Clarence Thomas and the Tough Love Crowd

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Justice Thomas’s Sins

How to Nail Thomas

This is what Clarence Thomas wanted. He wanted to be evaluated on the fucking merits. We said fine, we’ll take a look.

—NAACP board member, 1991

This comment was made in the process of explaining the NAACP’s decision to commission a study of Thomas’s record before taking a stance on his nomination. Clarence Thomas, protégé of Republican Senator Danforth, appointed by Reagan to head the EEOC, appointed by Bush to the Supreme Court, has likewise met with hostility from those even mildly concerned with the well-being of America’s dispossessed. The New York Times, for instance, reviewing Justice Thomas’s first term, headlined its editorial “The Cruellest Justice.” Weeks later, commenting on Thomas’s opinions in three death penalty cases, the Times editorial headline was “Cruel Injustice.” Such labels are entirely fair characterizations of particular Thomas decisions. Still, to characterize Thomas as a knowing perpetrator of what he recognizes to be injustice is unhelpful in several ways.

First, demonization is simplistic psychology. Thomas probably doesn’t view himself as an evil person. He probably thinks he is impeccable. Second, such demonization obscures Thomas’s probable self-righteous belief that, because he has access to truth, he is pursuing the authentic benefit of those he cares about. He probably believes not only that he is impeccable because of his inherent qualities (the first point of this paragraph) but also that he is ably serving the true interests of the subjugated. Third, demonization of Thomas obscures a more general problem that may well be the root of
Thomas’s self-righteousness: his reliance on the ideal of disinterested truth. A pillar of Thomas’s self-righteousness is the idea that he has the expert’s eye for reality or, as he himself has put it, that he stands “a few humble feet above the maddening crowd.” Fourth, most importantly, to demonize Thomas is, paradoxically, to place him beyond our criticism. If our complaint is that he is simply evil and we are simply good, he might retort that we simply inhabit different moral universes. This would place him beyond a binding moral criticism from within our own moral universe. For every voice that calls him callous and uncaring another might call us paternalistic and self-pitying. Relativism might ride to his rescue. When we say that Thomas denies American Blacks due reparations for undeniable historical injustice, he might reply that he detests handouts and reveres self-sufficiency above all else, including the welfare of America’s dispossessed. This is a conceivable moral choice. I would criticize it, and so might many others, but our criticism would proceed from our own values, which would precisely not be shared by Thomas. Our criticism would be reduced to spinning its wheels, would lack traction in Thomas’s own moral mind. An appeal to the values of racial justice will not mobilize Thomas if he has duly considered those values and determined that they are subordinate to others (the Klansman attitude).

It is crucial, for meaningful criticism, that Justice Thomas is not such a person. Responding to far-right arguments that EEOC enforcement policies, however diluted, remain immoral in principle, Thomas had this to say:

What is more immoral than the enslavement of an entire race—what is more immoral than the vicious cancer of racial discrimination—what is more immoral than the fabrication of a legal and political system which excludes, devalues and degrades an entire race? Those who seek to invoke morality today, must first address the pervasive and persistent immorality of yesterday.¹

Thomas is emphatically aboard the moral project of racial justice. Self-reliance, for example, is not for him a preferred value to which racial justice is secondary. He contends that the death penalty and racial justice are complementary. He contends that his approach to EEOC enforcement advances racial justice. This is, no doubt, intuitively odd (could it really be that Pat Buchanan was right all along?). But the important point is that Justice Thomas’s allegiance to racial justice as a value gives us an important ethical foothold from which to criticize him. Hitler did not value racial justice, and should have. His barbarism is vulnerable to powerful criticisms on humanitarian grounds. Yet it is often more difficult—beyond clear cases like Pol Pot and Henry Kissinger—to decide what is factually evil and what is
not. Because of this last difficulty, the present argument advances a second basis of ethical criticism—criticism internal to the project of racial justice. This second kind of criticism does not address unique cases like Hitler, or rare cases like Pol Pot and Kissinger. It is the kind of criticism that might (dubiously) berate Hitler as a bungling advocate of Jewish welfare. In Hitler’s case, his crimes being as hideous as they were, the unavailability of this second ground of criticism is obviously insignificant. But once we shift to a liberal ethos in which the rhetoric of tolerance smooths over clashes of values, where racial oppression is often perceived as spontaneous rather than a matter of formal governmental policy, where race-based injustice hides behind neutral terminology, the importance of this second source of obligation increases. In this liberal setting, any attempt to analogize Thomas with Hitler will obviously and appropriately fail. And Thomas will assume that he is home free on the high ground.

