JUDGE CLARENCE THOMAS:
A RECORD LACKING IN SUPPORT OF WOMEN'S LEGAL RIGHTS

A REPORT BY THE

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EXECUTIVE SUMMARY

What is at stake

The Supreme Court has shifted radically in recent years. In June, Chief Justice Rehnquist, in an opinion joined by Justices O'Connor, Scalia, Kennedy, and Souter, announced the Court's intention to rethink cases decided by narrow margins over "spirited dissents." The Court may be poised to reverse decisions protecting women's rights, including:

- **The constitutional right to equal protection of the laws,** which ensures that any government policy that discriminates based on sex must be substantially related to an important governmental objective not based on stereotypes about gender roles. Only four Justices are known to support this type of analysis, known as "heightened scrutiny," for sex-discrimination; others may hold such laws to a weaker standard.

- **The constitutional right to privacy,** which includes marriage, contraception, pregnancy, and abortion. At least four sitting Justices oppose constitutional protection for the right to privacy.

- **Broad interpretations of statutes barring sex discrimination,** including Title IX, relating to education, and Title VII, relating to employment. In recent years, increasingly conservative majorities have narrowed these statutes, leaving increasing numbers of women who experience discrimination without remedy.

Because of the growing activism of the Court, the next Justice's views regarding each of these key protections for women are critical.

Judge Thomas's views: Equal Protection

Judge Thomas's articulated views and record are antithetical to the continued viability of the heightened scrutiny standard of protection against sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.

- Judge Thomas's view that the Constitution should be interpreted as the founders originally intended freezes the Constitution at the time of its drafting – a time when women were second-class citizens, could not vote, and were subjugated to their fathers and husbands.

- The original intent of the Founders, according to Judge Thomas, is to be found in the Declaration of Independence, which in turn is based on "Natural Law" principles. Natural Law principles found their most consistent application in a century of Equal Protection cases decided before 1971. In these cases, "women's natural roles" as wife and mother were considered reason enough to deny women important benefits and opportunities.

- Judge Thomas proposes to make the Privileges or Immunities Clause the "core of the Fourteenth Amendment." This provision of the Constitution has never provided protection against sex discrimination, is a discredited source of individual rights, and is inadequate as a substitute for the Equal Protection Clause.

- In fact, Judge Thomas has made statements that indicate that he is skeptical that sex discrimination in employment exists. Rather, he has stated that women choose lower-paying jobs of their own accord. He has also praised the theories of Thomas Sowell, who writes that women do not experience the type of discrimination that should be prohibited by law.

Judge Thomas's views: **Privacy**

Judge Thomas's record indicates that he is hostile to the Ninth Amendment fundamental right to privacy and that he would an interpret the Constitution to protect life, defined to begin at conception.

- Judge Thomas has described the Court's interpretation of the Constitution to include a right to privacy through the Ninth Amendment as an "invention." He has specifically criticized the analysis of both Griswold v. Connecticut, which upheld married couples' right to use birth control, and Roe v. Wade, which protects women's right to abortion.

- The right to privacy criticized by Judge Thomas also protects the right to marry and divorce, and to have children. If no right to privacy exists, a legislature may place onerous restrictions on these intensely private matters.

- In fact, Judge Thomas has written that "allowing, restricting, or . . . requiring abortions are all matters for a legislature to decide." He sees no role for the Court in protecting women's right to privacy.

- Judge Thomas's theories of Natural Law, however, do support a right to life for the fetus. In praising Lewis Lehrman's article that argues that the Constitution and the Declaration

of Independence must be read together to guarantee a fetus's right to life, Judge Thomas indicated that Lehrman's was "a splendid example applying natural law." The logical end of Lehrman's and Judge Thomas's theory is that all abortions must be banned.

Judge Thomas's views: Discrimination in Education

Judge Thomas's overall record as Assistant Secretary for the Office for Civil Rights (OCR) of the Department of Education was characterized by a concerted effort to minimize enforcement of Title IX and other anti-discrimination laws, even where intentional discrimination against individuals was involved.

- Judge Thomas defied a federal court order designed to secure enforcement of Title IX and other civil rights laws.

- During Judge Thomas's tenure, OCR sought to exclude most cases of employment discrimination from the scope of Title IX. The Supreme Court eventually reversed the OCR position, but in the meantime, complaints of employment discrimination in violation of Title IX were not processed.

- Judge Thomas instituted policies that reduced remedies to victims of educational discrimination, including those who had been intentionally denied benefits based on their sex. During Judge Thomas's tenure, OCR implemented policies that called on educational institutions to assess and monitor their own compliance with civil rights laws, at the expense of individual victims of discrimination.

- Judge Thomas's OCR challenged Title IX's protection against nonintentional, but pervasive discrimination against girls and women. Although proof of an intent to discriminate was not required by the courts in order to establish a violation of Title IX, OCR required such a standard, particularly in athletics cases.

Judge Thomas's views: **Employment Discrimination**

As chair of the Equal Employment Opportunity Commission (EEOC), Judge Thomas presided over efforts to cut back on enforcement and limit the scope of anti-discrimination laws. These policies limited relief even for individual victims of intentional discrimination.

- Judge Thomas's EEOC tolerated employer policies intentionally barring women of child-bearing age from jobs. Under Judge Thomas, the EEOC took the position that these so-called fetal protection policies would be permitted as long as they were implemented for a legitimate business reason and failed to process complaints for several years. The Supreme Court subsequently reversed the EEOC position, holding that these policies had to meet the higher "bona fide occupational qualification" standard used for other types of sex-discrimination.

- Judge Thomas's EEOC reduced its efforts to protect women suffering intentional pay discrimination. During his tenure, the EEOC cut back enforcement of Equal Pay Act cases, and refused to process or issue a policy for other types of pay discrimination cases.

- Judge Thomas's EEOC failed to enforce affirmative action approved by the Supreme Court as a remedy for intentional as well as nonintentional discrimination. He forcefully

criticized the Supreme Court's holding that voluntary affirmative action to remedy underrepresentation of women was permissible under Title VII.

- Judge Thomas reduced EEOC's use of class action cases protecting many women from intentional discrimination while doing little to help individual women's cases.

- Judge Thomas challenged Title VII's protection against nonintentional, but pervasive discrimination against women. Judge Thomas was openly critical of a case against Sears brought by his agency because it relied on statistics to show discrimination against women employees.

Conclusion

When looked at as a whole, Judge Thomas's record shows no commitment to core constitutional or statutory protections for women. In fact, his stated views and actions evidence opposition to key protections. President Bush has said that Judge Thomas is the best "man" for the job. His record raises concerns about the basis for that conclusion.

INTRODUCTION

The Supreme Court has interpreted the Constitution to contain two core principles upon which women's access to the full panoply of rights and opportunities in this country rest. These principles are first, that sex discrimination must be subjected to especially searching scrutiny under the Equal Protection Clause of the Fourteenth Amendment; and second, that there is a fundamental right to privacy, which includes pregnancy and termination of pregnancy. Any nominee to the Supreme Court who does not fully support these two core principles should not be confirmed to the Supreme Court. Further, an individual nominated to the Supreme Court who has displayed hostility to the statutes designed to protect women from sex discrimination lacks an essential commitment to equal justice and should not be confirmed.

The next Justice's respect for core constitutional principles and existing precedents upholding both constitutional and statutory rights is of even greater significance given the increasing activism of the Court's conservative wing. Last term, Chief Justice Rehnquist made clear the Court's intention to review existing precedents, particularly those decided or reaffirmed by narrow margins over "spirited dissents."[1] Justice Marshall, in one of his last dissenting opinions, warned that the Court, due to the change in "personnel," had sent "a clear signal that scores of established constitutional liberties are now ripe for reconsideration." Justice Marshall included a list of sixteen "endangered precedents," including

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[1] *See* Payne v. Tennessee, 59 U.S.L.W. 4814, 4819 (1991). The Court in Payne upheld the use of victim impact evidence in capital cases, overturning two recent Supreme Court decisions that had barred such evidence. Chief Justice Rehnquist's majority opinion contended that the Court is not bound by the doctrine of *stare decisis* when cases are unworkable or badly reasoned, particularly in constitutional cases where "correction through legislative action is practically impossible." Payne at 4819, quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (Brandeis, J., dissenting).

Thornburgh v. American College of Obstetricians and Gynecologists (ACOG),[2] which reaffirmed the right to abortion recognized in Roe v. Wade.[3]

The new Justice may indeed provide a fifth vote to overturn existing precedents of critical importance to women. However, when viewed in the context of the Chief Justice's criteria for overturning existing precedents, the seat vacated by Justice Marshall becomes of even greater importance. Larger majorities embolden the Court to issue broader opinions, as the need to narrowly craft a decision to pick up a needed swing vote is eliminated. In areas where the Court has already begun to undermine rights guaranteed by previous Courts, the shift from a 5-4 to 6-3 or even 7-2 majority enables more sweeping decisions of greater durability. There is little doubt that the core constitutional protections for women are among those precedents threatened by the Court's ideological shift and increasing activism.

Equal Protection

Until 1971, the Court had never applied the Equal Protection Clause to invalidate a law treating men and women differently. In these earlier cases, the Court would accept any "rational" basis as reason enough to uphold the discriminatory law, including one based on gender stereotypes. Since 1971, however, the Supreme Court has applied more searching or "heightened" scrutiny to government policies that discriminate based on sex. Under the heightened scrutiny standard, a state must demonstrate that an important governmental interest is substantially served by the discriminatory practice. Further, the test must be applied free of fixed or stereotyped notions concerning the roles of males and females.[4] Using heightened scrutiny, the Supreme Court has struck down a wide variety of laws disadvantaging women in many diverse areas of life, including women's right to serve as executors of estates,[5] secure

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[2] 476 U.S. 747 (1986).

[3] 410 U.S. 113 (1973).

[4] *See infra.*

[5] *See* Reed v. Reed, 404 U.S. 71 (1971).

Social Security and other government benefits for their families,[6] be supported by their parents to the same age as their brothers,[7] and manage jointly owned community property with their husbands.[8]

Since the last gender-based equal protection challenge was heard by the Court in 1982,[9] the composition of the Court has changed radically. Only four of the current Justices have used heightened scrutiny to review a sex-discriminatory law. One -- Chief Justice Rehnquist -- has consistently rejected application of the heightened scrutiny standard to gender discrimination.[10] Judge Thomas, if confirmed, may well provide the fifth vote to return the Court to the days when any reason -- even one based on gender stereotypes -- was justification enough for government-mandated sex discrimination.

Privacy

As Justice Marshall pointed out in his dissent in Payne, the right to privacy as it protects reproductive freedoms, is similarly endangered by the Court's recent realignment. Because the right to privacy is "fundamental," the Constitution requires that government demonstrate a "compelling" state interest in order to justify its restriction.[11] The landmark decision in Roe v. Wade, extended the right to privacy guaranteed by the Ninth Amendment to termination of pregnancy, assuring that the privacy right's basic protections are fully available to women, as they are to men.[12] Roe followed a half-

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[6] *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977).

[7] *See* Stanton v. Stanton, 421 U.S. 7 (1975).

[8] *See* Kirchberg v. Feenstra, 450 U.S. 455 (1981).

[9] *See* Mississippi Univ. for Women (MUW) v. Hogan, 458 U.S. 717 (1982).

[10] *See infra.*

[11] *See infra.*

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

century-old line of cases, including Griswold v. Connecticut, which held that the privacy right includes the right of married couples to use contraception.[13]

In recent years, however, women's right to privacy has been seriously undermined, with the Court upholding state and federal laws that severely limit women's access to abortion. Webster v. Reproductive Health Services,[14] called into question whether a majority of the Supreme Court will interpret the fundamental right to privacy to apply to abortion, certain forms of contraception, and by this questioning, to pregnancy itself. In Webster, a 5-4 majority upheld a Missouri law declaring that life begins at conception and placing onerous restrictions on abortion, including a prohibition on the use of public facilities to perform abortions. Last term, again by a 5-4 majority, the Court relied on Webster to hold in Rust v. Sullivan that family planning program regulations prohibiting health care personnel in federally funded clinics from providing any information about abortion-related services did not violate women's right to abortion or doctors' right to freedom of speech.[15] Webster put four Justices -- Rehnquist, White, Kennedy, and Scalia -- on record as no longer applying strict scrutiny when the privacy right to contraception and abortion is implicated. In providing the fifth vote in Rust, Justice Souter aligned himself with the conservative attempt to render the privacy "right unenforceable, even against flagrant attempts by government to circumvent it."[16] The right to privacy, including abortion, now hangs by a fraying thread -- Justice Souter or Justice O'Connor, or the new Justice may provide the fifth vote to end constitutional protection for reproductive rights.

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[13] 381 U.S. 479 (1965).

[14] 109 S.Ct. 3040 (1989).

[15] 59 U.S.L.W. 4451 (U.S. May 23, 1991).

[16] 59 U.S.L.W. at 4464 (Blackmun, J., dissenting).

Statutory Rights

The twin pillars of statutory rights central to women are Title VII, prohibiting discrimination in employment, and Title IX, prohibiting discrimination in education. Each of these statutes contains broad-based protections, the contours of which have been interpreted by landmark Supreme Court cases over the years. For example, in the area of education, the Court has interpreted Title IX, to bar schools' employment discrimination on the basis of gender,[17] and to allow for a private right of action so that individuals who experience discrimination covered by the statute may seek redress through the courts.[18] In the area of employment, the Court has held that the Title VII prohibitions on sex discrimination encompass sexual harassment,[19] and policies that discriminate against women based on their parental status[20] and child-bearing capacities.[21] As the statutes were silent in each of these important areas, the Court's broad reading of prohibited discrimination has made a significant difference to millions of women in education institutions and in the workplace.

In recent years, several key decisions have restricted the reach of Title VII, making it harder for women and others who experience employment discrimination to prevail. For example, Ward's Cove Packing Co. v. Antonio made it more difficult to win "disparate impact" discrimination cases in which an apparently neutral employment practice, such as a height or weight restriction, actually discriminates against women or minorities.[22] In Price Waterhouse v. Hopkins, the Court held that if an employer makes a hiring, firing or promotion decision based on both discriminatory and nondiscriminatory factors,

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[17] *See* North Haven Board of Education v. Bell, 456 U.S. 512 (1982).

[18] *See* Cannon v. University of Chicago, 441 U.S. 677 (1979).

[19] *See* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

[20] *See* Phillips v. Martin Marietta, 400 U.S. 542 (1971).

[21] *See* United Auto Workers v. Johnson Controls, 111 S.Ct.1196 (1991).

