

# ARTICLES

## Doubting Thomas: Confirmation Veracity Meets Performance Reality

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### I. INTRODUCTION

At the close of the United States Supreme Court's 1994 term, Justice Clarence Thomas became the center of news media attention for his important role as a prominent member of the Court's resurgent conservative bloc. More frequently than in past terms, Thomas's opinions articulated the conservative position for his fellow Justices.<sup>1</sup> According to one report, "The newly energized Thomas has shown little hesitancy this term in leading the conservative charge."<sup>2</sup> Another article referred to Thomas's "full-throated emergence as a distinctive

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1. This was true in both majority and dissenting opinions. For example, Thomas spoke on behalf of the majority in a divided decision that permitted enforcement of waivers of exclusionary provisions of plea-statement rules, *United States v. Mezzanatto*, 115 S. Ct. 797 (1995), and rejected an *Ex Post Facto* Clause challenge to legislative changes that affected an inmate's parole eligibility, *California Dep't of Corrections v. Morales*, 115 S. Ct. 1597 (1995). He represented conservative dissenters in several cases, including *O'Neal v. Aninch*, 115 S. Ct. 992 (1995) (defining "harmless error" for habeas purposes); *City of Edmonds v. Oxford House*, 115 S. Ct. 1776 (1995) (application of Fair Housing Act to city's local ordinance); *United States Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995) (constitutionality of state-mandated term limits for representatives in Congress); and *Garlotte v. Fordice*, 115 S. Ct. 1948 (1995) (mootness of habeas petition for prisoner serving consecutive sentences).

2. Tony Mauro, *Court's Move to the Right is Confirmed*, U.S.A. TODAY, June 27, 1995, at A1, A2.

and articulate judicial voice."<sup>3</sup> Thomas's new prominence, assertiveness, and visibility have been attributed to his emergence from the shadows of an infamous confirmation battle.<sup>4</sup> As described by one report, "[Thomas] has hit his stride this year after three years of what some say was a healing period after a confirmation ordeal in which he denied sexual harassment charges by Anita Hill."<sup>5</sup>

The emergence of Thomas as a prominent actor on the Supreme Court may reflect, in part, conventional scholarly wisdom that at least three terms are required for a new Justice to become assimilated into the Court's decisionmaking processes.<sup>6</sup> Because neophyte Justices require a period of adjustment,<sup>7</sup> scholars prefer to assess Justices' initial performances after the new judicial officers have served for at least three terms.<sup>8</sup> In light of his four years of service and his publicly recognized emergence as an important Justice, this is an appropriate moment to analyze Justice Thomas's performance. Because Thomas received close scrutiny from the Senate Judiciary Committee,<sup>9</sup> his

3. David J. Garrow, *On Race, It's Thomas v. An Old Ideal*, N.Y. TIMES, July 2, 1995, at E1.

4. Thomas's nomination to the Supreme Court was confirmed in the United States Senate by a vote of 52 to 48, one of the narrowest approval margins in history. R.W. Apple, Jr., *Senate Confirms Thomas, 52-48, Ending Week of Bitter Battle; 'Time for Healing,' Judge Says*, N.Y. TIMES, Oct. 16, 1991, at A1. The close vote was generated by a significant political controversy when one of Thomas's former aides at the Equal Employment Opportunity Commission alleged that he had harassed her. See TIMOTHY M. PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES: THE INSIDE STORY OF CLARENCE THOMAS, ANITA HILL, AND A SUPREME COURT NOMINATION* (Harper Perennial) (1993); JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994).

5. Mauro, *supra* note 2, at A2.

6. For example, Justice Frank Murphy's biographer concluded that it took Murphy three terms to become assimilated into the Court. J. Woodford Howard, *Justice Murphy: The Freshman Years*, 18 VAND. L. REV. 473, 477 (1965).

7. According to Justice William Brennan,

One enters a new and wholly unfamiliar world when he joins the Supreme Court of the United States, and this is as true of a Justice who comes from the federal court of appeals as it is of a Justice, like me, who came from a state supreme court. I say categorically that no prior experience, including prior judicial experience, prepares one for the work of the Supreme Court. . . . The initial confrontation on the United States Supreme Court with the astounding differences in function and character of role, and the necessity for learning entirely new criteria for decisions, can be a traumatic experience for the neophyte.

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

8. See, e.g., John Scheb & Lee Ailshie, *Justice Sandra Day O'Connor and the "Freshman Effect,"* 69 JUDICATURE 9 (1985); Thea Rubin & Albert Melone, *Justice Antonin Scalia: A First Year Freshman Effect?*, 72 JUDICATURE 98 (1988); Albert Melone, *Revisiting the Freshman Effect Hypothesis: The First Two Terms of Justice Anthony Kennedy*, 74 JUDICATURE 6 (1990).

9. PHELPS & WINTERNITZ, *supra* note 4, at 197 ("For five days, beginning on September 10[, 1991], the Supreme Court nominee was subject to long hours of interrogation [by the Senate

confirmation hearing testimony provides a useful reference point for assessing his actual performance as a Justice.<sup>10</sup>

This Article will examine Thomas's confirmation testimony on issues such as voting rights, abortion, religion, criminal justice, and affirmative action, and will compare this testimony with Justice Thomas's Supreme Court record in these areas. This comparison will show that significant aspects of Justice Thomas's confirmation testimony are at odds with his decisions on the Supreme Court.

## II. THE CONFIRMATION HEARINGS

### A. Overview

Federal Appeals Court Judge Clarence Thomas appeared before the Senate Judiciary Committee (the Committee) for five days of testimony in September 1991. During these confirmation hearings to become a Supreme Court Justice, some Senators accused Thomas of running away from his record.<sup>11</sup> Throughout his testimony, Thomas "took pains, under intense and sometimes skeptical questioning by the Senators, to qualify or disavow views he had forcefully and repeatedly expressed during his years on the lecture circuit as the Reagan Administration's top civil rights official."<sup>12</sup> Thomas was apparently trying to avoid the confirmation problems experienced in 1987 by Judge Robert Bork,<sup>13</sup> whose strident conservative record eventually

Judiciary Committee's members].").

10. Thomas's single year of service as a judge on the D.C. Circuit Court of Appeals provided little evidence of his potential performance on the Supreme Court. Other than being tough on criminal cases, "Thomas's D.C. Circuit opinions read as if they had been stripped of controversy. . . . He also rarely expounded opinions from the bench." MAYER & ABRAMSON, *supra* note 4, at 162-63.

11. For example, Senator Howard Metzenbaum said, "Judge Thomas's statements regarding the abortion issue are simply not credible. He is asking millions of American women to ignore everything he has ever said or done in relation to the issue of abortion." *Excerpts From Remarks by Members of the Senate Judiciary Panel on Thomas*, N.Y. TIMES, Sept. 28, 1991, at 8.

12. Linda Greenhouse, *Etching a Portrait of Judge Thomas*, N.Y. TIMES, Sept. 15, 1991, at 28; see also PHELPS & WINTERNITZ, *supra* note 4, at 184:

But most of the quotes hurled at Thomas that day were not taken out of context. They were his own words, if not always his own thoughts. And Clarence Thomas, coached by [White House consultant Kenneth] Duberstein, was ready to disavow them if that's what it took for him to get onto the Supreme Court. He was even willing to disavow his intellectual mentor, Thomas Sowell, the academic economist whose writings attack the liberal orthodoxies on discrimination . . . .

13. David Margolick, *Confirmation Hearings: Questions to Thomas Fall Short of the Mark*, N.Y. TIMES, Sept. 15, 1991, at E1, E5 ("Chastened by the defeat of the outspoken Robert H. Bork, White House operatives [advising Thomas] have concluded that filibustering is preferable to philosophizing, that obfuscation beats elucidation, that blank slates are better than full ones.").

led to the defeat of his nomination to the Supreme Court.<sup>14</sup> Prior to his nomination to the high court, Thomas, like Bork, had made speeches and written articles in which he espoused a conservative ideology, often criticizing liberals, Congress, and the Supreme Court for advocating or creating policies that he deemed undesirable for American society.<sup>15</sup> At his confirmation hearings, when asked to explain whether his speeches and writings were consistent with his beliefs, Thomas either refused to respond to questions or disavowed his previous positions, portraying himself as an open-minded moderate.<sup>16</sup>

In response to the apparent inconsistencies between Thomas's prior speeches and writings and his confirmation testimony, Senator Edward Kennedy of Massachusetts summed up his concerns about Thomas's testimony:

Judge Thomas, I continue to have serious concern about your nomination. In your speeches and articles, you have taken many strong positions, but again and again you have asked this committee to ignore the record you have compiled over a decade.

. . . .

The vanishing views of Judge Thomas have become a major issue in these hearings.<sup>17</sup>

14. See ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989).

15. Examples of Thomas's writings and speeches are as follows: *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough*, 5 YALE L. & POL'Y REV. 401 (1987); *Towards a Plain Reading of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 691 (1987); *Civil Rights as a Principle Versus Civil Rights as an Interest*, in DAVID BOAZ, *ASSESSING THE REAGAN YEARS* 391 (1988); *Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom*, 8 LINCOLN L. REV. 7 (1988); *The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989); *Why Black Americans Should Look to Conservative Policies*, Speech given at The Heritage Foundation (June 18, 1987); *The Modern Civil Rights Movement: Can a Regime of Individual Rights and the Rule of Law Survive?*, Speech given at the Tocqueville Forum, Wake Forest University (Apr. 18, 1988).

An additional article of interest is a profile of Thomas: Juan Williams, *A Question of Fairness*, ATLANTIC MONTHLY, Feb. 1987, at 70.

16. See Neil Lewis, *Thomas Declines Requests by Panel for Abortion View*, N.Y. TIMES, Sept. 11, 1991, at A1, A23; Neil Lewis, *High Court Nominee's Testimony Continues to Frustrate Democrats*, N.Y. TIMES, Sept. 13, 1991, at A1, A19.

17. *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., 1st Sess., pt. 1, at 451-52 (1991) [hereinafter *Confirmation Hearings*]. Kennedy continued,

If nominees can blithely disavow controversial positions taken in the past, nominees can say those positions are merely philosophical musings or policy views or advocacy. If we permit them to dismiss views full of sound and fury as signifying nothing, we are abdicating our constitutional role in the advise-and-consent process.

*Id.* at 452.

Despite Senator Kennedy's doubts and those of some of his colleagues, the full Senate eventually confirmed Clarence Thomas by a fifty-two to forty-eight vote.<sup>18</sup>

### B. Testimony Concerning Judicial Orientation

During the confirmation hearings, Thomas gave an opening statement and was questioned on a variety of topics, including the role of natural law in constitutional adjudication, his general approach to judging, the proper roles of the three branches of government, and particularly his views on civil rights and liberties issues.<sup>19</sup> In the civil rights and liberties area, the Committee questioned Thomas about his views on the right of privacy, particularly abortion; First Amendment issues, including the Free Exercise and Establishment Clauses; enforcement of the Civil Rights Act of 1964, particularly Title VII; affirmative action; enforcement of the Voting Rights Act of 1965 and relevant Supreme Court decisions; and criminal justice issues, including capital punishment.

In his opening statement to the Committee, Thomas attempted to portray himself as fair, impartial, and not committed to any particular ideology or agenda:

It is my hope that when these hearings are completed that this committee will conclude that I am an honest, decent, fair person. I believe that the obligations and responsibilities of a judge, in essence, involve just such basic values. A judge must be fair and impartial. A judge must not bring to his job, to the court, the baggage of preconceived notions, of ideology, and certainly not an agenda. . . .<sup>20</sup>

At various points during his testimony, Thomas returned to this theme, stressing that he was open minded and that he was not an ideologue intent on pushing a particular agenda on the Supreme Court. In response to questioning from Senator DeConcini of Arizona about whether he agreed with the Court's three-tier approach to equal protection analysis or whether he wanted to alter it, Thomas made this general statement:

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18. Apple, *supra* note 4, at A1.