The present argument shakes Thomas and his supporters from this moral high ground. It takes seriously his rhetoric of concern and examines his performance in light of this rhetoric. Certainly, objective facts (is it raining? is there a brick on the freeway?) must be acknowledged. But beyond the very small range of such facts (if any), Thomas advances a harsh agenda under the alibis of truth and the rule of law. If truth and the rule of law don’t give him an alibi, the basis for his self-righteousness disappears and a basis for moral criticism takes its place.

The following discussion will pursue three main themes. First, in his role as a policymaker and bureaucrat, Thomas’s rhetoric reveals a strong commitment to abstract ideals of racial justice. Second, Thomas also has an allegiance to ideals of disinterest in policymaking; he considers politics an unwelcome intrusion on expertise. He thinks that the disinterested, rational pursuit of truth in policymaking is not only possible but essential. Third, Thomas thinks that allegiance to disinterested ideals is even more important for judges than for policymakers. Thomas’s ostensible allegiance to disinterest, however, turns out to be an allegiance to other interests. His truth-driven claim to be aboard the progressive project repeatedly fails.

**Thomas’s Partisanship**

Clarence Thomas has consistently spoken not only of an abstract commitment to racial justice but also of his own deeply personal indebtedness to those who struggled before him, and of the enduring racism of American
society. Such statements are a pervasive feature of Thomas’s writings and speeches, but his commencement address at Savannah State College on June 9, 1985, stands out:

I grew up here in Savannah. I was born not far from here (in Pinpoint). I am a child of those marshes, a son of this soil. I am a descendant of the slaves whose labors made the dark soil of the South productive. I am the great-great-grandson of a freed slave, whose enslavement continued after my birth. I am the product of hatred and love—the hatred of the social and political structure which dominated the segregated hate-filled city of my youth, and the love of some people—my mother, my grandparents, my neighbors and relatives. . . . That mean, callous world out there is still very much filled with discrimination. It still holds out a different life for those who do not happen to be the right race or the right sex. It is a world in which the “haves” continue to reap more dividends than the “have-nots.”

This speech could hardly have come from David Duke. A churlish researcher might prefer to emphasize Thomas’s equivocations, as when he says that race-conscious remedial policies are “merely some form of retribution.” Yet Thomas has conceded his indebtedness to civil rights forebears like Thurgood Marshall and Martin Luther King, Jr. (“Only by standing on their shoulders could I be here. At each fork in the road . . . someone came along to help.”). And he does not deny his debt, in the abstract, to legal principles (somehow defined) intended to remedy racial injustice (“But for them, God only knows where I would be today”).

It is important to note that this and similar rhetoric was exhumed and prominently broadcast by the media within days of the announcement of the Thomas nomination. This and similar Thomas rhetoric clearly played a role in hobbling his opposition. Still, the Savannah speech was made more than six years before the hearings, and it is so representative of Thomas’s pronouncements that it cannot be dismissed as straightforward dishonesty or opportunism. We needn’t dismiss such statements in that summary fashion. We need only look closer.

Thomas pursues this rhetoric of concern as follows. First, his concern does not extend to gender egalitarianism. Thomas is straightforwardly hostile on women’s issues. This is clearest in a District of Columbia opinion that he authored shortly before joining the Supreme Court. In that case Thomas expressly concluded that preference programs that can legitimately be based on racial factors cannot legitimately be based on gender because of the alleged failure of certain statistical connections where gender is concerned. This Thomas opinion is excellent evidence that the Tough judge is straightforwardly hostile to female America. Second, Thomas pursues his allegiance
to African America through a frankly utopian brand of conservative politics. This is especially ironic given that Thomas habitually accuses everyone else of refusing to face harsh realities. **Third,** Thomas purports to serve African America through the belief that, from his perch slightly above the swirling world of passions, he can divine what is really in that constituency’s best interests.

**Thomas’s Indifference to Women**

There is a difference between Thomas’s partisanship on racial issues and his position on gender issues. Thomas is always very concerned to announce his allegiance to racial justice—and his rhetoric of concern is shallow once his practice of judging is observed. On gender issues, a slightly different claim can be maintained: Thomas is straightforwardly hostile. Thomas’s conspicuous rhetoric favoring racial egalitarianism is not matched by any conspicuous rhetoric favoring gender egalitarianism. It is much easier to establish Thomas’s rhetorical allegiance to racial justice than it is to establish a like record on gender issues.

Before Thomas was appointed to the EEOC in the early 1980s, he wrote a memorandum to Jay Parker, fellow black conservative and long-time lobbyist for the unreconstructed South African regime, attacking the EEOC’s freshly minted Carter administration guidelines on sexual harassment. The Carter guidelines encouraged employers to take sexual harassment issues seriously by holding them responsible for harassment occurring under their supervision. The Thomas memorandum recommended diluting this incentive. Thomas suggested that liability be limited only to bosses who condoned or participated in the harassment. This stance suggests an outright unconcern with sexual harassment issues (an employer who participated or condoned sounds very likely to be guilty as a principal offender; Thomas’s ostensible reform thus would not significantly have enhanced liability).

