ENDANGERED LIBERTIES:
What Judge Clarence Thomas' Record Portends for Women

A Report by the Women's Legal Defense Fund
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
202/986-2600

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This report was produced by Women's Legal Defense Fund staff members Novella Abrams, Nicole Gueron, Judy Hodgson, Joanne Hustead, Donna Lenhoff, Debra Ness, Helen Norton, Virginia Sassaman, Nkechi Taifa, and Claudia Withers, and Nancy McFadden of O'Melveny & Myers.

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EXECUTIVE SUMMARY

The Supreme Court and our nation are at a crossroads. This is a time when women, especially women of color who face double discrimination based on both gender and race, are ever more vulnerable to invidious discrimination that threatens their economic security and personal freedom. The Court is poised to roll back the law's most basic protections of equality and individual liberty. At this critical time the judicial philosophy -- the principles that inform legal analysis -- of each Justice will determine the outcome of cases that carry enormous meaning for our lives far into the 21st century.

This report analyzes Judge Clarence Thomas' record in three key areas of particular concern to women: equal employment opportunity, constitutional protections against gender discrimination, and reproductive freedom. After reviewing Judge Thomas' words and actions, the Women's Legal Defense Fund finds in his record a disturbing pattern of disregard for these most fundamental principles.

First, Judge Thomas' record as leader of the agency charged with enforcing the nation's laws prohibiting employment discrimination is deeply troubling. It reveals a predilection to interpret restrictively equal opportunity laws that have proven essential to the economic security of working women and their families. While chair of the Equal Employment Opportunity Commission (EEOC), Judge Thomas too often worked to deny equal employment opportunity -- even as he was sworn to enforce the

nation's laws designed to expand such opportunity. For example, he stripped or attempted to strip the agency of several of its most effective tools for enforcing federal anti-discrimination law:

- As EEOC chair, Judge Thomas retreated from the proven and effective enforcement strategy of systemic litigation, while individual victims of discrimination too often received no remedy at all;
- Judge Thomas attacked affirmative action as a strategy in battling on-the-job discrimination, despite its proven effectiveness and repeated affirmation by the Supreme Court; and
- Judge Thomas proposed to weaken federal guidelines that set standards for employee selection practices in contravention of prevailing law.

As EEOC chair, Judge Thomas also:

- refused to perform his duty as required by law to enforce and evaluate anti-discrimination efforts by the federal government;
- failed to enforce the law against sex discrimination to ban employment practices that exclude all women of child-bearing age from certain high-paying jobs;
- failed to challenge gender-based wage discrimination under Title VII and the Equal Pay Act; and
- failed to enforce federal age discrimination law -- letting the claims of thousands of older workers lapse -- and took policy positions against the interests of the older workers he was sworn to protect.

Second, Judge Thomas' views of constitutional rights, articulated over more than 10 years as a public figure, reveal an allegiance to a judicial philosophy that could prove inimical to and inconsistent with the rights of women. For example, his oft-expressed support for jurisprudence based on a theory of "natural

rights" raises substantial concern about his adherence to the Constitution's most basic guarantees against sex discrimination:

- Judge Thomas' seeming indifference to the Equal Protection Clause is troubling, as the Equal Protection Clause has been interpreted as the primary source of constitutional protections against sex discrimination;
- Judge Thomas has not stated how or whether he would apply a natural rights analysis to sex discrimination; historically, though, natural law principles have been used to limit the lives and opportunities of women; and
- Judge Thomas has embraced an analysis of the status of working women that denies the reality of discrimination they face and its effects on their economic security and individual opportunity.

Third, Judge Thomas' record contains strong indications that he opposes the constitutional right to privacy that includes a woman's right to reproductive freedom:

- Judge Thomas praised as a "splendid example of applying natural law" an article arguing not only that Roe v. Wade was wrongly decided but that the Constitution affirmatively protects the fetus' "right to life";
- Judge Thomas served on the 1986 White House Working Group on the Family, which authored a report sharply criticizing Roe and other Supreme Court decisions protecting the right of privacy; and
- In other writings, Judge Thomas criticized Roe and even Griswold v. Connecticut, the case protecting the fundamental right of married couples to use contraceptives.

Taken as a whole, Judge Thomas' words and actions reveal a pattern of judgment and legal analysis that we find deeply troubling. We fear that the prism through which he views the legal claims of women, especially women of color, and disadvantaged people is clouded by an ideology that

misinterprets, ignores, or restricts legal principles of the greatest importance. In short, we believe that his record raises significant questions about his fitness for a lifetime appointment to the Supreme Court, the last bastion for justice and the protection of constitutional rights and liberties for all Americans.

INTRODUCTION: THE CURRENT CLIMATE ON THE COURT

The loss of Justice Thurgood Marshall as a key voice for equality and individual dignity leaves a void that must be filled with the greatest care. Careful scrutiny of any nominee to the Court is thus essential if our nation is to live up to its aspirations of "liberty and justice for all." The stakes are too high to entrust our constitutional future to any nominee who does not demonstrate unwavering commitment to the law's essential guarantees of individual rights and liberties.

Indeed, recent evidence confirms that the Court's vigilance in this area is needed now more than ever, as gender- and race-based discrimination still tarnish the American dream. For example:

- A recent General Accounting Office study on federally sponsored job training programs found that 20 percent of the programs discriminated against women and blacks. Some complied with employers' requests for white applicants only; others provided women and blacks with less classroom training and steered them towards lower-wage jobs.[1]

- Women of color suffer the economic effects of double discrimination. Economist Marilyn Power of Sarah Lawrence College found that black women are still frequently trapped in low-wage jobs: in 1989, 27.3 percent of employed black women were in low-paying service occupations, as compared to 16.1 percent of white women.[2]

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[1] Hearings Before the Subcommittee on Employment and Housing of the House Committee on Government Operations, 102d Cong., 1st Sess. (July 17, 1991)(statement of Lawrence H. Thompson, Assistant Comptroller General, General Accounting Office, on Job Training Partnership Act: Racial and Gender Disparities in Services).

[2] M. Power, "Occupational Mobility of Black and White Women Service Workers," (Presented at the Institute for Women's Policy Research Second Annual Women's Policy Conference, June, 1990) (unpublished manuscript).

- A 1991 study by The Urban Institute examined racial discrimination in hiring by charting the relative success of black and white men in the hiring processes of randomly-selected private-sector jobs. When pairs of men who were matched in all characteristics other than race -- age, speech, education, work experience, demeanor, and physical build -- applied for the same job, whites advanced farther than blacks 20 percent of the time; blacks advanced farther than whites only seven percent of the time. Whites received a job offer 15 percent of the time, compared to five percent for blacks.[3]

As another recent study has found, "setting a tone that condemns acts of bias and hatred will, in fact, discourage them."[4] Psychologists at Smith College found that people are encouraged to express anti-racist opinions after hearing others voice similar views. Those who hear opinions that condone racism are more likely to support or only weakly condemn racist incidents. These experts conclude that "[i]f national authorities were more vocal in disapproving of prejudice, you'd have less of it."[5] Such findings underscore the need for strong leadership from the Supreme Court in refusing to tolerate illegal discrimination.

In a cast of only nine players, every member of the Court plays an important role. The dynamics of this small body that must reach all its decisions by majority are dramatically affected by each new appointment. Even if this Court's decisions on important issues of our day are increasingly predictable, what

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[3] The Urban Institute, Opportunities Denied, Opportunities Diminished: Discrimination in Hiring 19 (1991).

[4] "New Ways to Battle Bias: Fight Acts, Not Feelings," N.Y. Times, July 16, 1991, at C1.

[5] Id.

the decisions say and how they say it are not at all certain. Indeed, the Court's underlying reasoning and analysis set precedents for future cases that are just as important as identifying the winning and losing parties. Thus, each case is shaped by the approach of a new Justice.

Because the Rehnquist Court has moved farther to the right in recent years, we believe the margin by which cases are decided has also become increasingly important: the closer the case, the narrower the opinion because Justices are less willing to extend their reasoning beyond the fact situation at hand. On the other hand, comfortable 7-2 margins free the Court to write far more sweeping opinions, unrestrained by the need to accommodate a hesitant member of a shaky coalition. Without diversity of viewpoint among members of the Court, the Rehnquist majority will be even more emboldened to produce aggressively conservative opinions.

Indeed, just such aggressiveness provoked an ominous warning from Justice Marshall in his final opinion. His words speak eloquently about why we must care about his successor. In his dissenting opinion in Payne v. Tennessee,[6] Justice Marshall warned that the Court had launched a "far-reaching assault upon this Court's precedents" and that in so doing, the majority "sends a clear signal that essentially all decisions implementing

[6] 59 U.S.L.W. 4814 (U.S. June 25, 1991) (No. 90-5721).

the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination."[7]

It becomes clear from reading the Chief Justice's majority opinion in Payne why Justice Marshall was so alarmed. The Chief Justice declared that the Court's principle of adhering to its own precedent is strongest in cases involving property and contract rights, weakest in cases involving the Constitution or procedural and evidentiary rules.[8] By applying Chief Justice Rehnquist's additional criterion for overruling -- that a case either was decided or reaffirmed by a 5-4 margin "over spirited dissen[t]"[9] -- it becomes clear that this Court is poised to alter some of the most important rulings of the past. The victims of such revisions are likely to be women, especially women of color, and disadvantaged people.

Justice Marshall was so disturbed by the Court's shift that he compiled an "endangered precedents" list. This list includes Metro Broadcasting v. FCC,[10] Justice Brennan's final opinion in which five members of the Court upheld affirmative action programs for minority broadcasters; and Thornburgh v. American

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[7] Payne, supra, at 4825-26 (Marshall, J., dissenting).

[8] Id. at 4819.

[9] Id.

[10] 110 S.Ct. 2997 (1990).

College of Obstetricians and Gynecologists,[11] which reaffirmed the right to abortion recognized in Roe v. Wade.[12]

Given this inclement judicial climate, next term's docket provides fertile ground for the Rehnquist Court to assault civil rights, social welfare, and reproductive freedom. The Court already has agreed to hear two cases challenging the government's role in eradicating the vestiges of race-based segregation. Freeman v. Pitts[13] involves the desegregation policies of the DeKalb County, Georgia, public schools, which were formerly segregated by law and have been under federal court supervision since the 1960s. The county argues that it should no longer be forced to operate under a court decree -- even though segregation has been perpetuated in its schools. The other case, United States v. Mabus,[14] concerns a Department of Justice challenge to Mississippi's state university system, which remains almost completely segregated by race. Mississippi claims (and a lower federal court agreed) that the state has done all it needs to do. In each case, the Court will decide whether the governmental

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[11] 476 U.S. 747 (1986).

[12] 410 U.S. 113 (1973).

[13] 887 F.2d 1438 (11th Cir. 1989), cert. granted, 111 S.Ct. 949 (1991).

[14] 914 F.2d 676 (5th Cir. 1990), cert. granted, 111 S.Ct. 1579 (1991).

entity has met its constitutional obligation to dismantle segregated public institutions.[15]

Even more ominous, the Court may soon choose to reconsider the critical 1973 Roe v. Wade decision. Indeed, no fewer than four laws may provide the test case for overturning Roe:

- Pennsylvania's anti-choice law, enacted in 1989, is furthest along in the federal appeals process. Pennsylvania's statute was found unconstitutional by a federal district court in 1990. The invalidated provisions include a 24-hour waiting period, husband notification, mandatory "counseling," and "informed" parental consent;

- Guam's 1990 law prohibits abortions except when two physicians determine that there is a substantial risk that continuing the pregnancy would endanger the woman's life or gravely impair her health. A federal district court found the statute unconstitutional;

- Utah's statute, enacted in January 1991, bans abortions except in cases of rape or incest, or in situations where the woman's life is in danger, there would be grave damage to the woman's medical health, or the fetus has grave defects. The state delayed enforcement of the statute until a federal district court rules on its constitutionality; and

- Louisiana's 1991 law is the most restrictive in the country, outlawing abortion except in cases of rape, incest, or to save the woman's life. Any doctor who performs an illegal abortion may be imprisoned for up to 10 years and liable for a $100,000 fine. Trial in district court is scheduled for August; many predict that the case will be quickly shepherded through the appeals process to come before the Supreme Court next term.

