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A RESPONSE TO JUDGE THOMAS' CRITICS

A REPORT PREPARED FOR COALITIONS FOR AMERICA
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A RESPONSE TO JUDGE THOMAS' CRITICS

By now, everyone knows that President Bush's nomination of U.S. Circuit Judge Clarence Thomas to replace Supreme Court Justice Thurgood Marshall has caused some controversy. Organizations have announced their support or opposition, though the former outnumber the latter by about 3-to-1.[1] The purpose of this report is to respond to the central arguments raised by the opposition.

Judge Thomas' opponents make the same fundamental errors we have seen in past nomination battles. The left cannot distinguish private opinions on policy or politics from an individual's judicial philosophy. Perhaps they cannot conceive of judges who do not mistake their personal opinions for the dictates of the law. The left cannot distinguish criticism of legal reasoning from criticism of case results. In short, the left sees judges as politicians and judicial nominees as congressional candidates. By doing so, they imperil not only the independence of the judiciary but the very notion of a judiciary at all.

I. Why Ignore a Judicial Record in the Search for One?

Every report, press conference, and public statement by Judge Thomas' opposition has ignored his judicial record. Listening only to the opposition, an uninformed observer would have no idea that Clarence Thomas is in fact a sitting federal appellate judge who has actually authored his own judicial opinions and participated in many others.

For example, the Mexican American Legal Defense and Educational Fund (MALDEF) based its opposition and report solely on Judge Thomas' "extrajudicial writings and speeches."[2] People for the American Way Action Fund (PAWAF) cites only the relative brevity of Judge Thomas' judicial record.[3] Americans for Democratic Action (ADA) completely ignores that record.[4] The NAACP Legal Defense and Educational Fund

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[1] A list of organizations supporting the nomination is attached.

[2] Mexican American Legal Defense and Educational Fund, "Natural Law: Not On Our Supreme Court," August 14, 1991, at 6 (hereinafter *MALDEF Report*).

[3] People for the American Way Action Fund, "Judge Clarence Thomas: 'An Overall Disdain for the Rule of Law'," July 30, 1991, at 3,4 (hereinafter *PAWAF Report*).

[4] Americans for Democratic Action, "Nomination of Judge Clarence Thomas to the Supreme Court of the United States: A Legal Analysis," July 23, 1991 (hereinafter *ADA Report*).

(LDEF) bases its opposition and report on "Judge Thomas' writings and speeches."[5] The nominee's judicial record likewise goes completely unnoticed in the reports by the Women's Legal Defense Fund (WLDF)[6] and the National Abortion Rights Action League (NARAL).[7] The AFL-CIO focuses exclusively on Judge Thomas' "public statements" and non-judicial writings.[8] Neither the American Civil Liberties Union of Southern California (ACLU/SC)[9] nor the National Association for the Advancement of Colored People (NAACP)[10] mention the nominee's judicial record. The National Women's Law Center (NWLC) completely ignores it as well,[11] as does the American Association of University Women (AAUW).[12] Two reports prepared by law professor Erwin Chemerinsky for opposition groups also ignore that record.[13]

This pattern of selective examination is very significant and perhaps says as much about Judge Thomas' opponents as their own reports do. They claim his past non-judicial record tells us, with an apparently high degree of confidence, what his future judicial record will be. But why do the nominee's opponents pass up the opportunity to test whether the views Judge Thomas has expressed as a private citizen or agency administrator on policy issues influence, determine, or otherwise are reflected in his work as a judge on legal issues? Why do they ignore the judicial record of a judicial nominee?

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[5] NAACP Legal Defense and Educational Fund, "An Analysis of the Views of Judge Clarence Thomas," August 13, 1991, at 1 (hereinafter *LDEF Report*).

[6] Women's Legal Defense Fund, "Endangered Liberties: What Judge Clarence Thomas' Record Portends for Women," July 30, 1991 (hereinafter *WLDF Report*).

[7] National Abortion Rights Action League, "Judge Clarence Thomas' Record on the Fundamental Right to Privacy," July 24, 1991 (hereinafter *NARAL Report*).

[8] AFL-CIO, "Background Paper on Judge Clarence Thomas," July 31, 1991, at 1 (hereinafter *AFL-CIO Report*).

[9] ACLU of Southern California release, "City-Wide Coalition Gathers, Announces Stand on Supreme Court Nominee," July 23, 1991 (hereinafter *ACLU/SC Report*).

[10] NAACP release, "Statement by Dr. William F. Gibson, Chairman the National Board of Directors of the NAACP on the Nomination of Judge Clarence Thomas to the U.S. Supreme Court," July 31, 1991 (hereinafter *NAACP Report*). This statement is treated herein as the NAACP's report. The NAACP board did have a secret report, excerpts of which were published in *Legal Times*, August 5, 1991. Separate reference will be made to that document.

[11] National Women's Law Center, *Judge Clarence Thomas: A Record Lacking In Support of Women's Legal Rights*, August 20, 1991 (hereinafter *NWLC Report*).

[12] American Association of University Women, *Five Reasons AAUW Opposes the Nomination of Clarence Thomas to the U.S. Supreme Court*, August 1991 (hereinafter *AAUW Report*).

[13] Memorandum to ACLU/SC Board of Directors, July 17, 1991 (hereinafter *Chemerinsky I*; Chemerinsky, "Clarence Thomas' Natural Law Philosophy," released by People for the American Way Action Fund, July 30, 1991 (hereinafter *Chemerinsky II*).

One leftist group let slip the answer. Within days of the nomination, the Alliance for Justice issued a document titled "Alliance for Justice Preliminary Report on Clarence Thomas," dated July 1, 1991.[14] It included summaries of Judge Thomas' opinions and concluded:

> ***"His decisions overall do not indicate an overly idealogical*** [sic] ***tilt, although they generally are conservative, especially his criminal law and procedure decisions."***

When the Alliance announced its opposition to Judge Thomas' nomination on July 29, 1991, it released four documents. One of them was titled "Alliance for Justice Preliminary Report on Clarence Thomas," dated July 1, 1991. It included summaries of Judge Thomas' opinions and purported to be the same document the Alliance had earlier released. Curiously, however, this July 1 opinion summary differed from the first July 1 opinion summary. The positive evaluative statement quoted above had mysteriously disappeared.

The Alliance owes everyone an explanation. Which is the **real** July 1 report? Do Judge Thomas' opinions suddenly tilt because the Alliance does? This approach of doctoring documents resembles turning the odometer back on a used car and raises serious questions about the Alliance's credibility. Not surprising, the same media which had investigated the flag Clarence Thomas had on his desk nearly 20 years ago[15] never raised an eyebrow over such tactics.

The Alliance was, in fact, right the first time. Judge Thomas' opinions are not ideological. Rather, in the words of one legal analyst, they are "textbook examples of judicial restraint."[16] No one who candidly examines Judge Thomas' **entire** record can honestly conclude that he imposes his personal views about policy or politics when performing his judicial function.

Quite the contrary, Judge Thomas believes in "a judiciary active in defending the Constitution, but judicious in its restraint and moderation."[17] The judiciary, in his view, has a vigorous yet defined role. His opinions reflect such a traditional commitment to judicial restraint and the rule of law in several ways.

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[14] The Alliance acknowledges that many of the decisions it reviewed are *per curiam* decisions not authored by Judge Thomas.

[15] See Clymer, "About That Flag on the Judge's Desk," *New York Times*, July 18, 1991.

[16] Crovitz, "The Views of Justice Thomas, According to Judge Thomas," *Wall Street Journal*, July 3, 1991, at A7.

[17] Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 *Harvard Journal of Law & Public Policy* 63,63-64 (1989).

* He adheres to precedent,[18] even when it produces liberal political results.[19]

* He consistently avoids answering questions or addressing issues unnecessary for deciding the particular case before the court.[20]

* He has declined the invitation to decide cases on purely policy grounds.[21]

* He pays close attention to issues affecting the court's jurisdiction.[22] Judge Thomas' leftist opponents, of course, characterize the desire to ensure that the court properly has jurisdiction as "limiting access to the courts."[23]

* He emphasizes a properly narrow role for an appellate court.[24]

* He utilizes traditional standards of construction and interpretation.[25]

Judge Thomas' opponents ignore his judicial opinions because that record undermines rather than advances their case against him. They must ignore the most relevant part of his record in order to pursue their campaign. For them, no distinction exists between politics and law, between politicians and judges. For them, raw results are

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[18] See, e.g., *United States v. Halliman*, 923 F.2d 873 (D.C. Cir. 1991) (applying D.C. Circuit rule after distinguishing it from rule in other circuits).

[19] See, e.g., *Action for Children's Television v. Federal Communications Commission*, 932 F.2d 1504 (D.C.Cir. 1991) (joining Chief Judge Mikva's opinion striking down FCC's 24-hour ban on indecent programming). Judge Thomas listed this decision on his Senate Judiciary Committee questionnaire as a significant opinion on a federal constitutional issue in which he participated.

[20] See, e.g., *Otis Elevator v. Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990).

[21] See, e.g., *id.* at 1291.