19. PHELPS & WINTERNITZ, *supra* note 4, at 167-225.

20. *Confirmation Hearings*, *supra* note 17, at 110. Thomas added, "If confirmed by the Senate, I pledge that I will preserve and protect our Constitution and carry with me the values of my heritage: fairness, integrity, *openmindedness*, honesty, and hard work." *Id.* (emphasis added).

It is important for us, and I believe one of the Justices, whose name I cannot recall right now, spoke about having to strip down, like a runner, to eliminate agendas, to eliminate ideologies, and when one becomes a judge, it is an amazing process, because that is precisely what you start doing. You start putting the speeches away, you start putting the policy statements away. You begin to decline forming opinions in important areas that could come before the court, because you want to be stripped down like a runner. So, I have no agenda, Senator.<sup>21</sup>

In addition, when Wisconsin Senator Herbert Kohl pressed him about the inconsistency of his testimony with the strong policy positions that he had taken previously, Thomas explained that his earlier positions were related to his offices<sup>22</sup> in the executive branch of government: "When I was in the political branch, I think I fought the policymaking battles. . . ."<sup>23</sup> He argued that because he was currently serving as a federal appeals court judge, his record on the appellate court was of more importance. However, Senator Kohl continued to press him:

Why is it inappropriate for us to make an evaluation of your candidacy based upon all the things that you have written and said—particularly in view of the fact that you have been on the [appeals] court for only 16 months? If we are going to make an informed judgment on behalf of the American people, why are your policy positions not important?<sup>24</sup>

In response, Thomas again argued that his policy positions were advocated when he was a member of the executive branch, and therefore should be discounted in his confirmation hearings for Supreme Court Justice:

When one becomes a judge, the role changes, the roles change. That is why it is different. You are no longer involved in those [policymaking] battles. You are no longer running an agency. You are no longer making policy. You are a judge. It is hard to explain, perhaps, but you strive—rather than looking for policy positions, you strive for impartiality. You begin to strip down from those policy positions. . . . And I think that is the important message that

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21. *Id.* at 203.

22. Thomas served as Assistant Secretary of Education for the Civil Rights Division from 1981-82, and as Chairman of the Equal Employment Opportunity Commission from 1982-90. MAYER & ABRAMSON, *supra* note 4, at 76-77, 116, 161.

23. *Confirmation Hearings*, *supra* note 17, at 264.

24. *Id.* at 266.

I am trying to send to you; that, yes, my whole record is relevant, but remember that that was as a policy maker not as a judge.<sup>25</sup>

Much of the anxiety of opponents of the Thomas nomination came from the belief that he would assist the conservative wing of the Court in directly overturning important decisions regarding abortion, school prayer, due process issues, and the like.<sup>26</sup> In his testimony, however, Thomas emphasized his commitment to *stare decisis*, and the importance of abiding by precedent even when in disagreement with it: "I think overruling a case or reconsidering a case, Senator [Thurmond] is a very serious matter. Certainly, the case would have to be—you would have to be of the view that a case is incorrectly decided, but I think even that is not adequate."<sup>27</sup> Moreover, he maintained that a judge who wants to overturn a precedent has a tremendous burden in demonstrating that such a drastic step is necessary.<sup>28</sup>

Near the end of his testimony, Judge Thomas again emphasized that he would be open minded as a Supreme Court Justice: "In specific areas, I have attempted to demonstrate, even when I have in the policymaking area strongly held views, that I have always looked to expand and to grow and to understand the counterarguments, not to simply reinforce my own."<sup>29</sup>

### III. PROMISE AND PERFORMANCE

Clarence Thomas's effort to present himself as a nonideological, open-minded judge was predictable in the sense that virtually all judges and judicial nominees seek to portray themselves as possessing the qualities of objectivity and neutrality.<sup>30</sup> However, Thomas's

25. *Id.* at 267.

26. See PHELPS & WINTERNITZ, *supra* note 4, at 163-65.

27. *Confirmation Hearings*, *supra* note 17, at 134-35.

28. According to Thomas,

There are some cases that you may not agree with that should not be overruled. *Stare decisis* provides continuity to our system, it provides predictability, and in our process of case-by-case decision making, I think it is a very important and critical concept, and I think that a judge has the burden. A judge that wants to reconsider a case and certainly one who wants to overrule a case has the burden of demonstrating that not only is the case incorrect, but that it would be appropriate, in view of *stare decisis*, to make that additional step of overruling that case.

*Id.* at 135.

29. *Id.* at 494.

30. For example, as a Supreme Court nominee, Justice Ruth Bader Ginsburg declared that she was "neither liberal nor conservative." Neil Lewis, *Ginsburg Promises Judicial Restraint if She Joins Court*, N.Y. TIMES, July 21, 1993, at A1, A3. Ginsburg has proved dissimilar to Thomas, whose first-term performance immediately established his membership in the Court's most

persistent efforts to repudiate his prior record of public statements, writings, and speeches was unprecedented<sup>31</sup> and provided a basis for questioning both Thomas's veracity and his likely performance on the bench. Despite backing away from his prior statements, Thomas could not avoid commenting in some way on the myriad of issues presented to him in the Senators' questions. His responses to those questions, when compared with his subsequent judicial decisions concerning the same issues, provide a basis to assess his performance.

#### A. Voting Behavior

Clarence Thomas characterized himself during his confirmation hearings as open minded and free of agendas.<sup>32</sup> If this characterization represented an accurate self-prediction about his judicial decision-making, one would expect Thomas's voting record to be moderate and not identifiable with either a conservative or liberal position. After

conservative bloc. Christopher E. Smith & Scott P. Johnson, *The First-Term Performance of Justice Clarence Thomas*, 76 JUDICATURE 172, 174 (1993). Ginsburg has been true to her word by initially locating herself in the ideological center of the Court. Christopher E. Smith et al., *The First-Term Performance of Justice Ruth Bader Ginsburg*, 78 JUDICATURE 74, 75-77 (1994).

31. Even in later confirmation hearings, Supreme Court nominees have, unlike Thomas, answered questions regarding their prior record. For example, in her subsequent confirmation hearings, Ginsburg remained true to her record as a litigator and scholar by endorsing a woman's constitutional right to make choices about abortion and expressing continued support for an Equal Rights Amendment to bar gender discrimination. Neil Lewis, *Ginsburg Affirms Right of A Woman to Have Abortion*, N.Y. TIMES, July 22, 1993, at A1, A21.

Similarly, although Justice David Souter avoided controversy during his confirmation hearings and had no prior record of speeches and articles, he discussed in great detail various developments in constitutional law. Linda Greenhouse, *Souter Tacks Over Shoals*, N.Y. TIMES, Sept. 14, 1990, at A1, B5. As one reporter noted, "Judge Souter displayed an easy familiarity with both legal history and current Supreme Court cases. His answers were filled with details and citations, sometimes more than the senators appeared to want." *Id.*

By contrast, Thomas often displayed glaring ignorance about constitutional law during his confirmation hearings:

During the course of the hearings, Thomas's lack of understanding of constitutional law was becoming abundantly apparent to those knowledgeable in this highly specialized field.

. . . .

In front of the crowd in the Senate Caucus Room, Thomas's most embarrassing moments with constitutional law came while trying to respond to a question from Senator Patrick Leahy of Vermont about the most important cases decided by the Supreme Court since his Yale law school days.

Thomas stumbled about, struggling to come up with some examples.

. . . .

Thomas's performance made constitutional law professors of all stripes cringe.

PHELPS & WINTERITZ, *supra* note 4, at 200-01.

32. See *supra* notes 20-21 and accompanying text.



examining data from his first three terms on the Court, however, one finds that he voted in a consistently conservative manner.

As Table 1<sup>33</sup> indicates, for his first three terms combined, Thomas edged out Chief Justice Rehnquist as the most conservative member by supporting the government over individual rights claimants in 72 percent of the Court's civil rights and liberties cases. Indeed, in his first term, 1991-92, Thomas immediately had a conservative voting record of 74 percent, second only to that of Justice Antonin Scalia, who has been a crucial member of the conservative wing of the Court.<sup>34</sup>

**Table 1**  
**Voting Records in Civil Rights and**  
**Liberties Cases\***

Justices	1991-92	1992-93	1993-94	Average
Thomas	74	69	73	72.0
Rehnquist	67	73	75	71.7
Scalia	75	65	67	69.0
White	56	61	--	58.5
O'Connor	42	57	65	54.7
Kennedy	51	61	52	54.7
Ginsburg	--	--	48	48.0
Souter	39	43	40	40.7
Stevens	20	24	33	25.7
Blackmun	27	22	27	25.3

\* Voting records of United States Supreme Court Justices in formally-decided civil rights and liberties cases, 1991 term through 1993 term (Justices ranked from highest to lowest in terms of total percent support for government versus individual rights claimants).

33. The data for Tables 1 and 2 are drawn from the United States Supreme Court Data Base. See Jeffrey Segal & Harold Spaeth, *Decisional Trends on the Warren and Burger Courts: Results From the Supreme Court Data Base Project*, 73 JUDICATURE 103 (1989). We express our appreciation to Harold Spaeth of Michigan State University who organized the Data Base and supervises its continuation, and to Thomas Hensley of Kent State University who helped to identify and obtain appropriate information from the Data Base for this project.

34. See CHRISTOPHER E. SMITH, *JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT* (1993).

Table 2 illustrates that Thomas joined the conservative voting bloc of Scalia and Rehnquist in his three initial terms. These Justices voted together with extraordinary consistency in the Supreme Court's civil rights and liberties cases. Under the stringent criteria applied in empirical judicial studies, voting blocs in Table 2 are only those voting pairs or larger groups who average 86 percent agreement or higher.<sup>35</sup>

**Table 2**  
**Bloc Voting Analysis--Civil Rights and Liberties Cases\***

	Th	Re	Sc	Wh	O	Ke	Gi	So	St	Bl†
Th	--	91	89	76	75	74	71	68	52	50
Re	91	--	86	87	80	82	73	71	53	53
Sc	89	86	--	76	77	79	77	72	55	50
Wh	76	87	76	--	70	82	--	77	62	63
O	75	80	77	70	--	80	79	75	68	67
Ke	74	82	79	82	80	--	88	82	70	67
Gi	71	73	77	--	79	88	--	88	81	71
So	68	71	72	77	75	82	88	--	76	75
St	52	53	55	62	68	70	81	76	--	88
Bl	50	53	50	63	67	67	71	75	88	--

\* Bloc voting analysis of formally-decided civil rights and liberties cases, average annual agreement rate for each pair of Justices, 1991 term through 1993 term.

† Th = Thomas, Re = Rehnquist, Sc = Scalia, Wh = White, O = O'Connor, Ke = Kennedy, Gi = Ginsburg, So = Souter, St = Stevens, Bl = Blackmun.

In general, these data show that Justice Thomas represented a predictable conservative vote in his first three terms on the Court. Far from being independent and nonideological, he immediately aligned himself with the conservative wing upon his ascension to the high

35. Voting blocs are identified through the use of the Sprague Criterion, which is calculated by subtracting the average agreement score for the entire Court from one hundred. JOHN SPRAGUE, VOTING PATTERNS OF THE UNITED STATES SUPREME COURT 54 (1968). The resulting number is divided by two and then added to the Court average in order to establish the threshold level for defining a bloc. *Id.* A bloc exists when the individual agreement scores for a set of Justices exceed the threshold established by the Sprague Criterion calculation. *Id.*

court.<sup>36</sup> Thus, it appears that his critics were correct in doubting the accuracy of his confirmation testimony about his judicial orientation, at least as far as his voting record is concerned.

