Clarence Thomas: The Invisible Man

Catharine P. Wells

Boston College Law School, wellscc@bc.edu

Follow this and additional works at: http://lawdigitalcommons.bc.edu/lsfp

Part of the Judges Commons, and the Politics Commons

Recommended Citation

ESSAY

CLARENCE THOMAS: THE INVISIBLE MAN

CATHARINE PIERCE WELLS*

I. POINT AND COUNTERPOINT: THE CONFLICTING IMAGES OF CLARENCE THOMAS ....................................... 119
   A. POINT: THOMAS' LIFE STORY AS A THEME FOR HIS SUPPORTERS .................................................. 120
   B. COUNTERPOINT: THOMAS' THEORIES OF NATURAL LAW AS A FOCUS FOR THE OPPOSITION ............. 123

II. WHO IS CLARENCE THOMAS AND WHAT KIND OF SUPREME COURT JUSTICE WILL HE BE? .... 127
   A. JUDICIAL DECISIONMAKING ............................................. 128
   B. WHO IS CLARENCE THOMAS? ........................................ 131
      1. Emma Mae Martin: Thomas' Sister ............................ 132
      2. Anita Hill: Thomas' Protege ................................. 134
      3. Natural Law: Thomas' Commitment to Conservative Principles ............................................. 139
   C. WHAT KIND OF JUSTICE WILL THOMAS BE? ......... 145

III. CLARENCE THOMAS: THE INVISIBLE MAN ...... 146

Rarely do people stay glued to their televisions in order to watch events they do not enjoy. But such was unquestionably the case with the Senate hearings on Clarence Thomas' nomination to the Supreme Court. There was widespread agreement on only one thing:

* Professor of Law, University of Southern California Law Center. B.A. 1968, Wellesley College; M.A. 1973, Ph.D. 1981, University of California, Berkeley; J.D. 1976, Harvard Law School. I am very grateful for the excellent research help provided by the staff of the University of Southern California Law Library and in particular to Paul George, Hazel Lord, Susan McGlamery, Brian Raphael, and Will Vinet. Thanks are also due to the members of the West Coast Femcrits for an engaging and useful discussion of the events surrounding the Thomas nomination, to Trina Grillo and Elyn Saks for their comments, and to Sally Stebbins for sharing her insights during the Senate hearings.

117
Something had gone terribly wrong with the process. Right or left, feminist or not, pro-life or pro-choice, however one stood on the question of confirmation, the hearings defied simple analysis. Racism and sexism provided a troubling backdrop as the hearings reminded us how little we understand one another. Neither Thomas nor Hill were easily stereotyped. Thomas radiated real strength and confidence. But equally real was the feeling of vulnerability that accompanied the charge that his opponents had made him the victim of a high-tech lynching. And Thomas was not the only paradox. Anita Hill had a prim and fastidious appearance that made her solemn use of words like “penis” and “pubic hair” seem surreal and unaccountable. Thus, the hearings generated a confusing array of images; like a kaleidoscope, they reflected American political life from many strange and unfamiliar perspectives.

The purpose of this Essay is to cut through some of the confusion and to consider Clarence Thomas on his own terms. What kind of person is he? Will he make a wise judge? Will the Supreme Court be enriched by his presence? These are important questions and answering them is not a simple matter. Inevitably, our understanding of Thomas is shaped by the political strategies of his supporters and opponents. Thus, in Part I, I consider these strategies and their effect upon public perceptions. As the hearings wore on, however, Thomas seemed to escape from his handlers and to present himself directly to the American people. In Part II, I consider what we learned about Thomas in the course of the hearings and what conclusions we might draw about his abilities as a judge. In making this assessment, I argue that good judging requires not only a talent for abstract analysis but also an ability to connect with the human context. With respect to the latter, I suggest that Justice Thomas is a man with an extreme preference for the ideological over the personal, for the general over the specific, and for abstract principles over concrete applications. Finally, I offer some conclusions—speculative and tentative conclusions to be sure—about Clarence Thomas and his future on the Supreme Court.
I. POINT AND COUNTERPOINT: THE CONFLICTING IMAGES OF CLARENCE THOMAS

An appointee’s ultimate performance on the Court is notoriously difficult to predict. Many doubtful candidates have risen to the occasion while others have displayed unexpected compassion for the disadvantaged and disempowered. Thus, it is not surprising that there is little consensus among lawyers and scholars as to what should count as qualifications for a Supreme Court appointment. Certainly, some requirements are beyond practical controversy. It is desirable, for example, that nominees have legal training and that they have no criminal record. In addition, a number of recent nominees have failed confirmation for a variety of reasons; among them are unethical conduct, discriminatory attitudes, and public use of marijuana. And beyond these considerations, most of us hope that those who are appointed will possess something beyond minimum standards of intelligence, honesty, and decency. But, in practice, assessing these qualifications is often a matter of considerable controversy.

In analyzing the judicial task, legal theorists have generally divided into two camps. On the one hand, there are formalists who argue that legal decisionmaking is a matter of applying preexisting rules or theories to the facts of a given case. On the other hand, there are realists who reject this idea and argue that substantive legal theories do not decide concrete cases. Not surprisingly, these two

1. Justice Fortas, for example, withdrew under pressure after senators began questioning the propriety of certain business arrangements.
2. During the Nixon administration, Judges Carswell and Haynsworth failed confirmation because it appeared that they had discriminatory attitudes towards African Americans. More recently, Judge Bork failed confirmation, in part, because of his insensitivity to women’s claims for equality.
3. In 1988 Professor Ginsberg withdrew from the confirmation process after it was disclosed that he frequently smoked marijuana at law school parties. The “drug free” requirement, however, is somewhat flexible. Judge Thomas was confirmed despite his admission that he had experimented with marijuana in his youth. Thus, it appears that early and infrequent drug use, especially if coupled with repentance, is not disqualifying.
4. While few contemporary theorists adhere to the strict Langdellian view that formal legal rules will provide an unequivocal answer to every legal question, there are many who believe that legal decisionmaking is properly a matter of applying some sort of preexisting rule or theory to the facts of a specific controversy. Dworkin, for example, believes that judicial decisions should be governed by both legal and moral principles. Thus, Dworkin argues that judges should decide constitutional cases by interpreting the relevant constitutional provision in the context of the “best” theory of moral or natural law. See RONALD DWORIN, TAKING RIGHTS SERIOUSLY (1977).
5. For example, some realists believed that judges decide cases intuitively and that they invoke legal rules only to rationalize decisions that have been previously made. See, e.g., Joseph
camps possess different attitudes towards judicial selection. The formalist places the emphasis on substantive law and normative theory, beginning the process with assumptions about the correctness of certain legal views and proceeding to make an evaluation by examining the candidate's grasp of and commitment to these views. The realist, by contrast, focuses on character and background, asking whether the prospective judge has the kind of character and background that would produce sound intuitions for resolving legal controversies.

Since the New Deal, formalism has been identified with the conservative camp, while realism has been closely allied with liberal causes. One of the ironies of the Thomas controversy was a reversal of these traditional alignments. The conservative forces seemed to adopt a realist strategy as President Bush pressed the argument that Thomas' personal history of economic and racial disadvantage were strong qualifications for the Supreme Court. Meanwhile, the liberal anti-Thomas forces seemed to take a formalist stance as they attempted to refocus the debate away from Thomas' personal history and toward the substance of his views on law and legal theory.

A. POINT: THOMAS' LIFE STORY AS A THEME FOR HIS SUPPORTERS

On July 1, 1991, President George Bush nominated Clarence Thomas to the Supreme Court of the United States describing him as "the best qualified" person for the job. Certainly Bush was exaggerating. Thomas' record at Yale Law School was not particularly distinguished. Nor did he distinguish himself in his few years of legal experience.


6. Dean Calabresi was a notable exception. A liberal from Yale with a long realist pedigree, he suggested that the Senate should look for strong character in a Supreme Court nominee. Speaking of the great Justices of the past, he argued: "In the end, it was a combination of character, ability, a willingness to work really hard and openness to new views that made them great justices. These qualities, if there truly is openness, matter far more than past positions." The Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 102d Cong., 1st Sess., pt. 2, at 250 (1991) [hereinafter Hearings].