[22] See, e.g., *United States v. Long*, 905 F.2d 1572 (D.C. Cir. 1990) (late filing of notice of appeal deprives court of jurisdiction); *Doe v. Sullivan*, No.91-5019 (July 16, 1990) (Thomas, J., dissenting) (mootness); *Cross-Sound Ferry Services, Inc. v. Interstate Commerce Commission*, No.90-1053 (May 10, 1991) (Thomas, J., dissenting) (standing).

[23] *PAWAF Report* at 5.

[24] See, e.g., *United States v. Poston*, 902 F.2d 90,94 (D.C. Cir. 1990); *United States v. Harrison*, No.89-3152 (May 16, 1991).

[25] See, e.g., *United States v. Rogers*, 918 F.2d 207,209 (D.C. Cir. 1990) (construing Federal Rules of Evidence using "traditional tools," beginning with "the language of the rules themselves"); *Buogiorno v. Sullivan*, 912 F.2d 504 (D.C. Cir. 1990) (examining the text of agency rule to determine reasonableness); *United States v. Shabazz*, No.90-3244 (May 28, 1991) (intent of Congress the guiding principle in reviewing the federal sentencing guidelines, natural reading of text first focus).

more important than objective and dispassionate application of the law to the facts of a particular case. Judge Thomas believes otherwise and his judicial record shows it, so they look the other way and move on.

Judge Thomas' opponents will no doubt claim that his judicial record is relatively brief. And so it is. He has to date authored 20 opinions and participated in approximately 170 cases during his tenure on the U.S. Court of Appeals. Nevertheless, relative brevity does not mean irrelevance. Again, the supposed goal is to determine what Clarence Thomas will do on the bench in the future; it is fundamentally irresponsible, therefore, to ignore what he has done on the bench in the past. That tactic can only be a deliberate attempt to distort the nominee's record.

People for the American Way actually claims that Judge Thomas' brief judicial tenure is itself sufficient reason for the Senate to withhold its consent to his appointment.[26] The American people will wait in vain for that group to announce that liberal Chief Justice Earl Warren, who had absolutely no judicial experience prior to taking the Supreme helm in 1953, should never have been appointed. But, then, PAWAF agrees with most of Chief Justice Warren's activist decisions.

The opposition will also contend that Judge Thomas' judicial record is irrelevant because, as a lower court judge, he was constrained by Supreme Court precedent.[27] On the highest court in the land, they contend, he will be unshackled to do as he pleases. Just when the left discovered this sudden devotion to judicial restraint remains a bit unclear. Nevertheless, by their logic, no one who has not previously served on the Supreme Court should be considered for appointment to that bench. Actually, this is not logic at all. Nor does it have any basis in reality. Judge Thomas' leftist critics have the burden of proof on this point. They have yet to provide a single shred of evidence that he lacks respect for precedent. He has already shown, albeit through the judicial opinions the left consistently ignores, that he knows the difference between his personal views and the requirements of the law.

II. Affirmative Action: Why Won't Anyone Read His Record?

It may serve to create some hysteria or raise some money, but tactics such as "the sky is falling" rarely have anything to do with the truth. Judge Thomas' opponents have made enormous general statements about his supposed opposition to "affirmative action." They have also refused to define that term so that the American people can have some idea of what they are talking about.

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[26] *PAWAF Report* at 3.

[27] See, e.g., *NWLC Report* at 35: "As a lower court judge, Judge Thomas was duty-bound to follow Supreme Court precedent."

It appears that the chorus of critics are reading off a single lyric sheet, at least on some of the songs. The choirmaster appears to be law professor Erwin Chemerinsky. Compare, for example, a passage on the affirmative action issue taken from his memorandum to the ACLU/SC Board of Directors and the MALDEF report:

Chemerinsky memo - July 17, 1991	MALDEF report - August 14, 1991
p.1 "The most pervasive theme in Clarence Thomas' writings is his vehement opposition to all forms of affirmative action, even affirmative action taken to remedy clearly proven past discrimination. He expresses a view that the Constitution requires that government be color-blind under all circumstances."	p.6 "One of the most frequently-repeated themes in Clarence Thomas' writings and speeches is his steadfast opposition to affirmative action in all forms, including affirmative action ordered by the courts to to remedy proven past discrimination. Clarence Thomas' opposition to affirmative action is based on his belief that the Constitution must in all circumstances be colorblind."

Others repeat the same party line. The most outrageous comes from Americans for Democratic Action, which states that "his numerous publications and speeches dealing with affirmative action show that he is opposed to even non-numeric approaches (i.e., special outreach and recruiting efforts) to enhance employment opportunities for minorities and women."[28] The NAACP claims that Judge Thomas' "position on affirmative action shifted dramatically" after 1986.[29] They, of course, offer no evidence for this claim.

Such sweeping generalizations can only be attributed to a desire to inflame passions because they have nothing to do with Judge Thomas' record. In fact, they are directly contradicted by that record, which has been consistent on this point for nearly a decade. In an April 1983 article in the *Labor Law Journal*, EEOC Chairman Thomas wrote: "Much of the heated debate and public confusion over affirmative action, in fact, stems from the confusion between flexible goals and inflexible quotas, and the use of these two distinct terms interchangeably."[30]

On August 17, 1983, Chairman Thomas delivered a speech in Chicago and drew the distinction between the general notion of affirmative action and rigid programs such as quotas. He stated:

> *In light of real world facts of life, there should be no reasoned disagreement over the underlying premise of affirmative action: that is, that we simply must do more than just stop discriminating if we are ever going to stop the effect of a history of discrimination. But, we must have the courage to recognize that there is room*

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[28] *ADA Report* at 2.

[29] *NAACP Report* at 3.

[30] Thomas, "Current Litigation Trends and Goals at the EEOC," 34 *Labor Law Journal* 208,212 (1983).

to question the effectiveness and legality of certain affirmative action programs and policies.[31]

Similarly, in an opinion piece for a major newspaper, Chairman Thomas distinguished between affirmative action and quotas. Failing to draw this distinction, he wrote, "we will fail to address the real issues and condemn the most disadvantaged individuals in our midst to an even bleaker future."[32] In a book chapter published three years later, he again distinguished between "affirmative action policies as they have developed" in the form of racial set-asides or preferences and "reducing barriers to employment, instead of trying to get 'good numbers.' Those who have been in the government know the artificial barriers to hiring someone you want. That is the sort of practice we should be seeking to eliminate. That is the sort of affirmative action I practice at my agency."[33] He is right. As EEOC Chairman, his hiring practices looked like this:

* Hired 49 individuals who reported directly to him - 53% women, 67% minorities

* 9 Office Directors	* 29 Special/Exec. Assts	* 11 personal support staff
5 women	14 women	7 women
5 black	15 black	10 black
	1 Hispanic	
	2 Asian	

* Hired 28 individuals as District Directors - 10 women, 10 black, 4 Hispanic

More recently, in a 1989 interview, Chairman Thomas was even clearer. He said:

I believe in affirmative action; my problem is with 'preferential treatment' because in there it assumes that I am not the equal of someone else, and if I'm not equal, then I'm inferior....I know what it feels like. I'm not a white male out there telling you that it ought to feel that way and it ought to do this and that. I'm telling you how it actually felt to me.[34]

When Senator Sam Nunn (D-GA) announced on July 16, 1991 that he would introduce Judge Thomas to the Judiciary Committee when it begins considering the nomination on September 10, he noted that in their private meeting the nominee continued

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[31] Thomas, "Discrimination and Its Effects," 21 *Integrated Education* 204,206 (1983).

[32] Thomas, "Abandon the Rules; They Cause Injustice," *USA Today*, September 5, 1985, at 8A.

[33] Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," in *Assessing the Reagan Years* (ed. D. Boaz) (Washington, D.C.: The Cato Institute, 1988), at 397.

[34] Quoted in Perry, "Clarence Thomas: Protecting People's Rights," *Minorities & Women in Business*, Sept./Oct. 1989, at 26.

to draw this same distinction "between affirmative action, which he supports, and the affirmative action quota type that he doesn't support."[35]

Allen Moore wrote: "When he gets a chance to fully explain his views in Senate hearings, he will challenge his listeners to think beyond platitudes and conventional orthodoxy. Clarence Thomas has always supported the idea of giving preferential treatment to the truly disadvantaged, especially minorities, rather than to those from middle- or upper middle-class backgrounds who happen to be members of a targeted minority. To do otherwise risks stigmatizing those favored--to make it appear as if they are incapable of competing fairly."[36]

Judge Thomas' opposition just hate mentioning that Arthur Fletcher, Chairman of the U.S. Commission on Civil Rights and the architect of affirmative action in this country, has publicly endorsed the nomination. He stated:

> *If anything should occur to diminish the effectiveness or eliminate opportunities in [employment or education], I would have as much, if not more, to lose than anyone....After reading all I could find written about him...and after talking to people who have known him 'up close' for a decade or more....I am convinced that in his heart of hearts, he knows that he has benefited from the fallout of the Brown Decision, and that he also has benefited from the dramatically improved opportunities environment created by the employment affirmative action enforcement movement; and that he has ridden it all the way to the top....I support the nomination.*

III. What's Good for Marshall is Good for Thomas

Judge Thomas has most often cited the American natural rights tradition when discussing the case against slavery, segregation, and discrimination - practices he repeatedly connects and condemns. In so doing, he has aligned himself with the dissenting opinion by Justice John Marshall Harlan in *Plessy v. Ferguson*,[37] the decision legitimating the "separate but equal" doctrine. He has called that dissent "one of our best examples of natural rights or higher law jurisprudence."[38] As a result, he has criticized the decision in *Brown v. Board of Education*,[39] which correctly repudiated the doctrine, because the Court based its opinion

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[35] *Washington Times*, July 17, 1991, at

[36] Moore, "The Clarence Thomas I Know," *Washington Post*, July 16, 1991, at A19.

