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FOR CIVIL RIGHTS UNDER LAW

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BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

September 17, 1991

TESTIMONY OF WILLIAM H. BROWN ON
NOMINATION OF JUDGE CLARENCE THOMAS

I. Introduction

My name is William H. Brown. I am a Co-Chairman of the Lawyers' Committee for Civil Rights Under Law. Dean Erwin N. Griswold and I are here today on behalf of the Lawyers' Committee. Ninety members of our Board of Trustees, and sixty-six Directors and Trustees of local Lawyers' Committees affiliated with us have submitted a Statement urging the members of this Committee to oppose Judge Clarence Thomas' appointment as an Associate Justice of the Supreme Court of the United States. We have also submitted the concurring statement of one Board member, and three dissenting statements signed by a total of eight Board members. We have submitted an updated list of signers of these statements to the Committee. In addition to our Statement, we have submitted to this Committee our Memorandum on the Nomination of Judge Clarence Thomas as an Associate Justice of the United States Supreme Court.

The Lawyers' Committee for Civil Rights Under Law is a

bipartisan legal organization established in 1963, at the request of President John F. Kennedy, to enlist the assistance of the private bar in the enforcement of civil rights. The Board of Trustees of the Lawyers' Committee is a bipartisan group of prominent American lawyers who are committed to strengthening civil rights protections where necessary and opposing measures which would unjustifiably diminish or curtail equal protection under the law. We are a diverse group, which includes liberals and conservatives, Republicans and Democrats, whites and minorities, men and women. We are bound together by our commitment to civil rights.

As a diverse group, 90 of us are united in our opposition to Judge Thomas. Although we are firm in our opposition, we did not come to this conclusion lightly. We entered into this debate with open minds, and, in fact, looked favorably upon the President's selection of a minority nominee because we believe it imperative that there be a breadth of perspectives among the members of the Supreme Court. As with any nominee, however, Judge Thomas' qualifications must be evaluated by reviewing his writings and speeches, his conduct as a public official and his testimony before this Committee.

Our Statement and our Memorandum show the care and the fairness of our review of his opinions, legal writings and speeches, of the actions which he took and the statements which he made during his tenure in the federal government. Based on these documents and on our evaluation of the testimony which he

gave during these hearings, we have concluded that Judge Thomas' appointment to the Supreme Court would be a serious threat to the civil rights of all Americans.

The evidence against Judge Thomas is compelling. We believe that there are three reasons why this nomination should be rejected.

First, Judge Thomas has rejected much of the decisional framework on which our nation's protection of civil rights is based. He has argued for a limitation of the disparate-impact principle enacted by Congress in 1964, recognized by Chief Justice Burger for a unanimous Court in Griggs v. Duke Power Co.,[1] and re-affirmed by Congress in enacting the Equal Employment Opportunity Act of 1972.[2] He has disagreed with the legal theories and evidentiary bases necessary to challenge systemic discrimination,[3] and has opposed the temporary race- and gender-conscious remedies the courts have often held to be necessary in providing effective relief for systemic discrimination.[4] Such relief is particularly necessary in the frequent situation in

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[1] 401 U.S. 424 (1971).

[2] Pub.L. 92-261, 86 Stat. 103. The significance of the Griggs decision, Judge Thomas' initial support for it, and his abrupt change of view on it after the 1984 election, are discussed in detail in the Lawyers' Committee's Memorandum at 34-47.

[3] Judge Thomas' views on the use of statistical evidence in proving discrimination are discussed in detail in the Lawyers' Committee's Memorandum at 47-51.

[4] Judge Thomas' former and present views on affirmative action, and his rationale in support of his views, are discussed in detail in the Lawyers' Committee's Memorandum at 51-76.

which it is impossible to provide purely individual remedies because the nature of the employer's discrimination has made it impossible to identify which particular black, Hispanic, Asian or woman would have been selected in the absence of discrimination. Its rejection would leave the courts without effective power to provide relief for the most serious instances of discrimination, and would leave employers powerless to undo the harm caused by their own past actions and those of others.

Second, Judge Thomas' theory of constitutional interpretation, which disregards the application of the Equal Protection Clause of the Fourteenth Amendment and rejects the concept of group violations, would make it impossible effectively to end systemic discrimination. For example, he has criticized the unanimous decision in Green v. County School Board of New Kent County,[5] and subsequent Supreme Court school desegregation decisions enforcing Brown v. Board of Education that compelled the dismantling of state-created segregated school systems.[6] He has thus disavowed a reading of the Constitution that would deny the Supreme Court, and the Congress, the authority to dismantle state-created segregated institutions. In the absence of a restructuring of long-segregated school systems and a view of the Constitution that insists that only individual liberties are

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[5] 391 U.S. 430 (1968).

[6] Clarence Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, in Assessing the Reagan Years 393 (D. Boaz, editor) [hereinafter Civil Rights as a Principle].

protected, the black school children in Green would still have only an individual choice between a segregated white school and a black school. Judge Thomas' theory of constitutional interpretation will be discussed by Dean Griswold.

Third, in evaluating any judicial nomination, we must consider whether the nominee's overall legal philosophy, if adopted generally by the courts, provides meaningful protection for the civil rights of minorities and women. We accept that a nominee may differ with us on particular issues. We attach great weight, however, to adherence to the principle of legally enforceable equality of opportunity, and to the degree of thought and understanding the nominee brings to the resolution of these issues. Regrettably, we have not found the depth of analysis we must expect -- and the nation should require -- of any nominee for the Supreme Court, especially one who proposes the rejection of the hard-won legal foundation for established protections for equality.

In this regard, it is not enough that the nominee has repudiated before this Committee so much of the thought and conclusions to which he laid claim prior to his nomination. Even accepting the sincerity of his repudiation, the withdrawal of his life's work of analysis and reflection leaves a void no one can fill. This Committee now has no body of work on which to base its judgment of the nominee's own judgment. In the absence of such a body of work, there is no sufficient basis upon which this Committee can make the determination which should be made before

recommending the confirmation of any nominee: that the quality, depth and breadth of the nominee's analysis would serve the Court and the country well in resolving the most important questions likely to come before the Court over the next generation.

Our concerns in each of these three areas, taken alone, would likely be enough to convince us that Judge Thomas should not sit on the Supreme Court. Taken together, these concerns present very strong evidence that Judge Thomas should not be confirmed.

II. Judge Thomas' Disagreements with the Legal Theories and Evidentiary Bases Necessary to Challenge Systemic Discrimination

A nominee's awareness that there are still substantial problems of entrenched discrimination against blacks, Hispanics, other minorities, and women is likely to affect his or her understanding of the cases which come to the attention of the Court. Between 1983 and 1987, Judge Thomas' view of the breadth of discrimination seems to have narrowed substantially. In 1983, Judge Thomas recognized that discrimination was more than an isolated phenomenon, and that it could not be eradicated solely through individual remedies.[7] In a speech to personnel officials, he

[7] Judge Thomas' views of the breadth of discrimination are discussed in detail in the Lawyers' Committee's Memorandum at 22-30.

stated:[8]

> Our experience in administering fair employment laws for over the past 18 years has provided greater knowledge and understanding of the complex and pervasive manner in which employment discrimination continues to operate. Experience has taught us all that apparently neutral employment systems can still produce highly discriminatory effects. They can also perpetuate the effects of past discrimination.

In a 1987 law review article describing his disagreement with race- and gender-conscious relief, Judge Thomas argued that reliance on such relief was a natural outgrowth of an emphasis on broad challenges to employment discrimination, and stated that the EEOC was de-emphasizing such broad challenges.[9] In describing the EEOC's docket, he stated:[10]

> In addition, most of our cases involve discrimination by a particular manager or supervisor, rather than a "policy" of discrimination. Many discriminating employers first responded to Title VII by turning from explicit policies against hiring minorities and women to unstated ones. Now even such veiled policies are uncommon; discrimination is left to individual bigots in positions of authority. As a result, the discrimination that we find today more often has a narrow impact, perhaps influencing only a few hiring decisions, and does not warrant the use of a goal that will affect a great number of subsequent hires or promotions.
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> We do not know of any change in the actions of employ-

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[8] March 17, 1983 Speech by Clarence Thomas to the American Society of Personnel Administrators, p. 4 (emphasis in original) [hereinafter, "March 17, 1983 Speech to A.S.P.A."].

[9] Clarence Thomas, Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!, 5 Yale Law & Policy Review 402, 403-04 (1987) (footnote omitted) (emphasis in original) [hereinafter, "Affirmative Action Goals"].

[10] Id. at 405.

ers during the four years from 1983 to 1987 which would justify the conclusion that broad patterns of discrimination had diminished in importance, or that women and minorities faced a different kind of threat at the end of this period than they had faced at its beginning. As the 1990 and 1991 Urban Institute reports[11] show, there are still broad patterns of disparate treatment affecting numerous persons at numerous employers.

Indeed, Judge Thomas may have come to his present emphasis on individual instances of discrimination even if he were convinced of the continuing nature of broad-scale, entrenched discrimination. In his profile in The Atlantic Monthly, he seemed to agree with the author's conclusions:[12]

> If an employer over the years denies jobs to hundreds of qualified women or blacks because he does not want women or blacks working for him, Thomas is not prepared to see a "pattern and practice" of discrimination. He sees hundreds of local, individual acts of discrimination. Thomas would require every woman or black whom that employer had discriminated against to come to the government and prove his or her allegation. The burden is on the individual. The remedy is back pay and a job. "Anyone asking the government to do more is barking up the wrong tree," Thomas says.

This is a philosophy incapable of redressing patterns of discrimination. Placing repetitive burdens on victim after victim ensures that some will falter, ensures that the EEOC's resources

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[11] The Urban Institute's recent studies on disparate treatment involving matched pairs of black and white job applicants, and matched pairs of Hispanic and Anglo job applicants, are described in the Lawyers' Committee's Memorandum at 23-24.

[12] Juan Williams, A Question of Fairness, The Atlantic Monthly, February 1987, at pp. 71, 79.

would be wasted in litigating the same question over and over against the same defendant, and ensures that much of the employer's discrimination will go unremedied.

In the pivotal Supreme Court decision of Griggs v. Duke Power Co., the Supreme Court recognized the disparate-impact theory of discrimination which Congress had enacted in 1964 and upheld the EEOC Guidelines on Employee Selection Procedures.[13] The treatise on employment discrimination law most widely used by practitioners describes Griggs as "the most important court decision in employment discrimination law."[14] Judge Thomas agrees that Griggs is one of the most important cases decided in the last twenty years.[15] As a result of Griggs, the EEOC Guidelines and the successor Uniform Guidelines, many employment practices were discarded because they had excluded minorities and women without good reason from jobs they could perform well. Any substantial weakening of Griggs carries with it the risk that employers will re-adopt needlessly exclusionary practices which will stratify the workforce along racial, ethnic, and gender lines.

As Chairman of the EEOC, Judge Thomas had a responsi-

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[13] The background and context of Griggs, the decision itself, and the EEOC Guidelines and Uniform Guidelines are discussed in detail in the Lawyers' Committee's Memorandum at 34-38.

[14] Barbara Lindemann Schlei and Paul Grossman, Employment Discrimination Law (Washington, D.C., Bureau of National Affairs, 2nd ed., 1983) at 5 (footnote omitted).

[15] Testimony of Judge Clarence Thomas in response to questioning by Senator Patrick Leahy, morning of September 13, 1991.

bility to deal carefully and accurately with an issue so important. As late as 1983, Judge Thomas issued public statements which provided strong support for both the Supreme Court's decision in Griggs and the Uniform Guidelines.[16] In commenting upon the value of the Uniform Guidelines, Judge Thomas noted that they were developed as a result of "an exceedingly lengthy process" and that any "future decision to reassess these important provisions will be made with an eye to that kind of deliberate procedure".[17] He referred to the need for stability:[18]

> The policies advanced by the EEOC Guidelines on Employee Selection Procedures ... have been given the force of law; they have given rise to a measure of certainty, stability in the employment arena; setting legal standards upon which both employers and employees can rely.

He cautioned against any weakening of the Guidelines:[19]

> We are not dealing with common zoning ordinances here. Whole classes of people in this country have come to rely on the vital protection offered by measures such as these.

Despite his earlier position, Judge Thomas' publicly stated view of Griggs and the Uniform Guidelines changed abruptly after President Reagan's landslide 1984 election, without any public explanation for the shift or its timing. A few days after the re-election, he stated that he had "a lot of concern" about

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[16] March 17, 1983 Speech to American Society of Personnel Administrators, at 4. The text of the quotation is set forth in our Memorandum at 40-41.

[17] Id. at 11.

[18] Id. at 9.

[19] Id. at 11.

the Uniform Guidelines, and that there was a good possibility that there will be "significant changes".[20] Three weeks later, he began to question the validity of Griggs and the disparate impact doctrine.[21] Complaining that Griggs had been "overextended and over-applied", he seemed to suggest that Griggs be limited to unskilled laboring positions.[22] In February of 1985 he criticized Griggs and the Uniform Guidelines in the strongest possible terms, and went on to suggest that the use of statistical proof in disparate impact cases was unsound:[23]

> UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race-and sex-neutral. Operating from these premises, UGESP makes determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term "discrimination."
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> The critical point is that, although Griggs and even

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[20] Policy Changes, Aggressive Enforcement, Will Mark Next Term at EEOC, Thomas Says, BNA Daily Labor Reporter, November 15, 1984, pp. A-6, A-8.

[21] Robert Pear, Changes Weighed in Federal Rules on Discrimination, N.Y. Times, December 3, 1984, at A1. See our Memorandum at 41-43.

[22] See our Memorandum at 43-45.

[23] February 1985 Report to the Office of Management and Budget, reprinted in Regulatory Program of the United States Government (August 8, 1985) (Statement of Clarence Thomas), at 523-24, also reprinted in Oversight Hearing on EEOC's Proposed Modification of Enforcement Regulations, Including Uniform Guidelines on Employee Selection Procedures Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 1st Sess., at 127-28 (October 2, 1985).

Wards Cove agree that an exclusionary practice should not simply be assumed to be proper and that evidence to show its propriety is necessary, Judge Thomas has criticized this requirement as assuming "some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people". His reference to even this remaining common ground between Griggs and the later decision in Wards Cove as outside "the plain meaning of the term 'discrimination'" necessarily raises the question whether he continues to accept this basic premise of Griggs, or whether he would go even farther than Wards Cove and abolish the disparate-impact standard altogether.

Such a change would restrict Title VII to cases of intentional discrimination, and leave minorities and women at the mercy of employers who would then have little incentive to curb their use of exclusionary practices. Indeed, employers which intended to limit their employment of blacks, Hispanics, or women could adopt paper-and-pencil tests, strength tests, and similar requirements secure in the knowledge that it would be extremely difficult to prove their wrongful intent in adopting such requirements but the results would be the same as with the more readily provable direct forms of intentional discrimination.

Disparate-impact cases, and broad patterns of discrimi-

nation, require statistical evidence.[24] The Supreme Court has repeatedly held that proper statistical evidence taking job qualifications, availability and employer explanations into account can in appropriate cases be sufficient to prove discrimination.[25] Few employers admit that they are discriminating, and the nature of their actions has to be deduced from all of the employment decisions they have made. In Teamsters, the Court quoted with approval an appellate decision stating that "In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved."[26]

We cannot and do not quarrel with the propositions that statistical evidence must be both accurate and appropriate, that unchallenged qualifications must be taken into account, that the defendant must always have an opportunity to provide explanations for any statistical disparities and that these must be considered, and that statistical evidence therefore creates at most a rebuttable presumption of discrimination. We also believe that there were legitimate grounds for the Chairman or anyone else to

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[24] Judge Thomas' views on the use of statistical evidence in discrimination cases are discussed in detail in the Lawyers' Committee's Memorandum at 47-51.

[25] E.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339-41 (1977); Dothard v. Rawlinson, 433 U.S. 321, 329-31 (1977).

[26] 431 U.S. at 339 note 20 (quoting United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.), cert. den., 404 U.S. 984 (1971)).

criticize the EEOC's approach to statistical proof in some of its cases. However, our concern is that Judge Thomas' general criticisms of statistical proof in connection with his statements on the Griggs rule and his attacks on the Uniform Guidelines seemed to disregard the value of statistical proof altogether.

In an important document describing his plans for regulatory changes at the EEOC, he told the Office of Management and Budget that the plaintiff's threshold burden of proving disparate impact under Griggs and the Guidelines was "a mechanical statistical rule that has no relationship to the plain meaning of the term 'discrimination.'" Later in the same document, he stated that "statistical disparities ... may reflect far too many factors other than unlawful discrimination by the employer for them to give rise to a presumption of such discrimination."[27]

These statements are extremely troubling. They may reflect an unwillingness to credit statistical proof even where the defendant has no credible rebuttal to the statistical evidence and the plaintiff has gone as far as possible in showing that a substantial disparity exists even after taking into account racial, national origin or gender differences in availability, in the possession of legitimate qualifications, and in other relevant factors. Such an approach would have the result of providing immunity for the many instances of discrimination

[27] The quotation is set out in text above.

where no direct proof of discriminatory purpose is available, and where discrimination can only be inferred from the results of the employer's actions and the absence of any credible explanation.

Judge Thomas' criticisms of Griggs, the Guidelines and the proper use of statistical proof represent a radical, unexplained departure from his earlier endorsement of these tools for proving and remedying discrimination.

III. Judge Thomas' Positions on Affirmative Action

Judge Thomas has consistently voiced reservations as to the use of race- and gender-conscious remedies for discrimination.[28] Despite his personal beliefs, during Judge Thomas' first two years at the EEOC, he usually was an advocate for existing EEOC policies including affirmative action, and specifically including the use of goals and timetables as flexible devices for monitoring an employer's conduct.[29] This stance often put him at odds with others in the Reagan Administration -- most frequently, William Bradford Reynolds, Assistant Attorney General For Civil Rights.

After President Reagan's re-election, Judge Thomas began to advocate publicly dramatic changes in EEOC policy.[30]

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[28] Judge Thomas' views are discussed in detail in the Lawyers' Committee's Memorandum at 52-76.

[29] These statements are discussed in detail in the Lawyers' Committee's Memorandum at 54-61.

[30] These statements are discussed in detail in the Lawyers' Committee's Memorandum at 61-66.

In an interview immediately after election day, Judge Thomas announced that, henceforth, the Administration would speak with one voice and that there would be concerted efforts to make EEOC policy consistent with the Administration's philosophy.[31] Although Judge Thomas pledged a concerted effort after the election, he often thereafter took positions worse than the litigation positions of Mr. Reynolds' Civil Rights Division. Reynolds routinely relied on disparate-impact theory and thought it proper, while Judge Thomas was attacking the theory; Reynolds routinely relied on the Uniform Guidelines while Judge Thomas battled to have them revised. In late 1987, Mr. Reynolds joined Judge Thomas in his opposition to the Guidelines.

In 1986 and 1987, the Supreme Court decided a string of cases which together demonstrated conclusively that race- and gender-conscious policies were in many circumstances acceptable remedies for discrimination and acceptable responses to patterns of underrepresentation of women and minorities.[32] Judge Thomas expressed his personal disagreement with each of these decisions.[33] He has repeated his disagreement with these decisions

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[31] November 15, 1984 Policy Changes, supra note 20, at A-1.

[32] Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987); United States v. Paradise, 480 U.S. 149 (1987); Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); and Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

[33] Affirmative Action Goals, supra note 9, at 403 note 3.

before this Committee.[34]

The bottom line with respect to Judge Thomas' alternatives for affirmative action is that they are not alternatives. They reach proven cases of intentional discrimination against identified victims, but much of what is considered to be discrimination today in this country under existing law cannot be proved under that standard or does not constitute that type of discrimination, including most disparate-impact employment situations.

Judge Thomas answers that such discrimination is, at least, far less significant than it used to be. We believe he is incorrect; there is current evidence which establishes that such discrimination remains pervasive,[35] and numerous decisions in the 1980's and afterwards reflect its many occurrences.

If Judge Thomas is right --- if, for example, there are few significant discriminatory practices resulting in victims who cannot be identified --- then there will be little further need for affirmative action. When that happens, if it ever does, Judge Thomas' concerns about affirmative action will be substantially relieved.

There is much legitimate concern, and Judge Thomas expresses such concern, over what are appropriate affirmative action remedies in a particular case of proven discrimination, or

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[34] Testimony of Judge Clarence Thomas in response to questioning by Senator Edward Kennedy, morning of September 12, 1991; Testimony of Judge Clarence Thomas in response to questioning by Senator Arlen Specter, morning of September 13, 1991.

