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Anton Bell

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## CLARENCE THOMAS: EVASIVE OR DECEPTIVE

ANTON BELL\*

... “[T]rust me, my mind is open, I don’t have a position or even an opinion on the issue of abortion.”

Senator Howard Metzenbaum quoting Clarence Thomas  
Senate Confirmation Hearings, 1991<sup>1</sup>

### INTRODUCTION

The Date: September 10, 1991.  
The Event: One of this nation’s most heated debates.  
The Place: The United States Senate.  
The Players: Clarence Thomas, Anita Hill, the members of the Senate Judiciary Committee, and the media.  
The Issue: Whether to confirm Clarence Thomas as the next Associate Justice of the United States Supreme Court.

Few debates in American history have generated such controversy as the Senate Judiciary Committee’s confirmation hearings on Clarence Thomas’ fitness for the position of Associate Justice of the United States Supreme Court.<sup>2</sup> From the moment President George Bush<sup>3</sup> announced Thomas’ nomination on July 1, 1991, division<sup>4</sup> and confusion erupted. Many civil rights leaders and organizations (e.g., Jesse Jackson,<sup>5</sup> the National Association for the Advancement of

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\* B.A., Political Science, Norfolk State University; J.D., North Carolina Central University School of Law, 1995. Mr. Bell is currently practicing in Virginia.

1. *Nomination of Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings on S. 1084 Before the Committee on the Judiciary*, 102nd Cong., 1st Sess., at 462 (1991) (statement of Senator Howard Metzenbaum quoting Clarence Thomas) [hereinafter *Hearings*].

2. Robert Christman and Robert L. Allen, *COURT OF APPEAL: THE BLACK COMMUNITY SPEAKS OUT ON THE RACIAL AND SEXUAL POLITICS OF CLARENCE THOMAS VS. ANITA HILL* xi (1992) [hereinafter *COURT OF APPEAL*].

3. See Acel Moore, *Bush Must Believe In Quotas When It Comes to The Supreme Court*, *PHILADELPHIA INQUIRER*, July 9, 1991, at A17 (alleging Thomas’ nomination may have been the result of his race rather than his qualifications).

4. See Karen Dewitt, *A.C.L.U. To Remain Neutral On Nomination of Thomas*, *N.Y. TIMES*, Aug. 19, 1991, at A10.

5. See Roberto Suro, *Thomas Smoked Marijuana but Retains Bush Support; Jackson Assails Thomas*, *N.Y. TIMES*, July 11, 1991, at A17.

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Colored People,<sup>6</sup> and the Congressional Black Caucus Foundation<sup>7</sup>) opposed the nominee because of his ultra-conservative views.<sup>8</sup> On the other hand, some African-Americans (e.g., Maya Angelou<sup>9</sup> and members of the Southern Christian Leadership Conference<sup>10</sup>), as well as liberal whites, supported Thomas because of his race. Nevertheless, the controversy that surrounded the nomination of Clarence Thomas only proved to be a mere sample of what was to follow during the confirmation hearings.

Throughout Clarence Thomas' confirmation hearings, his struggle to obtain approval by the Senate Judiciary Committee proved to be extremely difficult and, at times, embarrassing.<sup>11</sup> During the hearings, Thomas had to justify his public record.<sup>12</sup> Moreover, in an effort to rehabilitate his character, Justice Thomas had to defend himself against charges of sexual harassment.<sup>13</sup> However, despite all of the obstacles that were placed before him, Clarence Thomas emerged as the victor. He was confirmed as an Associate Justice of the Supreme Court, albeit by the narrowest margin in modern history.<sup>14</sup> The key question, however, still remained: Was Clarence Thomas indeed the

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6. See Steven A. Holmes, *N.A.A.C.P. Report Faults Thomas' View On Equality Issues*, N.Y. TIMES, July 31, 1991 (criticizing Judge Thomas on comments regarding racial issues). See also *The N.A.A.C.P. Announces Opposition to Judge Thomas' Nomination* (reprinted in COURT OF APPEAL, *supra* note 2, at 269); Steven A. Holmes, *The N.A.A.C.P. Votes No*, N.Y. TIMES, Aug. 4, 1991, sec. 4 at 7.

7. See Congressional Black Caucus Foundation, *In Opposition to Clarence Thomas: Where We Must Stand and Why* (reprinted in COURT OF APPEAL, *supra* note 2, at 231). See also Richard L. Berke, *Black Caucus Votes To Oppose Thomas For High Court Seat*, N.Y. TIMES, July 12, 1991, at A1.

8. See Scott D. Gerber, *The Jurisprudence of Clarence Thomas*, 8 J.L. AND POL. 107 (1991) (offering an interesting analysis of Justice Thomas' pre-nomination jurisprudence). See also *Clarence Thomas, No Room At The Inn; The Loneliness of the Black Conservative*, HERITAGE FOUNDATION POL'Y REV. at 72 (1991) (commenting on the criticism and anger directed towards him for being a black conservative).

9. See Maya Angelou, *I Dare To Hope*, N.Y. TIMES, Aug. 25, 1991, sec. 4 at 15 (expressing her optimism that Thomas would change his conservative views once he was confirmed as a Justice).

10. See Rev. Joseph E. Lowery, *The SCLC Position: Confirm Clarence Thomas* (reprinted in COURT OF APPEAL, *supra* note 2, at 283) (expressing his support for Thomas because of his race).

11. See Jill Abramson & David Shribman, *Sex Harassment Jeopardizes Thomas, Embarrasses Politicians*, WALL ST. J., Oct. 9, 1991, at A1 (presenting accounts of sexual harassment charges by Anita Hill).

12. See Neil A. Lewis, *The Thomas Hearings; Thomas Undergoes Tough Questioning on Past Remarks*, N.Y. TIMES, Sept. 12, 1991, at A1, A21 (questioning Thomas about his remarks on abortion).

13. See *Hearings*, *supra* note 1, at 36 (Anita Hill's allegations of sexual harassment). See also James Rowley, *Senate Delays Thomas Vote for a Week to Study Charges*, L.A. DAILY J., Oct. 9, 1991, at 1.