[37] 163 U.S. 537 (1896).

[38] Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 *Harvard Journal of Law & Public Policy* 63,66-67 (1989).

[39] 347 U.S. 483 (1954).

not on the enduring natural rights principles in Justice Harlan's *Plessy* dissent, but on social science data and psychological theories.

Judge Thomas' opponents frequently cite his criticism of the reasoning in *Brown v. Board of Education* as a reason to oppose his nomination.[40] By their failure to distinguish criticism of legal reasoning from criticism of case results, these folks who themselves have never endured segregation apparently intend the incredible suggestion that Judge Thomas supports the practice! Judge Thomas' record completely repudiates this offensive notion.

Americans for Democratic Action compares Judge Thomas to Judge Bork. The group might as well have compared him to Justice Thurgood Marshall who in *Brown* argued before the Court for the same position that Judge Thomas today says the Court should have adopted - one based on enduring natural rights principles rather than social science data and psychological theories. Legal analyst Gordon Crovitz writes that "when it comes to the Supreme Court's most important civil-rights case, Clarence Thomas *is* another Thurgood Marshall."[41] But then, selective memory seems to be standard operating procedure in this debate.

These fundamental principles of equality and liberty in fact formed an essential part of the legal assault on slavery, segregation, and discrimination. The brief for Oliver Brown in *Brown v. Board of Education*, filed by then-attorney Thurgood Marshall, is very instructive. Marshall summarized the issue at the very heart of this landmark case as "whether a nation founded on the proposition that 'all men are created equal' is honoring its commitments...when it...confers or denies benefits on the basis of color or race."[42] His assault on the *Plessy* doctrine was based squarely on Justice Harlan's dissent in that case. Marshall wrote:

> *While the majority opinion [in* Plessy*] sought to rationalize its holding on the basis of the state's judgment that separation of races was conducive to public peace and order, Justice Harlan knew all too well that the seeds for containing racial animosities had been planted....'Our Constitution,' said Justice Harlan, 'is colorblind, and neither knows nor tolerates classes among citizens.' It is the dissenting opinion of Justice Harlan, rather than the majority opinion in* Plessy v. Ferguson, *that is in keeping with the scope and meaning of the Fourteenth Amendment.*[43]

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[40] *See, e.g., ADA Report* at 3; *Chemerinsky I* at 4; *NWLC Report* at 32.

[41] Crovitz, "On *Brown v. Board of Education*, Call Him Thurgood Thomas," *Wall Street Journal*, July 31, 1991, at A11 (emphasis in original).

[42] Brief for Appellants, *Oliver Brown v. Board of Education of Topeka*, Supreme Court of the United States, October Term 1953, at 16.

[43] *Id.* at 41.

Thurgood Marshall argued that the "first Section of the Fourteenth Amendment is the legal capstone of the revolutionary dream of the Abolitionists to reach the goal of true equality."[44] The "central rallying point" for the Abolitionists, in turn, was the Declaration of Independence. "The philosophy upon which the Abolitionists had taken their stand," Marshall argued, "had been adequately summed up in Jefferson's basic proposition 'that all men are created equal' and 'are endowed by their Creator with certain inalienable Rights.'"[45]

Marshall must have anticipated the charge that his natural rights argument and appeal to the Declaration's principles of equality and liberty would be labeled "outside the mainstream" or "reactionary" because he took great pains to trace the deep "roots of our American equalitarian ideal."[46] The philosophers of centuries past who laid the foundation "rested upon the basic proposition that all men were endowed with certain natural rights."[47] The Founding Fathers, Marshall argued, considered these "self-evident truths" to be the basis for America itself. It was, he said, "the only political theory they knew" with roots extending "[l]ong before the Revolution."[48] This political theory was "popularly regarded as the marrow of the Constitution itself"[49] and the drive against slavery and for women's suffrage "was based fundamentally on Judeo-Christian ethic and was formulated in terms of equalitarianism and natural rights."[50]

Some of Judge Thomas' opponents seem blinded by their rage against this nominee to the facts of history. MALDEF, for example, cites Judge Thomas' criticism of *Brown* but makes the astonishing charge against "his apparent willingness to reject the legal arguments advanced by all the parties in a case and to legislate his own views instead."[51]

First, as detailed above, Judge Thomas' criticism of the reasoning in *Brown* simply mirrors a central legal argument advanced by the appellant in the case. Perhaps MALDEF has never read the briefs. Second, a private citizen offering an evaluation or opinion of the *Brown* decision more than 30 years after it was rendered is not the same as "rejecting" legal arguments and "legislating his own views instead." Indeed, the meaning of this legislating notion is a complete mystery.

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[44] *Id.* at 69.

[45] *Id.*

[46] *Id.* at 201.

[47] *Id.*

[48] *Id.* at 202.

[49] *Id.* at 203.

[50] *Id.* at 204.

[51] *MALDEF Report* at 14.

IV. Age Discrimination Cases: Liars Figure and Figures Lie

Perhaps the most persistent charge against Judge Thomas has been the lapse of a certain number of age discrimination charges beyond their statute of limitations, thus precluding relief in federal court. This is certainly an example of where a number takes on a life of its own and, if repeated often enough, lives on unchallenged. What it actually represents and whether it has any basis in reality is beside the point.

The EEOC's 50 field offices receive, investigate, and resolve charges of employment discrimination. To do this, EEOC contracts with 46 state and local Fair Employment Practices Agencies (FEPAs), which pre-date the 1964 Civil Rights Act creating the EEOC. Individuals can file charges of discrimination with either the EEOC or a FEPA. The right to sue in court lapses when neither the EEOC/FEPA nor the individual alleging discrimination initiates court action within two years of the alleged violation. Discrimination "charges" become discrimination "cases" only when actually taken to court.

Judge Thomas' opponents have invented numbers out of thin air, confused discrimination charges with discrimination cases, and lumped together actions handled by EEOC field offices and FEPAs to concoct a case against him.

The following table lists the opposition reports discussing this issue, the number of lapses they allege, the labels they use for the matters at issue, and the sources they provide.

Organization Report	Label	Number	Source
ACLU/SC Report, p.2	"claims"	"upwards of 15,000"	none
MALDEF Report, p.20	"cases"	13,000	none
ADA Report, p.7	"charges"	13,000	none
WLDF Report, p.44	"charges"	"thousands"	letter from PAWAF
PAWAF Report, p.12	"cases"	"more than 13,000"	letter from members of Congress
NAACP Report, p.3	"complaints"	"over 13 thousand"	none
LCCR Report, p.3	"charges"	"more than 13,000"	none
NWLC Report, p.72	"charges"	"thousands"	none
Chemerinsky I, p.9	"claims"	"over 13,000"	letter from PAWAF
AAUW Report, p.1	"complaints"	"more than 13,000"	none

Even this cacophony of sourceless numbers does not reveal the sloppy nature of this attack on Judge Thomas. PAWAF claims the EEOC allowed more than 13,000 cases to lapse and cites a letter from 14 members of Congress to President Bush dated July 17, 1989. That letter never mentions the number 13,000.[52] A virtually identical letter from 11 of those members of Congress to Senator Biden dated February 28, 1990 also fails to mention this number.[53] The source of this figure remains a mystery.

Lapses did occur, both in EEOC field offices and in FEPAs. These are the facts for the period from April 8, 1988, to June 30, 1990 (three months **after** EEOC Chairman Thomas became Judge Thomas), according to the U.S. General Accounting Office:[54]

	Resolved Charges	Lapsed Charges	Ratio of Lapsed to Resolved
EEOC Field Offices	39,626	348	.88
FEPA Offices	12,796	2453	19.17

Between January 1, 1984, and April 7, 1988, a total of 4377 lapses occurred among charges filed with either EEOC or FEPA offices.[55] A breakdown of this figure to determine the number for which the EEOC was responsible is unavailable, but it is clear that FEPAs were responsible for the vast majority of lapses and that the total was far less than Judge Thomas' critics have alleged.

The only reason we are now aware of the nature and extent of this lapsing problem at all is because of the case management and litigation tracking improvements initiated by Chairman Thomas. The problem had no doubt existed for a long time, but Chairman Thomas' commitment to real law enforcement made it possible to identify and finally correct the problem.

Of course, none of Judge Thomas' critics ever mention that both EEOC field offices and FEPAs are involved in this process and that many lapses occurred in the FEPAs. As part of his attempt to move the EEOC from an advocacy organization to a true law

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[52] *Confirmation Hearings on Federal Appointments*, No.J-101-6, Part 4, at 399-400.

[53] *Id.* at 458-59.