[22] 490 U.S. 642 (1989).

the employer will not be guilty of violating Title VII if he or she can show the same decision would have been made in the absence of in intentional discrimination.[23] Last term, in EEOC v. Arabian American Oil Co., the Court held that Title VII does not apply to United States employers who employ United States citizens at locations outside the United States.[24]

Next term, the Court will review at least one major issue with respect to Title IX: whether or not individuals may recover compensatory damages for intentional discrimination under Title IX. In September, the Eleventh Circuit determined in Franklin v. Gwinnett County Public that they may not;[25] the Third Circuit in Pfeiffer v. Marion Center Area School District held a month later that such damages are available in the case of intentional sex discrimination.[26] The Court has granted certiorari in the Franklin case;[27] its decision will determine whether women who experience sex discrimination in education will be able to receive compensation for their injuries.

As the Court moves to the right, those who would seek to restrict the scope of and remedies available under Title IX, Title VII, and other anti-discrimination laws have new opportunities to see earlier decisions overruled or limiting new precedent established. At the same time, victims of discrimination are having a harder time using the federal courts to redress their injuries. Given the growing power of those on the Court who would restrict anti-discrimination laws, it is clear that the rights of millions of Americans who experience education or employment discrimination, as well as other forms of bias, may be in grave jeopardy if the new Supreme Court Justice takes a narrow view of statutory civil rights protections.

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[23] 109 S. Ct. 177 (1989).

[24] 59 U.S.L.W. 4225 (U.S. Mar. 26, 1991).

[25] 911 F.2d 617 (11th Cir. Sept. 10, 1990).

[26] 917 F. 2d 779 (3rd Cir. 1990).

[27] 59 U.S.L.W. 3823 (U.S. June 109, 1991) (No. 90-918).

Judge Thomas's Record

Clearly women have much at stake in the areas of Equal Protection, privacy, and anti-discrimination laws. Judge Thomas's record therefore must be examined to measure his commitment to critical constitutional and statutory rights.

Judge Thomas and Equal Protection

Judge Thomas's writings on "Natural Law" give cause for grave concern about his commitment to a 14th Amendment that provides real protection to women. According to Judge Thomas, the Constitution should be interpreted by examining the Declaration of Independence to discern the "original intent" of the Framers. His theory sets him far outside the mainstream of legal thinking in two ways that do not bode well for women. First, despite two centuries of social change, Judge Thomas's reliance on the original intent of the Framers freezes the meaning of the Constitution and its amendments at the time of their drafting. Since neither the Framers nor the drafters of the 14th Amendment were concerned with sex discrimination, a theory of original intent could well read women out of the Equal Protection Clause.[28] Second, and even more extreme, Judge Thomas's view that original intent flows from the Declaration of Independence grounds his constitutional theory in the "laws of nature and nature's God." To him, these "laws set forth immutable principles that existed well before the drafting of the Constitution and will remain ever thus. Under such "laws of nature," women's "God-given" biological differences, rather than their abilities, could become the test for determining the scope of their constitutional protection. Not surprisingly, these Natural Law principles found a consistent application in the century of 14th Amendment decisions upholding blatant sex discrimination prior to 1971.[29] It is therefore deeply disturbing that Judge Thomas's theory of constitutional interpretation may return women to the days when childbearing was reason enough to deny women the benefits and opportunities associated with public life.

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[28] *See infra.*

[29] *See infra.*

Judge Thomas and Privacy

Natural law poses a similar threat to the fundamental right to privacy. Because it was not explicitly articulated by the Framers, under Judge Thomas's theory no right to privacy would exist. He has referred to the right to privacy under the Ninth Amendment as an "invention," and sharply criticized the decisions, including Griswold v. Connecticut and Roe v. Wade, that apply this right.[30] Of equal concern is the potential that Judge Thomas's theory of natural law would offer constitutional protection for a right to life for the fetus. This theory is spelled out in a 1987 American Spectator article by Lewis Lehrman which Judge Thomas has praised as "a splendid example of applying natural law."[31] Describing Roe v. Wade as a "coup" and resulting legal abortions as a "holocaust," Lehrman's article contends that the Declaration of Independence's statement that all men are endowed with the inalienable right to life and liberty signals the Founding Fathers' intent that 1) the fetus retain an inalienable right to be born; and 2) that the fetus's right is superior to any right to liberty retained by a pregnant woman.[32] Such a theory would not only require the reversal of Roe v. Wade, but could require that all states criminalize abortion. Further, it could support prosecuting women who have abortions -- and the doctors who perform them -- under criminal laws. Given Judge Thomas's favorable commentary about Lehrman's article, we must be seriously concerned for the future of reproductive freedom.

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[30] Thomas, *Civil Rights as a Principle Versus Civil Rights as an Interest*, ASSESSING THE REAGAN YEARS 391, 398 (D. Boaz ed. 1988) [hereinafter "Civil Rights"].

[31] Address by Clarence Thomas at The Heritage Foundation, *Why Black Americans Should Look to Conservative Policies*, at 8 (June 18, 1987) [hereinafter "Heritage Foundation"].

[32] Lehrman, *The Declaration of Independence and the Right to Life: One leads unmistakably from the other*, THE AMERICAN SPECTATOR 21 (Apr. 1987). Lehrman supports this contention by pointing out that "life" is ahead of "liberty" 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" in the Constitution. Id. at 23.

Judge Thomas and Statutory Rights

Judge Thomas's record as an executive branch official charged with enforcing key statutes barring discrimination in education and employment raise similar concerns. As Assistant Secretary for Civil Rights in the Department of Education and Chair of the Equal Employment Opportunity Commission, Judge Thomas presided over efforts to cut back enforcement of and narrow the scope of civil rights laws.[33] He made numerous statements indicative of a personal philosophy unsupportive of broad protections against sex discrimination, and pursued policies consistent with that philosophy. He defied Congress, the federal courts, and even the Justice Department on occasion, in pursuing policies inconsistent with the law. Whether the discrimination at issue was raised through a class-action or individual suit, and whether the case involved a disparate impact or intentional discrimination claim, Clarence Thomas too often proved to be no friend to plaintiffs seeking to redress their statutory rights.

Conclusion

Given the current Court's activist position regarding reversal of longstanding precedent, and the narrow margins by which core constitutional protections for women are now supported on the Court, Judge Thomas's views regarding constitutional interpretation raise deep concerns about the continued viability of these protections. In the case of equal protection, he has articulated legal theories and approaches in his writings that are antithetical to the application of the heightened scrutiny test to sex discrimination as we know it today. Similarly, Judge Thomas has criticized the key decisions upholding the right to privacy as applied to abortion and articulated legal theories and approaches which not only deny that such a right exists, but support a right to life for the fetus. Furthermore, Judge Thomas's record of limiting the scope and enforcement of civil rights laws

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[33] *See infra.*

suggests that he will join the conservative wing of the Court in narrowing statutory protections for women and others against discrimination.

This report elaborates on Judge Thomas's record in each of these key areas affecting women's rights: equal protection; privacy; and statutory protections against sex discrimination in education and employment. Clearly other aspects of Judge Thomas's experience also raise important concerns, including his legal qualifications, hostility to Congress, and lack of support for the rights of minorities, older Americans, and the disabled. This report is intended to add to the picture of Judge Thomas's record an analysis of his work and theories in distinct areas most critical to women. The portrait that emerges is one that has profound consequences for the future of legal rights and protections in this nation.

I. JUDGE THOMAS'S VIEWS REGARDING CONSTITUTIONAL INTERPRETATION ARE INCONSISTENT WITH PROTECTIONS FOR WOMEN UNDER THE FOURTEENTH AMENDMENT.

Judge Clarence Thomas's articulated views and record are antithetical to critically important constitutional protections women have gained over the past twenty years. Judge Thomas's original intent theory, which he grounds in "Natural Law" principles, could undermine the governing Supreme Court precedent that women have heightened protection under the Equal Protection Clause of the Fourteenth Amendment.[34] Furthermore, he threatens to dispense with equal protection analysis altogether by relying on the now disfavored Privileges or Immunities Clause, which has never afforded any protection to women, as the preferable constitutional source of equality analysis.[35]

A. With the Current Composition of the Court, Women are in Danger of Losing Heightened Scrutiny Protection under the Equal Protection Clause of the Constitution.

Prior to 1971, no constitutionally based sex discrimination case had ever been won before the Supreme Court. Cases brought under the Equal Protection Clause of the Fourteenth Amendment failed because a "rational basis" test was applied, giving the government virtually unlimited leeway to treat men and women differently. For example, the Court upheld various state statutes that prevented women from working beyond a certain number of hours, prohibited women from

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[34] *See generally* Thomas, *Toward a Plain Reading of the Constitution - The Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 691, 701-02 (1987) [hereinafter "Constitutional Interpretation"]; Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989) (hereinafter "Privileges or Immunities").

[35] In his writing, Judge Thomas criticizes the Brown v. Board of Education, 347 U.S. 483 (1954), decision for not adopting Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), and thus failing to revive the Privileges or Immunities Clause as the core of the Fourteenth Amendment. *See* Privileges or Immunities, *supra*, at 68.

bartending unless their fathers or husbands owned the bars, and deterred women from serving on juries.[36]

Commencing with Reed v. Reed, the Supreme Court abandoned the rational basis analysis and adopted what has come to be known as the "heightened scrutiny" test.[37] Under this standard a party seeking to uphold a gender-based classification must show "an exceedingly persuasive justification" for the classification. The burden is met only when the differential treatment is "substantially related" to the achievement of "important governmental objectives." Moreover, the test must be applied "free of fixed notions concerning the roles and abilities of males and females"; the statutory objective cannot reflect "archaic and stereotypical notions" about men and women.[38] This standard has been used repeatedly, since 1971, to overturn discriminatory laws premised on stereotypical assumptions about the roles of men and women. For example, the Court has struck down laws allowing servicemen but not servicewomen to claim spouses as dependents automatically;[39] providing Social Security payments to widows, but not widowers, with children;[40] providing for a higher age of majority for males than females so that males were entitled to parental support for a longer period of time;[41] giving husbands exclusive authority over community property;[42] providing Aid to Families

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[36] Muller v. Oregon, 208 U.S. 412 (1908); Goesaert v. Cleary, 335 U.S. 464 (1948); and Hoyt v. State of Florida, 368 U.S. 57 (1961), discussed *infra*.

[37] Reed v. Reed, 404 U.S. 71 (1971) (departing for the first time from the rational basis standard of review and holding that it was a denial of equal protection for a state automatically to prefer men over similarly situated women in appointing administrators for intestate estates).

[38] Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725-6 (1982).

[39] *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

[40] *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

[41] *See* Stanton v. Stanton, 421 U.S. 7 (1975).

[42] *See* Kirchberg v. Feenstra, 450 U.S. 455 (1981).

with Dependant Children to children with unemployed fathers, but not with unemployed mothers;[43] and granting Social Security survivor's benefits to any widow but only to widowers who had been receiving half of their support from their wives.[44]

With Justice Marshall's retirement, however, only four of the current Justices have a record of applying the heightened scrutiny standard to analyze sex discriminatory policies. For example, Justices Stevens and White joined Justice O'Connor's majority opinion in Mississippi University for Women v. Hogan (MUW), the last sex-based equal protection decision, to strike down a state-supported nursing school policy to limit enrollment to women.[45] Although Justice Blackmun dissented in MUW,[46] he has previously applied the heightened scrutiny test in gender-based equal protection challenges.[47] Chief Justice Rehnquist, on the other hand, has generally been hostile to a heightened scrutiny analysis.[48] Justices Scalia, Kennedy, and Souter have not yet addressed any sex-based equal protection challenge, so their position on the proper standard of review is not known.

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[43] *See* Califano v. Westcott, 433 U.S. 76 (1979).

[44] *See* Califano v. Goldfarb, 430 U.S. 199 (1977).

[45] 458 U.S. 717.

[46] Justice Blackmun's dissent in MUW suggests that the Court did not give enough weight to the value of single-sex education, especially in a situation in which other comparable education programs were available to the excluded class.

[47] *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (Blackmun, J., concurring opinion) (invalidating a statute providing for a younger drinking age for women than for men); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (invalidating a statute giving husband exclusive authority over community property); and Stanton v. Stanton, 421 U.S. 7 (1975) (invalidating a statute providing higher age of majority for males than for females so that males were entitled to parental support for a longer period of time).

[48] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting) (arguing that the gender-based classification need only pass the "rational basis" equal protection analysis); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 742 (1982) (Powell, J., and Rehnquist, J., dissenting) (stating that state's ability to continue single-sex university should be upheld under rational-basis analysis); Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Rehnquist, J., dissenting) (arguing that district court opinion, which stated that rational-basis test should have been applied to statute allowing servicemen but not servicewomen to claim spouses as dependents automatically, provided correct analysis).

Continued vitality of the heightened scrutiny analysis for sex-based equal protection challenges is of critical importance for women. In the almost ten years since the Court last applied this test, lower courts have used heightened scrutiny to hold unconstitutional, for example, a law denying citizenship to foreign-born offspring of female, but not male United States citizens;[49] a trial court's decision in a child custody case to look less favorably on a mother's employment outside the home than a father's;[50] and the denial of a promotion to a government employee because she was pregnant and her employer believed she should stay home with her family.[51]

However, recently several lower courts have evaluated government-sanctioned gender discrimination in a deeply troubling fashion. In U.S. v. Commonwealth of Virginia (VMI), a district court held in June of this year that Virginia may continue to exclude women from the taxpayer-supported Virginia Military Institute because the school's unique instructional method contributed to the overall diversity of the Commonwealth's public university system.[52] The court found that this instructional method -- which involves tormenting of first-year students, frequent punishment, lack of privacy, and intentional inducement of stress -- would ultimately have to be abandoned if the school became coeducational because most women would require a "system that provides more nurturing and

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[49] *See* Elias v. Department of State, 721 F. Supp. 243 (N.D. Ca. 1989).

[50] *See* Linda R. v. Richard E., 59 U.S.L.W. 2327 (N.Y. App. Div. 2d Dept. Oct. 1, 1990).

[51] *See* Herrin v. Newton Central Appraisal District, 687 F. Supp. 1072 (E.D. Tex. 1987).

[52] No. 90-0126-R, slip op. (W.D. Va. June 14, 1991). Judge Thomas was asked about the VMI case during his confirmation hearings for the D.C. Circuit Court of Appeals. In response, Judge Thomas stated that it would be inappropriate for him to comment on a case that might come before a circuit court. He did, however, incorrectly identify the case as a possible violation of Title VI of the Civil Rights Act -- which bars race discrimination in education -- rather than as a gender-based equal protection challenge. Hearings on the Nomination of Clarence Thomas to the United States Court of Appeals for the District of Columbia Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 56-57 (1990) [hereinafter "Court of Appeals hearings"].

support."[53] The court further noted that the presence of women would distract men from their studies, increase pressures relating to dating, and impair the esprit de corps of the institution. The VMI decision provides an opportunity for the Supreme Court to reverse MUW, which held unconstitutional a publicly funded women's nursing school. VMI's reliance on women's inability to adapt to an environment that was not "nurturing" flies in the face of the Court's position in MUW that statutory objectives may not reflect stereotypic views of males and females.[54]

Another recent decision similarly counters constitutional principles established in earlier cases. In United States v. Hamilton, the Fourth Circuit held that the Equal Protection Clause does not prohibit prosecutors from using peremptory challenges to exclude women from criminal juries on the basis of their sex.[55] Although the Supreme Court since 1975 has held that the Sixth Amendment right to a fair trial prevents women from being excluded from a jury based on their gender, and in 1988 held that the Equal Protection Clause bars the use of peremptory challenges to exclude jurors based on race,[56] the Fourth Circuit declined to extend the equal protection analysis to women.[57] As a result, the court upheld the prosecutor's elimination of three Black women from the jury solely because they were women.[58] This case has serious implications for women's right to be free from government-sponsored discrimination, with particularly troubling results for women of color: the fact that sex but not race is an acceptable reason to strike a juror allows prosecutors to limit the

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[53] Slip op. at 15.