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[15] Another case that the Court will hear in the coming term directly affects women's ability to challenge sex discrimination by educational institutions. In Franklin v. Gwinnett County Public Schools, 911 F.2d 617 (11th Cir. 1990), cert. granted, 59 U.S.L.W. 3823 (U.S. June 10, 1991) (No. 90-918), the Court will decide whether victims of sex discrimination in education can recover damages for those violations under Title IX.

Presaging a willingness to reject the constitutional right to an abortion, the Court this year upheld a ban on abortion counseling at federally-funded health clinics in Rust v. Sullivan.[16] Justices Rehnquist, White, Scalia, and Kennedy appear prepared to overrule Roe. It is less clear how Justice O'Connor or Justice Souter would vote. With Justice Marshall's departure, only two Justices remain who fully support the Roe decision -- Justice Stevens and its author, Justice Blackmun. Perhaps no other area of the law will be as significantly shaped by the next Justice as the constitutional right to privacy.

Clearly, millions of women will be affected by the next Court's rulings in this and other areas critical to women's lives, opportunities, and autonomy. The Rehnquist Court's unbridled willingness -- indeed eagerness -- to overturn precedent in the area of personal liberties will either be encouraged or restrained by the next appointment to the Court.

In the remainder of this report, we review Judge Thomas' record on these questions. Unfortunately, as this review shows, his record suggests a nominee who is actively hostile to the law's guarantees of "liberty and justice" for all.

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[16] 111 S.Ct. 1759 (1991).

EQUAL EMPLOYMENT OPPORTUNITY

In 1982, President Reagan appointed Clarence Thomas as chair of the Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing federal laws that prohibit employment discrimination on the basis of sex, race, national origin, religion, and age. The EEOC also coordinates all equal employment programs in the federal workplace.

Judge Thomas' overall record at the EEOC casts doubt on his commitment to broad interpretations and aggressive enforcement of legal protections against employment discrimination, including those proven extremely effective in translating the dream of equal opportunity into reality for women, especially women of color.

Throughout his eight-year tenure as EEOC chair, Judge Thomas frequently attempted to narrow basic principles and mechanisms of anti-discrimination law. And he too often allowed his opinions to override his obligation to adhere to established law and legal doctrine. Further, Judge Thomas stripped or attempted to strip the agency of several of its most effective tools for enforcing federal anti-discrimination law:

- As EEOC chair, Judge Thomas retreated from the proven and effective enforcement strategy of systemic litigation, while individual victims of discrimination too often received no remedy at all;
- Judge Thomas attacked the use of affirmative action as a strategy in battling on-the-job discrimination, despite its proven effectiveness and repeated affirmation by the Supreme Court; and

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As EEOC chair, Judge Thomas also:

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- failed to enforce federal age discrimination law -- letting the claims of thousands of older workers lapse -- and took policy positions against the interests of the older workers he was sworn to protect.

Each of these concerns is discussed more fully below.

As EEOC chair, Judge Thomas retreated from the proven and effective enforcement strategy of systemic litigation, while individual victims of discrimination too often received no remedy at all.

In many contexts, discrimination is system-wide, infiltrating an entire institution or industry. Strategic class-based legal action is thus required to attack effectively practices that harm large numbers of women, especially women of color, and disadvantaged people. Systemic litigation not only provides meaningful remedies for the victims of discrimination, but also deters continued discrimination by employers. Because systemic litigation is often beyond the resources of most private individuals and attorneys, Congress has authorized the EEOC to

attack broad institutional patterns and practices of discrimination through systemic litigation.[17]

The extraordinary effectiveness of "systemic," or "class action," litigation was demonstrated by the recent settlement agreement between the EEOC and AT&T. Filed in 1978, EEOC's lawsuit challenged the pregnancy leave policies of Western Electric (the manufacturing arm of AT&T until the 1980s) and covered the thousands of employees who became pregnant between 1965 and 1977. The employer's policies discriminated against women by requiring pregnant women to take unpaid leave at the end of their sixth or seventh month of pregnancy, regardless of their ability and willingness to continue working; by providing pregnant workers on leave only limited credit towards seniority while male employees on disability leave received full credit; and by offering no guarantee of a job upon return from leave. The 1991 settlement provided $66 million to compensate 13,000 women; the size and scope of the settlement no doubt sends a clear warning to employers across the country. It is nearly impossible to imagine each of these 13,000 victims of discrimination successfully pursuing her claim individually.

Despite the proven effectiveness of class action litigation, Judge Thomas criticized the EEOC's historic reliance on it and reduced the resources devoted to it, apparently causing a drastic reduction in the number of such cases brought by the agency.

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[17] The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

Since 1982, the number of attorneys in the litigation unit created to challenge systemic discrimination was reduced by about half. And the "early litigation identification" system, which had been instituted to identify potential systemic cases for litigation, was eliminated.[18]

It is thus not surprising that, while the EEOC filed a total of 218 class action lawsuits in fiscal year 1980, the number of such suits plummeted under Judge Thomas' leadership. During fiscal year 1989, the last full year of Judge Thomas' chairmanship, the EEOC filed only 129 class action suits.[19]

Judge Thomas justified this dramatic reduction by claiming that an "emphasis on 'systemic' suits led the Commission [prior to his appointment] to overlook many of the individuals who came to our offices to file charges and seek assistance."[20] He expressed preference for enforcing individual discrimination claims over attacking systemic discrimination. However, he failed to acknowledge that individual victims of discrimination -- such as the 13,000 victims of pregnancy discrimination at AT&T who were awarded $66 million -- are the beneficiaries of class

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[18] Hearings on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. 75 (1990)(statement of Nancy Kreiter, Research Director, Women Employed Institute).

[19] Women Employed Institute, EEOC Enforcement Statistics (1991).

[20] Thomas, "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!" 5 Yale Law and Public Policy Review 402, 404 (1987).

action litigation.[21] And, while any effective enforcement effort must naturally address both systemic and individual claims of discrimination, the EEOC under Judge Thomas did little of either.

Despite Judge Thomas' strong rhetoric, individual victims of discrimination were unlikely to receive any remedy during his tenure as EEOC chair. In fact, the EEOC under his leadership saw a sharp decline in the rate of remedies for individual claimants -- settlement rates plunged from 32.1 percent in fiscal year 1980 to 13.9 percent in fiscal year 1989.[22]

Moreover, the percentage of cases where the individual claimant received no remedy at all (classified as "no cause") nearly doubled under Judge Thomas, from 28.5 percent in 1980 to 54.2 percent in 1989.[23] Research shows that this sharp increase was due not to an increase in unsubstantiated charges filed, but rather to inadequate investigation.[24] In other

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[21] It is true that the agency steadily increased the number of cases it filed in court to 486 in FY 1989, up from 326 in FY 1980. The number includes class action and individual lawsuits filed. Women Employed Institute, EEOC Enforcement Statistics (1991). Thus the number of cases filed on behalf of individual claimants increased under Judge Thomas, but at the expense of class action litigation that can potentially compensate hundreds and even thousands of individual victims per suit -- as the AT&T case illustrates.

[22] Women Employed Institute, EEOC Enforcement Statistics (1991).

[23] Women Employed Institute, EEOC Enforcement Statistics (1991).

[24] A 1988 General Accounting Office study reviewed the investigations of charges that had been closed with "no-cause" determinations by six EEOC district offices and five state

words, more than half of those workers who took the not inconsiderable "time, effort, and risk to file charges against an employer they believe[d] to be discriminatory" saw their claims dismissed by the EEOC under Judge Thomas' leadership -- generally without adequate investigation.[25]

Indeed, Judge Thomas' EEOC policies all too often created barriers to claims of discrimination by individuals. For example, as will be discussed in greater detail below, thousands of individual claims of age discrimination, including those made by working women, lapsed during Judge Thomas' tenure at the EEOC, so that individual workers were stripped of their right to pursue their claims in court. Coupled with the retreat from systemic

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agencies between January and March 1987. The GAO study revealed that 41 to 82 percent of the charges closed by the EEOC offices were not fully investigated, and 40 to 87 percent of those closed by state agencies were not fully investigated. The GAO identified several factors contributing to the incomplete investigations: a perception by staff investigators that the Commission was more interested in reducing the backlog than full investigation; disagreement as to full investigation requirements; and inadequate monitoring of state investigations. U.S. General Accounting Office, Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges 3 (1988).

Similarly, the Women Employed Institute concluded that "'no-cause' determinations are being issued indiscriminately because of a lack of training on the part of the intake and investigative staff and management's emphasis on closing files." Hearings on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. 74 (1990)(statement of Nancy Kreiter, Research Director, Women Employed Institute).

[25] Hearings on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. 74 (1990)(statement of Nancy Kreiter, Research Director, Women Employed Institute).

litigation, the EEOC's poor record in responding to the claims of individual victims of discrimination drastically reduced the prevalence of meaningful remedies for discrimination under Judge Thomas. If Judge Thomas is elevated to the Supreme Court, this record augurs poorly for the claims of discrimination victims that will be considered by the Court in the future.

Judge Thomas attacked the use of affirmative action as a strategy in battling on-the-job discrimination, despite its proven effectiveness and repeated affirmation by the Supreme Court.

Without question, strong and effective remedies are necessary to eradicate the long legacy of discriminatory workplace practices that deny employment opportunities to women, especially women of color, and disadvantaged people. Affirmative action is among the most effective of the various strategies designed to remedy unlawful discrimination and expand equal opportunity. For this reason, Title VII of the Civil Rights Act of 1964 specifically authorizes courts to order affirmative action as a remedy when employers have violated the law.[26]

Although a variety of measures could be considered "affirmative action," the term most often refers to court-ordered or voluntary action that takes gender or race into account to provide meaningful opportunities for qualified women and people of color. Generally, these criteria are numerical "goals and

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[26] 42 U.S.C. § 2000e-5(g).

timetables" -- goals for training, hiring, assigning, or promoting qualified women and people of color; and timetables for achieving these goals.[27] The concept of "goals and timetables" was first introduced by the Department of Labor's Office of Federal Contract Compliance in the 1960s.[28] Goals and timetables were further incorporated into the affirmative action required of federal contractors by the Department of Labor under President Richard Nixon.[29]

Courts have repeatedly taken gender and/or race into account when fashioning remedies for unlawful discrimination. On many occasions, they have also approved voluntary efforts to correct historical imbalances in education, employment, and access to business opportunities. These efforts have played a crucial role in eliminating the effects of discrimination.

For example, the affirmative action required of federal contractors -- when effectively enforced -- provides a tremendous tool for expanding employment opportunities for women and people of color. In the late 1970s, the Office of Federal Contract

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[27] These goals are set with reference to the availability of qualified women or people of color in the relevant labor pool. Affirmative action programs with goals and timetables never require the hiring or promotion of unqualified people. To the contrary, hiring or promoting unqualified people is an abuse of affirmative action principles.

[28] 33 Fed. Reg. 7,804 (1968).

[29] George Shultz, Secretary of Labor under Richard Nixon, issued Order No. 4, which first specified the form of affirmative action for federal contractors. 35 Fed. Reg. 2,586 (1970). Revised Order No. 4, issued in 1971, required contractors to establish employment goals for women as well as for people of color. 36 Fed. Reg. 23,152 (1971).

