AN ANALYSIS OF THE VIEWS OF JUDGE CLARENCE THOMAS

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

AUGUST 13, 1991

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I. INTRODUCTION

The purpose of this analysis is to set out the bases for the Legal Defense Fund's conclusion that it must oppose the confirmation of Judge Clarence Thomas as an Associate Justice of the Supreme Court of the United States. We have researched Judge Thomas' writings and speeches in depth and have found them often to be contradictory and vague in the extreme. On a number of occasions he has rendered broad criticisms of Supreme Court decisions without clearly identifying the opinions involved. Indeed, he often misstates or mischaractarizes decisions to such a degree that one doubts that he has actually read them. In any event, over the last five years Judge Thomas has consistently taken positions that have become progressively more radical. Whatever he may have believed ten years ago, he has chosen to place himself firmly in the reactionary camp. What is apparent from his speeches and writings is an antipathy and hostility towards legal principles that benefit and protect the most disadvantaged of our society, principles that the great majority of Americans believe in and support.

Prior to 1986, Judge Thomas's speeches and writings were virtually devoid of explicit criticism of Supreme Court decisions other than *Dred Scott*[1] and *Plessy v. Ferguson*.[2] We have been able to identify during this period only one speech criticizing by name a twentieth century Supreme Court opinion, and that criticism, surprisingly, was directed at the conservative decision in *Memphis Firefighters v. Stotts*.[3] His public statements before 1986 were limited almost exclusively to racial issues, primarily employment discrimination questions and the operations of the EEOC. Then, beginning in late 1986, Judge Thomas'

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[1] 60 U.S. 393 (1856).

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

[3] 467 U.S. 561 (1984). Speech to BNA Conference, pp. 13-14 (June 15, 1984) ("Where individuals are being classified and treated as simply components of larger groups defined according to race, sex, or national origin, the courts will be exceedingly skeptical. The recent decisions in *Firefighters v. Stotts* can be viewed as a somewhat ambiguous and simplistic application of this principle.")

writings and speeches underwent a sharp transformation. There occurs an outburst of denunciations of both the Supreme Court and its civil rights decisions. In December, 1986, Thomas, as a member of the White House Working Group on the Family, joined in a Report excoriating a wide range of Supreme Court decisions. In early 1987, Judge Thomas wrote an article on natural rights and higher law, which then evolved into a species of economic libertarianism. Speeches and articles denouncing other Supreme Court decisions soon followed.

II. JUDGE THOMAS' VIEWS ON SUPREME COURT PRECEDENTS

We summarize below particular identifiable Supreme Court decisions that Judge Thomas has denounced. But these are merely illustrations of his sweeping antipathy towards those decisions that have expanded protections for the disadvantaged.

Judge Thomas' hostility to Supreme Court precedents is not limited to those cases he has referred to with specificity. His comments include open ended statements that suggest that the list of decisions with which he disagrees is a very long one indeed. A 1987 speech,[4] subsequently published as "Civil Rights as a Principle Versus Civil Rights as an Interest,"[5] emphasized what he regarded as a general

> failure of the Supreme Court to deal adequately with race-related issues. It is nowhere clearer than in the field of jurisprudence how distant the Court . . . remain[s] from an understanding of the principles of equality and liberty that make us one nation. . . . It is easy enough to blame the Court for "*voodoo jurisprudence*," but Congress must share a great deal of the blame.[6]

In addition to the busing decisions, Thomas asserted, there was also a

> disastrous series of cases requiring *other* policies that were irrelevant to parents' concern for a decent education. The Court appeared in these and

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[4] Speech before the Cato Institute, October 2, 1987, pp. 3-4, 7.

[5] Printed in D. Boaz, ed., *Assessing the Reagan Years*, 391 (1988).

[6] *Id.* at 392 (emphasis added).

> *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.[7]

In Thomas' view, most of the Supreme Court decisions concerned with the rights of the poor seems to have been a tragic mistake. The Report of the White House Working Group on the Family which he cosigned contended

> [A]s welfare analyst Charles Murray has said, "One may take *virtually* any . . . Supreme Court decision of the 1960's and early 1970's intended to help poor people and ask 'How would this affect a poor young person's perception of his personal responsibility?' and the answer would be the same: Right behavior, he would learn, is not necessarily followed by rewards; wrong behavior is not necessarily followed by penalties. . . ." In short, we may have made it desirable for some to behave on a short term basis in ways that clearly and demonstrably are negative and destructive in the long term.[8]

In a 1988 speech Thomas stated,

> The Supreme Court has used the due process and equal protection clauses in a variety of extremely creative ways. The Court has used them to make itself the national school board, parole board, health commission, and elections commission, *among other titles*. But these activities overlook (when they do not trivialize) the fundamental purpose of the 13th and 14th Amendments....[9]

Elsewhere he complained, "[O]ur current explosion of rights — welfare rights, animal rights, children's rights, and so on — goes to the point of trivializing [past legal inequities]."[10] Judge Thomas' objections are not limited to the Court's more recent decisions; he believes that the judicial branch has been arrogating to itself undue power "over the last 50 or so years."[11] The breadth and intensity of his disagreement with the

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[7] *Id.* at 393 (emphasis added) (emphasis on "against" in the original).