[54] 458 U.S. at 723, 725 ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.").

[55] 850 F. 2d 1038 (1988), *cert. denied*, 110 S.Ct. 1109.

[56] *See* Batson v. Kentucky, 476 U.S. 79 (1986).

[57] The Ninth Circuit reached a contrary result in U.S. v. DeGross, 59 U.S.L.W. 2204 (1990). The conflict in the circuits suggests that this issue may be considered by the Supreme Court in the near future.

[58] 850 F.2d at 1041.

participation of Blacks on the jury by striking Black women, but not white women or Black men.[59]

Given the important role that the Equal Protection Clause has played in ending gender discrimination, the recent decisions of lower courts in VMI and Hamilton are disturbing indeed. With the shift in the make-up of the Court, it is of critical importance that the next Supreme Court justice show commitment to preserve the kind of equal protection analysis that has served women well over the last two decades.

B. Judge Thomas's View of Constitutional Interpretation is Inconsistent With Heightened Scrutiny of Gender-Based Distinctions under the Equal Protection Clause of the Fourteenth Amendment.

Judge Thomas's writings on "Natural Law" as the basis for constitutional interpretation raise grave concerns about his commitment to a heightened scrutiny analysis "free of fixed notions concerning the roles and abilities of men and women."[60] If he lacks this commitment, Judge Thomas could well provide the deciding fifth vote to return the Court to the days when preserving women's traditional role in the family was reason enough to deny women the economic, social, and family benefits and opportunities associated with equal status under the law.

Although Judge Thomas claims to "not have a fully developed constitutional philosophy,"[61] he has written numerous articles arguing that the Constitution should be interpreted by examining the Declaration of Independence and other founding documents to discern the "original intent" of the Framers.[62] The Declaration, in turn, embodies moral principles of higher law, or "natural law."[63]

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[59] In Hamilton, the prosecutor declined to strike two white women prior to the time it struck the last two Black women. 850 F. 2d at 1041.

[60] MUW, 458 U.S. 718, 724-25 (1982).

[61] Court of Appeals hearings, *supra*, at 368.

[62] [T]he original intention of the Constitution [is] the fulfillment of the ideals of the Declaration of Independence, as Lincoln, Frederick Douglass, and the Founders understood it.

Judge Thomas's theory sets him far outside the mainstream of legal thinking[64] in two ways that present serious dangers to women's equal protection rights.

First, despite two centuries of social change, Judge Thomas's reliance on original intent of the Framers freezes the meaning of the Constitution and its amendments at the time of their drafting. In order to reconcile original intent with the existence of slavery, Judge Thomas argues that the founding documents intended equality for blacks. He states that slavery was "the greatest violation of the fundamental principle of equality, one of the [Founding Fathers'] higher law principles informing the Constitution."[65] To support his thesis, Judge Thomas refers to The Federalist Papers in which the slave trade is described as an "unnatural traffic."[66] In fact, he says, the Founders abhorred the institution of slavery so much that they did not permit the words "slave" or "slavery" to appear in the Constitution.[67] Furthermore, according to Judge Thomas, the "three-fifths" clause, which counted black males as "three-fifths" of a man for taxation and representation purposes, was meant in fact to

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Constitutional Interpretation, *supra*, at 693.

[63] Civil Rights, *supra*, at 400.

[64] *See, e.g.*, J. ELY., DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 50 (1980) ("The idea [of natural law] is a discredited one in our society, however, and for good reason. . . . [Y]ou can invoke natural law to support anything you want. . . . Thus natural law has been summoned in support of all manner of causes in this country -- some worthy, others nefarious -- and often on both sides of the same issue."); Calder v Bull, 3 Dall. 386, 399 (1798) (Iredell, J., dissenting) ("[T]he Court cannot pronounce [a law] to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject"); A DICTIONARY OF MODERN LEGAL USAGE (1990) ("Twentieth-century legal scholars have mostly rejected the notion of natural law on positivist grounds, because genuine scientific knowledge cannot validate value judgments, and natural law is composed entirely of value judgments. The modern user of this term should be aware of the debate surrounding the concept it denotes, and of the generally low regard in which the concept is now held.").

[65] Privileges or Immunities, *supra*, at 64.

[66] Constitutional Interpretation, *supra*, at 695.

[67] Constitutional Interpretation, *supra*, at 696.

weaken the power of the slave states by reducing the number of people who could be counted for representation in the House of Representatives.[68]

Through this reasoning, Judge Thomas extends his concept of the Founding principles of equality to include Blacks. But he has said nothing about how, if at all, these founding principles apply to women. That women would be included in the Founders' principles of equality is improbable, as it is well established that neither the Framers of the Constitution nor the drafters of the Fourteenth Amendment were concerned at all with sex discrimination.[69] The theory of original intent effectively reads women out of the Constitution, and inevitably leads to a return to the use of the rational basis test, instead of heightened scrutiny, in sex-based equal protection challenges. This rational basis standard offers virtually no protection to women.

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[68] Constitutional Interpretation, *supra*, at 696.

[69] In fact, the first time that gender was mentioned in the Constitution, the right to vote was specifically reserved for men.

> But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV §2 (1868).

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Second, Judge Thomas grounds his constitutional theory in the "laws of nature and nature's God."[70] To him, these "laws" set forth immutable principles that "transcend[] and under[y] time and place, race and custom."[71] Thomas's views of natural law include a strong religious emphasis. He refers to equality as a God-given right[72] and to the rights of life, liberty, and property as "given to man by his Creator."[73] He quotes John Quincy Adams in explaining natural law:

> Our political way of life is by the laws of nature [and] of nature's God, and of course presupposes the existence of God, the moral rule of the universe . . . .[74]

According to Judge Thomas, natural law principles are the basis of the Declaration of Independence and other founding documents. They should form the basis for constitutional interpretation because the original intention of the Constitution is "the fulfillment of the ideals of the Declaration of Independence as Lincoln, Frederick Douglass, and the Founders understood it."[75]

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[70] Civil Rights, *supra*, at 400.

[71] Heritage Foundation, *supra*, at 8.

[72] Id. at 9.

[73] Privileges or Immunities, *supra*, at 68.

[74] Heritage Foundation, *supra*, at 9.

[75] Constitutional Interpretation, *supra*, at 693.

The implications of using the "laws of nature" as the basis for constitutional interpretation are troubling. In an equal protection challenge, a court might well find that women's biological function of childbearing is sufficient to justify unequal treatment of women.

Our concern over the adverse implications of a Natural Law theory for women's constitutional rights is based squarely in the history of the Court's analysis of the Fourteenth Amendment. Reliance on the "laws of nature and of God" in American jurisprudence has been used explicitly to justify gender-based discrimination. Archaic and stereotypical notions about women's roles, grounded in women's "different" nature were applied to justify discriminatory treatment in a century of gender-based Fourteenth Amendment challenges decided prior to 1971. Natural law has meant that men and women are relegated to separate spheres and allocated and denied rights depending on gender.

The case of Bradwell v. Illinois,[76] clearly illustrates the result of "natural rights" reasoning. The Supreme Court upheld an Illinois statute that prohibited women from obtaining licenses to practice law.[77] In his concurring opinion, Justice Bradley stated that "civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and women. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[78] Furthermore, "[t]he paramount destiny and

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[76] 83 U.S. 130 (1873).

[77] In denying Myra Bradwell's license to practice law, the Illinois Supreme Court stated:

> That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth ... In view of these facts, we are certainly warranted in saying that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended to women.

83 U.S. at 132.

[78] 83 U.S. at 141.

mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[79]

Using a similar analysis, the Court in Muller v. Oregon,[80] upheld an Oregon statute that limited the number of hours women can work, by ruling that inherent differences between the sexes provide ample justification for the state to limit a women's liberty right to contract. The Court held that:

> [T]he sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.[81]

In Goesaert v. Cleary,[82] the Court again limited women's work opportunities by upholding a Michigan statute that prohibited all women, except for wives or daughters of male bar owners, from

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[79] 83 U.S. at 141.

[80] 208 U.S. 412 (1908).

[81] 208 U.S. at 423. *See also*, Riley v. Massachusetts, 232 U.S. 671 (1913) (state statute limiting the number of hours women can work in any mechanical or manufacturing establishment does not violate the liberty of contract assured by the Fourteenth Amendment); Miller v. Wilson, 236 U.S. 373 (1914) (forbidding the employment of women in certain establishments for more than eight hours per day or forty hours per week is a reasonable exertion of the state's protective authority and does not infringe upon the freedom to contract under the Fourteenth Amendment of the Constitution); Bosley v. McLaughlin, 236 U.S. 385 (1914) (state statute limiting the hours that women can work in hospitals does not deny women their freedom to contract as guaranteed under the Fourteenth Amendment); see also, Quong Wing v. Kirkendall, 223 U.S. 59 (1912) (upholding a state statute which exempted women from paying a license tax for hand laundry work). The Court stated that Montana can "put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former." Thus the Court found that the state can not only reward women who pursue traditionally acceptable work, but also punish those men who do "women's work." 223 U.S. at 63..

[82] 335 U.S. 464 (1948).

working as bartenders. The Court stated that Michigan can, in fact, prohibit all women from working as bar maids, since the state has an interest in preventing "moral and social problems" which may be caused by bartending by women.

Even where a basic responsibility of citizenship, rather than a job opportunity, was at stake, the Court did not hesitate to accept traditional gender roles as a sufficient reason to justify discriminatory treatment. As recently as 1961, the Court, in Hoyt v. Florida,[83] upheld a Florida statute that automatically exempted women from jury duty, unless the individual women affirmatively registered for such duty. Not surprisingly, this law commonly resulted in all-male juries.[84] The State of Florida justified the law by arguing that "[e]ver since the dawn of time," the rearing of children has been the prime responsibility of women, and breadwinning the responsibility of men.[85] Because women were the center of home and family life, the State, acting in pursuit of the general welfare, could relieve women from the civic duty of jury service, unless the individual woman determines that such service is "consistent with her own special responsibilities."[86]

Because Natural Law principles have provided the underpinnings of the historic legal analysis that kept women from full and equal participation in public life, it is important to know how Judge Thomas reads the Fourteenth Amendment's application to sex discrimination. His scholarly writings

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[83] 368 U.S. 57 (1961).

[84] The Hoyt case was brought by a Gwendolyn Hoyt, who had been convicted by an all-male jury of murdering her husband. Although the Court failed to find systematic exclusion of women from juries, statistics presented at the evidentiary hearing and in the briefs indicated that at the time Ms. Hoyt was tried, 10 women and 9,990 men were on the jury list from which the venire would be drawn. B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 102 (1975).

[85] Brief for Appellee at 11, quoted in B. BABCOCK, *supra*, at 101-2.

[86] 368 U.S. at 62. In 1975, Hoyt was effectively reversed by Taylor v. Louisiana, in which the Court held that the elimination of women from jury panels violates the fair cross section requirement of the Sixth Amendment and prevents a fair trial. 419 U.S. 522 (1975).

on the Constitution do not specifically address the issue. However, his statements during his tenure as a top executive branch official charged with enforcing our nation's civil rights laws underscore the serious concerns raised by his support of Natural Law. For example, Judge Thomas has discounted the role of sex discrimination in the concentration of women in low-paying jobs. He instead attributes women's disproportionate presence in certain poorly paid jobs and their absence in better, higher-paying jobs to women's own preferences -- that "women choose to have babies" rather than obtaining higher education and that "cultural differences" between men and women explain hiring differentials.[87] These types of statements suggest a lack of understanding of discriminatory factors which have historically kept women out of many higher paying jobs and reflect stereotypical notions of the roles and abilities of women.[88]

Judge Thomas's stated views mirror those of his self-proclaimed "intellectual mentor," Thomas Sowell.[89] Sowell in his many books on issues of race and politics has contended that "Political activists may analogize the situation of women to that of minorities and attribute economic

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[87] 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*, ATLANTIC MONTHLY 71, 79 (Feb. 1987).

In talking about the disparities in hiring figures in the EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), Judge Thomas is reported to have said that:

> [They] could be due to cultural differences between men and women, educational levels, commuting patterns, and other "previous events."

Id. at 81.

[88] Judge Thomas has praised Justice Scalia's dissent in Johnson v. Santa Clara County, 480 U.S. 616 (1987), which argues that women are not employed in road maintenance crews not because of discrimination, but because "it has not been regarded *by women themselves* as desirable work." 480 U.S. at 668 (emphasis in original). *See* Speech by Clarence Thomas to the Cato Institute 20-22 (Apr. 23, 1987).

[89] Kauffman, *Freedom Now II: Interview with Clarence Thomas*, REASON 28, 30 (Nov. 1987).

disparities to forces more sinister than domestic lifestyles but their reiterated vehemence is not evidence."[90] Sowell elaborates on this statement in the chapter, "The Special Case of Women," in his book Civil Rights: Rhetoric or Reality? This chapter, which Judge Thomas has described as "a much needed antidote to cliches about women's earnings and professional status,"[91] concludes that there is no evidence that "employer bias and 'stereotypes'" cause economic disparities.[92] Rather, women are attracted to the lower-paying jobs "that make sense to women."[93] Because these jobs are so appealing to women, they "are likely to have their pay held down by the competition of many applicants."[94] Sowell contends that women are underrepresented in fields such as engineering, research, law, and sports, not because of sex bias in those fields, but because the emphasis in such jobs on "continuous full-time work," make them unappealing to women.[95] Sowell fails to acknowledge the fact that women, including those who are married or have children, indeed choose jobs in engineering, research, law, and sports. Further, Sowell does not explain why within many specific job categories, holding education and experience levels constant, women still earn less than men.[96] Although he recognizes that employers may find a woman with family responsibilities to be

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[90] T. SOWELL, PREFERENTIAL POLITICS, 17 (1990); *see also* T. SOWELL, KNOWLEDGE & DECISIONS 260 (1980).

[91] Thomas, *Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom*, LINCOLN REVIEW 15 (Winter 1988) [hereinafter "LINCOLN REVIEW"].

[92] T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY 107 (1984).

[93] Id. at 107.

[94] Id. at 108.