Compliance Programs (OFCCP) targeted the coal mining industry for enforcement focus, achieving dramatic gains in women's employment. Although no women were employed in the coal mining industry in 1973, by December 1980, 3,295 women were so employed.[30] Similarly, the OFCCP's targeting of the banking industry encouraged steady improvement in hiring and promotion practices. In 1970, 17.6 percent of bank officials and financial managers were women; by 1981 that had more than doubled to 38 percent.[31]

Despite the proven effectiveness of this affirmative action program, in 1985 EEOC Chair Thomas joined Edwin Meese, William Bradford Reynolds, and other White House officials in attempting to eliminate these affirmative action requirements.[32] Though ultimately unsuccessful, Judge Thomas' efforts to undermine this program demonstrate the degree to which he was willing to sacrifice effective enforcement tools.[33]

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[30] Examination on Issues Affecting Women in our Nation's Labor Force: Hearings before the Senate Committee on Labor and Human Resources, 97th Cong., 1st Sess. (1981)(statement of Betty Jean Hall, Coal Employment Project).

[31] Statement of the Women's Legal Defense Fund before the U.S. Civil Rights Commission, Consultation on Affirmative Action (March 5, 1985).

[32] Letter from People for the American Way to Senator Biden (February 1, 1990); "Beleaguered Agency Claims Tough Enforcement of Job Anti-Bias Laws," L.A. Times, December 15, 1985, at 24, col. 1.

[33] Interestingly, at the beginning of his tenure at the EEOC, Judge Thomas seemed to recognize the importance of affirmative action as a tool in achieving equal employment opportunity. An example of this support appears in his answer to an interviewer's question:

On other occasions, Judge Thomas expressed his opposition to affirmative action as a remedy. For example, Judge Thomas announced in November 1984 that the EEOC would be "moving away from goals and proportional representation in both its

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> Q. Do you plan to free small firms from the obligation of filing affirmative-action plans?
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> A. The regulations on that proposal are still out for comment and they would apply only to firms that do business with government agencies and are monitored by the Office of Federal Contract Compliance. I can't speak for the other commissioners, but my own view is that the government should be careful in taking any steps that would lessen civil-rights enforcement or give the impression of doing so." (emphasis added)

"Job Discrimination is Still Very, Very Serious," U.S. News and World Report, March 14, 1983, at 67.

Judge Thomas also expressed support for affirmative action in an October, 1982 speech to the National Conference on Equal Employment Opportunity in the Federal Sector. He noted that "affirmative action was not created in a vacuum...affirmative action has been put in place because of [sic] minorities and women have been discriminated against in the past."

As discussed in the text, this attitude soon gave way to outright opposition to such affirmative action plans.

conciliation efforts and court-approved settlements."[34] In 1985, he wrote:

> The federal enforcement agencies. . .turned the statutes on their heads by requiring discrimination in the form of hiring and promotion quotas, so-called goals and timetables. . . . As Chairman of the EEOC, I hope to reverse this fundamentally flawed approach to enforcement of the anti-discrimination statutes.[35]

Indeed, Judge Thomas made good on his promise. In the fall of 1985, the EEOC acting general counsel, with Judge Thomas' support, ordered EEOC regional attorneys not to include goals and timetables in settlement proposals or other actions in which the EEOC had intervened. The general counsel also ordered legal staff not to seek enforcement of goals and timetables in existing

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[34] "Policy Changes, Aggressive Enforcement, Will Mark Next Term at EEOC, Thomas Says," 222 Daily Lab. Rep. (BNA) at A-6 (November 15, 1984). Judge Thomas' basis for that policy change was the Supreme Court's June, 1984, decision in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, in which the Court invalidated a court-ordered affirmative action plan that interfered with an established seniority system in determining the order of layoffs. But Stotts did not require the abandonment of all race- and gender-conscious relief by the EEOC. Indeed, Judge Thomas himself had, in August, 1984, interpreted Stotts as "not requir[ing] the EEOC to reconsider its stated policies with respect to the availability of numerical goals and similar forms of affirmative, prospective relief in Title VII cases." Letter from People for the American Way to Senator Biden at 4 (February 1, 1990).

[35] See Office of Management and Budget, Regulatory Program of the United States Government at 523 (February, 1985), reprinted in Majority Staff of the Committee on Education and Labor, U.S. House of Representatives, "A Report on the Investigation of Civil Rights Enforcement by the Equal Employment Opportunity Commission," 99th Cong., 2d Sess. at Appendix E (1986)(hereafter "Ed. and Lab. Comm. Rept. on Civil Rights Enforcement").

consent decrees.[36] In short, Judge Thomas deliberately chose not to seek all remedies available to victims of employment discrimination.

After a series of 1986 Supreme Court decisions reaffirmed the use of goals and timetables,[37] Judge Thomas pledged to abide by those rulings in seeking all available remedies in the future. Indeed, at hearings on his reconfirmation as EEOC chair, Judge Thomas promised to withdraw the policy eliminating the use of goals and timetables as a remedy.[38] Nonetheless, even after the Supreme Court reaffirmation, he continued publicly to express his objections to affirmative action. Indeed, Judge Thomas attacked virtually the entire body of Supreme Court jurisprudence in this area in various published articles, speeches, and interviews.

For example, Judge Thomas objected to the Court's 1987 ruling in Johnson v. Transportation Agency, Santa Clara

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[36] Ed. and Lab. Comm. Rept. on Civil Rights Enforcement at 11. Members of Congress whose committees had EEOC oversight responsibility wrote to Chairman Thomas to object to this policy change. See Letter to Clarence Thomas (December 6, 1985) in Ed. and Lab. Comm. Rept. on Civil Rights Enforcement at Appendix H.

[37] Wygant v. Jackson Bd. of Education, 476 U.S. 267 (1986); Local 28 of the Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421 (1986); Local Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501 (1986).

[38] See Nomination of Clarence Thomas of Missouri to be Chairman of the Equal Employment Opportunity Commission: Hearing Before the Senate Committee on Labor and Human Resources, 99th Cong., 2d Sess. (1986) (statement of Clarence Thomas, Chairman, EEOC).

County,[39] a case that specifically dealt with measures that expand equal employment opportunity for women. There the Court considered a county's voluntary affirmative action plan that was instituted in response to evidence that women were underrepresented in the county's workforce in certain, generally well-paying, job categories. The Court upheld the county's plan, which authorized the consideration of gender or ethnicity as a factor when choosing among qualified candidates for jobs in which members of such groups were poorly represented. Despite the clear implications of such plans for ensuring equal opportunity to qualified women, Judge Thomas criticized the Court's decision:

> It's just social engineering, and we ought to see it for what it is. I don't think the ends justify the means, and we're standing the principle of nondiscrimination on its head -- it's simple as that -- and we're standing the legislative history of Title VII on its head.[40]

The "ends" here, of course, are simply to create opportunity for women and people of color where none before existed. And, as noted earlier, Title VII explicitly authorizes the use of affirmative action.

Judge Thomas also criticized the Court's 1980 decision in Fullilove v. Klutznick,[41] which held that Congress has the power to pass remedial legislation to correct past

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[39] 480 U.S. 616 (1987).

[40] "Anger and Elation at Ruling on Affirmative Action," N.Y. Times, March 29, 1987, at D1, col. 1.

[41] 448 U.S. 448 (1980).

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discrimination. In Fullilove, the Court considered the constitutionality of a congressionally enacted set-aside program designed to remedy historic racial disparities in the construction industries. The Court upheld Congress' legislative response to evidence that minority business enterprises were denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination. Nonetheless, Judge Thomas criticized the decision, claiming that "the Court reinterpret[ed] civil rights laws to create schemes of racial preference where none was ever contemplated."[42]

Judge Thomas also attacked as "egregious"[43] the Court's decision in United Steel Workers v. Weber.[44] There the Court upheld a voluntary affirmative action plan collectively bargained to correct "traditional patterns of racial segregation and hierarchy"[45] in apprenticeship programs that denied equal opportunity in the form of well-paid, skilled jobs to people of color. Judge Thomas further expressed his "personal disagreement"[46] with Local 28 of the Sheet Metal Workers

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[42] Thomas, "Civil Rights as Principle Versus Civil Rights as an Interest," in Assessing the Reagan Years 391, 396 (D. Boaz, ed. 1988).

[43] Id.

[44] 443 U.S. 193 (1979).

[45] Id.

[46] Thomas, "Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!" 5 Yale Law and Public Policy Review 402, n.2, 403 (1987).

International v. EEOC,[47] which affirmed court-ordered affirmative action as a remedy for long-standing discrimination; and with United States v. Paradise,[48] which approved a one-black-for-one-white promotion requirement for state troopers in Alabama after the state was found guilty of blatant resistance to a court order to integrate.

By expressing opposition to affirmative action -- even when upheld by the Supreme Court as a remedy for egregious discrimination -- Judge Thomas' statements as head of the EEOC undermined the agency's credibility and effectiveness in enforcing the law. Moreover, his willingness to reject and undercut those legal principles leaves little reason to hope that he would afford them any more respect from the Supreme Court.

As EEOC chair, Judge Thomas proposed to weaken federal guidelines that set standards for employee selection practices in contravention of prevailing law.

In 1984 and 1985, Judge Thomas proposed significant changes that would have weakened key federal employment rules -- the Uniform Guidelines on Employee Selection Procedures. The Guidelines are designed to help employers in the public and private sectors comply with federal anti-discrimination laws when implementing tests and selection procedures for hiring and

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[47] 478 U.S. 421 (1986).

[48] 480 U.S. 149 (1987).

promotion. Jointly drafted and issued in 1978 by the EEOC, Department of Justice, Department of Labor, and Civil Service Commission (now the Office of Personnel Management),[49] the Guidelines play a key role in articulating standards for employment decisions and guide employers' decisions in implementing those standards.[50]

The Guidelines are based on Griggs v. Duke Power Co.,[51] a unanimous 1971 decision by the Supreme Court. Under Griggs, employment criteria that have a significantly disparate impact on women or people of color are prohibited -- even in the absence of discriminatory intent -- unless the employment criteria are shown to be job-related. This ruling has been critical in removing artificial barriers that have historically limited job opportunities for women and people of color. For example, minimum height and weight requirements for years excluded women from nontraditional occupations such as police officers, firefighters, and truck drivers. Because such practices have a demonstrably discriminatory impact on women, they are invalid under Griggs unless shown to be job-related. Although a recent Supreme Court decision has shifted the burden of proving job-relatedness from the employer to the employee,[52] another key

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[49] 29 C.F.R. § 1607.1 (1991).

[50] Letter from People for the America Way to Senator Biden (February 1, 1990).

[51] 401 U.S. 424 (1971).

[52] Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

Griggs holding -- that statistical evidence may be used to show the discriminatory effects of employment practices -- remains intact.

As EEOC chair, Judge Thomas repeatedly argued that Griggs places undue reliance on statistical evidence as proof of discrimination and that disparate impact theory was "conceptually unsound."[53] According to Judge Thomas, the Guidelines' adherence to Griggs encourages "too much reliance on statistical disparities as evidence of employment discrimination"[54] -- this despite years of experience that proved the Griggs principle both workable and successful.

In late 1984 and 1985, Judge Thomas took his disagreement with Griggs a step further. He proposed altering the Guidelines to de-emphasize the use of statistical evidence, despite the fact that there had been no change in Griggs or in any statutory or case law upon which the Guidelines were based. Judge Thomas told one interviewer that changing the Guidelines was the "first thing on my agenda."[55] After key Members of Congress criticized the

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[53] Office of Management and Budget, Regulatory Program of the United States Government (February, 1985), reprinted in Ed. and Lab. Comm. Rept. on Civil Rights Enforcement at Appendix E.