14. The margin was 52-48. See Scott D. Gerber, *Justice Clarence Thomas: First Term, First Impressions*, 35 HOW. L.J. 115, 118 (1992) [hereinafter Gerber, *First Term*]. See also 137 CONG. REC. S14, at 704-05 (daily ed. Oct. 15, 1991).

most "qualified person" to succeed Justice Thurgood Marshall,<sup>15</sup> one of the most zealous advocates of civil liberties?<sup>16</sup> Justice Marshall had indeed set the standard for every jurist of African descent. Commentators have noted that Justice Thomas may not meet this standard with only four years of experience on the High Court.<sup>17</sup>

Part I of this comment will present a brief biography of Clarence Thomas. This section will discuss his academic achievements as well as his social and political experiences. Part I will also examine Thomas' key mentor, Senator John Danforth, who has molded the nominee into what he has become today, one of the most conservative Justices on the United States Supreme Court.<sup>18</sup>

Part II of this comment will analyze the testimony of Clarence Thomas during the Senate confirmation hearings. It will focus on six areas of importance: natural law, abortion, voting rights, affirmative action, prisoners' rights and sexual harassment. This section will next examine Thomas' views (as expressed or implied during his testimony) in comparison to past speeches and statements (i.e., his public record) he made while holding other governmental or judicial positions (Assistant Secretary in the Department of Education, Chairman of the Equal Employment Opportunity Commission [hereinafter EEOC] and a judge on the United States Court of Appeals for the District of Columbia Circuit).

Part III of this comment will continue with a review of United States Supreme Court decisions in which Justice Thomas has participated and voted. A comparison of the decisions will follow.

Finally, Part IV of this comment will conclude with an assessment of Justice Thomas' credibility during the confirmation process. This section will present to the reader one question: Whether Clarence Thomas adequately answered the Senate's inquiries.

15. See William J. Brennan, Jr., *A Tribute to Justice Marshall*, 105 HARV. L. REV. 23-32 (1991) (referring to Justice Marshall as "probably the most important advocate in America, one who used his formidable skills to end the evils of discrimination"). See also Jesse Jackson, *Thurgood Marshall Commemorative Issue: Justice Thurgood Marshall: The Struggle Personified*, 34 HOW. L.J. 73 (1991) (giving a retrospective view of the achievements of Justice Marshall).

16. See Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (criticizing the Framers of the Constitution for creating a government that excluded minorities, i.e., blacks and women, from participating in government affairs, e.g., voting).

17. See Aaron Epstein, *Thomas And Marshall: Views Are Worlds Apart*, MIAMI HERALD, July 2, 1991, at A1 (noting that the two Justices differed in their views on race relations and civil rights law, despite their similar experience with racism).

18. See Acel Moore, *Thomas Has Left Little Doubt Now; Put Him On the Right With Scalia*, PHILADELPHIA INQUIRER, Feb. 27, 1992, at A19 (noting that Thomas' votes on the Court indicate his ideological preference). See also Gordon Crovitz, *Justice Scalia's Ally on the Court—And Then Some*, WALL ST. J., Mar. 11, 1992, at A15; Paul Barrett and Arthur S. Hayes, *Law: Thomas Displays A Conservative Stance*, WALL ST. J., Jan. 29, 1992, at B9 (suggesting that Justice Thomas has allied himself with the dominant conservative bloc).

## PART I - CLARENCE THOMAS: THE MAN BEFORE THE NOMINATION

Clarence Thomas, a product of a poverty-stricken community, was born and raised by his grandparents in Pin Point, Georgia.<sup>19</sup> Throughout his primary education, he attended segregated parochial schools. It was not until he entered Holy Cross College that he experienced social interaction with white students. Following his graduation from Holy Cross, Thomas was accepted into Yale University School of Law. At that time, the University was aggressively recruiting minority students to attend its school (i.e., an affirmative action program).<sup>20</sup> At Yale, Clarence Thomas made many business contacts which became useful to him later in his legal career.

For example, Justice Thomas' contacts included then Missouri State Attorney John Danforth, who hired Thomas immediately after he completed his studies at Yale. Thomas later joined Senator Danforth's staff as a legislative assistant in the United States Senate. Although the two colleagues eventually parted professionally, they still kept in frequent contact with one another. Senator Danforth became Justice Thomas' mentor, molding and guiding him through the hierarchy of governmental posts. In fact, throughout the entire confirmation process, Senator Danforth's support was immeasurable in assisting Justice Thomas in acquiring his present position on the Court.<sup>21</sup>

Following his departure from Yale, Clarence Thomas began his climb through the government ranks. Before acquiring his present position as an Associate Justice on the United States Supreme Court, he held the following positions: Assistant Attorney General in the State of Missouri; legislative assistant to Senator John Danforth; Assistant Secretary in the Department of Education; Chairman of EEOC; and a judge on the United States Court of Appeals for the District of Columbia Circuit. These positions brought Justice Thomas both prestige and power. They also gave him the opportunity to voice his opinion about many issues, namely affirmative action and abortion. These views, however, later would come to haunt the nominee throughout his confirmation.<sup>22</sup>

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19. *Hearings*, *supra* note 1, at 83, 108-09 (Justice Thomas' entire biography, as noted throughout Part I, was supplied by his opening statement to the Judicial Committee during the confirmation hearings).

20. *Id.* at 108, 250-51.

21. See Gerber, *First Term*, *supra* note 14, at 118 (lobbying by Senator Danforth for Thomas' confirmation).

22. See *Hearings*, *supra* note 1, at 177-86 (Senator Metzenbaum alerted Justice Thomas to the fact that he did have a record on, among other things, the issues of abortion and affirmative action). See also Viveca Novak, *Doubting Thomas*, 250 NATION 405 (1990); Juan A. Williams, *A Question of Fairness*, 259 ATLANTIC MONTHLY 70 (1987).

## PART II - CONFIRMATION VIEWS

During the confirmation hearings, Justice Thomas was repeatedly asked to comment on views he had expressed on several earlier occasions. Senators persistently asked the nominee to explain or elaborate on his statements concerning natural law, abortion, voting rights, affirmative action, prisoners' rights and sexual harassment. Justice Thomas' answers at time were found unsatisfactory.<sup>23</sup> Some commentators found that his answers were sometimes off-point, the issue was side-stepped,<sup>24</sup> or the response was in direct contrast to statements previously made during his tenure as Chairman of the EEOC.<sup>25</sup> Throughout the hearings, Justice Thomas portrayed himself as "someone other than the often strident and controversial figure he had been in the Reagan and Bush administrations."<sup>26</sup> Critics found that the nominee dismissed parts of his professional record as being irrelevant to his judicial performance.<sup>27</sup> On other occasions, they found he discredited his record by claiming that he was ill-advised or even ignorant of the contents of certain documents that he had endorsed.<sup>28</sup> At other times, they found that Justice Thomas characterized parts of his public record as statements (advocating or criticizing certain views/persons) that were either taken out of context or made with an ulterior purpose in stark contrast to the specific intent that was expressed.<sup>29</sup>

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23. See *Hearings*, *supra* note 1. See also Aaron Epstein, *Judiciary Panel Presses Thomas to State His Views*, MIAMI HERALD, Sept. 12, 1991, at A15 (confronting Thomas on his views concerning abortion and natural law). Examples of Justice Thomas' inconsistent statements made during the confirmation hearings will be discussed later in this comment.