[95] Id. at 95.

[96] NATIONAL COMMISSION ON WORKING WOMEN OF WIDER OPPORTUNITIES FOR WOMEN, WOMEN AND WORK 3 (1990).

"less valuable as an employee or less promotable," he does not consider this to be discrimination.[97] Finally, he declines to accept that Black women experience dual discrimination based on sex and race. Instead, he asserts incorrectly that Black women do better in the workforce than both Black men and white women, a fact which he believes "is a very serious embarrassment to the civil rights vision."[98]

Based on Thomas Sowell's arguments, Judge Thomas concludes that "women cannot be understood as though they were a racial minority group, or any kind of minority at all."[99] These comments, coupled with the general absence of discussions of the problems of discrimination against women,[100] are particularly disturbing given Judge Thomas's position as a top official, both at the Office for Civil Rights in the Department of Education and at the Equal Employment Opportunity Commission, charged with enforcing equality laws.

The omission is even more blatant given that Judge Thomas's considerable writings explaining how his original intent theory does include equality for racial minorities, even though the Founders allowed the practice of slavery to continue proposed theories that have no application to women.[101]

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[97] T. Sowell, *supra* at 97-8.

[98] [B]lack women have fared better, relative to their white counterparts, than have black men relative to white men. . . . Even when black and white women in general hold the same job currently, black women average more continuous experience. . . Indeed, the ability of black women to overtake white women in the marketplace is a very serious embarrassment to the civil rights vision.

Id. at 101-2.

[99] LINCOLN REVIEW at 15 - 16 (emphasis in original).

[100] Judge Thomas's speeches to women's groups and labor organizations have highlighted sex discrimination cases undertaken by the EEOC during his tenure. *See, e.g.*, Speech by Clarence Thomas to the National Women's Law Center, New York, New York (June 17, 1983); Speech by Clarence Thomas to the AFL-CIO Civil Rights Institute, Silver Spring, Maryland (Apr. 3, 1984). However, women are conspicuously absent in his writings on the Constitution or otherwise.

[101] [The Founders] did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the

Judge Thomas's arguments with respect to racial equality are not transferable to equality between the sexes, as they are based on the history of slavery and its abolition. With respect to women, principles of Natural Law as embodied in the founding documents have been exclusionary. If it is true that Judge Thomas does not read the founding documents to intend equality for women as he contends they did for Blacks, women may indeed lose the core protections guaranteeing their equality if he is confirmed.

C. Judge Thomas's Reliance on the Discredited Privileges or Immunities Clause is Inconsistent with Continued Use of the Equal Protection Clause to Protect Against Government-Sanctioned Sex Discrimination.

Judge Thomas relies on the Privileges or Immunities Clause as the preferable constitutional source of protection against discrimination.[102] Specifically, he contends that in Brown v. Board of Education,[103] the Court erred in relying on social science data, instead of following the analysis in Justice Harlan's dissent in Plessy v. Ferguson,[104] which relied on the Privileges or Immunities Clause.[105] This analysis has serious adverse implications for women's rights. First, Judge Thomas

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right, so that enforcement of it might follow as fast as circumstances should permit. (emphasis in original) (quoting Abraham Lincoln)

LINCOLN REVIEW, *supra*, at 8.

[102] Judge Thomas discusses the Brown case as a missed "opportunity to revive the Privileges and Immunities Clause as the core of the Fourteenth Amendment." Privileges or Immunities, *supra*, at 68.

[103] 347 U.S. 483 (1954).

[104] 163 U.S. 537 (1896).

[105] Brown v. Board of Education would have had the strength of the American political tradition behind it if it had relied upon Justice Harlan's arguments instead of relying on dubious social science.

Privileges or Immunities, *supra*, at 68; *see also* id. at 66-7; Constitutional Interpretation, *supra*, at 698-99, 701-03.

would suggest replacing equal protection doctrine -- which has been critical in protecting women's rights -- with the Privileges or Immunities Clause, which has been discredited as a source of protected individual rights.[106] The Privileges or Immunities Clause was given very limited application by the Slaughter-House Case.[107] It is limited to those matters which are derived from national as opposed to state citizenship and has been construed to extend only to a limited set of rights including those to carry on interstate commerce, to travel from state to state, to petition Congress, to vote for national offices, to enter public lands, to be protected while in custody of the United States marshals, to inform United States authorities of violations of their laws, and to take and hold real property.[108] All of these rights are already protected by other portions of the Constitution, thus rendering the Privileges or Immunities Clause a redundant and empty provision.[109]

Second, based precisely on the Natural Law reasoning that Judge Thomas embraces, the Privileges or Immunities Clause has historically been construed to offer no protection for women's rights -- a matter Judge Thomas neither acknowledges nor addresses. A prime example of this problem is the Bradwell case, discussed earlier.[110] In upholding a statute denying women a license to practice law, the Court ruled that the Fourteenth Amendment did not grant Bradwell the right to bar admission in the state of Illinois, since admission to a state bar is not a privilege or immunity of United States citizenship. Justice Bradley, in his concurring opinion, emphasized that the Privileges

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[106] "[The Privileges or Immunities Clause] has to all intents and purposes been dead for a hundred years." J. ELY, DEMOCRACY AND DISTRUST, 22 (1980).

[107] 16 Wall 36 (1873) (holding that laws enacted by the Louisiana legislature establishing a slaughter-house monopoly did not violate the Fourteenth Amendment's Privileges or Immunities Clause); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 418-24 (1988).

[108] *See* Crutcher v. Kentucky, 141 U.S. 47 (1891); Twining v. New Jersey, 211 U.S. 78 (1908); and Oyama v. California, 332 U.S. 633 (1948); *see also* L. TRIBE, *supra*, at 423.

[109] L. TRIBE, *supra*, at 423-24.

[110] 83 U.S. 130 (1873).

or Immunities Clause did not grant women as citizens the right to engage in any and "every profession, occupation, or employment in civil life." Since the right to practice law is a privilege granted by the states to its citizens, the state has the authority to determine who is and is not qualified for the profession. The state in this case determined that women were not qualified to practice law, given women's particular "delicate nature" and role in society as wife and mother.

A further limitation in the Privileges or Immunities Clause is evident within Justice Harlan's dissent in Plessy, upon which Judge Thomas relies. Justice Harlan envisioned the Privileges or Immunities Clause to provide for a "color-blind" constitution, even though the "white race" is the "dominant race" and "will continue to be for all time, if it remains true to its great heritage."[111] He contended that proper application of the Privileges or Immunities Clause would correct such anomalies as the fact that it is a violation of the law "If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while traveling."[112] Judge Thomas attempts to deal with these problematic aspects of the dissent by arguing that Justice Harlan meant that the superiority of the white race is dependent upon its accepting that it is not superior but equal and that the Constitution is color-blind.[113] The limits of this approach, however, are apparent, as a color-blind Constitution in the context of a society struggling with racism is a limited tool.

Further, Justice Harlan's dissent refers to Chinese immigrants as being from "a race so different from [the white race] that we do not permit those belonging to it to become citizens of the United States."[114] Judge Thomas attempts to deal with this glaring flaw by arguing that under

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[111] 163 U.S. at 559.

[112] 163 U.S. at 553.

[113] Constitutional Interpretation, *supra*, at 701.

[114] 163 U.S. at 561.

Justice Harlan's principles, the "Chinese and anyone who undertook the duties of citizenship could become citizens [and thus entitled to equality]," since citizenship requires both rights and duties.[115] Yet Justice Harlan explicitly excluded Chinese immigrants from the possibility of ever becoming citizens. This analysis presents a stark contrast to the more expansive equal protection analysis which extends to all persons and is not limited to citizens.

Taken as a whole, Judge Thomas's views regarding natural law and the primacy of the Privileges or Immunities Clause suggest that women have reason to be concerned. As a lower court judge, Judge Thomas was duty-bound to follow Supreme Court precedent applying heightened scrutiny to gender-based challenges under the Equal Protection Clause. As a Supreme Court Justice, he may have the opportunity to reverse precedent in this critical area. Judge Thomas's theory of constitutional interpretation undermines the Equal Protection Clause for women, as it is logically incompatible with applying heightened scrutiny under the Equal Protection Clause in gender discrimination cases. Even if heightened scrutiny is applied, Judge Thomas's support for Natural Law principles means that adherence to the traditional roles of women may be reason enough to justify unequal treatment of women. The Privileges or Immunities Clause, which has historically been used to deny women opportunities and which Judge Thomas proposes to revive "as the core of the Fourteenth Amendment,"[116] offers a poor alternative to the Equal Protection Clause, which since 1971 has offered women substantial protection against government-sanctioned discrimination. For these reasons, Judge Thomas's record is inconsistent with the core constitutional protection against unequal treatment of men and women by federal, state, and local government.

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[115] Constitutional Interpretation, *supra*, at 702.

[116] Privileges or Immunities, *supra*, at 68.

II. JUDGE THOMAS HAS FAILED TO DEMONSTRATE A COMMITMENT TO THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRIVACY THAT APPLIES TO PREGNANCY AND TERMINATION OF PREGNANCY

The long line of cases recognizing a constitutionally protected fundamental right to privacy stands for the clear proposition that decisions affecting marriage, childbirth, reproductive rights and family relationships are so fundamental and critical to self-determination that governmental interference must survive "strict scrutiny" judicial review. Under strict scrutiny, the government must demonstrate a compelling interest justifying its interference and that the interest is furthered by means which are the least restrictive on fundamental rights.[117] The Supreme Court's application of the right to privacy to pregnancy and termination of pregnancy, including contraception, assures that its basic protections are fully available to women, as they are to men. Any nominee to the Supreme Court must have a commitment to these core constitutional protections for women guaranteed by the fundamental right to privacy.

A. The Constitutional Right To Privacy That Includes Contraception, Abortion and Pregnancy is Threatened.

In a line of decisions stretching back more than half a century, the Supreme Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, exists under the Constitution. Decisions recognizing a fundamental privacy interest have forbidden governmental intrusion into marriage;[118] procreation;[119] family relationships;[120] and child rearing and education.[121]

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[117] *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

[118] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[119] Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).

[120] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[121] Meyers v. Nebraska, 262 U.S. 390, 399 (1923).

The leading modern case first recognizing the constitutional right to privacy in reproductive decisions is Griswold v. Connecticut,[122] in which the Court considered the constitutionality of a Connecticut law prohibiting the sale or use of contraceptives, even by married couples. The Griswold Court held that a right to privacy is found in the "penumbras" of the First, Third, Fourth, and Fifth Amendments and protected by the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[123] Finding that the Connecticut law implicated the right to privacy, and that the state lacked a compelling interest in the statute, the Court held the law to be invalid. In Eisenstadt v. Baird,[124] the Court extended the right to contraception to unmarried persons and defined a constitutional right to privacy broad enough to include "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[125]

Against this backdrop, the Court issued its decisions in Roe v. Wade[126] and Doe v. Bolton.[127] In opinions written by Justice Blackmun, the Court recognized that a woman's fundamental right to privacy includes the right to abortion, and thus any governmental interference with that right would be subjected to strict scrutiny. Under Roe, until the time a fetus is viable, in the beginning of the third trimester, the only state interest compelling enough to justify regulation of abortion is protection of the woman's health. The state's interest in fetal life only becomes a

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[122] 381 U.S. 479 (1965).

[123] *Quoted in* 381 U.S. at 484.

[124] 405 U.S. 438 (1972).

[125] 405 U.S. at 453 (emphasis in original).

[126] 410 U.S. 113 (1973).

[127] 410 U.S. 179 (1973).

sufficiently compelling justification to interfere with a woman's fundamental right when the fetus is viable.

The application of the right to privacy to contraception, abortion, and pregnancy assures that its basic protections are available to women as well as men. However, women's right to privacy based on their unique reproductive capacity is under serious threat.

After Griswold and Roe were decided, the Supreme Court repeatedly struck down state laws which infringed on women's privacy rights. For instance, the Court invalidated laws prohibiting the sale of contraceptives to minors and limiting their distribution to licensed pharmacists;[128] laws restricting the availability of unemployment benefits for pregnant women;[129] laws requiring that married women obtain their husbands' consent to have an abortion;[130] and laws requiring physicians to convey intimidating information designed to dissuade women from having abortions.[131]

However, with the changing composition of the Supreme Court, the assault on women's privacy rights -- and especially the strict scrutiny of governmental interference in contraception and abortion, including minors' access to abortion -- has intensified.

The Supreme Court's decision in Webster v. Reproductive Health Services[132] was an unprecedented retreat from the long line of cases recognizing that contraception and abortion are included in the fundamental right to privacy, and thus any governmental interference with these rights must be subjected to strict scrutiny. The Missouri law at issue in Webster began with a preamble, which stated the legislature's "findings" that a human being's life begins at conception, defined as the

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[128] Carey v. Population Services International, 431 U.S. 678 (1977).

[129] Turner v. Department of Employment Services, 423 U.S. 44 (1975).

[130] Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

[131] Thornburgh v. American College of Obstetrics and Gynecologists (ACOG), 476 U.S. 747 (1986).

[132] 109 S.Ct. 3040 (1989).

time of fertilization, and that "unborn children" have protectable interests in life, health and well-being. The preamble further directed that the laws of Missouri be interpreted to assure that "unborn children" have the same rights as all other persons in the state, within the limits imposed by the United States and Missouri Constitutions.

Chief Justice Rehnquist wrote for five justices in upholding the preamble, construing it as merely expressing the state's value judgment favoring childbirth over abortion. Since the preamble by itself did not restrict the activities of the plaintiffs, these justices decided that only when Missouri uses the preamble to restrict an individual's actions would the Court determine whether the particular restriction was constitutional.

The four dissenting justices held that an assault on the fundamental privacy right to contraception and abortion was inherent in the preamble. According to the dissent, the preamble's definition of life as beginning at conception and conception as occurring at the time of fertilization unconstitutionally interferes with a woman's right to abortion and to use methods of contraception that can prevent implantation of the fertilized ovum, including the IUD, the "morning-after" pill, low-dosage oral contraceptives, and the French-produced drug RU-486.[133]

The preamble to the Missouri law at issue in Webster was enacted as part of a comprehensive law placing onerous restrictions on abortion, including a prohibition on the use of employees or public facilities (broadly defined) to perform abortions; a requirement of specific viability tests for abortions at twenty weeks of pregnancy; and a prohibition on the use of public funds for abortion counseling. In addition to the preamble, the Court upheld the prohibition on public funding and the viability testing requirement.[134]

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[133] 109 S.Ct. at 3068, n.1, 3081 (Stevens, J., dissenting).

[134] The prohibition on the use of public funds for abortion counseling was dismissed as moot and the Court did not rule on its constitutional validity.