[54] "Changes Needed in Federal Rules on Discrimination," N.Y. Times, December 3, 1984, at A1.

[55] "EEOC Chairman Questions Job Bias Guidelines," Assoc. Press, December 5, 1984.

Commission for failing to follow Title VII precedent,[56] Judge Thomas withdrew his proposal to weaken the Guidelines.[57]

Though never implemented, Judge Thomas' proposal provides yet another example of his preference for restricting equal opportunity laws and his willingness to permit his opinions about prevailing law to override his obligation to enforce that law. This behavior gives us little reason to entrust the interpretation of these vital legal principles to him as a member of the Supreme Court.

As EEOC chair, Judge Thomas refused to perform his duties as required by law to enforce and evaluate the anti-discrimination efforts of federal agencies.

Judge Thomas' disagreement with affirmative action programs influenced EEOC policy in other areas as well. Under his leadership, the EEOC abdicated its responsibility to evaluate and ensure effective anti-discrimination efforts by other federal agencies.

With over three million civilian employees, the federal government is the nation's largest employer. Nearly half of the government's workers are women and more than a quarter are people

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[56] Ed. and Lab. Comm. Rept. on Civil Rights Enforcement at VII.

[57] Letter from People for the American Way to Senator Biden (February 1, 1990).

of color.[58] The government's employment policies -- and its willingness to police its own efforts to ensure equal employment opportunity -- set standards that affect the attitudes and practices of employers nationwide.

Indeed, all federal agencies are required by law[59] to provide the EEOC with goals and timetables for hiring and promoting women and people of color. These plans must contain a profile of the current agency workforce, an analysis of any barriers to employment opportunities, and a plan for removing the barriers so the agency can better achieve equal employment opportunity. The EEOC is required to review these plans to ensure that the agencies adopt effective anti-discrimination programs.

However, when several agencies, including the Departments of Justice and Education, refused to comply with this directive, Judge Thomas acquiesced in their noncompliance, claiming that he did not have the power necessary to enforce them.[60] But when

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[58] Office of Personnel Management, "Annual Report to Congress on the Federal Equal Opportunity Recruitment Program Fiscal Year 1990" (January, 1991).

[59] Section 717(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(b), requires each federal agency to prepare national and regional equal employment opportunity plans in order to "maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment." The regulations promulgated pursuant to Section 717(b) are found at 29 C.F.R. §§ 1613.201-205.

[60] In response to questioning from Congresswoman Cardiss Collins regarding the refusal of the National Endowment for the Humanities (NEH) and the Department of Justice to submit goals and timetables, Judge Thomas indicated that "[t]here is nothing that I can do to NEH or to anyone who does not obey." Hearings

Congress introduced legislation to provide the EEOC with just such authority, Judge Thomas declined to support it. He said he preferred the flexibility of the current arrangement.[61]

Then, in 1987, Judge Thomas issued a management directive that shifted the major responsibility for implementing affirmative action plans to individual agency heads, leaving EEOC with only nominal oversight responsibilities.[62] By stripping the EEOC of its role as the lead enforcement agency, Judge Thomas diminished the scope of his official responsibilities in a way that undermined the enforcement of equal employment opportunity laws in federal agencies.

This provides yet another example of Judge Thomas' predilection for restrictive interpretation of equal employment opportunity law. Such an approach is disturbing indeed in a nominee to the Supreme Court who will be called upon to uphold and interpret legal protections for women, especially women of color, and disadvantaged people.

Before the Subcommittee on Government Activities and Transportation of the House Committee on Government Operations, National Endowment for the Humanities and the Equal Employment Opportunity Commission Hiring Policies, 98th Cong., 2d Sess. 31 (1984).

[61] Hearing Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor on H.R. 3330, 100th Cong., 2d Sess. (1988)(testimony of Clarence Thomas).

[62] "Management Directive 714" issued pursuant to Section 717(b) of Title VII of the Civil Rights Act.

Judge Thomas failed to enforce the law against sex discrimination to ban employment practices that exclude all women of child-bearing age from certain high-paying jobs.

One of the most important issues of sex discrimination arises from policies that exclude all women of child-bearing age from certain high-paying jobs unless they can prove that they are infertile. These policies are based on fears that those jobs' occupational hazards would harm women and the fetuses they might carry. Because a number of women have been sterilized to keep their hard-won jobs, these policies have been referred to as "forced-sterilization" policies; others call them "fetal protection" policies. It has been estimated that

> ... as many as 20 million jobs in the United States expose workers to reproductive or fetal health hazards, and employers increasingly exclude women from such jobs based on this new gender stereotype.[63]

For example, in 1978, the American Cyanamid Company began to exclude all women age 16 to 50 from jobs involving exposure to lead and other hazardous substances unless they could prove that they were sterile. As a result, five women in the lead pigment department obtained sterilizations to keep their jobs.

The company justified its policy by arguing that the fetuses of women exposed to lead could be harmed. Despite the company's laudable goal of protecting its employees' health, its draconian

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[63] Majority Staff of the Committee on Education and Labor, U.S. House of Representatives, "A Report on the EEOC, Title VII and the Workplace -- Fetal Protection Policies in the 1980s," 101st Cong., 2d Sess. 2 (1990) (hereafter, "Ed. and Lab. Comm. Rept.").

response -- excluding all fertile women because any fertile women could be pregnant at any time -- was blatant sex discrimination that did not protect employees' health. To the contrary, the policy ignored two other major health risks: the serious health problems that lead exposure causes in adult workers -- men and women; and the reproductive or genetic damage to fetuses that paternal lead exposure may cause.[64]

The American Cyanamid case and others like it involving intentional sex discrimination under Title VII posed a problem for the Equal Employment Opportunity Commission to resolve.[65] In response, the EEOC (prior to Judge Thomas' appointment) and the Department of Labor in 1980 proposed a guideline interpreting Title VII, as amended by the Pregnancy Discrimination Act of 1978, to prohibit gender-based "fetal protection" policies. This proposal rejected the argument that such policies were saved by the statutory "BFOQ" defense -- the claim that not being a fertile woman was a "bona fide occupational qualification" for jobs involving lead exposure. Instead, the EEOC proposal provided that intentional sex-based discrimination is legal only

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[64] Id. at 5.

[65] It also implicated occupational health and safety law. Indeed, the Department of Labor, which enforces the federal Occupational Safety and Health Act ("OSHA"), challenged American Cyanamid's practice as a violation of that Act as well. Judge Robert Bork, then on the U.S. Court of Appeals for the D.C. Circuit, joined by then Judge Antonin Scalia, held that American Cyanamid's adoption of an exclusionary policy that forced five women employees to become sterilized did not violate OSHA's provision that employers have a general duty to maintain hazard-free workplaces. Oil, Chemical, and Atomic Workers International Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984).

when sex or pregnancy is shown to interfere with the worker's ability to perform the actual tasks of the job. Because neither fertility nor gender affects an employee's ability to perform those tasks, such forced sterilization policies would be illegal.[66]

Though it would have ruled that gender-based exclusionary policies are per se sex discrimination, the proposal also made clear that an employer could institute gender-neutral policies to protect all its employees from reproductive hazards.[67] Thus, the proposal would have encouraged employers to eliminate workplace hazards for all employees, rather than selectively and discriminatorily eliminate workers who might be susceptible to those hazards.

After receiving extensive comments on the proposal, the Commission withdrew it in 1981, preferring instead to rely on "investigation and enforcement of the law on a case by case basis" to resolve complaints of sex discrimination based on exclusionary policies involving reproductive hazards.[68]

Rather than resolving such complaints, however, the EEOC warehoused them. In 1982, the EEOC, under Judge Thomas, instructed its staff to forward those charges to a central Washington, D.C., office, because it had not developed a

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[66] As will be discussed, the Supreme Court ultimately endorsed this analysis in United Auto Workers v. Johnson Controls, Inc., 111 S.Ct. 1196 (1991).

[67] 45 Fed. Reg. 7514 et seq. (1980).

[68] 46 Fed. Reg. 3916 (1981).

comprehensive policy to deal with them.[69] For the next seven years, the EEOC took no action on at least 60 charges of intentional sex discrimination.[70]

Some of the charges that languished involved examples of discrimination that did not depend on development of a comprehensive theory for their resolution. For example, in one case in which a woman was denied a lead-exposure job, other evidence of intentional sex discrimination (including the personnel manager's observation that he "could use a pretty face in the office") established that the lead exposure was a pretext for discrimination. This case, which was filed in 1981, languished for years and was closed in 1989 because the Commission could no longer locate the charging party.[71] For this woman and the others who were denied or lost jobs or chose sterilization to keep them, Judge Thomas' EEOC abdicated its statutory responsibility to address their complaints of sex discrimination. And employers were left without the guidance to know which of their practices would be interpreted to violate Title VII.

In 1988, the Thomas EEOC finally issued a policy directive on the application of Title VII to policies excluding fertile

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[69] Ed. and Labor Comm. Rept. at 14-15.

[70] Id. at 2, 16. Some of the "warehoused" charges were filed as early as the 1970s. Id. at 16.

[71] Id. at 17-18.

women.[72] But that policy was plainly inconsistent with Title VII. In it, the EEOC allowed employers to rely on Title VII's BFOQ defense, even though fertile women are capable of performing the jobs from which they are excluded by such policies.[73] In other words,

> ... the EEOC watered down [discrimination] theory so that employers could successfully defend their fetal protection policies without establishing any link between such policies and job performance.[74]

Rather than interpreting Title VII to discourage employers from solving the problem of reproductive hazards in their workplaces by excluding women, the EEOC's 1988 policy permitted employers both to limit women's employment opportunities and to maintain workplaces in which men's exposure to health hazards continued unabated.

That Title VII interpretation was, ultimately, soundly rejected by the Supreme Court in United Auto Workers v. Johnson Controls, Inc.[75] All nine Justices concluded that Johnson

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[72] "EEOC Policy Guidance on Reproductive and Fetal Hazards," Daily Lab. Report (BNA), No. 193 at D-1 (October 5, 1988).

[73] The policy also expressly sanctioned sex discrimination in the evaluation of evidence of health risks: for men, inconclusive evidence would be presumed not to show a risk to them. But for women, inconclusive evidence of health risk would be presumed to show "substantial risk" to them that justified sex-based discrimination. "EEOC Policy Guidance on Reproductive and Fetal Hazards," Daily Lab. Report (BNA), No. 193 at D-2 (October 5, 1988).

[74] Ed. and Lab. Comm. Rept. at 3.

[75] 111 S.Ct. 1196 (1991).

Controls' "fetal-protection policy explicitly discriminate[d] against women on the basis of their sex,"[76] and that Johnson Controls had failed to establish the BFOQ defense. A majority held that the BFOQ defense is not available because "[f]ertile women...participate in the manufacture of batteries [the task of the jobs from which fertile women were excluded] as efficiently as anyone else."[77] The Thomas EEOC's 1988 interpretation of Title VII in this area was narrower than even the interpretation of Justices Rehnquist and Scalia.

The EEOC did begin to improve its record in this area in 1989, after inquiries by the House Education and Labor Committee. It began to resolve charges (although as of April, 1990, not all of the warehoused charges had been resolved, and many had to be closed because they were too old).[78] And it revised its policy interpretation to be more consistent with the language and intent of Title VII.[79] Nevertheless, the years of EEOC inactivity and inconsistency in such an important area of sex discrimination law -- on Judge Thomas' watch -- again demonstrate his preference for

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[76] Id. at 1202.

[77] Id. at 1207.

[78] Ed. and Lab. Comm. Rept. at 16.