[8] *The Family: Preserving America's Future*, 18 (1986) (emphasis added).

[9] Speech at the Tocqueville Forum, Wake Forest University, p. 8 (April 18, 1988)(emphasis added).

[10] Thomas, "Rewards Belong to Those Who Labor," Washington Times, Jan. 18, 1988, at F4.

[11] Address to the ABA Business Law Section, p. 13 (August 11, 1987).

record of the federal courts in enforcing the Bill of Rights has led him to refer on a number of occasions to what he regards as abuses by "runamok judges."[12]

In the discussion that follows, we will focus on his opinions as they relate to a number issues of crucial importance to African American and other citizens who are concerned about civil rights and equal justice: voting rights, fair employment and related affirmative action issues, school desegregation, the right to privacy, and the protection of the poor and disadvantaged. In all these areas, Judge Thomas consistently attacks the concept that the courts should address denials of equal rights as involving the rights of persons to obtain effective remedies for discrimination because they are members of groups who have historically suffered from discrimination.

A. Voting Rights

In 1988, Judge Thomas denounced, without identifying, Supreme Court decisions applying the Voting rights Act:

> The Voting Rights Act of 1965 certainly was crucial legislation. It has transformed the policies of the South. Unfortunately, many of the Court's decisions in the area of voting rights have presupposed 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.[13]

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[12] Speech to the Federalist Society, University of Virginia School of Law, p. 2 (March 5, 1988); Thomas, "The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment," 12 Harv. J. L. & Pub. Pol. 63, 64 (1989).

[13] Speech at the Tocqueville Forum, April 18, 1988, p. 17.

This is consistent with Judge Thomas's statements that the 1982 amendments to section 2 were "unacceptable",[14] and his somewhat obscure objection to the Supreme Court's redistricting decisions.[15]

The "many" Supreme Court decisions referred to by Judge Thomas presumably are *White v. Register*, 412 U.S. 755 (1971) and *Thornburg v. Gingles*, 478 U.S. 30 (1986). The latter decision implemented the 1982 amendments to section 2 of the Voting Rights Act, which prohibits election laws and practices with a racially discriminatory effect. The most important application of this prohibition is to forbid schemes that dilute minority voting strength.

Judge Thomas' criticism of section 2 and the related Supreme Court cases reflects a fundamental misunderstanding of the law. Neither section 2 nor those decisions "assume" that whites or minorities vote in racial blocs; in a section 2 case like *Gingles* the burden is on the plaintiff to adduce evidence proving that racial bloc voting does occur in the jurisdiction at issue. Where that, in fact is the case, the individual's right to vote can well be rendered meaningless by a system which assures that the candidate supported by black voters has no chance whatsoever of actually being elected.

Thus, by mischaracterizing what the Court has actually held, Judge Thomas is able to denounce it as focusing on "group" rights and requiring relief in cases where, he asserts, there has been no showing of discrimination against individuals.

B. Fair Employment/Affirmative Action.

Judge Thomas has criticized on a number of occasions decisions that have upheld limited affirmative action programs in circumstances where such programs were necessary

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[14] Speech to the Heritage Foundation, p. 10 (June 15, 1987); Speech at Suffolk University, Boston, p. 17 (March 30, 1988).

[15] *Toward a 'Plain Reading' of the Constitution — The Declaration of Independence in Constitutional Interpretation*, 30 Howard L. J. 985, 991 (1987).

either to overcome demonstrated, and often egregious, discrimination, or where programs were instituted because of the lack of members of a protected group in jobs or educational institutions.

1. *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

This decision held that Title VII permits private employers to engage in race conscious affirmative action if the policy is adopted as a temporary measure to "eliminate a manifest racial imbalance," and "is not intended to maintain racial balance." 443 U.S. at 208. *Weber* is a vitally important decision since it permits, and indeed encourages, employers to take action to correct past discriminatory practices without waiting for employees or the government to institute costly and time-consuming litigation.