7. See, e.g., Ronald Dworkin, Justice for Clarence Thomas, N.Y. Rev. Books, Nov. 7, 1991, at 41. If, as Dworkin argues, being qualified is a matter of holding the "best" theories of law and morals, then it follows that the job of the Senate is to assess the merits of a nominee's beliefs. Thus, in Dworkin's view, Thomas' opponents were fully justified in trying to pin him down with respect to his views on natural law.

practice. In the Reagan-Bush years, Thomas held a series of political jobs culminating in a recent appointment to the United States Court of Appeals. Thus, while Thomas had been visible as one of the few Black participants in the Reagan and Bush administrations, there was little in his professional history that suggested that he was exceptionally well qualified to sit on the Supreme Court. In fact, Thomas was the first Supreme Court appointment to receive a "qualified" rather than a "highly qualified" designation from the American Bar Association.

One explanation for Bush's overly generous appraisal of Thomas' credentials is that Bush viewed Thomas as an affirmative action candidate. Clarence Thomas may not have been the "best" qualified person for the job, but he did seem to have the kind of minimalist qualifications that cynical proponents of affirmative action purport to find acceptable. Thus, many felt that Bush's strong endorsement of Thomas was accompanied by an invisible wink: Clarence Thomas is the best-qualified . . . (insert the word "Black") . . . man for the job. And, so strong is the hypocrisy that has grown up around affirmative action, that many believed this even in the face of Bush's explicit denial: "[T]he fact that he is Black and a minority has nothing to do with this."

There are two reasons, however, why it makes sense to believe that Thomas was not an affirmative action appointment and that Bush was not trying to maintain diversity on the Court by appointing the "best-qualified Black." First, the claim that Thomas is the best-qualified Black is so clearly false that it could not be credited except in the presence of some exceedingly negative stereotypes about Black people and their achievements. Second, Bush has consistently demonstrated in real and concrete terms that he is not the sort of man who places a positive value on diversifying American political life. His

9. He chiefly argued routine tax cases for the state of Missouri.
10. And even this modest recommendation was not unanimous with two members of the panel ranking him as "not qualified." Anthony Lewis, Thomas Ends Testimony but Senators Grumble Over Elusive Views, N.Y. Times, Sept. 17, 1991, at A14.
11. For many Americans, affirmative action has become the ultimate game of denial in which poorly qualified candidates are described as excellent prospects. For an extended discussion of the ambiguities of affirmative action, see Margaret Jane Radin, Affirmative Action Rhetoric, 8 Soc. Phil. & Pol'y 130 (1991).
12. Many people use the term "affirmative action" loosely to cover any decision that is made in part on the basis of race. More precisely, however, affirmative action takes place when special consideration is given to race in order to promote racial justice; it does not include situations where race is considered for political or pragmatic reasons.
repeated opposition to civil rights legislation and the employment practices of his own administration are strong evidence that George Bush is sincerely and firmly opposed to affirmative action in all its forms.\footnote{13}

While race was certainly a factor in Bush’s selection of Thomas, it mattered in a way that had little to do with affirmative action. It was in Bush’s best interest to find a nominee who would be acceptable to the political right but would be confirmed with the least amount of controversy. Thomas was certainly conservative. He was also Black and likely to receive support from significant segments of the Black community.\footnote{14} Furthermore, his appointment would create a real dilemma for liberal white senators—those senators who would be most opposed to his politics were precisely those who would be most silenced by his racial identity. Thus, while Thomas was controversial, it must have seemed in the pre-Anita Hill days of summer that he stood a good chance of getting through the confirmation process without major incident.

An essential element of the administration’s plan to avoid controversy was the espousal of a realist theory of judicial selection. The administration consistently tried to focus the debate on Thomas’ personal history and away from his legal views and theories. Bush’s praise for Thomas must be understood in these terms. In making the appointment, Bush emphasized the fact that Thomas grew up in the midst of poverty in the racially segregated South. Despite this background, Bush continued, Thomas had “excelled in everything that he has attempted.”\footnote{15} Bush also referred to Thomas’ personal characteristics: “He is a delightful and warm, intelligent person who has great empathy and a wonderful sense of humor.”\footnote{16} He concluded by saying: “Judge Thomas’ life is a model for all Americans, and he has earned

\footnotesize{13. For example, Bush’s initial Cabinet contained ten white men, one white woman, and three men of color. In addition, Bush’s steadfast opposition to quotas and his wavering support for civil rights legislation strongly suggests that he does not support most forms of affirmative action.}

\footnotesize{14. Note that Thomas’ race counted for Bush not because of affirmative action but because of certain political advantages.}

\footnotesize{15. \textit{Press Conference}, supra note 8.}

the right to sit on this nation's highest court." In making these comments, Bush was attempting to craft an image of Clarence Thomas that presented just the right combination of conservative ideology, personal charm, acceptable (if not outstanding) legal credentials, and a background that suggested character, empathy, and compassion. In addition, Bush hoped to undermine liberal opposition with the unstated but powerful argument that a man like Thomas, who had personally experienced racism and discrimination, could surely be trusted to safeguard the civil rights of others.

B. COUNTERPOINT: THOMAS' THEORIES OF NATURAL LAW AS A FOCUS FOR THE OPPOSITION

Thomas' supporters portrayed him as a man whose strict conservative philosophy would be tempered by compassion. Their strategy, however, was complicated by the fact that it rested upon a vision of Thomas that was not entirely consistent with his previous public record. Leaders of the Black community, in particular, were disturbed by his record on civil rights and by the level of concern he had shown for the poor and disadvantaged. These leaders charged that Thomas' conservative views had made him a willing tool of the white establishment, and they were soon joined in these charges by the white men who opposed him in the Senate.

Thomas and his supporters had a ready response to this line of attack. The attack, they said, was racist. Everyone understands, they argued, that whites can be conservative for principled reasons but, they continued, when a Black such as Thomas embraces the same conservative principles, he is inevitably and unfairly accused of being an ambitious Uncle Tom.

This charge of racism is overstated. While it is certainly true that Black conservatives are widely misunderstood, it is also true that Black leaders and white liberal senators would have opposed any white nominee who held the sort of extreme conservative views that Thomas held. Nevertheless, this aspect of racial politics played an

17. Press Conference, supra note 8.
18. His conduct as a public official as well as his express convictions seem to suggest that he will not support government help for the disempowered and disadvantaged.
important role in shaping the contours of the Senate hearings. The fear of appearing racist led Thomas' white, liberal critics to frame their questions and contentions entirely in terms of substantive controversy. If Thomas' supporters wanted to discuss his personality and character, his opponents were equally determined to shift the discussion to the merits of his political and legal opinions.

As the liberals on the Judiciary Committee tried to focus discussion on Thomas' substantive views, they encountered a serious obstacle. Thomas repeatedly insisted that he had no firm views upon any controversial question that might come before the Court. The White House strategy was clear: By urging Thomas to avoid controversy, the administration hoped that he would receive the same kind of amiable treatment that had been given to Justice Souter. Unlike Souter, however, Thomas did not start with a blank slate. Thomas had been one of the most outspoken members of the Reagan and Bush administrations. In speeches, interviews, and published articles, he had aggressively stated his conservative views on many contemporary controversies. And, in speaking out, Thomas had not adopted a judicial tone. He had sounded less like a judge and more like someone who was anxious to prove that a Black man could embrace political positions that were as extreme and uncompromising as those of the most conservative whites. How then could he convincingly claim to possess an open mind and a judicial temperament? Would not these claims raise significant doubts about his credibility? What could he say that would effectively counter his record and reputation as an energetic controversialist?

Thomas' strategy in this regard had several elements. First, there was simple denial. For example, Thomas generally denied having views about the correctness of the Court's decision in *Roe v. Wade*. Specifically, he stated that during his years at Yale, he had never discussed or thought about the issue. And, while he did not exactly say so, he did in fact imply that it would take some further reflection on his part before he could be sure what his final conclusions would be with respect to the abortion controversy. Since Justice Souter had sidestepped all substantive controversy, there had been little to fuel Senate opposition to his appointment.