## B. Abortion

### 1. Confirmation Testimony

One of the most controversial subjects during the confirmation hearings was Thomas's views on abortion and the landmark decision of *Roe v. Wade*.<sup>37</sup> Upon repeated questioning, he refused to disclose whether he agreed or disagreed with *Roe*, claiming that answering the question would "leave the impression that [he] prejudged this issue."<sup>38</sup> The following exchange between Thomas and Senator Howard Metzenbaum of Ohio illustrates Thomas's refusal to answer questions regarding *Roe*:

Senator METZENBAUM. . . . Do you believe—I am not asking you to prejudge the case. I am just asking you whether you believe that the Constitution protects a woman's right to choose to terminate her pregnancy.

Judge THOMAS. Senator, as I noted yesterday, and I think we all feel strongly in this country about our privacy—I do—I believe the Constitution protects the right to privacy. And I have no reason or agenda to prejudge the issue or to predispose to rule one way or the other on the issue of abortion, which is a difficult issue.

Senator METZENBAUM. I am not asking you to prejudge it. Just as you can respond—and I will get into some of the questions to which you responded yesterday, both from Senators Thurmond, Hatch, and Biden about matters that might come before the Court. You certainly can express an opinion as to whether or not you believe that a woman has a right to choose to terminate her pregnancy without indicating how you expect to vote in any particular case. And I am asking you to do that.

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36. Smith & Johnson, *supra* note 30, at 177-78.

37. 410 U.S. 113 (1973). At the time of the Thomas nomination, four justices—Rehnquist, White, Scalia, and Kennedy—were in favor of overturning *Roe*. Those Justices had indicated a preference for the elimination of *Roe* in majority and concurring opinions in *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989). In fact, Rehnquist and White had dissented in the original *Roe* decision and in the various abortion cases during the subsequent two decades. Thus, the Thomas nomination was pivotal because he could potentially provide the fifth vote to overrule *Roe*.

38. *Confirmation Hearings*, *supra* note 17, at 180.

Judge THOMAS. Senator, I think to do that would seriously compromise my ability to sit on a case of that importance and involving that important issue.<sup>39</sup>

Senator Metzenbaum was not satisfied with this response, and he continued—to no avail—to press Thomas for an answer.<sup>40</sup>

Later in the hearings, Senator Patrick Leahy of Vermont asked Thomas about a speech in which Thomas appeared to praise an article about natural law that criticized the Court's decision in *Roe*.<sup>41</sup> Thomas claimed that he had not read the article fully and was simply using a part of the article to convince conservatives that natural law principles could be applied to civil rights issues.<sup>42</sup> Incredibly, Thomas claimed that he never even discussed the *Roe* case, despite the fact that he was in law school at the time it was decided, and it is one of the most widely publicized and controversial cases ever decided by the Supreme Court.<sup>43</sup>

39. *Id.* at 180-81.

40. *Id.* at 181. In response to Thomas's claim that he could not discuss the abortion issue, Metzenbaum said,

I have some difficulty with that, Judge Thomas, and I am frank to tell you, because yesterday you responded, when Senator Biden asked you if you supported the right to privacy, validated in *Moore v. City of East Cleveland* [431 U.S. 494 (1977)], by agreeing that the Court's rulings supported the notion of family as one of the most private relationships we have in our country. That was one matter that might come before the Court.

*Id.*

41. The article in question was Lewis Lehrman, *The Declaration of Independence and the Right to Life: One Leads Unmistakably from the Other*, AMERICAN SPECTATOR, Apr. 1987, at 21-23.

42. When Leahy asked Thomas, "Had you read the article before you praised it?" Thomas replied, "I think I skimmed it, Senator. My interest, again, was in the fact that he used the notion or the concept of natural law, and my idea was to import that notion to something that I was very interested in." *Confirmation Hearings*, *supra* note 17, at 219.

43. Here is the particular exchange:

Judge THOMAS. Because I was a married student and I worked, I did not spend a lot of time around the law school doing what the other students enjoyed so much, and that is debating all the current cases and all of the slip opinions. My schedule was such that I went to classes and generally went to work and went home.

Senator LEAHY. Judge Thomas, I was a married law student who also worked, but I also found, at least between classes, that we did discuss some of the law, and I am sure you are not suggesting that there wasn't any discussion at any time of *Roe v. Wade*?

Judge THOMAS. Senator, I cannot remember personally engaging in those discussions.

Senator LEAHY. OK.

Judge THOMAS. The groups that I met with at that time during my years in law school were small study groups.

Senator LEAHY. Have you ever had discussion of *Roe v. Wade*, other than in this room, in the 17 or 18 years it has been there?

## 2. Judicial Decisions

For such organizations as the National Abortion Rights Action League, the Fund for the Feminist Majority, the Women's Legal Defense Fund, the National Women's Law Center, and Planned Parenthood, there was little doubt that Clarence Thomas opposed a woman's right to choose whether to have an abortion.<sup>44</sup> Despite his testimony that emphasized his purported lack of prior thinking about abortion, these pro-choice groups feared that Thomas would join with conservative Justices to overrule *Roe*.<sup>45</sup>

While *Roe* has not yet been overruled, pro-choice advocates' fears about Thomas's views have proved accurate. In his very first term on the Court, he joined in the judgment in *Planned Parenthood v. Casey*,<sup>46</sup> a decision upholding several of Pennsylvania's abortion regulations. The statute challenged in *Casey* contained several restrictions: (1) a detailed informed consent provision, (2) a twenty-four-hour waiting period, (3) a parental consent requirement for minors, (4) a spousal notification requirement for married women, and (5) detailed reporting and public disclosure requirements for physicians who perform abortions.<sup>47</sup> The Court upheld all of these restrictions with the exception of the one requiring spousal notification.<sup>48</sup> Because there was no majority opinion, however, the decision was complicated and fragmented.<sup>49</sup> Although five Justices—O'Connor, Kennedy, Souter, Blackmun, and Stevens—refused to overrule *Roe* and continued to use viability as the line for the most restrictive abortion regulations,<sup>50</sup> a moderate triumvirate of O'Connor, Kennedy, and

Judge THOMAS. Only, I guess, Senator, in the fact in the most general sense that other individuals express concerns one way or the other, and you listen and you try to be thoughtful. If you are asking me whether or not I have debated the contents of it, that answer to that is no, Senator.

*Confirmation Hearings*, *supra* note 17, at 222.

44. Representatives from these groups presented statements and gave testimony in opposition to Thomas's nomination at the confirmation hearings. See generally *Confirmation Hearings*, *supra* note 17, at pts. 1 & 2.

45. See Marcia Coyle & Fred Stasser, *Abortion Rights Activists See Hostile Thomas*, NAT'L. L.J., Mar. 23, 1992, at A5.

46. 112 S. Ct. 2791 (1992).

47. *Id.* at 2803.

48. *Id.* at 2829.

49. Four justices—Rehnquist, White, Scalia, and Thomas—voted to uphold all of the provisions, *id.* at 2875, while a single justice—Blackmun—favored invalidating all of them. *Id.* at 2845. Justice Stevens was in favor of upholding only the informed consent and reporting requirements. *Id.* at 2843. The trio of O'Connor, Kennedy, and Souter determined the outcome of this case. They voted to strike only the spousal notification requirement. *Id.* at 2830.

50. *Id.* at 2817-18.

Souter abandoned *Roe*'s trimester framework, replacing it with an "undue burden" test.<sup>51</sup> The test is the same one suggested by O'Connor nearly ten years earlier in *Akron v. Akron Center for Reproductive Health*.<sup>52</sup>

The new approach set forth by the moderate triumvirate was unsatisfactory to Chief Justice Rehnquist and Justices White, Scalia, and Thomas, who called for *Roe* to be explicitly overruled and for abortion regulations to be examined only under the rational basis test.<sup>53</sup> Writing for the four dissenters, Rehnquist argued,

We think . . . that the Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a "fundamental right" that could be abridged only in a manner which withstood "strict scrutiny."

. . . .  
In our view, authentic principles of *stare decisis* do not require that any portion of the reasoning in *Roe* be kept intact.<sup>54</sup>

That Thomas joined this opinion so soon after his entrance on the Court is all the more interesting given his passionate statement during the confirmation hearings about the importance of adhering to precedent. According to Thomas, merely deciding that a case was decided incorrectly would not provide an adequate basis for overruling that case.<sup>55</sup>

Even more striking than Thomas's decision to oppose *Roe*, however, was his support for Justice Scalia's strident dissenting opinion. Despite his claim to have never examined the issue of abortion, Thomas evinced no reluctance to quickly and whole-heartedly endorse an opinion that contained Scalia's characteristically strong and sarcastic attacks on the majority position.<sup>56</sup> Was the abortion issue

51. *Id.* at 2819. Under this standard, an abortion regulation is to be examined first to determine whether it presents an "undue burden" on a pregnant woman's right to abortion, that is, "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 2821. Regulations posing an undue burden may be justified only by a compelling state interest. *Id.* If there is no undue burden, the state need prove only a rational basis for the regulation to be upheld. *Id.*

52. 462 U.S. 416 (1983).

53. *Casey*, 112 S. Ct. at 2860 (Rehnquist, J., concurring and dissenting).

54. *Id.* at 2860-61.

55. *Confirmation Hearings*, *supra* note 17, at 134-35.

56. Scalia often writes dissenting opinions that sarcastically attack the majority. See Christopher E. Smith, *Justice Antonin Scalia and the Institutions of American Government*, 25 WAKE FOREST L. REV. 783, 804-05 (1990) ("Other justices respond with sensitivity and diplomacy to opposing viewpoints. Scalia's opinions, by contrast, evince the consistent confidence and self-righteousness of a 'prophet' who possesses a clear, fixed vision of how cases should be decided. In advocating this clear vision, Scalia [applies a] strident tone and concomitant penchant

so clear-cut that upon an initial consideration Thomas could immediately adopt a strident position? For some other conservative Justices, this was certainly not the case, as indicated by the more moderate, evolving views of Justices O'Connor<sup>57</sup> and Kennedy.<sup>58</sup> Thomas's quick endorsement of a strong conservative position on abortion did little to quell suspicions that he had already adopted such a position but had intentionally hidden his views from the Senate and the public.<sup>59</sup>

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for attacking and condemning colleagues with whom he disagrees . . ."). In *Casey*, Scalia followed his characteristic approach. Scalia sarcastically declared,

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be "tested by following," and whose very "belief in themselves" is mystically bound up in their "understanding" of a Court that "speak[s] before all others for their constitutional ideals"—with the somewhat more modest role envisioned for these lawyers by the Founders.

*Casey*, 112 S. Ct. at 2882 (Scalia, J., concurring and dissenting).

57. O'Connor's initial examination of the abortion issue led her to criticize *Roe*'s reliance on extant medical knowledge in the trimester framework, but she did not urge reversal of *Roe*. *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983).

58. Kennedy joined Rehnquist's opinion in *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989), that criticized *Roe*, but later decided in *Casey* that the right to choice for abortion should be preserved. See Christopher E. Smith, *Supreme Court Surprise: Justice Anthony Kennedy's Move Toward Moderation*, 45 OKLA. L. REV. 459, 465-68 (1992).