24. See *Hearings*, *supra* note 1. See also Paul M. Barrett, *Democrats Charge Thomas Is Evasive, Willing To Discuss Anything But Abortion*, WALL ST. J., Sept. 13, 1991, at A12.

25. See *Hearings*, *supra* text accompanying note 1. See also Paul M. Barrett, *Democrats Accuse Thomas of Changing Positions To Win Confirmation As Justice*, WALL ST. J., Sept. 12, 1991, at A20 (suggesting that Justice Thomas separated himself from his conservative stance in hopes of winning confirmation).

26. Michael Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Clarence Thomas*, 60 GEO. WASH. L. REV. 969, 980 (1992) (noting that the nomination and eventual confirmation of Thomas were the result of a mixture of race and politics).

27. *Id.*

28. *Hearings*, *supra* note 1, at 219.

29. See Clarence Thomas, *Why Black Conservatives Should Look to Conservative Policies, Speech to Heritage Foundation* (June 18, 1987) [hereinafter Thomas, *Why Black Conservatives*]. See also Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. PUB. POL'Y 63 (1989) [hereinafter Thomas, *Higher Law Background*].

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A. *Natural Law*<sup>30</sup>

When asked to explain a statement he made concerning natural law, Clarence Thomas responded that he was interested in the doctrine<sup>31</sup> and that his interest in exploring natural law and natural rights was purely in the context of political theory. The nominee noted that he was only attracted to the doctrine's main premise: all men are created equal (i.e., the Framers' [of the U.S. Constitution] view of the principle of liberty).<sup>32</sup> Hence, in retrospect, Justice Thomas stressed that he did not see any role for the application of natural law to constitutional adjudication.<sup>33</sup> His position, however, was in direct contrast to prior statements he had made concerning this area of law.

For example, during the hearings, Justice Thomas once noted, "I have not in any speech said that we should adjudicate cases by directly appealing to natural law."<sup>34</sup> The nominee, however, once published an article (during his tenure as EEOC Chairman) that read in part:

[w]ithout recourse to higher law [natural law], we abandon our best defense of judicial review—a judiciary active in defending the Constitution, but judicious in its restraint and moderation. Rather than being a justification of the worst type of judicial activism, higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges.<sup>35</sup>

In another example, Clarence Thomas remarked during a speech to the Heritage Foundation that New York businessman Lewis Lehrman's essay, "The Declaration of Independence and the Right to Life," was "a splendid example" of applying natural law in the context of the abortion rights issue,<sup>36</sup> thus indicating an application of natural

30. "This expression, 'natural law,' was largely used in the philosophical speculations of the Roman jurists of the Antonine age, and was intended to denote a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his 'nature,' meaning by that word his whole mental, moral, and physical constitution." BLACK'S LAW DICTIONARY 1026 (6th ed. 1990). "Under natural law, anything that goes against human dignity and reason is to be rejected." Ted Gest & Jeffrey L. Sheler, *A Higher Law For the High Court*, 111 U.S. NEWS & WORLD REPORT 50 (1991) (quoting Chester Gillis, Assistant Professor of Theology at Georgetown University).

31. *Hearings*, *supra* note 1, at 112. Senator Biden quoted Judge Thomas as praising the works of Harvard Law Professor Stephen Macedo, a staunch advocate of natural law playing a role in constitutional adjudication. *Id.* See also Stephen Macedo, *Morality and the Constitution: Toward a Synthesis for "Earthbound" Interpreters*, 61 U. CIN. L. REV. 29 (1992).

32. *Hearings*, *supra* note 1, at 171, 189.

33. For examples of the use of natural law in constitutional adjudication, see *Bradwell v. Illinois*, 83 U.S. 130 (1872) (holding that a state's refusal to grant women the right (i.e., a license) to practice law, does not violate any provision of the U.S. Constitution); see also *Lochner v. New York*, 198 U.S. 45 (1905) (holding that a business has the right to contract the number of hours an employee will work).

34. *Hearings*, *supra* note 1, at 271.

35. Gerhardt, *supra* note 26, at 981 (quoting Thomas, *Higher Law Background* at 63-64).

36. Thomas, *supra* note 29, at 8.

law to constitutional issues. Lehrman's article advocated the criminalization of all abortions as a constitutional matter. The article also claimed that the theory proclaiming that all abortions are fundamentally unconstitutional was rooted in the language of the Declaration of Independence.<sup>37</sup>

However, in responding to the anti-abortion statement during the hearings, Justice Thomas noted that he was not endorsing Lehrman's essay when he made the remark. Instead, he explained that he was attempting to gather support for a civil rights agenda.<sup>38</sup> Thomas stated, in essence, that his sole purpose for making the comment was "to demonstrate to a conservative audience that one of their own [Lehrman] had used this notion of natural rights."<sup>39</sup>

From these examples, it is apparent that Clarence Thomas supported the use of natural law in constitutional adjudication. His public record serves as evidence of that fact. Additionally, the record serves as evidence of contradictions that would surface throughout the confirmation hearings.

## B. Abortion

Clarence Thomas also attempted to distance himself from his record on the abortion issue. At the time of the hearings, the topic was an extremely controversial issue that had destroyed the nomination of Judge Robert Bork<sup>40</sup> and had nearly disrupted the nomination of Justice Souter.<sup>41</sup> As a result, Justice Thomas made every effort to avoid the subject. Nevertheless, a confrontation between Justice Thomas and the abortion issue was inevitable.

During the hearings, when asked whether he had a view on the subject, Justice Thomas replied:

I think that whether or not I have a view on this important issue is irrelevant to being an impartial judge and having one could undermine or create a perception that could undermine my impartiality. That is very important to me, and I think it is critical, if not important, to any judge.<sup>42</sup>

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37. *Id.*

38. *Hearings*, *supra* note 1, at 128.

39. *Id.* at 353.