20. This was, in fact, Thomas' perception of his own situation. See Clarence Thomas, *No Room at the Inn: The Loneliness of the Black Conservative*, Pol'y Rev., Fall 1991, at 72, 76.


22. All of this seems extremely disingenuous. Certainly Thomas knew at the time of the hearings that he would vote to overturn *Roe v. Wade* as soon as the issue came before the Court.
The second element of Thomas' strategy was disavowal. Thomas repeatedly tried to distance himself from previous statements by suggesting that his warm endorsements of extreme conservative views were not what they seemed. He had, for example, only seemed to endorse the idea that the Supreme Court should make use of language in the Declaration of Independence to criminalize all abortions as a constitutional matter.\textsuperscript{24} Similarly, he had only seemed to argue that the Court should expand the protection for property rights in such a way that private owners would be spared the burden of environmental regulation.\textsuperscript{25} He had endorsed these views, he testified, simply to be polite to conservative audiences. Indeed, his interest in these matters was so marginal that he had not even read the arguments in question.\textsuperscript{26} Thus, much to the frustration of Senate staffers who had worked hard to document his political and legal views, Thomas repeatedly dismissed his own written and recorded statements as unreliable indications of his true opinions.

In disavowing his earlier statements, Thomas portrayed himself as a busy government official who did not have time to read all the work that etiquette required him to praise. Other parts of his testimony painted a somewhat different picture. Thomas often characterized himself as an avid intellectual who embraced many different ideas only in the course of an ongoing philosophical inquiry. Thus, for example, his endorsement of Sowell's argument that women earn less money because they do not like well-paying work\textsuperscript{27} did not, according to Thomas, express his true views. He believed, he said, that women are victims of discrimination in fact but, the facts notwithstanding, he

\textsuperscript{24} If he had seemed, at one point, to endorse Lewis Lehrman's argument that anti-abortion regulation was affirmatively mandated by the Declaration of Independence, Lewis E. Lehrman, \textit{The Declaration of Independence and the Right to Life}, AM. SPECTATOR, April 1987, at 21; Thomas, supra note 21, at 78, that was simply a move in his overall strategy to interest the Republican Party in a civil rights agenda:

"I was speaking in the Lewis Lehrman auditorium of the Heritage Foundation. I thought that, if I demonstrated that one of their own accepted at least the concept of natural rights, that they would be more apt to accept that concept as an underlying principle for being more aggressive on civil rights."


\textsuperscript{25} PHELPS & WINTERNITZ, supra note 24, at 176.

\textsuperscript{26} Id. In a similar fashion, Thomas disavowed the views contained in a report issued by the White House Working Group on the Family. Thomas was a member of the Group and had signed on to the report as one of its authors. Nevertheless, when pressed on one of its more controversial recommendations, Thomas claimed that he had written only one small section of the report and that he had not even read the remainder. Id. at 180.

\textsuperscript{27} Hearings, supra note 6, pt. 1, at 144-48.
found Sowell’s “statistical” point interesting and intriguing.28 Similarly, Thomas dismissed his own repeated suggestion that natural law should be used to decide constitutional cases as nothing more than an expression of his abstract interest in political theory—natural law, he claimed, had nothing at all to do with how he would decide actual cases. Thus, Thomas tried to separate his intellectual persona—a man who thought about statistics and political theory as part of a detached intellectual discourse—from the Supreme Court Justice he was anxious to become. The potential Justice, he seemed to suggest, was a practical man who (most likely, though he could not say definitely) held more mainstream views.

The final element of Thomas’ strategy was to claim, as Souter had claimed, that it would be inappropriate for him to discuss his current thinking about any issue that might arise before the Court. For example, even though his background and his political alliances suggested that he was avidly opposed to abortion, Thomas demurely insisted that he be treated as though his opinions were tentative and uncertain.29 As a judge, he argued, he had to develop an open mind with respect to the particular cases and, accordingly, he had “stripped down like a rummer” in order to meet the demands of judicial office.30 And, since he had bowed to the dictates of fairness, so must the Senate. Respect for the integrity of the judicial function, his supporters argued, required the Senate to allow Thomas to maintain a dignified silence on all controversial matters.

The overall effect of Thomas’ strategy was complicated. For some who followed the hearings and were knowledgeable about his career, Thomas’ disavowals seemed disingenuous, unprincipled, and cynical.31 For others, Thomas’ performance simply reflected the political reality of the confirmation process. In the battle of soundbites, Thomas had not been “tagged” with any of the controversial views that he had previously endorsed. And, since he could not be tagged, it was difficult for opponents to find a focus. Their only hope, it seemed, was to persuade the public to think about Thomas’ denials and disavowals in the context of his ongoing commitment to conservative

28. Id.
30. Id. at 61.
31. Thomas is quoted as telling William Gates: “‘My motto is “Don’t get mad. Don’t get even, get confirmed.”’” Phelps & Winternitz, supra note 24, at 178.
legal theory. But, not surprisingly, this hope proved elusive. The American public, confronted by a humble, genial, and generally likeable Black man, was little inclined to take up legal theory as a way of predicting his influence on an already solidly conservative Supreme Court.

II. WHO IS CLARENCE THOMAS AND WHAT KIND OF SUPREME COURT JUSTICE WILL HE BE?

In the last part, I argued that public perceptions of Thomas were shaped by two competing strategies. One was the Horatio Alger image cultivated by his supporters. The other was his opponents' charge of opportunism—the charge that Thomas was hiding his views behind a series of confirmation conversions and false claims of judicial neutrality. While there is some truth to both images, neither tells us much about Thomas' character. The Horatio Alger image overlooks the fact that those who escape from humble origins are not necessarily hard-working and honest. Similarly, the charge of opportunism denies the political realities of the confirmation process.

In this part, I will look beyond the political-image making and attempt to address a central question that has been the subject of surprisingly little attention: Who is Clarence Thomas and what sort of Supreme Court Justice will he ultimately prove to be? I will tackle this issue in two stages. First, I will examine the nature of judicial decisionmaking with a view towards defining the characteristics and attitudes that lead to doing it well. Second, I will consider what we learned about Thomas from the confirmation process. Specifically, I will address the following issues: How does Thomas think about the world? What kind of evidence does he find persuasive? What type of factors are important to him in making a decision? In posing these questions, I will be seeking to define what I take to be a fundamental constituent of Thomas' intellectual life. Thomas, I will argue, is a man who thinks and makes decisions at a high level of abstraction. He is a man of ideas who is not easily moved by individual stories and personal experience.

Before beginning, I would like to note that my discussion will take Thomas entirely on his own terms. Thus, even though Thomas'...
credibility was subject to question, I will proceed on the basis that his testimony was generally truthful with respect to his own recollections of motives and events. I will also try to focus on Thomas as a raceless and genderless individual even while recognizing that this approach has serious limitations. One difficulty is that it ignores issues that are frequently and wrongfully marginalized. Another is the obvious fact that Thomas' race and gender are strong constituents of who he is and who others conceive him to be. Thomas' life experiences—that means his experiences as a Black and male person—have clearly had a significant impact on both his intellectual style and on his understanding of legal and political issues. But, despite these problems, my thoughts about the hearings were drawn over and over again to this simple observation: If we—we white people\(^{34}\)—only talk about Thomas in relation to his race and gender, if we fail to examine his own, particular qualifications for high judicial office, then our failure to move beyond race-based considerations deprives Thomas of the kind of individual recognition and consideration to which he is entitled.

**A. JUDICIAL DECISIONMAKING**

It is generally thought that there are good judges and bad judges and that judicial decisionmaking is the type of activity that can be done well or poorly. Good judges are deliberative and thoughtful. Bad judges are dogmatic and impulsive. Sometimes, when we call someone a good judge, we mean that we agree with the outcome of the cases that (s)he has decided. On other occasions, we mean something different. We say, for example: “I don’t always agree with Judge Smith’s decisions but I have to admit that Smith is a very good judge.” What is it that we mean when we make such statements? What is it that judges do, and under what circumstances are we justified in making the claim that they have done it well?