Subsequently, as EEOC chairman, Thomas actively campaigned against parental leave laws, claiming that the alleged expenses the legislation would impose on small businesses violated the “freedoms” of those businesses. When he moved on from the EEOC and joined the Court of Appeals for the District of Columbia Circuit, Thomas authored an opinion in *Lamprecht v. FCC* that is an important further piece of the argument that he is straightforwardly hostile to gender egalitarianism. Thomas’s opinion in *Lamprecht* turned largely on a distinction between gender injustice and racial injustice.
Thomas concluded that while race was a sufficient basis for preference programs, gender was not. Thomas reasoned that while there was a proven link between racially diverse ownership of broadcasting licenses and the congressionally endorsed goal of broadcast diversity, no similar connection between female ownership and broadcast diversity had been proven. Thomas thus presented his decision as though it hinged on empirical questions of statistical proof. A close reading of his opinion, however, reveals that the fate of the FCC’s gender preference programs was sealed by Thomas’s overt and straightforward value judgment, suppressed in a footnote of the opinion. (Thomas’s reasoning in Lamprecht is discussed more fully in another section.)

Thomas’s outright hostility to gender egalitarianism is further evidenced by his tactics during his Supreme Court confirmation hearings. Thomas’s explicit and implied attacks (and those of his supporters) on Anita Hill’s character, honesty, even sanity, played into well-worn preconceptions in which female credibility is an easy target.

Thomas carried his indifference to women onto the Supreme Court itself, as evidenced by his support for antichoice positions. In Planned Parenthood v. Casey the Supreme Court’s majority upheld measures restrictive of a woman’s right to choose. Justice Thomas joined Scalia and went even further than the heavily criticized majority opinion. Thomas would have overturned Roe v. Wade outright, on the basis that a woman’s right to choose simply is not a constitutionally protected liberty.

Swimming with the Barracuda: Thomas’s Utopian Conservatism

In June 1987, twelve years after Jimmy Carter’s ethnic purity campaign, eight years after Ronald Reagan’s Welfare Queen campaign, one year before George Bush’s Willie Horton campaign, and five years before Bill Clinton’s Sister Souljah campaign, Clarence Thomas had this to say to Lee Atwater, Jesse Helms, Patrick Buchanan, William Bradford Reynolds, and the rest of the Republican party faithful:

Blacks just happened to represent [to the Republicans in the 1986 congressional elections] an interest group not worth going after. Polls rather than principles appeared to control. We must offer a vision, not vexation. . . . We must start by articulating principles of government and standards of goodness. I suggest that we begin . . . with the self-evident truths of the Declaration of Independence.

Who mentioned Don Quixote? Thomas’s earnest lecture was, to say the least, optimistic, especially given Thomas’s own views on the permanence of
racism in American society. Derrick Bell’s book, *Faces at the Bottom of the Well*, was widely and inaccurately reviewed as despairing, pessimistic, and even separatist for its conclusion that American racism is permanent. Less broadcast is the fact that Clarence Thomas shares that view. Thomas said as much in an interview, nearly ten years before the appearance of Bell’s recent book:

**QUESTION:** Will discrimination ever disappear?

**THOMAS:** I’m not one who believes that it will.

Thomas has repeatedly denounced the “hypocrisy and irony of repeated calls for color-blind legal remedies in a country which has tolerated color-conscious violations of the law for so much of its history.” Indeed, despite Thomas’s adherence to Republican party politics and Reagan-Bush policies, he has never denied the racism of America’s conservatives, and its Republican party in particular. He objected, for instance, that Reagan civil rights policy was “unnecessarily negative.” Given this double acknowledgment—of the permanence of American racism and the prevalence of Republican distaste for blacks—Thomas’s advocacy of conservative policies is a straightforwardly utopian exercise. Thomas urges an admittedly flawed, racist, American right wing to live up to a true self that Thomas has invented on its behalf: “I am of the view that black Americans will move inexorably and naturally toward conservatism when we stop discouraging them . . . when conservatives stand up for what they really believe in rather than stand against blacks.”