[35] See the Urban Institute studies discussed above at 23-24.

in the settlement of discrimination claims, or in legislation providing for minority set-asides.[36] The tailoring of equitable relief in this area must truly be equitable, and that is an enormously difficult task. Judge Thomas' answer is to do away with the remedy entirely, and that strikes at the heart of established civil rights jurisprudence long recognized by the Congress, successive Administrations, and the courts.

Judge Thomas' many public statements do not adequately address the difficulty of providing any meaningful remedy for patterns of discrimination if affirmative action is not allowed, and if it is not possible to determine which particular black, Hispanic, Asian or female candidates would have been selected in the absence of discrimination. The problem is a very real one, and it arises frequently. If there is no meaningful remedy, even an intentional discriminator would have succeeded in its primary goal: keeping its workforce lily-white, or Anglo, or male, or as much so as possible. Such an employer does not limit itself to keeping a particular black, Hispanic, Asian or woman out; it wants to keep as many as possible out. A remedy which does not deprive the employer of such a goal is ineffective.

It is not an adequate answer to reject the promotion of potential victims because the precise victims are unknowable. If such rejections were to become the law, minorities and women would be left without the hope of a meaningful change in their

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[36] Drew S. Days III, Fullilove, 96 Yale Law Journal 453 (1987).

workplace and would have correspondingly little incentive to file charges and litigate cases.

There is a substantial question whether Judge Thomas would vote to overturn the affirmative-action decisions the Court handed down from Weber to Johnson and Paradise, and thus to leave minorities and women without any effective remedy for past discrimination in those cases where individual victims cannot be precisely identified.

IV. Judge Thomas' Theories of Constitutional Interpretation

After reviewing Judge Thomas' legal writings and listening to his testimony before this Committee, we have concluded that Judge Thomas' disagreement with important Supreme Court decisions in the area of civil rights is merely an outgrowth of his unusual, and potentially disastrous, theory of constitutional interpretation, which disregards the Equal Protection Clause and rejects the concept that persons are protected from violations of their rights based on their membership in a group disfavored by society or a legislature. Judge Thomas' views stand in stark contrast to long-established constitutional analysis and threaten the guarantees of the Equal Protection Clause.

The Equal Protection Clause, applied to the States in the Fourteenth Amendment and applied to the Federal government in the Fifth Amendment, prohibits the classification of persons for discriminatory treatment on either an impermissible basis (such

as race, gender or natural origin), or in the exercise of fundamental rights (such as the right to vote, to marry, to travel, and to seek access to the courts). The Equal Protection Clause stands as a guarantee that the exercise of fundamental rights are as available to the poor as to the wealthy, to whites as well as blacks, and to both men and women.

Despite the overwhelming importance of the Equal Protection Clause in our current system of constitutional jurisprudence, Judge Thomas has repeatedly rejected use of the Equal Protection Clause. Through statements concerning the proper application of constitutional principles,[37] his criticism of the analysis in Brown v. Board of Education,[38] and his interpretation of Judge Harlan's dissent in Plessy v. Ferguson,[39] Judge Thomas has made it plain that he opposes established equal protection doctrine on the asserted ground that it protects the rights of groups of persons, rather than individuals.

Thus, Judge Thomas has written that it is "error" to apply "the principle of freedom and dignity" to groups "rather

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[37] See e.g. Clarence Thomas, The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment, 12 Harvard Journal of Law and Public Policy 63 (1989); Clarence Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, in Assessing the Reagan Years 392 (D. Boaz, editor, 1988); Clarence Thomas, Toward a "Plain Reading" of the Constitution --- the Declaration of Independence in Constitutional Interpretation, 30 Howard Law Journal 691 (1987).

[38] 347 U.S. 483 (1954).

[39] 163 U.S. 537 (1896).

than to individuals;"[40] he has criticized the school desegregation cases following Green v. County School Board, claiming that they were "disastrous" and "more concerned with meeting the demands of groups than with protecting the rights of individuals;"[41] and he has criticized Justice Powell's opinion in Bakke v. Board of Regents for an alleged misplaced concern with "the admission of groups of whites" rather than with "rights inherent in the individual."[42]

It is apparent that Judge Thomas' rejection of the Equal Protection Clause arises from his conviction that the Constitution protects only the rights of individuals and that only an individual deprivation can be remedied. The result of this view of the Constitution is a refusal to recognize that discriminatory classifications affect not just one or several individuals, but all persons who find themselves members of a disfavored group. Under such a theory, judicial relief or congressional enactments designed to remove state-imposed barriers that effect all persons within a legislative classification or disfavored group in society is not supported by the Constitution.

Not only is Judge Thomas' view completely contrary to well-established law, but, if adopted by the Court, would seri-

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[40] Civil Rights as a Principle at 393.

[41] Id.

[42] Plain Reading at 700 and 700 note 36.

ously undermine constitutional protections. The clearest example of this result is found in Judge Thomas' apparent criticism of the Green decision as departing from a "color-blind" view of the Constitution[43]. In Green, the Court rejected the school board's arguments that it could continue to operate separate "white" and "negro" schools simply by adopting a policy that ostensibly permitted individual black students to choose to attend "white" schools, and held that school authorities had to do more than purportedly offer individual students a choice, and were instead required "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[44] To the extent that Green and subsequent school desegregation decisions imposed an obligation upon school authorities to dismantle the segregated "dual" school systems, they required "race-conscious remedies." A view of the Constitution that forbade a restructuring of long-segregated school systems, would have left individual black school children alone to confront a segregated school system. In the Supreme Court's insistence that black school children be afforded more than a theoretical choice, Judge Thomas evidently finds it to have been "more concerned with meeting the demands of groups than with protecting the rights of individuals."[45] The Supreme

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[43] Plain Reading, at 700.

[44] 391 U.S. at 437-38.

[45] Civil Rights as a Principle, at 393.

Court's requirement that the continuing reality and structure of segregated school systems be dismantled -- in enrollment, faculty, condition of facilities and other respects -- Judge Thomas appears to perceive as "disastrous," reflecting a "lack of principle," and "against what was best in the American political tradition."[46]

Judge Thomas has not restricted his criticism of the application of equal protection principles to Brown and other school desegregation cases. For example, Judge Thomas has argued that deprivations of the right to vote should be found only with respect to individuals: "Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected when the individual's racial or ethnic group has sufficient clout."[47] He has, therefore, criticized equal protection precedent generally: "In both the areas of school desegregation and voting, the Court has tended to think in terms of protecting groups." [48]

An insistence that only the liberties of individuals are protected -- a deprecation of the protection of persons from different treatment through group-based governmental classifications -- and a view of the Constitution that forbids consider-

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[46] Id. (emphasis in original).

[47] "The Modern Civil Rights Movement: Can a Regime of Individual Rights and the Rule of Law Survive?," April 18, 1988 Speech by Clarence Thomas delivered at The Tocqueville Forum, Wake Forest University, at 17.

[48] Id.

ation of race, for example, even where necessary to remedy a constitutional violation, would render the law incapable of removing barriers to equality for members of a disfavored group.

In the course of these hearings, Judge Thomas has indicated that he has no reason to "question or disagree with the three tier approach" which the Supreme Court currently uses in analyzing cases which fall under the Equal Protection Clause.[49] Moreover, he has gone so far as to indicate that in some instances involving particularly egregious cases of discrimination it might be appropriate to be "ratcheting up or applying a more exacting standard" than the current heightened scrutiny.[50] However, his unprecedented endorsement of equal protection analysis remains at odds with his long-standing rejection of the concept of protecting and remedying deprivations of rights that effect all persons falling within a classification. Moreover, the mere fact that Judge Thomas now states that he does not "disagree with the three tier approach" does not shed any light

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[49] Clarence Thomas Supreme Court Nomination, Hearings of the Senate Judiciary Committee, Testimony of Judge Thomas in response to questioning by Senator Dennis DeConcini, morning of September 11, 1991. See also Clarence Thomas Supreme Court Nomination, Hearings of the Senate Judiciary Committee, Testimony of Judge Thomas in response to questioning by Senator Edward Kennedy, morning of September 12, 1991; Clarence Thomas Supreme Court Nomination, Hearings of the Senate Judiciary Committee, Testimony of Judge Thomas in response to questioning by Senator Howell Heflin, afternoon of September 13, 1991.

[50] Clarence Thomas Supreme Court Nomination, Hearings of the Senate Judiciary Committee, Testimony of Judge Thomas in response to questioning by Senator Dennis DeConcini, morning of September 11, 1991.

upon the manner in which he would apply such scrutiny to claimed violations. Unless Judge Thomas has completely abandoned his theory of constitutional interpretation, a transformation for which we have no evidence, and now accepts the notion that the constitution provides protection for all members of a group, as well as for individual violations, his acceptance of the Court's current approach to equal protection analysis is meaningless.

Even in light of Judge Thomas' acceptance of the Court's three tiered approach to equal protection analysis, we believe that his preference for individual remedies, as exemplified by his testimony criticizing the result which the Court reached in both Green and subsequent school desegregation decisions, indicate a continuing emphasis on individual remedies for violations of individual rights and a hostility to effective protections for all members of a disfavored classification. Barriers or discriminatory acts which effect whole groups of individuals cannot be effectively addressed by remedies which only effect a single individual. In light of widespread, institutional discrimination which we believe still exists in our society, Judge Thomas' emphasis on individual rights and remedies, and the inevitable consequences of these views, seriously threaten our ability to end systemic discrimination.

V. Conclusion

Prior to Judge Thomas' testimony before this Committee,

a substantial majority of the members of the Board of Trustees of the Lawyers' Committee opposed Judge Thomas' nomination as Associate Justice of the Supreme Court. After listening to his testimony, we remain firm in our conviction that Judge Thomas' legal philosophy, with its disregard for established precedent, its hostility to the equal protection doctrine, and its reliance on individual rights, poses a substantial threat to the ability of minorities and women to enforce their civil rights.

Judge Thomas has criticized most of the judicial and statutory building blocks for the protection of civil rights in this country --- not only admittedly controversial and difficult court decisions and governmental policies, but also those widely accepted as fundamental to the protection of civil rights for every American. Judge Thomas has also attacked the Court and the Congress for their role in laying down those building blocks, arguing instead for a "limited government" that would leave Americans with rights but uncertain remedies --- or no remedies at all --- for violations of those rights.

Moreover, we believe that Judge Thomas' changes of position with respect to matters of fundamental importance do not demonstrate the reflection before reaching important conclusions which is essential in a Justice of the Supreme Court.

We urge the Senate not to confirm this nomination.

NOTES FOR APPEARANCE OF ERWIN N. GRISWOLD
BEFORE THE COMMITEE ON THE JUDICIARY OF THE UNITED STATES SENATE
-- TUESDAY, SEPTEMBER 17, 1991

In the time available to me, I can only summarize. I will first say, though, that the present hearings seem to me to leave open several basic and important issues.

I. Qualifications

No one questions that Judge Thomas is a fine man, and deserves much credit for his achievements over the past forty-three years. But that does not support the conclusion that he has as yet demonstrated the distinction -- the depth of experience, the broad legal ability -- which the American people have the right to expect from persons chosen for our highest judicial tribunal. Compare his experience and demonstrated abilities with Charles Evans Hughes or Harlan Fiske Stone, with Robert H. Jackson or the second John M. Harlan, with Thurgood Marshall and Lewis H. Powell, for example. To say that Judge Thomas has such qualifications is obviously unwarranted. If he should continue to serve on the court of appeals for eight or ten

years, he may show such qualities, but he clearly has not done so yet.

I have no doubt that there are a number of persons, male or female, African American or while or Hispanic, who have demonstrated such distinction. I do not question that the President has the right to take ideological factors into consideration, and it seems equally clear to me that this Committee and the Senate have a similar right and power. But that is no reason for this Committee, or the Senate, approving a presidential nominee who has not yet demonstrated any clear intellectual or professional distinction. And the down side is frightening. The nominee, if confirmed, may well serve for forty years. That is until the year 2030. There does not seem to me to be any justification for taking such an awesome risk.

II. Natural Law

Judge Thomas' present lack of depth seems to me to be demonstrated by his contact with the concept of "natural law." He has made various references to "natural law" in his speeches

and writing, though it is quite impossible to find in these any consistent understanding of that concept. This is very disturbing to me because loose use of the idea of natural law can serve as support for almost any desired conclusion, thus making it fairly easy to brush aside any enacted law on the authority of a higher law -- what Holmes called a "brooding omnipresence in the sky."

That is bad enough, but the nominee has now said to this Committee that he does not think that "natural law" plays any role in constitutional decisions. This is frightening indeed -- for it is quite clear in the two hundred years of this country under the Constitution that "natural law" or "higher law" concepts do have an appropriate role -- not in superseding the Constitution but in construing it.

Corwin, "The Higher Law Background of American Constitutional Law," 42 Harv. L. Rev. 149 (1928), 365 (1929)

Fuller, "The Morality of Law" (1964)

Rawl, "A Theory of Justice" (1971)

Bickel, "The Morality of Consent" (1975)

The Dred Scott case, for example, was one where the Court did not make adequate use of "natural justice." If it had done so, recognizing that Scott had become a citizen when he ws taken to free territory, it might have averted the Civil War.

A more current example is Privacy. It is not mentioned in the Constitution, but the Supreme Court has rightly found it there by interpreting several of the Constitution's clauses together, in the light of deep-seated "natural justice" concepts, including the Court's conclusion and understanding that this is implicit in the basic concept of the founding fathers when they drafted the Constitution.

Cruel and Unusual Punishment

Weems v. United States, 217 U.S. 349 (1910)

Robinston v. California, 370 U.S.660 (1962) -- The crime of being "addicted to the use of narcotics."

Solem v. Helm, 463 U.S. 277 (1983)

Rights of Conscience

Welsh v. United States, 398 U.S. 333 (1970) -- not a religion case. The petitioner asserted his beliefs were not religious.

III. Due Process

Voting

Reynolds v. Sims, 377 U.S. 5333 (1964) - one man, one vote case

Denial of education to children of illegal aliens

Yick Wo v. Hopkins, 118 U.S. 356 (1886)

Moore v. City of East Cleveland, 431 U.S. 494 (1977), quoting Harlan, J.: Respect for the teachings of history [and] solid recognition of the basic values that underlie our society.

Appointment of Counsel

Gideon V. Wainwright, 372 U.S. 355 (1963)

Affirmative Action

For more than two hundred years, the white settlers in this new country grievously victimized persons of African descent, whose descendants today are our African American citizens. Not only were they held in slavery, but they were denied education and all cultural advantages.

It took a Civil War to end this massively unjust regime. But then we had the period of share croppers, and lynching, and Jim Crow. Though the slaves were free, their opportunities were severely restricted by force of law. It was not until the middle of this century that we began to move ahead, and, under the leadership of Lyndon B. Johnson, the Congress enacted a number of constructive statutes designed to provide greater equality of opportunity.

We should not forget that the Thirteenth, Fourteenth and Fifteenth Amendments were adopted as a result of the Civil War. They were essentially focused on African Americans. They were designed to pull the African Americans up to a position of

equality. Every one was protected by the Due Process Clause, but the African Americans needed it most. The same was true of the Equal Protection Clause. As Justice Blackmun has so well said in this opinion in the Bakke case (Regents of the University of California v. Bakke, 437 U.S. 265, 407 (1978):

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot -- we dare not -- let the Equal Protection Clause perpetrate racial supremacy.

Frankfurter, J., in *Railway Mail Association* v. *Corsi,* 326 U.S. 88, 97 (1945)

> A State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that amendment.

Any one who has lived through the past fifty years can see that we have made some progress. When I was a young man in the Department of Justice, now sixty years ago, it would have been

inconceivable that the President would nominate a black man to the Supreme Court, or that the Senate would give serious consideration in such a case. There were then no black lawyers in the Department of Justice, no black F.B.I. Agents.

We have made progress, but not enough. I hate to think that the progress we have made will come to a halt by a literalistic interpretation of the Civil War Amendments, thus frustrating the accomplishment of what they were clearly intended to do.

IV. Other Questions

What is the nominee's approach to other important questions which frequently come before the Court?

Separation of Powers

Preemption -- When dos a federal statute over-ride state law?

Intergovernmental immunities

ON THE NOMINATION OF JUDGE CLARENCE THOMAS
AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of President John F. Kennedy to enlist the private bar in the enforcement of civil rights. This statement is submitted on behalf of the members of the Board of Trustees of the Lawyers' Committee whose names are attached. We have concluded that Judge Clarence Thomas should not be confirmed as an Associate Justice of the Supreme Court of the United States.

Since its founding, the Lawyers' Committee and its members have been concerned with making the rule of law as effective for the protection of civil rights as it has been for the protection of other established rights. We have sought to enforce the existing law through litigation on behalf of racial minorities and women. In addition, we have endeavored to strengthen civil rights protections where necessary, and we have opposed measures which would unjustifiably diminish or curtail equal protection under the law.

In evaluating any judicial nomination, we must consider whether the nominee's overall legal philosophy, if adopted generally by the courts, provides meaningful protection for the civil rights of minorities and women. We accept that a nominee may differ with us on particular issues. We attach great weight, however, to adherence to the principle of legally enforceable equality of opportunity, and to the degree of thought and understanding the nominee brings to the resolution of these issues.

Only when a nominee's stated legal philosophy clearly threatens these principles, which are of enormous national impor-

tance, have the members of the Lawyers' Committee chosen to recommend the rejection of a nomination. In its 28-year history, the members have opposed only one other judicial nominee.

We have reviewed and considered the published articles and written statements of Judge Thomas from the foregoing perspective. Judge Thomas has announced his disagreement with many of the major judicial decisions that constitute the underpinnings of modern-day civil rights jurisprudence. He has proposed in their stead novel and ill-considered theories of constitutional and statutory interpretation that would substantially erode the fundamental civil rights protections of minorities and women. Regrettably, we have not found the depth of analysis we must expect -- and the nation should require -- of any nominee for the Supreme Court, especially one who proposes the rejection of the foundation for hard-won, established legal protections for equality.

* * *

While conceding that discrimination still exists, Judge Thomas focuses on individual acts of discrimination and de-empnasizes the importance of systematic institutionalized bias. For example, he has written that in his experience "even such veiled policies are uncommon; discrimination is left to individual bigots in positions of authority", "perhaps influencing only a few hiring decisions". He has disagreed with the legal theories and evidentiary bases necessary to challenge systemic discrimination, and has opposed the broad remedies the courts have often held to be necessary in providing effective relief to the victims of such discrimination.

* * *

Judge Thomas' legal philosophy evidences a hostility to, and rejection of, the core of civil rights jurisprudence in the areas of school desegregation, voting rights, employment discrimination, and affirmative action generally. Specifically, we emphasize the following:

- He has criticized Green v. School Board of New Kent County, the unanimous 1968 Supreme Court decision which invalidated "freedom-of-choice" plans that served to perpetuate officially segregated white and black schools, and imposed an obligation to eliminate racial discrimination from schools "root and branch." Judge Thomas wrote: "... in the Green ... case, we discovered that Brown not only ended segregation but required school integration. And then began a disastrous series of cases requiring busing and other policies that were irrelevant to parents' concern for a decent education." In the absence of Green, school authorities would have had no obligation to dismantle state-segregated schools.

- He has criticized the Supreme Court's decisions interpreting the Voting Rights Act on the ground that the Court has not limited its inquiry to whether an individual's right to vote is impaired. This view reflects a refusal to acknowledge that the Act was designed to remove electoral or districting schemes that dilute or render meaningless the ballots of minority voters. Judge Thomas' views would preserve electoral systems that effectively disenfranchise minority voters.

- He has criticized the Griggs v. Duke Power Co. decision, which construed Title VII as prohibiting employment practices having a discriminatory impact, unless they are shown to be job-related. He has questioned the validity of statistical evidence (an essential element of proof in disparate impact cases challenging practices that appear fair in form but discriminate in effect), and implied that the protections of Griggs should be limited to menial jobs.

- He has rejected on policy grounds, such leading precedents as United Steelworkers v. Weber, Johnson v. Transportation Agency, Santa Clara County, Local 28 of the Sheet Metal Workers v. EEOC, and United States v. Paradise, permitting race- and gender-conscious remedies under limited circumstances. These are often the only effective remedies for broad patterns of discrimination.

- He has rejected the Supreme Court's decision in Fullilove v. Klutznick and has strongly criticized Congress for enacting the minority set-aside program it approved as a remedy for the long-standing exclusion of minority contractors from public works programs. Similarly, he has sharply criticized affirmative action programs that allow race to be considered along with other factors in the admission of minority students in higher education, such as the type of program approved in Bakke v. Regents of the University

of California.

Judge Thomas' views reflect a significant departure from the civil rights jurisprudence and policies that are embodied in Supreme Court decisions, federal and state laws, and the voluntary actions of private and public institutions throughout the country. Judge Thomas' views are even more disturbing because he advanced these positions when, as Chairman of the Equal Employment Opportunity Commission, he was under a sworn duty to enforce and uphold much of the law he was denouncing.