59. Ironically, Thomas's own mother later undercut his credibility by telling reporters that Thomas possessed a definite viewpoint on abortion: "Thomas's mother, Leola Williams, remembered clearly that she and Thomas discussed the issue and that his opinion was based on her experience. He opposed abortion on demand, she said he told her, because 'if you had one, where would I be?'" *MAYER & ABRAMSON, supra note 4*, at 67.

Thomas's veracity and credibility were further weakened by his behavior after the confirmation fight. His continuing associations with conservative political activists portrayed him as someone who shared their values and interests. After he was confirmed, Thomas reportedly acted like a politician in showing his appreciation to conservative groups, including anti-abortion groups, for supporting him:

The few public appearances Thomas made during the months that followed raised even more questions about his sensitivity to judicial codes of conduct. Like a victorious candidate, Thomas paid a round of thank-you calls to the conservative groups that had helped him win [confirmation].

. . . Thomas also paid several courtesy calls to the political activist Paul Weyrich, the founding father of the New Right, whose aides, beginning with Tom Jipping, had lobbied so hard to secure Thomas's seat for him. On three occasions the justice visited Weyrich's headquarters at Free Congress Foundation, a center of anti-abortion, anti-pornography, and pro-school prayer activism . . . .

. . . .  
Although many of the justices appear publicly before legal groups and several have been keynote speakers at events organized by the conservative Federalist Society, Thomas's ties to Weyrich and other political activists who were taking sides on major issues before the Court are unparalleled.

*MAYER & ABRAMSON, supra note 4*, at 355-56.

### C. Religious Liberties

#### 1. Confirmation Testimony

Another area of controversy in recent years involves religious liberties, so it was not surprising that the Committee questioned Thomas about his views on Supreme Court decisions involving both the Free Exercise and Establishment Clauses. The Committee's primary questions involved the doctrinal tests used by the Court to decide such cases.

With respect to the Free Exercise Clause, the Committee asked Thomas about *Employment Division v. Smith*,<sup>60</sup> the 1990 case in which the Court significantly modified the strict scrutiny test that had been applied for nearly two decades since *Sherbert v. Verner*.<sup>61</sup> Under *Sherbert*, if a government policy was challenged as abridging the free exercise of religion, the government had to show a compelling interest in order to uphold the policy. *Smith* revised this standard, holding that if a policy is not directed at religion—if it is neutral and generally applicable—the government need demonstrate only a rational basis for the policy to be upheld.<sup>62</sup> This new precedent established by *Smith* had the potential for lowering the protection accorded religious freedom. When asked about his view of the appropriate test, Thomas responded, "I have not thought through those particular approaches, but I myself would be concerned that we did move away from an approach that has been used for the past I guess several decades."<sup>63</sup>

The Committee also asked Thomas about his views on the Establishment Clause precedents and doctrine. Senators Paul Simon of Illinois and Herbert Kohl of Wisconsin questioned him about his

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60. 494 U.S. 872 (1990).

61. 374 U.S. 398 (1963).

62. See *Smith*, 494 U.S. at 878-80.

63. *Confirmation Hearings*, *supra* note 17, at 398. Senator Biden referred to the test established in *Smith* as the Scalia approach. After Biden expressed his concerns about how this approach could have a significant impact on religious freedom, Thomas indicated that this was of concern to him as well:

And I guess my point is our concerns are the same, that any test which lessens the protection I think is a matter of concern. The point I am making, though, in not being absolutist is that I think it is best for me, as a sitting Federal judge, to take more time and to think that through, but my concern about the approach taken by Justice Scalia is that it may have the potential and could have the potential of lessening protection, and I think the approach that we should take certainly is one that maximizes those protections.

*Id.* at 399 (emphasis added).



knowledge of the *Lemon* test,<sup>64</sup> and whether he thought that test was appropriate.<sup>65</sup> The *Lemon* test aspires to uphold Thomas Jefferson's "wall of separation" metaphor,<sup>66</sup> and the application of *Lemon* usually results in the invalidation of policies that allegedly involve government in religious activities. The Supreme Court included several Justices who were critical of the *Lemon* test, and Thomas's arrival created the possibility that the test might be invalidated with potentially far-reaching results, such as the return of organized prayer to public schools.<sup>67</sup> Thomas said that he was aware of both *Lemon* and the "wall of separation" metaphor, and that he knew the Court had experienced difficulty with decisionmaking in this area.<sup>68</sup> Nonetheless, he expressed his general agreement with *Lemon* and the "wall of separation" metaphor:

The Court has established the *Lemon* test to analyze the establishment clause cases, and I have no quarrel with that test.

The Court, of course, has had difficulty in applying the *Lemon* test and is grappling with that as we sit here. I would assume, and over the past few years, but the concept itself, the Jeffersonian wall of separation, the *Lemon* test, neither of those do I quarrel with.<sup>69</sup>

## 2. Judicial Decisions

Supreme Court interpretations of the Free Exercise and Establishment Clauses have long been subjects of analysis and debate.<sup>70</sup> In

64. This test was established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under this test, a policy does not violate the Establishment Clause if (1) it has a valid secular purpose; (2) its primary effect neither advances nor inhibits religion; and (3) it does not require excessive government entanglement with religion. *Id.* at 612-13.

65. Senator Simon said to Thomas, "I guess I have a twofold question: Number 1, are you familiar with *Lemon* criteria? And, number 2, if you are, do you think they are reasonable criteria that should be used in the future?" *Confirmation Hearings*, *supra* note 17, at 256. Senator Kohl asked, "In your view, Judge, what is the current state of the law with regards to the establishment clause of the first amendment?" *Id.* at 265.

66. According to Leonard Levy, "In a famous letter to the Baptist Association of Danbury, Connecticut, President Jefferson spoke of the 'wall of separation' [between church and state]." LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 181-82 (1986). This phrase, which implies that the First Amendment requires strict judicial vigilance to insure that government and religion are kept as separate as possible, was used by the Supreme Court in *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947), and "the Court has frequently quoted these words, with approval." LEVY, *supra*, at 124.

67. Christopher E. Smith & Linda Fry, *Vigilance or Accommodation: The Changing Supreme Court and Religious Freedom*, 42 SYRACUSE L. REV. 893, 918-33, 941 (1991).

68. *Confirmation Hearings*, *supra* note 17, at 265.

69. *Id.*

70. See, e.g., ROBERT S. ALLEY, *THE SUPREME COURT ON CHURCH AND STATE* (1988); PAUL KAUPER, *RELIGION AND THE CONSTITUTION* (1964); LEVY, *supra* note 66; LEO PFEFFER, *CHURCH, STATE AND FREEDOM* (1967).

recent years, this interest has intensified as the Court's composition has changed. The Justices have been both praised and criticized for decisions that limit free exercise, especially for nonmainstream religious groups,<sup>71</sup> and for establishment decisions that appear to sanction substantial government involvement with religion.<sup>72</sup> Although the conservative Rehnquist Court seemed poised to change jurisprudence concerning religious freedom,<sup>73</sup> Thomas's testimony at the confirmation hearings indicated that he endorsed liberal doctrines that had been criticized by many of his supporters.

Although Thomas claimed during his confirmation hearings that he was concerned about the Court's modification of the long-standing *Sherbert* test in *Smith*,<sup>74</sup> in *Church of the Lukumi Babalu Aye v. City of Hialeah*,<sup>75</sup> the first major free exercise case since *Smith*, Thomas joined the majority opinion that endorsed *Smith*.

Similarly, although during his confirmation hearings Thomas expressed his general support for the *Lemon* test, claiming to "have no quarrel" with it,<sup>76</sup> when called upon to decide Establishment Clause cases as a Supreme Court Justice, Thomas joined two opinions that strongly criticized *Lemon* and called for it to be overruled. In the 1992 case of *Lee v. Weisman*,<sup>77</sup> the Court held by a narrow five-to-four vote that school-sponsored prayer at public school commencement ceremonies violates the Establishment Clause.<sup>78</sup> Thomas joined Justice Scalia's blistering dissent in which he emphasized the importance of prayer as a "prominent part of governmental ceremonies and proclamations."<sup>79</sup> Moreover, the dissenting opinion ridiculed the majority for its conclusion that the school district's sponsorship of the

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71. See Michael W. McConnell, *Free Exercise and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

72. See DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME 110-27 (1993).

73. *Smith & Fry*, *supra* note 67, at 941.

74. See *supra* note 63 and accompanying text.

75. 113 S. Ct. 2217 (1993). Justice Kennedy, the author of the majority opinion, wrote, "[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 2226 (citing *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

76. *Confirmation Hearings*, *supra* note 17, at 265.

77. 112 S. Ct. 2649 (1992).

78. *Id.* at 2661.

79. *Id.* at 2679.

prayer amounted to psychological coercion.<sup>80</sup> Finally, Scalia took the opportunity to express his distaste for the *Lemon* test:

Our religion-clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test, which has received well-earned criticism from many members of this Court. The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may be the one happy by-product of the Court's otherwise lamentable decision.<sup>81</sup>

Thomas joined another Scalia opinion criticizing *Lemon* in *Lamb's Chapel v. Center Moriches Union Free School District*.<sup>82</sup> In *Lamb's Chapel*, the Court unanimously ruled that a school district policy prohibiting the after-hours use of its school buildings by religious groups while permitting such use by other community groups was a violation of free speech.<sup>83</sup> In addition, the Court held that permitting religious groups to use the buildings after school hours would not violate the Establishment Clause or fail the *Lemon* test.<sup>84</sup> While agreeing with the general conclusion of no Establishment Clause violation, Justices Scalia and Thomas expressed their regret over the application of *Lemon*:

As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again.

For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced. I will decline to apply

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80. Justice Kennedy wrote,

The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.

*Id.* at 2658.

81. *Id.* at 2685 (citations omitted).

82. 113 S. Ct. 2141 (1993).

83. *Id.* at 2148.

84. *Id.*

*Lemon*—whether it validates or invalidates the government action in question . . . .<sup>85</sup>

Thomas's consistent support for this viewpoint appears to be in direct conflict with his earlier confirmation testimony.

#### D. Criminal Justice Issues

##### 1. Confirmation Testimony

During the confirmation hearings, the members of the Committee probed Thomas about capital punishment and the general due process rights of criminal defendants. In response, Thomas expressed concern about these issues. For example, when Senator Strom Thurmond asked him how he felt about limiting the number of post-trial appeals in death penalty cases, Thomas replied,

The death penalty is the harshest penalty that can be imposed, and it is certainly one that is unchangeable. And we should be most concerned about providing all the rights and all the due process that can be provided and should be provided to individuals who may face that kind of a consequence.<sup>86</sup>

Later in the hearings, Senator Arlen Specter of Pennsylvania asked him specifically whether he would have any problem in upholding application of the death penalty. He responded,

Philosophically, Senator, there is nothing that would bother me personally about upholding it in appropriate cases. My concern, of course, would always be that we provide all of the available protections and accord all of the protections available to a criminal defendant who is exposed to or sentenced to the death penalty.<sup>87</sup>

Specter then noted that there were legislative proposals to place a time limit on the Supreme Court's hearing of death penalty cases, and he asked Thomas whether a ninety-day time limit was reasonable.<sup>88</sup> Thomas said he did not know whether ninety days was appropriate and

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85. *Id.* at 2149-50 (citations omitted).

86. *Confirmation Hearings*, *supra* note 17, at 133. Thomas continued,

I would be concerned, of course, that we would move too fast, that if we eliminate some of the protection that perhaps we may deprive that individual of his life without due process. So I would be in favor of reasonable restrictions on procedures, but not to the point that individuals—or I believe that there should be reasonable restrictions at some point, but not to the point that an individual is deprived of his constitutional protections.