[79] In fact, in 1990 the EEOC issued a new policy directive that interpreted Title VII more faithfully than its 1988 policy had done, and was much more in line with the Supreme Court's ultimate interpretation. The EEOC also urged the Department of Justice not to file a brief on the side of the employer in the Seventh Circuit appeal of the Johnson Controls case. Ed. and Lab. Comm. Rept. at 26-29.

restrictive applications of the laws that protect women, including women of color, from unlawful discrimination.

Judge Thomas failed to challenge gender-based wage discrimination under Title VII and the Equal Pay Act.

Although the status of women in the labor market has improved in some ways, they remain clustered in predominantly "female jobs" -- secretaries, file clerks, teachers, and nurses. These jobs are invariably less well compensated than jobs held by white males. Women of color -- in particular, black women -- tend to be "crowded" in the lower paying jobs within female-dominated jobs.[80] Even where women perform the same jobs as men, they may be paid less.

The federal civil rights laws provide ample tools for the redress of discrimination in compensation. The Equal Pay Act of 1963[81] prohibits gender-based pay differentials in jobs that are equal or substantially equal. And, the Supreme Court in Gunther v. County of Washington[82] held that Title VII forbids intentional gender-based wage discrimination in jobs that may not be substantially equal.

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[80] J. Malveaux, "Low Wage Black Women: Occupational Descriptions, Strategies for Change," (unpublished paper prepared for the NAACP Legal Defense and Education Fund, Inc. 1984).

[81] 29 U.S.C. § 206(d).

[82] 452 U.S. 161 (1981).

Before 1981, the EEOC took the initiative in the area of wage discrimination by filing amicus briefs in important cases,[83] by conducting hearings on wage discrimination in the workplace, and by commissioning a National Academy of Sciences study.[84] However, the EEOC under Judge Thomas did little in this area of equal employment opportunity law. On September 15, 1981, the Commission began on a relatively positive note by issuing a 90-day notice to provide "interim guidance" in the processing of gender-based wage claims under Title VII and the Equal Pay Act. This "interim policy" was renewed regularly until 1985.[85] While the policy was in effect, there was evidence

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[83] The EEOC was amicus curiae to the plaintiffs in Gunther, and was also amicus in IUE v. Westinghouse, 631 F. 2d 1094 (3d Cir. 1980), cert. denied, 452 U.S. 967 (1981). In IUE, the Third Circuit found that, even though job classifications were not substantially equal, women in predominantly female job classifications could still compare their wages to wages paid to males in predominantly male job classifications. The employer in this case had relied on a job evaluation system to determine the relative worth of jobs at its facilities. Even though male and female job classifications received the same point rating, wage rates for predominantly female job classifications were deliberately set lower than wage rates for predominantly male job classifications.

[84] The study was published as Women, Work and Wages: Equal Pay for Jobs of Equal Value (H. Hartmann & D. Treiman ed. 1981).

[85] "Notice Adopted by the Equal Employment Opportunity Commission to Provide Interim Guidance to Field Offices on Identifying and Processing Sex-Based Wage Discrimination Charges Under Title VII and the Equal Pay Act." According to the notice, charges were to be investigated thoroughly. Investigators were directed to seek out evidence concerning a variety of factors, including: 1) a breakdown of the employer's workforce by gender; 2) information about wage schedules; 3) where relevant, copies of any available analyses of job evaluations systems; and 4) where the market was the basis for the gender-based disparity, information about how the employer determined the market rate.

that wage discrimination charges were mishandled or were not investigated at all. Wage discrimination charges forwarded to Washington, D.C., languished there.[86] At one of several oversight hearings on wage discrimination, Judge Thomas testified that approximately 266 such charges were pending without resolution.[87]

The EEOC issued an official policy on gender-based wage discrimination under Title VII in the summer of 1985.[88] The charge involved claims by female employees of the Rockford, Illinois, Housing Authority that the employer paid its administrative staff (85 percent female) less than its maintenance staff (88 percent male), even though the duties

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The policy identified several issues which were to be considered "non-CDP" (non-Commission Decision Precedent); that is, cases involving those issues were to be sent to Washington. Among the issues were "claims of sex-based wage discrimination brought under Title VII that may be based on the concept sometimes referred to as 'comparable worth.'"

[86] H.R. Rep. No. 98-796, 98th Cong., 2d Sess. (1984).

[87] Equal Employment Opportunity Commission Handling of Pay Equity Cases: Hearings Before the Manpower and Housing Subcommittee of the House Committee on Government Operations, 98th Cong, 1st Sess. (1984) (statement of Clarence Thomas, Chairman of the EEOC). In a response to the Subcommittee report on the hearings, the Commission indicated that the charges were not languishing in Headquarters; rather, the Commission was engaged either in active consideration of a number of the charges, or was requesting additional information before determining what to do. Response of the Chairman of the Equal Employment Opportunity Commission To the Committee on Government Operation's Thirty-Ninth Report, "Pay Equity: EEOC's Handling of Sex-Based Wage Discrimination Complaints", at 6. (August 1984). We have no information regarding the final disposition of those charges.

[88] EEOC No. 85-8, 37 FEP Cases 1889 (BNA) (June 17, 1985).

performed by the women required equal or more skill, effort, and responsibility than those performed by men. The female employees also charged that the employer intentionally set wage increases for female-dominated jobs at lower levels than the prevailing rate of increase for such jobs in local municipal agencies, while giving men wage increases that equaled the prevailing rate for their jobs.

The Commission found that the complainants did not have a Title VII claim because they had not alleged or provided any evidence that women's access to jobs in the higher paid male job classifications was limited, or that the classifications compared involved work that was similar in skill, effort, responsibility, and working conditions. The Commission noted that "the mere predominance of individuals of one sex in a job classification is not sufficient to create an inference of sex discrimination in wage setting." The claim appeared to be a "comparable worth" claim, according to the Commission.[89] The Commission relied on the Gunther definition of "comparable worth" claims as those involving "increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community."[90]

The Commission followed Gunther in its determination that Title VII covers gender-based wage discrimination cases where there is evidence of intentional discrimination. That was no

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[89] Id. at 4.

[90] Gunther, supra, 452 U.S. at 166.

surprise. What is troubling is the Commission's decision to interpret Gunther as restrictively as it did -- to designate all charges where there appears to be no evidence of intentional discrimination as "comparable worth" claims not within the jurisdiction of the EEOC without investigating them. Such a designation is circular and guarantees that many potential wage discrimination cases never get investigated.

Of equal concern are the statistics indicating the reduction of Commission filings of straightforward Equal Pay Act cases. These statistics indicate that the Commission paid scant attention to a viable and undisputed avenue for challenging discrimination in compensation. Fifty Equal Pay Act cases were filed in fiscal year 1980. While Judge Thomas chaired the Commission, the number of Equal Pay Act cases filed by the agency dropped: in fiscal year 1984, 9 cases were filed; in FY 1985, 10; FY 1986, 12; FY 1987, 12; FY 1988, 5, and in FY 1989, 7 cases.[91] These figures, coupled with the restrictive

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[91] Women Employed Institute, EEOC Enforcement Statistics (1991). We note that these statistics also include a line in the section on litigation labelled "concurrent," after listings for Title VII, Equal Pay, and Age Discrimination cases. We can assume that those numbers may reflect cases filed concurrently under Title VII and the Equal Pay Act. Thus the number of Equal Pay cases filed increased as follows (for the years for which there are "concurrent" statistics): in fiscal year 1984, there were 17 concurrent cases filed, for a possible total of 26 Equal Pay cases for that year; in FY 1985, 8 concurrent cases filed, for a total of 18 Equal Pay cases; in FY 1986, 17 concurrent cases filed, for a total of 29 Equal Pay cases; in FY 1987, 29 concurrent cases filed, for a total of 41 Equal Pay cases; in FY 1988, 24 concurrent cases filed, for a total of 29 Equal Pay cases for that year; and in fiscal year 1989, 27 concurrent cases filed, for a total of 34 Equal Pay cases filed the final year that Judge Thomas was chair of the Commission. Even if all

interpretation given by the Commission to Title VII wage discrimination lawsuits, give rise to serious concerns regarding Judge Thomas' commitment to securing equal employment opportunity for women.

Judge Thomas failed to enforce federal age discrimination law and consistently took policy positions against the interests of the older workers he was sworn to protect.

Due to dramatic demographic shifts in the American population, older Americans represent the fastest growing segment of the population. Our labor force relies more and more upon the labor of its older workers, many of whom are women.[92] To ensure fairness for these workers, Congress in 1967 enacted the Age Discrimination in Employment Act (ADEA), which prohibits discrimination against older workers.

"concurrent" cases filed are Title VII/Equal Pay cases, the totals reflect a drop in litigation which remains cause for concern.

[92] By the year 2000, approximately one in three working women will be midlife or older. Older women workers are especially vulnerable to both age and sex discrimination. For example, the median earnings of midlife and older women who work full time year-round are less than two-thirds that of men; women over 64 earn only 58 percent of the wages paid to men of the same age. Older women in particular are segregated into low-paying jobs. Fifty-eight percent of all employed women over age 45 work in sales, clerical, or service occupations; 62 percent of women over 55 work in these fields. Older black women feel the discriminatory effects of race as well: black women over 55 are three times more likely than white women to work in service occupations, while nearly one-third of those over 65 work as private household workers. Older Women's League, Paying for Prejudice: A Report on Midlife and Older Women in America's Labor Force (1991).

Under Judge Thomas' leadership, the EEOC allowed thousands of ADEA charges filed by older workers to exceed the two-year statute of limitations. Once this statute is exceeded, the charges "lapse" and the workers lose their right to pursue their claims in court and to receive remedies for proven discrimination.

In response to congressional inquiry about the severity of the problem, Judge Thomas consistently underestimated the number of charges that had lapsed. At first, he reported that only 78 cases had lapsed; later he revised that figure to approximately 900, then to 1,600, and then to over 9,000. On May 1, 1989, Judge Thomas informed the Senate Committee on Aging that approximately 13,000 age discrimination claims had been allowed to expire.[93]

To remedy this crisis and to protect the older workers involved, in 1988 Congress enacted the Age Discrimination Claims Assistance Act (ADCAA) to extend temporarily the filing period for these workers and to require the EEOC to notify those affected. Yet even after the problem was publicly identified and corrective legislation enacted, the EEOC continued to let age discrimination charges lapse. At his confirmation hearings for the D.C. Circuit, Judge Thomas admitted that thousands of additional claims had lapsed since enactment of the ADCAA -- claims that were not covered by the filing extension created by

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[93] Letter from People for the American Way to Senator Biden (February 1, 1990).

the ADCAA because they occurred after April 1, 1988.[94] When asked to explain the continuation of this problem, Judge Thomas blamed the state and local fair employment agencies with which the EEOC contracts to handle processing of many federal employment claims.[95] Remarkably, he further asserted that the lapsing of the federal claims was not significant because the workers involved were still left with state claims, which are not subject to the two-year statute of limitations.[96] He further claimed that the EEOC was not necessarily involved with or responsible for ADEA claims filed with state or local enforcement agencies.

Judge Thomas' testimony on this issue is enormously troubling. As any lawyer should be well aware, the loss of a federal claim because the statute of limitations has expired is a very serious matter. A state law claim in no way substitutes for federal rights. Congress enacted the ADEA to provide older workers with a federal cause of action in federal court; state age discrimination laws often provide more limited relief than that available under federal law.[97]

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[94] Hearings on the Nomination of Clarence Thomas to the United States Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. 189-90 (1990)(hereafter "Hearings on the Nomination of Clarence Thomas").

[95] Id. at 190-91.

[96] Id. at 192-93.