40. See Michael J. Gerhardt, *Interpreting Bork*, 75 CORNELL L. REV. 1358 (1989) (analyzing Judge Bork's views towards the confirmation process following his Senate rejection) [hereinafter *Bork*]. See also Catherine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L. REV. 117-19 (1993) (expressing her opinion of the true political and ideological persona of Justice Thomas).

41. Wells, *supra* note 40, at 123 n.20.

42. *Hearings*, *supra* note 1, at 262.



When questioned later, however, about the *Roe v. Wade*<sup>43</sup> decision, the landmark U.S. Supreme Court case that legalized abortions, Justice Thomas commented that he did not have an opinion about the case. The nominee did note, however, that he was "open-minded on this issue."<sup>44</sup>

Upon reviewing Clarence Thomas' statements concerning abortion, it was found that the nominee had an opinion on the subject: he supported Lewis Lehrman's essay<sup>45</sup> which advocated the criminalization of all abortions with no exceptions. Additionally, in a report produced by the White House Working Group on the Family, where Thomas served as the highest ranking White House official on the task force, Thomas criticized the U.S. Supreme Court decisions in *Roe v. Wade* and *Planned Parenthood v. Danforth*.<sup>46</sup> The report criticized as fatally flawed a line of cases upholding the right of privacy in a woman's right to an abortion.<sup>47</sup> Moreover, the report went as far as to declare that State-imposed restrictions on a woman's right to an abortion should not be challenged by the Supreme Court.<sup>48</sup>

In response to the report, Thomas explained that he had not fully read the document. Consequently, he was not fully aware of its contents. Furthermore, the nominee noted that if he had read the entire report, he would have voiced his concerns over the criticism.

### C. Civil Rights

Commentators have found Clarence Thomas' views in the area of civil rights to be somewhat perplexing. Although the nominee has publicly admitted benefitting from advancements and opportunities that were made available as a result of the labor of many civil rights leaders,<sup>49</sup> he has nonetheless criticized some of these leaders for their methods of leadership.<sup>50</sup> For example, the nominee once characterized the "civil rights community [as] wallowing in self-delusion and pulling the public with it."<sup>51</sup>

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43. 410 U.S. 113 (1973).

44. *Hearings, supra* note 1, at 294.

45. See Lewis Lehrman, *The Declaration of Independence and the Right to Life*, AM. SPECTATOR, April 1987, at 21. See Thomas, *supra* note 29, at 8.

46. 428 U.S. 52 (1975).

47. *Hearings, supra* note 1, at 184.

48. *Id.*

49. *Id.* at 281.

50. See A. Leon Higginbotham, *An Open Letter To Justice Clarence Thomas From A Federal Judicial Colleague*, 1006 U. PENN. L. REV. 1005, 1011-20 (1991) (criticizing Justice Thomas for an ultra-conservative stance on racial issues). See also Juan Williams, *EEOC Chairman Blasts Black Leaders*, WASH. POST., Oct. 25, 1984, at A7 (presenting accounts of Thomas' criticisms of black civil rights leaders).

51. Higginbotham, *supra* note 50, at 1012 n.21 (quoting Thomas).

In another instance, Justice Thomas has admitted being the beneficiary of the *Brown v. Board of Education*<sup>52</sup> decision, the landmark U.S. Supreme Court case that struck down segregation in public schools.<sup>53</sup> Yet, he has criticized the decision for "resting on feelings rather than reason and moral and political principles."<sup>54</sup>

In retrospect, Clarence Thomas has benefitted from the fruits of the civil rights struggle.<sup>55</sup> Yet, he has remained one of the staunchest critics of some of its advancements. He has been most harsh in his comments on two advancements in particular: the Voting Rights Act of 1965<sup>56</sup> and affirmative action.<sup>57</sup>

When asked during the hearings about his views on voting rights and affirmative action, Justice Thomas commented that each, to a certain degree, had its place in American jurisprudence. He stated that these minority advancements, however, could be detrimental to society as a whole if taken too far, e.g., reverse discrimination.<sup>58</sup>

### 1. Voting Rights

When questioned during the hearings about his views on the Voting Rights Act of 1965,<sup>59</sup> Justice Thomas expressed his gratitude and loyalty to the statute. The nominee stressed that he had "absolutely nothing but the greatest support for the legislation that secures the right to vote."<sup>60</sup> In addition, Thomas noted, "I do treasure it [the Voting Rights Act], of course, coming from the background or an area where that right was considered enormously important and difficult to secure."<sup>61</sup> Justice Thomas, however, later took exception to certain aspects of the Act. He stated that when the statute is used to create

52. 347 U.S. 483 (1954).

53. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that "separate but equal" accommodations are constitutional). For an analysis of *Plessy*, see Loren Miller, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 165-82 (1966).

54. Higginbotham, *supra* note 50, at 1008 n.9 (quoting Thomas).

55. See *Hearings*, *supra* note 1, at 108-09. Justice Thomas noted during his personal statement to the Senate Judiciary Committee that he had benefited greatly from the efforts of the civil rights struggle and its leaders. He stated that but for them, there would have been no road to travel. He also admitted during the confirmation hearings that his acceptance into Yale was based on the school's aggressive recruiting of minority students (i.e., an affirmative action plan). *Id.* See also *supra* text accompanying note 3 (contending that Clarence Thomas has been helped by affirmative action throughout his life).

56. 42 U.S.C.A. § 1971 (1981). See *infra* Part II, section C(1) of this comment for examples of Thomas' comments in this area.

57. 42 U.S.C. § 2000e-12 (1992). See *infra* Part II, section C(2) of this comment for examples of Thomas' comments in this area.

58. *Hearings*, *supra* note 1, at 249-51, 262-63.

59. The Voting Rights Act of 1965 makes it illegal for any state to engage in discriminatory practices to impede a person's right to vote.

60. *Hearings*, *supra* note 1, at 411.

61. *Id.* at 410.

racial stereotypes (e.g., all blacks vote the same) or generalize an individual's right to vote, it must be placed back into its proper perspective, which is to ensure equal voting rights for all, regardless of race.<sup>62</sup>

Thomas' statement was consistent with his views prior to the hearings. In a 1988 speech at the Tocqueville Forum, the nominee expressed the same criticism when referring to Supreme Court decisions that had applied the Voting Rights Act. In this speech, Thomas stated:

[U]nfortunately, many of the Supreme Court decisions in the area of voting rights presuppose that blacks, whites, Hispanics, and other ethnic groups will inevitably vote in blocs. Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected when the individual's racial or ethnic group has sufficient clout.<sup>63</sup>

In another criticism of the Court's application of the Voting Rights Act, Justice Thomas noted that he also had a problem with the effects test.<sup>64</sup> The nominee questioned whether the Court could examine "how effective[ly] a person's voting rights were being implemented, or how effective the minorities were in participating in the political process" by simply judging the number of individuals who held office.<sup>65</sup> The nominee explained that this test [effects test] was only one measure.<sup>66</sup> However, he never stated whether other measures were needed to make such an assessment.