[54] Letter from Linda G. Morra, Director, Human Resources Policy and Management Group, U.S. General Accounting Office, to U.S. Representatives Edward R. Roybal, Augustus F. Hawkins, and Matthew G. Martinez, dated October 5, 1990.

[55] Letter from Deborah J. Graham, Director of Communications and Legislative Affairs, U.S. Equal Employment Opportunity Commission, to U.S. Senator Edward M. Kennedy, dated May 1, 1989, at 1; see also *Confirmation of Federal Appointments*, *supra* note 52, at 267.

enforcement agency, Chairman Thomas initiated several policy changes which offered parties charging discrimination more opportunities for relief than the law itself requires. He activated the "dual filing" system, whereby a party can file a discrimination charge with the EEOC if he or she was dissatisfied with how a FEPA is processing a claim. Chairman Thomas thereby heightened his agency's responsibility in protecting the rights of charging parties beyond what is required by law.

This commitment to protecting individual rights beyond what the law requires is hardly the mark of the typical bureaucrat; it was motivated by Clarence Thomas' personal commitment. He increased his agency's involvement and responsibility and, as a result, increased the potential points of criticism. And it was Chairman Thomas who brought this problem to the public's attention, accepted full responsibility for it before congressional committees,[56] and supported measures to correct the problem. He took the agency a long way from the days when no one even knew just how bad the problems were, let alone found ways to solve them.

Judge Thomas' opponents also will never reveal certain other facts about his record of fighting age discrimination. In fiscal year 1981, before Chairman Thomas' tenure, the EEOC recovered less than $30 million in benefits for victims of age discrimination; in fiscal year 1989, the agency recovered nearly $61 million. In 1981, the EEOC filed 89 lawsuits under the Age Discrimination in Employment Act; in 1989, the agency filed 133. This dramatic increase in litigation and benefit recovery for the victims of age discrimination occurred during a period when the agency's manpower decreased by 10%.[57]

V. What Stream Are They In Anyway?

Judge Thomas has written and spoken about the fundamental principles that underlie the sweeping guarantees of the Constitution and give that compact its moral and legal force. He has argued for a deeper appreciation of the Declaration of Independence in understanding the Constitution. In short, he has embraced the "natural rights" tradition on which this country was founded.

The Declaration of Independence reflects this tradition when it states as a "self-evident truth" that "all men are created equal, and are endowed by their Creator with certain unalienable rights." The Constitution, which along with the Declaration is one of the "organic laws of the United States" according to the U.S. Code, implements these truths. Judge Thomas has indeed called the Constitution "a logical extension of the principles of

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[56] The *Chicago Tribune* editorially praised Chairman Thomas on January 30, 1988 this way: "No excuses, no bellyaching about the other guy, no flabby claim that it's difficult--or impossible, as bureaucrats and elected officials increasingly bleat in sticky situations--to assess blame. Everybody makes mistakes. Too few people in public life own up to them, much less pledge uncompromisingly that they will be corrected. Bless you, Mr. Thomas, for straight talk in an age of waffling."

[57] *Confirmation Hearings on Federal Appointments*, *supra* note 52, at 269.

the Declaration."[58] This fact about Judge Thomas' record makes unintelligible AAUW's claim that Judge Thomas believes "that the 'inalienable rights' cited in the Declaration of Independence are a higher authority than the U.S. Constitution."[59]

Judge Thomas' critics appear completely unaware of American history, especially when they attribute these principles to him. For example, the Alliance for Justice states that "Judge Thomas also displays a strong adherence toward 'natural law' theory, which he says stems from a belief in 'the laws of nature and of nature's God.' (Speech to the Pacific Research Institute)."[60] Similarly, the National Women's Law Center states that "Judge Thomas grounds his constitutional theory in the 'laws of nature and nature's God.'"[61] Perhaps the quoted phrase never rang a bell for anyone at either the Alliance or NWLC, but those words come from the Declaration of Independence.

In fact, Judge Thomas is in good company in embracing the American natural rights tradition. Throughout American history, statesmen and judges, liberals and conservatives, have embraced this view.

* In 1987, after the defeat of Judge Robert Bork's nomination to the Supreme Court, Senate Judiciary Committee Chairman Joseph Biden (D-Del.) said that "I have certain inalienable rights because I exist, [not]...because my government confers them on me."[62]

* Dr. Martin Luther King, Jr., whom Judge Thomas cites more often than any other individual in this regard, said in his 1961 address at Lincoln University that the best expression of the American dream is the "sublime" statement of self-evident truths in the Declaration of Independence.[63]

* Abraham Lincoln regularly attacked the Supreme Court's decision in *Dred Scott v. Sanford*, which denied citizenship to black Americans, by reference to the inherent equality of all human beings.

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[58] Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 *Harvard Journal of Law & Public Policy* 63, 64 (1989).

[59] *AAUW Report* at 1.

[60] *AFJ Report* at 2.

[61] *NWLC Report* at 25, citing Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," in *Assessing the Reagan Years* (ed. D. Boaz) (Washington, D.C.: Cato Institute, 1988), at 400. The proper quote reads: "the laws of nature and of nature's God."

[62] Quoted in Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 *Harvard Journal of Law & Public Policy* 63,68 (1989).

[63] See Thomas, "The Calling of the Higher Law," *Congressional Record*, February 3, 1987, at E339.

* Natural rights thinking was the basis of the shared political philosophy of the Founding Fathers. Both the Declaration of Independence and the Constitution are based firmly on it and, indeed, are inexplicable without it.

* Judge Thomas has cited James Madison, Alexis de Tocqueville, Winston Churchill, and Booker T. Washington as other prominent figures in this long tradition. Attorney Patrick Riley likewise notes that this history of "natural law jurisprudence runs from Cicero...through Bracton, Coke and Blackstone -- some of the greatest names in the law. It is a long, constructive and noble history....In embracing a jurisprudence of natural law, Clarence Thomas puts himself in the best tradition of ancient Rome, of the great jurists, both Catholic and Protestant, and of our Founding Fathers."[64]

Now Judge Thomas' opponents make the astonishing claim that embracing the fundamental principles which served as the principal weapon against slavery, segregation, and discrimination, is reason to **oppose** his nomination! The Leadership Conference on Civil Rights says it is "radical and places him well outside of the judicial mainstream."[65] The Alliance for Justice says it is "dangerously out of the mainstream."[66] The National Women's Law Center repeats that "Judge Thomas's theory sets him far outside the mainstream of legal thinking."[67] The NAACP dismisses it out of hand as "reactionary."[68] The Women's Legal Defense Fund says it is cause for "serious concern," "alarm," and "considerable discomfort."[69] They and others claim that Judge Thomas' support for natural rights means he will not adhere to the 14th Amendment.[70] Americans for Democratic Action claims flatly that, because Judge Thomas embraces this core American tradition, he "will not enforce the U.S. Constitution"[71] and "[o]n this basis alone he is unqualified to serve

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[64] Riley, "Thomas' Nod to Natural Law Is No Crime," *Los Angeles Times*, July 22, 1991. See also Hittinger, "Natural Law and Marshall," *Washington Times*, August 8, 1991, at G3: "Insofar as Judge Thomas has held that there exist certain inalienable rights, including equality before the law, he stands not only in the political and moral mainstream of our polity, but also in the mainstream of our judicial history--one that Justice Marshall himself helped to shape and articulate."

[65] *LCCR Report* at 2.

[66] *AFJ Report* at 1.

[67] *NWLC Report* at 23.

[68] *NAACP Report* at 1.

[69] *WLDF Report* at 55,57.

[70] *NWLC Report* at 13.

[71] *ADA Report* at 9.

as a Justice on the Supreme Court of the United States."[72] NARAL tries to cast this American tradition as existing only as Catholic Church doctrine since the 13th century.[73] People for the American Way claims it "has been widely discredited."[74]

What has happened to the judicial selection process when an interest group receives anything but derision for claiming that a judicial nominee will not enforce the Constitution because he embraces the principles in the Declaration of Independence? The American people have every right to demand that the NAACP brand Martin Luther King as a reactionary for embracing these same principles. Fat chance.

Judge Thomas' opponents, of course, have every right to repudiate the entire American political and legal tradition, reject the Declaration of Independence, and claim that James Madison and the Founding Fathers, Abraham Lincoln, the Abolitionists, and Martin Luther King are "outside the mainstream." But they should have the guts to do so up front. One wonders what stream, main or otherwise, the leftist opposition must be traveling in if it excludes the very principles underlying the American system of law and politics.

The central fallacy in the leftist assault on Judge Thomas is its claim that he will use the American natural rights tradition not as a means to **understand** the Constitution but as a tool to **interpret** the Constitution. NARAL claims that belief in natural rights is "central to Judge Thomas'...approach to constitutional interpretation."[75] The Women's Legal Defense Fund says it is "a theory of jurisprudence to be applied by the Supreme Court."[76] In characteristically extreme fashion, Americans for Democratic Action claims that "Judge Thomas has been bold in asserting that he will interpret the U.S. Constitution on the basis of natural law."[77] People for the American Way states that "Mr. Thomas has written and spoken extensively about natural law or higher law as being a necessary part of constitutional interpretation."[78] The National Women's Law Center likewise refers to "Judge Thomas's writings on 'Natural Law' as the basis for constitutional interpretation."[79]

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[72] *Id.* at 10.