Thomas, throughout the eighties, untiringly urged his political allies to abandon the false conservatism of their racist ways and adopt, instead, the path of his imagined real conservatism. He urged a “principled approach” that would

*make clear to blacks that conservatives are not hostile but aggressively supportive. . . . This is particularly true to the extent that conservatives are now perceived as anti-civil rights. Unless it is clear that conservative principles protect all, there are no programs or arguments that will attract blacks to conservative ranks.*

Thomas found his role as head of the EEOC compromised by his conservative fellow travelers, by the rhetoric of the Reagan administration, and by that administration’s specific initiatives (and lack thereof):

*Some employers have seen certain actions of this administration over the past two years as reason to cool their heels in reducing job discrimination. . . . We made some mistakes in this administration that may have fostered the perception that attacking*
discrimination is not a top priority. One is the Bob Jones University fiasco, in which the administration argued that the Internal Revenue Service does not have the power to revoke that institution's tax exempt status, despite the school's ban on interracial dating. The controversy surrounding that issue overshadowed some of the good things this administration has done.

Thomas's political allies set him a task of damage control. He was forced to campaign against the impression that the EEOC was asleep at the wheel. Thomas lectured that, contrary appearances notwithstanding, employers "should not [cool their heels], because enforcement actions will be swift and very aggressive in cases where we can prove discrimination."

When Thomas publicly championed an affirmative action plan for the New Orleans Police Department, he was derailed by William Bradford Reynolds, who had him called to the White House and told to toe the party line. Again, on the Voting Rights Act, Thomas criticized his Republican brethren for "failing to get out early and positively in front of the effort" and he found it "intriguing that we consistently claimed credit for extending it."

Nor did Thomas personally escape the conservatives' own stereotyping and their open demands that he serve as the mouthpiece for their antiblack agenda: "For (conservative) blacks, the litmus test was clear. You must be against affirmative action and welfare. Your opposition had to be adamant and constant or you would be suspected of being a closet liberal. . . . But what is done is done."

Despite being thus beleaguered, Thomas advocated the prevailing conservative policies and lent himself to promotion of the prevailing conservative agenda. He forgave his fellow Republicans ("what is done is done"), revealing a generosity of spirit that, sadly, did not extend to his sister. All the while accusing others of ignoring reality, Thomas has been relentless in his own utopian conservatism.

This is clearest in Thomas's frequent references to the fact that the government could never do for people what his family did for him ("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."). Perhaps the government and one's grandparents have dissimilar roles? The thought doesn't dawn on him. Thomas advocates "Family Policy, Not Social Policy," and boasts that in his youth, "Unlike today, we debated no one about our way of life—we lived it." Ironically, Thomas's frequently invoked grandfather himself apparently broke with Thomas over what he saw as Thomas's self-absorption and problematic pro-Reagan politics.
Thomas's pride in his upbringing is, nevertheless, such that he occasionally appears to slide from a (justified) admiration for the endurance his ancestors showed in adverse conditions to a (strange) suggestion that such feats of endurance are worthwhile as ends in themselves. Thomas, overexuberantly, proclaims that he was "raised to survive under the totalitarianism of segregation, not only without the active assistance of government but with its active opposition." Despite these obstacles that the policymakers of his youth were able to place in his way, Thomas, in his own policymaking role, usually disavows the idea that policymakers have the ability to shape social landscapes. Instead he falls into a paralyzed nostalgia: "[The correct road] is the road—the old-fashioned road—traveled by those who endured slavery, who endured Jim Crowism, who endured hatred. It is the road that might reward hard work and discipline, that might reward intelligence, that might be fair and provide equal opportunity. But there are no guarantees."

Thomas's tendency to make policy as though a wished-for tomorrow had already arrived, or as though a painfully endured yesterday were an end in itself, is a serious deficiency in his attempts to serve the ends of racial justice. This utopian streak is the linchpin of his adherence to Ronald Reagan's small-government rhetoric: "Why do you need a Department of Labor, why do you need a Department of Agriculture, why do you need a Department of Commerce? You can go down the whole list—you don't need any of them really."

Yet Thomas, lifetime public servant that he is, does not think government ought to be entirely dismantled. It ought to exist, but just do little:

Not everything that the EEOC or the federal government has done has been correct, but we're going to need the EEOC for a very long time to come. Protecting the civil rights of citizens, in my view, is a prime responsibility of government. States, historically, have not done a particularly good job in this area, and until they show they can, the federal government will have to play the lead role in seeing that discrimination is stamped out.

If the parental path to virtue is the only workable one, and the government is a no-good parent, then it follows that the government, in fulfilling its prime responsibility, ought to confine itself to unshackling individuals rather than implementing broad remedial measures. How to go about this unshackling exercise remains vague: "It had been my hope and continues to be my hope that we would espouse principles and policies which by their sheer force would preempt welfare and race-conscious policies." But what are these forceful policies? Thomas, adrift for such alternatives, comments
that “the most compassionate thing [my family] did for [me] was to teach [me] to fend for [myself] and to do that in an openly hostile environment.”