Chief Justice Rehnquist's opinion on these provisions -- joined by Justices White and Kennedy -- did not explicitly overrule Roe, but undermined its foundation by concluding that the viability testing requirement is "reasonably designed to ensure that abortions are not performed where the fetus is viable -- an end which all concede is legitimate -- and that is sufficient to sustain its constitutionality."[135] This language suggests the plurality is applying rational basis review, the standard applied to rights granted only minimal constitutional protection, not fundamental rights like the right to privacy. Moreover, the plurality also concluded that there was no reason that the state's interest in protecting fetal life should come into existence only at the point of viability, referring to a "compelling interest" in protecting potential human life throughout pregnancy, from the moment of conception. Under this analysis, even if the rights to abortion and contraception remain in name fundamental rights, strict scrutiny is satisfied by the state's compelling interest in potential life from the very beginning of pregnancy, and thus any governmental interference with the rights could be upheld. Justice Scalia's separate opinion recognized that the plurality's analysis covertly overruled Roe and denounced the failure to repudiate Roe completely and explicitly. Thus, there are at least four Justices[136] no longer applying the strict scrutiny protection of the rights to contraception and abortion included in the fundamental right to privacy.[137]

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[135] 109 S.Ct. at 3058.

[136] Although dissenting from the plurality's analysis in Webster, in previous cases Justice O'Connor has supported the authority of states to enact restrictions which do not impose an "undue burden" on the right to choose, a less rigorous standard than strict scrutiny review. See, e.g., Thornburgh v. ACOG, 476 U.S. at 828 (O'Connor, J., dissenting).

[137] Two 1990 Supreme Court decisions upholding rigid parental notification laws, Hodgson v. Minnesota, 110 S.Ct. 2926 (1990) and Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990), demonstrate that young women's abortion rights have already been severely eroded.

Last term, the Court continued its assault on Roe v. Wade in Rust v. Sullivan,[138] with Justice Souter joining the four Justices who had abandoned strict scrutiny protection for abortion rights in Webster. In Rust, a five-member majority upheld regulations prohibiting health care personnel at federally funded family planning clinics from providing information on any abortion-related services, even in response to direct inquiries by women. Despite the fact that the statute implicated not only the right to privacy, but also the first amendment, the Court found that the government's regulations were constitutionally permissible because the "Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected."[139] Justice Blackmun, however, found that the Rust majority had gone beyond previous decisions, such as Webster, which limited the availability of abortion, and had reached a level of coercion that violated women's right to choose: "Roe v. Wade . . . and its progeny are not so much about a medical procedure as they are about a woman's fundamental right to self-determination."[140] He concluded that Rust v. Sullivan resembles Webster, in that it technically leaves the fundamental right protected by Roe v. Wade intact, while robbing it of substance. He called the decision "nearly as noxious as overruling Roe directly, for if a right is found to be unenforceable . . . then it ceases to be a right at all."[141]

The next appointee to the Supreme Court may well provide the fifth or sixth vote to end constitutional protection of women's fundamental right to privacy, including the rights to contraception and abortion. In the wake of Webster, numerous states have enacted laws that could provide the basis for a full reversal of Roe v. Wade.

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[138] 59 U.S.L.W. 4451 (U.S. May 23, 1991).

[139] 59 U.S.L.W. at 4459.

[140] 59 U.S.L.W. at 4463 (Blackmun, J., dissenting).

[141] 59 U.S.L.W. at 4464 (Blackmun, J., dissenting).

A recently enacted Louisiana law, for example, outlaws abortion except in very narrowly defined cases of rape, incest, or to save the woman's life. The Louisiana law carries with it a penalty of a fine of $100,000 and imprisonment for up to 10 years for any doctor who performs an abortion. Although the law was struck down by a federal district court judge, the state is seeking an expedited review of the case by the Supreme Court. Both Guam and Utah have enacted similar laws, which could also be used to overturn Roe.[142]

A Pennsylvania statute, held unconstitutional by the federal district court, imposes a 24-hour waiting period for abortions, requires spousal notification, "informed consent" by both a minor seeking an abortion and a parent, and mandatory counseling by a physician.[143] The district court observed that several of these provisions are essentially the same as those struck down in Thornburgh in 1986 and rejected the state's argument that the constitutional standard had been modified by Webster and other recent decisions. The Pennsylvania statue, therefore, also presents a clear opportunity for the Court to undermine Thornburgh and the decision upon which Thornburgh was based -- Roe v. Wade -- and to continue the Court's pattern of chipping away at the right to privacy until it ceases to exist.

As the Court moves toward returning the rights of women to the days of back-alley abortions and prohibitions on contraceptives, there is no more important inquiry than where the nominee stands on the fundamental right to privacy.

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[142] The Guam law, which was recently suspended by a federal court, prohibits abortions except when two physicians determine that continuing the pregnancy would endanger the woman's life or gravely harm her health. Unlike the Louisiana law, it carries a penalty against the woman. The Utah statute allows abortion only if the woman's life or health is gravely endangered or if the fetus has significant defects. A federal district court is expected to rule on its constitutionality in the near future.

[143] 59 U.S.L.W. 2160 (E.D. Pa. Sept. 18, 1990).

B. Judge Thomas's Record Indicates That He is Hostile to the Fundamental Right To Privacy and Supports an Interpretation of the Constitution That Includes the Principle that Life Begins At Conception.

Judge Thomas has criticized the key constitutional decisions that establish the right to privacy. Finding the line of cases based on the Ninth Amendment to be constitutionally flawed as inconsistent with the intent of the Framers, Judge Thomas argues that Natural Law principles are the appropriate basis for interpreting the scope of unenumerated constitutional rights. These Natural Law theories, discussed in the previous section, are not only inconsistent with a right to privacy that includes termination of pregnancy, but could read into the Constitution the principle that life begins at conception.

In his writings on Natural Law, Judge Thomas criticizes the line of cases upholding the right to privacy based on the Ninth Amendment. In his article "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," Judge Thomas argues against "the willfulness of both run-amok majorities and run-amok judges" in favor of limited government based on the "higher law political philosophy of the Founding Fathers."[144] A self-proclaimed conservative,[145] Judge Thomas notes that the "current case provoking the most protest from conservatives" is Roe v. Wade.[146] He cites both Roe and Griswold v. Connecticut, which struck down a statute barring married couples from using birth control, as examples of activist judicial use of the Ninth Amendment in violation of higher law principles.[147]

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[144] Privileges or Immunities, *supra*, at 63 - 64.

[145] *See* Heritage Foundation, *supra* (describing Judge Thomas's experiences as a conservative Black in the Reagan Administration).

[146] Privileges or Immunities, *supra*, at 63 n.2.

[147] Id.

Judge Thomas explained his "misgivings" about Roe, Griswold, and other privacy cases in "Civil Rights as a Principle Versus Civil Rights as an Interest." This article criticizes Justice Arthur Goldberg's "discovery, or rather invention," of the Ninth Amendment in Griswold.[148] Justice Goldberg's often-cited concurring opinion in Griswold elaborated upon Justice Douglas's majority opinion, which held that the right to privacy is found in the "penumbras" of specific rights contained within the Bill of Rights and given force through the Ninth Amendment.[149] Justice Goldberg's concurrence suggests that although the "right to privacy" is not explicitly stated within the Constitution, it exists as a fundamental personal right, found in the "'traditions and [collective] conscience of our people,'" and applied through the Ninth Amendment. According to the Goldberg concurrence, just as the Government could not impose a "totalitarian limitation of family size,"[150] the government cannot outlaw voluntary birth control by married persons, absent a showing of a compelling subordinating state interest.

Judge Thomas, however, regards the Ninth Amendment as "an additional weapon for the enemies of freedom."[151] If the Court can find the right to privacy in the Constitution, Judge Thomas argues, might the Court not also find a right to welfare, for example? The desire to protect rights "simply plays into the hands of those who advocate a total state," because rights read into the Constitution by Congress or the Court will be enforced through "the expansion of bureaucratic government."[152] In short, Judge Thomas makes the extreme argument that the rights of people must be limited in order to stop the growth of government.

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[148] Civil Rights, *supra*, at 398.

[149] 381 U.S. at 487.

[150] 381 U.S. at 497.

[151] Civil Rights, *supra*, at 399.

[152] Id.

The right to privacy expressed in Griswold and Roe would presumably not find a place within Judge Thomas's framework of limited government. This framework would place at risk not only women's right to terminate a pregnancy, but also the right not to have an abortion. Judge Thomas has written that "allowing, restricting, or . . . requiring abortions are all matters for a legislature to decide."[153] In Judge Thomas's view, a court may not rely on the Constitutional right to privacy to prevent a legislature from, for example, limiting the number of children a family may have or requiring the sterilization of certain individuals, as long as the state could articulate a rational reason for the policy.

Other manifestations of the right to privacy unrelated to issues of abortion and contraception would also be implicated. For example, the Court in Moore v. City of East Cleveland relied on the Griswold precedent to find strong constitutional protection for the sanctity of the family, and thereby invalidated a local housing ordinance that made it a crime for a woman to share her home with her son and two grandsons.[154] If no privacy right is found in the Constitution, however, a legislature might be able to separate families without running afoul of the Constitution.

Judge Thomas's participation in a 1986 White House Working Group on the Family confirms his hostility toward the Court's interpretation of the Ninth Amendment. The Working Group issued a Report sharply critical of Roe, Griswold, Eisenstadt v. Baird, Planned Parenthood v. Danforth and Moore, describing them as part of a series of cases that "abruptly strip the family of its legal protections and pose the question of whether this most fundamental of American institutions retains any constitutional standing."[155] The Report further pledges that "a fatally flawed line of court

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[153] Thomas, Notes on Original Intent, unpublished paper, at 2 (emphasis in original).

[154] 431 U.S. 494 (1977). The two grandsons were first cousins, one of whom had come to live with the family upon the death of his mother.

[155] A Report to the President from the White House Working Group on the Family, The Family: Preserving America's Future, December 1986 at 11 [hereinafter "Preserving America's Future"].

decisions can be corrected, directly or indirectly, through . . . the appointment of new judges and their confirmation by the Senate, the limitation of the jurisdiction of Federal courts, and, in extreme cases, amendment of the Constitution itself."[156]

While Judge Thomas's writings indicate that he would not construe the Ninth Amendment to provide constitutional protection for a woman's right to terminate a pregnancy, he has made statements indicating that he might find that the fetus has greater rights than it has ever been given. Depending on the grounds, a reversal of Roe v. Wade might nonetheless permit states the option of preserving legal abortion. However, a reversal based on the notion that life begins at conception could go much further, requiring that all abortions throughout the United States be prohibited.

This extreme philosophy is laid out in "The Declaration of Independence and the Right to Life," by Lewis Lehrman, an article that Judge Thomas has described as "a splendid example of applying natural law."[157] Lehrman, like Judge Thomas, contends that the Constitution must be interpreted in a manner consistent with the original intent of the Framers, and that this intent may be found in the Declaration of Independence. Lehrman goes on to interpret the Declaration's statement that all men are endowed by their Creator with the inalienable right to life and liberty as including "a right to life of the child-about-to-be-born (a person)."[158] As "all persons cannot be endowed both with the liberty to take innocent life by abortion and with the inalienable right to life," Lehrman concludes that the Supreme Court overstepped its lawful authority in the Roe v. Wade decision.[159] He bases this argument on his view that the right to abortion is "a spurious right born exclusively of

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[156] Id. at 12.

[157] Heritage Foundation, *supra*, at 8.

[158] Lehrman, *The Declaration of Independence and the Right to Life: One leads unmistakably from the other, The American Spectator* 21, 22 (April 1987).

[159] Id. at 22.

judicial supremacy with not a single trace of lawful authority, implicit or explicit, in the actual text or history of the Constitution itself."[160] He further argues that as the text of the Declaration and the Constitution place "life" sequentially ahead of "liberty," life must be regarded as the more important right:

> Is it to be reasonably supposed that the right to liberty is safe if the right to life is not first secured; and, further, is it to be maintained that human life 'endowed by the Creator' commences in the second or third trimester and not at the very beginning of the child-in-the-womb?[161]

For these reasons, Lehrman concludes that Roe v. Wade can only be regarded as a "'coup' against the Constitution," with legal abortions as "the resulting holocaust."[162]

Lehrman's views on the rights of the fetus place more at stake even than the ability of a woman to terminate her pregnancy. As Justice Stevens points out in his dissenting opinion in Webster v. Reproductive Health Services, if life begins at conception "common forms of contraception such as the IUD and the morning-after pill" and even some versions "of the ordinary, daily ingested birth control pill" which prevent implantation of a fertilized egg in the uterine wall would be outlawed.[163] Further, as the majority concluded in Roe, if a fetus is entitled to constitutional rights, a woman who has an abortion must be prosecuted, and, if guilty, given "the maximum penalty for murder."[164]

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[160] Id. at 23.

[161] Id.

[162] Id.

[163] 109 S.Ct. 3040, 3081 & n.7 (1989).

[164] In Roe, the majority discussed inconsistencies between granting Fourteenth Amendment status to a fetus and the typical abortion statute: "It has already been pointed out . . . that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion . . . is significantly less than the maximum penalty for murder . . . . If the fetus is a person, may the penalties be different?" 410 U.S. at 158 n.54.

The logical conclusion of these views -- the principle that a fetus possesses a protected constitutional right to life combined with a repudiation of the right to privacy under the Ninth Amendment -- allows for total state control of the most private details of our lives. These theories free the state to impose restrictions that not only affect procreation, but the ability of individuals to marry and live with whom they please, to obtain a divorce, and to make their own decisions regarding other intensely private matters.

III. IN HIS ROLE AS CHIEF ENFORCER OF CIVIL RIGHTS LAWS PROHIBITING DISCRIMINATION IN EDUCATION AND EMPLOYMENT, JUDGE THOMAS ADOPTED POLICIES THAT SIGNIFICANTLY REDUCED THE SCOPE AND ENFORCEMENT OF THESE LAWS, THEREBY RAISING CONCERNS REGARDING HIS COMMITMENT TO EQUAL JUSTICE.

Judge Thomas's overall record at the Office for Civil Rights of the Department of Education (OCR) and the Equal Employment Opportunity Commission (EEOC) was characterized by the failure to carry out enforcement responsibilities properly -- even including court-ordered requirements -- as well as increasingly narrow interpretations of substantive key legal protections for women, minorities, the elderly and disabled. There can be no more important rights than those protecting individuals from discrimination in their efforts to seek an education or a job. The rights abridged included discrimination targeted against individuals or large classes of people, discrimination arising from intentional discrimination or discrimination resulting from the adverse impact of a policy or practice, and discrimination stemming from narrowed policy interpretations or seriously inadequate enforcement efforts. Judge Thomas's record of limiting these rights in education and employment, as found by the courts, congressional oversight committees and even the General Accounting Office, warrants serious concern.

A. As the Chief Official Charged With Enforcing Laws Prohibiting Discrimination in Education, Judge Thomas Presided Over Efforts to Diminish the Effectiveness of Title IX and Other Anti-Discrimination Laws.