In five speeches in 1982 and 1983, using virtually identical language, Thomas accepted *Weber* without any evident reservations:

> Some judges [formerly] expressed the view that consideration of race or ethnicity for any purpose was illegal "racism." However, since the advent of authoritative Supreme Court decisions such as *Steelworkers v. Weber* . . . it is settled that, as a matter of law, affirmative action — including the use of numerical goals — may be used in appropriate circumstances.[16]

On December 14, 1984, Thomas told a House subcommittee

> I have not developed a specific opinion on *Weber* per se. . . . I have not developed a position on *Weber*. I think I could over time, but I think it would be imprudent for me to say that I have developed one on *Weber* when I haven't.[17]

Then on October 2, 1987, in a speech to the Cato Institute, Thomas announced a position of unequivocal disagreement with *Weber*:

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[16] Speech to National Conference on Equal Employment, p. 12 (October 1, 1982); Speech to Litigation Programs Conference, p. 20 (January 13, 1983); Speech to NASA, p. 15 (May 26, 1983); Speech at Department of Transportation, p. 15 (June 15, 1983); Speech at Department of Health and Human Services, p. 16 (November 16, 1983).

[17] Oversight Hearing on the EEOC's Enforcement Policies before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 98th Cong., 2d Sess., 34 (1984).

> The Court has made rather creative interpretations of legislative intent in a number of civil rights cases. . . . The *egregious* example was *United Steel Workers v. Weber* . . . .[18]

The same comment appears in his essay "Civil Rights As A Principle Versus Civil Rights As An Interest,"[19] based on the speech. In 1988 Judge Thomas endorsed the critiques of *Weber* by right-wing theorists.[20]

2. *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

This decision reaffirmed *Weber* and applied it to uphold an affirmative action program that benefitted women. Once again, the Court approved of an employer, this time a public agency, taking responsible action to provide employment benefits to a group previously excluded almost totally from a particular job category.

Judge Thomas immediately denounced the majority opinion.

> In this case, I think they went far beyond what I thought the Court should 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 . . . [W]e're standing the principle of nondiscrimination on its head — it's as simple as that — and we're standing the legislative history of Title VII on its head.[21]

On April 23, 1987, a month after the decision in *Johnson*, Judge Thomas made clear his agreement with the dissent:

> [O]ur thinking . . . is necessarily affected by the recent Supreme Court case, *Johnson v. Transportation Agency*. . . . Let me commend to you Justice Scalia's dissent, which I hope will provide guidance *for lower courts and a possible majority in future decisions*. . . .
>
> The difference between this and previous affirmative action rulings should not go unnoticed. Last year's case of *Local 28 of the Sheet Metal Workers v. EEOC* stressed that the discrimination must be "particularly longstanding or

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[18] Speech to the Cato Institute, p. 7 (October 2, 1987)(emphasis added).

[19] Printed in D. Boaz, ed., *Assessing the Reagan Years*, 391, 395 (1988).

[20] Speech at the Tocqueville Forum, p. 17 (April 18, 1988) ("I refer you . . . to the writings of scholars such as Tom Sowell or Clint Bolick for treatments of . . . *Weber*").

[21] N. Y. Times, March 29, 1987, 4, p. 1, col. 1.

> egregious" for a race-conscious remedy to be applied. In the instant case there was a finding of no discrimination. Now, it seems that employers are free to develop plans to classify, hire, and promote on the basis of race and gender, just to satisfy some desirable scheme of race and gender distribution. Don't ask me where such an arrangement comes from. . . . Following the *Johnson* decision, justice is to be achieved by having white males feel this anger and frustration![22]

3. *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986).

This decision concerns the circumstances under which a court may order race-conscious remedies, such as goals and timetables, to correct intentional racial discrimination. The case involved both egregious and long-standing intentional discrimination against black workers, as well as defiant and flagrant disobedience of orders of a federal court. A majority of the Court held that such remedies were permissible under Title VII.

In the April 1987 statement quoted above Judge Thomas appeared to agree with *Sheet Metal Workers* and to criticize *Johnson* because, in his view, it had gone beyond *Sheet Metal Workers*. In October 1987, however, Thomas lumped *Sheet Metal Workers* with *Weber* and *Johnson* as mistaken applications of Title VII:

> The Court has made rather creative interpretations of . . . legislative intent in a number of civil rights cases. . . . The egregious example was *Steel Workers v. Weber* . . . followed by recent decisions such as *Sheet Metal Workers v. EEOC* (1986), and *Johnson v. Transportation Agency* . . . . (1987) . . . . [T]he Court can reinterpret civil rights laws to create schemes of racial preference where none was ever contemplated.[23]

In a 1987 law review article Thomas noted the Supreme Court had approved "race conscious relief" in four cases, *Johnson*, *Sheet Metal Workers*, *United States v. Paradise*, 480

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[22] Speech to the Cato Institute, pp. 20-22 (April 23, 1987); see also Speech to the Cato Institute, p. 17 (October 2, 1987)(*Johnson* an example of mistaken statutory interpretation).

[23] Speech to Cato Institute, October 2, 1988, p. 7, reprinted in D. Boaz, ed., *Assessing the Reagan Years*, 391, 395-96 (1988).