[73] *NARAL Report* at 3.

[74] *PAWAF Report* at 3.

[75] *NARAL Report* at 2.

[76] *WLDF Report* at 55.

[77] *ADA Report* at 9.

[78] *PAWAF Report* at 3.

[79] *NWLC Report* at 22.

Anyone who has studied Judge Thomas' record will scratch her head wondering who these folks are talking about. Judge Thomas has discussed the American natural rights tradition as political philosophy, not a blueprint for judicial review. He has gone further to explain the difference:

> *The best defense of limited government, of the separation of powers, and of the judicial restraint that flows from the commitment to limited government, is the higher law political philosophy of the Founding Fathers....Moreover, without recourse to higher law, we abandon our best defense of judicial review--a judiciary active in defending the Constitution, but judicious in its restraint and moderation. Rather than being a justification of the worst type of judicial activism, higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges.*[80]

> *To believe that natural rights thinking allows for arbitrary decisionmaking would be to misunderstand constitutional jurisprudence based on higher law.*[81]

> *Justice Harlan's reliance on political principles was implicit rather than explicit, as is generally appropriate for Supreme Court opinions.*[82]

One can easily see the consistency in Judge Thomas' judicial philosophy. A judiciary "active in defending the Constitution" will be a hedge against "run-amok majorities" and a judiciary "judicious in its restraint and moderation" will guard against "run-amok judges."

One analyst recently concluded that Judge Thomas' views "have been not only caricatured but turned on their head. Far from being a judicial activist, Thomas has repeatedly criticized the idea that judges should strike down laws based on their personal understanding of natural rights. Far from being bizarre or unpredictable, Thomas's view of natural rights is deeply rooted in constitutional history."[83] He points out that the liberal groups opposing Judge Thomas today because he **does** take the American natural rights tradition seriously also opposed Judge Robert Bork in 1987 because he **did not** take that tradition seriously.[84] This writer has also drawn the same distinction outlined above: "But in Thomas's case, fears of judicial activism seem to be unfounded. Like many liberals, Thomas believes in natural rights as a philosophical matter, but unlike many liberals, he

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[80] Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 *Harvard Journal of Law & Public Policy* 63,63-64 (1989) (emphasis added).

[81] *Id.* at 66.

[82] *Id.* at 68.

[83] Rosen, "Thomas's Promise," *The New Republic*, September 9, 1991, at 18.

[84] *Id.*

does not see natural law as an independent source of rights for judges to discover and enforce....Natural law for Thomas, then, is a way of providing 'moral backbone' for rights that are explicitly listed in the Constitution, rather than a license for creating ones that aren't."[85]

The real issue is that Judge Thomas will indeed enforce the U.S. Constitution, but not the leftists' political agenda. They seem to mix those up most of the time.

VI. Unenumerated Rights: Shooting Themselves in the Foot

In complete disregard of Judge Thomas' record, his opponents claim his embrace of the American natural rights tradition describes his judicial philosophy rather than his political philosophy. They claim that he will therefore be an activist, giving meaning to constitutional provisions based on his personal predilections. They say this will be the same "substantive due process" approach the Supreme Court once used but has rightfully abandoned. The Alliance for Justice uses as an example of the approach Judge Thomas will supposedly champion the Court's 1905 decision in *Lochner v. New York*[86] striking down a law prescribing maximum hours for work in bakeries.[87] The Leadership Conference on Civil Rights[88] and others[89] make this same comparison.

As we have already seen, Judge Thomas does not embrace the American natural rights tradition as a blueprint for judicial review; as such, all the accusations, speculations, and predictions about where this view would take him simply miss the point. That minor hurdle aside, however, the nominee's leftist critics shoot themselves in the jurisprudential foot. They claim he will do what the Supreme Court did in *Lochner*. They say that's bad. Yet the Supreme Court in *Roe v. Wade*[90] did exactly what it had done in *Lochner*. They say that's good. Justice Potter Stewart acknowledged this fact in his *Roe* concurrence.[91] Moreover, Professor John Hart Ely, whom Judge Thomas' critics frequently cite with approval when discussing the nominee's judicial philosophy,[92] has written: "The Court

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[85] *Id.* at 20.

[86] 198 U.S. 45 (1905).

[87] *AFJ Report* at 2.

[88] *LCCR Report* at 9.

[89] See, e.g., *Chemerinsky II* at 11.

[90] 410 U.S. 113 (1973).

[91] *Id.* at 167-68 (Stewart, J., concurring).

[92] See, e.g., *Chemerinsky II* at 3-4,7; *NWLC Report* at 23 n.64, 33 n.106.

continues to disavow the philosophy of *Lochner*. Yet as Justice Stewart's concurrence admits, it is impossible candidly to regard *Roe* as the product of anything else."[93]

Just why the left ventures into this thicket is a mystery. Judge Thomas' record, both on and off the bench, could not be clearer. He is hardly a judicial activist who will simply pour his personal opinions into open-ended constitutional provisions. Yet even if he were, his critics are caught between a rock and a hard place. How can *Lochner*ing be bad should he do it but just fine when the Court in *Roe* does it? If Judge Thomas will not do what they predict, they are now simply blowing more smoke. If Judge Thomas will do what they predict, they cannot criticize him without criticizing the foundation for their most prized "privacy" precedents.

VII. I Thought They Said Too Many Rich White Guys?

Another strawman popular with the left has also fallen. Last year, leftist critics including the Alliance for Justice and People for the American Way attacked President Bush for appointing too many rich white males to the federal bench.[94] Conservatives responded that if the federal judiciary were stacked with liberal activists, the left would not care about race or wealth. The Thomas nomination shows which side was right.

The left claims that the "archetypal Bush judicial nominee is a white man...with a net worth upwards of $1,000,000."[95] Clarence Thomas is black and, according to the information he submitted to the Senate Judiciary Committee last year, his net worth was $91,978.16.[96] He grew up in segregated Southern poverty. If race and wealth really mattered, the left would cheer a nominee so different from the "archetypal" norm. Their opposition lays bare the fact that this too is a strawman. They want liberal activists. Judge Thomas is neither.

VIII. Whatever Happened to Sensitivity?

On September 14, 1990, during the hearing on the nomination of then-Judge David Souter to replace Supreme Court Justice William Brennan, Senator Paul Simon (D-IL) said to the nominee: "I want you to understand perhaps a little more than you now do some of

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[93] Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale Law Journal* 920,939 (1973).

[94] *See, e.g.*, Moran, "In His Own Image," *Legal Times*, December 3, 1990, at 1.

[95] *Id.* at 14.

[96] *Confirmation Hearings on Federal Appointments, supra* note 52, at 243.

the aches of America." Doing so, Simon said, would make someone "a better United States Supreme Court justice." Senator Simon recommended spending some time in "the West Side of Chicago, maybe an Indian reservation." He quoted Justice Benjamin Cardozo to the effect that a justice gets an important component of the knowledge he needs "from experience and reflection; in brief, from life itself." On September 17, Senator Simon again emphasized the need "to understand a little more the desperation of some in this country."

Clarence Thomas spent more than 15 years in poverty. He lived in tenements with no plumbing. His world was entirely segregated by race; he entered the first grade the year the Supreme Court outlawed segregation in education but had to endure the practice for years thereafter. Not until college did he interact regularly with white people. Nearly half a lifetime in segregated poverty certainly trumps a few days on an Indian reservation. Where are the sensitivity police today? If sensitivity and compassion are really what they mean, they should be out in front cheering for this nominee. If sensitivity and compassion are merely another smokescreen for the drive toward liberal activism, they will oppose him.

Judge Thomas told the Senate Judiciary Committee: "The reason I became a lawyer was to make sure that minorities, individuals who did not have access to this society, gained access. Now, I may differ with others as to how best to do that, but the objective has always been to include those who have been excluded." Others who have known Judge Thomas know that he retains the sensitivity and compassion born from life itself:

* William Robinson, dean of the District of Columbia School of Law, said in an interview that "Clarence Thomas has felt the lash of injustice. He's old enough to have experienced the pre-1964 apartheid system in this country."

* James Clyburn, a black member of the South Carolina Human Affairs Commission, says the nominee "has a great deal of sensitivity for his background and upbringing....He said he understood what it's like to be poor."[97]

* Senator John Danforth (R-MO) says that Clarence Thomas is "a first-rate human being" and "a compassionate kind of conservative, not rigid or ideological in his views. His every motive is that he empathizes with ordinary people; he's one of them."

* The late Althea Simmons, long-time director of the NAACP's Washington bureau, met with Clarence Thomas at the time of his first judicial nomination and concluded that "he had not forgotten his roots or Black folk....I gained a new meaning of Clarence Thomas and feel that he will help us. He's a very dedicated man."[98]

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[97] Quoted in Wiggins, "Friends in South Carolina Say Thomas Is His Own Man," *The State*, July 5, 1991, at 14A.

[98] "Clarence Thomas Rises From Poverty to Supreme Court Nominee," *Jet*, July 22, 1991, at 9.