Throughout the discussions on the Voting Rights Act, when he was asked whether his exception to the effects test and past Supreme Court decisions would affect his support for the statute, Justice Thomas replied:

[M]y concerns were not intended to suggest that I was in any way opposed to voting rights or concerned that we have them. I think that they are critical, and I certainly have been most supportive and felt that we should have been more aggressive in stating that position during the Reagan years.<sup>67</sup>

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62. *Id.* at 445-46.

63. *Id.* at 444-45.

64. *Id.* at 412.

65. *Id.*

66. *Id.*

67. *Id.* at 411-12.

## 2. Affirmative Action<sup>68</sup>

When questioned during the hearings about his views on affirmative action,<sup>69</sup> Justice Thomas emphasized that he had supported such programs. He stressed that he understood that racism existed and stated that "society had an obligation to include those individuals who had been left out in our society, in the economy, in our schools, our educational programs, et cetera."<sup>70</sup> In addition, the nominee noted that he had agreed with affirmative action policies that focused on disadvantaged minorities and disadvantaged individuals in our society. "We need to look at all avenues of inclusions,"<sup>71</sup> exclaimed Justice Thomas. The nominee, however, cautioned that if affirmative action was ever extended too far, whereby it created an equal protection problem (e.g., it became unfair to members of the "majority" race), the scope of the program would have to be limited.<sup>72</sup>

When describing his record on affirmative action, the nominee stated that he had been "an aggressive advocate of giving minorities the opportunity and the occasion to develop potential."<sup>73</sup> The jurist referred to his record at EEOC for hiring and promoting minorities, women, and handicapped employees.

Justice Thomas, however, failed to reveal his negative treatment of affirmative action. For example, the nominee neglected to disclose how he once characterized affirmative action as being "offensive"<sup>74</sup> even though he had benefitted from such a program when he was accepted into Yale Law School. In an opinion written by Justice Thomas when he was on the United States Court of Appeals for the District of Columbia Circuit that limited the scope of affirmative action policies in the Federal Communications Commission, he revealed his approach to affirmative action. In that case, *Lamprecht v. FCC*,<sup>75</sup> then-Judge Thomas held that the FCC's policy of giving preference to women was unconstitutional because "it simply is not reasonable . . . that granting preferences to women will increase programming diver-

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68. Affirmative action programs are employment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members; i.e. positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination. BLACK's, *supra* note 30, at 59.

69. Affirmative action programs originated in the federal government as a result of a 1961 executive order by President Kennedy (popularly known as the "Affirmative Action Order"). Samuel Starks, Note, *Understanding Government Affirmative Action and Metro Broadcasting, Inc. v. FCC*, 41 DUKE L.J. 933, 937 (1992). See Exec. Order No. 11,246, 3 C.F.R. 339 (1965).

70. *Hearings*, *supra* note 1, at 301.

71. *Id.* at 363.

72. *Id.*

73. *Id.* at 361.

74. Gerhard, *supra* note 26, at 979.

75. 958 F.2d 382 (D.C. Cir. 1992).

sity."<sup>76</sup> He found that the government failed to show that its sex-preference policy was substantially related to achieving diversity on the airwaves.<sup>77</sup>

Critics state that the only reason Justice Thomas may not have revealed his negative treatment of such policies could have been an effort to secure a seat on the Court. In fact, it was reported in the *New York Times* that then-Judge Thomas had purposely delayed the release of the *Lamprecht* decision so as not to imperil his nomination.<sup>78</sup> Justice Thomas denied the report.<sup>79</sup> Regardless of whether the nominee delayed the report or not, this incident serves as yet another contradiction made by him during the hearings.

#### D. Prisoners' Rights

During the hearings, Justice Thomas expressed his views on prisoners' rights. This line of questioning was the least controversial subject discussed during the hearings, partly because the nominee had a somewhat clean slate on the topic. During Thomas' testimony, he spoke of preserving the rights of criminal defendants, especially those who faced the death penalty. He stated that the irreversible punishment was "the harshest penalty that could be imposed."<sup>80</sup> Consequently, he felt that society "should be most concerned about providing all the rights and all the due process that can be provided and should be provided to individuals who may face that kind of a consequence."<sup>81</sup>

Indeed, it did appear that Clarence Thomas was an advocate of prisoners' rights given his testimony at the hearings. The nominee expressed both compassion and understanding for the criminal defendants. Unfortunately, the compassion the nominee possessed during the hearings did not surface when the Justice confronted prisoners' rights issues during his first term on the Court.

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76. *Id.* at 385. "It is not reasonable to expect that a woman would manifest a distinctly female view." *Id.* See also Neil A. Lewis, *Appeals-Court Ruling by Thomas Limits FCC Affirmative Action*, N.Y. TIMES, Feb. 20, 1992, at A1.

77. *Lamprecht*, 958 F.2d at 385.

78. Neil A. Lewis, *Appeals-Court Ruling by Thomas Limits FCC Affirmative Action*, N.Y. TIMES, Feb. 20, 1992, at A1.

79. *Id.*

80. *Hearings*, *supra* note 1, at 133.

81. *Id.*

E. *Sexual Harassment*<sup>82</sup>

The sexual harassment issue was the most controversial topic discussed during the confirmation hearings. All other subjects paled in comparison. The controversy, however, did not focus on the nominee's views concerning the topic. Instead, the dispute centered around sexual harassment allegations against the nominee by a former employee.<sup>83</sup>

Professor Anita F. Hill,<sup>84</sup> a former assistant to Clarence Thomas, charged that the nominee had harassed her during his tenure at the Department of Education and later at EEOC. This allegation subsequently created a media frenzy, which resulted in Anita Hill being summoned to publicly testify before the Senate Judiciary Committee and the nation.<sup>85</sup> This allegation, unfortunately, also forced Anita Hill to confront Clarence Thomas and the men who would later confirm him as a Supreme Court Justice.<sup>86</sup>

During what was termed as the Anita Hill/Clarence Thomas hearings, Professor Hill described the abuse she suffered at the hands of the nominee.<sup>87</sup> She noted that she had repeatedly asked Justice Thomas to discontinue his sexual innuendos towards her. She stated that the nominee simply ignored her plea. As a result, Professor Hill revealed, she suffered from severe stress which resulted in her hospitalization for acute stomach pain. She also disclosed that the harassment resulted in her decision to find employment elsewhere.<sup>88</sup>

In responding to the allegations, Justice Thomas declared his innocence. He stated that he had not sexually harassed Professor Hill or anyone else at anytime while he was at the Department of Education and EEOC. Thomas explained:

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82. Sexual harassment, as a type of employment discrimination, includes sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature prohibited by federal law and commonly by state statutes. BLACK'S, *supra* note 30, at 1375.