U.S. 149 (1987) and *Local 93, Firefighters v. Cleveland*, 478 U.S. 501 (1986).[24] He emphasized, however, his "personal disagreement with the Court's approval of numerical remedies," explaining

> I continue to believe that distributing opportunities on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on its head. . . . I think that preferential hiring on the basis of race or gender will increase racial divisiveness, disempower women and minorities by fostering the notion that they are permanently disabled and in need of handouts, and delay the day when skin color and gender are truly the least important things about a person in the employment context.[25]

Thomas' article proceeds to argue that, rather than use goals and timetables, it would be more effective if law enforcement officials instead obtained orders "to hand over control of an employer's personnel operations to a special master" and "to impose heavy fines and even jail sentences on discriminators who defy court injunctions against further discrimination."[26] The EEOC has apparently never advocated that it should be empowered to seek such remedies during the eight years that Judge Thomas was the chairman of the Commission.

4. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

This decision, authored by Chief Justice Burger, upheld a federal statute which, subject to a variety of conditions, set aside ten percent of certain federal contracts for minority contractors.

Judge Thomas has denounced *Fullilove* in particularly harsh terms — both *Fullilove* and the Congress which adopted the set-aside plan.

> 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

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[24] Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 Yale L. & Pol'y. Rev. 402, 407 n. 2 (1987).

[25] *Id.* at 403 and n. 3.

[26] *Id.* at 408-09.

> 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. . . . Congress already has virtually unlimited power, as the *Fullilove* case indicates.[27]

This sweeping characterization of the *Fullilove* opinion is unwarranted. Far from dismissing as irrelevant the equal protection component of the Fifth Amendment, Chief Justice Burger's opinion discusses it at length. 448 U.S. at 480-489.

E. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

This decision by Chief Justice Burger held that under Title VII employers may not use selection procedures which discriminate against women and minorities unless those procedures are related to job performance. Federal regulations implementing *Griggs*, the Uniform Guidelines on Employee Selection Procedures, were promulgated jointly by EEOC and several other agencies in 1978.

In March 1983 Judge Thomas aggressively defended both *Griggs* and the Guidelines.[28] In March and May of 1985, however, Judge Thomas challenged the whole concept of adverse impact that underlies *Griggs*:

> We have permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories such as adverse impact . . . We have locked amorphous, complex, and sometimes unexplainable social phenomena into legal theories that sound good to the public, please lawyers, *fit legal precedents*, but make no sense. If I have my way, we will have the legal theories conform to reality as opposed to reality being made to conform to legal theories.[29]

On August 8, 1985, Judge Thomas announced his intent to revise the Guidelines, attacking what he perceived to be the rationale of the Guidelines and *Griggs* itself:

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[27] Thomas, "Civil Rights As A Principle Versus Civil Rights As An Interest," in D. Boaz, ed., *Assessing the Reagan Years*, 391, 396, 399 (1988).

[28] Speech to American Society of Personnel Administrators, pp. 8-10 (March 17, 1983).

[29] Speech to Cascade Employers Association, p. 18 (March 13, 1985); see also Speech at EEO Law Seminar, p. 18 (May 2, 1985); Thomas, *The Equal Employment Opportunity Commission: Reflections on a New Philosophy*, 15 Stet. L. Rev. 29, 35-36 (1985).

> The premise underlying [the Guidelines] 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. . . . [The Guidelines] also see[m] to assume 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, [the Guidelines] mak[e] determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term "discrimination".[30]

This statement seriously mischaracterized the purpose and application of the law. Neither *Griggs* nor the Uniform Guidelines "assume inherent inferiority" of minorities and women; they merely require that any job requirement that in fact results in the disproportionate exclusion of a protected group be shown to be actually related to the ability to do the specific job in question.

5. *Bakke v. Regents of University of California*, 438 U.S. 265 (1978).

In this decision, the opinion of Justice Powell, which controlled the outcome of the case, concluded that Title VI and the Fourteenth Amendment permit colleges and universities to take race into account when admitting students in order to insure a diverse student body. Powell also concluded that rigid admission quotas, setting aside a fixed number of slots for minority applicants, are forbidden by that statute and the Constitution.

In a 1982 article Judge Thomas commended Justice Powell's opinion as a balanced approach to the issue:

> One interpretation of . . . Justice Powell's opinion was that the Court was trying to reach a compromise position, one that recognized the past inequalities of minority education without punishing present-day majority students. To the extent that the Supreme Court said "yes" to the use of race and ethnicity as a criteria in the selection process but "no" to a predetermined set-aside for minority students, the Court successfully achieved that compromise.[31]

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[30] Reprinted in Oversight Hearings on EEOC's Proposed Modification of Enforcement Regulations before the Subcommittee on Employment opportunities of the House Committee on Education and Labor 99th Cong., 1st sess., (27-28)(1985).