* * *

In addition to disapproving bedrock civil rights precedents, Judge Thomas has fashioned a radical and incomplete theory of constitutional interpretation that undermines protections for many of the civil rights of American citizens. Specifically, Judge Thomas disregards an analysis of discrimination and inequality under the Equal Protection Clause of the Fourteenth Amendment, in favor of his own only partially articulated interpretation of the long-dormant Privileges and Immunities Clause, an interpretation that would result in the protection of only the liberties of individuals. This constitutional theory would endanger the power of Congress and the courts to remove state-imposed barriers to equality for disfavored groups. Quite apart from this nominee's substantive positions, his writings and statements suggest a cavalier disregard for the context and substance of Constitutional provisions, Congressional enactments, and Supreme Court holdings critical to the rights of minorities and women.

For example, in order to reach his theory of constitutional interpretation, Judge Thomas ignores or rejects not only the

text and history of the Fourteenth Amendment, but of the Constitution itself. Judge Thomas supports his theory of interpretation by the novel argument that the Declaration of Independence is incorporated into the Constitution through its "explicit" reference to the Declaration in Article VII, which states only:

> DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of Our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.

Similarly, although advocating the incorporation into the Constitution of broad notions of "inalienable rights" -- drawn from the Declaration of Independence -- Judge Thomas rejects and ridicules use of the Ninth Amendment, which refers specifically to unenumerated rights "retained by the people." Thus, Judge Thomas displaces the text and established framework of constitutional jurisprudence in favor of undefined natural-law theories.

Finally, he has criticized the reasoning of Brown v. Board of Education -- a decision that continues to stand as the pillar upon which rests much of the jurisprudence of equal rights and opportunity for minorities and women -- and attributes what he views as subsequent Supreme Court errors to this allegedly faulty reasoning. Yet his criticism places great emphasis on a questionable interpretation of Justice Harlan's 1896 dissenting opinion in Plessy v. Ferguson, and neglects the extensive and scholarly contributions to the debate concerning the Brown decision. To suggest that Brown and other landmark civil rights decisions rest on insubstantial ground, without providing a persuasive argument or analysis to support the criticism, cannot be ignored when the critic stands as a nominee to the Supreme Court.

* * *

Based upon a thorough analysis of Judge Thomas' published articles and written statements, it is clear that he disagrees with the legal theories and remedies necessary to remove the formidable barriers that still block the path of African-Americans and other minorities; that he is hostile towards leading Supreme Court civil rights precedent; and that his ill-defined expressions of constitutional and statutory interpretation would forsake established constitutional protections for untested theories lacking credible support in established legal and philosophical jurisprudence. Although reasonable people may differ with respect to whether any one of these points would disqualify Judge Thomas from being a Supreme Court Justice, we believe strongly that the combination of these three inadequacies is clearly disqualifying.

In light of the deficiencies in his legal analysis, his disregard for established precedent, and his stark opposition to the principles that the Lawyers' Committee for Civil Rights Under Law has advocated -- which must be vigorously defended at this critical juncture in our country's history -- we urge the United States Senate to reject the nomination of Judge Clarence Thomas as Associate Justice of the Supreme Court of the United States.

APPENDIX A

Howard J. Aibel
Albert E. Arent
Clinton Bamberger
Thomas D. Barr
G. d'Andelot Belin
David R. Brink
Brooksley Born
Jack E. Brown
Tyrone Brown
William H. Brown
Goler T. Butcher
Robert Carswell
J. LeVonne Chambers
Irvin B. Charne
Frank Cicero, Jr.
James E. Coleman, Jr.
Jerome A. Cooper
James T. Danaher
Drew S. Days, III
Armand G. Derfner
Sara-Ann Determan
Adrian W. DeWind
John W. Douglas
Robert Ehrenbard
Cassandra Flipper
Laurence S. Fordham
Alexander D. Forger
Eleanor M. Fox
Edward M. Friend, Jr.
A. Spencer Gilbert, III
Linda S. Greene
Erwin N. Griswold
Herbert J. Hansell
Seth M. Hufstedler
Jerome E. Hyman
Hugh R. Jones, Jr.
John B. Jones, Jr.
Robert H. Kapp
Maximilian W. Kempner
Stuart J. Land
Robert M. Landis
George N. Lindsay
John V. Lindsay
Hans F. Loeser
Robert MacCrate
Henry L. Marsh III
Joseph P. Martori
Gabrielle McDonald
Ronald S. Miller
Robert F. Mullen
Robert A. Murphy
James M. Nabrit, III
Frederick M. Nicholas
Eleanor Holmes Norton

APPENDIX A

Kenneth Penegar
Stephen J. Pollak
Norman Redlich
Judith Resnik
James Robertson
William D. Rogers
Edward W. Rosston
Edwin A. Rothschild
Charles Runyon
Lowell E. Sachnoff
David M. Satz, Jr.
Paul C. Saunders
John H. Schafer
Bernard G. Segal
Jerome G. Shapiro
Otis M. Smith
McNeill Smith
Asa D. Sokolow
Nicholas U. Sommerfield
David S. Tatel
John E. Tobin
Michael Traynor
Harold R. Tyler, Jr.
Cyrus R. Vance
James Vorenberg
Herbert M. Wachtell
Togo D. West, Jr.
Francis M. Wheat
Roger Wilkins
John Taylor Williams
Judith A. Winston

APPENDIX B - LAWYERS AFFILIATED WITH LOCAL LAWYERS' COMMITTEES

Boston

Kathryn Abrams

John F. Adkins

G. d'Andelot Belin

Bernard J. Bonn, III

Mark S. Brodin

Judith O. Brown

Steven S. Fischman

Nancy Gertner

Geraldine S. Hines

William P. Homans, Jr.

Laurence M. Johnson

Scott P. Lewis

Glendora M. Putnam

Elizabeth K. Spahn

Donald K. Stern

Daniel D. Sullivan

Thomas V. Urmy

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Mark S. Kende

Randall S. Rapp

Jack L. Block

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Michele D. Brown

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Madeline A. Collison

Kevin W. Daley

Lynn Diamon Feiger

Darold W. Killmer

Mary S. McClatchey

Catherine A. Tallerico

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Fernando Del Rio

Ronald diNichola

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Lawrence B. Steinberg

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Lawrence T. Hoyle, Jr.
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Suzanne S. Levy
Marciene S. Mattleman
Marcia L. Olives
Wendy C. Shiba
Patrick F.E. Temple-West
Joseph A. Torregrossa
Robert T. Vance, Jr.
Shelly D. Yanoff

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William Alderman
Morris J. Baller
Alice Beasley
Carolyn Patty Blum
Wynne Carvill
Terry Helbush
Bill Ong Hing
Gordon Lau

Raymond Charles Marshall

Drucilla Ramey

Bernida Reagan

Mark I. Schickman

Robert A. Thompson

Polly Webber

Washington, D.C.

Charles R. Both

Allen T. Eaton

Warren Kaplan

Lawyers' Committee For Civil Rights Under Law

Concurring Opinion of
Laurence S. Fordham, Esq.
Boston, Massachusetts

As a member of the Board of Directors of the Lawyers' Committee, I wish to file a concurring opinion opposing the nomination of Judge Thomas as a Justice of the Supreme Court. I do so solely on the basis that his public record as it appears is not of the quality that should be nominated and confirmed as a Justice of the Supreme Court.

The Nation needs and deserves high quality on the Supreme Court. The Court is too important for less. The practice of ideological appointments do not serve the Nation well.

The position of the Committee of the American Bar Association that reviewed the nomination confirms this view as to quality. It is difficult to say that any competent lawyer or judge is not qualified. Many competent lawyers and judges are qualified.

The standard should be excellence or well qualified. Judge Thomas has not been so rated.

It does not appear that he has demonstrated the standard of excellence that should be requisite to nomination and confirmation to the United States Supreme Court.

If the President is not going to insist on excellence in appointments to the Supreme Court, then scrutiny of nominees as to whether they meet the standard of excellence should begin in the United States Senate

Ideological differences aside, excellence should be the standard, or well qualified in the rhetoric of the Committee of the American Bar Association that reviews judicial appointments.

Labels - conservative and liberal - do not assist. Quality should be the core concern, such as demonstrated before nomination by Justices Holmes, Harlan and Powell, all of whom would be widely perceived by lawyers and other interested

citizens alike, as conservative and meeting the highest standards of excellence. The Nation imperatively needs excellent or well qualified nominees, whether they be labelled conservatives, moderates or liberals by those disposed to labels.

The most important label is excellence.

If the nomination is confirmed, I sincerely hope he demonstrates excellence as a Justice of the Supreme Court.

Respectfully submitted,

Laurence S. Fordham

Laurence S. Fordham
Member, Board of Directors
of the Lawyers Committee For
Civil Rights Under Law
Boston, Massachusetts

FSLI340

Dissent to the Statement Presented by the Lawyers' Committee for Civil Rights Under Law on the Nomination of Judge Clarence Thomas as an Associate Justice of the United States Supreme Court

I disagree with the decision to file in the name of the Lawyers' Committee a Statement in Opposition to the nomination of Judge Clarence Thomas to the United States Supreme Court. I have great respect for the judgment and intellectual integrity of the members who prepared the Statement in Opposition. I would feel more comfortable with their conclusion, however, if a more balanced view were presented. I am disappointed that every evaluation, observation or conjecture in the Statement is in the negative. It is admittedly more a brief in opposition than an objective evaluation. The Statement does not acknowledge the positive qualities which Judge Thomas would bring to our highest court. It does not give the Congress a fair picture of the nominee.

Judge Thomas would bring to the Court a background of experience seldom, if ever before, found on our highest tribunal. It cannot be questioned that he is and will remain throughout life a staunch foe of discrimination. It seems a gross overstatement to describe Judge Thomas' view of the place of the Declaration of Independence in constitutional interpretation as a "radical and incomplete theory." Judge Thomas' view, as I understand it, is that the guarantees of the Fourteenth Amendment are undergirded by the assertion in the Declaration of Independence "that all men are created equal." This is a concept of fundamental morality which should be reflected in all

of our laws and governmental actions. To suggest that such a noble principle can be twisted and misused is not a legitimate criticism of a person who expresses it in its purest form. Nor does it take anything away from the Civil War Amendments to recognize that the immorality of discrimination set forth so clearly in the words of the Declaration of Independence should have colored the interpretation of the Constitution in pre-war years, particularly on the issue of slavery.

One might differ with some of Judge Thomas' views as to the procedures by which equality may be achieved and discrimination eliminated in our land. But he is a young man, forty-three years of age, with less than twenty years of professional life as a lawyer, Federal appointee and Judge of a Federal Court of Appeals. It impresses me greatly that he is willing to speak and write so extensively about our Nation's social problems, the related laws and court decisions, the philosophy behind them and their effectiveness in achieving their declared objectives. His professional life has been a continuing learning experience and he has been remarkably honest and responsible to express his views and so invite constructive comment. I feel confident that Judge Thomas' judicial philosophy will continue to grow and develop during future years on the Court, just as has been true in the case of many other Justices before him.

Judge Thomas undertakes to dignify the status of the individual. Those in opposition to Judge Thomas would seemingly

give primary attention to broad actions for the benefit of groups with the expectation that individual benefits would follow. Of course, neither emphasis is intended to be exclusive of the other but the difference is meaningful in understanding Judge Thomas' strengths and the apparent basis for much of the opposition to him. He has asserted repeatedly that the greatest needs for the children of the very poor, especially among African-Americans and other minorities, are education, self-esteem, the work ethic, the influence of a stable family and the church. As I understand Judge Thomas, he considers these to be valuable ingredients in a young person's efforts to overcome the handicaps of racial discrimination. The difficulty of attainment of these ends should not direct attention away from their importance. Nor should Judge Thomas be criticized for expressing his belief that some of our social programs may not have been administered in a way that supports attainment of these objectives. We should not insist that our minority leaders think in "lock-step" and we should not reject those who attempt to be objective and innovative in their thinking. Judge Thomas has been an excellent role model for our young people of all races and economic levels. He should be applauded for this, not faulted on theoretical and hypothetical grounds.

Judge Thomas' critics make much of his primary emphasis on the individual rather than on the group in his years of service as Chairman of the Equal Employment Opportunity Commission. A former General Counsel of the EEOC under Judge

Thomas, Professor Charles A. Shanor of the Emory Law School, tells me that, even though the program of the Commission had reached a point where most large employers had introduced fair employment policies, systematic cases of discrimination were pursued vigorously. Additionally, many cases of individual mistreatment were arising, particularly in discriminatory discharges and these were actively pressed. Giving primary emphasis to the vigorous pursuit of meritorious complaints by individuals is the sort of policy decision a governmental official must often make, with which others may differ, but it hardly indicates a rigid and unacceptable judicial philosophy.

Over the past two academic years, Judge Thomas has visited the Emory Law School where he has been named a Distinguished Lecturer in Law. In that position, he talks with students, staff, and faculty, teaches several classes and shares his experiences as a federal judge with the Law School community. His travel expenses are paid, but there is no other financial consideration. On his last visit, he taught classes in Legal Ethics, Employment Discrimination and Constitutional Law. He met with the Black Law Students Association, the Federalist Society, the editorial boards of the School's three law reviews, and joined in a discussion group with faculty members and, at his request, the support staff. With the latter group, he spent about two hours patiently answering questions about what it means to be a judge. As expressed by Dean Howard O. Hunter, "It was apparent to me and to everyone else that he is a man who takes

his duties as a judge very seriously and who is aware that a judge must, to the extent possible, be aware of the compassion of the law as well as the rule of law."

The following appraisal of Judge Thomas provided by Dean Hunter is instructive:

> He has not forgotten his roots. He understands the importance of family, friends and customs in the creation of a society. He recognizes that law is a matter of trust in a democracy, and that without the bonds of trust among members of a society the possibilities for self-government are slim. He has understanding and empathy for those who are less fortunate, but he is not condescending. He has a sharp intellect and can hold his own with the best of our faculty, but he can also carry on an easy and mutually enjoyable conversation with every member of our support staff. And perhaps most important, he has a wry, self-deprecating sense of humor. Judges who take themselves too seriously and are too sure of their own opinions concern me, but I have more confidence in those blessed with a healthy sense of their own limitations.

This appraisal was heartily endorsed by Larry D. Thompson, a highly respected Atlanta lawyer, a former United States Attorney and now a partner with the law firm of King and Spalding. Mr. Thompson served with Judge Thomas in the legal department of a national corporation and has for years been a close friend and confidant.

At the least, it would seem appropriate for the Lawyers' Committee to refrain from a recommendation until after the nominee has been given a hearing.

The strength of my feeling about Judge Thomas is not attributable to the fact that he is a fellow Georgian and Southerner. However, interest in the welfare of a native son compels me to express my views when otherwise I might be inclined to remain silent. I must confess that my sense of "fair play" is offended. I regret that the Statement in Opposition fails entirely to recognize what a bulwark against discrimination and a fighter for equality this young Judge from Pin Point, Georgia, can be expected to be for many years ahead.

For the foregoing reasons, I dissent from the Statement in Opposition.

Randolph W. Thrower
999 Peachtree Street, N.E.
Atlanta, GA 30309-3996

Joining in Mr. Thrower's Dissent:

Morris B. Abram,
U.S. Ambassador to
U.N. European Office
Geneva, Switzerland

Martin R. Gold
41 Madison Avenue
New York, New York 10010

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Rhyne & Brown
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Prof. Gray Thoron
The Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853-4901

Leonard Garment, Esq.
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037

Additional Dissenting Opinion:

I also disagree with the Statement in Opposition, in part for the reasons stated by Mr. Thrower, but primarily because of its timing. The nominee should be given his day in Court.

Victor M. Earle, III
220 E. 42nd Street
21st Floor
New York, New York 10017

Concurring in Mr. Earle's dissent:

Jerome B. Libin
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Additional Dissenting Opinion:

I dissent from the Statement in Opposition for the reason that I believe the Committee should await the conclusion of a full hearing by the Senate Judiciary Committee before taking a position.

Stuart L. Kadison
2049 Century Park East
Los Angeles, CA 90067

Additional Dissent by Trustee of Lawyers' Committee

Joining in Mr. Thrower's dissent:

Professor Gray Thoron
The Cornell Law School
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Introduction

This Memorandum provides the background and context for the statement in opposition of Members of the Lawyers' Committee for Civil Rights Under Law On the Nomination of Judge Clarence Thomas as an Associate Justice of the United States Supreme Court. While many of the materials discussed herein were available to the members of the Lawyers' Committee who signed that statement, this Memorandum itself was not available because it was prepared subsequently. This Memorandum discusses the many public statements of Judge Thomas on the proper means of interpreting the Constitution and on the existing legal framework for the protection of civil rights.

This assessment is based upon Judge Thomas's academic writings, speeches, written interviews, and stated positions as Chairman of the Equal Employment Opportunity Commission. We have attempted to provide an accurate portrayal of Judge Thomas's views based on these materials. Where Judge Thomas has taken a position publicly, we assume that he continues to adhere to that position unless he has publicly revised such views. Where Judge Thomas has revised his views, we have attempted accurately to indicate the substance of the revision and the point in time at which it was made.

This memorandum does not discuss the decisions of Judge Thomas as a Judge of the United States Court of Appeals for the District of Columbia Circuit. Judge Thomas has testified that "as a lower court judge, I would be bound by the Supreme Court

decision" governing a matter.[1]

A. Judge Thomas's Theory of Constitutional Interpretation

1. His Rejection of Existing Legal Protections Based on the Equal Protection Clause

Judge Thomas has written and spoken widely on his views of constitutional interpretation. Judge Thomas has directed his attention primarily to the constitutional bases on which racial segregation is, or should have been, held to be unconstitutional. He has indicated that his analysis of the Constitution and post-Civil War Amendments, though based on his interpretation of Justice Harlan's dissenting opinion in Plessy v. Ferguson,[2] provides "a foundation for interpreting not only cases involving race, but the entire Constitution and its scheme of protecting rights."[3] Judge Thomas's views stand in stark contrast to long-established constitutional analysis and Supreme Court precedent and, as such, threaten the foundations of the guarantees of the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause, applied to the States in the Fourteenth Amendment and applied to the Federal government in the Fifth Amendment, prohibit these governments from classifying

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[1] Confirmation Hearings on Federal Appointments Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess., p. 30, Part 4 (1990) (statement of Judge Clarence Thomas).

[2] 163 U.S. 537 (1896).

[3] Clarence Thomas, The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment, 12 Harvard Journal of Law and Public Policy 63, 68 (1989) [hereinafter, Higher Law].

persons for discriminatory treatment on either an impermissible basis (such as race, gender, national origin, and illegitimacy),[4] or in the exercise of fundamental rights (such as the right to vote, to marry, to travel, and to seek access to the courts). "In recent years the equal protection guarantee has become the single most important concept in the Constitution for the protection of individual rights."[5] It was on equal protection grounds, for example, that poll taxes, property-ownership and other restrictions on the right to vote were invalidated, and inequitable voting districts were required to conform to the principle of "one person-one vote."[6] The Equal Protection Clause has also stood as a guarantee that the exercise of fundamental rights are as available to the poor as to the wealthy, not only with regard to voting, but when faced with criminal prosecution.[7]

Judge Thomas has consistently expressed an incomplete theory of constitutional interpretation, difficult to understand, that radically departs from this most basic protection of civil

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[4] Strauder v. West Virginia, 100 U S. 303 (1880) (race); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (national origin), Brown v. Board of Education, 347 U.S 483 (1954) (race); Reed v. Reed, 404 U S. 71 (1971) (gender); Frontiero v. Richardson, 411 U S. 677 (1973) (gender)(Fifth Amendment), Levy v. Louisiana, 391 U.S. 68 (1968) ("illegitimate" children); Graham v. Richardson, 403 U S 365 (1971) (aliens)

[5] J Nowak, R. Rotunda, & J Young, Constitutional Law 585 (2d ed., 1983)

[6] Harper v. Virginia Board of Elections, 383 U.S 663 (1966); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969); Reynolds v. Sims, 377 U.S. 533 (1964).

[7] Griffin v. Illinois, 351 U.S. 12 (1956), Douglas v. California, 372 U.S. 353 (1963)

rights afforded by the Constitution. Specifically, Judge Thomas disregards an analysis of discrimination and inequality under the Equal Protection Clause of the Fourteenth Amendment, in favor of a suggested analysis based upon the Privileges or Immunities Clause of that Amendment.