83. The sexual harassment charges were leaked to Timothy Phelps of *Newsday* and Nina Totenberg of National Public Radio. Gerber, *supra* note 8, at 117.

84. Anita Hill is currently a tenured Professor of Law at the University of Oklahoma.

85. See *Anita Hill and the Senate's Duty*, N.Y. TIMES, Oct. 8, 1991, at A24; See also Susan Estrich, *Forced to be Fair*, N.Y. TIMES, Oct. 9, 1991, at A25; Anna Quindlen, *Listen to Us*, N.Y. TIMES, Oct. 9, 1991, at A25; *Proper Hearing*, N.Y. TIMES, Oct. 10, 1991, at A26.

86. For an interesting insight into the aftermath of the hearings, see *Voter Revolt: A Giant-Killer in Illinois*, NEWSWEEK, Mar. 30, 1992, at 38; Bill Turque, *Arlen Specter's Specter*, NEWSWEEK, Apr. 27, 1992, at 31.

87. Professor Hill recalled how Justice Thomas had occasionally described "pornographic materials depicting individuals with large penises and large breasts involving various sex acts." She also disclosed how he occasionally referred to the size of his own penis as being larger than normal. In addition, she revealed that the nominee had several times graphically given accounts of his own sexual prowess (for instance, how he gave pleasure to women by performing oral sex). *Hearings*, *supra* note 1, at 37.

88. *Id.*

[D]uring my tenure in the executive branch, as a manager, as a policy maker and as a person, I have adamantly condemned sex harassment. There is no member of this [c]ommittee or this Senate who feels stronger about sex harassment than I do. As a manager, I make every effort to take swift and decisive action when sex harassment raised or reared its ugly head.<sup>89</sup>

In fact, the nominee noted that while at EEOC, he had played an extensive role in the development of legal arguments in a sexual harassment case.<sup>90</sup>

Justice Thomas later commented that he did not know why Anita Hill made such allegations against him. He noted that "had any statements or conduct [on his part] been brought to [his] attention, [he] would have remembered it clearly because of the nature and seriousness of such conduct, as well as [his] adamant opposition to sex discrimination and sexual harassment."<sup>91</sup> "But there were no such statements," proclaimed Clarence Thomas.<sup>92</sup>

Whether to believe the nominee or Anita Hill created a strong uproar in this country. Indeed, the Anita Hill/Clarence Thomas hearings had divided the nation. As one commentator insightfully noted, "What you saw depended on who you were."<sup>93</sup> Unfortunately, the hearings took the focus off of Clarence Thomas' views and placed it on his character.<sup>94</sup>

### PART III - CASES

#### *Abortion*

When asked about his views on abortion, Justice Thomas declined to give a definitive answer. He stated that he believed in an individual's right to privacy and a couple's right to procreate.<sup>95</sup> Moreover, Justice Thomas asserted that he had no quarrel with following precedent in this area, such as *Roe v. Wade*.<sup>96</sup> However, despite repeated efforts by Senators to have the nominee specifically state his position

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89. *Id.* at 7.

90. *Id.* at 442.

91. *Id.* at 6.

92. *Id.* at 7.

93. Gerber, *supra* note 8, at 117 (quoting from Emma Coleman Jordan, *Race, Gender, and Social Class in the Thomas Sexual Harassment Hearings: The Hidden Fault Lines in Political Discourse*, 15 HARV. WOMEN'S L.J. 1 (1992)).

94. It is the author's opinion that Justice Thomas' character had already been flawed by the many contradictions throughout the hearings, as evidenced by facts contained in Part II of this comment.

95. *Hearings*, *supra* note 1, at 277, 394.

96. *Id.* at 462. Senator Metzenbaum reminded Judge Thomas of some of his writings and statements concerning the reversal of *Roe v. Wade*.

on abortion, Justice Thomas refused to comment on the topic even though his public record suggested that he was a pro-life advocate.<sup>97</sup>

Although Justice Thomas refused to disclose his position on abortion during the confirmation hearings, his view became apparent in *Bray v. Alexandria Women's Health Clinic*<sup>98</sup> and *Planned Parenthood v. Casey*.<sup>99</sup> In *Bray*, the Court reversed the convictions of anti-abortion protestors who were found guilty of conspiring to deprive women access to abortion clinics, a violation of 42 U.S.C. § 1985(3).<sup>100</sup>

Joining in the majority's opinion, Justice Thomas held that the first clause of section 1985(3) did not provide a federal cause of action against persons obstructing access to abortion clinics. Also, the clinic had not shown that opposition to abortions qualified alongside race discrimination as an "otherwise class-based, invidiously discriminatory animus [underlying] the conspirators' action."<sup>101</sup> Finally, the clinic had not shown that the protestors "aimed at interfering with rights" that were "protected against private, as well as official encroachment," a second prerequisite to proving a private conspiracy in violation of § 1985(3).<sup>102</sup>

In a 5-4 decision, the *Casey* Court upheld the right of women to have an abortion, as held in *Roe v. Wade*. The majority, however, placed restrictions on that privilege. It held that the Commonwealth of Pennsylvania had the right to require, among other things, mandatory counseling, a waiting period of twenty-four hours, and judicial or parental permission if the patient is a minor. The Court also held that these limitations did not cause any "undue hardship" upon the woman's ability to have the procedure.

Justice Thomas, joining the dissenting opinion of Chief Justice Rehnquist, stated that the *Roe* decision was decided incorrectly when it held that the right to purposely terminate the potential life of a fetus was fundamental. In Justice Scalia's dissent, Justice Thomas supported the conclusion that a woman's decision to abort her unborn child was not a constitutionally protected 'liberty' because "(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed."<sup>103</sup>

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97. See *Thomas Praised Anti-Roe Essay*, MIAMI HERALD, July 3, 1991, at A1.