One way to think about these questions is to focus on the process that judges utilize in making their decisions. We do not think of a judge who flips a coin as a good judge. To the contrary, we think of a good judge as one who deliberates in an open and conscientious

\(^{34}\) Thomas seemed to recognize only occasionally that the path to his success had been cleared by others. Thus, the issue of his individualism was central to many African Americans who opposed him. See, e.g., A. Leon Higginbotham, *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992), reprinted in *RACE-INNO JUSTICE*, supra note 16, at 3; sources cited supra note 19. On the other hand, I feel that there is merit to Thomas’ claim that white people should consider him as an individual and not just as a representative of his race.
At the trial level, we recognize good judges by their attentiveness to the witnesses, by the fairness with which they regulate their courtrooms, and by the deliberate and calm manner in which they reach a conclusion. At the appellate level, however, the process is more mysterious. There are no longer any witnesses—only sheafs of voiceless papers. The impersonality of the appellate process leads some to suggest that we can recognize good appellate judges by their grasp of abstract theory, by their commitment to sound arguments, and by their rejection of spurious claims. But this kind of theory-based evaluation is vulnerable to the charge that the relevant theories— theories of law, theories of judicial role, and theories of the public good—are all inherently political. If theories are the only things that count, then a judge who applies conservative theories will appear "brilliant" to conservative audiences while appearing "dogmatic or "political" to those with more liberal views. Thus, evaluating judges on the basis of the theories they hold is subject to the same kind of criticism as evaluating judges entirely on the basis of the outcomes they reach: Such judgments will inevitably seem "correct" to some but "political" to others.

Furthermore, the identification of good judging with good theories relies upon a naive view about the nature of abstract normative judgments. Such judgments, it seems to argue, are simply the result of applying a general normative theory to the facts and circumstances of a concrete case. I have suggested elsewhere that this view of judicial decisionmaking is overly simplistic in that it overemphasizes the importance of theoretical considerations in the decisionmaking process. I have also argued that a better analysis of judicial decision-making begins with a recognition that making good decisions requires the simultaneous application of two distinct skills.

The first skill has a theoretical element. It is the ability to locate the controversy within a web (or several different webs) of relevant normative analysis. Suppose that a judge must decide a question under the Due Process Clause. In analyzing the question, (s)he must bring to bear a wide range of theoretical considerations. What is the relevant constitutional doctrine? Does the governmental action in

36. Catharine Wells, Situated Decisionmaking, 63 S. Cal. L. Rev. 1728 (1990); Catharine Pierce Wells, Improving One's Situation: Some Pragmatic Reflections on the Art of Judging, 49 Wash. & Lee L. Rev. 323 (1992). This was, of course, also the point made by the moderate realists.
this case violate contemporary norms of fairness? Under what circumstances should a court interfere with the exercise of executive or legislative power? And so forth. A good judge is a theory sophisticate because theory—be it legal doctrine, moral or political theory—constructs every legal problem. A judge who is ignorant of these considerations will misunderstand the nature of the case at hand. Thus, a good judge thinks about a case “from the top down” by starting with various theories that can be articulated independently of the problem and then proceeding to consider the problem in the context of these theories.

Theories, however, are only part of the story. A good judge will also consider the problem “from the bottom up.” Abstract arguments that are disconnected from real life are legalistic in the bad sense. They do not adequately attend to the fact that every case represents a series of real-world events that are experienced and interpreted by real-world participants. Sound legal analysis does not just parse the legal sentence; rather it begins with an understanding of the case that does justice to the differing perspective of each participant. Thus, a judge does not understand the facts of a case merely because (s)he can recite them as they appear in the briefs of the various parties. Instead, what is required is a full understanding of the factual circumstances that have brought this case to judgment. Understanding these circumstances requires real empathy and a sense of connection to the human aspects of the case. Who are these people? What is this case about from their point of view? And how will they be affected, as a practical matter, by the final judgment in this case?

The above discussion suggests that judicial nominees should be evaluated in terms of two distinct qualities. On the one hand, we are looking for someone who is able to identify and apply the relevant legal theories. And, on the other hand, we are looking for someone who is able to connect with the human situation in a deep and substantial way. Indeed, those who are commonly recognized as the greatest American judges are precisely those who possess both these qualities. Furthermore, a little reflection on the special role of the Supreme Court will demonstrate that both of these qualities are particularly essential for Supreme Court Justices. The Supreme Court occupies a central position in American political life. Its caseload requires it to speak authoritatively on many of the most difficult issues.

37. The “bottom up” and “top down” terminology has recently been utilized by Cass R. Sunstein in *On Analogical Reasoning*, 106 Harv. L. Rev. 741 (1993).
of the day. It must also articulate and defend the nation’s highest ideals. Fulfilling these responsibilities requires both technical legal ability and inspired human judgment. Technical abilities are important because the Court derives its exceptional authority from the widespread understanding that a nontyrannical government must be constrained by law. The Court’s moral authority therefore rests largely upon its legal powers; it can speak with authority precisely because it speaks in the name of impersonal legal constraint. On the other hand, a Supreme Court that spoke in nothing more than technical legal arguments would soon seem to be out of touch. Legal discourse has its limits and these limits create a need for inspired human judgment. Hard cases are not solved by theoretical agility; they inevitably require a fine sensibility for the realities of human life. Thus, Supreme Court nominees should possess more than just the right items on the resume—they should not only be good lawyers but they should also be wise leaders who are sensitive to a diverse range of interests, scrupulously fair to all parties, and knowledgeable about the circumstances of contemporary life.

B. Who Is Clarence Thomas?

In the last section, I argued that we should evaluate Thomas’ qualifications by examining two distinct questions. The first question asks whether Thomas is theory literate, whether he is able to identify and apply relevant legal theories to the difficult controversies that come before the Court. The second asks whether he has the ability to connect with the human dimension of legal problems. In this section, I suggest that Thomas, in fact, has great difficulty with the second task. He is a man of ideas and abstractions and not the sort of person who readily recognizes the human realities that shape legal cases. Specifically, I shall discuss three incidents that I believe shed some light on Thomas’ intellectual style. The first is Thomas’ use of his sister as an illustration of the evils of welfare dependency. The second is Thomas’ decision not to watch the testimony given by Anita Hill. And the third is a speech to the Heritage Foundation discussing the role of African Americans in conservative politics. I shall argue that each of these incidents indicates Thomas’ preference for abstract ideas over the personal and concrete, and that together they suggest that Thomas lacks the kind of human understanding that is necessary to becoming a truly excellent Supreme Court Justice.
1. Emma Mae Martin: Thomas' Sister

One recurrent topic of criticism against Thomas was the fact that he held his sister, Emma Mae Martin, up to public scorn by using her as an example of the dangers of welfare dependency.\(^\text{38}\) The point he was making was not original. The welfare system, he argued, encouraged the poor to become dependent on government programs. Martin, he claimed, was so dependent upon welfare that watching her wait for her check was like watching an addict waiting for a fix.\(^\text{39}\) Indeed, she was a perfect example of what was wrong with the welfare system—it was so generous and so readily available that it caused recipients to lose all chance of self-reliance and self-esteem. Later, when reporters interviewed Martin, they found that she was not the welfare addict that Thomas had described. Her need for public assistance arose largely because she was responsible for the care of an elderly aunt. Furthermore, Thomas' public concern for her self-respect and self-reliance had been ill founded: Indeed, by the time she was interviewed, she was not on welfare at all. Instead, she was supporting herself and her family by working two shifts as a nursing home cook.\(^\text{40}\)

This incident generated harsh criticism of Thomas. Some commentators suggested that, even if his account had been accurate, his public use of his sister's plight invaded her privacy and portrayed her in a most unsympathetic and ungenerous light.\(^\text{41}\) Some wondered why Thomas felt so little responsibility for the care of an elderly woman who was, after all, his aunt as well as his sister's.\(^\text{42}\) In addition, the incident led to questions about Thomas' failure to grasp the obvious—is it possible that he simply failed to understand that, racism and sexism being what they are, many hardworking Black women end up in the kind of poverty that mandates reliance on occasional government assistance?\(^\text{43}\)

\(^{38}\) Phelps & Winternitz, supra note 24, at 85.