Eureka!: “Government cannot develop individual responsibility, but it certainly can refrain from preventing or hindering the development of this responsibility.”

Predictably, the line Thomas appears to draw between nonhindrance (appropriate) and affirmative assistance (ineffectual and dangerous) is inconsistently applied. In 1983, early in his EEOC tenure, Thomas recognized that the EEOC’s job was “to shape the law” and to be at the “forefront of defining the parameters of discrimination” (emphasis original). Thomas here acknowledges that policy can affect the social landscape and assist individuals.

Yet, as his first EEOC term expired and the issue of renomination loomed large between late 1985 and mid-1986, Thomas suddenly discovered a tension between shaping the law and fighting hard for those discriminated against under the current state of the law. The bottom line is, of course, that Thomas adopted the view that broad impact strategies—whether numerical goals and timetables, test cases, or disparate impact relief—are a bad remedy, that only actions short of those are acceptable remedies. Instead of arguing this point directly, Thomas at the EEOC often found it convenient to claim that “the statute” (Title VII) says nothing about broad impact strategies like timetables and goals, and so precludes them. This rationale ran into trouble where Thomas conceded that “even though the statute mentions nothing about quotas [sic], courts as a remedy for discrimination have sometimes ruled that certain individuals be hired according to specific goals, timetables and, in some instances, quotas.” Thus the barrier to race-conscious remedies (misnomer, “quotas”) is, for Thomas, some sense of “the statute” other than that which some courts have announced. As a policymaker Thomas obviously agrees with some courts and not with others. His job is to advocate, yet he thinks he “can” (“the statute” binds him) only do less than “some courts” have granted. He gets behind the courts that take a restrictive approach to the statute he’s meant to enforce, rather than the courts that would enable him to do more. In contrast, when William Bradford Reynolds championed an expansive reading of a Supreme Court case hostile to affirmative action goals, Thomas had no problem pushing that case to the edge of the envelope.8

That zig-zag (restrictive reading of progressive Court precedent; expansive reading of regressive precedent) reflects Thomas’s truth. Thomas’s truth
Justices Thomas's Sins 125

is that the small state is best. The way his grandparents raised him “was not their social policy, it was their family policy—for their family, not those nameless families that politicians love to whine about.” One might think this distinction (family policy versus social policy) would survive when Thomas leaves home and has to make policy with precisely such “nameless families” in mind. In fact, in his various public roles, Thomas arrived at his desk with this mantra intact. “Family Policy, Not Social Policy.” Don’t leave home without it.9

A Few Humble Feet above the Maddening Crowd

Thomas’s confidence in his own familial truth is in turn traceable to his belief that he has the expert’s eye for a reality that lies outside the frenzy of politics. In these days of widespread skepticism about claims of simple truth, Thomas has no difficulty urging his Republican allies to embrace natural law (somehow defined) and “begin the search for standards and principles with the self-evident truths of the Declaration of Independence.” For Thomas, natural law “both transcends and underlies time and place, race and custom.” Moreover,

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, and of just and unjust, binding upon man, preceding all institutions of human society and of government... Without such a notion of natural law, the entire American political tradition, from Washington to Lincoln, from Jefferson to Martin Luther King, would be unintelligible... All our political institutions presuppose this truth.10

Res ipsa loquitur. Thomas compounded this exhortation with his much-publicized reference, in the same speech, to an antiabortion pamphlet by Nicholas Lerhman that appeared in the American Spectator, the magazine that gave birth, in article form, to David Brock’s book The Real Anita Hill. Thomas described Lerhman’s offering as a “splendid example of applying natural law.” For Thomas, “human nature provides the key to how men ought to live their lives.” This self-evident truth about “men[’s]” lives has some predictable consequences in Thomas’s case law on a woman’s right to choose. Yet it would be far too simple, and it would understate Thomas’s personal moral responsibility for his decisionmaking, if we laid the blame at religion’s doorstep. The church has played a central role in much of the
American civil rights movement. It continues to give us our foremost civil rights and intellectual leaders. Apart from mainstream black American churches, there is a strong Franciscan element, within the Catholic Church, that is socioeconomically progressive. Thomas’s own early schooling was carried out by white Franciscan nuns from Ireland who ventured to serve in the segregated American South where they were reviled and publicly abused as the “nigger sisters.” Moreover, Thomas’s own grandfather was propelled into the civil rights struggle by the idea that civil rights came from God, not man, and that the Jim Crow regime, as “legal” as it might seem, was not consistent with divine law. Thomas defenders thus cannot blame the details of his pro-Reagan agenda on any church, nor on any legal theory. It is Thomas’s manipulations, seldom intellectually consistent, of various theories in order to reach results consistent with Reaganite ideology that form the basis for criticism. The NAACP Legal Defense Fund, in a thorough review of Thomas’s speeches and writings, suggests persuasively that “it is as though Thomas had several right-wing speech writers, one a libertarian, one a natural law advocate, one an executive branch-statist, one a neo-McCarthyite, who took turns framing his views.” Thomas’s natural-law rhetoric may indeed merely have furnished grandiose underpinnings for his political agenda. But whether or not his resort to various theories was deliberately opportunistic, Thomas’s natural-law incantations are consistent with his frequent claims that, as an unfettered persona, he is best placed to find truth. Thomas and his supporters frequently emphasize the supposed unfetteredness of his intellect. One headline proclaims: “Clarence is nothing if not an independent thinker.” Assisted by this unfetteredness Thomas can—quite apart from divine intervention—discern what’s best for people: “As your front-runner, I have gone ahead and taken a long, hard look. I have seen two roads from my perch a few humble feet above the maddening crowd.”