Judge Thomas's speeches and written statements do not specifically reject every use of the Equal Protection Clause. While not disagreeing with the result in Brown v. Board of Education,[8] Judge Thomas has criticized the basis on which the decision was rendered. Through statements concerning the proper application of constitutional principles, his criticism of Brown and subsequent cases based on equal protection grounds, and his interpretation of Justice Harlan's dissent in Plessy and its significance, Judge Thomas makes plain that he opposes established equal protection doctrine that he views as protecting the rights of groups of persons.

Thus, in criticizing the views of Professor Ronald Dworkin, Judge Thomas writes:[9]

> ... Dworkin does go to the core of the civil rights debate today. Dworkin correctly notes the primacy of the principle of freedom and dignity, but I think he misunderstands the substance of that principle. He reveals his error by applying his principle to groups, rather than to individuals. For it is above all the protection of individual rights that America, in its best moments, has in its heart and mind.

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[8] 347 U.S. 483 (1954).

[9] Clarence Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest, in Assessing the Reagan Years 392 (D. Boaz, editor) [hereinafter Civil Rights as a Principle].

In an "attempt to recover that foundation of individual liberties," Judge Thomas criticizes the "[Supreme] Court for 'voodoo jurisprudence'" and "the development of civil rights law since Brown".[10] The Brown decision, he contends, is without "adequate principle," and subsequent Supreme Court decisions that followed and applied Brown are "disastrous" and are "more concerned with meeting the demands of groups than with protecting the rights of individuals."[11]

Judge Thomas has developed much of his criticism of the Supreme Court's use of the Equal Protection Clause starting from his criticism of the reasoning of the unanimous opinion in Brown. Specifically, Judge Thomas attributes the "lack of principle" in Brown to its reliance on "[p]sychological evidence, compassion, and a failure to connect segregation with the evil of slavery".[12] Judge Thomas is not alone in his criticism regarding Brown, although his statements and writings do not discuss the substantial scholarly debate on this subject.[13] Instead, his criticism is based nearly exclusively on the reading he gives to Justice Harlan's Plessy dissent, discussed below.

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[10] Id.

[11] Id. at 393.

[12] Id.

[13] Judge Thomas's criticism of Brown makes reference only to two articles written by a political scientist at the Claremont Graduate School, and to Simple Justice, a book chronicling the history of the Brown case which does not analyze or critique the decision of the Court. Clarence Thomas, Toward a "Plain Reading" of the Constitution --- the Declaration of Independence in Constitutional Interpretation, 30 Howard Law Journal 691, 699 notes 32, 33 (1987) [hereinafter, Plain Reading].

2. His Proposed Substitution of a Theory of Rights Based on the Privileges or Immunities Clause

Judge Thomas concludes that Brown should have been decided on an entirely different basis. "The great flaw of Brown is that it did not rely on Justice Harlan's dissent in Plessy, which understood well that the fundamental issue of guidance by the Founders' constitutional principles lay at the heart of the segregation issue,"[14] asserts Judge Thomas. In order to fully understand this reference, it is important to understand Judge Thomas's interpretation of Justice Harlan's dissent. Essentially, he views it as an expression of "higher law" jurisprudence, and as having been based on the Thirteenth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment.

Specifically, Judge Thomas states that: "Justice Harlan's opinion provides one of our best examples of natural rights or higher law jurisprudence."[15] This may not be readily apparent, asserts Judge Thomas, because "[i]n order to appreciate the subtleties of Justice Harlan's dissent, one must read it in light of the 'higher law' background of the Constitution."[16] Such natural law principles are expressed in the Declaration of Independence and Judge Thomas finds Justice Harlan to have implicitly written them into the Constitution through the Privileges or Immunities Clause and the guarantee clause of Article

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[14] Id. at 698.

[15] Higher Law, supra note 3, at 66-67.

[16] Plain Reading, supra note 13, at 701.

IV, Section 4 of the Constitution.[17] Thus, Judge Thomas concludes that "[t]he proper way to interpret the Civil War Amendments is as extensions of the promise of the original Constitution which in turn was intended to fulfill the promise of the Declaration."[18] Reference to "the old Natural law tradition of the founders -- which enshrines the natural rights of all men", Judge Thomas posits, "allows us to reassert the primacy of the individual".[19]

More particularly, Judge Thomas finds the dissent premised on three bases growing from the Founder's notions of "universal principles of equality and liberty."[20] First, he restates the dissent's view that the Thirteenth Amendment prohibited "badges of slavery" in addition to abolishing slavery and "decreed universal civil freedom".[21] Second, Judge Thomas asserts that Justice Harlan applied the intention of the Founders in viewing segregation as "an unreasonable infringement of personal freedom."[22] Third, Judge Thomas finds that the dissent articulated a view of the Constitution as "color-blind."[23]

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[17] Higher Law, supra note 3, at 67-68; Plain Reading, supra note 13, at 701.

[18] Plain Reading, supra note 13, at 702.

[19] April 25, 1988 Speech delivered at California State University, pp 10-11.

[20] Plain Reading, supra note 13, at 701

[21] Id., quoting Plessy, 163 U.S. at 555 (Harlan, J. dissenting).

[22] Id. at 701.

[23] Id.

Judge Thomas does not inform us of his view of the significance of Justice Harlan's reliance on the Thirteenth Amendment, other than that Brown was remiss in not finding the roots of segregation in slavery.[24] As to his emphasis on "personal freedom," Judge Thomas has made clear his perspective: "Thus has civil rights become entrenched as an interest-group issue rather than an issue of principle and universal significance for all individuals."[25] Finally, with regard to the "color blind" Constitution, Judge Thomas identifies "racial preference policies" as at odds with "color-blind principles," and criticizes Justice Powell's equal protection analysis in Bakke as more concerned with "the admission of groups of whites" than with "rights inherent in the individual."[26]

Having identified what he views as the bases on which Brown should have been decided, Judge Thomas does not explain the practical consequence of such a decision. Instead, we are informed that "[t]he first principles of equality and liberty should inspire our political and constitutional thinking" and "... could lead us above petty squabbling over 'quotas,' 'affirmative action,' and race-conscious remedies for social ills."[27]

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[24] Id. at 699.

[25] Civil Rights as a Principle, supra note 9, at 392.

[26] Plain Reading, supra note 13, at 700 and 700 note 36.

[27] Id. at 703.

3. The Consequences of a Theory that the Constitution Does Not Require "Equal Protection of the Laws", But Only Protects Individual Liberty Interests

In search of illustrations of the consequences of a Brown decision reaching the same result, but based on the principles suggested by Judge Thomas, we return to his criticism of the cases following Brown. "[I]n the Green ... case," he contends, "we discovered that Brown not only ended segregation but required school integration. And then began a disastrous series of cases requiring busing and other policies that were irrelevant to parents' concern for a decent education."[28] That Judge Thomas distinguishes the Green holding from that of the original Brown decision and views it as leading to a series of decisions he views as "disastrous" provides some insight into the change in course he perceives would, or should, have followed a Brown decision grounded in "an adequate principle."[29]

The decision in Green v. County School Board of New Kent County,[30] was the Supreme Court's response to fourteen years of massive resistance to the right of school children to be free from segregation announced in Brown. In a unanimous decision, the Court held that such rights were not guaranteed simply by pronouncements that individual black students were permitted to choose to attend "white" schools, where separate "white" and

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[28] Civil Rights as a Principle, supra note 9, at 393 (discussing Green v. County School Board of New Kent County, 391 U S. 430 (1968))

[29] Civil Rights as a Principle, supra note 9, at 393.

[30] 391 U.S. 430 (1968)

"negro" schools continued to be operated on a completely segregated basis. An officially segregated school district sought to preserve segregation by continuing to operate its separate one-race schools, but adopting a policy that individual students had a "freedom of choice" to attend a different school. No white students chose to attend black schools and few black students risked crossing the "color line" to enroll in all-white schools. Indeed, this "freedom of choice" was frequently impaired by intimidation, threats and violence.[31] In answer to the pleas of black parents, the Supreme Court held that school authorities had to do more than purportedly offer individual students a choice, and were instead required "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[32]

Judge Thomas's criticism or characterization of the Green decision as "requir[ing] school integration"[33] mirrors the argument of the segregationist school board in that case: to require it to do more to end segregation than announce a "freedom of choice" policy amounted to a reading of the Fourteenth Amendment as requiring "compulsory integration."[34] This argument, and such a reading of the Fourteenth Amendment, was rejected by

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[31] United States Commission on Civil Rights, Southern School Desegregation, 1966-67 88 (1967), quoted in Green, 391 U S at 440-41.

[32] 391 U.S. at 437-38.

[33] Civil Rights as a Principle, supra note 9, at 393.

[34] 391 U.S. at 437.

the Court, which found presented "the question whether the Board has achieved the 'racially nondiscriminatory school system' Brown II held must be effectuated," and refused to adopt a per se rule invalidating all "freedom of choice" plans.[35]

Similarly, to the extent Judge Thomas criticizes the decision as not viewing the interests of school children at issue as "personal freedom[s]," his argument is similar to that once advanced by the segregationists, who sought to avoid the command of Brown by arguing that the Constitution guaranteed only "personal rights" that could be asserted and enforced only by each individual. They were acutely aware that if the Constitution protects only the rights of individuals, then only an individual deprivation could be remedied, and segregated institutions could be preserved, subject only to the exceptional individual case.

This strategy is clearly described in correspondence between the Chief Counsel of the South Carolina School Segregation Committee (the "Gressette Committee"), David W. Robinson, and the Attorney General of South Carolina, T. C. Callison, dated June 5, and June 11, 1954, respectively -- one month after the first Brown decision.[36] In suggesting arguments to be presented by either the Clarendon County School District or the State of South Carolina in the argument leading to the second Brown decision, Mr. Robinson proposed the following:

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[35] 391 U.S. at 437, 439-40.

[36] Gressette Committee Files, South Carolina State Archives. Copies are available from the Lawyers' Committee.

> In a recent conversation with you I suggested that the problem of adjusting our public school situation to Chief Justice Warren's opinion might be soluble if the Supreme Court in its decree held to the view that the equal protection clause of the Fourteenth Amendment protected a personal right which could not be enforced or waived by any other person.
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> * * *
>
> It seems to me that if the Court would restrict its decree in line with the principle that the right to go to a mixed school is individual and personal, for which reason each child or each parent may exercise the right, or refuse to exercise it, the school authorities could adjust their operations within the frame work of the present segregated public school program.
>
> Such a restrictive decree would in the first instance permit the Board of Trustees to assign white and negro students to segregated schools. The Legislature might then provide an administrative procedure whereby any parent dissatisfied with the assignment of his child to the nearest segregated school could petition the County board to permit his child to go to the nearest school of the other race. This right to petition should be restricted in various ways. A suggested procedure might require the petition to be filed sixty days before the opening of the September term; might authorize the Board of Trustees to take sworn testimony; require the presence of the parents; restrict the legal representation by the parent to members of the South Carolina Bar resident in the State; might provide an appeal to the County Board, then to the State Board, then to the Court of Common Pleas.
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> Since it is my view that most of the parents prefer their children to go to segregated schools, there would be few taking advantage of this procedure. If a negro parent persisted in urging his constitutional right, it is my thought that a few negro children in the white schools would not create a serious problem.

Judge Thomas's apparent criticism of the Green decision as departing from a "color-blind" view of the Constitution[37] is troubling. To the extent that Green and subsequent school

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[37] Plain Reading, supra note 13, at 700

desegregation decisions imposed an obligation upon school authorities to dismantle the segregated "dual" school systems, they required "race-conscious remedies." In the absence of a restructuring of long-segregated school systems, the black school children in Green would still have only a choice between a white school and a black school. In the Supreme Court's insistence that black school children be afforded more than a theoretical choice, Judge Thomas evidently finds it to have been "more concerned with meeting the demands of groups than with protecting the rights of individuals."[38] The Supreme Court's requirement that the continuing reality and structure of segregated school systems be dismantled -- in enrollment, faculty, condition of facilities and other respects -- Judge Thomas appears to perceive as "disastrous," reflecting a "lack of principle," and "against what was best in the American political tradition."[39]

Judge Thomas has not restricted his criticism of the application of equal protection principles to Brown and other school desegregation cases. For example, Judge Thomas has argued that deprivations of the right to vote should be found only with respect to individuals: "Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected when the individual's racial or ethnic group has

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[38] Civil Rights as a Principle, supra note 9, at 393

[39] Id. (emphasis in original)

sufficient clout."[40] He has, therefore, criticized equal protection precedent generally: "In both the areas of school desegregation and voting, the Court has tended to think in terms of protecting groups. This tendency is most sharply noted in cases dealing with what is known as affirmative action, but is better denominated racial (or gender) preference schemes." [41]

An insistence that only the liberties of individuals are protected -- a deprecation of the protection of persons from different treatment through group-based governmental classifications -- and a view of the Constitution that forbids consideration of race, for example, even where necessary to remedy a constitutional violation, would render the law incapable of removing barriers to equality for members of a disfavored group.

4. His Theory that the Declaration of Independence and Its References to the "Laws of Nature and of Nature's God" Are Expressly Incorporated into the Constitution

As discussed in the preceding section, Judge Thomas has fashioned an interpretation of the Constitution based primarily on his own reading of Justice Harlan's dissent in Plessy v. Ferguson. Apart from the substance of that interpretation, Judge Thomas's method and sources of analysis, in this and other instances, deserve comment.

An important premise of Judge Thomas's interpretation

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[40] "The Modern Civil Rights Movement: Can a Regime of Individual Rights and the Rule of Law Survive? " April 18, 1988 Speech by Clarence Thomas delivered at The Tocqueville Forum, Wake Forest University, at 17 [hereinafter "April 18, 1988 Tocqueville Forum Speech"]

[41] Id.

of the Harlan dissent in Plessy is his conclusion that the opinion, insofar as it relied on the Fourteenth Amendment, was based on the Privileges or Immunities Clause, rather than the Equal Protection Clause. Thus, Judge Thomas begins his analysis with the statement that: "It is not sufficiently appreciated that Justice Harlan's dissent focused on both the Thirteenth and the entire Fourteenth Amendments -- in particular, the 'privileges or immunities of citizens of the United States' clause."[42] However, he subsequently departs from this view of the dissent's treatment of the Fourteenth Amendment and concludes that the dissent relied exclusively on the Privileges or Immunities Clause. Judge Thomas reaches this conclusion based on the following interpretation of the language employed by Justice Harlan in the opinion:[43]

> He brings us back to privileges and immunities by constantly speaking of "citizens" and their rights. ... That Justice Harlan spoke of "citizens" rather than "persons" shows that he relied on the Privileges and Immunities Clause rather than on either the Equal Protection or the Due Process Clause, both of which refer to persons.

Justice Harlan, however, quoted the Privileges or Immunities, Equal Protection and Due Process Clauses of the Fourteenth Amendment together, along with the separate clause granting citizenship to persons born or naturalized in the United States, and made frequent use of the word "citizen."[44] He did

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[42] Higher Law, supra note 3, at 66

[43] Id. at 67 (footnote omitted).

[44] 163 U.S at 553-62 (Harlan, J., dissenting).

not single out the Privileges or Immunities Clause, and used language fully consistent with analysis under the Equal Protection Clause:[45]

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

Another basic premise of Judge Thomas's interpretation of the Plessy dissent is his determination that: "Justice Harlan's opinion provides one of our best examples of natural rights or higher law jurisprudence."[46] Although Justice Harlan did not speak of "natural law," "higher law," or the Declaration of Independence, Judge Thomas finds Justice Harlan to have implicitly written into the Constitution the natural law principles of the Declaration of Independence. As support for this proposition Judge Thomas refers us to "the briefs which Homer Plessy submitted" to the Court, and the following quote from the briefs:[47]

> The Declaration of Independence ... is not a fable as some of our modern theorists would have us believe, but the all-embracing formula of personal rights on which our government is based .... [This] controlling genius of the American people ... must always be taken into account in construing any expression of the sovereign will ... .

Indeed, Judge Thomas repeatedly asserts that the Constitution cannot be comprehended without reference to higher law.

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[45] 163 U.S at 559; See also at 555.

[46] Higher Law, supra note 3, at 66-67.

[47] Id. at 67-68 (citation omitted).

> The rule of law in America means nothing outside constitutional government and constitutionalism, and these are simply unintelligible without a higher law. Men cannot rule others by their consent unless their common humanity is understood in light of transcendent standards provided by the Declaration's "Laws of Nature and of Nature's God." Natural Law provides a basis in human dignity by which we can judge whether human beings are just or unjust, noble or ignoble.[48]

Although the concept of natural law is not referred to in the text of the Constitution, Judge Thomas argues that the Declaration of Independence, which includes a reference to "Laws of Nature and of Nature's God" is explicitly incorporated into the Constitution.[49] According to Judge Thomas,[50]

> ... the Constitution makes explicit reference to the Declaration of Independence in Article VII, stating that the Constitution is presented to the states for ratification by the Convention "the Seventeenth Day of September in the Year of our Lord one-thousand seven-hundred and eighty-seven [and] of the Independence of the United States of America the Twelfth ... ."

Based upon this short phrase in the Constitution, he asserts that the Constitution should be understood "in light of the Declaration of Independence" and that the Framers intended to incorporate the Declaration into the Constitution.[51]

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[48] Remarks of Clarence Thomas in panel discussion, "Affirmative Action Cure or Contradiction?", Center Magazine, November/December 1987, at 21, see also March 5, 1988 Speech by Clarence Thomas to the Federalist Society for Law and Policy Studies, University of Virginia School of Law, at 5

[49] Judge Thomas has frequently articulated the view that "important parts of the Constitution are inexplicable" if the Declaration of Independence is not incorporated into the Constitution See, e.g., Higher Law, supra note 3 at 64-67, Plain Reading, supra note 13 at 691, 693-95

[50] Plain Reading, supra note 13, at 695.

[51] Higher Law, supra note 3, at 64-65.

5. His Insistence that the Ninth Amendment to the Constitution is Only an Historical Reminder of the Limited Powers of the Federal Government, and His Rejection of Any Judicial Enforcement of the Amendment Because It Refers to Rights Which Are Not Specified

Although Judge Thomas has posed an interpretation of the Constitution in such a way as to incorporate the natural law concepts of the Declaration of Independence, he has expressed a disdain for the concept of unenumerated rights "reserved to the people" in the Ninth Amendment, despite its explicit inclusion in the text of the document. The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people." The Supreme Court has repeatedly found that the Ninth Amendment protects the right to privacy and personal liberty. For example, relying upon the privacy protections embodied in the Ninth Amendment, in Griswold v. Connecticut,[52] the Supreme Court struck down a Connecticut law that banned distribution of medical information and advice about contraceptives to a married couple; seven years later, in Eisenstadt v. Baird,[53] the Supreme Court held that, under the Ninth Amendment, laws which banned the distribution of contraceptives to unmarried individuals were also unconstitutional.

Judge Thomas does not view the Ninth Amendment as a source of unenumerated rights, as in these decisions, but states

[52] 381 U.S. 479 (1965)

[53] 405 U.S 438 (1972)

that "it has a great significance in that it reminds us that the Constitution is a document of limited government."[54] Thus, he has expressed "misgivings about activist judicial use of the Ninth Amendment,"[55] and has argued against a reading of the Amendment that protects unenumerated rights. He has suggested that an interpretation of the Ninth Amendment which gives the Supreme Court power to strike down legislation

> ... would seem to be a blank check. The Court could designate something to be a right and then strike down any law it thought violated that right.[56]

Although Judge Thomas rejects the use of the Ninth Amendment to define and protect unenumerated rights as a "blank check," he advocates the reinvigoration of the "Privileges or Immunities Clause" of the Fourteenth Amendment as a vehicle through which undefined natural or higher law principles are incorporated into the Constitution.[57] Indeed, Judge Thomas frankly admits that such an approach attempts to "giv[e] body to open-ended constitutional provisions,"[58] and that "[t]he specific content of these privileges and immunities is to be determined by both the courts and Congress."[59] Judge Thomas would thus apparently abandon established Ninth Amendment precedent and the

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[54] Civil Rights as a Principle, supra note 9, at 398

[55] Higher Law, supra note 3, at 63 note 2

[56] Civil Rights as a Principle, supra note 9, at 399

[57] See text supra at 6-7 and 14-17

[58] Higher Law, supra note 3, at 63.

[59] Id. at 67.

Framers' explicit reservation of unenumerated rights, in favor of the blank slate of a Privileges or Immunities Clause interpreted to incorporate the undefined higher law principles noted in the Declaration of Independence.