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* Margaret Bush Wilson chaired the NAACP from 1975 to 1984. She has known Clarence Thomas for nearly two decades. She wrote recently that "Clarence Thomas knew how to listen as well as talk....Even when we disagree, I have found him to be a sensitive and compassionate person trying to do what is right, working to make the world a better place....On a personal level, he knows the struggle and hardship blacks and the impoverished of every race grapple with daily....I asked him to promise that if he were ever in a position to reach out and help others that he would do it, just as some had done for me and as I had done for him. He promised he would, and Judge Thomas has been keeping his word ever since, looking out for the vulnerable and victimized on the job, in the community and at the court. I know that as a Supreme Court justice Clarence Thomas will continue to defend and protect the rights of the needy."[99]

* Allen Moore, a long-time policy advisor to Senator Danforth and a friend of Judge Thomas' for more than a decade, wrote: "The Clarence Thomas I know is a caring, decent, honest, bright, good-humored, modest and thoughtful father, husband and public servant who has already come farther in 43 years than most of us will in a lifetime....Thomas' professional and personal life, not to mention his conscience, wouldn't permit him to forget his roots if he wanted to. Neither would the world around him."[100]

* Constance Newman, director of the U.S. Office of Personnel Management, wrote that Judge Thomas is "a person who will be fair and sensitive to the struggles of all Americans....He has a special understanding of those poor striving for political and economic empowerment."[101]

IX. Confirmation Conversion: The Left Calls for Judicial Restraint and Moderation

The left's sudden discovery of judicial restraint and its call for "moderation"[102] fool no one. They have never believed in these principles and only appear to embrace them now in the hope of achieving the singular objective of defeating Judge Thomas' nomination. Their opportunism and hypocrisy just won't fly.

The Alliance for Justice takes the transparently simplistic view, at least for the moment, that being willing to "overturn Supreme Court precedent on Constitutional issues" automatically makes one an "activist."[103] The American people will wait in vain for the

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[99] Wilson, "The NAACP Is Wrong on Thomas," *Washington Post*, August 16, 1991, at A15.

[100] Moore, "The Clarence Thomas I Know," *Washington Post*, July 16, 1991, at A19.

[101] Newman, "Talking With Thomas for 10 Years," *Washington Post*, July 17, 1991, at A23.

[102] *AFJ Report* at 5.

[103] *Id.* at 2.

Alliance to denounce the Warren Court and its upsetting of the precedential applecart. This double standard is, of course, explained by which precedents the Alliance likes and which ones it doesn't.

But the Alliance is more than hypocritical; it is also pathetically uninformed. The Supreme Court itself, through both its liberal and conservative members, has repeatedly held that the doctrine of *stare decisis*, or respecting prior decisions, is least binding in constitutional cases. Justice Louis Brandeis explained more than a half century ago that "in cases involving the Federal Constitution where correction through legislative action is practically impossible, this Court has often overruled its prior decisions. The Court bows to the lessons of experience and the force of better reasoning."[104] Justice Brandeis cited 28 decisions by which the Court changed its own prior interpretations of the Constitution. Writing 35 years later, Professor Albert Blaustein identified 60 constitutional law reversals.[105] The Court overturned nearly 50 constitutional decisions between 1960 and 1979.[106] The Library of Congress in 1987 identified 184 Supreme Court reversals of its prior rulings.[107]

The appendix to the annotated version of the Constitution published by CRS shows that the Court overruled more than 260 of its prior decisions of all types, in whole or in part, through 1988. While Eleanor Holmes Norton, Judge Thomas' predecessor at EEOC, has said that the Court had never overruled more than the five decisions it did last term, as a law professor she should know better. Analyst Terry Eastland points out that this tally has been exceeded many time before the Rehnquist Court began - for example, in 1964 (11 overruled), 1967 (7 overruled), 1968 (6 overruled), 1970 (6 overruled), 1976 (9 overruled), 1978 (11 overruled).[108]

Justice Hugo Black wrote that "[a] constitutional interpretation that is wrong should not stand."[109] Justice Felix Frankfurter stated that "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."[110] Even

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[104] *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393,410 (1932) (Brandeis, J., dissenting).

[105] Blaustein & Field, "'Overruling' Opinions in the Supreme Court," 57 *Michigan Law Review* 151,167,184-94 (1958).

[106] Maltz, "Some Thoughts on the Death of Stare Decisis in Constitutional Law," 1980 *Wisconsin Law Review* 467,494-96.

[107] Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation* (1987), at 2115-27 and supplement.

[108] Eastland, "260 Precedents That Bit the Dust," *Wall Street Journal*, July 10, 1991, at A12.

[109] *Connecticut General Co. v. Johnson*, 303 U.S. 77,85 (1938) (Black, J., dissenting).

[110] *Graves v. New York* ex rel. *O'Keefe*, 306 U.S. 466,491-92 (1939) (Frankfurter, J., concurring).

Justice William Douglas, author of the cherished *Griswold v. Connecticut*[111] decision that the left wants so badly to preserve, said that the doctrine of *stare decisis* is "tenuous" where a prior decision may conflict with the Constitution itself:

> *A judge looking at a constitutional decision may have compulsions to reverse past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put upon it.*[112]

Apparently, an "activist" is one willing to apply this long-standing view only to precedents the left would rather keep on the books. Gordon Crovitz described the left's new "stare-decisis litmus test" this way: "[C]onservative judges are supposed to follow precedents, no matter how unprincipled the earlier rulings, while liberal judges are free to ignore even the most firmly rooted constitutional precedents."[113]

The Alliance for Justice ends its report with an unprecedented call for "moderation." It wants a Court that reflects "the rich texture and complexity of American society itself."[114] It defies the imagination, not to mention reality, how **any** group of nine individuals can reflect the "texture" (whatever that means) of any society. That minor problem aside, the Alliance's smokescreen could not be more obvious. They cannot simply demand "nine like me" up front so they cast it in terms of an institution reflecting "the diversity of viewpoints representative of American society."[115]

The suggestion that the Supreme Court be a representative institution is hardly moderate; it is radical. The Founding Fathers created a governmental structure with three branches, two of which would be political and reflect textured diversity, and the third which would be insulated from politics. It would be guided by law, not passion or public opinion. It would protect the rights even of minorities against majorities - that is, it would buck the political tide when the law required it. A "representative" institution is a majoritarian institution and cannot guarantee protection of individual rights.

Judge Thomas himself provided the best response to this radical idea. He wrote that "the founders purposely insulated the courts from popular pressures, on the assumption that they should not make policy decisions. The judiciary was protected to ensure justice for individuals. This required insulating judges from other groups or interests in society, even

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[111] 381 U.S. 479 (1965).

[112] Douglas, "Stare Decisis," 49 *Columbia Law Review* 735,736 (1949).

[113] Crovitz, "Reverse a Precedent, Protect the Constitution," *Wall Street Journal*, July 10, 1991, at A13.

[114] *AFJ Report* at 5.

[115] *Id.* at 6.

the interests of the majority. However, it was unthinkable that courts would take the side of particular groups in the policymaking arena....By turning Supreme Court nominations into power struggles, they transform the Court into another majoritarian institution. How, then, can it protect the rights of politically unpopular minorities?"[116]

Columnist Charles Krauthammer recently wrote:

> *And what exactly is Thomas's offense? Whether a judge calls what he believes natural law or something else, every justice brings a certain intellectual structure and understanding of rights to his interpretation of the Constitution. Thomas is simply more ingenuous than most: He spells out what it is he appeals to--the classical tradition of natural law and the explicit words of the Declaration of Independence. The nation is far safer entrusting its future to such a justice than to the kind that pulls new rights out of a hat and declares them penumbral emanations.*[117]

X. Who Wrote *Griswold* After All?

Judge Thomas' opponents ignore his lengthy record on many substantive issues and try to create one that simply does not exist on others. Americans for Democratic Action, for example, makes a claim that will no doubt surprise both Judge Thomas and anyone who has actually read his record: "Judge Thomas has publicly stated his position on the issue of reproductive freedom."[118] NARAL claims to have uncovered "strong evidence" that is "overwhelming" about exactly what he would do in this area on the Supreme Court.[119] AAUW states flatly that Judge Thomas "has said that he believes the *Griswold* decision...was wrongly decided."[120] They offer neither source nor citation for this notion and none exists; he has never said any such thing.

These critics claim that Judge Thomas has criticized the Supreme Court's decision in *Griswold v. Connecticut*.[121] Professor Chemerinsky, in contrast, admits that the nominee

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[116] Thomas, "Civil Rights as a Principle Versus Civil Rights as an Interest," in *Assessing the Reagan Years* (ed. D. Boaz) (Washington, D.C.: Cato Institute, 1988), at 394-95.

[117] Krauthammer, "Look Who's Discovered Judicial Restraint," *Washington Post*, July 19, 1991.

[118] *ADA Report* at 3.

[119] *NARAL Report* at 2.

[120] *AAUW Report* at 1.

[121] 381 U.S. 479 (1965).

"has not expressly discussed abortion."[122] This confusion is the inevitable result of attempting to create something that just is not there.