*Id.*

87. *Id.* at 423.

88. *Id.* at 424.

conceded that federal judges have often felt pressure to move these types of cases along.<sup>89</sup> After stating that ninety days may be too short for some cases, he continued,

I would be reluctant to say that I endorse a particular cookie-cutter approach, but at the same time, I have no alternative to offer as to what is an appropriate length of time. But my concern would always be that we do not put ourselves in the position of adopting an approach that would ultimately in some way curtail the rights of the criminal defendant.<sup>90</sup>

One of the most dramatic moments during the hearings occurred when Thomas indicated an identification with those caught up in the criminal justice system. He said that his background made him sensitive to their problems and concerns.<sup>91</sup> This statement came in response to a question from Senator Kohl about why he wanted to become a Supreme Court Justice. After acknowledging that being a Justice was a tremendous responsibility, he said that the position would give him an "opportunity to serve," to give something back to the community.<sup>92</sup> Moreover, he claimed,

You know, on my current court [the United States Court of Appeals for the District of Columbia Circuit] I have occasion to look out the window that faces C Street, and there are converted buses that bring in the criminal defendants to our criminal justice system, busload after busload. And you look out, and you say to yourself, and I say to myself almost every day, But for the grace of God there go I.

So you feel that you have the same fate, or could have, as those individuals. So I can walk in their shoes, and I can bring something different to the Court. And I think it is a tremendous responsibility, and it is a humbling responsibility; and it is one that, if confirmed, I will carry out to the best of my ability.<sup>93</sup>

## 2. Judicial Decisions

Contrary to his confirmation testimony of identification with those in the criminal justice system and concern for protecting their due process rights, Justice Thomas has appeared less concerned than other Justices about the constitutional rights of criminal defendants.

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89. *Id.*

90. *Id.*

91. *Id.* at 260.

92. *Id.*

93. *Id.*

For example, among all Justices serving on the Supreme Court between 1986 and 1993, Thomas was the least likely to support individuals' claims in Eighth Amendment, capital punishment, and habeas corpus cases.<sup>94</sup> In his first term on the Court, Thomas wrote a dissent that criticized prisoners' rights. In *Hudson v. McMillian*,<sup>95</sup> the Court ruled that the use of excessive force by prison guards against an inmate violated the Eighth Amendment ban against cruel and unusual punishment even though the beating did not result in "significant injury."<sup>96</sup> Writing in dissent for himself and Justice Scalia, Thomas wrote,

Today's expansion of the Cruel and Unusual Punishments Clause beyond all bounds of history and precedent is, I suspect, yet another manifestation of the pervasive view that the Federal Constitution must address all ills in our society. Abusive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt. But that does not mean that it is invariably unconstitutional. The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation.<sup>97</sup>

In Thomas's view, the prevention and punishment of abusive conduct by prison guards should be left to state law.<sup>98</sup> This view appears to be at odds with the strong sensitivity to the rights of defendants and prisoners that he evinced during his confirmation.

One year later, in *Helling v. McKinney*,<sup>99</sup> Thomas again moved away from his confirmation testimony, reiterating his view that the Cruel and Unusual Punishments Clause should not apply to anything except the sentencing decision itself. In *Helling*, the seven-Justice majority held that prison inmates could raise an Eighth Amendment claim that involuntary exposure to second-hand tobacco smoke exposed

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94. Thomas supported the government in 94% of such cases. This contrasts with the more modest support for the government manifested by stalwart conservatives Justices Byron White (68%) and Sandra O'Connor (64%), and is quite different from the voting record of his predecessor, Justice Thurgood Marshall, who never supported the government in such cases during this time period. Christopher E. Smith, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 DRAKE L. REV. 593, 597 (1995).

95. 503 U.S. 1 (1992).

96. See *id.* at 11. Keith Hudson, while handcuffed and shackled, had been beaten by two guards, and the beating resulted in loosened teeth, facial swelling, a split lip, and a cracked dental plate. The beating was witnessed by a supervisor who told the guards not to "have too much fun." *Id.* at 4. A lower court had ruled that the injuries sustained by Hudson were minor. *Id.* at 5.

97. *Id.* at 28.

98. *Id.*

99. 113 S. Ct. 2475 (1993).

them to unreasonable health risks.<sup>100</sup> Writing in dissent, Thomas argued, “[A]lthough the evidence is not overwhelming, I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose ‘punishment.’”<sup>101</sup> Continuing his criticism of the Court’s decisions in this area, he stressed,

To state a claim under the Cruel and Unusual Punishments Clause, a party must prove not only that the challenged conduct was both cruel and unusual, but also that it constitutes *punishment*. The text and history of the Eighth Amendment, together with pre-*Estelle* precedent, raise substantial doubts in my mind that the Eighth Amendment proscribes a prison deprivation that is not inflicted as part of a sentence. And *Estelle* itself has not dispelled these doubts.<sup>102</sup>

In *Helling*, Thomas and Scalia “established themselves as advocates for a return to the ‘hands-off’ judicial policy of yesteryear with respect to prison conditions and the treatment of convicted offenders.”<sup>103</sup>

Justice Thomas also moved away from his confirmation testimony when addressing death penalty issues. At the hearings, Thomas stressed the necessity of maintaining careful procedures in order to protect the constitutional rights of defendants facing the death penalty.<sup>104</sup> Nonetheless, on the Court he has been a leader in the conservative Justices’ efforts to limit convicted offenders’ access to federal judicial review.

For example, on behalf of himself, Chief Justice Rehnquist, and Justice Scalia, Thomas authored the plurality opinion in *Wright v. West*,<sup>105</sup> which advocated a rule requiring broad federal court deference to decisions by state courts in habeas corpus cases. The deferential approach advocated by Thomas represents a more severe restriction on post-conviction proceedings than those advocated by

100. *Id.* at 2481.

101. *Id.* at 2484.

102. *Id.* at 2485. *Estelle v. Gamble*, 429 U.S. 97 (1976), the case referenced by Thomas, concerned a prisoner’s claim that a correctional institution’s provision of inadequate medical care constituted a violation of the Eighth Amendment’s prohibition on cruel and unusual punishments. In *Estelle*, the Court determined that while inadequate care could violate the Eighth Amendment, a violation would occur only if corrections officials manifested deliberate indifference to the prisoner’s condition and care. *Id.* at 105.

103. Smith, *supra* note 94, at 603.

104. See *supra* note 94 and accompanying text.

105. 112 S. Ct. 2482 (1992).

most other Justices and effectively places strong limits on habeas petitioners' access to review by federal courts.<sup>106</sup>

Further illustrating a departure from his confirmation testimony, Thomas joined Chief Justice Rehnquist's majority opinion in *Herrera v. Collins*,<sup>107</sup> which held that despite new evidence purporting to show innocence, defendants sentenced to death are not ordinarily entitled to new trials. Rather they must also show evidence of an independent constitutional error in state court proceedings.<sup>108</sup> According to the majority, the proper remedy in cases asserting new evidence of innocence is executive clemency.<sup>109</sup> Although Rehnquist's opinion recognized possible exceptions to this general rule, Thomas joined Scalia's concurrence, which refused to concede that there are any situations where evidence of innocence is so overwhelming that federal habeas relief is warranted. According to this concurrence, "There is no basis in text, tradition, or even in contemporary practice (if that were enough), for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."<sup>110</sup>

In *McFarland v. Scott*,<sup>111</sup> Thomas again backed away from his confirmation testimony by dissenting from the majority's interpretation of a federal law that created a right to counsel in federal habeas corpus proceedings for capital defendants convicted of certain drug offenses.<sup>112</sup> The majority rejected the lower court ruling that the law did not require the appointment of counsel until after the habeas petition had been filed, and that it prohibited judges from entering stays of executions in the meantime.<sup>113</sup> According to Justice Blackmun's majority opinion, the right to counsel in this context would be meaningless unless (1) death row inmates received assistance in preparing their habeas petitions, and (2) executions were stayed until the petitions were filed.<sup>114</sup> Thomas, writing for himself, Chief

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106. See Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2393-99 (1993).

107. 113 S. Ct. 853 (1993).

108. *Id.* at 869.

109. *Id.*

110. *Id.* at 874-75.

111. 114 S. Ct. 2568 (1994).

112. The law in question was the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e).

113. *McFarland*, 114 S. Ct. at 2572.

114. *Id.* On the first point Blackmun noted,

Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face, and to deny a stay of execution where a habeas petition fails to raise a substantial federal claim . . . . Requiring an indigent capital petitioner to proceed without counsel in order to obtain counsel thus would expose him to the



Justice Rehnquist, and Justice Scalia, disagreed with both conclusions. While acknowledging that "legal assistance prior to the filing of a federal habeas petition can be very valuable to a prisoner,"<sup>115</sup> Thomas claimed that it "does not compel the conclusion that Congress intended the Federal Government to pay for it."<sup>116</sup> Furthermore, he argued that the majority's interpretation permitting federal judges to stay executions until the habeas petitions were filed was much too expansive.<sup>117</sup> Thomas's approach raises the specter of placing condemned prisoners in a "Catch-22": Prisoners need an attorney to help them file their habeas corpus petition, but they would not be permitted to have an attorney appointed at public expense until after the filing of the petition.

Although Thomas has supported the protection of rights for criminal defendants in some cases, his support has often been limited to unanimous cases in which Justices across the philosophical spectrum share a consensus.<sup>118</sup> When the Justices are divided about a criminal justice issue, Thomas usually sides with the government.<sup>119</sup>

As his judicial record shows, Justice Thomas has not translated the empathic understanding of the criminally accused that he asserted at his confirmation hearings into a concern for their constitutional rights. Thomas's record has yet to show any indication that his confirmation testimony accurately represented his views. Instead, Thomas has demonstrated a rigid formalism that has produced harsh consequences for defendants and prison inmates.<sup>120</sup> Thomas's efforts

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substantial risk that his habeas claims never would be heard on the merits.

*Id.* (citations omitted).

Regarding the stay of execution, Blackmun argued, [T]he right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims. Where this opportunity is not afforded, "[a]pproving the execution of a defendant before his [petition] is decided on the merits would clearly be improper."

*Id.* at 2573 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983)).

115. *Id.* at 2578.

116. *Id.*

117. *Id.* at 2579-80.

118. See, e.g., *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995) (unanimous decision recognizing the common law "knock and announce" doctrine as part of the Fourth Amendment's reasonableness requirement and therefore a barrier to "no-knock" searches in most cases).

119. See, e.g., *Kyles v. Whitley*, 115 S. Ct. 1555 (1995) (a five-to-four decision concerning prosecutor's failure to reveal exculpatory evidence).

120. For example, despite a long history of abusive and inhuman conditions in American prisons, LARRY BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* 141-56 (1975), Thomas follows a rigid, originalist approach to the Eighth Amendment that would leave the protection of convicted offenders "in the hands of the same elected legislative and executive branches that created and maintained the civil rights violations in the first place." Christopher

to prevent habeas petitioners from gaining access to federal court review<sup>121</sup> clash with his purported concerns for due process.

Moreover, Thomas's efforts have contributed to a legal environment in which defendants whose constitutional rights were apparently violated and about whom there are significant questions regarding actual guilt face execution because they no longer have access to post-conviction federal judicial review.<sup>122</sup> Thomas's rigid formalism has even led him to naively assert that mandatory death sentences would serve as a means to eliminate racial discrimination in sentencing.<sup>123</sup> Such a view reveals a complete misapprehension of the role of cumulative discretionary decisions in determining outcomes of criminal cases.<sup>124</sup> Thus, Thomas's confirmation hearing claims of empathic understanding toward people whose rights must be protected when facing the government's prosecutorial machinery do not withstand scrutiny of his record.