[31] Thomas, *Minorities, Youth and Education*, 3 J. of Lab. Res. 428, 436 (Fall 1982).

In 1987, however, Judge Thomas denounced *Bakke* as as faulty an interpretation of equal protection as *Weber*, in his view, was of Title VII.[32] In 1988, Judge Thomas endorsed Thomas Sowell's denunciation of race-conscious college admissions practices.[33]

C. School Desegregation.

In *Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 1, (1971) and several other decisions that followed it, the Supreme Court held that federal courts may in certain instances use busing to desegregate formerly de jure segregated school districts. Judge Thomas has denounced this entire line of decisions as "disastrous".[34] Similarly, Judge Thomas regards *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), one of the pivotal Supreme Court decisions implementing *Brown v. Board of Education*, as an unwarranted extension of *Brown*, objecting that in *Green* "we discovered that *Brown* not only ended segregation but required school integration."[35] This short, seemingly obscure remark in effect endorses what was the single most effective tactic of the southern segregationists determined to avoid compliance with *Brown*, the use of so-called "freedom of choice" plans, which were a subterfuge used to perpetuate the maintenance of segregated schools.

D. Right to Privacy

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), a decision grounded on an interpretation of the Ninth Amendment, the Supreme Court held that there is a constitutional right of privacy, and that that right was violated by a state law prohibiting

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[32] Speech to the Cato Institute, p. 7 (October 2, 1987).

[33] Speech at the Tocqueville Forum p. 17 (April 18, 1988).

[34] Thomas, "Civil Rights As a Principle Versus Civil Rights as an Interest," in D. Boaz, ed. *Assessing the Reagan Years*, 391, 393 (1988).

[35] *Id.* at 391.

the sale of contraceptives to married couples. This was one of the Supreme Court decisions most vociferously attacked by Judge Robert Bork, who insisted that there is no constitutional right to privacy and that the Ninth Amendment protects no rights whatsoever. The issue is of particular importance to minorities because, in practice, government officials are mindful of the privacy of the affluent, and are more prone to invading that of the poor and unpopular. In *Griswold*, for example, the state declined to enforce its anti-contraceptives law in the case of women rich enough to have their own private physicians to obtain birth control products for them, but prosecuted a clinic when it attempted to provide similar materials to poor women.

Judge Thomas squarely endorses Judge Bork's rejection of *Griswold* and the Ninth Amendment:

> Some Senators and scholars are horrified by Judge Bork's dismissal of the Ninth Amendment, as others were horrified by Justice Arthur Goldberg's discovery, or rather invention of it in *Griswold v. Connecticut* . . . . Does the Ninth Amendment, as Justice Goldberg contended, give to the Supreme Court certain powers to strike down legislation? That would seem to be a blank check. . . . In a nutshell, this is the problem with using the Ninth Amendment. Maximization of rights is perfectly compatible with total government regulation. Bounded by notions of obligation and justice, the desire to protect rights simply plays into the hands of those who advocate a total state . . . . Far from being a protection, the Ninth Amendment will likely become an additional weapon for *the enemies of freedom*.[36]

E. Rights of the Poor and Disadvantaged.

In 1986 Judge Thomas joined in the Report of the White House Working Group on the Family. The report denounced a series of Supreme Court decisions and admonished that such a:

> *fatally flawed* line of court decisions can be corrected directly or indirectly, through mechanisms created by the Constitution itself. These include the appointment of new judges and their confirmation by the Senate, the limitation of the jurisdiction of Federal Courts, and, in extreme cases,

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[36] *Id.* at 398-99 (emphasis added).

> amendment of the constitution itself. All these have been proposed in response to judicial tendencies of the last quarter century, and we do not presume to endorse or oppose any of them here. But we anticipate that the good sense of the American people, through one means or another will generate the means and the will to restore the legal standing of the American family.[37]

All of the criticized decisions, the Report insisted, "would abruptly strip the family of its legal protections.[38] After objecting to a number of specific Supreme Court decisions, the Report insists:

> Taken together, these *and other* decisions by the Supreme Court have crippled the potential of public policy to enforce familial obligations, demand family responsibility, protect family rights or enhance family identity.[39]

The decisions attacked by the Report include *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), *King v. Smith*, 392 U.S. 309 (1968), *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), *Levy v. Louisiana*, 391 U.S. 68 (1968), *Glona v. Americans Guarantee, etc., Insurance Co.*, 391 U.S. 73 (1968), *Gomez v. Perez*, 409 U.S. 535 (1973), and *Goss v. Lopez*, 419 U.S. 565 (1975). Simply stated, the Report egregiously misrepresents what these cases held: they are **not** attacks on the family. Rather, they extend basic constitutional guarantees to the poor and the most disadvantaged of our society, and give protection against arbitrary governmental action that would deny fundamental rights to the most needy and powerless.