B. Judge Thomas's Positions on School Desegregation and on Enforcement of the 1982 Amendments to the Voting Rights Act

As noted in the discussion of Judge Thomas' theories of constitutional interpretation above, he has rejected the reasoning of the decision in Brown v. Board of Education as without "adequate principle."[60] He has also criticized the Supreme Court's holding in Green v. County School Board, mischaracterizing it as requiring integration. Although not identifying them with any specificity, he has expressed an apparent blanket rejection of more than 20 years of established Supreme Court school desegregation precedent following Green:[61]

> And then began a disastrous series of cases requiring busing and other policies that were irrelevant to parents' concern for a decent education. The Court appeared in these and many other cases to be more concerned with meeting the demands of groups than with protecting the rights of individuals. I could go into other cases, but the principle, or rather the lack of principle, is clear enough. In a good cause, the Court was attempting to argue against what was best in the American political tradition.

Judge Thomas's criticisms of Green and of the Supreme Court decisions following Green are not limited to his opposition

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[60] Civil Rights as a Principle, supra note 9, at 393

[61] Id. (emphasis added)

to "busing" as a remedy. The criticized cases include the Court's unanimous decisions rejecting persistent delays and attempts to avoid compliance with Brown even after Green,[62] requiring that faculties be desegregated,[63] announcing that only upon school authorities' default in the obligation to remove official segregation could courts order desegregation plans,[64] and authorizing compensatory and remedial education programs for students harmed by segregation.[65] In addition, these decisions applied Brown to "Northern" school districts, required discriminatory "intent" as a prerequisite to the duty to desegregate,[66] and limited the scope of metropolitan remedies.[67]

The grave consequences of Judge Thomas' theories of constitutional interpretation with respect to the Equal Protection Clause and school desegregation have been discussed above. However, if Judge Thomas' views had prevailed, hundreds of thousands of school children now in desegregated schools would still be attending schools established along racial lines.

Judge Thomas has also criticized the Court's Voting Rights Act cases for "presuppos[ing] that blacks, whites, Hispan-

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[62] See, e.g., Alexander v. Holmes County Bd. of Ed., 396 U.S. 19 (1969).

[63] United States v. Montgomery County Bd. of Ed., 395 U.S. 225 (1969).

[64] Swann v. Charlotte-Mecklenberg Bd. of Ed., 402 U.S. 1 (1971).

[65] Milliken v. Bradley (Milliken II), 433 U.S. 267 (1977).

[66] Keyes v. School District No. 1, 413 U.S. 189 (1973).

[67] Milliken v. Bradley (Milliken I), 418 U.S. 717 (1974).

ics, and other ethnic groups will inevitably vote in blocs."[68] Although he did not specify the objectionable decision by name, it is clear he was referring to Thornburg v. Gingles,[69] a decision interpreting the 1982 amendments to Section 2 of the Voting Rights Act, which prohibits election laws and practices with a racially discriminatory effect, including those that would dilute the voting strength of minorities. In Gingles the Court did not "assume" that people vote in racial blocs. Instead, the Court said that Section 2 requires the plaintiff to bear the burden of proving that racial bloc voting does occur in the jurisdiction; only then can a challenge be raised to election laws and redistricting plans that would scatter minority voters so that they have no opportunity to elect a candidate of their choice.[70]

C. Judge Thomas's Views on the Present Breadth of Employment Discrimination

A nominee's awareness that there are still substantial problems of entrenched discrimination against blacks, Hispanics, other minorities, and women is likely to affect his or her understanding of the cases which come to the attention of the Court. For example, if a nominee believes that the remaining problems of discrimination essentially involve isolated instances of individual discrimination, he or she is unlikely to understand the

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[68] April 18, 1988 Tocqueville Forum Speech, supra note 40, at 17

[69] 478 U.S. 30 (1986).

[70] 478 U.S. at 55-58.

importance of the kinds of procedural and evidentiary rules required to allow effective challenges to systemic discrimination. The question whether a nominee believes that systemic discrimination still exists is therefore highly relevant to his or her suitability to sit on the Court.

We recognize, as does everyone, that an enormous amount of progress in reducing discrimination has been made since the time of the decision in Brown v. Board of Education and since passage of the Civil Rights Act of 1964. At the same time, we must recognize that a great deal more remains to be done.

The Urban Institute's recent studies on disparate treatment involving matched pairs of black and white job applicants, and matched pairs of Hispanic and Anglo job applicants, graphically illustrate the extent of the remaining problem. Each member of a pair had the same "age, physical size, education, experience, and other 'human capital' characteristics," as well as the same "openness, apparent energy level, and articulateness". They had conventional appearance, conventional dress, and used conventional language. They applied for low-skilled entry-level jobs requiring limited experience, in response to newspaper advertisements.[71] The testing for disparate racial treatment between equally qualified blacks and whites took place in Chicago and in Washington, D.C. The results showed substantial differences: in 20% of the pairs, whites advanced farther than equally-

[71] Margery Austin Turner, Michael Fix, and Raymond J. Struyk, Opportunities Denied, Opportunities Diminished: Discrimination in Hiring (Washington, D.C.: Urban Institute Press, 1991) at 4, 9, 12.

qualified blacks, compared to 7% of the pairs in which blacks advanced farther than equally-qualified whites. In 15% of the pairs, only whites received job offers, compared to 5% of the pairs in which only blacks received job offers.[72] The testing for disparate national-origin treatment involved Hispanic citizens and Anglo citizens in Chicago and in San Diego. Hispanics were three times more likely than equally-qualified Anglos to encounter unfavorable treatment. Anglos received 33% more interviews, and 52% more job offers, than equally-qualified Hispanics.[73] The same results could probably be replicated in every city in the country.

Between 1983 and 1987, his view of the breadth of discrimination seems to have narrowed substantially. In 1983, Judge Thomas recognized that discrimination was more than an isolated phenomenon, and that it could not be eradicated solely through individual remedies. In a speech to personnel officials, he stated:[74]

> Our experience in administering fair employment laws for over the past 18 years has provided greater knowledge and understanding of the complex and pervasive manner in which employment discrimination continues to operate. Experience has taught us all that apparently neutral employment systems can still produce highly

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[72] Id. at 18-19

[73] Harry Cross, Genevieve Kenney, Jane Mell, and Wendy Zimmerman, Employer Hiring Practices Differential Treatment of Hispanic and Anglo Job Seekers, Urban Institute Report 90-4 at pp. 1-3 and 20-23 (Washington, D C., Urban Institute Press, 1990).

[74] March 17, 1983 Speech by Clarence Thomas to the American Society of Personnel Administrators, p. 4 (emphasis in original) [hereinafter, "March 17, 1983 Speech to A.S.P.A."].

> discriminatory effects. They can also perpetuate the effects of past discrimination.

In a 1983 speech to a women's organization, he stated:[75]

> Although, my commitment to individual rights causes me to raise questions about the effectiveness of group remedies, with the exception of quotas, I support many affirmative action remedies. I support these remedies because the remedies which are truly necessary to make individual rights a meaningful reality are not yet on the books.

In a 1983 speech to the Kansas City Bar Association, Judge Thomas stated: "I have even supported the use of some so-called affirmative action remedies . . . despite the social problems which can result from an over-reliance on them . . . ."[76] At that time, Judge Thomas often stressed the pervasiveness of discrimination notwithstanding its changing nature, while recognizing that other problems must also be addressed:[77]

> In many respects, the problem of discrimination also has changed. Yesterday, we confronted clear-cut acts of blatant discrimination. Today, we are facing less obvious, but no less pervasive effects caused by discrimination. Moreover, the problem of discrimination is compounded by a lack of preparation.

The EEOC's enforcement priorities mirrored the narrowing of his views over this period. In a 1987 law review article

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[75] March 30, 1983 Speech by Clarence Thomas to the General Meeting of Women Employed in Chicago, Ill., pp 14-15 [hereinafter, "March 30, 1983 Speech to Women Employed"]

[76] April 28, 1983 Speech by Clarence Thomas to the Kansas City Bar Association, pp 22-23 [hereinafter, "April 28, 1983 Kansas City Bar Speech"

[77] September 19, 1983 Speech by Clarence Thomas before the Capital Press Club at the Capital Press Club in Washington, D C . p. 15 See also August 2, 1983 Speech by Clarence Thomas before the National Urban League, p. 7, July 8, 1983 Speech by Clarence Thomas before the Commonwealth Club of California, p. 6.

describing his disagreement with race- and gender-conscious relief, Judge Thomas argued that reliance on such relief was a natural outgrowth of an emphasis on broad challenges to employment discrimination:[78]

> ... During the mid- and late-1970s, the Commission concentrated its efforts to enforce Title VII on suits that would affect large numbers of people. The EEOC first obtained authority to litigate employment discrimination suits under a 1972 amendment to the Civil Rights Act of 1964. At that time, blatant discrimination was still prevalent. Many employers openly maintained "No Blacks/Women Need Apply" policies, and many others had moved such practices underground. Minorities and women were not advancing into the workforce in as great numbers as many had hoped.
>
> The Commission, confronted with the enormity of the problem and limitations on its litigation resources, took a "bang for the buck" approach to fighting discrimination. Although Title VII guaranteed individuals the right to be free of discrimination in employment, the Commission did not attempt to right every wrong individually, a task for which its litigation machinery was not prepared. Instead, the Commission tried to make quick statistical progress by funneling resources into challenges against the hiring practices of some of the country's largest employers. During this period, suits were brought against such companies as American Telephone and Telegraph, General Electric, Ford Motor, General Motors, and Sears Roebuck.
>
> The use of remedies that included racially defined goals and timetables was a necessary consequence of the emphasis on this kind of litigation. Under then-prevailing judicial standards, many of these cases were based solely on statistical disparities. Frequently, all that was known was that members of one group were substantially underrepresented in the employer's workforce....

Arguing that it was often impossible to provide back pay relief because of the difficulty in determining "which of the

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[78] Clarence Thomas, Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!, 5 Yale Law & Policy Review 402, 403-04 (1987) (footnote omitted) (emphasis in original) [hereinafter, "Affirmative Action Goals"].

many rejected applicants would have been hired absent discrimination," Judge Thomas stated that the result was a resort to relief "under which other members of the victims' class were given positions as substitutes for those who would have been employed had nondiscriminatory selection criteria been used." The result of the Commission's concentration on big cases was, he argued, that individuals who did not raise class-type issues or other priority issues were overlooked. The Commission was unlikely "to go to bat" for them in court.[79]

In point of fact, the courts have developed means for providing back pay relief in situations in which it is impossible to identify the individuals who would have been selected in the absence of discrimination.[80] In Congressional hearings held on April 15, 1983, Judge Thomas recognized the propriety of using formulas in order to provide effective back pay relief where the nature of the employer's discrimination made it impossible to identify which of the discriminatees would have been selected in the absence of discrimination:[81]

> ... [I]n cases where it is impossible or diffi-

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[79] Id. at 404

[80] E.g., Catlett v. Missouri Highway and Transp. Comm'n, 828 F 2d 1260, 1267 (8th Cir. 1987), Segar v. Smith, 738 F 2d 1249, 1289-91 (D.C. Cir. 1984), cert. den., 471 U.S. 1115 (1985), White v. Carolina Paperboard Corp., 564 F 2d 1073, 1087 (4th Cir. 1977), Pettway v. American Cast Iron Pipe Co., 494 F 2d 211, 260-63 (5th Cir. 1974) (the courts can award back pay in a manner avoiding the "quagmire of hypothetical judgment")

[81] Testimony of Clarence Thomas, Oversight Hearings on the OFCCP's Proposed Affirmative Action Regulations Before the Subcommittee on Employment Opportunities of the House Committee on Labor, 97th Cong., 1st Sess., at 66 (1983) [hereinafter, "1983 Oversight Hearings on the OFCCP"].

> cult to determine the precise relief that should go to the individuals, remedies have permitted the use of formula relief. Whether or not the specific case that you outline would be one of those cases, I do not know. But it is available in cases where it would be impractical to provide such individual relief.

In his Yale article, Judge Thomas then turned to the present breadth of discrimination and of the EEOC's litigation challenging discrimination:[82]

> The Commission has now entered a new stage in its enforcement work. Although systemic litigation is still an area of emphasis for the Commission, it no longer need consume our resources to the exclusion of other types of cases. Many of the very large employers who once appeared to discriminate have been brought into compliance through lawsuits and Commissioner Charges. Other large and sophisticated employers, in response to the publicity surrounding the Commission's efforts, voluntarily changed their discriminatory practices and sought to remedy the continuing effects of those practices. Now, for the first time, the Commission has the luxury and freedom to fight to vindicate the Title VII rights of every individual victim of discrimination. The Commission has committed itself to a policy of seeking full relief for every victim of discrimination who files a charge. ...
>
> It is now more likely that the Commission will be able to identify the discriminatees entitled to back pay or placement after making a finding of discrimination in hiring or promotion. Our emphasis on helping all individuals who come to the Commission's offices with claims of discrimination means that in most cases we will know who the victims are. Even many of our larger class action cases are set in motion by complaints filed by individuals rather than by the observation of a statistical disparity. Needless to say, the Commission's ability to produce flesh-and-blood victims is very helpful when we go to court to prove discrimination.
>
> In addition, most of our cases involve discrimination by a particular manager or supervisor, rather than a "policy" of discrimination. Many discriminating employers first responded to Title VII by turning from

[82] Affirmative Action Goals, supra note 78, at 404-05 (footnote omitted).

> explicit policies against hiring minorities and women to unstated ones. Now even such veiled policies are uncommon; discrimination is left to individual bigots in positions of authority. As a result, the discrimination that we find today more often has a narrow impact, perhaps influencing only a few hiring decisions, and does not warrant the use of a goal that will affect a great number of subsequent hires or promotions.

We do not know of any change in the actions of employers during the four years from 1983 to 1987 which would justify the conclusion that broad patterns of discrimination had diminished in importance, or that women and minorities faced a different kind of threat at the end of this period than they had faced at its beginning. As the Urban Institute reports above show, there are still broad patterns of disparate treatment affecting numerous persons at numerous employers.

Indeed, Judge Thomas may have come to his present views even if he were convinced of the continuing nature of broad-scale, entrenched discrimination. In his profile in The Atlantic Monthly, he seemed to agree with the author's conclusions:[83]

> If an employer over the years denies jobs to hundreds of qualified women or blacks because he does not want women or blacks working for him, Thomas is not prepared to see a "pattern and practice" of discrimination. He sees hundreds of local, individual acts of discrimination. Thomas would require every woman or black whom that employer had discriminated against to come to the government and prove his or her allegation. The burden is on the individual. The remedy is back pay and a job. "Anyone asking the government to do more is barking up the wrong tree," Thomas says.
>
> Thomas has made it EEOC policy to shy away from class-action suits. He doesn't want to see blacks

[83] Juan Williams, A Question of Fairness, The Atlantic Monthly, February 1987, at pp. 71, 79 [hereinafter "1987 Atlantic Profile"].

> treated as numbers. So he favors aggressive attacks on employers only when they are proved to have discriminated against particular persons. "My view is that the most vulnerable unit in our society is the individual. And blacks, in my opinion being one of the most vulnerable groups, should fight like hell to preserve individual freedoms so people can't gang up on us. Blacks are the least favored group in this society. Suppose we did band together, group against group -- which group do you think would win? We're breaking down everything, ten percent for the blacks, twenty-five percent for the women, two percent for the aged, everything broken out according to groups. Which group always winds up with the least? Which group always seems to get the hell kicked out of it? Blacks, and maybe American Indians."

This is a philosophy incapable of redressing patterns of discrimination. Placing repetitive burdens on victim after victim ensures that some will falter, ensures that the EEOC's resources would be wasted in litigating the same question over and over against the same defendant, and ensures that much of the employer's discrimination will go unremedied.

D. Judge Thomas's Implementation of His Views of Employment Discrimination While He Was Chairman of the Equal Employment Opportunity Commission

1. Role of the EEOC Chairman

As Chairman of the Equal Employment Opportunity Commission, Judge Thomas was responsible for directing the administrative processing[84] of scores of thousands of employment discrimination charges annually. In addition, as Chairman he participated with other Commissioners in setting EEOC policy, and in

[84] Such administrative processing includes intake, investigation, deciding whether there is reasonable cause to believe that discrimination occurred, and issuance to charging parties of Notices of Right to Sue.

determining whether the Commission would bring suit on particular charges of discrimination. He had the right to file Commissioner's charges of discrimination to challenge broad patterns of discrimination. He dealt with other Federal agencies sharing responsibilities for equal employment opportunity and for personnel policy, including the U.S Department of Justice, the U.S. Department of Labor and its Office of Federal Contract Compliance Programs, and the U.S. Office of Personnel Management.

The powers and duties of the Chairman affect every aspect of the EEOC's activities. Charge intake officials and investigators look for guidance to the statements and actions of the Chairman, and reflect that guidance in their write-up of charges and in their performance of investigations. EEOC attorneys look to the Chairman's statements and actions for guidance on the kinds of lawsuits the Commissioners will authorize for filing. All of these officials will rely on such guidance to avoid wasting their time working on claims of discrimination which the Commission will not pursue.

Nor is this effect limited to the EEOC itself. Because of President Carter's Executive Order 12067, issued July 1, 1978, the EEOC is the lead agency for the development of EEO policy.[35] Until policy changes are formally voted by the Commission, the statements and actions of the Chairman are other agencies' best

[35] Sec. 1-201 of the Executive Order, 43 Fed. Reg. 28967 (1978), states in part: "The Equal Employment Opportunity Commission shall provide leadership and coordination to the efforts of Federal departments and agencies to enforce all Federal statutes, Executive orders, regulations and policies which require equal employment opportunity ...."

guidance as to the policies the EEOC will adopt in the future, and as to which they will then have to consult, and possibly pay deference.

The EEOC and its Chairman are not, of course, free to adopt any policies they wish. They are constrained by the language and intent of Congress in enacting the statutes they administer --- Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the Age Discrimination in Employment Act of 1965 --- and the decisions of the courts interpreting those statutes. With the limited exception of charges of discrimination involving Federal agency employers, Congress has not given the EEOC the power to issue binding decisions under any of these statutes. The EEOC may only issue advisory decisions; the courts have been given the authority to make binding determinations on the meaning of the law and on its application in particular cases. The administrative enforcement of the EEO laws cannot be effective unless it is consistent with the warp and woof of controlling caselaw interpreting those laws.

It is obvious that the Chairmanship of the EEOC is an extremely influential position. While every public official has the duty to be accurate and fair as to the law and its application, a Chairman of the EEOC is under a heightened duty of accuracy and fairness.

As Chairman, Judge Thomas failed this test, with results which seriously harmed the government's enforcement of Title VII. Consistency in the statement of agency positions is

important to allow staff to perform their jobs under clearly understood principles and in allowing employers to shape their personnel actions in accordance with the law. Unfortunately, Judge Thomas's abrupt shifts of positions on major questions of Title VII interpretation after President Reagan's 1984 re-election left the agency and the public in confusion.

Judge Thomas's views on the breadth of discrimination also had a major impact in reducing the effectiveness of the fight against discrimination. During the 1980's, fewer and fewer private attorneys and the clients they represented were able to afford decade-long litigation against broad patterns of discrimination. Broad patterns of discrimination continued, but in subtler forms which required a much greater investment of time and money to prove. The courts were imposing ever-greater evidentiary burdens on plaintiffs, thus requiring greater and greater reliance on expert testimony while the courts were simultaneously suggesting --- and then holding --- that a winning plaintiff could not recover expert fees even if the expert testimony had been essential.

The result was that fewer and fewer private attorneys were willing to file class actions challenging broad patterns of discrimination, and could only afford to handle individual cases. Nationally, class action filings to enforce the civil rights laws went down dramatically, from 1,174 new class actions filed in the judicial reporting year ending June 30, 1976 to 48 filed in the judicial reporting year ending June 30, 1987. At the same time,

total job discrimination filings went up dramatically, from 5,321 filed in the judicial reporting year ending June 30, 1976 to 8,993 filed in the judicial reporting year ending June 30, 1987.[86]

In these circumstances, enforcement of Title VII by the EEOC became even more important. When the private bar can no longer afford to tackle broad problems of discrimination, there is no effective substitute for governmental enforcement. The EEOC's shifting of its emphasis from broad cases to individual cases simply replicated what the private bar was doing, and did nothing to fill the gap which only the EEOC could fill.

2. Background and Context of the Supreme Court's Unanimous 1971 Decision in Griggs v. Duke Power Co.

One of the most important developments in the legal effort to dismantle racial discrimination and exclusion in hiring was the challenge to discriminatory employment tests and diploma requirements having little or no relation to job performance.