Clarence Thomas took over as Acting Assistant Secretary for Civil Rights of the Department of Education in May, 1981. He was confirmed for this post in July, 1981, and served through May, 1982. In this capacity, he was responsible for the OCR, the office within the Department of Education that is charged with enforcing laws barring discrimination in education. These laws include Title IX of the Education Amendments of 1972, barring sex discrimination in education, Title VI of the Civil Rights Act of 1964, prohibiting discrimination based on race and national origin, the Age

Discrimination Act, protecting victims of age discrimination, and Section 504 of the Rehabilitation Act, which bars discrimination on the basis of disability.

When Judge Thomas arrived at the Department of Education as its chief civil rights enforcer, problems of sex discrimination in schools were serious. The National Advisory Council on Women's Educational Programs issued a report at that time entitled Title IX: The Half Full, Half Empty Glass, documenting widespread sex discrimination in scholarships, athletics, employment, and math, science and vocational education programs faced by girls and women in schools throughout the country[165].

Despite these serious problems, the Administration was determined to retrench enforcement efforts. Shortly before Judge Thomas's appointment, then-Secretary of Education Terrell Bell wrote to then-Senator Paul Laxalt suggesting his intention to adopt a new approach to civil rights enforcement:

> In my opinion, the Title IX regulations need to be modified.... I am still reviewing these and other regulations and plan to take action to cut back as much as I can under the law and under the restraints and demands imposed by the courts.... The Federal Courts may soon be after us for not enforcing civil rights laws and regulations. Your support for my efforts to decrease the undue harassment of schools and colleges would be appreciated. It seems that we have some laws we should not have, and my obligation to enforce them is against my own philosophy.[166]

During his confirmation hearings to be Assistant Secretary, Judge Thomas stated that he indeed intended to enforce civil rights laws "in the least intrusive manner."[167] His record at OCR,

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[165] NATIONAL ADVISORY COUNCIL ON WOMEN'S EDUCATIONAL PROGRAMS, TITLE IX: THE HALF FULL, HALF EMPTY GLASS (1981).

[166] Letter from Secretary Bell to Senator Laxalt (Apr. 24, 1981). The letter is apparently in response to an inquiry from Senator Laxalt regarding OCR enforcement of Title IX in the area of intercollegiate athletics.

[167] Nominations: Hearing before the Senate Committee on Labor and Human Resources on . . . Clarence Thomas of Maryland to be Assistant Secretary for Civil Rights, Department of Education, 97th Cong., 1st Sess., 65 (1981).

when taken as a whole, confirms that he used his role as chief enforcement officer for civil rights in education to create agency enforcement so unintrusive as to be a nonpresence in many key respects. A court found that Judge Thomas, as Assistant Secretary, failed to comply with its order designed to cure nonenforcement through mandatory timeframes and procedures that OCR must follow in handling its complaints and compliance reviews. Moreover, by narrowly construing the controlling law and seriously limiting OCR's enforcement activities in a number of areas, Judge Thomas undermined the ability of those protected by civil rights laws to obtain remedial action. His record at OCR, when taken as a whole, demonstrates a lack of regard both for a court's order and for the underlying rights of women, the disabled, and persons of color that order sought to protect.

1. **Judge Thomas Defied a Court Order Designed to Secure Enforcement of Title IX and the Other Civil Rights Laws Under His Jurisdiction.**

Following a long history of litigation prior to Judge Thomas's tenure at OCR regarding the agency's failure to enforce Title IX, Title VI and Section 504,[168] a court order was entered setting forth detailed timeframes and procedures intended to improve enforcement by requiring OCR to handle complaints and compliance reviews within specified timeframes, thereby eliminating the office's ability to put enforcement on indefinite hold and allow discrimination to continue unchecked.[169] Under Judge Thomas's watch, however, OCR's enforcement efforts slackened, and the clear requirements of the court order were violated.

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[168] The National Women's Law Center represented the plaintiffs in Women's Equity Action League (WEAL) et al. v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990), which was originally brought in 1974 to challenge government nonenforcement of Title IX. Court orders were entered in the case in 1975 and 1977 designed to remedy the nonenforcement. In 1981, the plaintiffs in WEAL filed a motion to show cause why the government should not be held in contempt for its failure to adhere to the terms of the court order. The case was ultimately dismissed in 1990 for lack of standing of the plaintiffs to pursue the claims.

[169] *See* Court Order, Adams v. Bell, No. 3095-70 and WEAL v. Bell, No. 74-1720 (D.D.C. Dec. 29, 1977).

In March, 1982, the district court judge who entered the order held a hearing to determine whether there was noncompliance, and to decide whether the order should remain in place, or be lifted as requested by the government. In his testimony before the court, then-Assistant Secretary Thomas admitted to violating the time frames:

> Q. And you go down to the 12-month average for compliance reviews, you find, do you not, that the time frames were met with respect to compliance reviews only three percent of the time; is that correct?
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> A. That's right.[170]
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> * * * *
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> Q. Well, whatever numbers we use, it's pretty clear that most of the time you violate the time frames for compliance reviews?
>
> A. Definitely.[171]

At the conclusion of the hearing, at which Judge Thomas testified extensively, the court found that:

> The order has been violated in many important respects and we are not at all convinced that these violations will be taken care of and eventually eliminated without the coercive power of the court.[172]

Starkly contrasting Judge Thomas to previous OCR Assistant Secretary David Tatel, Judge Pratt observed that whereas under David Tatel, "things were on the way to being improved,"[173] under

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[170] Excerpt of Proceedings, Testimony of Clarence Thomas, March 11, 1982 Adams v. Bell, WEAL v. Bell at 21, (D.C. Cir. 1982).

[171] Id. at 23.

[172] Transcript of Hearing, March 15, 1982 Adams v. Bell, WEAL v. Bell at 0816.

[173] Id. at 0824.

Clarence Thomas's supervision, "we've almost come full cycle."[174] Judge Pratt specifically criticized Judge Thomas's lack of commitment to complying with the court order, stating that OCR's enforcement of the civil rights statutes was being carried out, not as required by the law, but according to Judge Thomas's "own way" and "own schedule."[175] Judge Pratt explained that he regarded the time frames as important to "impress on the people who observe those time frames that after all we've got, first of all, a Constitution; we've got certain acts of Congress, and we've got to pay attention to those things."[176] He stated:

> I don't like to hold people in contempt. On the other hand, I'd like to see some kind of manifestation by the people that administer these statutes that they realize they are under the constraints of a court order and accordingly, are going to make a good faith effort to comply.[177]

While Judge Thomas may have sincerely believed that the time frames were not sound policy, he substituted his judgment for that of a court order, demonstrating an alarming disregard for the law. As a result, many individuals who suffered discrimination received no remedy, while federal funds continued to flow to the discriminatory schools.

2. Judge Thomas's OCR Sought to Limit Employment Discrimination Protections, Even for Individual Employees Suffering Intentional Discrimination, Under Title IX and Section 504.

Since their promulgation in 1975, Title IX regulations have provided that job discrimination on the basis of sex was covered by Title IX's prohibitions against sex discrimination by education institutions.[178] Although a Supreme Court decision on precisely this point was anticipated within

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[174] Id. at 0822.

[175] Id. at 0822.

[176] Id. at 0823.

[177] Id. at 0824.

[178] *See* 34 CFR 106.51-61 (1975). These Title IX regulations were issued when Casper Weinberger was Secretary of Health, Education and Welfare.

the next term, Judge Thomas announced in July of 1981 that the Department was planning a change in rules to exclude employment from the scope of Title IX.[179] Following this announcement, the Department sought permission from the Justice Department to repeal the existing regulations, which would effectively have reversed the government's position in litigation before the Supreme Court urging that employees were protected under Title IX.[180] However, the Justice Department refused, and the Education Department's position on this matter was subsequently repudiated by the Supreme Court. In North Haven Board of Education v. Bell,[181] the Supreme Court held that Title IX covers employment discrimination.

Judge Thomas took a similar position on Section 504, by putting "holds" on Section 504 employment cases. Assistant Attorney General William Bradford Reynolds questioned "the propriety of refusing to process" the Section 504 employment discrimination complaints in areas of the country not affected by contrary judicial orders.[182] He requested that Judge Thomas "direct OCR to begin accepting, investigating and, where appropriate, remedying those complaints."[183] Judge Thomas rejected Reynolds' recommendation, however, and continued the policy of not enforcing the law in

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[179] *See* UPI Release, July 13, 1981; UPI Release, August 4, 1981. The proposed policy would have protected employees only insofar as the discrimination against then was proved to cause discrimination against students, or if the federal funding was not for general educational purposes, but for the purpose of providing employment.

[180] *See* BNA DAILY LABOR REPORT, Aug. 5, 1981, at p. A-5 (reprint of letter of July 27, 1981).

[181] 456 U.S. 512 (1982).

[182] Letter to Clarence Thomas from Assistant Attorney General Reynolds (Apr. 9, 1982).

[183] Id.

this area.[184] In Consolidated Rail Corp. v. Darrone,[185] the Court held that Section 504 prohibits employment discrimination, again rejecting the narrow position Judge Thomas followed.

3. Judge Thomas Instituted Policies That Reduced Remedies to Victims of Educational Discrimination, Including Individual Victims of Intentional Discrimination.

The Early Complaint Resolution (ECR) procedure, implemented during Judge Thomas's tenure at OCR, involved seeking settlements in individual cases before an investigation would be undertaken. In November, 1981, the Justice Department notified OCR of its "major concern" that the ECR procedure does:

> not require that the agreements reached between a complainant and recipient meet the legal standards set by Title VI, Title IX, Section 504 and your implementing regulations. The apparent willingness of OCR to accept any agreement which results in a withdrawn complaint, regardless of the substance of that agreement, could lead to a weakening of your enforcement posture and our litigation position.[186]

Judge Thomas, however, declined to alter the procedure, which the House Committee on Government Operations eventually concluded "may be illegal, may not protect the rights of complainants, and may jeopardize future litigation involving violations of civil rights laws."[187]

Also during Judge Thomas's tenure, OCR began a policy of accepting promises of remedial action, rather than actual compliance by the institution accused of violating civil rights laws, as sufficient settlement of cases prior to the issuance of a Letter of Finding. In such cases, the Letter of

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[184] Letter to Reynolds from Clarence Thomas (Apr. 31, 1982).

[185] 465 U.S. 624, 632-33 (1984).

[186] Letter from Stewart B. Oneglia, Civil Rights Division, Department of Justice to Kristine M. Marcy, Office of Civil Rights (Nov. 13, 1981).

[187] House Committee on Government Operations, Investigation of Civil Rights Enforcement by the Office for Civil Rights at the Department of Education, 99th Cong., 1st Sess. 27 (1985).

Finding would indicate that any violation had been corrected.[188] In practice, the institutions' assurances often involved vague or inadequate promises of remedial action; in addition, OCR did little or nothing to monitor whether the institution actually undertook the promised action.[189] The practical effect of this policy was to diminish enforcement of laws protecting the rights of and remedies received by women, minorities, and persons with disabilities in education.[190]

Judge Thomas's exceedingly limited view of federal civil rights enforcement is effectively summarized in an OCR budget document advocating a dramatically diminished federal role in civil rights enforcement. Judge Thomas proposed, among other things:

> reviewing the desirability of OCR investigating every complaint over which it has jurisdiction; . . . reviewing the procedure of allowing recipients to assess their own compliance prior to an OCR compliance review; reviewing the procedure of having community groups rather than the Federal government monitor the implementation of remedial plans.[191]

And he concluded, "I can foresee the time when OCR, instead of automatically conducting a compliance review when a serious civil rights violation becomes apparent, would require the institution to conduct a self-assessment of its compliance status."[192]

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[188] Memorandum to Regional Directors from Michael A. Middleton (Oct. 19, 1981).

[189] *See* Civil Rights Enforcement in the Department of Education: Hearing before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 97th Cong., 2d Sess. 36-38, 63 (1982) [hereinafter "House Education Enforcement Hearings"]; House Committee on Education and Labor, Report on the Investigation of the Civil Rights Enforcement Activities of the Office for Civil Rights, U.S. Department of Educ., 100th Cong., 2d Sess. 2, 3, 21 (1988) [hereinafter "House Majority Staff OCR Report"]; CIVIL RIGHTS LEADERSHIP CONFERENCE FUND, AN OATH BETRAYED: THE REAGAN ADMINISTRATION'S CIVIL RIGHTS ENFORCEMENT RECORD IN EDUCATION 25-26 (1983).

[190] House Majority Staff OCR Report, *supra* at 2.

[191] OCR Budget Document 2 (July 29, 1981) (discussing appropriate staff and funding levels for FY 1983) (Assistant Secretary Memorandum). In fact, in justifying its budget request, the purpose stated was to "facilitate getting the Department out from under the scrutiny of the judicial branch [presumably referring to the Adams and WEAL cases] and refocus its enforcement activities to assistance." Id. at 7.

[192] OCR Budget Document, *supra*, (Talking Points) at 5.

These suggestions of reliance on community groups and self-assessment to assure compliance with the civil rights laws fly in the face of the very raison d'etre of federal civil rights enforcement.

4. Judge Thomas's OCR Challenged Title IX's Protection Against Nonintentional, but Pervasive Discrimination Against Girls and Women.

Title IX regulations, since their promulgation in 1975, have prohibited practices which are intentionally discriminatory, and those which, although not necessarily by design, have an unfair discriminatory impact against girls and women in education.[193] Title IX protection against practices with discriminatory impact on the basis of sex is of great importance in opening educational opportunities to women young and old.

For example, young women have been hurt by improper uses of SAT tests - which are designed to predict first year college grades. While women's grades are higher than their male colleagues, since 1972 women have scored lower than men in the verbal and math sections of the SAT.[194] When SAT scores are rigidly used, young women can be denied scholarships, admission to schools or educational programs, and a host of other educational benefits. Relying on the Title IX adverse impact regulations, a court recently violated a New York state program for awarding college ...ips to high school students, because it improperly relied on the SAT to the detriment of many deserving young women.[195]

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[193] For example, the regulations addressing admissions, employment, counseling and vocational education covers practices which have an adverse effect based on sex. 34 C.F.R. §106.21(b)(2)(1990); 34 C.F.R. §106.52(1990); 34 C.F.R. §§106.36(b) and (c)(1990); 34 C.F.R. Part 100, App. B, IV, K (1990).

[194] P. ROSSER, THE SAT GENDER GAP: IDENTIFYING THE CAUSES 22 (1989).

[195] Sharif v. New York State Educ. Dept., 709 F. Supp. 345 (S.D.N.Y. 1989). Using this unfair system, 60% of its Regents Scholarships and over 70% of its Empire State Scholarships went to young men. 709 F. Supp. at 355.