## E. Voting Rights

### 1. Confirmation Testimony

Another important area of inquiry during his confirmation hearings involved voting rights, particularly Thomas's views about the Supreme Court's interpretation and application of the Voting Rights

E. Smith, *Federal Judges' Role in Prisoner Litigation: What's Necessary? What's Proper?*, 70 JUDICATURE 144, 150 (1986). According to Thomas, "At a minimum, I believe that the original meaning of 'punishment,' the silence in the historical record, and the 185 years of uniform precedent shift the burden of persuasion to those who would apply the Eighth Amendment to prison conditions. In my view, that burden has not been discharged." *Helling v. McKinney*, 113 S. Ct. 2475, 2484 (1993). This formalistic approach to the Eighth Amendment is out of step with all of the other Justices except for Scalia. *See id.*; *Hudson v. McMillian*, 503 U.S. 1 (1992).

121. *See supra* notes 105-106 and accompanying text.

122. Christopher E. Smith & Avis A. Jones, *The Rehnquist Court's Activism and the Risk of Injustice*, 26 CONN. L. REV. 53, 66-75 (1993).

123. *Graham v. Collins*, 113 S. Ct. 892, 904-06 (1993) (Thomas, J., concurring).

124. A mandatory death penalty for first-degree murder would not eliminate discrimination because prosecutors still use discretion to decide which defendants will be charged with first-degree murder and juries still use discretion to decide which defendants will be convicted of first-degree murder as opposed to some lesser offense. *See, e.g.*, Christopher E. Smith, *The Supreme Court and Ethnicity*, 69 OR. L. REV. 797, 830 (1990).

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

*Id.*

Act of 1965<sup>125</sup> and its amendments. Senator Kennedy began the questioning by referring to a speech given by Thomas in which he seemed critical of the Court's treatment of voting rights cases. Kennedy read a passage which Thomas had delivered at the Tocqueville Forum in April 1988:

Unfortunately, many of the Court's decisions in the area of voting rights presuppose that blacks, whites, Hispanics, and other ethnic groups will inevitably vote in blocs. Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected when the individual racial or ethnic group has sufficient clout.<sup>126</sup>

After quoting this passage, Kennedy asked Thomas to identify the judicial decisions to which he was referring. Thomas replied that he could not remember any specific decisions to which he may have been referring, but that he was probably thinking about the "effects test," which involves an examination of the effects of various electoral schemes on the voting rights of minorities.<sup>127</sup>

Kennedy continued his questioning by referring to what he thought were two of the most significant Supreme Court decisions interpreting the Act: *White v. Regester*<sup>128</sup> and *Thornburg v. Gingles*.<sup>129</sup> In both cases, the Court ruled that at-large districts had the negative effect of diluting the voting strength of minorities (Hispanics in *White* and African-Americans in *Thornburg*), and that this adverse effect could violate the Voting Rights Act.<sup>130</sup> When Kennedy mentioned these cases, Thomas responded that he was merely concerned that all-black or all-white districts might not necessarily be beneficial for African-Americans.<sup>131</sup> He emphasized his concern that

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125. 42 U.S.C. § 1973.

126. *Confirmation Hearings*, *supra* note 17, at 410.

127. *Id.* Supreme Court Justices have disagreed about whether violations of voting rights should be determined through an effects test or through a test of intent. Under an effects test, violations could be identified if the impact or effect of a policy concerning districting or voting could be shown to dilute the electoral strength of minority voters. By contrast, a focus on intent merely looks for demonstrable bias underlying the motivations of the officials who designed and implemented the policy. LUCIUS J. BARKER & TWILEY W. BARKER, *CIVIL LIBERTIES AND THE CONSTITUTION* 558 (7th ed. 1994).

128. 412 U.S. 755 (1973).

129. 478 U.S. 30 (1986).

130. *White*, 412 U.S. at 769; *Thornburg*, 478 U.S. at 77.

131. *Confirmation Hearings*, *supra* note 17, at 411.

"minorities have the ability to vote and to have an effective participation in the political processes."<sup>132</sup>

Kennedy then pressed Thomas on his earlier comments about the effects test, asking what problems he could identify that stemmed from the Court's holding. Thomas replied,

Well, I guess the only point that I was making, Senator, was whether or not it was on—again, this is general—whether or not we could really judge from the number of individuals who held office, for example, how effective a person's voting rights were being implemented or how effective the statute was implemented or how effective the minorities were in participating in the political process.<sup>133</sup>

Not satisfied with these responses, Kennedy requested that Thomas review his speeches and the relevant decisions in this area to help recollect his particular concerns.<sup>134</sup> Returning to this topic later in the hearings, Kennedy reread the quotation from the 1988 speech in which Thomas alleged that the Court's voting rights decisions were based incorrectly on the notion of bloc voting. Again referring to *White* and *Thornburg*, Kennedy said the Court specifically rejected this presupposition regarding bloc voting, and he contended that the Justices' main concern in both cases was that at-large elections "were being used to diminish and undermine the effectiveness of the rights to vote" of African-Americans and Hispanics.<sup>135</sup> Kennedy questioned Thomas again about why he was so critical of these cases, especially *Thornburg*. Thomas claimed that he was not referring to specific cases, but was simply using the Voting Rights Act as an example of the difficulties in reconciling individual rights with group rights.

The point that I was trying to make was that—and it was my—there was a school of thought. There was thinking, I remember, involving—being involved or reading about the debates in the early 1980s about the Voting Rights Act that felt that the early cases that presupposed or would lead to proportional represen-

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132. *Id.* He continued,

My concerns were not intended to suggest that I was in any way opposed to voting rights or concerned that we have them. I think they are critical, and I certainly have been most supportive and felt that we should have been more aggressive in stating that position during the Reagan years.

*Id.*

133. *Id.* at 412.

134. *Id.*

135. *Id.* at 445.

tation. It was that kind of mentality that I felt presupposed that blacks would vote a particular way, that there was the stereotypes. . . . But I was not, as I indicated, going through any cases and specifically saying here is the precise language in that case, but rather to that general school of thought that interpreted those cases to require proportional representation.<sup>136</sup>

Thomas then acknowledged that the language in the Voting Rights Act and its amendments preclude a requirement for proportional representation and that *Thornburg* clearly does not presuppose bloc voting.<sup>137</sup> Finally, he appeared to indicate his agreement with the Court's decision in *Thornburg*. The following exchange illustrates this point:

Senator KENNEDY. The only point I raise is when you mention here many of the Court's decisions, I was just trying in my own mind—and recognizing the importance of voting rights, to find in my own mind what were the areas of the Supreme Court decisions in voting rights that you are most critical of. But I understand now—and I would like to move on—that with regards to *White [v. Regester]* and *Thornburg[] [v. Gingles]* that you support certainly their—

Judge THOMAS. I absolutely support the aggressive enforcement of voting rights laws and certainly support the results in those cases. I think I said that or attempted to say that. . . .<sup>138</sup>

## 2. Judicial Decisions

Despite Thomas's expressions of general support for the Voting Rights Act of 1965 as well as for important precedents that broaden the statute's application, as a Supreme Court Justice he has adopted a position that narrows the interpretation and application of the Act. The first hint that Thomas might not support a broad interpretation of the Act came in *Presley v. Etowah County Commission*<sup>139</sup> when he joined in the ruling which held that the Voting Rights Act did not apply to changes in the organization and functions of government. In *Presley*, the responsibilities of elected county commissioners had been changed so that the power of newly elected black county commissioners decreased.<sup>140</sup> Moreover, in *Miller v. Johnson*,<sup>141</sup> Thomas's vote was a decisive component of the five-member majority decision barring

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136. *Id.* at 445-46.

137. *Id.* at 446.

138. *Id.*

139. 502 U.S. 491 (1992).

140. *Id.* at 497.

141. 115 S. Ct. 2475 (1995).

the use of race as a predominant factor in drawing legislative districts.<sup>142</sup>

Thomas's most significant and revealing action came in *Holder v. Hall*,<sup>143</sup> in which he wrote a lengthy concurring opinion criticizing the Court's broad interpretation of the Voting Rights Act and calling for the reversal of *Thornburg*, the primary precedent in this area. He contended that the Act was not meant to cover matters of districting and vote dilution, but instead was aimed solely at devices used to restrict or prevent persons from registering to vote.<sup>144</sup> Referring to section 2(a) of the Act, he said that the terms "standard, practice, or procedure" mean only those "practices that affect minority citizens' access to the ballot. Districting systems and electoral mechanisms that may affect the 'weight' given to a ballot duly cast and counted are simply beyond the purview of the Act."<sup>145</sup> Therefore, according to Thomas, *Thornburg* must be overruled because it is an incorrect and inappropriate departure from that purpose:

[O]ur decision in [*Thornburg v. Gingles*] interpreting the scope of § 2 was badly reasoned; it wholly substituted reliance on legislative history for analysis of statutory text. In doing so, it produced a far more expansive interpretation of § 2 than a careful reading of the language of the statute would allow.<sup>146</sup>

In a dramatic passage near the end of the opinion, Thomas called for an immediate change in the Court's approach to deciding cases under the Voting Rights Act:

In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day. The disastrous implications of the policies we have adopted under the Act are too grave; the dissembling in our approach to the Act too damaging to the credibility of the federal judiciary. The "inherent tension"—indeed, I would call it an irreconcilable conflict—between the standards we have adopted for evaluating vote dilution claims and the text of the Voting Rights Act would itself be sufficient in my view to warrant overruling the interpretation of § 2 set out in [*Thornburg v. Gingles*]. When that obvious conflict is combined with the destructive effects our expansive reading of the Act has had in involving the federal judiciary in the project of dividing the Nation into racially segregated electoral districts, I can see no

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142. *Id.* at 2482.

143. 114 S. Ct. 2581 (1994).

144. *Id.* at 2592.

145. *Id.* at 2603.

146. *Id.* at 2614.

reasonable alternative to abandoning our current unfortunate understanding of the Act.<sup>147</sup>

Thomas's aggressive attack against Supreme Court interpretations of the Voting Rights Act not only contradicts statements he made at his confirmation hearings, it also constitutes the kind of judicial activism that conservative jurists have long claimed to oppose. When liberal Justice William Brennan retired, his critics regarded him as "the worst kind of judicial activist, willing to substitute his whims for the legislated preferences of the majority."<sup>148</sup> With respect to the Voting Rights Act cases, Thomas has done the same thing by challenging doctrines that Congress has left in place. Unlike constitutional interpretation, in which the Supreme Court can freely reverse precedents, statutory interpretation requires the Justices to defer to Congress, the ultimate controller of statutory meaning.<sup>149</sup> The Court should interpret a statute's meaning and then leave it to the Legislature to correct any misinterpretations.<sup>150</sup> As Justice Thomas's opinion in *Holder* shows, however, Thomas has not deferred to Congress with respect to the Voting Rights Act.

Other Justices have even commented on this point. In *Holder*, Justice Stevens, joined by Justices Blackmun, Ginsburg, and Souter, pointed out in a separate opinion focused solely on refuting Thomas's views, "When a statute has been authoritatively, repeatedly, and consistently construed for more than a quarter century, and when Congress has reenacted and extended the statute several times with full awareness of that construction, judges have an especially clear obligation to obey settled law."<sup>151</sup> Stevens labeled Thomas's views as "radical"<sup>152</sup> and declared,

The large number of decisions that we would have to overrule or reconsider, as well as the congressional reenactments discussed [in the opinion], suggests that Justice THOMAS'[s] radical reinterpret-

147. *Id.* at 2618.