Widespread legal attention to the possibility of racial differences in the ability of tests to make predictions about the future performance of students or employees did not arise until the beginning of the substantial dismantling of segregation in the 1960's. "In a society in which blacks were openly excluded from jobs, the idea of devoting effort to studying the problem of

[86] Administrative Office of the U.S. Courts, the various Annual Reports of the Director and unpublished statistics available to the public.

subtle exclusion through tests hardly seemed worthwhile."[87]

Challenges to employment tests as discriminatory began before Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., was enacted. In the debate leading to passage of the Act, there was extended discussion of a decision by a hearing examiner for the Illinois Fair Employment Commission, Myart v. Motorola Co.[88] The case sparked so much interest because the hearing examiner suggested that standardized tests could not be used, even if the employer's legitimate interests required their use. This led to concern whether passage of Title VII would require the same result.

Sen. Tower proposed an amendment to immunize from the reach of Title VII "professionally developed ability tests" which are "designed to determine or predict whether such individual is suitable or trainable with respect to his employment ... ."[89] The amendment was defeated because, in the words of Senator Case, it would authorize any test, "whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute."[90] Two days later, Senator Tower proposed an amendment

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[87] George Cooper and Richard B Sobol, Seniority and Testing Under Fair Employment Laws, A General Approach to Objective Criteria of Hiring and Promotion, 82 Harvard Law Review 1598, 1645 (1969)

[88] The proceedings were reprinted in 110 Cong. Rec. 13492-13505 (June 11, 1964)

[89] 110 Cong. Rec. 13492.

[90] 110 Cong. Rec. 13504.

which became section 703(h) of the Act, immunizing only those professionally developed ability tests which are "not designed, intended or used to discriminate".[91]

Thus, Congress accepted the proposition that even a good-faith qualification required by an employer would be unlawful if the qualification requirement had an exclusionary effect on minorities or women and was not job-related. In its brief as amicus curiae to the Supreme Court in Griggs v. Duke Power Co.[92], the Nixon Administration supported this principle.

3. The Griggs Decision

Griggs upheld the disparate-impact theory of discrimination recognized by Congress in enacting the statute. Duke Power had imposed high school degree and testing requirements for the company's better-paying jobs in the Operations, Maintenance, and Laboratory and Test Departments. The unappealed findings of the district court specified that the jobs in these departments included positions as trainee, as Power Station Control Operator, as Pump Operator, as Utility Operator, as Mechanic, as Electrician-Welder, as Machinist, as Lab and Test Assistant, as Lab and Test Technician, and as supervisors.[93]

Existing employees could be assigned to one of these departments with either a high school degree or a passing score

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[91] 42 U.S.C. § 2000e-2(h).

[92] 401 U.S. 424 (1971).

[93] See Griggs v. Duke Power Co., 292 F. Supp. 243, 245 note 1 (M.D.N.C., 1968).

on certain personnel tests. Outside applicants for these better-paying departments had to meet both the high-school degree requirement and the testing requirement.

The Supreme Court found that while the company had not acted with a discriminatory purpose, neither the tests nor the degree requirement had been "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used."[94] They were therefore unlawful. If these selection practices had been proven to be necessary and related to job performance, however, their use would have been lawful notwithstanding their exclusionary effect.

4. Enforcing the Griggs Decision: Guidelines on Employee Selection Procedures, and Subsequent Decisions

Griggs held that the 1966 and 1970 EEOC Guidelines on Employee Selection Procedure were supported by the Act and its legislative history, that there was "good reason to treat the guidelines as expressing the will of Congress", and that they are "entitled to great deference."[95] The Court re-affirmed this ruling in Albemarle Paper Co. v. Moody.[96] Even the partial reversal of Griggs in Wards Cove Packing Co. v. Atonio,[97] left some features of Griggs untouched: the initial statistical focus

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[94] 401 U S at 431

[95] 401 U S. at 434

[96] 422 U S. 405, 430-36 (1975)

[97] 490 U.S 642 (1989)

on whether the test or other employment practice disproportionately affected minorities or women, the refusal to accept a mere assumption or assertion that an exclusionary practice is job-related, and the employer's burden of at least producing meaningful evidence that the exclusionary practice is job-related.[98] These surviving common aspects of the Court's disparate-impact decisions are the ones which concern us here.

The Department of Justice, the Department of Labor, and the Office of Personnel Management also have some responsibility for enforcement of the fair employment laws. Thus, in 1978, these three agencies joined the EEOC in issuing the Uniform Guidelines on Employee Selection Procedures ("UGESP"),[99] which incorporated the principles expressed in Griggs.

5. The Practical Importance of the Griggs Decision

"The use of tests and similar requirements can be an engine of exclusion of minorities far more efficient than any individual's personal intent."[100] Griggs provided an effective means of challenging these practices. The treatise on employment discrimination law most widely used by practitioners describes Griggs as "the most important court decision in employment

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[98] Prior to Wards Cove, the employer had the burden of persuasion on this point

[99] 29 C.F.R. Part 1607

[100] Richard Talbot Seymour, Why Plaintiffs' Counsel Challenge Tests, and How They Can Successfully Challenge the Theory of 'Validity Generalization', 33 Journal of Vocational Behavior 331, 333 (1988).

discrimination law."[101]

As a result of Griggs, many employers stopped using off-the-shelf tests which arbitrarily[102] excluded minorities and women from job opportunites. Many employers had assumed from the assurances of test developers that the tests automatically had a useful function, and learned otherwise when Griggs, Albemarle Paper, and the Guidelines required them to determine whether the tests were in fact useful. As a result of Griggs, arbitrary height-and-weight requirements were ended for many jobs, including positions as police officers; this had the effect of opening up these jobs to the women, Hispanics, and Asians interested in these public-safety careers. The elimination of arbitrary high-school degree requirements opened up many industrial jobs for blacks, particularly in the South where many blacks had been required by economic circumstances to leave school to work as agricultural laborers, but were then being displaced from agriculture by increasing mechanization.

The Executive Officer of the American Psychological Association testified before Congress in 1985 that "psychologists generally agree that the caliber of employment practices in organizations has improved dramatically since publication of the

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[101] Barbara Lindemann Schlei and Paul Grossman, Employment Discrimination Law (Washington, D C., Bureau of National Affairs, 2nd ed., 1983) at 5 (footnote omitted).

[102] An exclusion from job opportunities which is not job-related is arbitrary.

existing Uniform Guidelines in 1978".[103] Few management or plaintiffs' attorneys would disagree that Griggs led many employers to examine their employment practices more closely, and to end their use of tests and other practices which were unrelated to job performance. Any weakening of Griggs leading to the general re-introduction of such tests would defeat the purpose of Title VII. "The widespread use of such tests would reestablish a racially segregated job structure that would be the same in effect, if not intent, as the old pattern of segregation and hierarchy that Title VII was designed to break down."[104]

6. Judge Thomas's Initial Support for Griggs and for the Uniform Guidelines

As late as 1983, Judge Thomas's public statements provided strong support for Griggs and the Uniform Guidelines:[105].

> We know that employment discrimination today often results from facially neutral employment policies and practices. Our experience in administering fair employment laws for over the past 18 years has provided a greater knowledge and understanding of the complex and pervasive manner in which employment discrimination continues to operate. Experience has taught us all that apparently neutral employment systems can still produce highly discriminatory effects. They can also perpetuate the effects of past discrimination.

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[103] On the Subject of Uniform Guidelines on Employment Selection Procedures, Hearings before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong., 1st Sess., October 2, 1985 (Testimony of Leonard Goodstein, p. 2).

[104] Barry L. Goldstein, and Patrick O. Patterson, Turning Back the Title VII Clock: The Resegregation of the American Work Force through Validity Generalization, 33 Journal of Vocational Behavior 452, 457 (1988).

[105] March 17, 1983 Speech to A.S.P.A., supra note 74, at 4 (emphasis in original).

While recognizing that the Uniform Guidelines might need to be updated on occasion, he cautioned against any substantial weakening:[106]

> We have recognized, for example, that there can be problem areas in the very guidelines for which we have pledged our continued support. But it should also be remembered that the development of the EEOC guidelines was an exceedingly lengthy process. It involved exhaustive public comment, public hearings and analysis. Any future decision to reassess these important provisions will be made with an eye to that kind of deliberate procedure -- one in which our aim must be limited to measuring the performance of the guidelines as set against their critical purpose. As long as they serve that purpose effectively, there is no present need for revision. We are not dealing with common zoning ordinances here. Whole classes of people in this country have come to rely on the vital protection offered by measures such as these.

In further support of the continuation of the Guidelines, Judge Thomas emphasized the need for stability and predictability:[107]

> The policies advanced by the EEOC Guidelines on Employee Selection Procedures ... have been given the force of law; they have given rise to a measure of certainty, stability in the employment arena; setting legal standards upon which both employers and employees can rely.

7. Judge Thomas's Abrupt Change of View After the 1984 Election

Judge Thomas's publicly stated view of Griggs, the Uniform Guidelines, and their importance changed abruptly after President Reagan's landslide 1984 re-election, without any public explanation for the shift or for its timing. He began the change a few days after the re-election, stating that he had "a lot of

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[106] Id. at 11 (emphasis supplied)

[107] Id. at 9.

concern" about the Uniform Guidelines, and that there was a good possibility there will be "significant changes".[108]

In a newspaper interview three weeks later, he stated that he thought the affirmative-action decision in Firefighters Local Union No. 1784 v. Stotts[109] somehow "modified Griggs"[110] or drew Griggs into question.[111] Judge Thomas's statement in the interview that "recent Supreme Court decisions preclude preferential treatment for anyone who was not actually found to be a victim of discrimination" makes clear that the decision to which he referred was Stotts; no other recent decision fits that description.

On its face, this contention is difficult to understand. The Court's opinion in Stotts did not even mention either Griggs or the disparate-impact doctrine. Stotts involved a consent decree establishing hiring goals for blacks as a remedy for past discrimination. The consent decree came into conflict with a seniority system when the fire department implemented layoffs. In order for blacks to maintain the percentage representation they had gained in various Fire Department positions,

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[108] Policy Changes, Aggressive Enforcement, Will Mark Next Term at EEOC, Thomas Says, BNA Daily Labor Reporter, November 15, 1984 pp A-6, A-8 [hereinafter, "November 15, 1984 Policy Changes"]

[109] 467 U.S. 561 (1984).

[110] Juan Williams, EEOC Chief Cites Abuse of Racial Bias Criteria, Washington Post, December 4, 1984, at A13 [hereinafter "December 4, 1984 EEOC Chief Cites Abuse"].

[111] Robert Pear, Changes Weighed in Federal Rules on Discrimination, N.Y. Times, December 3, 1984, at A1.

the trial court ordered that a number of more senior, white firefighters be laid off ahead of less-senior blacks. The Court reversed the Sixth Circuit's and the trial court's finding that the seniority system was not a bona fide seniority system within the meaning of § 703(h) of Title VII, which the lower courts had relied upon to state that the layoffs would have a racially discriminatory effect. The Court held that competitive seniority --- an effective protection against the layoffs --- could not be given to blacks who were not actual victims of past discrimination.

Compounding the problem of his meaning, Judge Thomas went on in one of these interviews to state incorrectly that the employment practices in Griggs had been applied to persons seeking ditch-digging jobs, and that Griggs had been taken too far:[112]

> "I'm not saying Griggs [v. Duke Power Co.] is bad law," Thomas said. "In that case they were asking that workers have a high school diploma to dig ditches. But the way Griggs has been applied has been overextended and over-applied."

This description of Griggs had the facts and import of the case exactly backwards, an error surprising for the head of an enforcement agency when discussing the most important case construing the law he is charged with enforcing.

It seems a fair inference from this statement that Judge Thomas favored limitation of the Griggs doctrine to unskilled laboring positions. Such a limitation would have robbed

[112] December 4, 1984 EEOC Chief Cites Abuse, supra note 110.

Griggs of most of its value. Exclusionary practices are rarely applied to jobs at the bottom of the socio-economic ladder, and are much more frequently applied to higher-level positions, including higher-level trainee positions such as some of the jobs in Griggs itself. The Lawyers' Committee testified before Congress shortly after this statement was made, and commented on the importance of the Uniform Guidelines:[113]

> Much of the job advancement of members of minority groups and of women over the last two decades has been a direct result of these rules. The "reasonably certain" awards of back pay against employers, even if they are acting in good faith, does in fact spur employers to take a second look at exclusionary practices before suit is brought, and to look for alternatives which will be just as good in determining real qualifications and which will not have the exclusionary effect. This "spur" would not work, however, if employers did not know in advance the standards by which their tests and other selection standards would be judged.

Notwithstanding Judge Thomas's earlier statements on the need for caution in considering changes to the Uniform Guidelines, and on the need of employers and employees alike for stability, at some time in 1984 he decided to undertake a complete review of the Guidelines. An internal EEOC document outlining the scope of the proposed review included questions on whether there should be any Uniform Guidelines at all.[114] The revelation of this inquiry triggered a wave of Congressional hearings and caused substantial

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[113] Prepared statement of William L. Robinson and Richard T Seymour on Behalf of the Lawyers' Committee for Civil Rights Under Law, Hearing Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 98th Cong , 2d Sess. at 10 (December 14, 1984)

[114] Id., Appendix A.

uncertainty among the persons and organizations affected by the Uniform Guidelines.

In a February 1985 report to the Office of Management and Budget on the Commission's regulatory agenda, Judge Thomas wrote his sharpest criticism of the Griggs rule:[115]

> The premise underlying UGESP is that but for unlawful discrimination by an employer, there would not be variations in the rates of hire or promotion of people of different races, sexes, or national origins who are hired or promoted by that employer. ... UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race-and sex-neutral. Operating from these premises, UGESP makes determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term "discrimination."
>
> The premises underlying UGESP are conceptually unsound because (1) blacks, Hispanics, other minorities, and women are not inherently inferior, and (2) statistical disparities in the rates at which an employer hires or promotes people of different races, sexes, or national origins may reflect far too many factors other than unlawful discrimination by the employer for them to give rise to a presumption of such discrimination. Moreover, the use of a mechanical statistical rule to define "discrimination" encourages employers to discriminate in order to secure the workforce composition necessary to satisfy the statistical rule.

The critical point is that, although Griggs and even Wards Cove agree that an exclusionary practice should not simply

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[115] Office of Management and Budget, Regulatory Program of the United States Government (August 8, 1985) (Statement of Clarence Thomas), at 523-24, reprinted in Oversight Hearing on EEOC's Proposed Modification of Enforcement Regulations, Including Uniform Guidelines on Employee Selection Procedures Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 99th Cong, 1st Sess., at 127-28 (October 2, 1985).

be assumed to be proper and that evidence to show its propriety is necessary, Judge Thomas has criticized this requirement as assuming "some inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people". His reference to even this remaining common ground between Griggs and the later decision in Wards Cove as outside "the plain meaning of the term 'discrimination'" necessarily raises the question whether he continues to accept this basic premise of Griggs, or whether he would go even farther than Wards Cove and abolish the disparate-impact standard altogether.

Such a change would restrict Title VII to cases of intentional discrimination, and leave minorities and women at the mercy of employers who would then have little incentive to curb their use of exclusionary practices. Indeed, employers which intended to limit their employment of blacks, Hispanics, or women could adopt paper-and-pencil tests, strength tests, and similar requirements secure in the knowledge that it would be extremely difficult to prove their wrongful intent in adopting such requirements but the results would be the same as with the more readily provable direct forms of intentional discrimination.

The EEOC continued the issue of changes in the Uniform Guidelines on its regulatory agenda for some years, but the agency never did announce proposals for specific changes. The Uniform Guidelines were still intact when Judge Thomas left office as Chairman to take up his judgeship on the U.S. Court of

Appeals for the District of Columbia Circuit.

8. Judge Thomas's Views on the Use of Statistical Evidence in Discrimination Cases

The Supreme Court has repeatedly held that proper statistical evidence taking job qualifications, availability and employer explanations into account can in appropriate cases be sufficient to prove discrimination.[116] Few employers admit that they are discriminating, and the nature of their actions has to be deduced from all of the employment decisions they have made. In Teamsters, the Court quoted with approval an appellate decision stating that "In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved."[117] In disparate-impact cases, the plaintiff has the burden of persuasion that the challenged requirement disadvantages members of minority groups or women to a substantially greater extent than whites or men; such proof is necessarily statistical.

In discussing statistical evidence, some important qualifications must be kept in mind. First, statistical evidence has no weight unless it is both accurate and appropriate. Where there are legitimate qualification requirements, such as a teaching degree for a position as teacher or an engineering degree for a position as engineer, a plaintiff has the burden of

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[116] E.g., International Brotherhood of Teamsters v. United States, 431 U S 324, 339-41 (1977), Dothard v. Rawlinson, 433 U S 321, 329-31 (1977)

[117] 431 U S at 339 note 20 (quoting United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.), cert. den., 404 U S 984 (1971)).

taking such qualifications into account in presenting any statistical proof.

Second, a plaintiff's statistical evidence never creates a conclusive presumption of discrimination. A court must always consider the defendant's explanation of the statistics, and must always consider any alternative statistical analysis offered by the defendant. The Supreme Court has made clear that a proper statistical showing, not adequately rebutted by the defendant, is sometimes enough to prove discrimination. No matter how strong or appropriate the statistical proof, therefore, the most it can do is to create a rebuttable presumption of discrimination.

Third, in the judgment of the Lawyers' Committee there were legitimate grounds for the Chairman or anyone else to criticize the EEOC's approach to statistical proof in some of its cases. Sometimes, the EEOC's presentation was too simple; sometimes, it was based on unchecked assumptions on the availability of minorities or women for some kinds of jobs. Sometimes, the EEOC did not pay careful enough attention to the employer's explanations and determine whether nondiscriminatory factors accounted for substantial parts of the racial, national origin or gender disparities on which it relied. Sometimes, the EEOC failed to develop the kinds of non-statistical testimony which would have made its statistical case much more convincing. We cannot criticize Judge Thomas for calling attention to such problems. His former agency, and other agencies, bring bad cases

from time to time. Any serious attempt to reduce the number of such cases is commendable.

However, our concern is that Judge Thomas's general criticisms of statistical proof in connection with his statements on the Griggs rule and his attacks on the Uniform Guidelines exceeded the dimension of the problems mentioned above, and seemed to disregard the value of statistical proof altogether. In his August 8, 1985 statement of the EEOC's regulatory program, he referred to provisions of the Uniform Guidelines on the determination of adverse impact --- which is the same as the threshold burden on the plaintiff in a disparate-impact case --- as a "mechanical statistical rule that has no relationship to the plain meaning of the term 'discrimination.'" Later in the same document, he stated that "statistical disparities ... may reflect far too many factors other than unlawful discrimination by the employer for them to give rise to a presumption of such discrimination."[118]

These statements are extremely troubling. The reference to "the plain meaning of the term 'discrimination'" has been discussed above. The latter statement may reflect an unwillingness to credit statistical proof even where the defendant has no credible rebuttal to the statistical evidence and the plaintiff has gone as far as possible in showing that a substantial disparity exists even after taking into account racial, national origin

[118] August 8, 1985 Statement of Clarence Thomas, full quotation set out in text, supra at 45-46.

or gender differences in availability, in the possession of legitimate qualifications, and in other relevant factors. Such an approach would have the result of providing immunity for the many instances of discrimination where no direct proof of discriminatory purpose is available, and where discrimination can only be inferred from the results of the employer's actions and the absence of any credible explanation.

This type of statement was taken by some EEOC district offices as an indication that they were not allowed to consider statistical evidence offered by a charging party, or that they were only allowed to consider such evidence where some unusual condition was met. In one case, we were told that a charging party's statistics could only be relied upon if the charging party produced a witness who had direct personal knowledge of intentional discrimination. In another case, a plaintiff's attorney was told that a charging party's statistics could only be relied upon if the charging party produced a list of all victims of the discrimination in question. We think it unlikely that Judge Thomas gave these types of instructions to the district offices; instead, these misguided policies seem to us to reflect the confusion of EEOC officials across the country arising from Judge Thomas's repeated criticisms of statistical evidence without his having clarified what he saw as the proper role, if any, of statistical proof.

In fact, the type of lawsuit the Commission was likely to bring changed during Judge Clarence Thomas' tenure from the

type of high-impact cases requiring statistical proof to cases brought on behalf of individuals alleging specific acts of discrimination against themselves.[119]

E. Judge Thomas's Positions on Affirmative Action

1. Overview

Judge Thomas has consistently voiced reservations as to the use of race- and gender-conscious remedies for discrimination. Despite his personal beliefs, during Judge Thomas' first two years at the EEOC, he usually was an advocate for existing EEOC policies including affirmative action. This stance often put him at odds with others in the Reagan Administration -- most frequently, William Bradford Reynolds, Assistant Attorney General For Civil Rights. After President Reagan's re-election, Judge Thomas began to advocate publicly dramatic changes in EEOC polity. In an interview immediately after election day, Judge Thomas announced that, henceforth, the Administration would speak with one voice and that there would be concerted efforts to make EEOC policy consistent with the Administration's philosophy.[120]

Although Judge Thomas pledged a concerted effort after the election, he often thereafter took positions worse than the litigation positions of Mr. Reynolds' Civil Rights Division. Reynolds routinely relied on disparate-impact theory and thought

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[119] 1987 Atlantic Profile, supra note 83, at 79

[120] November 15, 1984 Policy Changes, supra note 108, at A-1.

it proper, while Judge Thomas was attacking the theory; Reynolds routinely relied on the Uniform Guidelines while Judge Thomas battled to have them revised. In late 1987, Mr. Reynolds joined Judge Thomas in his opposition to the Guidelines.