98. 113 S. Ct. 753 (1993).

99. 112 S. Ct. 2791 (1992).

100. 42 U.S.C. § 1985(3) prohibits conspiracies to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."

101. *Bray*, 113 S. Ct. at 758.

102. *Id.*

103. *Casey*, 112 S. Ct. at 2874.



In *Bray* and *Casey*, Justice Thomas' support of the majority and dissents, respectively, clearly revealed his pro-life position on the issue of abortion.<sup>104</sup>

### Civil Rights

In *Shaw v. Reno*<sup>105</sup> and *Presley v. Etowah County Commission*,<sup>106</sup> Justice Thomas stood by his position on the issue of voting rights. Joining in the majority opinion in *Shaw*, Thomas held that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race and that separation lacked sufficient justification.<sup>107</sup>

In *Presley*, Thomas joined in the opinion of the majority to limit the scope of the Voting Rights Act. In this decision, the majority upheld Etowah County's decision to shift the power of its commissioners (to authorize road repairs) to an appointed commission when a black candidate was elected to the Board. In reaching this decision, the Court reasoned that "(1) section 5 [of the Act did] not cover changes other than changes in rules governing voting, and (2) [that] neither change in question effected change in rules governing voting such that preclearance was required."<sup>108</sup>

In *Presley*, Justice Thomas illustrated his position regarding the application of the Voting Rights Act in "all aspects" of the voting arena.<sup>109</sup> In that decision, he allowed the manipulating of the positions for which the candidates were elected.

In *Northeastern Florida Contractors v. Jacksonville*,<sup>110</sup> Justice Thomas also stood by his position on affirmative action. In that case, Justice Thomas wrote the opinion for the majority which struck down an affirmative action program that set aside a certain percentage of government contracts for minority businesses. In ruling on this case, the majority stated:

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104. For an interesting analysis of the effects of *Casey*, see Mark H. Woltz, Note, *A Bold Reaffirmation? Planned Parenthood v. Casey Opens the Door for States to Enact New Laws to Discourage Abortion*, 71 N.C.L. REV. 1787 (1993).

105. 113 S. Ct. 2816 (1993).

106. 502 U.S. 491 (1992).

107. *Shaw*, 113 S. Ct. at 2824.

108. *Presley*, 502 U.S. at 491. Section 5 of the Voting Rights Act of 1965 requires a covered jurisdiction to obtain either judicial or administrative preclearance before enforcing any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." *Id.* at 2820. See also 42 U.S.C. § 1973c (1965).

109. See Linda Greenhouse, *In Retreat, Supreme Court Limits Scope of '65 Voting Rights Act*, N.Y. TIMES, Jan. 28, 1992, at A1.

110. 113 S. Ct. 2297 (1993).

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.<sup>111</sup>

In sum, Justice Thomas stated that in order to bring a suit, a plaintiff did not have to prove that he could have won the contract had it not been for the affirmative action program.<sup>112</sup>

In both *Shaw* and *Northeastern Florida*, the plaintiffs did not have to show an injury-in-fact.<sup>113</sup> The Court created a new cause of action by allowing members of the majority race to bring equal protection claims merely by showing a hypothetical injury or risk of injury.<sup>114</sup>

### *Prisoners' Rights*

During the hearings, Justice Thomas displayed compassion and understanding for criminal defendants. He stated that every step should be taken to insure that their rights are afforded to them. However, in *Hudson v. McMillian*<sup>115</sup> and *Helling v. McKinney*,<sup>116</sup> Justice Thomas took a different position. In *Hudson*, a prisoner sued prison officials for violating his Eighth Amendment right against cruel and unusual punishment. In this case, two prison guards attacked an inmate while he was handcuffed and shackled and while their supervisor looked on and commented "not to have too much fun."<sup>117</sup> The assault on the inmate resulted in minor bruises and swelling of the face, mouth, and lip; loose teeth; and a cracked dental plate. The Court, in a 7-2 decision, held that the "beating" violated the prisoner's rights. It stated that the use of excessive force against a prisoner may constitute cruel

111. *Id.* at 2303.

112. For an interesting look into the racial aspect of affirmative action, see Frederick A. Morton, Jr., *Classed-Based Affirmative Action: Another Illustration of America Denying the Impact of Race*, 45 RUTGERS L. REV. 1089 (1993) (discussing how the conservative Supreme Court has, in a number of decisions, made it considerably more difficult for plaintiffs challenging discriminatory practices).

113. See *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977) (holding that the Constitution did not prevent a state that is subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complied with sec. 5); see also *Warth v. Seldin*, 422 U.S. 490 (1975) (holding that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that such practices harmed him, and that he personally would benefit in a tangible way from the Court's intervention).

114. For an interesting discussion on the aftermath of the *Shaw* decision, see Symposium, *The Future of Voting Rights After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993). See also *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993) (this case was based on the *Shaw* decision).

115. 503 U.S. 1 (1992).

116. 113 S. Ct. 2475 (1993).

117. *Hudson*, 503 U.S. at 6.

and unusual punishment even though the inmate does not suffer serious injury.<sup>118</sup>

In the dissent, Justice Thomas, along with Justice Scalia, held that the majority went far beyond precedents in reaching its decision. He noted that the inmate's injuries were indeed "minor."<sup>119</sup>

In *Helling*, a prisoner again sued prison officials for violating his Eighth Amendment rights after he was exposed to environmental tobacco smoke (ETS). The Court, in a 7-2 decision, held that such a cause of action could arise because of the possible future harm to health as well as present harm to the inmate due to the exposure.<sup>120</sup> In the dissent, Justice Thomas and Justice Scalia again held that the majority had extended the prohibition too far. In sum, Clarence Thomas stated that the Court's holding was "unacceptable" because it had created a cause of action for a "mere risk of injury."<sup>121</sup>

In *Keeney v. Tamayo-Reyes*,<sup>122</sup> a Spanish-speaking Cuban prisoner sought to have his conviction overturned through habeas corpus proceedings. The inmate alleged that his plea of nolo contendere to first-degree manslaughter was without his full knowledge and consent because he did not fully understand the mens rea element of the crime. Moreover, he contended that when this issue was brought on appeal, post-conviction counsel neglected to develop crucial facts surrounding his inability to understand the crime.