The only way they can build their case is to take Judge Thomas' skepticism about "judicial activist use of the Ninth Amendment"[123] and link it to the completely false idea that *Griswold* is based on the Ninth Amendment. AAUW says that *Griswold* "was based on the Ninth Amendment."[124] The National Women's Law Center says that the Court held in *Griswold* that the "right to privacy" is found in the "penumbras" of the Bill of Rights and is "protected by the Ninth Amendment."[125] One will read the Court's opinion in vain looking for this "protection" idea.

The fact remains that the *Griswold* decision in not based on the Ninth Amendment. Neither is *Roe v. Wade*, which is based on the due process clause of the Fourteenth Amendment. In fact, the Court explicitly rejected the lower court's conclusion in that case that the "right to privacy" was based on the Ninth Amendment.[126] The Supreme Court has never held that the Ninth Amendment is a open-ended repository of substantive constitutional rights which judges are free to discover, announce, and use to invalidate undesirable legislation. The left perhaps wishes that were the case, but it is not.

XI. Grasping at Straws: Separation of Church and State?

The Women's Legal Defense Fund argues that "critical questions about the separation of church and state" would arise if a Supreme Court justice were motivated at all by personal religious beliefs.[127] Likewise, AAUW states that "Thomas' statements about 'natural law' raise serious doubts about his commitment to maintain separation of church and state."[128] The First Amendment to the U.S. Constitution reads in part: "Congress shall make no law respecting an establishment of religion." It boggles the mind how the subjective motivation of an individual member of the judicial branch can somehow violate a constitutional provision directed at the results of actions by the legislative branch!

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[122] *Chemerinsky I* at 5.

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

[124] *AAUW Report* at 1.

[125] *NWLC Report* at 38.

[126] *Roe*, 410 U.S. at 153.

[127] *WLDF Report* at 55 n.113.

[128] *AAUW Report* at 2.

Attorney Thurgood Marshall argued before the Supreme Court in *Brown v. Board of Education* that the drive to achieve suffrage for women "was based fundamentally on Judeo-Christian ethic"[129] and constituted "an ethico-moral-religious-natural rights argument."[130] The American people will wait in vain for the Women's Legal Defense Fund to argue that the suffrage movement raises "critical questions about the separation of church and state."

This argument has been rejected by both liberals and conservatives. Professor Laurence Tribe once argued that laws against abortion were unconstitutional because legislators often voted for them out of religious conviction. He said that a constitutional problem exists "whenever the views of organized religious groups have come to play a pervasive role in an entire subject's legislative consideration."[131] Even he later recanted this view: "But, on reflection, that view appears to give too little weight to the value of allowing religious groups freely to express their convictions in the political process."[132] Justice Antonin Scalia wrote in 1987 that "political activism by the religiously motivated is part of our heritage."[133] This view applies with equal force to the personal beliefs or motivations of judges.

This argument is really no different than the comments by Virginia Governor Douglas Wilder,[134] NOW Massachusetts president Ellen Convisser,[135] and others suggesting that Judge Thomas' nomination should be more carefully scrutinized because he supposedly was raised a Catholic. This is, at its root, religious bigotry and anyone who fosters it should be repudiated outright. The Founding Fathers were correct when they prohibited, in Article VI of the Constitution, a religious test for public office. The Women's Legal Defense Fund is scraping the bottom of the tactical barrel by attempting to impose one.

Judge Thomas' opponents have refined their approach, to be sure, but continue trying to exploit bigotry in a number of ways. NARAL tries to suggest that the American natural rights tradition actually has existed nowhere but in Catholic Church doctrine for more than 600 years![136] Professor Chemerinsky points out that "Thomas' view of natural

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[129] Brief for Appellants, *supra* note 42, at 204.

[130] *Id.* at 205.

[131] Tribe, "The Supreme Court, 1972 Term--Foreword: Toward a Model of Roles in the Due Process of Life and Law," 87 *Harvard Law Review* 1,22,23 (1973).

[132] L. Tribe, *Constitutional Law* (Mineola, NY: The Foundation Press, 2d ed. 1988), at 1350.

[133] *Edwards v. Aguillard*, 107 S.Ct. 2573,2594 (1987) (Scalia, J., dissenting).

[134] "Gov. Wilder Is Questioning Role of Thomas's Religion," *Wall Street Journal*, July 3, 1991.

[135] Kennedy, "Liberals Troubled by Nomination," *Boston Herald*, July 2, 1991, at 2.

[136] *NARAL Report* at 3.

law is openly religious."[137] The National Women's Law Center likewise states that "Thomas's views of natural law include a strong religious emphasis."[138] The Women's Legal Defense Fund is more heavy-handed. Compare their claim and the truth:

WLDF Report, p.55 n.112	*The Center Magazine*, Nov./Dec. 1987, p.21
"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.'" *The Center Magazine*, November/December 1987, at 21.	"In his 1963 book, *Why We Can't Wait*, Dr. King, citing St. Thomas Aquinas, notes that 'an unjust law is a human law that is not rooted in eternal law and natural law.'

Judge Thomas provided the same reference to Dr. King's reliance on Aquinas in a 1987 speech at the Department of Justice commemorating the Martin Luther King, Jr. holiday.[139] Yet the NAACP's secret report to its board insists that "[t]he natural law of which Clarence Thomas speaks has...a great deal to do with the sectarian and highly theological writings of medieval scholastic philosophers like Thomas Aquinas."[140]

Goodness, the Rev. Martin Luther King sounds pretty motivated by religious values. Perhaps his leadership during the civil rights movement raises "critical questions about the separation of church and state." One wonders why the NAACP has not similarly dismissed Dr. King as "sectarian and highly theological."

XII. Do They Want a Stealth After All?

President Bush nominated someone who has written and spoken extensively on a wide array of issues. Because the left knows they cannot come forward and say they oppose Judge Thomas simply because of the substance of his views, they attack the nominee's attitude in expressing his opinions. The AFL-CIO charges him with "intemperance" for not affirmatively recognizing "the legitimacy of competing ideas."[141] Maybe he disagrees with those ideas! Judge Thomas' opponents, including the AFL-CIO, certainly devote little ink to recognizing the legitimacy of his ideas. Does that make them similarly intemperate?

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[137] *Chemerinsky II* at 2.

[138] *NWLC Report* at 25.

[139] "The Calling of the Higher Law," *Congressional Record*, February 3, 1987, at E339.

[140] Quoted in "NAACP: Doubting Thomas' Commitment," *Legal Times*, August 5, 1991, at 17.

[141] *AFL-CIO Report* at 2.

The Alliance for Justice claims that Judge Thomas' supposed "animosity to views different from his own" is evidence of "lack of compassion."[142] Are they kidding? Committee chairman Joseph Biden offered the right response back in 1977, during the hearing on the nomination of former U.S. Representative Abner Mikva to be a U.S. Circuit Judge:

> *I frankly do not know how we could approve any Members of the U.S. Senate, U.S. Congress, a member of any legislative body, or anyone who ever served in a policy position, who has taken a position on any issue, if the rationale for disqualifying you is that you have taken strong positions. That is certainly not proof of your inability to be objective and avoid being a policymaker on the bench. If we take that attitude, we fundamentally change the basis on which we consider the appointment of persons to the bench.*[143]

XIII. Additional Specific Responses

A. Response to National Women's Law Center

The National Women's Law Center first tries its best to paint the so-called "Rehnquist Court" as activist. But the Center can't seem to get its facts straight. It claims that in *Webster v. Reproductive Health Services*,[144] "Chief Justice Rehnquist wrote for five justices in upholding the preamble."[145] In *Webster*, the Court expressly refused to rule on the constitutionality of the statute's preamble.[146]

The Center next claims that Judge Thomas "cites both Roe and Griswold v. Connecticut...as examples of activist judicial use of the Ninth Amendment in violation of higher law principles."[147] This is false for two reasons. First, the text which the Center cites proves them wrong. In a speech to the Federalist Society, Judge Thomas said that the "expression of unenumerated rights today makes conservatives nervous, while at the same

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[142] *AFJ Report* at 2-3.

[143] *Nomination of Abner Mikva to be Circuit Judge, United States Court of Appeals for the District of Columbia Circuit*, 95th Cong., 1st Sess. (1977), at 402-03.

[144] 109 S.Ct. 3040 (1989).

[145] *NWLC Report* at 40.

[146] *Webster*, 109 S.Ct. at 3050.

[147] *NWLC Report* at 45.

time gladdening the hearts of liberals."[148] This is, of course, a factually correct statement. In a footnote, he offered an example: "The current case provoking the most protest from conservatives is Roe v. Wade, 410 U.S. 113 (1979), in which the Supreme Court found a woman's decision to end her pregnancy to be part of her unenumerated right to privacy established by Griswold v. Connecticut, 381 U.S. 479 (1965)."[149] In a **subsequent paragraph** in that footnote, he referred to another if his writings as discussing his "misgivings about activist judicial use of the Ninth Amendment."[150] No one who reads this footnote can conclude that Judge Thomas cited either *Roe* or *Griswold* as examples of judicial activist use of the Ninth Amendment.