For the next two years, Judge Thomas argued that under Stotts race- and gender-conscious remedies for discrimination were unconstitutional and inconsistent with Congressional intent and existing Supreme Court precedent. After the Supreme Court held in a series of decisions that United Steel Workers of America v. Weber[121] was still good law and that narrowly-tailored and adequately supported race- and gender-conscious remedies remained both constitutional and in compliance with Title VII,[122] Judge Thomas opposed such remedies on policy grounds.

These developments are set forth in greater detail below.

2. Judge Thomas's Views While a Member of President-Elect Reagan's Transition Team

Judge Thomas urged major changes in the direction of EEOC policy when he served, in December of 1980, on a Reagan Administration transition team preparing a report on civil rights

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[121] 443 U.S. 193 (1979).

[122] Johnson v. Transportation Agency of Santa Clara County, 480 U S 616 (1987); United States v. Paradise, 480 U.S. 149 (1987); Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986), Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S 421 (1986); and Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

policy.[123] In that role, Judge Thomas drafted a memorandum which said:[124]

> It appears that EEOC has made little effort to validate the assumptions underlying affirmative action and has not evaluated the effects of affirmative action on the lot of minorities, especially those who are disadvantaged. . . .
>
> There appears to have been little effort made to determine whether disadvantaged minorities and women have actually been helped as a result of affirmative action. Nor does it appear that there has been any determination that the inadequacies which resulted in the disadvantage have been removed or whether they can be remedied by mere inclusion in the workforce.
>
> In essence, EEOC has extended its authority to include voluntary affirmative action in the private sector without constitutional or statutory basis. Moreover, the assumption that this approach would help minorities and women overcome disadvantages caused by past discrimination has not been verified or reassessed.

The memorandum concluded that the EEOC:[125]

> ... should reexamine the assumptions underlying affirmative action, with special emphasis on determining whether there are non-employment and non-race-related causes of underrepresentation of minorities and women in certain areas.

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[123] The report was described in Major Change in EEOC Direction Likely Under New Chairman-Designate, BNA Daily Labor Reporter, February 22, 1982, p A-3 [hereinafter cited as "February 22, 1982 Major Change"]

[124] December 1980 Memorandum to the Reagan Administration from Clarence Thomas, quoted in February 22, 1982 Major Change, supra note 123, NEXIS pagination at 2-3

[125] Id.

3. Judge Thomas's Support for Goals and Timetables from His Appointment as EEOC Chairman in 1982 Until the 1984 Re-Election of President Reagan

(a) General Statements

Although his work on the civil rights transition team focused on EEOC policy, Judge Thomas was not initially appointed to a position at the EEOC, but instead was named Assistant Secretary for Civil Rights in the Department of Education. A year later, when he was nominated to be Chairman of the EEOC, Judge Thomas was given an opportunity to point the EEOC in the direction described in the transition team memorandum. However, the new Chairman's initial public statements and actions suggested that his personal opposition to race-conscious policies would not dramatically affect his administration of the EEOC.

Despite his earlier harsh words for affirmative action, Judge Thomas initially defended the use of goals and timetables. At his 1982 confirmation hearing as Chairman of the EEOC, Judge Thomas testified that:[126]

> [T]here has been an overreliance on quotas in remedying past problems with respect to discrimination. I do not, however, believe that there should be a wholesale abandonment of any sort of numerical timetables, at least as monitoring devices.

In public remarks, Judge Thomas explained that much of the "heated debate and public confusion over affirmative action in fact stems from the confusion between flexible goals and

[126] Hearing Before the Committee on Labor and Human Resources on the Nomination of Clarence Thomas To Be Chairman of the EEOC, 97th Cong., 2d Sess., at 16 (March 31, 1982)

inflexible quotas".[127] Judge Thomas told BNA through an aide that he has "never been against goals and timetables when used properly for monitoring purposes. But when they are used as ends in themselves they become nothing more than quotas".[128]

In March, 1983, Judge Thomas told a women's organization that he continued to have questions about the effectiveness of group remedies, but supported affirmative-action remedies other than quotas "because the remedies which are truly necessary to make individual rights a meaningful reality are not yet on the books."[129] In April, 1983 Judge Thomas spoke to the Kansas City Bar Association, saying that "I have even supported the use of some so-called affirmative action remedies ... despite the social problems which can result from an over-reliance on them").[130]

(b) The Controversy Over the Justice Department's Position in Williams v. City of New Orleans

Early in Judge Thomas's tenure as Chairman of the EEOC, the Commission strongly disagreed with the Justice Department on the issue of the propriety of race-conscious prospective remedies under Title VII. A panel of the U.S. Court of Appeals for the Fifth Circuit had reversed the district court's denial of approval for a consent decree containing race-conscious relief in

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[127] Chairman Thomas Explains Views on Affirmative Action at EEO Conference, BNA Daily Labor Reporter, October 5, 1982, p A-6

[128] Affirmative Action Program for Federal Agencies Under Revision, BNA Daily Labor Reporter, October 13, 1982, p A-3

[129] March 30, 1983 Speech to Women Employed, supra note 75, at 14-15 The quotation is set out above at 25

[130] April 28, 1983 Kansas City Bar Speech, supra note 76, at 22-23

promotions. Williams v. City of New Orleans.[131] The court of appeals had voted to rehear the case en banc at the request of the Justice Department, which argued that such relief was impermissible under Title VII and violated the constitutional right of other officers to equal protection.[132]

Judge Thomas and the other Commissioners of the EEOC, surprised by this about-face in the federal government's civil rights enforcement strategy and disturbed at the Justice Department's failure to consult the EEOC before acting, sent a jointly-signed sharply worded letter on January 26, 1983 to Attorney General William French Smith, Solicitor General Rex Lee and Assistant Attorney General William Bradford Reynolds calling Justice's failure to consult with the EEOC "deplorable" and stating that:

> Many of our lawsuits and conciliations under Title VII have resulted in the adoption and implementation of affirmative action goal relief programs which are currently being monitored and enforced by the Commission.
>
> The Justice Department's brief, however, urges the Court of Appeals to reverse a panel decision by an en banc ruling on the ground that Title VII flatly prohibits courts from awarding any affirmative action relief which benefits individuals who were not specific victims of discrimination. This interpretation of Title VII is the direct opposite of the interpretations

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[131] 694 F.2d 987 (5th Cir , 1982) On the rehearing requested by the Justice Department, the court rejected the Justice Department's broad arguments but held that the district court did not abuse its discretion in refusing to approve the particular race-conscious relief at issue. 729 F 2d 1554 (5th Cir., 1984) (en banc)

[132] EEOC Chides Justice for "Deplorable" Action on New Orleans Police Case, BNA Daily Labor Reporter, February 1, 1983, p. A-2 [hereinafter "February 1, 1983 EEOC Chides Justice"].

> previously urged by both the Department of Justice and the Equal Employment Opportunity Commission. If this position is adopted by the courts, it could seriously affect our ability to enforce many existing judgments, consent decrees and settlement agreements entered into between this agency and employers over the last 11 years. ...

The EEOC Commissioners subsequently voted to file their own amicus brief in the City of New Orleans case supporting approval of the consent decree and arguing that neither Title VII nor equal protection prohibits a court from ordering race-conscious remedies.[133] In another letter to Attorney General William French Smith, Chairman Thomas informed Smith of the EEOC's substantive position in City of New Orleans and suggested that, though it would be beneficial if the Administration could speak with one voice on these issues, "considerable public benefit would result from squarely joining these important legal issues for consideration in the Fifth Circuit."[134] On April 5, 1983, bowing to intense pressure from the White House, the EEOC rescinded the decision to file its own brief in City of New Orleans.[135] Explaining the Commission's decision, Chairman Thomas stated, "The Commission decided it would be within the public interest not to file conflicting views on a legal issue involving a city government where the Justice Department has sole enforce-

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[133] EEOC May File Brief Opposing Justice Department Stand on Affirmative Action, BNA Daily Labor Reporter, March 7, 1983, p A-10

[134] March 21, 1983 Letter from EEOC Chairman Clarence Thomas to Attorney General William French Smith.

[135] EEOC Bows to White House Pressure, Says It Won't File New Orleans Brief, BNA Daily Labor Reporter, April 6, 1983, p. A-6.

ment litigation responsibility."[136] Judge Thomas later asserted that this was the only time the White House ever attempted to influence EEOC policy.[137]

In a May 1983 interview, Judge Thomas reflected on his first year at the EEOC and on Williams v. City of New Orleans. He defended the substantive position in support of affirmative action which the Commission took in its letters to the Attorney General --- and which the EEOC had wished to defend in an amicus brief --- because it was supported by the law in effect at the time, but also mentioned his disagreement with affirmative action on policy grounds:[138]

> "The debate over affirmative action is a real one," he observed. "There is argument about what the law should be, there is no argument about what the law is, and that's the position the Commission took in the Williams case," he said. "I disagree from an ideological viewpoint [with] what was being done in Williams, but the law supports what is being done. . That was the opinion of our general counsel and that is precisely what I have an obligation to uphold."

(c) The Controversy Over the Labor Department's Proposed Changes in the Enforcement of Executive Order 11246

Executive Order 11246,[139] as amended, requires that prospective government contractors pledge not to discriminate and

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[136] Id. at A-6

[137] Thomas Stresses EEOC's Independent Role in House Subcomm. Oversight Hearing, BNA Daily Labor Reporter, October 27, 1983, p. A-6

[138] EEOC Chairman Thomas Reviews Role After a Year on the Job, BNA Daily Labor Reporter, May 26, 1983, p. A-9 [hereinafter "May 26, 1983 EEOC Chairman Thomas Reviews Role"].

[139] 30 Fed.Reg. 12319 (1965).

to undertake "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."[140] The order is implemented by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"). Since 1978, OFCCP's implementing guidelines have required that any government contractor with 50 or more employees and a contract of $50,000 or more maintain a written affirmative action plan.[141] The plan must contain an analysis of the contractor's workforce to determine whether there are any occupations in which minorities or women are not being utilized in accordance with their availability, and must detail the steps being taken to address any problems with the utilization of women or minorities. Where there are deficiencies, the contractor is to establish "goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies".[142] "Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."[143]

In September 1982, OFCCP announced that it planned to

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[140] Id., § 202, ¶ 1 of the language to be inserted in government contracts

[141] 41 C.F.R. § 60-1.40. This requirement was published in the Federal Register on October 20, 1978 and November 3, 1978. 43 Fed. Reg. 49240 (1978) and 43 Fed. Reg. 51400 (1978)

[142] 41 C.F.R. § 60-2.10, also in effect since 1978

[143] 41 C.F.R. § 60-2.12(e), also in effect since 1978.

issue revised guidelines under Executive Order 11246 by the end of 1982.[144] The proposed revisions were controversial, in part because they raised the threshold for the written affirmative action plan requirement to contractors with 100 or more employees and a contract of at least $100,000 and in part because they cut back on the use of pre-award audits. When they were submitted to the EEOC for review, the Commissioners, including Chairman Thomas, objected to portions of the guidelines as contrary to established equal opportunity policy.[145]

In hearings before the Subcommittee on Employment Opportunities of the House Education and Labor Committee on April 15, 1983, Chairman Thomas voiced the Commission's view that the proposals were not stringent enough and would create the possibility of a contractor's being in compliance with OFCCP's regulations but susceptible to a finding of discrimination under Title VII of the Civil Rights Act of 1964.[146]

Judge Thomas attacked several aspects of the proposed regulations which set lower standards than those required by Ti-

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[144] EEOC Chairman Thomas Announces New Emphasis on Training and Education, BNA Daily Labor Reporter, September 30, 1982, p. A-5. The article reported on the proceedings of the Fifth Annual Equal Employment Opportunity Conference sponsored by the Federal Bar Association and the Bureau of National Affairs Solicitor of Labor Timothy Ryan discussed the OFCCP proposals

[145] EEOC Voices Concern over OFCCP Rules, Must Comment by April 12, BNA Daily Labor Reporter, March 22, 1983, p A-3 The EEOC reviewed the proposed revisions pursuant to Section 715 of Title VII and Executive Order 12067 which give the EEOC advisory authority for coordinating all regulations, directions, and policies of executive agencies relating to equal employment opportunity

[146] 1983 Oversight Hearings on the OFCCP, supra note 81, at 64, see also Collyer Tells Subcommittee Not To Expect OFCCP's Affirmative Action Rules for Sixty Days, BNA Daily Labor Reporter, April 15, 1983, p. A-14

tle VII, including too narrow an approach to the determination of the availability of women and members of minority groups, by "failure to include in their definition of 'availability' minorities and women whom the contractor can reasonably train". He expressed concern that OFCCP had already implemented certain policy changes without having published the changes in the Federal Register for public comment, such as orally instructing OFCCP field staff that contractors would not be permitted to establish hiring goals that exceed the proposed narrow definition of "availability."[147] Judge Thomas was concerned by this limitation on the use of goals and timetables.

4. Judge Thomas's Positions on Affirmative Action After President Reagan's 1984 Re-Election

(a) His Disapproval of Affirmative Action

In an interview printed on November 15, 1984, just days after Reagan's reelection, Judge Thomas carried these themes further. He told the Daily Labor Reporter that the next term would be marked by concerted efforts to promote the President's position on affirmative action:[148]

> EEOC's next four years will be marked by concerted efforts to set forth the Reagan Administration's position on affirmative action --- favoring victim-specific remedies and moving away from quotas and proportional representation in both its conciliation efforts and court-approved settlements --- Chairman Clarence Thomas says.

* * *

[147] 1983 Oversight Hearings on the OFCCP, supra note 81, at 64-65

[148] November 15, 1984 Policy Changes, supra note 108, at A-6, A-7.

> "I don't appreciate reading in the paper that [EEOC] agreed to some settlement with quotas in it," he told BNA. In the future, the five-member Commission will be working to see that its philosophy is carried out on the field and that its policy --- "not filtered and translated" --- is carried out by Commission staffers.

Notwithstanding his prior recognition of the utility of goals and timetables as instruments by which to measure an employer's progress in remedying the effects of its past discrimination, he stated:[149]

> "People have tended to take comfort in these numbers [goal and timetable requirements]," he contended. "They think that somehow hiring by these numbers --- even without any oversight or monitoring --- enough was being done. I think that's baloney."

Further notwithstanding his earlier support for goals and timetables as monitoring devices, in 1987 he criticized them and their proponents:[150]

> Goals and timetables, long a popular rallying cry among some who claim to be concerned with the right to equal employment opportunity, have become a sideshow in the war on discrimination.

He specifically criticized their use as a monitoring device, because this "allows an employer to hide continuing discrimination behind good numbers."[151]

Judge Thomas's comments, although predicting a new direction for the EEOC as a whole, could only reflect his own views. In a subsequent interview, he acknowledged that the

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[149] Id. at A-7

[150] Affirmative Action Goals, supra note 78, at 402.

[151] Id. at 407.

Commission's view on affirmative action for non-victims of discrimination was "evolv[ing]," but he insisted that the tendency of the Commission was moving "very strongly away" from approving affirmative action for persons not proven to be individual victims of discrimination.[152]

Despite the fact that the EEOC's position on the issue was far from settled, in late 1985 the EEOC's acting General Counsel Johnny J. Butler began orally instructing regional EEOC attorneys not to include goals and timetables in settlements sent to the Commission for approval because it was his assessment that a three-member majority of the Commission would not approve the use of goals and timetables.[153] Regardless of his earlier disapproval of OFCCP's changes in policy without bothering to go through the public procedures required for such changes,[154] Judge Thomas agreed that Mr. Butler's action was taken pursuant to a de facto policy which had not been submitted to the full Commission:[155]

> "As a practical matter, there are at least three commissioners who are opposed to the use of quotas," Butler said, using the term interchangeably with goals and timetables. "All three of them have said, 'Johnny,

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[152] EEOC Moving Toward Victim-Specific Remedies, Chairman Thomas Predicts BNA Daily Labor Reporter, March 5, 1985, p A-3 (NEXIS pagination at 2)

[153] EEOC'S Move Away From Goals and Timetables Not Finally Resolved, Commissioner Says, BNA Daily Labor Reporter, February 12, 1986, p A-9 (NEXIS pagination at 1)

[154] See the discussion above at 61.

[155] Howard Kurtz, EEOC Drops Hiring Goals, Timetables, Washington Post, February 11, 1986, pp A1, A6

> you shouldn't be bringing any more quota cases.'"
>
> EEOC Chairman Thomas said the de facto policy has been in effect for about a year as the commission considers proposed legal settlements.
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> * * *
>
> Thomas said he will put the new policy before the full commission, but could not say when. "It is not a burning issue with me," he said.

Meanwhile, in 1986 and 1987, the Supreme Court decided a string of cases which together demonstrated rather conclusively that race-conscious policies were -- in many circumstances -- acceptable remedies for discrimination.[156] Judge Thomas expressed his personal disagreement with each of these decisions.[157] Judge Thomas specifically expressed great disappointment at the Court's decision in Johnson:[158]

> I thought that where the Court was going in its previous cases was to say that there needed to be a finding of egregious discrimination before conscious remedies in the form of quotas or goals were needed. In this case, I think they went far beyond what I thought the Court would do. This is basically throwing out any kind of pretense that explicit race-conscious remedies have to be predicated on a finding of discrimination. It's just social engineering, and we ought to see it for what it is. I don't think the ends justify the means, and we're standing the principle of nondiscrimination on its head -- it's simple as that -- and we're standing the legislative history of Title VII on its head.

At his renomination hearing in 1986, Judge Thomas was pressed for his personal views on the use of goals and timeta-

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[156] These decisions are listed in note 122 above.

[157] Affirmative Action Goals, supra note 78, at 403 note 3

[158] Anger and Elation at Ruling on Affirmative Action, New York Times, March 29, 1987, at D1, col. 1.

bles, both as a remedy and as part of voluntary affirmative action programs, in light of the Supreme Court rulings in the Sheet Metal Workers[159] and City of Cleveland[160] cases, allowing race-conscious relief for persons not themselves proven to have been identified victims of discrimination. Judge Thomas replied that he disapproved of the decisions, but would abide by them.[161]

With much of the legal basis for his arguments against goals and timetables undermined, Judge Thomas returned to themes that he had emphasized in the early years of his tenure at EEOC, particularly the argument that race-conscious hiring programs are bad public policy. In a 1987 article in the Yale Law & Policy Review, Judge Thomas set out fully his case against goals and timetables.[162] He argued that goals and timetables are ineffective and possibly harmful for the following reasons: (1) they allow employers to hide behind a "good bottom line," (2) they fail to address the opportunity for upward mobility after hiring, (3) they are premised on the "dubious assumption" that actual

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[159] Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986). The Supreme Court upheld a race-conscious membership order which had been imposed on a union found to have discriminated and to have resisted compliance with earlier remedial orders.

[160] Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). The Supreme Court upheld the approval of a race-conscious affirmative action plan established by a consent decree as within the remedial authority of Title VII.

[161] Hearing Before the Senate Committee on Labor and Human Resources on the Nomination of Clarence Thomas To Be Chairman of the EEOC, 99th Cong., 2d Sess. 44-46, 50 (July 23, 1986) (Testimony of Clarence Thomas).

[162] Affirmative Action Goals, supra note 78, at 402.

representation of minorities should precisely mirror the percentage of minorities in the labor pool, (4) they deprive actual victims of compensation in the form of back pay and tend to benefit the least needy in the minority community, (5) they do not address current conditions in the job market, (6) they allow employers to shift the costs of the remedy from themselves to their inadequately-compensated victims and to other employees who bear the burden of reduced opportunities, and (7) they create enmity between the races and perpetuate the notion that minorities cannot compete without built-in preferences. The article did not discuss his views on the adequacy of relief in the common situation where the form of the employer's discrimination has made it impossible to identify the minorities or women who would have been selected in the absence of discrimination.