148. David Kaplan, *A Master Builder*, NEWSWEEK, July 30, 1990, at 19, 20.

149. See, e.g., LAWRENCE BAUM, *THE SUPREME COURT* 223 (3d ed. 1992) ("In the interpretation of federal statutes, the Supreme Court's legal position is inferior to that of Congress.").

150. [W]hen the Court is asked to interpret a provision of a statute *for the first time*, its job is to "fix the meaning of the words"—that is to interpret what the statute says based on a literal reading of its text—and to determine its legislative history, which requires the Court to decide what the legislators really meant . . . .

WILLIAM C. LOUTHAN, *THE UNITED STATES SUPREME COURT: LAWMAKING IN THE THIRD BRANCH OF GOVERNMENT* 130 (1991).

151. *Holder*, 114 S. Ct. at 2629 (Stevens, J., separate opinion).

152. *Id.*

tation of the Voting Rights Act is barred by the well-established principle that *stare decisis* has special force in the statutory arena.<sup>153</sup>

Stevens characterized Thomas's analysis as a policy argument that should be directed to Congress rather than persuasive legal reasoning that justifies a dramatic jurisprudential shift.<sup>154</sup> Whether or not Thomas ultimately succeeds in rewriting the interpretation of the Voting Rights Act, it is clear that his confirmation testimony led senators to believe his views on these issues were quite different than what they have actually proved to be.

## F. Equal Protection and Affirmative Action

### 1. Confirmation Testimony

During the confirmation process, Thomas presented as one of his major qualifications the fact that he had overcome a difficult childhood in the segregated South in order to become educated and successful.<sup>155</sup> Specifically, he told the Committee that these childhood experiences made him sensitive to the harms of discrimination and that he would apply that sensitivity to his decisionmaking on the Supreme Court.<sup>156</sup>

Prior to his nomination, Thomas had spoken and written fairly extensively on affirmative action.<sup>157</sup> His views in this area transformed over time. At first, Thomas seemed to be somewhat supportive of the use of affirmative action in remedying employment discrimination. In a March 1983 speech he said,

Although my commitment to individual rights causes me to raise questions about the effectiveness of group remedies, with the exception of quotas, I support many affirmative action remedies. I support these remedies because the remedies which are truly

153. *Id.*

154. *Id.* at 2625.

155. I watched as my grandfather was called "boy." I watched as my grandmother suffered the indignity of being denied the use of a bathroom. But through it all they remained fair, decent, good people. Fair in spite of the terrible contradictions in our country.

. . . I follow in their footsteps and I have always tried to give back.

*Confirmation Hearings*, *supra* note 17, at 109.

156. *Id.* at 260.

157. See Speech to the General Meeting of Women Employed in Chicago, Illinois (Mar. 30, 1983); Speech to the Kansas City Bar Association (Apr. 28, 1983); Speech to the Cato Institute (Apr. 23, 1987); *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough?*, *supra* note 15; *Civil Rights as a Principle Versus Civil Rights as an Interest*, *supra* note 15.



necessary to make individual rights a meaningful reality are not yet on the books.<sup>158</sup>

By 1987, however, Thomas's views had changed. Thomas began to criticize race-conscious and gender-conscious measures as unacceptable methods of eradicating discrimination: "Goals and timetables, long a popular rallying cry among some who claim to be concerned with the right to equal employment opportunity, have become a sideshow in the war on discrimination."<sup>159</sup>

During the confirmation hearings, a number of civil rights organizations presented statements and testimony critical of Thomas's nomination, particularly his opposition to affirmative action.<sup>160</sup> Upon questioning from the members of the Committee, Thomas appeared to soften his opposition to this discrimination remedy. He stated,

I have initiated affirmative action programs, I have supported affirmative action programs. Whether or not I agree with all of them I think is a matter of record. But the fact that I don't agree with all of them does not mean that I am not a supporter of the underlying effort. I am and have been my entire adult life.<sup>161</sup>

Later in the hearings, in a brief exchange with Senator Biden, Thomas again expressed support for limited affirmative action policies.

The CHAIRMAN. . . . I would like to make a point of clarification. Did you say, Judge, that affirmative action preference programs are all right as long as they are not based on race?

Judge THOMAS. I said that from a policy standpoint I agreed with affirmative action policies that focused on disadvantaged minorities and disadvantaged individuals in our society.<sup>162</sup>

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158. Speech to the General Meeting of Women Employed in Chicago, Illinois, *supra* note 157.

159. *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough?*, *supra* note 15, at 402.

160. These organizations included the Lawyers' Committee for Civil Rights Under Law, the NAACP Legal Defense and Educational Fund, Inc., the Leadership Conference on Civil Rights, the Mexican-American Legal Defense and Education Fund, and the Center for Constitutional Rights. See generally *Confirmation Hearings*, *supra* note 17, at pts 1 & 2.

161. *Confirmation Hearings*, *supra* note 17, at 263.

162. *Id.* at 363.

## 2. Judicial Decisions

### a. *Equal Protection and Affirmative Action*

In his freshman term, Thomas participated in *Georgia v. McCollum*,<sup>163</sup> an equal protection case concerning racially-motivated uses of peremptory challenges by criminal defendants. Although Thomas disagreed with the majority's conclusion that such challenges should be barred, he concurred because he agreed with Chief Justice Rehnquist's conclusion that the outcome was mandated by an unchallenged recent precedent.<sup>164</sup>

Thomas's concurring opinion in *McCollum* is interesting for two reasons. First, he openly acknowledged that "conscious and unconscious [racial] prejudice persists in our society and . . . [c]ommon experience and common sense confirm this understanding."<sup>165</sup> In a later case, however, he was among the majority that accepted a pretextual explanation for a prosecutor's decision to remove African-American jurors;<sup>166</sup> the Court said that the prosecutor's race-neutral explanations need not be "persuasive, or even plausible."<sup>167</sup>

Second, he effectively endorses the application of a race-based remedy to address the consequences of racial prejudice upon jury decisionmaking. He said that the Court had, in a previous case, "reasonably surmised, without direct evidence in any particular case, that all-white juries might judge black defendants unfairly."<sup>168</sup> Thus he was concerned that the elimination of black defendants' ability to apply racially-motivated peremptory challenges would lead to racial discrimination in the outcomes of criminal cases: "I am certain that black criminal defendants will rue the day that this court ventured down this road that inexorably will lead to the elimination of peremptory strikes."<sup>169</sup> This position placed him completely at odds with his predecessor, Justice Thurgood Marshall, who believed that

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163. 112 S. Ct. 2348 (1992).

164. *Id.* at 2359 (Thomas, J., concurring) ("A criminal defendant's use of peremptory strikes cannot violate the Fourteenth Amendment because it does not involve state action. Yet, I agree with the Court and THE CHIEF JUSTICE that our decision last term in *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991), governs this case and requires the opposite conclusion. Because the respondents do not question *Edmonson*, I believe that we must accept its consequences.").

165. *Id.* at 2360.

166. *Purkett v. Elem*, 115 S. Ct. 1769 (1995).

167. *Id.* at 1771.

168. *McCollum*, 112 S. Ct. at 2360.

169. *Id.*

peremptory challenges must be completely eliminated in order to combat their discriminatory effects.<sup>170</sup>

In other contexts, however, Thomas subsequently railed against race-based remedies, revealing that he had either lost his sensitivity to the continuing existence of discrimination or accepted such discrimination as the unremediable product of large social forces and private decisions that should remain untouched by judicial decisions.<sup>171</sup> In adopting these positions, Thomas endorsed both the conservative Justices' narrow definition of "state action" for equal protection purposes and a vision of judicial restraint that would remove the courts from an active role in addressing social problems. This formalist stance raises questions about whether Thomas's confirmation hearing statements claiming to support some kinds of affirmative action were indeed accurate.

For example, in the Supreme Court's most important affirmative action case during Thomas's tenure, *Adarand Constructors, Inc. v. Peña*,<sup>172</sup> Thomas launched a vigorous assault against government affirmative action programs. According to Thomas, "So-called 'benign' discrimination teaches many [whites] that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence."<sup>173</sup> He also added that "[t]he programs stamp minorities with a badge of inferiority."<sup>174</sup>

Given the strident and categorical nature of Thomas's denunciations in *Adarand*, how could he have said in his confirmation hearings that "from a policy standpoint I agreed with affirmative action policies that focused on disadvantaged minorities and disadvantaged individuals in our society"?<sup>175</sup> If benign discrimination is inevitably stigmatizing in such a harmful way, how could any affirmative action program be acceptable to Thomas, even if the program could somehow be tailored to benefit only those whom Thomas would identify as the truly disadvantaged? Moreover, what became of Thomas's prior acknowledgment of the pervasiveness of "conscious and unconscious [racial] prejudice" in American society with its concomitant discriminatory

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170. *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.")

171. *E.g.*, *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995).

172. 115 S. Ct. 2097 (1995).

173. *Id.* at 2119 (Thomas, J., concurring).

174. *Id.*

175. *Confirmation Hearings*, *supra* note 17, at 363.

impacts?<sup>176</sup> Thomas merely applies his formalism for two propositions: (1) government race preferences are state action that cannot withstand strict scrutiny in an equal protection analysis, and (2) such state action harms minorities and must be eradicated.<sup>177</sup>

When juxtaposing this approach with Thomas's statements in *McCullum*,<sup>178</sup> one can see that Thomas's narrow definition of state action does not encompass racially discriminatory decisions made by private actors in government-sponsored, government-designed, and government-controlled legal processes.

Moreover, while Thomas apparently regards racial prejudice and discrimination as a continuing, pervasive problem in society, he sees stigmatization of minorities by governmental remedies as a more significant problem. He may also regard pervasive societal discrimination as beyond the reach of governmental remedial authority in all but the most formal settings, such as legal cases that provide a quantum of proof of discrimination against specific individuals.

#### b. Racial Discrimination and Judicial Remedies

Thomas's views on equal protection issues came into sharper focus in his concurring opinion in the school desegregation case, *Missouri v. Jenkins*.<sup>179</sup> In joining the Court's majority to reject a remedial order imposed by a district court judge upon the Kansas City, Missouri, school system, Thomas seemed to regard judicial action in desegregation cases as insulting to minorities. Because he apparently saw such judicial policies, like affirmative action, as paternalistic, he did not evince any recognition that such cases attempt to redress the imbalance of resources devoted to the education of youngsters in single-race schools:

It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior. Instead of focusing on remedying the harm done to those black schoolchildren injured by segregation, the District Court here sought to convert the Kansas City, Missouri, School District (KCMSD) into a "magnet district" that would reverse the "white flight" caused by desegregation.<sup>180</sup>

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176. *McCullum*, 112 S. Ct. at 2360 (Thomas, J., concurring).

177. *Adarand Constructors, Inc.*, 115 S. Ct. at 2119 (Thomas, J., concurring).

178. See *supra* text accompanying notes 163-169.

179. 115 S. Ct. 2038 (1995).

180. *Id.* at 2061-62 (Thomas, J., concurring).

The district court judge in *Jenkins* had issued many orders leading to the construction of new schools and innovative educational programs. Whether or not one believes such orders were excessive, Thomas did not even see how those orders would remedy "the harm done to those black schoolchildren injured by segregation."<sup>181</sup> Thomas criticized the judge for finding that segregation even existed in Kansas City and needed to be remedied. According to Thomas, the continued existence of virtual single-race schools did not stem from illegal segregation that should be remedied by a judge. Rather, "[t]he continuing 'racial isolation' of schools after *de jure* segregation has ended may well reflect voluntary housing choices or other private decisions."<sup>182</sup> Apparently, Thomas believed that the judge should have done nothing at all absent concrete evidence of specific discriminatory decisions, as opposed to lingering discriminatory impacts.