[97] For example, the ADEA permits a private right of action 60 days after filing an administrative claim, jury trials, liquidated damages, and attorney's fees for a prevailing

Furthermore, the existence of a state claim in no way diminishes the EEOC's obligation to enforce older workers' rights under federal law. As the head of the EEOC should well know, the EEOC may contract with a state or local agency to serve as its agent in receiving and processing complaints. The EEOC remains responsible for ensuring that federal charges are handled and investigated in a timely manner, including monitoring its agents' work in handling such matters.

Not only did Judge Thomas fail to enforce age discrimination law, he also often took policy positions that were damaging to the economic interests of older workers. While the EEOC during Judge Thomas' early years did in fact take some positions supportive of older women workers, as in Norris v. Arizona Governing Committee[98] and EEOC v. Newport News Shipbuilding & Dry Dock Co.,[99] the EEOC's policy positions for the remainder of Judge Thomas' tenure too often hurt older workers' economic security.

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plaintiff; many states do not. See Letter from American Association of Retired Persons to Senator Biden (February 16, 1990).

[98] 671 F.2d 330 (9th Cir. 1982), aff'd, 463 U.S. 1073 (1983). In Norris, the EEOC successfully urged the Court that Arizona violated Title VII by establishing a pension plan for state employees that paid lower monthly benefits to retired women than to men.

[99] 462 U.S. 669 (1983). In Newport News, the EEOC urged that an employer violates Title VII's Pregnancy Discrimination Act by providing a health insurance plan for workers and their families that covers spouses' pregnancy-related costs less favorably than costs resulting from other spousal illness and injuries.

For example, the EEOC under Judge Thomas' leadership failed to rescind regulations that allowed employers to stop contributions to employees' pension accounts when employees continued to work past age 65, despite the EEOC's own determination that such regulations violated the ADEA.[100] The EEOC's failure to rescind the unlawful regulations was estimated to cost older workers $450 billion in lost pension benefits annually.[101] Congress was finally forced in 1986 to pass legislation that explicitly prohibited employers from cutting off pension accruals, contributions, and credits for workers who reach age 65.[102]

Second, Judge Thomas promulgated regulations that increased older workers' vulnerability to coercion by employers to relinquish their legal rights. Prior to 1987, an employer could ask an employee to waive her rights under the ADEA only with the approval of the EEOC. The EEOC under Judge Thomas promulgated regulations that allowed employers to solicit such waivers without the supervision of the EEOC. Even though Congress

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[100] Hearings on the Nomination of Clarence Thomas at 185-87. When confronted by Senator Metzenbaum about the failure to rescind the regulations, Judge Thomas claimed that federal rulemaking requirements and the actions of other agencies prevented the EEOC from rescinding the illegal regulations. However, the EEOC's acting legal counsel at the time had advised the EEOC that federal law permitted the rescission. Id.

[101] Letter from People for the American Way to Senator Biden (February 1, 1990).

[102] Congress amended the ADEA as part of the Omnibus Reconciliation Act of 1986. B. Fretz & D. Shea, "Age Discrimination," One Nation Indivisible: Report of the Citizen's Commission on Civil Rights 185 (1989).

suspended these regulations in fiscal years 1988, 1989, and 1990, the EEOC refused to withdraw or modify them.[103] Again, Judge Thomas' willingness to interpret the law to the detriment of older workers' rights casts doubt upon his commitment to uphold these laws from the Supreme Court.

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[103] B. Fretz & D. Shea, One Nation Indivisible, at 186.

CONSTITUTIONAL PROTECTIONS AGAINST SEX DISCRIMINATION

For the last 20 years, the Supreme Court has consistently held that sex-based distinctions in the law require careful scrutiny under the Fourteenth Amendment's Equal Protection Clause.[104] The Court has recognized that such scrutiny is necessary since "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."[105]

Without question, the Court's commitment to equal protection analysis has proved critically important in battling sex discrimination. As New York University School of Law professor Sylvia Law has testified:

> The Supreme Court's recognition that gender discrimination is presumptively wrong has had a tremendously positive impact on the lives of women in this country. Under the Court's direction, the federal courts have invalidated dozens of laws excluding women from wage work and public life and devaluing the wages and benefits they receive.[106]

Indeed, the Equal Protection Clause provides the primary constitutional protection against laws that discriminate on the basis of gender. At a minimum, any nominee to the Supreme Court

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[104] See Mississippi University for Women v. Hogan, 458 U.S. 718 (1987); Craig v. Boren, 429 U.S. 190 (1976).

[105] Frontiero v. Richardson, 411 U.S. 677, 685 (1973).

[106] Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States Before the Senate Committee on the Judiciary, 100th Cong., 1st Sess. 2361 (1987)(statement of Sylvia A. Law, Professor of Law, New York University).

must demonstrate his or her adherence to these most basic guarantees against invidious sex-based discrimination.

- o Judge Thomas' seeming indifference to the Equal Protection Clause is troubling, as the Equal Protection Clause has been interpreted as the primary source of constitutional protections against sex discrimination;
- o Judge Thomas has not stated how or whether he would apply a natural rights analysis to sex discrimination; historically, though, natural law principles have been used to limit the lives and opportunities of women; and
- o Judge Thomas himself has embraced an analysis of the status of working women that denies the reality of discrimination in women's lives and its effects on their economic security and individual opportunity.

Each concern is discussed in greater detail below.

Judge Thomas' seeming indifference to the Equal Protection Clause is troubling, as the Equal Protection Clause has been interpreted as the primary source of constitutional protections against sex discrimination.

Judge Thomas' public record on constitutional issues of bedrock importance to women is surprisingly thin. He has not issued any opinions that touch upon equal protection issues during his short tenure on the federal bench. Nor, it seems, during almost eight years as head of the EEOC, did Judge Thomas comment on constitutional protections against sex discrimination.

Judge Thomas' analysis of sex-based constitutional claims received only a passing mention at his confirmation hearings for the D.C. Circuit Court of Appeals. When asked by Senator Kohl about an equal protection challenge to a publicly-funded military academy's policy of excluding women from admission, Judge Thomas

declined to answer on the grounds that he might have to rule on such a case as an appellate judge. In responding, however, Judge Thomas failed to mention the constitutional implications of the case. Instead, he discussed it only as a possible violation of statutory law -- inaccurately identifying Title VI of the Civil Rights Act as the legal standard to be applied[107] -- and not as an equal protection challenge.[108] Judge Thomas' apparent

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[107] In fact, Title VI of the Civil Rights Act prohibits discrimination on the basis of race -- but not sex -- by any program that receives federal funds, including educational institutions. In light of his experience as Assistant Secretary for Civil Rights in the Department of Education, Judge Thomas' misapplication of Title VI to the case at hand is surprising, to say the least.

[108] Senator Kohl: I would like to ask you about a controversy that has been in the newspapers recently. In Virginia, there is a military academy known as VMI; which educates young men but admits no women. Without commenting on the specific case, I would like to know your views in this kind of situation.

Mr. Thomas: Well, that is exactly the kind of case, Senator, or similar case that could come before a circuit court at some point, since I would assume that the alleged violation is of title VI of the Civil Rights Act of 1964. And having been the Assistant Secretary for Civil Rights in the Department of Education, I know that it would take some time for those kinds of cases to find their way through courts and I think it would be inappropriate for me to prejudge it at any point, but certainly in the context of a confirmation hearing to sit on the court of appeals.

Senator Kohl: In general, do you think that a publicly funded military academy should be allowed to exclude women?

Mr. Thomas: Again, the allegation there in that matter is in court, even as we speak, is that this is a violation of title VI of the Civil Rights Act of 1964, which I enforced as the Assistant Secretary for Civil Rights. I abhor discrimination. The constraint that I am

failure to recognize the fundamental constitutional implications of the case -- regardless of his judgment as to how it should be decided -- raises serious concern about his understanding of and commitment to well-established constitutional protections against sex discrimination.

Judge Thomas had another opportunity to articulate his commitment to the Fourteenth Amendment's guarantees against sex discrimination when asked by Senator DeConcini to discuss his views "of the proper application of the constitutional doctrine of equal protection." Judge Thomas replied:

> As an appellate court judge, I am duty bound to follow and apply Supreme Court precedent to cases which might come before me. In interpreting the equal protection clause, the Supreme Court has set out essentially three standards of review, strict scrutiny, intermediate review, and rational review. Though I do not have a fully developed Constitutional philosophy, I have no personal reservations about applying these standards as an appellate court judge in cases which might come before me.[109]

Judge Thomas' recitation that he would be bound to follow Supreme Court precedent as an appellate court judge provides little insight into how he would evaluate equal protection cases as a Supreme Court Justice -- a position that would enable him to deviate from established precedent and create new case law. Nor

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> operating under is that we are looking at an alleged statutory violation which will wind its way through the courts and could eventually, not necessarily the D.C. circuit, but could eventually be before a court of appeals, if I understand the intensity of that battle.

Hearings on the Nomination of Clarence Thomas at 56-57.

[109] Id. at 386.

does his disclaimer that he does "not have a fully developed Constitutional philosophy" (reiterated at least one other time during his confirmation hearings)[110] offer any reassurances as to his commitment to equal protection. Indeed, his long-standing support for "natural rights" analysis suggests that he does indeed have a constitutional philosophy, one that could threaten women's constitutional rights.

Although Judge Thomas has written several articles that discuss constitutional protections against race-based discrimination, none address the standards and analysis to be applied in evaluating gender-based claims. In fact, Judge Thomas has at times downplayed the use of the Equal Protection Clause as a tool for eradicating invidious discrimination.[111]

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[110] Id. at 56.

[111] For example, Judge Thomas agrees with the result in the Supreme Court's decision in Brown v. Board of Education -- that state-imposed school segregation is constitutionally repugnant -- but takes issue with the Court's equal protection analysis in reaching that result. Judge Thomas asserts that Brown was a "missed opportunity" to apply higher law analysis, identifying Brown's "great flaw" as its reliance on empirical evidence of the effects of segregation without recognizing that segregation was a derivative of slavery and thus "at fundamental odds with the founding principles." Thomas, "Toward a 'Plain Reading' of the Constitution," 30 Howard Law Journal 691, 698-99 (1987).

In particular, Judge Thomas has argued that the Brown case would have been better decided had it relied on the analysis used by Justice Harlan in dissent in Plessy v. Ferguson, the 19th-century case which upheld the doctrine of "separate but equal." In praising Harlan's analysis, he concludes that Harlan "relied on the Privileges or Immunities Clause rather than on either the Equal Protection or the Due Process Clause." Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy 63, 66-68 (1989). Judge Thomas' seeming indifference to the Equal Protection Clause provides cause for concern, since the

Hence, the resultant uncertainty as to his views on constitutional protections against sex discrimination, coupled with his expressed support for jurisprudence based on "natural rights" theory, raises substantial concern about his adherence to the Constitution's most basic guarantees against invidious sex discrimination.

Judge Thomas has not stated how or whether he would apply a natural rights analysis to sex discrimination; historically, though, natural law principles have been used to limit the lives and opportunities of women.

Judge Thomas has consistently reiterated in writings and speeches his support for a "higher law" or "natural rights" theory of constitutional law. This theory argues that legal principles must be measured against the standards of a natural law that reflects humankind's highest values and aspirations.[112]

Equal Protection Clause has been interpreted as the primary source of constitutional protections against sex-based discrimination.

[112] This higher law is often -- but not always -- informed by reference to religious values. For example, in articulating natural law theory, Judge Thomas, quoting John Quincy Adams, has asserted:

> "Our political way of life is by the laws of nature of nature's God, and of course presupposes the existence of God, the moral ruler of the universe, and is a rule of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government."