\(^{39}\) Thomas' addict analogy is really troubling. Does Thomas believe that all needs are addictions? If not, what converts Martin's obvious need for welfare into an addiction? Are her needs addictive merely because she cannot satisfy them with her own hard work and determination?

\(^{40}\) Phelps & Winternitz, supra note 24, at 58.


\(^{42}\) E.g., id.

It is possible to make too much of what this story shows about Thomas' character. Perhaps we should follow the lead of Martin herself and decline to judge Thomas too harshly on the basis of this incident. And, once we step back from the moral judgment, we can see what this incident says about Thomas. It reveals Thomas as the kind of person whose intellectual life is dominated by abstract considerations. From this perspective, the question raised by Thomas' reference to his sister is not—Why did he hold her up to public scorn?—but rather—Why do the facts of her particular case seem to count for so little when they are set against his own theory-driven assessment of the welfare system?

Thomas' views on welfare stem from his generally conservative philosophy. Thomas grew up in the South during the waning years of the Jim Crow era. In this context, he observed that government was no friend to Black interests. State government often demeaned Black people; it shunned their participation; it limited them to segregated, unequal, and inadequate state services; and it seemed to condone racist violence against them. Thomas' conservatism is based upon a simple conclusion drawn from this experience: Do not, under any circumstances, trust government to improve the situation of Black people. For Thomas, it was clear that the hard work and determined efforts of Black people would never find their natural reward until racist white governments were confined to the bare essentials. And, in the context of this conservatism, the welfare system posed a particularly dangerous threat. Welfare may appear to fill a need. On some level, it may even be an act of generosity. However, when it is instituted by whites in a pervasively racist society, it can have terrible consequences for Black recipients. It may breed dependency, undermine

44. True, the incident suggests that he is disloyal, ungenerous, and insensitive. On the other hand, we should be hesitant to condemn public figures on the basis of a single incident. When it comes to such things as loyalty, generosity, and sensitivity, most of us have lapses—private people, however, are simply fortunate enough to have them in private. In any case, Thomas himself was appalled when his account of Martin's situation was widely reported in the press. He apparently recognized that he had made a serious error and was prompt and sincere in making his apologies. See Phelps & Winternitz, supra note 24, at 145.

45. Martin herself appears to have forgiven Thomas. She strongly supported his brother's nomination and remained at his side throughout the Senate hearings.

46. While I go on to criticize Thomas for being too preoccupied with abstractious, it is important to note that his abstract beliefs are strongly rooted in his own experience. Perhaps a different way of describing Thomas' difficulty in this regard is to say that he has been so profoundly affected by certain formative experiences that he is unable to understand that others may experience very different realities.
self-esteem, and reduce incentives for self-improvement and hard work.

What makes Thomas' assessment of his sister's situation so troubling is not that Thomas holds such conservative views—indeed these views are widely held in the Black community—and that his abstract views on race and welfare prevent him from seeing the undeniable realities of his sister's situation. Is she properly called a "welfare addict" when she needs her check to feed and clothe her family? Should Emma Mae Martin "just say no" and, if so, to whom and to what?

My point is this. Suppose we assume for the moment that Thomas is right and that the welfare system is, on balance, bad for the Black community. It does not necessarily follow that all Black citizens should shun welfare payments even when they are desperately needed. Many generally bad institutions have some local benefits. And, while there may be circumstances where individuals should forgo these benefits, such sacrifice is normally justified by a showing that it will, in fact, bring about a long-range benefit. Should Emma Mae Martin have left her (and Thomas') aunt out on the street rather than participate in the evils of the welfare system? To justify an affirmative answer, most people would place a heavy burden on Thomas to show that there is some practical point to refusing help. But it never seems to occur to Thomas that there is such a burden. For him, practical arguments are not important—abstract theories offer the final word; they are the measuring sticks against which all human action should be evaluated. And, as a result, questions of right and wrong will seldom have a human dimension. For Thomas, there are no gray areas and no mitigating factors—one's abstract principles generate a series of categorical judgments that need never yield to a human dimension.

2. Anita Hill: Thomas' Protege

Anita Hill's appearance sparked renewed interest in the Senate hearings. Her charge of sexual harassment was particularly harmful to Thomas for a number of reasons. First, the sexual nature of the allegations resonated with a host of negative racial stereotypes. Second, the charge that Thomas had abused his power undercut the moral position that he had seemed to acquire from his remarkable triumph

47. See infra text accompanying note 64.
over adversity. Third, and most importantly, the charge of sexual harassment went to the heart of his fitness for the Supreme Court. If Thomas could not refrain from blatant sexism while he was officially responsible for fighting against it, how could he be trusted with the weighty responsibilities of a Supreme Court Justice? Furthermore, Hill was a credible witness. She was a lawyer with a fine reputation and with no apparent reason to lie—her religious background as well as her long association with Thomas made it unlikely that her charges were politically motivated. Thus, her testimony had to be heard and once heard, it radically altered the nature of proceedings. Before her appearance in the Senate, Thomas was well on his way to confirmation. After her appearance, the nomination became a matter of bitter controversy.

Much has been written about Hill's testimony and about Thomas' reaction to it. The conventional wisdom seems to be that the two positions are so contradictory that either Thomas or Hill had to be lying. Thus, as I continue to take Thomas at his word, I feel some need to clarify my own position concerning the underlying controversy. Like so many women, I believe Anita Hill. But my belief in Hill does not entail a belief that Thomas told conscious lies. It is a commonplace of legal proceedings that witnesses perceive events differently and that what is vividly recalled by one observer may be entirely forgotten by another. Furthermore, these discrepancies are often especially great when the events themselves are constructed by power and abuse. Abusive behavior is a complex phenomenon. Many who abuse others have themselves been victims of abuse and, both as victims and perpetrators, they employ a variety of defensive mechanisms. Dissociation and denial can obliterate painful memories. And, for this reason, it does not seem irrational to believe both that Thomas actually did what Hill alleged and that he is telling the truth with respect to his own recollection of events.

Against this background, Thomas' assertion that he had not watched Hill's testimony requires some discussion. At the beginning

48. Indeed there was some controversy about this. The Judiciary Committee had planned to adjourn without considering the issue but, when Hill's allegations became public, there were loud demands that she should be called as a witness. See, e.g., Anita Hill and the Senate's Duty, N.Y. Times, Oct. 8, 1991, at A24; 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; Finally a Proper Hearing, N.Y. Times, Oct. 10, 1991, at A26.

49. At the beginning of this part, I stated that I would "proceed on the basis that [Thomas'] testimony was generally truthful with respect to his own recollections of motives and events." For the reasons stated below, this promise accords with my own view of Thomas' testimony.
of the second round of hearings—before Hill had testified—Thomas took the stand to vehemently deny all charges. Although he was adamant that her charges were false, he had no explanation of why she would make false charges against him. Thus, he complained that his strength had been sapped by Hill's reckless and scurrilous charges:

It was sapped out of me because Anita Hill was a person I considered a friend, whom I admired and thought I had treated fairly and with the utmost respect.