For example, the Report describes *Moore* in the following terms:

> In *Moore v. City of East Cleveland* . . . the court denied to the citizens of that predominantly black community the power to zone their town to limit occupancy of dwelling units to members of a single family, in order to protect residents from the downward drag of the welfare culture. In doing

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[37] *The Family: Preserving America's Future*, (1986).

[38] *Id.* at 12.

[39] *Id.* at 12 (emphasis added).

> so, *Moore* in effect forbade any community in America to define "family" in a traditional way.[40]

This description of the facts of *Moore* bears little resemblance to the actual case.

The petitioner in Moore was a 63 year old grandmother who had been prosecuted and sentenced to jail for permitting her 10 year old grandson to live in her home. The grandson had lived with her since his mother died when he was still an infant; the grandmother was the only maternal figure the 10 year old had had in his life. The city insisted, however, that the 10 year old was an "illegal occupant" in his grandmother's home, and demanded that he be removed. His presence was unlawful under a city ordinance because the grandmother also shared her home with one of her sons and his son. The presence of the two grandsons in a single home violated city law, which forbade cousins from residing in a single family dwelling.

Justice Powell's majority opinion invalidating the ordinance stressed that the law forbade *relatives* from living together:

> East Cleveland . . . has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. . . . [T]he ordinance . . . selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here.

431 U.S. at 498-99. Justice Brennan, in a concurring opinion, stressed the impact the ordinance would have on blacks.

> In today's America, the "nuclear family" is the pattern so often found in much of white suburbia. . . . The constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. . . . The "extended" form is especially familiar among black families. We may suppose that this reflects the truism that black citizens, like generations of white immigrants before them, have been victims of economic and other disadvantages that would worsen if they were compelled to abandon extended for nuclear living patterns. . . . In black households whose head is an elderly woman, as in this case, the contrast is even more striking: 48% of such black households,

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[40] *Id.* at 12.

> compared with 10% of counterpart white households, include related minor children not offspring of the head of the household.

431 U.S. at 508-10.

It is particularly surprising that Judge Thomas should object to the decision in *Moore*, since he himself was raised by his grandparents.

The Report joined by Judge Thomas denounces *Moore* as among the Supreme Court decisions that question whether "the family . . . . retains any constitutional standing."[41] This is the very opposite of the truth. Justice Powell's opinion is expressly based on the special constitutional status of the family. "A host of cases . . . have consistently acknowledged a 'private realm of family life in which the state cannot enter'". 431 U.S. at 499. It is the *dissenting* opinion in *Moore* which disputed the special constitutional status of the family.

> To suggest that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated persons is to misunderstand the nature of the associational freedoms that the Constitution has been understood to protect.

431 U.S. at 435.

The Report's misdescription of the holding and rationale of the decision in *Moore* is typical of its distortion of the other decisions it denounces. Again, if Judge Thomas and his co-signors of the Report had their way, the most disadvantaged in our society would have stripped away many of the constitutional protections developed by the Supreme Court over the last forty years.

F. Congressional Power.

Finally, it is important to note Judge Thomas' attack on *Morrison v. Olson*, 487 U.S. 654 (1988). This decision upheld the constitutionality of the Independent Counsel provisions in the Ethics in Government Act. The Reagan Administration had challenged

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[41] *Id.* p.11.

the validity of the law authorizing selection of a special Independent Counsel to investigate suspected criminal activity by high-ranking federal officials, objecting, inter alia, to the provision that the Independent Counsel could only be fired by the President or Attorney General only for "good cause." Chief Justice Rehnquist wrote the majority opinion upholding the law; only Justice Scalia dissented.

> Judge Thomas reportedly declared that *Morrison v. Olson* . . . is "the most important court case since *Brown v. Board of Education*" in 1954. Thomas thought *Morrison* was wrongly decided, and he lauded Justice Antonin Scalia's dissent as "remarkable." Chief Justice William Rehnquist, who wrote the majority opinion, "failed not only conservatives but all Americans," Thomas said.[42]

The correctness of the decision in *Morrison* involves issues regarding which the Legal Defense Fund takes no position. But to describe *Morrison* as "the most important case since *Brown*" is to express a view of the law, and of the nation's priorities and problems, that is troubling.

III. JUDGE THOMAS'S LACK OF MODERATION

Judge Thomas candidly revealed his views regarding the proper direction for the Supreme Court in his comments on a nominee overwhelmingly rejected by the Senate and the nation, Judge Robert Bork:

> I strongly support the nomination of Bob Bork to the Supreme Court. Judge Bork is no extremist of any kind. If anything, he is an extreme moderate, one who believes in the modesty of the Court's powers. . . .[43]

> I know Bob Bork as such a man of integrity and moderation the founders would have wanted on the Court . . . . Judge Bork . . . if he is an extremist at all, is an extremist on behalf of the modesty of the judiciary.[44]

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[42] Fred Barnes, "Weirdo Alert," The New Republic Aug. 5, 1991, p. 7.