This picture of the wise man, separate from the flux and fortified, therefore, in divining the true “road” to racial salvation, is a role that Thomas treats with monklike seriousness: “I pay little heed to our critics [because] my personality and my style of operating approach is that of a monastic recluse.” And Thomas has no doubt that his cloistered wisdom is superior to the folly of others. Of the two roads that Thomas spots from his perch above the maddening crowd, he continues, “On the first [road], a race of people is rushing mindlessly down a highway of sweet, intoxicating destruction, with all its bright lights and grand promises constructed by social scientists and
politicians. To the side, there is a seldom used, overgrown road leading through the valley of life.”

Thomas is in no doubt that such divinations are superior to what he calls the “ludicrous . . . perceptions” of many African Americans. In 1987 he praised fellow Toughs, Sowell and Parker, for standing steadfast and “refusing to give in to the cult mentality and childish obedience that hypnotize black Americans into a mindless political trance. I admire [Sowell and Parker] and only wish I could have a fraction of their courage and strength.”

Since joining the Court, Thomas has continued to present himself as a lonely and heroic questioner of “current social and cultural gimmicks.” In the midst of the Guinier affair, a Thomas speech criticized mainstream civil rights hostility to those, like himself, who questioned “popular political, social or economic fads.” Years earlier, in 1985, Thomas told a series of professional groups in a number of speeches that upon his arrival at the EEOC, “The civil rights community did not hail me as a champion of their cause, but that was good. There was no nonsense to get in the way of doing the hard work that had to be done.”

Thomas further opined in this speech that the civil rights community was “wallowing in self-delusion” and ignoring “reality.” He assured his audiences that, because of his personal experience of race-based humiliation, he “find[s] it very difficult to criticize publicly anything that minorities perceive to be beneficial or positive.” The clear implication is that a monkish discipline has enabled him to overcome the seductions of group adulation and to make hard choices for the authentic benefit of those he cares about. This notion of unflinching expertise pervades Thomas’s writings. He has the expert’s disdain for emotive debate and the expert’s preference for rational argument (as though the two were necessarily in conflict):

People are very passionate about their rights . . . . This is only natural. But careless, irresponsible and often manipulative rhetoric can and does raise such passions to a feverish level. Fear, anger and hostility dominate people’s reactions. They overwhelm and displace rational thought and precise analysis among those who feel the most threatened, and who are the most vulnerable in our society.

Thomas thus carries Julien Benda’s disdain for mere passions into his role as head of the EEOC, which he himself described as “one of the most visible and controversial agencies in the United States Government.” Upon arrival, Thomas eagerly adopted the role of the rational administrator faced with an undisciplined, chaotic constituency. According to Thomas, the activists’ displacement of rationality by passion leads to “further polarization of
groups. These fears can register voters, fill ballot boxes or supply audiences for skilled orators who bleed them for cheers, applause, popularity and adulation.”

What is most revealing here is the characterization of the political process as an ugly intrusion on his EEOC work. Thomas has mistaken the EEOC’s domain as, ideally, an apolitical sphere wherein a neutral expertise can and should prevail. Julien Benda, addressing those prepared to declare that their kingdom is not of this world, lamented that “never were there so many political works among those which ought to be the mirror of disinterested intelligence.” Clarence Thomas, in 1985, appointed to head the controversial EEOC, regurgitated, with no self-consciousness whatsoever, this Bendaresque sentiment.