Perhaps I could have . . . better weathered this if it was from someone else. But here was someone I truly felt I had done my best with.50

Throughout his testimony, he appeared sincerely baffled about what could have prompted her to make such serious charges: "Though I am, by no means, a perfect person—no means—I have not done what she has alleged. And I still don't know what I could possibly have done to cause her to make these allegations."51 Indeed, Thomas was confronted by seemingly inconsistent circumstances. On the one hand, Hill had been a trusted and valued employee. Thomas stated that he was fond of her; that he respected her integrity; and that he viewed her as a protegé—as his special charge.52 Thus, in his view, there was no particular reason why she would want to do him any harm. On the other hand, Hill had come forward with some very serious charges and, with respect to these, Thomas believed that she had lied under oath and that she had, in particular, told lies that were especially hurtful and damaging to him. Thus, prior to Hill's testimony, Thomas' own beliefs were in conflict and, according to his own testimony, he had been desperately searching for an explanation. In such circumstances, most people would find it helpful to watch Hill's testimony. As a lawyer, Thomas presumably recognized the power of live testimony to resolve factual discrepancies. Live testimony gives us the opportunity not only to assess the witness's credibility but also to draw conclusions about his or her certainty, precision, and skill at observation and interpretation. And we can assess these things not just in general but with particular regard for the matter under discussion. Thus, if Thomas had difficulty reconciling his general impression

51. Id.
52. He stated: "This is a person I have helped at every turn in the road since we met. She seemed to appreciate the continued cordial relationship we had since day one. She sought my advice and counsel, as did virtually all the members of my personal staff." Id.
of Hill’s honesty with the perceived falsity of her charges, watching her testimony might have helped him to resolve this difficulty.

It is also worth noting that the nature of Hill’s charges made it especially important for Thomas to watch the testimony. One potential explanation of Hill’s charges was that they were based upon a mistake; that she had simply misinterpreted some of his behavior.53 In his initial testimony, Thomas seemed to favor this explanation and he even tendered a somewhat tentative apology:

I cannot imagine anything that I said or did to Anita Hill that could have been mistaken for sexual harassment. But with that said, if there is anything that I have said that has been misconstrued by Anita Hill or anyone else to be sexual harassment, then I can say that I am so very sorry and I wish I had known. If I did know, I would have stopped immediately and I would not, as I’ve done over the past two weeks, had to tear away at myself trying to think of what I could possibly have done.54

Certainly many people who heard this statement could sympathize with Thomas’ plight. Two great fears have accompanied the development of sexual harassment doctrine. The first is that women will use false accusations to exact revenge for grievances real or imagined; the second is that women will misunderstand or misinterpret well-meaning gestures of esteem and affection. Thomas, confronted by Hill’s accusations, grabbed at both alternatives: The charges were false but, if not false, then they were the result of misunderstanding. But we would expect such a person, if sincere, to take the trouble to examine the charges against him. “What did I say or do?” he might ask. “Did I inadvertently overstep the bounds? Did she misunderstand? What does she say is the basis for her charges?” Listening to Anita Hill was Thomas’ best opportunity to answer these questions.

Given these circumstances, Thomas’ assertion that he had not watched Hill’s testimony took the Senate committee by surprise.55 Surely, at the very least, listening to Hill would be an important step to take in his own defense. On the other hand, if my thesis about Thomas is correct—if, in fact, he lives in a world of abstractions and generalities rather than in a world of concrete details—then his lack of interest in Hill’s testimony is readily understood by analyzing it in

53. Hill’s subsequent testimony was so graphic as to make the “mistake” explanation rather unlikely.
54. Obstacle, supra note 50.
terms of his unrelenting preference for the abstract over the concrete. In this particular instance, the preference is played out as a contrast between the general nature of his denials and the painful specificity of Hill's allegations. There was no reason, he seemed to suggest, why anyone should listen to Hill when he had already put the matter to rest by tendering the appropriate denials. Thus, Senator Heflin's prompting—

But if you didn’t listen and didn’t see her testify, I think you put yourself in an unusual position. You in effect are defending yourself, and basically some of us want to be fair to you, fair to her, but if you didn’t listen to what she said today, then that puts it somewhat in a more difficult task to find out what the actual facts are relative to this matter.56

—received this reply:

The facts keep changing, senator. When the FBI visited me, the statements to this committee and the questions were one thing; the FBI's subsequent questions were another thing; and the statements today as I received summaries of them were another thing. It is not my fault that the facts change. What I have said to you is categorical, that any allegations that I engaged in any conduct involving sexual activity, pornographic movies, attempted to date her, any allegations, I deny. It is not true.

So the facts can change, but my denial does not.57

Notice how this answer pitted Thomas' denial against the "facts." The facts are unreliable and keep changing. His denial, on the other hand, is categorical and unwavering. There is no need, he seems to suggest, for anyone to delve into the facts so long as he has made his denial.

The suggestion that denials trump facts goes a long way towards explaining why Thomas felt it was appropriate to attack the Judiciary Committee for providing Hill with an opportunity to testify. A typical example of these attacks occurred in Thomas’ prepared statement:

I think that this today is a travesty. I think it is disgusting. I think that this hearing should never occur in America. This is a case in which this sleaze, this dirt was searched for by staffers of members of this committee, was then leaked to the media, and this committee and this body validated it and displayed it at prime time over our entire nation . . . . And from my standpoint, as a black American . . . it is a message that unless you kowtow to an old order, this is

56. Id.
57. Id.
what will happen to you. You will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree. 58

This attack on the Committee and Thomas' use of the lynching metaphor proved to be effective. 59 It seemed to intimidate his opponents and to render them helpless to mount an offensive. But it would be a mistake to think that Thomas' response was solely a matter of shrewd and calculated politics. To the contrary, it was an instinctual response that was deeply rooted in his own particular mode of interaction with the world.

3. Natural Law: Thomas' Commitment to Conservative Principles

In June 1987, Thomas gave a speech to the Heritage Foundation. 60 In it he recounted his experiences as one of the few Black Americans in the Reagan Administration. The speech developed two major themes: first, his deep commitment to conservative principles and, second, his sense of exclusion from conservative circles.

One cannot read this speech without understanding that Thomas' political views come straight from the heart. It does him a grave injustice to suggest that his commitment to conservative causes is insincere and opportunistic. To the contrary, it is deeply rooted in his Georgia boyhood. "I grew up," Thomas tells us, "under state-enforced segregation, which is as close to totalitarianism as I would like to get." 61 While the state was his enemy, Thomas' family provided a strong refuge as well as a model for living in an openly hostile environment:

My household ... was strong, stable, and conservative . . . .

God was central. School, discipline, hard work, and knowing right from wrong were of the highest priority. Crime, welfare, slothfulness, and alcohol were enemies. But these were not issues to be debated by keen intellectuals, bellowed about by rousing orators, or dissected by pollsters and researchers. They were a way of life; they marked the path of survival and the escape route from squalor. 62

Thus, for Thomas, escape from the twin misfortunes of race and poverty was a matter of individual effort. In the Jim Crow South, he

59. For an insightful critique of Thomas' lynching metaphor, see Kendall Thomas, Strange Fruit, in RACE-ING JUSTICE, supra note 16, at 364.
60. The speech was reprinted as No Room at the Inn: The Loneliness of the Black Conservative. Thomas, supra note 21, at 72.
61. Id.
62. Id.
knew, it would have been foolish to look to the government for help. Equally foolish, he thought, was the idea that the end of state-sponsored segregation meant a new and more active role for government in achieving racial progress. In a deeply racist society, he believed, any form of government assistance is bound to be more apparent than real. Government solutions, he argued, are patronizing and paternalistic; they only impede the development of self-sufficiency. Thus, the basis of Thomas’ conservatism is aptly summarized in this passage from his speech:

Self-sufficiency and spiritual and emotional security were tools to carve out and secure freedom. Those who attempt to capture the daily counseling, oversight, common sense, and vision of my grandparents in a governmental program are engaging in sheer folly. Government cannot develop individual responsibility, but it certainly can refrain from preventing or hindering the development of this responsibility.63

From this, Thomas concluded that it was in the best interests of Black Americans to oppose big government in all its forms.

Obviously, as a conservative Republican, Thomas was at odds with much of the national Black leadership. His substantive views, however, had substantial support in the Black community. Thomas frequently pointed out that many Blacks “think right but vote left.”64 “Right” thinking—Republican thinking—emphasizes a number of themes that resonate with Black experience. For example, the Black community includes many religious organizations—both Muslim and Christian—that preach self-reliance, family values, and strong deterrence of criminal activity. It also includes political organizations that promote racial separatism and economic self-sufficiency. Ideologically, these organizations have more in common with the Republican emphasis on Black capitalism than they do with the liberal program of integration and affirmative action. Thus, within the Black community, Thomas’ conservatism is a familiar theme as millions of African Americans have adopted hard work and high moral standards as their response to racism.