[43] Address to the Pacific Research Institute, p. 18 (August 10, 1987).

[44] Address to the ABA Business Law Section, pp. 13-14 (August 11, 1987).

> It is preposterous to think that by spending so much energy opposing as decent and moderate a man as Judge Bork that this [civil rights] establishment was actually protecting the rights and interests of black Americans.[45]

> It was a disgrace on the whole nomination process that Judge Bork is not now Justice Bork.[46]

In half a dozen early speeches Judge Thomas often singled out for praise Rosa Parks,[47] whose refusal to make it to the back of a segregated bus helped to spark the civil rights movement. But in 1987 and 1988 he lauded instead J. A. Parker, president of the Lincoln Institute for Research and Education:

> [A] few dissidents like . . . J. A. Parker have stood steadfast, refusing to give in to the cult mentality and childish obedience which hypnotizes black Americans into a mindless, political trance. I admire them, and only hope I could have a fraction of their courage and strength.[48]

In one sense this endorsement is understandable, since Judge Thomas served for years on the board of the Lincoln Review, the journal published by the Lincoln Institute.

But the positions taken by J.A. Parker in fundraising letters mailed out by the Lincoln Institute are far from the mainstream of American society. One Parker fundraising letter denounced proposals to make Dr. King's birthday a national holiday:

> The . . . reason I oppose the designation of Martin Luther King's birthday as a national holiday is that I believe the "jury is still out" as to whether he was a hero or a villain. I have not forgotten that while Americans were fighting an dying in Vietnam, Martin Luther King gave his full support to the North Vietnamese communists. Is this really the kind of man you and I should honor with a national holiday?[49]

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[45] Remarks at Claremont McKenna College, p. 6 (November 16, 1987).

[46] Speech before the Cato Institute, October 2, 1987, p. 2.

[47] See, e.g. Speech to National Institute for Employment Equity, p. 5 (May 26, 1984).

[48] Speech before the Heritage Foundation, p. 1 (June 18, 1987); Speech at Suffolk University, Boston, p. 8 (March 30, 1988); Remarks at California State University, p. 13 (April 25, 1988).

[49] Undated "Dear Friend" letter, p.2.

A second letter expressed dismay at the possibility of increased registration by black voters by so-called "radical blacks."[50] It is difficult to understand how Judge Thomas could have been unaware of these views.

It is said on Judge Thomas' behalf that he is still evolving, that his embrace of more extreme views is relatively recent, and that he will surely change once elevated to the Supreme Court. But the discernible pattern of change so far has generally been a change for the worse. In 1984 Judge Thomas gave a series of speeches lauding Thurgood Marshall; later his speeches strongly criticized Justice Marshall. In his early speeches Thomas most often quoted Langston Hughes and Martin Luther King's *Why We Can't Wait*; in his later years he emphasized Ayn Rand and Alan Bloom's *Closing of the American Mind*. Having in an earlier era repeatedly praised by name Justices Black, Douglas, Frankfurter and Warren, Thomas in his later speeches directed his plaudits to Justice Scalia and Judge Bork.

There are some variations in this pattern, but they suggest a disconcerting inconsistency. In 1983, for example, Thomas described the Reagan Administration's position in the Bob Jones case as a "fiasco"[51]; then in 1987, although decrying the bad publicity, he argued "the point being made in the argument that the administrative and regulatory arm of the government should not make policies through regulations was a valid point."[52] On March 5, 1988, Thomas insisted that "an administration inspired by higher law thinking would not have argued on behalf of Bob Jones University's racial

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[50] Undated "Dear Friend" letter, pp. 2-3.

[51] U.S. News & World Report, March 14, 1983, p. 67.

[52] Speech to the Heritage Foundation, p. 9 (June 18, 1987).

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policies"[53], but three weeks later he returned to arguing that the position of the Reagan Administration "was a valid point."[54]

It is asserted in support of Judge Thomas that his denunciations of numerous Supreme Court decisions, and of the Court itself, are not to be taken too seriously, and do not necessarily reflect the nominee's real views. However, the United States Senate and the public have no choice but to take seriously the record of a judicial nominee. The confirmation process would be unintelligible and meaningless if members of the Senate, in deciding whether the views of a nominee would be harmful to the Supreme Court and the nation, were required to somehow ignore any statements a nominee had made which reflected adversely on him.