As a theory of jurisprudence to be applied by the Supreme Court, natural rights analysis provides cause for serious concern. Its reliance on "higher" moral principles leaves open the dangerous possibility that cases will be decided on the basis of individual judges' musings, intuitions, or religious beliefs. These personal conclusions are bound to vary unpredictably from Justice to Justice.[113] As one Supreme Court Justice wrote in dissenting from the Court's natural rights analysis in a 1798 probate case: "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject..."[114] Then, as now, the notion that personal moral beliefs can trump bedrock legal principles is cause for alarm among members of a diverse, democratic society.

Address by Clarence Thomas, "Why Blacks Should Look to Conservative Policies," The Heritage Foundation (June 18, 1987) at 9.

Judge Thomas, paraphrasing St. Thomas Aquinas, has further explained that "an unjust law is a human law that is not rooted in eternal law and natural law" and that "a just law is a man-made code that squares with the moral law or the law of God." Thomas, "Affirmative Action: Cure or Contradiction?" The Center Magazine, November/December 1987, at 21.

[113] To the extent that these values are informed by a Justice's religious beliefs, the use of natural rights theory raises critical questions about the separation of church and state. And, since religions vary tremendously in identifying life's fundamental values -- as do even varying denominations of the same religion or church -- the application of natural rights theory will similarly vary depending upon the religious affiliation of the Justice involved.

[114] Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)(Iredell, J., dissenting).

In numerous articles and speeches, Judge Thomas has applied natural rights theory to conclude that state-imposed racial discrimination is constitutionally prohibited, not necessarily by the Fourteenth Amendment's Equal Protection Clause, but by the "higher law" principles articulated in the Declaration of Independence.[115] Indeed, his application of natural rights theory leads him to a powerful condemnation of race-based segregation. However, since his natural rights analyses have been directed almost exclusively to race-based discrimination, it is not clear whether Judge Thomas would apply this analysis to claims of discrimination against women, including women of color.

Judge Thomas' support for natural rights analysis raises substantial questions about the theory's application to gender discrimination.[116] Historically, the language of natural rights and higher law has been used to limit women's lives and opportunities. For example, an 1873 Supreme Court decision denied a woman a license to practice law, arguing that

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[115] More specifically, Judge Thomas has argued that racial segregation is unconstitutional because the Constitution is intimately linked to the Declaration of Independence, which makes clear that the United States is premised "the promise of equality of rights." Thomas, "Toward a 'Plain Reading' of the Constitution -- The Declaration of Independence in Constitutional Interpretation," 30 Howard Law Journal 691, 692 (1987).

[116] For example, Judge Thomas has urged that constitutional interpretation return to a "'plain reading' of the Constitution -- which puts the fitly spoken words of the Declaration of Independence in the center of the frame formed by the Constitution." Thomas, "Toward a 'Plain Reading' of the Constitution -- The Declaration of Independence in Constitutional Interpretation," 30 Howard Law Journal 691, 703 (1987). The Declaration, of course, fails explicitly to mention the rights of women in its pronouncement that "all men are created equal."

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> ...civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman is to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.[117]

The Court relied upon similar principles in Muller v. Oregon,[118] when it upheld a state statute that limited the number of hours women could work. The Muller Court held that legislation restricting women's employment was permissible because "healthy mothers are essential to vigorous offspring, [and] the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[119] It justified its limitations on women's opportunities by noting that "woman has always been dependent upon man."[120]

Reliance on "natural law" thus threatens to limit women's freedom and equality by introducing outdated notions of women's "natural" roles and capabilities into constitutional interpretation. For these reasons alone, Judge Thomas' support for natural rights theory generates considerable discomfort as to

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[117] Bradwell v. Illinois, 83 U.S. 130, 141-42 (1873).

[118] 208 U.S. 412 (1908).

[119] Id. at 421.

[120] Id.

his willingness to uphold constitutional protections against sex discrimination.

Judge Thomas has embraced an analysis of working women's status that denies the reality of discrimination in women's lives and its effects on their economic security and individual opportunity.

Judge Thomas' approval of an analysis that rejects the role that discrimination plays in limiting women's lives further fuels concern as to his willingness to abide by constitutional prohibitions against invidious sex-based discrimination. Specifically, Judge Thomas has written approvingly of academic Thomas Sowell's analysis of working women in Civil Rights: Rhetoric or Reality?[121] Judge Thomas praised Mr. Sowell's work as

> ... a useful, concise discussion of discrimination faced by women. We will not here attempt to summarize it except to note that by analyzing all the statistics and examining the role of marriage on wage-earning for both men and women, Sowell presents a much-needed antidote to cliches about women's earnings and professional status.[122]

Mr. Sowell's analysis is so outrageous that Judge Thomas' support for it requires discussion in some detail. In short, at

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[121] Sowell, "The Special Case of Women," Civil Rights: Rhetoric or Reality? 91-108 (1984)(hereafter "Sowell, Civil Rights").

[122] Thomas, "Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom," Lincoln Review, vol. 8, no. 2 at 15-16 (Winter 1988)(hereafter "Thomas Sowell and the Heritage of Lincoln").

no point in his chapter devoted to women does Mr. Sowell acknowledge any "discrimination faced by women." Rather, he concludes that inequities in pay and career advancement stem merely from women's own behavior and choices, claiming that women prefer jobs and careers with greater flexibility -- yet lower pay -- to accommodate their roles as wives and mothers.

In attempting to justify the historic pay inequities between men and women, Mr. Sowell goes so far as to claim that:

> Women are typically not educated as often in such highly paid fields as mathematics, science, and engineering, nor attracted to physically taxing and well-paid fields such as construction work, lumberjacking, coal-mining, and the like.[123]

Mr. Sowell makes no mention of data that show that a substantial portion of the wage gap between men and women (even after considering factors like experience, education, training, and length of workforce attachment) is attributable to discrimination.[124]

Nor does Mr. Sowell acknowledge the impact of pregnancy discrimination in limiting women's employment opportunities -- even as he gives credence to stereotypes that suggest that working mothers are "not willing to work overtime as often as

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[123] Sowell, Civil Rights at 92. Mr. Sowell is demonstrably wrong. For example, as discussed earlier, thousands of women have entered the "physically taxing and well-paid" field of coal mining, enabled in large part by affirmative action efforts that overcame many of the barriers to women's participation in the industry.

[124] Women, Work and Wages: Equal Pay for Jobs of Equal Value (H. Hartmann & D. Treiman ed. 1981).

some other workers (male or female), or need more time off for personal emergencies" and may thus be "less valuable as an employee or less promotable to jobs with heavier responsibilities."[125] Mr. Sowell instead asserts that "the physical consequences of pregnancy and childbirth alone are enough to limit a woman's economic options,"[126] without recognizing the role that employers play in transforming a woman's pregnancy disability into an excuse for her termination, reassignment, or demotion.

Mr. Sowell even argues that treating women fairly is too costly: employers, he claims, won't hire women who cost them more because of the legal protections against sex discrimination[127] (yet Mr. Sowell refused to recognize this as "discrimination").

And, while Mr. Sowell gives a nod to racial differences between women by recognizing that black women's labor force participation rates were historically higher than white women's, he asserts incorrectly that black women -- who suffer from

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[125] Sowell, Civil Rights at 97-98. Mr. Sowell writes that "[b]ecause of domestic responsibilities and the rearing of children, women also tend to drop out of the labor force completely more often than men do." He suggests that these women "drop out" voluntarily; he makes no mention of the thousands of women who are forced from their jobs for want of supportive and efficient workplace policies and standards, such as job-guaranteed family and medical leave.

[126] Id. at 97.

[127] Id. at 105.

discrimination based on gender and race -- fare better in the labor market than white women.[128]

In short, Thomas Sowell's "much-needed antidote[s] to cliches about women's earnings and professional status," as Judge Thomas puts it, are themselves stereotypical and unsupportable assumptions that perpetuate discrimination in the workplace. Judge Thomas' praise for this analysis -- especially in light of his experience as head of the agency charged with fighting workplace sex discrimination -- is, at the very least, alarming. Certainly it fuels fears that he will not strike down invidious sex-based distinctions as constitutionally impermissible.[129]

Mr. Sowell's analysis leads Judge Thomas to conclude that "[i]n any event, women cannot be understood as though they were a

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[128] M. Power, "Occupational Mobility of Black and White Women Service Workers," (Presented at the Institute for Women's Policy Research Second Annual Women's Policy Conference, June, 1990)(unpublished manuscript); J. Malveaux, "Low Wage Black Women: Occupational Descriptions, Strategies for Change," (unpublished manuscript prepared for NAACP Legal Defense and Education Fund, Inc. 1984) at 8, 12-13.

[129] Judge Thomas expressed support for a similar analysis in another context as well. In an interview published in The Atlantic Monthly, Juan Williams writes of Thomas,

> But people who argue that they are victimized in corporate life as part of historical, across-the-board discrimination against a group find little sympathy at [Judge Thomas'] agency. It could be, Thomas says, that blacks and women are generally unprepared to do certain kinds of work by their own choice. It could be that blacks choose not to study chemical engineering and that women choose to have babies instead of going to medical school.

Williams, "A Question of Fairness," The Atlantic Monthly, February 1987, at 79.

racial minority group, or any kind of minority at all" (emphasis in original).[130] This statement carries significant implications for any analysis of women's equality under the Equal Protection Clause (which has been interpreted to provide protections against gender-based discrimination that are modelled after those provided against racial discrimination). It suggests that Judge Thomas is less likely to view sex-based distinctions as presumptively discriminatory, as they are treated under equal protection analysis, but rather as the acceptable result of women's choices, behavior, or social roles.

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[130] Thomas Sowell and the Heritage of Lincoln at 16.

REPRODUCTIVE FREEDOM

A woman's ability to enjoy the full range of personal liberties guaranteed by the Constitution -- her privacy and her equality before the law -- is integrally related to her freedom to control her reproductive life. Judge Thomas, through published writings and one speech, has not only questioned the constitutional basis of the right of privacy articulated in Griswold v. State of Connecticut[131] and Roe v. Wade,[132] but has also expressed approval of the extreme view that the Constitution affirmatively protects a fetus' "right to life." In particular:

- Judge Thomas offered one of the few specific examples of how he would apply natural law in a speech praising as a "splendid example of applying natural law" an article arguing not only that Roe v. Wade was wrongly decided but that the Constitution affirmatively protects the fetus' "right to life";
- Judge Thomas served on the 1986 White House Working Group on the Family, which authored a report that sharply criticized Roe and other Supreme Court decisions protecting the right of privacy; and
- In other writings, Judge Thomas criticized Roe and even Griswold v. Connecticut, the case protecting as fundamental the right of married couples to use contraceptives.

After a brief introduction summarizing Griswold, Roe, and the right to privacy, each of these concerns will be discussed below.

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[131] 381 U.S. 479 (1965).

[132] 410 U.S. 113 (1973).

Griswold, Roe and the Right to Privacy

The landmark case of Griswold v. State of Connecticut involved a constitutional challenge to a state criminal law banning the use of contraceptives. The lawsuit was brought by a physician and family planning clinic director who were convicted as accessories for providing a married couple with medical information and advice about contraceptives. The Supreme Court struck down the statute as violating the constitutional right of privacy surrounding the marriage relationship.

In Griswold, the Court concluded that a "zone of privacy created by several fundamental constitutional guarantees" rendered the law unconstitutional.[133] In the majority opinion, Justice Douglas cited various provisions of the Bill of Rights: the right of association contained in the First Amendment; the prohibition against housing soldiers in people's homes contained in the Third Amendment; the right to be "secure in their persons, houses, papers, and effects" contained in the Fourth Amendment; the prohibition against self-incrimination contained in the Fifth Amendment; and the Ninth Amendment, which states:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Justice Goldberg, in a separate and famous concurring opinion, wrote "to emphasize the relevance of [the Ninth] Amendment to the Court's holding."[134] Drawing on the

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[133] 381 U.S. at 485.