What is unusual about Thomas is not his commitment to conservative principles but instead his choice of the Reagan-Bush Republican party as a forum for his political efforts. This choice is especially puzzling given the fact that, by his own account, he had been badly

63. Id.
64. See, e.g., id. at 76.
treated in conservative circles. The speech to the Heritage Foundation is especially clear on this point. Conservatives, Thomas charged, do not really welcome Black participation. "[T]here was the appearance," he said, "within the conservative ranks that blacks were to be tolerated but not necessarily welcomed."65 This appearance, he argued, was reinforced in a number of ways. First, the Reagan administration had made "little or no effort... to proselytize those blacks who were on the fence or who had not made up their minds about the conservative movement."66 Second, it had adopted a consistently negative tone when dealing with race issues.67 And third, it had made numerous decisions that pointlessly alienated potential Black voters.68 But beyond these matters, its treatment of Thomas and other Black Republicans was particularly grievous.69 Conservatives, Thomas felt, had marginalized him—

I would have to characterize the general attitude of conservatives toward black conservatives as indifference—with minor exceptions. It was made clear more than once that, since blacks did not vote right, they were owed nothing.70—stereotyped him—

[T]here was the constant pressure and apparent expectation that even blacks who were in the [Reagan] administration and considered conservative publicly had to prove themselves daily... For blacks the litmus test was fairly clear. You must be against affirmative action and against welfare. And your opposition had to be adamant and constant or you would be suspected of being a closet liberal.71—and failed to recognize his human dignity—

It often seemed that to be accepted within the conservative ranks and to be treated with some degree of acceptance, a black was

65. Id. at 76.
66. Id.
67. Id. at 75.
68. Thomas points specifically to the decision made by the Reagan administration to support tax exemption for Bob Jones University and to its equivocation over the Voting Rights Act. Id.
69. The Heritage Foundation speech is, for Thomas, an unusually candid discussion of his political difficulties. His more usual mode is to deny any problems as when, for example, he replied to a reporter's question about personal difficulties—"You had a very rough life, didn't you?"—with "I did not... I did indeed come from very modest circumstances but... I had lived the American dream and... I was attempting to secure this dream for all Americans...." Id. at 77.
70. Id. at 76.
71. Id.
required to become a caricature of sorts, providing sideshows of anti-black quips and attacks.\textsuperscript{72}

I cite these examples at length because it seems important to recognize that Thomas was indeed very badly treated by his colleagues in the Reagan administration. The conduct that Thomas describes is racist. It is abusive. And its existence at the highest levels of the federal government is deeply shocking.\textsuperscript{73}

Thomas' account of life in Republican circles tells us much about the Republican party and about the depth of racism in our society. It also tells us something important about Clarence Thomas. It is worth considering why a man with Thomas' abilities and opportunities would choose to work in such an openly hostile environment. Even if racism is a pervasive phenomenon, the reckless insensitivity that Thomas describes is not universal—some communities are more integrated and inclusive than others. Indeed, Thomas himself recognized this fact as he confidently informed his Republican colleagues that the Democratic party would have provided a more supportive environment.\textsuperscript{74} Thus, Thomas' choice to plant his career in the salty soil of Republican politics seems a notable triumph of political principle over personal considerations.\textsuperscript{75} And this is especially true given that Thomas' political principles were not entirely in tune with the political practices of the Republican party. While he agreed with the general outlines of the Reagan revolution—small government, free enterprise, and government enforced family values—there were obvious differences with respect to specifics. Thomas was, for example, frequently disturbed by the Administration's handling of racial politics.\textsuperscript{76} Given the depth of these disagreements, even a highly principled person might consider that the choice of political alliances should be based upon more than just shared principles. A more balanced approach

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} The environment Thomas describes—an environment that prompted him to feel that he had to provide "anti-black quips" and "sideshows"—must have caused Thomas a great deal of personal misery. Surely, it must have been difficult for him to work day in and day out in such a hostile environment. And it must have been debilitating to have one's hard work met with suspicion and distrust. As a person, Thomas deserves our sympathy and our respectful attention.\textsuperscript{74}

\textsuperscript{74} Thomas, \textit{supra} note 21, at 76.

\textsuperscript{75} There are many who would say that Thomas' involvement in Republican politics furthered his ambitions. For the reasons already stated, I am skeptical that Thomas' career choices were dictated by a practical pursuit of personal advantage. Furthermore, while Thomas' path may look like a fast track when viewed ex post facto, his first Republican job—for Danforth as an Assistant Attorney General for the state of Missouri—does not, \textit{ex ante}, stand out as a particularly ambitious choice for a young Yale Law graduate.\textsuperscript{76}

\textsuperscript{76} \textit{See}, e.g., Thomas, \textit{supra} note 21, at 75.
might seek a closer connection between theory and practice. And, if Thomas had employed such an approach, he might have been less satisfied with abstract agreements and more demanding of respectful treatment.

I argued in the preceding sections that Thomas is a man who is more strongly moved by abstract ideas than by his sense of personal connection to people and events. It is tempting to treat Thomas’ career choice as simply one more example of this tendency. But this explanation may be an oversimplification. Racism presents people of color with some extremely difficult choices and many choose to confront some of the worst forms of racism in order to achieve their own particular vision of racial progress. To understand Thomas’ decision, it is therefore necessary to consider his underlying vision and to ask: What is the vision that fueled Thomas’ hope that his presence within the Republican party would bear the fruits of racial progress? And the answer to this question is not hard to find—Thomas envisions a Republican party revitalized by a commitment to racial justice and to the supremacy of natural law.

Thomas’ belief in natural law is fundamental to his political beliefs. He explains his conception by quoting John Quincy Adams:

Our political way of life is by the laws of nature and of nature's God, and of course presupposes the existence of God, the moral ruler of the universe, and a rule of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government.

This conception provides him, on the one hand, with a philosophical theory of government and, on the other, with a rationale for his conservative politics. Natural law, as he understands it, supports individualism, freedom from government restraint, strong recognition of individual property rights, and the controversial right to life. Furthermore, his vision of natural law allows him to weld strong support for

77. For an extended discussion of some of the practical aspects of these choices, see Jill Nelson, Voluntary Slavery: My Authentic Negro Experience (1993).

78. He argues, for example, that the Republican party should concentrate less on polls and more on “making conservatism more attractive to Americans in general.” He states: “We must offer a vision, not vexation. But any vision must impart more than a warm feeling that ‘everything is just fine—keep thinking the same.’ We must start by articulating principles of government and standards of goodness. I suggest that we begin the search for standards and principles with the self-evident truths of the Declaration of Independence.” Thomas, supra note 21, at 78.

79. Id.
civil rights enforcement to the traditional conservative agenda. Natural law, he argues, recognizes the morality of the claim for racial justice:

[The natural law] approach allows us to reassert the primacy of the individual, and establishes our inherent equality as a God-given right. This inherent equality is the basis for aggressive enforcement of civil rights laws and equal employment opportunity laws designed to protect individual rights. Indeed, defending the individual under these laws should be the hallmark of conservatism rather than its Achilles' heel.80

Thus, Thomas hoped to use the concept of natural law to inspire his Republican audience to make a greater commitment to civil rights. He also hoped to persuade them to be more sensitive and attentive to the needs of Black conservatives:

Unless it is clear that conservative principles protect all individuals, including blacks, there are no programs or arguments, no matter how brilliant, sensible, or logical, that will attract blacks to the conservative ranks. They may take the idea and run, but they will not stay and fraternize without a clear, principled message that they are welcome and well protected.81

Thomas' appeal to natural law in this context is somewhat problematic. While the natural law tradition has served as the conscience of American politics, it is not based upon any particular theory of substantive morality. Appeals to natural law must draw upon shared beliefs about moral requirements. Thus, for example, the Reverend Martin Luther King, Jr., could effectively use the concept of natural law to denounce the violent practices of the segregated South.82 But Thomas, in seeking to condemn the more subtle practices of contemporary racism, faced a much more difficult task—that of convincing a solidly conservative white audience to make an active commitment to civil rights not just out there but within the ranks of its own political community.