Thomas's formalist thinking sees *de jure* segregation in very limited terms and seems to ignore the role of housing discrimination and other accumulated discriminatory impacts, which involve direct or indirect government support, as remediable causes of discrimination.<sup>183</sup> Unlike Professor Laurence Tribe, who argued that courts should make at least symbolic statements condemning the government's role in ghettoization that produced continuing racial isolation in schools,<sup>184</sup> Thomas apparently accepts housing segregation as the product of "choices or other private decisions"<sup>185</sup> and he believes that it is beyond the practical ability of the federal courts to address demographic patterns.<sup>186</sup>

Whether Thomas recognizes it or not, housing segregation is not simply a product of voluntary choices by individuals regarding where they want to live. It involves systematically-discriminatory steering,

181. *Id.* at 2061.

182. *Id.* at 2062.

183. See THOMAS F. PETTIGREW, *RACIAL DISCRIMINATION IN THE UNITED STATES* (1975).

184. Even if it would have had no impact on judicial *remedies*, a judicial proclamation that inner city ghettoization was constitutionally infirm might have avoided legitimating this nationwide travesty [of severe segregation in large cities]. Had the Court exerted the one thing it clearly can control—its rights-declaration powers—to recognize the role of law and of state action in creating ghettoization, the Court could at least have created positive social and political tension, the sort of tension that makes kids grow up thinking something is wrong, instead of inevitable, about ghettoization.

Laurence Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 30 (1989) (footnote omitted).

185. *Jenkins*, 115 S. Ct. at 2062.

186. *Id.* at 2063.

"red lining" by real estate agents and government-backed lenders,<sup>187</sup> and various governmental policy decisions<sup>188</sup>—hardly the kind of "private decisions" the consequences of which should automatically be immune from judicial scrutiny simply because they do not fit a narrow, formalistic definition of "state action" for equal protection purposes.

Instead of viewing judicial power as one means for redressing—albeit incompletely—aspects of discrimination, Thomas merely asks whether segregation is the product of patent state action, narrowly defined, and then condemns the courts for acting at all. According to Thomas, "The exercise of [judicial] authority has trampled upon principles of federalism and the separation of powers and has freed courts to pursue other agendas unrelated to the narrow purpose of precisely remedying a constitutional harm."<sup>189</sup> Thomas further stated that judicial intervention into various issues constitutes "extravagant uses of judicial power [that] are at odds with the history and tradition of the equity power and the Framers' design."<sup>190</sup>

In Thomas's formalistic thinking, several points appear to stand out: (1) private discrimination must be accepted; (2) housing segregation and racial isolation in schools are a product of demographic trends based on voluntary choices and private decisions that must be accepted; (3) remediable discrimination will be recognized only in narrow instances; (4) judges should leave to other branches of government social problems which, ironically, were very often created by those branches of government themselves,<sup>191</sup> and (5) the protection of federalism, separation of powers, the tradition of equity power, and the Framers' intentions are more important judicial goals than the

187. "Redlining is the practice of outlining in red on a city map an area where no [mortgage] financing will be considered." GARY ORFIELD, *MUST WE BUS?: SEGREGATED SCHOOLS AND NATIONAL POLICY* 81 n.12 (1978). Such practices were used by banks and real estate agents, with the endorsement of the Federal Housing Agency, as a means to maintain racial segregation in housing. OLIVER C. COX, *RACE RELATIONS: ELEMENTS AND SOCIAL DYNAMICS* 132-37 (1976).

188. See PETTIGREW, *supra* note 183, at 38 ("Residential separation by race does not simply 'happen,' *de facto*; its structural roots have to be carefully planned and implemented. Once established, the apartheid pattern is typically maintained by a vigilant exclusion of prospective black residents in predominantly white areas.").

189. *Jenkins*, 115 S. Ct. at 2062.

190. *Id.* at 2067.

191. For example, if judges cannot issue orders to remedy racial isolation in schools, then it is left to state legislatures, city councils, and school boards to remedy problems that they spent decades fostering. In the analogous prison reform context, which Thomas also cites as an example of judicial excess, *id.* at 2067, 2071, Thomas would place "the actualization of prisoners' constitutional rights . . . in the hands of the same elected legislative and executive branches that created and maintained the civil rights violations in the first place." Smith, *supra* note 120, at 150.

eradication of discrimination. According to Professor Tribe, “[Thomas] takes a more limited view than any other justice for the past 40 years of the proper scope of authority of a federal court confronted with a deliberate violation of the Constitution.”<sup>192</sup>

Thomas’s opinion went even further by criticizing the Supreme Court’s landmark decision in *Brown v. Board of Education*.<sup>193</sup> Despite commentators’ remarks that “[a]nybody who [opposed *Brown*] today would be assailed as a segregationist crank,”<sup>194</sup> Thomas stepped forward as the first Justice ever to question the basis of *Brown*.<sup>195</sup> In particular, Thomas criticized the *Brown* decision’s famous reliance on Professor Kenneth Clark’s studies showing the psychological harms experienced by African-American children subjected to segregated education in the South during the 1950s.<sup>196</sup> According to Thomas,

[T]he court has read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies on questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority.<sup>197</sup>

What Thomas perceives as an “assumption of black inferiority” is merely, in the minds of other observers, the recognition that the unequal treatment and inferior resources attendant to enforced separation was harmful to African-Americans—just as it would be harmful to any other group of children singled out in this way.<sup>198</sup>

As one of Thomas’s critics notes about his approach to issues of racial discrimination, the Justice’s written opinions

veer[] off into a neverland of color-blind philosophizing in which all race-based policies, from Jim Crow laws designed to oppress minorities to affirmative-action measures seeking to assist them, are conflated into one morally and legally pernicious whole[, and thus]

192. Jack E. White, *Uncle Tom Justice*, TIME, June 26, 1995, at 36, 36.

193. 347 U.S. 497 (1954).

194. Stuart Taylor, Jr., *Meese v. Brennan: Who’s Right About the Constitution?*, NEW REPUBLIC, Jan. 6 & 13, 1986, at 17, 20.

195. See White, *supra* note 192, at 36 (“This, notes Ted Shaw, the NAACP Legal Defense and Education Fund lawyer who represented the plaintiffs in the *Jenkins* case, ‘is probably the first time a Supreme Court Justice has questioned the reasoning in *Brown*.’”).

196. RICHARD KLUGER, SIMPLE JUSTICE 315-20, 706 (1976).

197. *Jenkins*, 115 S. Ct. at 2062.

198. It was not separation *per se* that produced the harms, but rather the crushing cumulative impacts of a society that provided fewer opportunities and resources, including educational resources, for African-American students. KLUGER, *supra* note 196, at 319-20.

[h]e heaps scorn on federal judges who have used the bench to enforce and expand civil rights, accusing them of a paternalistic belief in black inferiority.<sup>199</sup>

In addition, Thomas's elevation of constitutional principles, as distinct from and superior to social science research,<sup>200</sup> raises questions about how he could possibly fulfill the message of his confirmation testimony, namely his purported ability to bring personal experience and sensitivity to judicial decisionmaking on issues of discrimination. If Thomas sees rigid constitutional principles as excluding consideration of systematic evidence about social reality, then how could he ever honestly purport, as he told the Committee, to "bring something different to the Court [by] walk[ing] in the shoes of the people who are affected by what the Court does"?<sup>201</sup> Presumably, the anecdotal evidence of social reality reflecting his personal experiences is even less valid than social science evidence. Based on his simplistic conception and acceptance of housing segregation as, in large part, an unremediable product of personal choice,<sup>202</sup> it appears that Thomas's elevation of his putative constitutional principles has completely overwhelmed any sensitivity to the reality of social forces that shape society.

It is also disconcerting that Thomas has rejected social science evidence on the impact of discrimination after having concluded that in the jury context it can be "reasonably surmised, without direct evidence in any particular case, that all-white juries might judge black defendants unfairly."<sup>203</sup> In the jury context, Thomas draws from his unproven perception of social reality, while in other contexts he rejects systematic studies of social reality. Such an approach raises the possibility that Thomas selectively uses the concept of empirical evidence to support his preferred philosophical position. If this is true, it makes one wonder whether Thomas, like Scalia and others, will ignore social science evidence in other contexts, such as racial discrimination in the application of capital punishment.<sup>204</sup>

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199. White, *supra* note 192, at 36.

200. For example, Thomas wrote that "[t]he lower courts should not be swayed by the easy answers of social science, nor should they accept the findings, and the assumptions, of sociology and psychology at the price of constitutional principle." *Jenkins*, 115 S. Ct. at 2066.

201. *Confirmation Hearings*, *supra* note 17, at 260.

202. *Jenkins*, 115 S. Ct. at 2062.

203. *McCollum*, 112 S. Ct. at 2360.

204. See Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies From the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 MERCER L. REV. 1035 (1994).



In contrast to Thomas's presentation at his confirmation hearings, his rigid, formal views on the narrow definition of remediable discrimination and race-based policies seem to preclude support for any affirmative action programs. Moreover, his defensive perception that the identification of discrimination problems is the equivalent of labeling African-Americans as inferior combines with his limited view of federal judicial power to refute his confirmation claims that his sensitivity to discrimination would shape his judicial decisions.<sup>205</sup> As one analyst has noted, Thomas is not inclined to permit human experience and humane sensitivity to affect his decisions because his judicial voice "is a voice for a formal, even rigid approach to constitutional interpretation, a rejection of the idea that modern influences might cast a new light on the intentions of the framers."<sup>206</sup>

#### IV. CONCLUSION

Whether or not Thomas's confirmation testimony was purposefully deceptive, the evidence clearly shows that significant aspects of his testimony are at odds with his record on the Court. He has not proven to be an open-minded, independent thinker and, on such controversial issues as abortion, voting rights, and affirmative action, Thomas's views in Supreme Court cases have been consistent with his controversial pre-Court speeches and writings rather than with the disclaimers and explanations he presented during his confirmation hearings. Did we see a genuine, honest Clarence Thomas at the 1991 confirmation hearings? In light of the intensive coaching that Thomas received from Bush Administration officials before presenting his testimony,<sup>207</sup> it is not surprising that Thomas put a safe, positive gloss on his responses to the Senators' questions. It is most troubling and disappointing, however, that the nation's policies and future must be affected by a judicial officer, steeped in the authority of the country's highest court, whose judicial performance has been so quickly and obviously out of step with his confirmation testimony. This was no evolutionary process in which a judge developed new perspectives

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205. See *Confirmation Hearings*, *supra* note 17, at 260.

206. David J. Garrow, *On Race, It's Thomas v. an Old Ideal*, N.Y. TIMES, July 2, 1995, at E1.

207. See Ruth Marcus, *Haven't We Met Before? If You Liked the Souter Hearings, Then You Loved the Thomas Replay*, WASH. POST NAT'L WKLY. ED., Sept. 23-29, 1991, at 14 ("To ready himself for the hearings, Judge Thomas reviewed videotapes of Souter's performance before the Senate Judiciary Committee. That preparation clearly showed during Thomas' five days of testimony, when the Souter hearings appeared to provide almost a playbook.").

after spending time on the bench.<sup>208</sup> Thomas did not move to a new position from his original point. Instead, he moved back to his original positions after telling the nation that he really stood on some other ground as a judge.

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208. See Christopher E. Smith & Kimberly A. Beuger, *Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 AKRON L. REV. 115, 120-24 (1993) (description of Justice Harry Blackmun's gradual transformation from conservative to liberal).