(b) His Views on the Inadequacy of Present Remedies

As an alternative to affirmative action, Judge Thomas has consistently called for the strengthening of remedies for violations of Title VII.[163] He argued that stronger civil rights penalties would avoid the problem of unfairness that he

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[163] See February 20, 1986 Speech by Clarence Thomas before the Georgetown Law Center EEO Symposium at the Hyatt Regency in Washington, D.C., p. 11 (referring to "the inherent weakness of Title VII"). EEOC Head, Rights of Individual No. 1, Washington Times, July 20, 1983, at 2 (claiming that Title VII "could really stand some more clout") [hereinafter "July 20, 1983 EEOC Head"]. EEOC Is Looking Closely at Affirmative Action Rules, Thomas Tells Women's Group, BNA Daily Labor Reporter, March 31, 1983, p. A-9. The Lawyers' Committee and other civil rights groups have also advocated strengthening remedies under Title VII.

found inherent in race-conscious remedies.[164] Judge Thomas blamed the lack of appropriate civil rights penalties for the widespread acceptance of race-conscious programs:[165]

> Today, the civil rights laws often appear to be without the teeth to ensure nondiscrimination. And, as a result, social engineering is substituted for a remedy that fits the wrong.

In Judge Thomas' view, a well-tailored remedy would penalize those who discriminate and would operate as a viable deterrent, ultimately removing the need for broad group-based remedies.[166]

Judge Thomas said that Title VII's equitable remedies are not as "compelling" as the civil remedies available under other statutes because they do not penalize employers who discriminate.[167] Judge Thomas repeatedly lamented that:

> [T]here is something less than equitable about a system that subjects an individual to stronger sanctions for breaking into a mailbox than for violating the basic

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[164] See October 19, 1983 Speech by Clarence Thomas at the University of Virginia, p. 18 See also May 26, 1983 EEOC Chairman Thomas Reviews Role, supra note 138, at A-9

[165] March 9, 1983 Speech by Clarence Thomas before the Equal Employment Opportunity Commission Seminar [hereinafter "March 9, 1983 EEOC Seminar Speech"]. See also May 20, 1983 Speech by Clarence Thomas before the State of Missouri Human Rights Conference, p. 17 (stating that "[w]ith this anemic history, it is no wonder there have been efforts to accomplish by fiat what could not be accomplished by the use of enforcement sanctions and disincentives for discrimination")

[166] See, e.g., July 11, 1983 Speech by Clarence Thomas before the International Association of Official Human Rights Agencies, in Philadelphia, Pa., pp. 20-21 [hereinafter "July 11, 1983 Human Right Agencies Speech"]. see also Letter to the Editor from Clarence Thomas, Make Discrimination Expensive, USA Today, February 15, 1988

[167] See, e.g., An Alternative to Quotas Must Be Located, Washington Times, August 6, 1984 (claiming that "[t]here should be a cost to discrimination"), July 20, 1983 EEOC Head, supra note 163, at 2

> civil rights of another human being.[168]

Judge Thomas believed that the public does not perceive civil rights statutes as providing effective remedies for discrimination because they lack such penalty provisions. In a frequent comparison, Thomas states:

> One significant difference between the antitrust laws and the civil rights laws is the magnitude of public acknowledgment that a violation will result in the imposition of a meaningful remedy.[169]

Lacking such penalties as the treble damages assessed against antitrust violators, the civil rights laws, Judge Thomas says, do not "command meaningful compliance".[170] For Judge Thomas, the obvious solution is to "change the law to permit greater penalties," such as the compensatory and punitive damages then allowed under California law.[171]

In his Yale article, Judge Thomas identified other ways to penalize discriminating employers including: allowing courts to impose heavy fines and jail sentences against discriminators who defy injunctions; handing over control of a discriminating employer's personnel operations to a special master; and seeking

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[168] July 11, 1983 Human Right Agencies Speech, supra note 166, at 20-21 See also Clarence Thomas, Discrimination and its Effects, 21 Integrated Education 204, 205 (1983)

[169] March 9, 1983 EEOC Seminar Speech, supra note 165, at 14

[170] April 27, 1983 Speech by Clarence Thomas to the American Newspaper Publishers Association, pp 5-6

[171] Equal Employment Opportunity Commission Update, Policies on Pay Equity and Title VII Enforcement Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess 105-06 (June 21, 1985) (statement of EEOC Chairman Clarence Thomas), see also March 22, 1984 Speech by Clarence Thomas before the EEOC/706 Agency Conference, pp 2-3.

specific recruitment and hiring practice changes.[172] However, anyone defying an injunction is obviously already exposed to severe sanctions by way of civil or criminal contempt. In addition, a court enforcing Title VII has always had the power to appoint a Special Master to oversee the affairs of a particularly recalcitrant defendant; this actually occurred in the Sheet Metal Workers case.[173] Specific recruitment and hiring practice changes are already common features of litigated and consent decrees.

This leaves penal sanctions for discussion. Some criminal penalties for civil rights violations already exist.[174] Some or all of Title VII could also be criminalized, although most blatant, intentional civil rights violations with identifiable victims could probably be prosecuted under existing law. In that regard, some State Fair Employment Practice Laws include criminal sanctions, but these have not been seen as very effective.

The bottom line with respect to Judge Thomas's alternatives for affirmative action is that they are not alternatives. They reach proven cases of intentional discrimination against identified victims, but much of what is considered to be discrimination today in this country under existing law cannot be proved under that standard or does not constitute that type of discrimi-

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[172] Affirmative Action Goals, supra note 78, at 408-11

[173] 478 U.S. at 432.

[174] See 18 U.S.C. §§ 241, 242, 243, 245, 246 and 247.

nation, including most disparate-impact employment situations.

Judge Thomas answers that such discrimination is, at least, far less significant than it used to be. We believe he is incorrect; there is current evidence which establishes that such discrimination remains pervasive,[175] and numerous decisions in the 1980's and afterwards reflect its many occurrences.

If Judge Thomas is right --- if, for example, there are few significant discriminatory practices resulting in victims who cannot be identified --- then there will be little further need for affirmative action. When that happens, if it ever does, Judge Thomas's concerns about affirmative action will be substantially relieved.

There is much legitimate concern, and Judge Thomas expresses such concern, over what are appropriate affirmative action remedies in a particular case of proven discrimination, or in the settlement of discrimination claims, or in legislation providing for minority set-asides.[176] The tailoring of equitable relief in this area must truly be equitable, and that is an enormously difficult task. Judge Thomas's answer is to do away with the remedy entirely, and that strikes at the heart of established civil rights jurisprudence long recognized by the Congress, successive Administrations, and the courts.

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[175] See the Urban Institute studies discussed above at 23-24

[176] Drew S. Days III, Fullilove, 96 Yale Law Journal 453 (1987).

(c) His Policy Rationale for Disapproving Affirmative Action

In a 1987 profile of Judge Thomas in The Atlantic, Juan Williams related a story Judge Thomas had told him years before:[177]

> He was on the back porch, playing blackjack for pennies with some other boys. As the game went on, one boy kept winning. Thomas finally saw how: the cards were marked. The game was stopped. There were angry words. Cards were thrown. From all sides fast fists snatched back lost money. There could be no equitable redistribution of the pot. The strongest, fastest hands, including those of the boy who had been cheating, got most of the pile of pennies. Some of the boys didn't get their money back. The cheater was threatened. The boys who snatched pennies that they had not lost were also threatened. But no one really wanted to fight -- they wanted to keep playing cards. So a different deck was brought out and shuffled, and the game resumed with a simple promise of no more cheating.
>
> That story, Thomas said, is a lot like the story of race relations in America. Whites had an unfair advantage. But in 1964, with the passage of the Civil Rights Act, the government stopped the cheating. The question now is, Should the government return the ill-gotten gains to the losers -- the blacks, the Hispanics, and the women who were cheated by racism and sexism? Does fairness mean reaching back into the nation's past to undo the damage? . . .
>
> Thomas believes that government simply cannot make amends, and therefore should not try. The best it can do is to deal a clean deck and let the game resume, enforcing the rules as they have now come to be understood. "There is no governmental solution," Thomas said. "It hasn't been used on any group. And I will ask those who proffer a governmental solution to show me which group in the history of this country was pulled up and put into the mainstream of the economy with governmental programs. The Irish weren't. The Jews weren't. Use what was used to get others into the economy. Show us the precedent for all this experimentation on our race."

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[177] 1987 Atlantic Profile, supra note 83, at 78-79.

> He returned to the idea of the cheater on the porch: "I would be lying to you if I said that I didn't want sometimes to be able to cheat in favor of those of us who were cheated. But you have to ask yourself whether, in doing that, you do violence to the safe harbor, and that is the Constitution, which says you are to protect an individual's rights no matter what. Once you say that we can violate somebody else's rights in order to make up for what happened to blacks or other races or other groups in history, then are you setting a precedent for having certain circumstances in which you can overlook another person's rights?"

When government does try to help, Judge Thomas believes, it fails to help those really in need. "[T]hose who are the best prepared are the beneficiaries of programs and policies which are, or should be, designed to help the least prepared."[178]

Judge Thomas has also voiced great distaste for policies that classify people into groups, even where this is necessary to address a pattern of discrimination. His conviction that this is inappropriate is so strongly felt that he is willing to abide by it even at the price of rendering the civil rights laws powerless to deal effectively with broad patterns of discrimination.[179]

If we permit taking race into account in classifying people, Judge Thomas argues, we undermine the only principled defense against racial discrimination.[180]

> The NAACP, the Urban League and other civil rights organizations considered it a victory when we got the

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[178] June 7, 1982 Speech by Clarence Thomas to an EEOC Workshop sponsored by the Associated Industries of Alabama, p 8

[179] See the discussion above at 29-30

[180] Interview in 1984 with Clarence Thomas, printed in You Be the Judge, The Capital Spotlight, July 25, 1991, at 1.

> Civil Rights Act of 1964, which pointedly said, don't consider [race and national origin]. Civil Rights organizations fought for the public not to consider race when one goes for a job.
>
> . . . Once you start conceding that under certain circumstances, one can consider race, you are setting a precedent for the consideration of race in a lot of other instances. If it is okay to consider that I am black to get a job, why isn't okay to consider that I am white to get the same job?

Judge Thomas's many public statements do not adequately address the difficulty of providing any meaningful remedy for patterns of discrimination if affirmative action is not allowed, and if it is not possible to determine which particular black, Hispanic, Asian or female candidates would have been selected in the absence of discrimination. The problem is a very real one, and it arises frequently. If there is no meaningful remedy, even an intentional discriminator would have succeeded in its primary goal: keeping its workforce lily-white, or Anglo, or male, or as much so as possible. Such an employer does not limit itself to keeping a particular black, Hispanic, Asian or woman out; it wants to keep as many as possible out. A remedy which does not deprive the employer of such a goal is ineffective.

It is not an adequate answer to reject the promotion of potential victims because the precise victims are unknowable. If such rejections were to become the law, minorities and women would be left without the hope of a meaningful change in their workplace and would have correspondingly little incentive to file charges and litigate cases.

There is a substantial question whether Judge Thomas

would vote to overturn the affirmative-action decisions the Court handed down from Weber to Johnson and Paradise, and thus to leave minorities and women without any effective remedy for past discrimination in those cases where individual victims cannot be precisely identified.

F. Judge Thomas's Positions on Fullilove v. Klutznick, and on Set-Asides of Government Contracts for Minority Contractors

Judge Thomas has denounced the Supreme Court's decision in Fullilove v. Klutznick,[181] which approved Federal legislation requiring that at least 10% of the Federal grants from the public works projects being funded be set aside for minority business enterprises. The legislation was passed as a Congressional effort to halt years of exclusion of minority contractors from the business opportunities created by such public-works projects. Congress had included the provision in the Public Works Employment Act of 1977 after receiving "abundant evidence" that minority businesses had been denied effective participation in public contracting opportunities "by procurement practices that perpetuated the effects of prior discrimination."[182]

While individual Justices in the majority disagreed about the standard to be used in reviewing race-conscious remedies, all agreed that the program satisfied whatever level of scrutiny they applied, as it was "equitable" and "reasonably

[181] 448 U.S 448 (1980).

[182] 448 U.S. at 477-78 (opinion of Burger, C.J.).

necessary to the redress of identified discrimination."[183]

Judge Thomas denounced the Court's decision in Fullilove for accepting the idea the Congress has "virtually unlimited power."[184] In fact, each of the opinions of the Court stated an explicit and far from unlimited standard for review of congressional racial classifications.

Judge Thomas's criticism of the Court's decision in Fullilove is tame compared to his criticism of the Congress which enacted the provision at issue. Judge Thomas wrote:

> Not that there is a great deal of principle in Congress itself. What can one expect of a Congress that would pass the ethnic set-aside law the Court upheld in Fullilove v. Klutznick? What the two branches were saying is this. . . . Congress can devise laws justifying racial and ethnic set-asides on the basis of its powers to regulate interstate commerce. Any "equal protection" component of the Fifth Amendment due process clause is irrelevant. . . .[185]

In fact, in enacting the remedial provision to assure minority business enterprises a portion of public works contracts, the Congress was relying on "an amalgam of its specifically delegated powers":[186] specifically the spending power, whose reach, Chief Justice Burger said, is as broad as the Commerce Clause,[187] and

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[183] 448 U.S. at 510, 516 (Powell, J., concurring)

[184] Civil Rights as a Principle, supra note 9, at 399

[185] Id at 396 In a 1988 speech, Judge Thomas appeared to express a general denunciation of Congress' role in the arena of civil rights. See April 18, 1988 Tocqueville Forum Speech, supra note 40, at 20 (Congress has "proven to be an enormous obstacle to the positive enforcement of civil rights laws that protect individual freedom")

[186] 448 U S at 473 (opinion of Burger, C J)

[187] 448 U S at 475

Congress' enforcement power under Section 5 of the Fourteenth Amendment.

Conclusion

Because Judge Thomas is a nominee for a lifetime position on the highest court in the land, his stated views must not only withstand rational scrutiny, but must demonstrate that he has the ability to work within the framework of over two hundred years of established Supreme Court precedent to address the difficult issues that are sure to arise.

Judge Thomas has criticized most of the judicial and statutory building blocks for the protection of civil rights in this country --- not only admittedly controversial and difficult court decisions and governmental policies, but also those widely accepted as fundamental to the protection of civil rights for every American. Judge Thomas has also attacked the Court and the Congress for their role in laying down those building blocks, arguing instead for a "limited government" that would leave Americans with rights but uncertain remedies --- or no remedies at all --- for violations of those rights.

Moreover, Judge Thomas has presented a novel and ill-considered constitutional theory as an alternative to the jurisprudence of the Supreme Court since Brown v. Board of Education. The potential consequences of this theory for Supreme Court jurisprudence in a wide array of constitutional issues are enormous. There is no sign in Judge Thomas's statements and writings that he has thought through the implications of his

theories.

Judge Thomas's abrupt and unexplained changes of position on the breadth of discrimination in this country, on the Griggs rule, on the Uniform Guidelines for Employee Selection Procedures, on the use of statistical evidence in proving discrimination, on the remedies for discrimination in the common situation in which the form of the employer's discrimination has made it impossible to prove which particular minorities or women would have been selected in the absence of discrimination, and in the propriety of goals and timetables as devices for measuring an employer's compliance with the law, do not demonstrate the reflection before reaching important conclusions which is essential in a Justice of the Supreme Court.

We urge the Senate not to confirm this nomination.

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

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September 30, 1991

Ms. Anne Rung
Senate Judiciary Committee
Room 224 Dirksen Senate Bldg.
Washington, D.C. 20510

Dear Ms. Rung:

Attached is the corrected version of the Lawyers' Committee for Civil Rights Under Law's letter to Senator Joseph Biden dated September 20, 1991 requesting inclusion of William H. Brown's testimony and other documents. Please substitute the attached letter for the one you previously received.

Sincerely,

Barbara R. Arnwine
Executive Director

BRA:vpj
Attachment

cc: William H. Brown, III
Herbert M. Wachtell
Dean Erwin Griswold
The Executive Committee
The Ad Hoc Committee on
the Thomas Nomination

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September 20, 1991

VIA MESSENGER

Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Re: Formal Request for the Inclusion of the Testimony of the Lawyers' Committee for Civil Rights Under Law and Related Documents in the Record of the Confirmation Hearings of Judge Clarence Thomas

Dear Senator Biden:

On September 10, 1991, we transmitted to the Senate Judiciary Committee, by letter to you, a statement in opposition to the confirmation of Judge Clarence Thomas as an Associate Justice of the United States Supreme Court. We included with that statement the names of individual members of the Board of Trustees and others affiliated with local Lawyers' Committees who endorsed the statement. We also included a concurring statement and three statements of dissent. Moreover, we included a lengthy Memorandum on the nomination of Judge Clarence Thomas, discussing, in detail, the reasons that the Lawyers' Committee opposed the confirmation of Judge Thomas.

On September 17, 1991, Dean Erwin Griswold and myself testified before the Senate Judiciary Committee on behalf of the the Lawyers' Committee. In light of the number of groups which requested an opportunity to testify, we greatly appreciated being given the occasion to appear before the Senate Judiciary Committee. At the time of our testimony, we submitted written copies of our testimony to members of the Senate Judiciary Committee and to the recording secretary who was present at the Hearings.

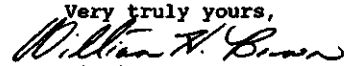
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Although we have already submitted our written testimony and other related documents to all of the members of the Senate Judiciary Committee, we formally request that these documents be included in the record of the Hearings on the Confirmation of Judge Clarence Thomas. Furthermore, we would like to update the list of names appended to the statement in opposition to the confirmation of Judge Clarence Thomas and the dissent. As is reflected on our updated list, ninety members of our Board of Trustees have signed the statement of opposition in their individual capacity and seventy-eight lawyers affiliated with local Lawyers' Committee have joined in expressing their opposition. One additional member has joined the dissent, for a total of eight dissenters.

To faciliate the inclusion of these documents in the record, we enclose three complete sets of the documents which the Lawyers' Committee requests be entered into the record of Confirmation Hearings of Judge Clarence Thomas. If possible, we would appreciate it if these documents are included in the record of the afternoon session of September 17, 1991, following or near the recordation of our testimony.

Once again, we appreciate being given the opportunity to testify before the Senate Judiciary Committee. We would also like to express our appreciation for the efforts made by all of the members of staff, including Mr. Jeff Peck, in facilitating our participation in this process.

Very truly yours,



William H. Brown
Co-Chair

Enclosures

cc: Honorable Strom Thurmond
Ranking Minority Member
Committee on the Judiciary
United States Senate

The CHAIRMAN. Thank you, Mr. Brown.
Dean Griswold, welcome.

STATEMENT OF ERWIN N. GRISWOLD

Mr. GRISWOLD. Thank you, Senator. Obviously, I can only summarize. It seems to me, however, that the present hearings have left open several basic and important issues. No one questions that Judge Thomas is a fine man and deserves much credit for his achievements over the past 43 years. But that does not support the conclusion that he has as yet demonstrated the distinction, the depth of experience, the broad legal ability which the American people have the right to expect from persons chosen for our highest court.

Compare his experience and demonstrated abilities with those of Charles Evans Hughes or Harlan Fiske Stone, with Robert H. Jackson or the second John M. Harlan, with Thurgood Marshall or Lewis H. Powell, for example. To say that Judge Thomas now has such qualifications is obviously unwarranted.

If he should continue to serve on the court of appeals for 8 or 10 years, he may well show such qualities, and I hope he does. But he clearly has not done so yet.

I have no doubt that there are a number of persons—white, African-American, or Hispanic, male or female—who have demonstrated such distinction. I do not question that the President has the right to take ideological factors into consideration, and it seems equally clear to me that this committee and the Senate have a similar right and power. But that is no reason for this committee or the Senate approving a Presidential nominee who has not yet demonstrated any clear intellectual or professional distinction.

And the downside—and this worries me profoundly—is frightening. The nominee, if confirmed, may well serve for 40 years. That would be until the year 2030. There does not seem to me to be any justification for taking such an awesome risk.

Judge Thomas' present lack of depth seems to me to be demonstrated by his contact with the concept of natural law. He has made several references to natural law in his speeches and writings, though it is quite impossible to find in these any consistent understanding of that concept. This is very disturbing to me because loose use of the idea of natural law can serve as support for almost any desired conclusion, thus making it fairly easy to brush aside any enacted law on the authority of a higher law what Holmes called a brooding omnipresence in the sky.

That is bad enough, but the nominee has now said to this committee that he does not think that natural law plays any role in constitutional decisions. And this is frightening, indeed, for it is quite clear in the 200 years of this country under the Constitution that natural law concepts do have an appropriate role, sometimes in modern times called moral concepts, law and morals, not in superseding the Constitution but in construing it.

There are a number of excellent articles in this difficult field. The great Princeton scholar, Corwin, wrote on the higher law background of American constitutional law. Professor Fuller wrote a book on the morality of law. The philosopher, not a lawyer, Raul,