With Judge Thomas at the helm, OCR began to undercut the Title IX prohibition against adverse impact discrimination. For example, in the area of sex discrimination in athletics, OCR sent a letter of findings that despite the fact that the female athletic program did not give its athletes honors given to the male athletes, there was no violation of Title IX[196] because it was not done for a "sexually discriminatory purpose." In 1982, the National Women's Law Center testified before the House Subcommittee on Civil and Constitutional Rights, expressed its concern about the use of an intent standard, and stated that "[i]t and is not uncommon to read Letters of Findings from OCR which articulate legal standards which are the reverse of those required by the statute and regulations."[197]

The OCR budget document for FY 1983 prepared while Judge Thomas was at OCR, in addition to the changes in enforcement strategies discussed above, also suggests that OCR will be considering "reviewing all policies and regulations for appropriateness" and that "compliance review activities will be targeted exclusively at the comparatively small number of recipients which seem to knowingly and severely violate major civil rights guarantees."[198] The process began while Judge Thomas was at OCR ultimately led to a situation after his departure in which:

> "The National Office made it virtually impossible to find a violation of the civil rights laws because the standard of proof required to establish a violation was the stringent "intent" standard, which many regional office staff interviewed believed was not required by the courts.[199]

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[196] August 31, 1981 OCR Letter of Findings, Simms Independent School District.

[197] House Education Enforcement Hearings, *supra* at 31-32.

[198] OCR Budget Document, *supra* at 2, emphasis added

[199] Majority Staff OCR Report, *supra* at 5.

In short, while at OCR, Judge Thomas presided over the beginning of serious cutbacks in the enforcement and interpretation of Title IX and the other statutes prohibiting discrimination in education. This disturbing trend continued over the time he was at the head of the EEOC.

B. Judge Thomas Undercut the Laws Prohibiting Employment Discrimination as Chair of the Equal Employment Opportunity Commission.

Judge Thomas's efforts to cut back on enforcement and limit the scope of anti-discrimination laws that began during his short tenure as head of OCR, continued with great force over the eight years he served as Chair of the EEOC. Those years were marked by restrictive EEOC interpretations of employment protections, whether intentional discrimination or practices with discriminatory impact were at stake, whether individuals or large classes of victims of discrimination were injured, and whether the issues were novel or settled.

1. Judge Thomas's EEOC Tolerated Employer Policies Intentionally Barring Women of Child-Bearing Years From Jobs.

Just last term, a unanimous Supreme Court held in United Auto Workers v. Johnson Controls, Inc.,[200] that policies that exclude all fertile women from certain jobs, ostensibly to reduce perceived risks to fetal health from exposure to workplace hazards, can be an intentional violation of Title VII. These policies typically prohibit all women between 16 and 50 who are unable to prove their sterility from jobs that, according to the employer, pose reproductive risks. The policies apply only to women, despite the fact that workplace hazards can pose risks to all adult workers, and can cause fetal harm by paternal exposure prior to conception through reproductive or genetic damage.[201] As many as 20 million jobs in the United States expose workers to reproductive or fetal

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[200] 111 S.Ct. 1196 (1991).

[201] House Committee on Education and Labor, A Report on the EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s, 101st Cong., 2nd Sess. 6-7 (April 1990) [hereinafter "House Fetal Protection Report"]. This Report, issued in April of 1990, by the Majority Staff of the Committee, strongly criticizes the Commission for its inaction on this issue during the Judge Thomas' tenure.

health hazards,[202] making the stakes of "fetal protection" policies for women's employment very high. So, too, these policies coerce women into becoming sterilized in order to keep jobs that they desperately need to support themselves and their families.[203] By excluding women as a class from entire job categories, these policies constitute blatant and intentional sex discrimination in employment, and therefore fall squarely within the jurisdiction of the EEOC.

During Judge Thomas's tenure at the EEOC, virtually no women who filed complaints with the EEOC alleging this blatant form of discrimination received any help from the agency in handling their complaints.[204] Until 1988, the EEOC did not develop guidelines for reviewing fetal protection policies, in spite of repeated calls to do so and a mounting number of sex discrimination complaints filed by women over the issue. While the EEOC supposedly followed a "case by case" approach to complaints filed by women who were turned away from jobs as a result of fetal protection policies,[205] in fact EEOC staff were told to forward complaints to the agency's Office of Legal

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[202] Id. at 2.

[203] Five female employees of the American Cyanamid Company were irreversibly sterilized by tubal ligations in order to keep jobs requiring exposure to lead after the Company passed a fetal protection policy. One year later, American Cyanamid shut down the plant where the women worked. Id. at 5.

[204] Id. at 16.

[205] In 1978, the EEOC issued a policy statement indicating its concern about the legality of fetal protection policies that exclude women from jobs based on gender. In 1980, the EEOC issued proposed interpretive guidelines on the issue of employment discrimination and reproductive hazards. After widespread controversy over the proposals, the EEOC withdrew the guidelines with a statement that "the most appropriate method of eliminating employment discrimination in the work place where there is potential exposure to reproductive hazards is through investigation and enforcement of the law on a case by case basis, rather than by the issuance of interpretive guidelines." 46 Fed. Reg. 3916 (Jan. 16, 1981); House Fetal Protection Report, *supra* 37, at 14.

Counsel, which in turn was instructed to do nothing with them. Over 100 of these claims were simply "warehoused."[206]

When EEOC did develop a policy, the approach taken was far less protective of women's employment rights than the position ultimately adopted by the Supreme Court in Johnson. Under Chairman Thomas, the EEOC first took a position as a participant in several important federal court cases addressing the issue. In Wright v. Olin Corporation,[207] the agency argued that Olin's fetal protection policy constituted facial discrimination in express violation of Title VII, but also took the unprecedented position that although none was present in the case, a "legitimate business interest" might justify the policy in some cases.[208] The EEOC position was unprecedented for the only Title VII statutory defense to facial sex discrimination which had ever applied was the far more narrow

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[206] Id. at 16. An unsuccessful effort was made to provide guidance to field investigations in the EEOC compliance manual. However, according to the House Fetal Protection Report:

> in the final drafting stages, a disclaimer was added to the Compliance Manual Section at the request of EEOC Chairman Clarence Thomas. The disclaimer reflected the EEOC's effort to duck the fetal protection issue: 'The Commission has not yet decided whether such a policy or practice can lead to or be a violation of Title VII, or how the theories of disparate treatment and adverse impact should be applied.' Although this language was not included in the final version, the Chairman's request for such a disclaimer suggests at a minimum that he approved of the EEOC's default on this issue.
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> Chairman Thomas' desire that the Compliance Manual Section reflect the Commission's neutrality on the fetal protection issue was ultimately satisfied by the deletion of a discussion of how the facial discrimination or disparate impact theories might apply to such policies.

Id. at 15.

[207] 697 F.2d 1172 (4th Cir. 1982).

[208] House Fetal Protection Report, *supra* at 20-21.

bona fide occupational qualification ("BFOQ") defense.[209] The Wright court followed the EEOC position. In Hayes v. Shelby Memorial Hospital,[210] the EEOC again urged the court to move from the stringent "BFOQ" defense, and adopt the looser standard it had advanced which was adopted by the court in Wright.[211] The Hayes court agreed to the lower business necessity standard.

In 1988, the EEOC finally issued interpretive guidelines on the applicability of Title VII to fetal protection policies. The 1988 policy guidance adopted the analysis of Wright and Hayes:

> [P]olicies which exclude only women constitute per se violations of the Act. Although the BFOQ defense is normally the only available defense in the case of overt discrimination the Commission follows the lead of [Wright and Hayes] that the business necessity defense applies to these cases.[212]

These guidelines are in sharp contrast to the approach taken by the majority in Johnson Controls.[213] In this landmark decision, the Supreme Court repudiated the attempt to weaken Title VII protections for women suffering intentional sex discrimination by soundly rejecting the business necessity defense which was advanced while Clarence Thomas was at the EEOC. The Supreme Court ruled that the statutory language could not admit Judge Thomas's interpretations.

In sum, in an area of vital concern to women, with women's access to millions of jobs at stake, Judge Thomas failed to establish a policy, warehoused cases, and ultimately adopted a policy that directly contradicts the clear statutory language of Title VII as interpreted by the Supreme Court last term. As the House Report noted, in 1990, the EEOC took its most forceful stand up to that

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[209] Id. at 21.

[210] 546 F. Supp. 259 (N.D. Ala. 1982).

[211] House Fetal Protection Report, *supra* at 21.

[212] *EEOC Policy Guidance on Reproductive and Fetal Hazards*, BNA DAILY LABOR REPORT Oct. 5, 1988) at D-1.

[213] 111 S.Ct. 1196 (1991).

point in condemning the lower court decision in Johnson Controls which had upheld the fetal protection policy.[214] This EEOC stand came after Judge Thomas left the agency.

2. Judge Thomas's EEOC Reduced Its Efforts to Protect Women Suffering Intentional Pay Discrimination.

The EEOC is responsible for enforcing the two major laws that prohibit discrimination in pay on the basis of sex: the Equal Pay Act of 1963[215] and Title VII of the Civil Rights Act of 1964.[216] While under the Equal Pay Act, the jobs being compared for purposes of determining whether a pay discrimination exists must be the same or substantially so, the Supreme Court in County of Washington, Oregon v. Gunther held that Title VII also prohibits employers from intentionally segregating even very different jobs according to sex and then depressing the wages of the jobs held predominantly by women.[217] The Court noted, however, that it was not ruling on the issue of "comparable worth," where purposeful pay discrimination was not an issue, but where traditionally "female" jobs paid less than those held by men. The Court left open the question of whether a Title VII violation could apply when women's wage rates were not intentionally reduced on account of sex, but where the lower pay could not be justified on the basis of nondiscriminatory factors such as relative skill, difficulty or importance of the jobs in question.

On May 22, 1984, the House Committee on Government Operations submitted a report entitled Pay Equity: EEOC's Handling of Sex-Based Wage Discrimination Complaints.[218] The Committee made a series of findings extremely critical of EEOC and Judge Thomas as its chair.

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[214] House Fetal Protection Report, *supra* at 29.

[215] 29 U.S.C. § 206(d) et seq (1978).

[216] 42 U.S.C. 2000 et seq.

[217] 42 U.S. 161 (1981).

[218] 98th Cong., 2d Sess. (1984).

First, the Committee found that the EEOC had taken no action on charges and cases of sex-based wage discrimination, other than straight Equal Pay Act cases, since the June 1981 Gunther decision. At the time of the report, EEOC had no policy on handling these types of cases, yet the Commission believed it needed to adopt such a policy before any charges could be processed. The Committee found the need for a policy questionable, since the issue was simply one of implementing the Gunther decision. By its insistence on a policy in this area prior to taking action and then refusing to adopt a policy, the EEOC had denied relief to victims of intentional pay discrimination and failed to provide guidance for the courts and employers.[219]

Second, the Committee determined that there were over 250 sex-based wage discrimination charges, some dating from 1974, languishing in EEOC's Washington office. These claims were all in areas outside the limited Equal Pay Act criteria of identical or substantially similar jobs and therefore were not covered by EEOC policy, but could violate Title VII under Gunther.[220]

Third, the Committee recognized that in May, 1984, the EEOC adopted a Compliance Manual Section on Wage Discrimination, but believed that the adoption came only as a result of the Committee's investigation and hearings and public attention to EEOC's lack of activity in the wage discrimination area. Further, the EEOC hastily formed a task force to examine the more than 250 pending charges, again, according to the Committee, in response to its investigation.[221]

When the EEOC finally began to handle cases, its long-awaited policy simply tracked the specific Gunther ruling, and gave no additional guidance or explication of issues left open by the Court. The EEOC's policy, issued four years after the Gunther decision, merely reiterated the Gunther finding that Title VII does not bar claims of sex-based wage discrimination merely because

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[219] Id. at 3-4.

[220] Id. at 4.

[221] Id. at 4.

the jobs involved are not identical.[222] According to one report, a draft decision had been approved by the four other EEOC commissioners a week before the final June 17, 1985, release of the final policy, but Clarence Thomas wanted a more restrictive position than called for in the draft decision.[223] As a result, the policy was revised to simply restate the Gunther holding, adding no new guidance. Moreover, the EEOC not only refused to consider other types of pay discrimination claims where no intentional discrimination was alleged -- the issue left open in Gunther -- but even refused to investigate the pending charges it had received which did not explicitly allege intentional discrimination to determine if intentional discrimination was present.[224] In sum, then-Commissioner Thomas warehoused over 250 claims for more than three years in order to develop a policy, which once developed, only reiterated Supreme Court case law. Moreover, the ultimate policy adopted interpreted the issue left open by the Supreme Court of Title VII protection for nonintentional pay discrimination adversely to the interests of women.

Moreover, the EEOC's lack of attention to pay discrimination of the type prohibited in Gunther was not accompanied by any increased attention to traditional Equal Pay Act cases. Even straightforward Equal Pay Act claims, where a woman is paid less for virtually the identical job held by a man, did not fare well during Judge Thomas's tenure at the EEOC. In fact, the number of cases brought by the EEOC under the Equal Pay Act during Judge Thomas's tenure dropped noticeably from the number brought in FY 1980, the year before he arrived.[225]

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[222] Equal Employment Opportunity Commission Update: Policies on Pay Equity and Title VII Enforcement: Hearing Before A Subcommittee of the House Comm. on Government Operations, 99th Cong., 1st Sess., 69 (1985) (testimony of Clarence Thomas) [hereinafter "Pay Equity House Hearing"].

[223] *Consensus on Comparable Worth Difficult to Find at EEOC*, BNA GOVERNMENT EMPLOYEE RELATIONS REPORT, June 17, 1985 at 867.

[224] *See* Pay Equity House Hearing, *supra, at 16-20* (testimony of Winn Newman).

[225] WOMEN EMPLOYED INSTITUTE, EEOC ENFORCEMENT STATISTICS (1991).

3. Judge Thomas's EEOC Failed To Enforce Affirmative Action Approved By The Supreme Court As A Remedy For Intentional As Well As Nonintentional Discrimination.

During Judge Thomas's tenure at the EEOC, his view on the appropriateness of affirmative action to remedy the effects of discrimination against women and minorities seemed to evolve. He began his tenure articulating some support for such remedies,[226] but moved to consistent, strong and vocal opposition, even to those remedies explicitly approved by the Supreme Court.

The importance of affirmative action to women is highlighted by the Supreme Court case, Johnson v. Santa Clara County.[227] Johnson dealt with an all-too-common situation, the total absence of any women in well-paid, but traditionally male jobs. The job in this case was road dispatcher in Santa Clara County, California. Concerned that it had never employed any women in this position,[228] the County voluntarily reviewed its employment practices. Determining that a female employee of the County for nine years was rated well qualified for the job, the County promoted her to a road dispatcher job over a white male who had a similar rating. The white male, who had scored 75 points to the female candidate's 73 points in an oral interview, sued claiming reverse discrimination.[229] The Supreme Court upheld the County's action as entirely consistent with Title VII.