This antipassion sentiment, in turn, underpins Thomas’s adherence to an ideal of professionalism. Thomas has disclosed that he was insulted when initially offered the EEOC position because the offer appeared to be based on his presumed interest in racial matters, rather than on his inherent neutral competences. Likewise, he “always found it curious that, even though my background was in energy, taxation and general corporate regulatory matters, I was not seriously sought after to move into one of those areas.” Thomas ultimately took the EEOC post, but immediately became absorbed in getting the “monkey” (his word) off his back: he set out to be a corporate managerial superstar, with the EEOC as a foil for his inherent neutral competences. This profound concern to present a picture of managerial competence is clear in many of Thomas’s speeches and much of his writing. Former EEOC colleagues remembered fondly that “in the early days of his chairmanship, he would go down to the finance section so often that he had his own chair there.” They were not, though, sure that his micromanagement was a good idea. Undaunted, Thomas boasted to an industry group that “we have begun automating our agency with personal computers and an array of electronic wizardry.” Thomas repeatedly emphasized, during his time as EEOC chair, how effectively he was tackling an inherited administrative and managerial disaster. His supporters also pick up this theme, noting that Thomas liked to tell the story of when he first arrived at the EEOC and “neither chair, system nor semblance of organization was to be found. Clarence got himself a chair and a Classic Coke, put his grandfather’s and his son’s picture on his desk . . . and went to work.”

Fully half of a speech Thomas delivered to various professional and business organizations in 1985 is given over to a discussion of these
managerial issues. He draws the contrast (politics versus managerialism) explicitly: "These are the boring time-consuming factors that make an organization work. These are the aspects of a manager’s job that the politicians, interest groups and news media could not care less about."

An initial response is that the politicians, interest groups, and media have got it right. A person appointed to head a large organization had better have the necessary organizational skills—or else know how to tap them. These skills are essential, but also merely instrumental. The EEOC, perhaps, was not set up so that it could be efficiently run as an end in itself and as a tribute to its chairperson’s fungible managerial skills. Its mission, rather, is the efficient pursuit of certain ends—those are properly of general interest. Nevertheless, in his public appearances on behalf of the EEOC, Thomas consistently presented himself as technocrat, not visionary.

Thomas ended this frequently delivered 1985 speech with what is, for present purposes, a fascinating passage. It reflects both his concern for civil rights goals as well as the facile conception of truth that afflicts Thomas’s decisionmaking on the Supreme Court:

I would suggest that we have, unfortunately, permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories and procedures such as “adverse impact” and “prima facie cases.” We have locked an amorphous, complex, sometimes unexplainable social phenomenon into legal theories that sound good to the public, please lawyers and fit legal precedents, but make no sense. If I have my way, the legal theories will conform to reality instead of reality being made to conform to legal theories. (Emphasis added)

One could hardly ask for a clearer statement of a faith in the existence of an objective pretheoretical reality. It is (per Thomas) the job of a legal concept to describe this preexistent reality. Interestingly, Thomas’s objective “reality” is something different from that which sounds good to the public, pleases lawyers, and fits legal precedents. Having announced this eccentric yet objective grip on “reality,” Thomas continues:

My goal is to take reality into account while enforcing the law. We at the Commission will steadfastly resist political and public pressure to ignore reality and conform our policies to popular notions rather than to demonstrated facts. We have no interest in unfairly attacking employers, but our job is to defend the rights of all individuals in this society.

Thomas has not explained what reality is, but we are left clear on what it is not: it clearly excludes political and public pressure that, he assumes, is always a distraction from demonstrated facts. There is evidence in the speech
that Thomas feels politically pressured by the Right as well as the Left. The point is not that Thomas uses the rhetoric of fact as a deliberate expedient to exclude the voices of the Left. Rather, the point is that Thomas thinks his job as EEOC administrator is, properly, one insulated from politics. This attitude is itself a serious failing, for it saddles Thomas with a danger-laden indifference among competing ideological descriptions of reality and jeopardizes, in practice, the progressive values to which he freely admits in theory.

Finally, this allegiance to apolitical rhetoric intensified as Thomas shifted from bureaucrat to judge. At his confirmation hearings, Thomas repeatedly disavowed controversial aspects of his prior truth telling (his hostility to class-action civil rights claims; his hostility to race-conscious remedies; his preference for natural-law theories hostile to a woman’s right to choose). Thomas repeatedly denied the relevance of statements made before he became a judge. He said that becoming a judge is “an amazing process. You want to be stripped down like a runner” and to “shed the baggage of ideology.” He claimed to have succeeded so well that old friends of Clarence the administrator soon found Clarence the (Court of Appeals) judge a worthless conversationalist. Thomas suggested that judges ought to renounce ideology the better to pursue law as laid down by the language of the Constitution, the Congress, and the Supreme Court’s own prior cases. But has he done this?

Is Thomas Bound by Legal Language?

