 (1993) (holding that the appellants had stated a claim in order to defeat a motion to dismiss in a case challenging a reapportionment statute under the Equal Protection Clause as a form of racial gerrymander that intended to separate voters into different districts on the basis of race, even if the purpose of the redrawing was to give a stronger political voice to minorities); *see also* *Bush v. Vera*, 517 U.S. 952, 1000 (1996) (Thomas, J., concurring) (arguing that two majority-minority voting districts in Texas were subject to strict scrutiny because all racial classifications by the government, including state legislative redistricting, must be strictly scrutinized).

genuinely suffer from racial bias,<sup>48</sup> to use that very same “race card” when his place on the highest court was in doubt, and when the allegation rang hollow.

The other major instance of an apparent inconsistency involves Justice Thomas’ views about affirmative action. For years before his nomination to the Court, Clarence Thomas expressed a strong opposition to affirmative action on both legal and moral grounds.<sup>49</sup> He argued that past discrimination did not justify current racial preferences and that to the extent these programs helped blacks, they primarily helped middle and upper middle class blacks without addressing the problems of the poorest and neediest in the community.<sup>50</sup> He also argued that affirmative action programs created a stigma for those who benefited from them by fostering the impression that the apparent beneficiaries were somehow undeserving of their positions in schools, jobs, or whatever else they may have obtained through some kind of racial preference.<sup>51</sup> Indeed, Justice Thomas has stated that this stigma is reason enough to justify ending the practice.<sup>52</sup>

Quite understandably, Justice Thomas has been questioned about how he can reconcile these views with his own apparent benefit from affirmative action in his admittance to Yale Law School. Many have asserted that it is disingenuous, or worse, for a man who was admitted to school based on affirmative action to argue that others should not benefit from the practice.<sup>53</sup> I am willing to accept the notion that

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48. See Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL’Y REV. 402, 410-11 (1987) (arguing that affirmative action programs should only be used for those individuals who have suffered actual harm based on his or her race, rather than merely an individual’s race alone). But see Scott D. Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 S.U. L. REV. 43, 46 (1997) (outlining six opinions that Justice Thomas wrote during his first five years on the Supreme Court which illustrate the subtle changes in Justice Thomas’s opinions regarding affirmative action).

49. See Thomas, *supra* note 48, at 410-11 (stating that “[a]ny preferences given should be directly related to the obstacles that have been unfairly placed in . . . individuals’ paths, rather than on the basis of race or gender”).

50. See *id.* at 410 (explaining that the problems of the poorest and neediest in the community call for remedial education and training especially as technological continues to advances and the economy continues to shift from a manufacturing to a services-based economy).

51. See *id.* at 402 n.3 (stating that “[c]lass preferences are an affront to the rights and dignity of individuals . . . I think that preferential hiring on the basis of race or gender will increase racial divisiveness, disempower women and minorities by fostering the notion that they are permanently disabled and in need of handouts”).

52. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (arguing that affirmative action stamps minorities “with a badge of inferiority” and equating the practice with “laws designed to subjugate a race”).

53. See, e.g., Neil A. Lewis, *Justice Thomas Suggests Critics’ Views Are Racist*, N.Y. TIMES, July 30, 1998, at A1 (quoting former Chief Judge of the U.S. Court of Appeals

someone can benefit from a program like affirmative action in his or her youth, and then argue consistently for ending the practice. But this is not the position that Justice Thomas has taken. Instead of acknowledging the role that affirmative action played in his law school admission, he has offered the less-than-convincing argument that there was no real affirmative action program (no “set aside” or “preference” *per se*) at Yale University the year that he was admitted, but simply an initiative to find otherwise qualified applicants of different races.<sup>54</sup> Regardless of what the real story of Clarence Thomas’ admission to law school is, I can certainly imagine how he might have allowed himself to benefit from affirmative action in law school admissions feeling that there was nothing wrong with that at the time and only later, maybe as a result of some negative personal experiences in law school, have concluded that there were flaws with the system.

I find a disturbing inconsistency in his response to a much more important instance of affirmative action that happened later in his life — his nomination to the Supreme Court of the United States. When asked if race had played a part in his nomination of Thomas to the Court, President Bush responded that he had appointed “the most qualified person” for the position.<sup>55</sup> When asked the same question, Thomas said that he had no reason to disagree with President Bush, but that even if race did play a role, it was an appropriate factor for President Bush to consider.<sup>56</sup>

First, I can not imagine there is anyone who would seriously argue, notwithstanding these statements, that race played *no role* in the nomination of Clarence Thomas to the Supreme Court. I think that if one were to judge applicants for positions in school or for jobs on their objective qualifications alone, as demanded by the foes of

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for the Third Circuit, A. Leon Higginbotham’s statements regarding Thomas’ hypocrisy for opposing affirmative action after having benefited from it at Yale University).