Second, neither *Roe* nor *Griswold* are based on the Ninth Amendment. *Griswold* is based on the notion that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[151] It was Justice Goldberg's concurrence that argued for grounding the decision in the Ninth Amendment. The Court in *Roe* specifically held that its decision was based on "the Fourteenth Amendment's concept of personal liberty" and not on the Ninth Amendment, as the district court in that case had concluded.[152]

The Center next contends that, in Judge Thomas' view, "'allowing, restricting, or...requiring abortions are all matters for a legislature to decide.'"[153] It provides the following as the source for this notion: "Thomas, Notes on Original Intent, unpublished paper, at 2 (emphasis in original)."[154] The misquoted fragment does appear, though without any emphasis, in the cited paper, which was devoted largely to a critical evaluation of the "original intent" approach to constitutional interpretation. Here it is in context:

> *Recall Judge Bork's problems before the Judiciary Committee, when he tried to explain his views about privacy and the proper interpretation of the Ninth Amendment. His reading of the Amendment appeared to be a legalistic means or eliminating what most Americans believe they hold: a right of privacy.*

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

[149] *Id.* at 63 n.2. Technically, Judge Thomas was incorrect on one point. *Griswold* was based on the penumbral emanations of the Bill of Rights and *Roe* was based on the due process clause of the Fourteenth Amendment.

[150] *Id.*

[151] *Griswold*, 381 U.S. at 484.

[152] *Roe*, 410 U.S. at 153.

[153] *NWLC Report* at 46.

[154] *Id.* at 46 n.153.

Restricting birth control devices or information, and allowing, restricting, or (as Senator Kennedy put it) requiring abortions are all matters for a legislature to decide; judges should refrain from "imposing their values" on public policy.

Surprise! In context, the Center's fragment of choice is not an expression of Judge Thomas' view at all, but what appeared to some in 1987 to be the implication of Judge Robert Bork's view of the Ninth Amendment. Oops! Wrong judge.

While the Center claims he is the author of this unpublished paper, Judge Thomas did not write it. While he was head of EEOC, Judge Thomas regularly had his staff draft memoranda and make arguments to explore various legal issues. The paper on original intent which the Center, and even the *Washington Post*,[155] claims he wrote was in fact authored by a member of his staff.

Fourth, the Center insists that "[a]ccording to Judge Thomas, the Constitution should be interpreted by examining the Declaration of Independence to discern the 'original intent' of the Framers."[156] The simple fact is that Judge Thomas has never said any such thing, and the Center provides no source for this notion. This report has already discussed how Judge Thomas has embraced the American natural rights tradition as a matter of political philosophy, not as a tool for judicial review. Indeed, the connection the Center's attempts to draw between "natural law" (a phrase Judge Thomas has rarely used) and "original intent" would probably confuse other jurists who have embraced the latter. Judge Bork, perhaps the most widely known proponent of interpretevist jurisprudence, has written negatively about reliance on natural law in constitutional interpretation.[157] During his September 1990 nomination hearing, Justice David Souter openly embraced the need to determine the meaning originally given a legal document by its drafters without ever mentioning natural law principles. This configuration remains a figment of the Center's imagination.

Disregarding the facts, the Center claims that the EEOC during Chairman Thomas' tenure inadequately handled individual discrimination cases.[158] It cites a General Accounting Office report claiming that between 41% and 82% of the discrimination charges closed by EEOC offices had not been fully investigated.[159] Even the untrained observer

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[155] Marcus, "How Thomas, Conservatives Are at Odds," *Washington Post*, August 14, 1991, at A6.

[156] *WNLC Report* at 13.

[157] R. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), at 66,209-10.

[158] *NWLC Report* at 71.

[159] *Id.* at 72 n.240.

should question why the GAO's conclusion appears to have a 100% margin of error. This is because it was based on just 3.28% of the cases investigated and closed during just three months in early 1987 and focused on only six of 50 EEOC field offices.[160]

B. Response to AFL-CIO

The AFL-CIO makes a charge that, like so many others, flies directly in the face of Judge Thomas' record. The union's report states: "Judge Thomas has aligned himself with the theorists who not only accept the harshness and inequality of the unfettered market, but claim that such markets provide the answer to every social problem and that mute acceptance of their harshness and inequality is the very essence of human liberty."[161]

This is what Judge Thomas has actually said: "Surely the free market is the best means for all Americans, in particular those who have faced legal discrimination, to acquire wealth. Yet the marketplace guaranteed neither justice nor truth. After all, slaves or drugs can be bought and sold. The defense of equal opportunity to compete in a free market is a moral one that presupposed the Declaration....In striving to preserve and bring about what is good, politics must measure itself by the standards of the higher law, of rights, or else it becomes part of the problem instead of part of the solution."[162]

Pursuing this theme of fundamental rights providing the need to temper the excesses of the unfettered marketplace, Judge Thomas elsewhere has criticized libertarians who would go too far in unshackling that marketplace.[163]

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[160] Chairman Thomas repeatedly pointed out the basic flaws in the GAO report's methodology and also its refusal to compare the agency's performance before and after a series of fundamental substantive and procedural changes in its operations. See, e.g., Thomas, "EEOC Counters the GAO," *Miami News Weekender*, November 19, 1988; Thomas "EEOC Responds," *St. Petersburg Times*, November 17, 1988; Thomas, "'Biased' Job Report," *Detroit News*, November 27, 1988; Thomas, "Against Discrimination," *St. Louis Post-Dispatch*, November 19, 1988; Thomas, "EEOC Criticism Based On a Misleading Report," *Denver Post*, November 20, 1988; Thomas, "A Misleading Report," *Los Angeles Daily Journal*, December 6, 1988; Thomas, "EEOC Chief Defends Agency," *Miami Times*, December 22, 1988; Thomas, "EEOC's Work Defended," *Milwaukee Journal*, December 23, 1988.

[161] *AFL-CIO Report* at 2.

[162] Thomas, "What the Declaration Offers Conservatives," *Winston-Salem Journal*, April 18, 1988, at 11.

[163] See, e.g., Thomas, "A Second Emancipation Proclamation," *Policy Review*, Summer 1988.

C. Response to Americans for Democratic Action

On July 12, 1991, the *Dallas Times Herald* reported that Judge Thomas had praised Nation of Islam leader Louis Farrakhan in two 1983 speeches.[164] Given Farrakhan's reputation for bigotry, the left tries casting Judge Thomas the same way. Americans for Democratic Action states that "in 1983, Thomas referred to Louis Farrakhan 'as a man I have admired for more than a decade.'"[165] That tactic has already flopped. In 1983,[166] Judge Thomas knew only about Farrakhanin's emphasis on black self-help. On July 12, 1991, Judge Thomas flatly repudiated Farrakhan: "I am and have always been unalterably and adamantly opposed to antisemitism and bigotry of any kind, including by Louis Farrakhan. I repudiate the antisemitism of Louis Farrakhan or anyone else."[167] In an interview with *Catholic Twin Circle* magazine in early 1989, Judge Thomas was asked whether hate groups "such as the skinheads...represent a growing trend of racism?" He responded: "Of course, you never want to have hate groups in your society--whether it's Farrakhan or the skinheads."[168]

D. Response to Professor Chemerinsky

Professor Chemerinsky offers perhaps the most outrageous accusation in his July 17 memorandum to the ACLU of Southern California board. He asserts, in the ambiguous manner characteristic of those who have absolutely no evidence to back them up, that "Thomas appears to have intentionally omitted his most controversial article from the listing of his publications submitted to the Senate at the time of his appointment to the D.C. Circuit."[169] Because Judge Thomas did list many other publications, the professor says, "there is an inference that this chapter was intentionally omitted because of its controversial content."[170]

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[164] Arvidson, "Speeches of Court Nominee Cite Admiration for Farrakhan," *Dallas Times Herald*, July 12, 1991, at A-1.

[165] *ADA Report* at 2.

[166] Marcus, "Nominee Thomas Distances Himself From Farrakhan," *Washington Post*, July 13, 1991, at A7: "Thomas's positive reference to Farrakhan came before the Nation of Islam leader attracted national publicity the next year during the presidential campaign of Jesse L. Jackson. Jackson refused to repudiate Farrakhan."

[167] Quoted *id.*

[168] Reprinted in *Catholic Twin Circle*, July 28, 1991, at 10.

[169] *Chemerinsky I* at 11.

[170] *Id.* at 12.

Whether that article is controversial is a matter of opinion, but Professor Chemerinsky's opinion that it is does not then question Judge Thomas' candor. Absolutely no evidence exists of any intentional omission. None. Period. Judge Thomas did submit the article in question in its original speech form, containing all the supposedly controversial material, to the Senate Judiciary Committee.

XIV. Conclusion

The left has pulled out the stops to defeat Judge Thomas' nomination to the Supreme Court. This report examines the results of their efforts. They must ignore entirely the most relevant part of the nominee's record and completely distort the rest just to be in the ballpark. But when all the smoke and mirrors are removed, what remains is a fully qualified individual whose judicial philosophy is restrained and with whom some leftist fringe groups differ on some matters of substantive policy.

Nothing has happened since the Senate voted nearly unanimously to approve Judge Thomas' appointment to the federal appellate bench to make the result of this current process any different. Indeed, what has happened is the judicial record the left refuses to examine. Judge Thomas is more qualified to sit on the Supreme Court in 1991 than Chairman Thomas was to sit on the U.S. Court of Appeals in 1990.