Judge Thomas forcefully criticized the decision, embracing Justice Scalia's dissent and stating his hope that it would "provide guidance for lower courts and a possible majority in future

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[226] *See, e.g.*, BNA DAILY LABOR REPORT, July 22, 1982.

[227] 480 U.S. 616 (1987).

[228] In fact, of the 238 skilled craft worker positions in the County, none were held by women. 480 U.S. at 621.

[229] 480 U.S. at 624-25.

decisions."[230] Yet, Justice Scalia's opinion was a broadside attack on Title VII Supreme Court case law. Justice O'Connor, in her concurring opinion in Johnson, stated that "Justice Scalia's dissent rejects the Court's precedents and addresses the question of how Title VII should be interpreted as if the Court were writing on a clear slate."[231]

In fact, Judge Thomas has repeatedly criticized Supreme Court precedent, giving rise to serious concern that he, like Justice Scalia whom he has praised, would ignore the principle of stare decisis and disregard or overturn settled Supreme Court cases which have set boundaries for affirmative action under Title VII.[232]

Judge Thomas's aversion to Supreme Court interpretations of Title VII was reflected in his reluctance to enforce the law's mandate as Chair of the EEOC. In 1985, the EEOC acting general counsel, with Judge Thomas's knowledge, ordered EEOC regional attorneys to avoid the use of goals and timetables in any settlements or actions in which EEOC was involved, and to halt enforcement of goals and timetables in any ongoing consent decrees.[233] It was not until his reconfirmation hearings as Chair of the EEOC in 1986 that he promised to withdraw the EEOC ban on the use of goals and

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[230] Speech by Clarence Thomas to the Cato Institute 20-22 (Apr. 23, 1987).

[231] 480 U.S. at 646 (O'Connor, J., concurring).

[232] Judge Thomas has criticized United Steel Workers v. Weber, 443 U.S. 193 (1979) (allowing private employers to engage in voluntary affirmative action); Fullilove v. Klutznick, allowing Congress to remedy past-discrimination by statute). See "Principle Versus Interest" at 395. He also criticized Local 28 Sheet Metal Workers International Association v. EEOC, 478 U.S. 421 (1986) (allowing court-ordered affirmative action to remedy proven discrimination); Firefighters v. Cleveland, 478 U.S. 501 (1986) (allowing affirmative action in consent decrees); and United States v. Paradise, 480 U.S. 149 (1987) (allowing court-ordered affirmative action remedy). Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!* 5 YALE L. AND POL. REV. 402, 407 n.2 (1987).

[233] Equal Employment Opportunity Commission Policies Regarding Goals and Timetables in Litigation Remedies: Hearing Before the Subcomm. on Employment Opportunities of the House Education and Labor Committee 99th Cong., 2nd Sess., 3-4 (1986); 24 BNA GOVERNMENT EMPLOYEES RELATION REPORT, June 2, 1986, at 764. Judge Thomas misread Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) as justification for this position.

timetables as a remedy.[234] He only did so in recognition of explicit Supreme Court cases decided in 1986 reaffirming the appropriateness of goals and timetables, not because he agreed with the decisions. Rather, Judge Thomas is quoted as saying "That's the law of the land whether I like it or not."[235]

4. Judge Thomas Reduced EEOC's Use of Class Action Cases Protecting Many Women from Intentional Discrimination While Doing Little to Help Individual Women's Cases.

As Chair of the EEOC, Judge Thomas made no secret of his strong preference that the EEOC bring cases on behalf of individuals, rather than the more broad-based class action suits that are designed to benefit large numbers of employees. According to the Washington Post:

> The Reagan-run EEOC has announced its intention to move away from class-action suits on employment discrimination in favor of smaller, individual suits for persons who can prove that they, specifically, were victims of bias.[236]

Judge Thomas indicated his agreement with this new focus. The New York Times reported that Judge Thomas wanted to move toward a policy of bringing cases where an individual could testify about "what happened to me."[237]

The results of the policy were predictable: the ability of the agency to remedy discrimination against large numbers of women was severely reduced. A good example of the policy's impact is the recent, widely publicized $66 million settlement on behalf of 13,000 women in a case brought by EEOC in 1978 against Western Electric. The company had a policy forcing pregnant women who

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[234] TIME, Aug. 4, 1986.

[235] Nomination of Clarence Thomas of Missouri to be Chairman of the Equal Employment Opportunity Commission: Hearing Before the Senate Comm. on [illegible] and Human Resources, 99th Cong. 2d Sess. (1986) (Statement of Clarence Thomas, Chairman, EEOC).

[236] Wash. Post, July 9, 1985.

[237] N.Y. Times, Dec. 3, 1984.

were willing and able to work to take unpaid leave at the end of their sixth or seventh month of pregnancy, then limiting their seniority benefits and offering no guarantee of a job when they sought to return.[238] In abandoning these kinds of class action cases, which remedied intentional discrimination against thousands of women, Judge Thomas's EEOC did not substitute 13,000 individual cases vindicating the rights of these women. In fact, during his tenure at the EEOC, there was only a small increase in the number of individual cases brought, while the number of class action cases dropped substantially.[239] A significant net reduction in EEOC effectiveness resulted.

Moreover, the way in which the EEOC handled individual cases has been faulted. The General Accounting Office (GAO) concluded that the EEOC routinely closed cases without adequate investigations.[240] The bottom line was that the percentage of individuals filing claims of discrimination who got no relief jumped from 28.5% in FY 1980 to 54.2% in FY 1989.[241]

Nowhere is the damage done to individual victims of discrimination more stark than in EEOC's handling of age discrimination cases. During Judge Thomas's tenure, thousands of charges filed by older workers were ignored, and the two-year statute of limitations ran, thereby causing these workers to lose their right to pursue their claims in court. Congress enacted the Age Discrimination Claims Assistance Act to extend the period of time for filing temporarily, so that these cases could be

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[238] N.Y. Times, July 18, 1991.

[239] In FY 1980, the EEOC filed 218 class action cases. In the last year of Judge Thomas' tenure at EEOC, FY 1989, the EEOC filed only 129 such cases. In FY 1980 the EEOC filed 326 cases in total (108 individual) as compared to 486 (357 individual) in FY 1989. WOMEN EMPLOYED INSTITUTE, EEOC ENFORCEMENT STATISTICS (1991). Therefore, the increase in individual cases brought by the EEOC (249) would have a negligible effect as compared to one Western Electric type of case.

[240] GAO reviewed six EEOC district offices and five state agencies during the period January to March, 1987, and concluded that 41% to 82% of the charges closed by the EEOC offices were not fully investigated. GAO, EQUAL EMPLOYMENT OPPORTUNITY: EEOC AND STATE AGENCIES DID NOT FULLY INVESTIGATE DISCRIMINATION CHARGES 3 (1988).

[241] WOMEN EMPLOYED INSTITUTE, EEOC ENFORCEMENT STATISTICS (1991).

brought. Even after the law was passed, however, Judge Thomas's EEOC allowed thousands of additional claims that were filed after the law's effective date to lapse.[242] Judge Thomas's rationale that older workers facing age discrimination still had state law claims fails to address the serious adverse consequences of losing EEOC enforcement and access to the federal courts.[243]

Although the EEOC under Judge Thomas supported the rights of older women workers in several cases involving sex discrimination in retirement benefits,[244] the EEOC also failed to secure benefits to which older workers were entitled. For example, despite an EEOC policy determination that regulations allowing employers to stop paying into employer pension accounts when they reached the age of 65 violated the ADEA, the EEOC did not rescind the regulations.[245] Even cases of intentional facial discrimination against older workers were left unremedied during Judge Thomas's tenure at the EEOC.

5. Judge Thomas Challenged Title VII's Protection Against Nonintentional, but Pervasive Discrimination Against Women.

Twenty years ago, the Supreme Court established in Griggs v. Duke Power Co.,[246] that Title VII prohibits unjustified employment policies that have discriminatory impact against women or minorities, whether intended to have such adverse impact or not. While in 1983 Judge Thomas

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[242] Court of Appeals Hearing, *supra* at 189-90 (1990).

[243] Id. at 190-91.

[244] Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983); Spirt v. Teachers Ins. & Annuity Ass'n, 735 F.2d 23 (1984).

[245] Court of Appeals Hearing, *supra* at 185-87.

[246] 401 U.S. 424 (1971).

indicated approval of Griggs,[247] his later comments explicitly rejected this seminal Supreme Court decision's basic holding on adverse impact. Judge Thomas said:

> We have unfortunately permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories and procedures such as adverse impact . . . We have locked amorphous, complex, and sometimes unexplainable social phenomena into legal theories that sound good to the public, please lawyers, and fit legal precedents, but make no sense. If I have my way, we will have the legal theories conform to reality as opposed to reality being made to conform to legal theories.[248]

This hostility to Title VII protection for practices which may seem fair on their face, but actually adversely affect women or minorities, is reflected in Judge Thomas's criticisms of reliance on statistics which demonstrate such adverse impact. His controversial handling of the Sears case[249] demonstrates the difficulties his approach caused in eliminating discrimination against women in the workplace.

The case began in the Nixon Administration with the filing of an EEOC Commissioner's charge in 1973.[250] In 1979, the EEOC filed a lawsuit that included claims that Sears segregated its female employees into low-paying noncommission sales while men were in high-paying commission sales jobs.[251] The segregation of Sears's workforce resulted in a tremendous disparity between the

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[247] Speech by Clarence Thomas to American Society of Personnel Administrators 8-10 (Mar. 17, 1983).

[248] Speech by Clarence Thomas to the Cascade Employers Association 18 (Mar. 13, 1985); *see also* Speech by Clarence Thomas at EEO Law Seminar 18 (May 2, 1985); Thomas, *The Equal Employment Opportunity Commission: Reflections on a New Philosophy*, 15 STETSON L. REV. 29, 35-36 (1985).

[249] EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986).

[250] 628 F. Supp. at 1278.

[251] 628 F. Supp. at 1289.

pay scales of its male and female employees, and the purpose of the suit was to open Sears's higher-paying jobs to women.

As Chair of the EEOC, Judge Thomas openly criticized his own agency's case against Sears while it was pending in court. For example, his criticisms were reported in the New York Times:

> [Thomas] said the agency had relied too heavily on statistics in investigations initiated by the commission itself and in its review of complaints filed by individuals. For example, he said, a case filed by the commission in 1979 against Sears, Roebuck & Company, still pending in a Federal court, 'relies almost exclusively on statistics' to show discrimination against women.[252]

The Washington Post quoted Thomas as saying, "I've been trying to get out of this [case] since I've been here [at the EEOC]."[253]

Judge Thomas's main criticism of the case was its reliance on statistics. He stated in a congressional hearing that the EEOC had relied too much on statistical disparities:

> I, personally, have problems with cases that rely exclusively on statistics.... I did not say that statistics were not useful. In my opinion at least, we should not rely solely on statistics to process cases.[254]

A New York Times, article explained that Thomas believes that statistical disparities can often be explained by cultural and educational differences.[255]

The press even reported that EEOC officials hoped to lose the case. The Washington Post reported that "administration officials privately make little secret of their desire to lose the case, and lose it in a way that would explode any chance for future EEOC officials to bring class-action suits on

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[252] N.Y. Times, Dec. 3, 1984.

[253] Wash. Post, July 9, 1985.

[254] Hearing Before the Subcomm. of Employment Opportunities of the House Comm. on Education and Labor, 98th Cong., 2d Sess., 11-12 (1984). Judge Thomas also criticized the Sears case for its cost, calling it "an albatross around our neck," GOVERNMENT EMPLOYEE RELATIONS REPORT, June 17, 1985.

[255] N.Y. Times, Dec. 3, 1984.

the basis of statistics."[256] That article quoted an unnamed "high-ranking Justice Department official who has followed the Sears case, but who refused to be quoted publicly," who described the Sears case as "a 'straw man we would like to have beat to death to prevent future class-action cases' by the government."[257] The Nation reported that "Administration officials have made it clear they'd like to lose the case to discourage EEOC officials from bringing similar suits."[258] Another news article reported that "[t]he EEOC under President Reagan was only halfheartedly pursuing the Sears case."[259]

Judge Thomas was widely criticized for his public statements about the Sears case. Judge Thomas was asked by Rep. Augustus F. Hawkins (D.-Calif.), Chairman of the House Subcommittee on Employment Opportunities, during a congressional hearing, "Do you think it is appropriate for you, as Chairman of the Commission, or for the other Commissioners, to be criticizing the Commission's own case while the case is still before the Court?"[260] Judge Thomas responded:

> I did not say that the Sears case was not a winable case or a defensible case. I simply indicated that it was a case that relies exclusively on statistics. I, personally, have problems with cases that rely exclusively on statistics.[261]

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[256] Wash. Post, July 9, 1985.

[257] Id.

[258] THE NATION, Sept. 7, 1985.

[259] INDUSTRY WEEK, Feb. 17, 1986.

[260] Oversight Hearings on the EEOC's Enforcement Policies: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 98th Cong., 2d Sess. 11 (1984).

[261] Id. If Judge Thomas were considered part of the EEOC legal team, he would have breached his ethical obligations as a lawyer by criticizing the case publicly. Disciplinary Rule 7-107(G) of the ABA Model Code of Professional Responsibility provides:

> A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation

Sears lawyers were impressed enough with the helpfulness of his statements to their case that they attempted to subpoena him to testify at the trial.[262]

In fact, EEOC did lose the Sears case, and never appealed. The trial judge criticized the agency for not calling any individual witnesses, claimed its statistics were faulty and otherwise asserted that the EEOC failed to present its case adequately.[263] The quoted hopes of some government officials that EEOC lose the Sears case and no longer bring cases affecting such large numbers of women were realized.

CONCLUSION

Judge Thomas's record includes his actions as chief enforcer of the nation's primary laws prohibiting discrimination in employment and education and a body of speeches, interviews and writings. When looked at as a whole, it is not a record in which a commitment to core constitutional or statutory protections for women emerges. Instead, the overarching constitutional philosophy of national law which Judge Thomas has articulated is at odds with equal protection and privacy rights for women. His actions as head of OCR and EEOC give no comfort that this philosophy will bend to

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> from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to: . . . (4) His opinion as to the merits of the claim or defenses of a party, except as required by law or administrative rule. (5) Any other matter reasonably likely to interfere with a fair trial of the action.

Model Code of Professional Responsibility DR 7-107(G), in American Bar Association, (MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT) 38 (1982). The Disciplinary Rules are the most stringent of the provisions in the Model Code. According to the Preliminary Statement, "The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Id. at 1. This rule would prohibit Judge Thomas's statements about the Sears case if held to apply to him, for his statements about the reliance on statistics fall under his "opinion as to the merits of the claim."

[262] BNA DAILY LABOR REPORT, Dec. 7, 1984.

[263] 628 F. Supp. at 1294, 1324, 1352.

accommodate women's legal rights, under the constitution or by statute. President Bush has said that Judge Thomas is the best "man" for the job. His record to date raises concerns about the basis for that conclusion.

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