[134] 381 U.S. at 487.

legislative history and language of the Ninth Amendment, Justice Goldberg stated:

> [T]he Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.[135] ...To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.[136]

Justice Goldberg stated that the Ninth Amendment did not constitute an "independent source of rights," but rather reflected "a belief ... that fundamental constitutional rights exist that are not expressly enumerated in the first eight amendments."[137] He further stated that this did not mean that judges should decide cases based on "their personal and private notions":

> Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there]...as to be ranked as fundamental."[138]

Eight years later, in Roe v. Wade, the Supreme Court concluded that the fundamental right of personal privacy recognized in a long line of cases, including Griswold, included a woman's decision whether or not to terminate a pregnancy.

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[135] 381 U.S. at 488.

[136] 381 U.S. at 491.

[137] 381 U.S. at 492.

[138] 381 U.S. at 493 (citations omitted).

While acknowledging that the district court had rooted this right "in the Ninth Amendment's reservation of rights to the people," the Court concluded that this fundamental right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty."[139] The Court, noting that "prevailing legal abortion practices were far freer" during the 19th century, also rejected unequivocally the argument that a fetus is a "person" within the meaning of the Fourteenth Amendment.[140]

In his writings, Judge Thomas has criticized Roe and even Griswold v. Connecticut, the case protecting as fundamental the right of married couples to use contraceptives.

In two articles published in 1988 and 1989, Judge Thomas criticized Roe v. Wade and the majority and concurring opinions in Griswold.[141] In a footnote in the context of a critique of judicial activism, unenumerated rights and "run-amok judges," Judge Thomas stated:

> The current case provoking the most protest from conservatives is Roe v. Wade, 410 U.S. 113 (1973), in which the Supreme Court found a woman's decision to end her pregnancy to be part of her unenumerated right to privacy established in Griswold v. Connecticut, 381 U.S. 479 (1965). In Griswold, Justice Douglas found that "[s]pecific

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139 410 U.S. at 153.

140 410 U.S. at 157-58.

141 Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy 63-70 (1989); and Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," Assessing the Reagan Years 391-402 (D. Boaz, ed. 1988).

> guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." Id. at 484 (citation omitted).
>
> I elaborate on my misgivings about activist judicial use of the Ninth Amendment in Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," Assessing the Reagan Years 398-99 (D. Boaz ed. 1988).[142]

Viewed in context, these remarks clearly criticize the unenumerated right of privacy articulated in Roe and Griswold.

In the article referred to in the above-quoted text, Judge Thomas discusses the Ninth Amendment at some length. He interprets Justice Goldberg's view of the Ninth Amendment as giving the Supreme Court "a blank check" to "strike down legislation."

> Unbounded by notions of obligation and justice, the desire to protect rights simply plays into the hands of those who advocate a total state. The rhetoric of freedom (license, really) encourages the expansion of bureaucratic government.[143]

Judge Thomas argues that the Ninth Amendment should instead be seen as a reminder that "the Constitution is a document of limited government."[144] What Judge Thomas fails to appreciate is that devaluing constitutional rights of individuals, and the Court's role in protecting them, expands the power of the other

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[142] Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Public Policy 63, n.2 (1989).

[143] Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," Assessing the Reagan Years 391, 399 (D. Boaz, ed. 1988).

[144] Id. at 398.

branches of government to interfere with those rights. This is hardly consistent with a professed desire for limited government.

Although one could disagree with Justice Goldberg's view of the Ninth Amendment and yet agree with the analysis of the fundamental right of privacy in Roe and in the Griswold majority opinion, Judge Thomas' explicit criticism of the unenumerated right of privacy again shows that he does not support the constitutional analysis in Griswold and Roe.

Judge Thomas served on the 1986 White House Working Group on the Family, which authored a report that sharply criticized Roe and other Supreme Court decisions protecting the right of privacy.

In 1986, Judge Thomas, then chair of the Equal Employment Opportunity Commission, served on the White House Working Group on the Family. The report submitted by that group to President Reagan in December 1986 attributes authorship of the report to "the White House Working Group on the Family," and Judge Thomas is listed as a member of that group.[145]

The Working Group's report includes explicit criticism of a series of Supreme Court decisions affirming the fundamental right to privacy: Roe v. Wade, Eisenstadt v. Baird,[146] and Planned

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[145] A Report to the President from the White House Working Group on the Family, The Family: Preserving America's Future, December 1986 (hereafter "The Family: Preserving America's Future").

[146] 405 U.S. 438, 453 (1972).

Parenthood v. Danforth.[147] In Eisenstadt, the Court invalidated a Massachusetts law that banned distribution of contraceptives to unmarried individuals. The Court's plurality opinion extended the reasoning of Griswold, which was based on a right of marital privacy, and concluded that the right of privacy, to mean anything, must mean the right of the individual, married or unmarried, to be free from unwarranted government intrusion into such personal matters. In Danforth, the Court held unconstitutional a Missouri statute requiring the written consent of a woman's spouse or the written consent of a young woman's parent or guardian before an abortion could be performed; both provisions gave others (a spouse or a parent) absolute veto power over a woman's decision to terminate a pregnancy.

In the context of a discussion of the legal status of the family, the Working Group criticizes Roe, stating that the Court "struck down State attempts to protect the life of children in utero," and Danforth, stating that the Court invalidated state attempts "to protect paternal interest in the life of the child before birth, and to respect parental authority over minor children in abortion decisions."[148] The Working Group's criticism of Eisenstadt appears to be based on its view that the decision denigrates the status of the marital relationship and thus the family.

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147 428 U.S. 52 (1976).

148 The Family: Preserving America's Future at 11.

Rather than giving any consideration to constitutionally-based privacy interests in analyzing Roe, Eisenstadt, and Danforth, the White House Working Group simply describes these cases as decisions made by the Supreme Court "on a philosophical basis which left little room for legal recognition of the family."[149] The Working Group states that these and other decisions from the Court "have crippled the potential of public policy to enforce familial obligations, demand family responsibility, protect family rights, or enhance family identity."[150] Sex education classes and school-based clinics are similarly criticized in the report, described not as providing information about constitutionally protected rights as decided in Griswold and Eisenstadt, but rather as "the abdication of moral authority."[151]

Of particular concern is the Working Group's position that state legislatures and Congress, not the courts, should decide these issues. Such a view of the Supreme Court would eviscerate the Court's historic role in safeguarding constitutional rights. Despite the Working Group's objection to judicial action in this arena, the report lists various options to "correct" such "a fatally flawed line of court decisions," including "the

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[149] Id. at 11.

[150] Id. at 12.

[151] Id. at 27 (citing then Secretary of Education William Bennett).

appointment of new judges and their confirmation by the Senate."[152]

Judge Thomas offered one of the few specific examples of how he would apply natural law in a speech praising as a "splendid example of applying natural law" an article arguing not only that Roe v. Wade was wrongly decided but that the Constitution affirmatively protects the fetus' "right to life."

In 1987 Judge Thomas delivered a speech entitled "Why Black Americans Should Look to Conservative Policies" at The Heritage Foundation. In this speech, which includes a discussion of the need "to reexamine the natural law," Judge Thomas described an essay as follows:

> Heritage Foundation Trustee Lewis Lehrman's recent essay in The American Spectator on the Declaration of Independence and the meaning of the right to life is a splendid example of applying natural law.[153]

The Lehrman essay, published in April, 1987, is entitled "The Declaration of Independence and the Right to Life: One Leads Unmistakably From the Other."[154] In this short, three-page article, Mr. Lehrman discusses:

> 1) "the 'durable' moral issue of our age," which he describes as "the struggle for the inalienable right to life

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[152] Id. at 12.

[153] Address by Clarence Thomas, "Why Blacks Should Look to Conservative Policies," The Heritage Foundation (June 18, 1987) at 9.

[154] Lehrman, "The Declaration of Independence and the Right to Life: One Leads Unmistakably From the Other," The American Spectator 21-23 (April, 1987).

> of the child-in-the-womb -- and thus the right to life of all future generations";
>
> 2) "the conjured right to abortion in Roe v. Wade, a spurious right born exclusively of judicial supremacy with not a single trace of lawful authority, implicit or explicit, in the actual text or history of the Constitution itself"; and
>
> 3) "the right to life of the child-about-to-be-born -- an inalienable right, the first in the sequence of God-given rights warranted in the Declaration of Independence and also enumerated first among the basic positive rights to life, liberty, and property stipulated in the Fifth and Fourteenth Amendments of the Constitution" (emphasis added).[155]

Mr. Lehrman also refers to the Court's "overreaching" decision in Roe as a "coup" against the Constitution leading to a "holocaust."[156] Through the application of "natural law" theory, Mr. Lehrman concludes that the Constitution affirmatively protects a fetus' "right to life." This view goes far beyond disputing whether there is a constitutional right of privacy and whether such a privacy right encompasses a woman's decision to terminate a pregnancy.

Should the Supreme Court ultimately conclude that the Constitution does not protect privacy or the right to terminate a pregnancy, abortion would not automatically be banned unless the states affirmatively decided to enact restrictive laws. Moreover, Congress and the states, through state constitutions and statutes, could protect the right to choose.

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[155] Id. at 22, 23.

[156] Id. at 23.

But if Mr. Lehrman's extreme view of the Constitution were adopted by the Supreme Court, neither the federal government nor the states could enact laws to protect the right to choose, and state constitutional provisions that protect the right to choose would be voided. To protect a woman's reproductive choices would require a federal constitutional amendment.

In short, Judge Thomas has on several occasions criticized the line of privacy cases beginning with Griswold and ending with Roe v. Wade and its progeny -- cases that protect as fundamental the right of personal privacy in decisions relating to contraception and abortion. Judge Thomas' views go beyond opposition to a constitutional right of privacy to an affirmative belief that the fetus has enforceable legal rights under the Constitution, a view that would lead not merely to the overruling of Griswold and Roe, but also to state control over all aspects of women's reproductive lives.

CONCLUSION

In our system of constitutional government, the Supreme Court functions as the last bastion of justice. It is the Court's duty to safeguard individual rights and liberties for all Americans -- especially those who are most vulnerable to invidious discrimination and the deprivation of their rights. In a Court with nine members that has just lost a forceful counterweight to prevailing majority opinion, and in an era of widespread racism and sexism, the stakes in replacing Justice Thurgood Marshall are very high.

Our review of Judge Clarence Thomas' record reveals a complex, extensive pattern of disturbing actions and statements that makes us unwilling to entrust our constitutional future to his care. We fear Judge Thomas approaches the law via a prism clouded by an ideology that misinterprets and ignores legal principles of the greatest importance.

Indeed, this report highlights issues that will have life-shaping impact on millions of Americans, particularly our society's most disadvantaged individuals.

The Thomas record on these issues casts grave doubt upon his commitment to equal employment opportunity that could enable working women and their families to achieve and maintain economic security -- in ways similar, perhaps, to Judge Thomas' own admirable climb out of poverty. His record on constitutional protections against gender discrimination for women -- including women of color who are vulnerable to double discrimination based

on gender and race -- is deeply troubling. And we are extraordinarily concerned by evidence that Judge Thomas will endorse extreme limitations on every woman's most fundamentally important right, the right to make her own reproductive choices.

Our report raises many tough questions that must be answered during the confirmation process. Indeed, considering that this is a lifetime appointment, the Senate is duty-bound to conduct the most thorough interview Judge Thomas has ever faced. The Senators must thoroughly probe, and Judge Thomas must fully address, each disturbing question raised in this report. If Judge Thomas does not affirmatively endorse equal employment opportunity, constitutional protections against gender discrimination, and reproductive freedom and the right to privacy for all American women, the nation cannot afford to place him on the bench of the Supreme Court.