We do not insist that Judge Thomas is irretrievably set in his ways. The Clarence Thomas of 1988 differed substantially in substance and tone from the Clarence Thomas of 1984. We do not pretend to know what further changes lie ahead, or what views he may espouse in 1995, 2005, or 2015. But the man whom the Senate is being asked to place on the United States Supreme Court is not some hypothetical future Clarence Thomas with a possible more moderate creed, but the actual Clarence Thomas with his present views. And that nominee, we maintain, should not be confirmed.

IV. CONCLUSION

There was a time when Judge Thomas believed, as we do, that discrimination against racial minorities was the central civil rights problem in the United States. But Judge Thomas has somehow come to the conclusion that the most important civil rights problem in America today is reverse discrimination:

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[53] Remarks to the Federalist Society, University of Virginia School of Law, March 5, 1988, p. 11.

[54] Remarks at Suffolk University, p. 13 (March 30, 1988).

> In our time, the problems of civil rights seem to have become more intractable than ever before. And the reason is not the one usually given. It is not pervasive racism in the population at large that is the cause of recent failure of civil rights policy. There is less racism — and less authoritative support for it — in the general population — now — than at any time in our history. *The present problem* stems from the fact that although circumstances have not ma[d]e it practically possible to approximate those principles of equality reiterated by Lincoln, those in positions of responsibility no longer believe in the principles.[55]

In his last years at EEOC, Judge Thomas took to explaining away the persistent disparities in American society.

> It could be, Thomas says, that blacks and women are generally unprepared to do certain kinds of work *by their own choice*. It could be that blacks choose not to study chemical engineering and that women choose to have babies instead of going to medical school. . . . Thomas was sensitive to reports that white managers often feel they cannot find enough qualified minority candidates. Perhaps an employer in the Southwest fires more Hispanics and women simply because he made an effort to hire them in the first place. . . .[56]

Civil rights laws pose for Judge Thomas a very considerable philosophical and jurisprudential dilemma. On the one hand, he would undoubtedly like to see an end to racial discrimination in the United States. On the other hand, he perceives in these laws a serious encroachment on the freedoms of the would be perpetrators of discrimination.

> [**Interviewer**]: Say I'm a private employer and I'm a racist, and no matter how qualified a black candidate is I won't look at him. Isn't it my right to hire whom I choose?
>
> **Thomas**: I guess, theoretically, you're right. You say, its my property and I can do as I damn well please. I'm able to choose my wife; I can choose my employees. I can choose where I live. . . .[57]

In a similar vein, Judge Thomas has attacked the idea

> that freedom requires a powerful activist government at every turn in our lives. . . . The passage of major civil rights legislation coincided with a

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[55] Remarks at California State University, p. 3 (April 25, 1988).

[56] Juan Williams, "A Question of Fairness," *Atlanta Monthly* (February, 1987, p. 79).

[57] Reason, "Clarence Thomas," November, 1987, p. 31.

> revolutionary burst in the growth and scope of government. You know the sorry tale at least as well as I do.[58]

Thomas believes that a right is indeed violated when blacks, on account of race, are prevented "from participating in our free society and the economics of our free society."[59] Yet he is equally passionate in his desire to "protect the rights of the biggest bigot to preserve individual freedoms — the safe harbor of liberty."[60]

In balance, although still supporting Title VII, Judge Thomas candidly confess he is "torn"[61] while still willing to enforce such statutes, he is

> deeply suspicious of laws and decrees. . . . Government does have necessary functions to play, but the most important thing it can do is respect people's freedom.[62]

Judge Thomas' strong libertarian inclinations may, in other areas of the law, be all to the good. The eradication of racial discrimination, however, demands a clear, deeply held and unwavering commitment that the rights of the victims of discrimination must take precedence over the whims of bigots. There may be a role in law school seminars for anguish over the prerogatives of the perpetrators of discrimination, and for suspicion of the laws and decrees required to banish bigotry from our shores, but the Supreme Court of the United States is not a disinterested commentator in a philosophical debate. The choice between the perpetrators and the victims of discrimination, between mere importuning and irresistible decrees, has been made for the Court — by the Fourteenth and Fifteenth Amendments, by the Congress which adopted the civil rights laws, by the

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[58] Speech to the Cato Institute, p. 10 (April 23, 1987).

[59] *Reason*, "Clarence Thomas," November 1987, p. 31.

[60] Speech at EEO Law Seminar, p. 17 (May 2, 1985); Speech before the American Bankers Association, p. 22 (September 11, 1985).

[61] *Reason*, "Clarence Thomas," November 1987, p. 31.

[62] Speech to the Cato Institute, p. 5 (April 23, 1987).

men and women who marched and rode and sat — in across the south, and by the Union Army. On a Supreme Court with such a vital and historic mission, there is no place for ambivalence. For these reasons, the NAACP Legal Defense and Educational Fund, Inc., is led to the position that it must and will oppose the confirmation of Judge Clarence Thomas to be an Associate Justice of the Supreme Court of the United States.