54. See *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the U.S.: Hearings Before the Comm. on the Judiciary, United States Senate*, 102d Cong., 251, 358 (1991) [hereinafter *Nomination Hearing*] (statement of Clarence Thomas) (claiming that the Yale University program made an active effort to recruit minorities to apply, but then evaluated them on their individual merits and never used specific quotas).

55. Richard Cohen, *As It Happens* . . . , WASH. POST MAG., July 26, 1992, at W5 (stating that “President Bush . . . defended his choice of Clarence Thomas for the Supreme Court . . . [by saying] of all the lawyers in the whole country, Clarence Thomas was the most qualified”).

56. See *Nomination Hearings*, *supra* note 54, at 263 (“The President indicated that he nominated me [because] I was the best qualified. I take him at his word, but I also believe that there is a need in all of our institutions, on the Supreme Court and elsewhere, in diversity. I think it is important to our society.”).

affirmative action, it would be impossible to contend under any objective standards, that Justice Thomas was the *most* qualified person for the job in 1991.

What might the objective indicators of qualification for the highest court in the land be? Grades in law school? No, that seems a bit silly. How about length and depth of legal experience, and time on the federal or other high court bench? That seems a bit better. The American Bar Association, which until recently played a key role in the evaluation of the qualifications of nominees to the federal bench, uses this indicator as their relevant criteria.<sup>57</sup>

Justice Thomas had served as a federal judge for approximately a year and a half when he was nominated.<sup>58</sup> Although no one would suggest that nomination of Supreme Court Justices should be determined on time spent as a federal judge alone, no person can argue that there were not many other judges with substantially more experience than Clarence Thomas when he was nominated.<sup>59</sup> The point is not that his relative lack of qualifications should have precluded his nomination. Rather, the focus here is the apparent inconsistencies in some of the beliefs Justice Thomas has expressed and some of his subsequent statements and actions.

As I have already stated, I do not claim to be clairvoyant, but it is hard to imagine that Justice Thomas was not aware of his relative lack of objective qualifications when he accepted his nomination. He certainly cannot claim to have been unaware of the specific Justice that he was being nominated to replace. Indeed, he discussed the importance of Justice Thurgood Marshall's role as an African-American on the Court during his confirmation hearings.<sup>60</sup> Again,

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57. The ABA's Standing Committee on the Federal Judiciary evaluated a nominee's "professional qualifications," such as competence, integrity, and judicial temperament. In the late 1970s, the rules of the body were amended to permit consideration of extreme political views if they were thought to affect a candidate's judicial temperament. See Terry Eastland, *Closing Time for the Bar; And Happy Hour for Conservatives*, WKLY. STANDARD, Apr. 2, 2001, at 12. The ABA's evaluation criteria during the Bork nomination permitted examination of a prospective nominee's compassion and open-mindedness. See Elisabeth Frater, *Revenge of the Bork Conservatives*, NAT'L J., Mar. 31, 2001, at 970.

58. See Carlson, *supra* note 1, at 18 (providing a brief biography of Clarence Thomas).

59. See *id.* (noting that "as Supreme Court nominees go, Thomas had little judicial experience . . . [and was] not a brilliant legal scholar, a weighty thinker or even the author of numerous opinions"). But see *The Supreme Court, 1999 Term: The Statistics*, *supra* note 13, at 395 (displaying that Thomas placed in the "middle of the pack" regarding the number of opinions that he authored compared to other Justices).

60. See *Nomination Hearing*, *supra* note 54, at 358 (praising Thurgood Marshall as "one of the great architects of the legal battles to open doors that seemed so hopelessly and permanently sealed and to knock down barriers that seemed so

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there is an apparent inconsistency created by the acceptance of the personal benefits of racial preferences by someone who has so strongly argued against their application. It is one of the true ironies that undoubtedly the most powerful and influential African-American opponent of affirmative action is now, just as undoubtedly, the African-American who has attained the highest ever position because of, in at least some significant part, his race.

As I have noted, my personal concerns about the first ten years of Justice Thomas' tenure on the Court are not because of his ideology and judicial decisions. Instead, my concerns are raised by the inconsistencies inherent in the new conservative judicial activism, Justice Thomas' shocking use of the "race card" during his confirmation process, and his personal benefit from affirmative action. I am sure that Justice Thomas is a good and well-meaning individual, and notwithstanding the fact that he has the nerve to disagree with my politics and judicial philosophy, I believe that he can become, as the man that he replaced on the Court was, a role model for a segment of the nation in great need of one. I hope that in the decades to come, the kind of inconsistencies that I have noted will not continue and that they might be addressed and explained more directly. I hope that Justice Thomas will be judged as he should be judged, based solely on his work on the Court, and his opinions and public statements.

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insurmountable to those of us in the Pin Point, [Georgia's] of the world.").