Justice Thomas joined in the majority opinion which held that an evidentiary hearing was proper only if Tamayo-Reyes could show cause for his failure to develop the facts [about his interpretation of the mens rea element as explained by an interpreter] in state-court proceedings and actual prejudice resulting from that failure.<sup>123</sup> The majority also held that "[f]ederal courts [were] no longer obliged to grant a hearing on a state prisoner's challenge to his conviction, even if the prisoner [could] show that his lawyer had not properly presented crucial facts of the case in a state-court appeal."<sup>124</sup>

In *Keeney*, the majority restricted habeas corpus proceedings and practically eliminated a criminal defendant's right to effective assistance of counsel in post-conviction proceedings, thus reflecting Clarence Thomas' position on this issue.

Justice Thomas' position in both *Helling* and *Hudson* do not coincide with the remarks he once made about how moved he would get

118. *Id.* at 12.

119. *Id.* at 45.

120. *Helling*, 113 S. Ct. at 2481.

121. *Id.* at 2482.

122. 504 U.S. 1 (1992).

123. *Id.* at 17.

124. COURT OF APPEAL, *supra* note 2, at xxxix.

every time he saw a busload of young black men being transported to the courthouse because "but for the grace of God," he could have been on that bus.<sup>125</sup> Indeed, Justice Thomas' positions in these cases were harsh. Justice O'Connor, in her opinion in *Hudson*, stated:

[T]he dissent's argument that excessive force claims and conditions of confinement claims are no different in kind is likewise unfounded. . . To deny the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment.<sup>126</sup>

Justice Thomas' position in these two cases provoked the *New York Times* to crown him "the youngest and the cruelest justice."<sup>127</sup>

### *Sexual Harassment*

Throughout the hearings, Clarence Thomas declared his hatred and condemnation for sex discrimination and sexual harassment. When faced with his first case involving this issue, the Justice's position was not as adamant. In *Franklin v. Gwinnet County Public School*,<sup>128</sup> a teenaged girl sued the school system for condoning sexual harassment by failing to protect her from the sexual advancements of her teacher. In an unanimous decision, the Court held that Title IX of the Education Amendments of 1972<sup>129</sup> was enforceable through an implied right of action and that monetary damages were allowed. However, Justice Thomas, joining the concurring opinion of Justice Scalia, concluded that since the right to sue under this Act was "judicially" implied, the scope of relief should be implied as well.<sup>130</sup> Consequently, the remedies afforded under this Act should be limited.

In *Landgraf v. USI Film Product*,<sup>131</sup> Justice Thomas, joining in the concurring opinion of Justice Scalia, again attempted to limit the reach of remedies afforded to a victim. In that case, he held that section 102 of the Civil Rights Act of 1991<sup>132</sup> did not apply to a Title VII case that was pending on appeal when the Act was enacted. Thus, a plaintiff

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125. *Hearings*, *supra* note 1, at 480. It appears from the dissents in the prisoners' rights cases that Justice Thomas had lost all sense of compassion and understanding that he expressed for prisoners during the confirmation hearings.

126. *Hudson*, 503 U.S. at 17-18.

127. *See The Youngest, Cruellest Justice*, N.Y. TIMES, Feb. 27, 1992, at A24.

128. 503 U.S. 60 (1992).

129. Title IX in pertinent part prohibits any type of verbal or physical conduct that amounts to sexual harassment in the workplace. *See* 20 U.S.C.A. §§ 1681-88 (1972).

130. *Franklin*, 503 U.S. at 31, 32.

131. 114 S. Ct. 1483 (1994).

132. Section 102 in pertinent part prohibits sexual harassment in the workplace, and it provides an adequate means of relief for any violation of this Act. *See* 42 U.S.C.A. § 1981a(a) (1991).

was denied equitable relief for the harassment she suffered at the hands of her former employer.

In another sexual harassment suit, Justice Thomas did advance the fight against such conduct by lowering the standard upon which a cause of action may exist. In *Harris v. Forklift*,<sup>133</sup> petitioner sued her former employer for creating an "abusive work environment"<sup>134</sup> in violation of Title VII of the Civil Rights Act of 1964.<sup>135</sup> The Court, in a unanimous decision, held that Title VII is violated when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment<sup>136</sup> and concluded that to be actionable as abusive work environment harassment, the conduct need not "seriously affect [an employee's] psychological well-being" or lead the plaintiff to "suffer injury."<sup>137</sup>

In assessing Justice Thomas' position concerning sexual harassment, his opinions were indeed conflicting. In *Franklin* and *Landgraf*, the Justice attempted to limit or restrict the remedies available to a person who brings suit alleging sexual misconduct. On the other hand, the *Harris* decision opened the door to victims who may have been shut out because of the rigid "abusive environment" standard.<sup>138</sup>

#### PART IV - CLARENCE THOMAS: EVASIVE OR DECEPTIVE

Throughout the confirmation hearings, Clarence Thomas was found to be ambiguous and vague with respect to his responses to inquiries by the Senate Judiciary Committee.<sup>139</sup> Whenever the nominee was presented with a key concern, he either side-stepped the question or refused to specifically address the matter on the ground that his answer would affect his impartiality as a Supreme Court Justice.<sup>140</sup> When confronted with past comments or writings, Justice Thomas merely brushed them aside as misquotes or statements taken out of context.<sup>141</sup>

133. 114 S. Ct. 367 (1993).

134. For an analysis of the abusive work environment standard, see *Meritor v. Vinson*, 477 U.S. 57 (1986).

135. Title VII of the Civil Rights Act of 1964 makes it "unlawful employment practice for an employer. . .to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1964).

136. *Landgraf*, 114 S. Ct. at 370.

137. *Id.* at 371.

138. Consequently, the author must withhold judgment on Justice Thomas with respect to this issue.

139. See Neil A. Lewis, *Thomas Ends Testimony but Senators Grumble over Elusive Views*, N.Y. TIMES, Sept. 17, 1991, at A14.

140. See *Hearings*, *supra* note 1, at 181.

141. See *supra* Part II of this perspective for detailed examples.

When examining Clarence Thomas' "statements" during the confirmation hearings, it is apparent that the nominee had an opinion or view as to many of the topics discussed (e.g., abortion, affirmative action, voting rights, and natural law) but his views were not always clearly expressed to the Senate Judiciary Committee. This can be seen from the recent Supreme Court decisions over which Justice Thomas presided. His statements during the hearing were not consistent with his position in these Supreme Court opinions. Thus, in comparing the testimony of Clarence Thomas during the hearings to his past speeches and contemporaneous decisions, one question should come to mind: Were Clarence Thomas' answers to the Senate's inquiries merely evasive or unscrupulously deceptive?