Ultimately, Thomas' appeal to natural rights proved ineffective. While his speech received considerable comment, it did not prompt the Republican party to reexamine its attitudes about race. Indeed, the hope of inspiring such a reexamination seems misplaced and quixotic. In the abstract, phrases like “natural law” and “racial justice”

80. Id.
81. Id.
82. See, e.g., MARTIN LUTHER KING, JR., LETTER FROM A BIRMINGHAM CITY JAIL (1963).
have a compelling tone. Translated into practical realities, however, the tone fades. It fades because racism entails a kind of blindness—an unwillingness or an inability to see the effects of one's own conduct. Racist practices often stem from routine and thoughtless acts. Thus, without conscious intention, white people may engage in positive or negative stereotyping. In addition, they may regard people of color with unwarranted suspicion. Further, groups that are dominated by white people will often fail to recognize the differing problems and perspectives of their Black members and, as a result, there may be unacknowledged burdens and double standards. For these reasons, a commitment to justice requires real attention and sensitivity; it does not just flow from the compelling tones of high-sounding phrases. And, as Thomas' own experience so amply demonstrated, it was precisely this kind of sensitivity that Thomas' political colleagues lacked. Racial justice was not (and probably would never be) their particular cause. And Thomas' failure to perceive this fact—a failure made all the more extreme by his personal experiences—casts real doubt upon the quality of his judgment.

C. What Kind of Justice Will Thomas Be?

Over a year has passed since Thomas was sworn in as an Associate Justice of the Supreme Court. During that time his voting record has been consistently conservative. In most cases, he joins Justice Rehnquist and Justice Scalia in articulating the Court's most conservative position. And indeed, for all his preconfirmation coyness, he has been a solid and unwavering vote against abortion rights in any form. For anyone who had read his record prior to appointment, these outcomes are not surprising—Thomas truly believes in conservative theories of law and government and, for him, these theories are sufficient to determine the outcome of every legal issue.

Thomas' brief record on the Court seems to underscore the notion that judging is a political act. His decisions reflect his politics, and this leads conservatives to celebrate his steadfast commitment to a correct judicial philosophy and liberals to decry his mindless invocation of Republican ideology. But it is important to consider whether we shouldn't expect more from a Supreme Court appointment. Is this

really the best we can do? Can we hope for nothing better than nominees who will consistently vote their politics? In this Essay, I am suggesting that we should, in fact, demand a great deal more. Supreme Court Justices must bring to their high office more than just a political ideology. They should bring a certain openness and willingness to be moved by the plight of individual litigants. Good judging requires more than an abstract answer for every legal question; it requires an ability to look beyond the technical legal arguments to discern real injustice wherever it occurs. A good judge is able to seek justice by getting to the moral heart of the matter. Thomas, however, lacks these abilities. What is wrong with Thomas is not his conservative philosophy. It is his inability to open his heart, to listen to evidence, and to formulate realistic strategies for bringing about progressive change. Unfortunately, Clarence Thomas is not the sort of person who is likely to inspire genuine respect for the breadth of his heart and the depth of his soul.

III. CLARENCE THOMAS: THE INVISIBLE MAN

I want to close this essay by explaining why I see (or don't see) Thomas as "The Invisible Man." At one point during the hearings, Thomas said that he had "stripped down like a runner" in anticipation of his appointment to the Court. By this he meant that he had renounced his general political beliefs so that he could fairly decide controversial cases. What came to my mind at this moment was an

---

84. One feminist has argued that feminist jurisprudence must attempt to identify the "moral crux of the matter." Ann C. Scales, The Emergence of Feminist Jurisprudence: An Essay, 95 YALE L.J. 1373, 1389 (1986). I agree with Scales but believe that this task is an essential element of the judicial function whether one is a feminist or not.

85. Indeed, Thomas' opinions often display a technical style that makes the practical issue presented by the case difficult to see. See, e.g., U.S. v. Wilson, 112 S. Ct. 1351 (1992) (holding that it was error for the lower court to credit a criminal defendant with time spent in official detention); Hudson v. McMillan, 112 S. Ct. 995 (1992) (Thomas, J., dissenting) (arguing that a prisoner who had been beaten by prison guards did not have a claim under the Eighth Amendment). But see Dawson v. Delaware, 112 S. Ct. 1093 (1992) (holding that defendant's membership in a racist prison gang was irrelevant to any issue being decided in the punishment phase), where Thomas' dissenting opinion puts the practical elements of the case into a clearer perspective.

86. This inability is illustrated by Thomas' harsh appraisal of his sister. See supra part II.B.1.

87. This inability is illustrated by Thomas' refusal to listen to Anita Hill. See supra part II.B.2.

88. This inability is illustrated by Thomas' quixotic hope of reforming the Republican party by appeals to natural law. See supra part II.B.3.

89. See supra text accompanying note 30.
image of Claude Rains in "The Invisible Man." In one scene, he appeared as a normal person wearing a coat, hat, and muffler. When he removed these items, however, there was nothing underneath. The coat, the hat, and the muffler were the man. Without the clothing, there was no physical body to mark his presence. Thus, as Thomas removed the coat and hat of political principles, he seemed to render himself invisible. Who, we might ask, is Clarence Thomas if he is not understood in terms of his commitment to conservative politics? And to this question, the answer seems reasonably clear—Clarence Thomas is his principles; he lacks the flesh and blood of concrete connection to individual context.

I began Part II with a commitment to discuss Thomas' qualifications independently of race. This commitment seemed desirable for a white writer who was about to evaluate a Black nominee. It is also true that race and gender have dominated most of the discussions about Thomas and I felt that there was much to learn from a "race neutral" approach. On the other hand, I began with some misgivings about whether it was possible to exclude race from an examination of Thomas' qualifications. In this society, race matters; it especially matters in Thomas' world of high-powered politics. In writing this Essay, I was reminded over and over again of the many ways in which race had an impact on Thomas and on people's perceptions of Thomas. What I see in Thomas is a man who has suffered many forms of racial abuse and who has tried to avoid the pain of this abuse by "living in his head." While this perception of Thomas provokes real sadness and sympathy, it also leads me to believe that he is a poor choice for the Supreme Court . . . but I have doubts about my ability to make a race-neutral assessment of this issue.

These doubts are well illustrated by another image of an invisible man. In 1947 Ralph Ellison wrote a novel entitled The Invisible Man. The protagonist of this novel is an "invisible man" of flesh and

90. The Invisible Man (Universal Productions 1933).
91. While it is true that we often ignore race in evaluating the qualifications of white people, we may not be justified in this practice. If white people benefit from the privileges accorded on account of race in a racist society, why should we not take that fact into account in assessing their qualifications?
92. See supra note 34.
93. Fortunately, there are two excellent collections of essays that deal with the racial aspects of the Thomas nomination: COURT OF APPEAL, supra note 19, and RACE-ING JUSTICE, supra note 16. See also Symposium, Gender, Race and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings, 65 S. CAL. L. REV. 1279 (1992).
blood—he is embodied but unseen. He wanders the streets but remains invisible to the dominant white society. He lives unnoticed in their city and feels disconnected and disregarded. This too is Clarence Thomas. Whether it was his classmates who called him “America’s Blackest Child”95 or the comfortable white liberals who suggested that he was an “Oreo cookie,” Thomas has been cruelly misperceived in a variety of undeniably racist ways.96 Ellison’s story reminds us to ask an important question: Is Thomas invisible or merely hidden? Does Thomas lack the flesh and blood of concrete connection, or is he connected to a context that we, as members of a predominantly white society, find it difficult to see?

95. Phelps & Winternitz, supra note 24, at 41.
96. He has also been painfully invisible to those around him. For example, when the Reverend Martin Luther King, Jr. was shot, Thomas was attending a Catholic seminary. A fellow seminarian, unaware of Thomas’ presence said “That’s good, I hope the SOB dies.” Id. at 44. See also supra text accompanying notes 66-73.