Are Thomas and the Court, on the evidence of their judicial decisions, bound by the language of the rules laid down by the Constitution, the Congress, and the Supreme Court’s prior cases? The earlier discussion established the legal-theoretical arguments against this idea that law binds judges. This section illustrates law’s unbindingness by reference to the Supreme Court’s actual case law.

The idea that legal language binds judges is often advanced as the best insurance against an unelected Court tyrannizing the country. Yet an ostensible allegiance to language can actually be a useful tool in a judge’s hands and can be used in a manner contrary to majority sentiment. The case of *Conroy v. Aniskoff* illustrates this. *Conroy* concerned interpretation of the language of the Soldiers’ and Sailors’ Civil Relief Act. That legislation ensures that (e.g.) a soldier’s house is not sold away from under her should she fail
to make mortgage payments while she is away fighting for her country. Conroy failed to pay real estate taxes and the city sold his house. He sued the city and the new owners of the house, relying on the Act’s provision that the “period of military service” should be excluded from a time lapse the city had to observe before it could validly take the house. Conroy had not, however, been in a faraway land serving his country. He’d been around and just had not paid his taxes. Could he get the benefit of the Relief Act? Or was that law limited to those who had suffered actual hardship because of military service? Thomas and the Supreme Court concluded that Conroy could get the benefit because the “statutory command” was “unambiguous, unequivocal, and unlimited.” Such confident assertions might lead casual observers to believe that the Court has just provided an example of the stable practice of adjudication that the competent lawyer might master through strenuous study. Closer examination suggests otherwise. The trial court earlier dismissed the result the Supreme Court reached, saying it was “absurd and illogical” to give Conroy the benefit of the Relief Act. Maine’s highest court, itself bitterly divided, upheld that lower court result—that Conroy was not entitled to the benefit. The Supreme Court was, thus, the first court to hold otherwise.

There is a sense in which one might say that the divergent legal results reached by the state courts and the Supreme Court in Conroy were predictable: state courts might be thought to favor their own state taxing authority, whereas the Supreme Court might be thought more impartial. Yet this is itself not a special legal explanation, just a plainly political one. Moreover, the Supreme Court’s “impartiality” might easily be redescribed as Reagan-era antitax ideology. The factors in play are thus not peculiarly legal. The “plain-language” analysis in Conroy was thus the site of a political battle, not a means of escape from politics.

Moreover, Scalia’s separate concurring opinion demonstrates that a strict judicial allegiance to language can be a useful tool in resisting legislative will. Scalia advocated confining the Court’s attention to the “law as it is passed.” Yet, whatever the basis of Scalia’s allegiance to plain language in Conroy, it was clearly not a desire to keep the Court in its place and to uphold the will of the elected legislature. Scalia: “The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.” This is a useful doctrine for a judge who dislikes the prevailing congressional power balance. Scalia’s putsch seems to have alarmed most members of the majority. Stevens wrote that Scalia was apparently willing
to assume that the Supreme Court has “a duty to enforce the statute as written even if fully convinced that every member of the enacting Congress, as well as the President who signed the Act, intended a different result. . . . We disagree.”

It is thus difficult to argue that confining judges to statutory language is a surefire way to safeguard majoritarian democracy. Justice Thomas joined in all of the Stevens opinion, except the above-quoted language in which the majority took issue with Scalia. Moreover, in an opinion he wrote on the court of appeals, before ascending to the Supreme Court, Thomas showed a similar distaste for deference to the legislature, suggesting that such deference might render judicial review “an elaborate farce.” Before that, at the EEOC, Thomas emphasized the importance of sticking to one’s ideals and being “defiant in the face of [the] petty despots in Congress.” He repeatedly praised Oliver North for showing that Congress was “fake” and “out of control.” Conversely, during Thomas’s tenure at the EEOC, congressional committees repeatedly clashed with Thomas over his neglect of complaints filed under his tenure (thousands of age-discrimination claims simply lapsed), and for a variety of other transgressions. In 1989, no fewer than fourteen chairpersons of House subcommittees cosigned a letter condemning Thomas’s “overall disdain for the rule of law.”

Justice Thomas’s allegiance to statutory language as opposed to legislative history and congressional intent is perhaps not democracy’s best bet.

Justice Thomas’s Failed Flight from “Policymaking”

Unwilling to defer to the legislature, Thomas and Scalia also—paradoxically—claim to oppose judicial policymaking. (As previously argued, avoidance of policymaking is impossible for a judge.) In Rowland v. California Men’s Colony, for instance, the question before the Court was whether certain benefits (waivers of court fee and prepayment obligations, etc.) granted to impoverished individual litigants extended to impoverished organizational litigants. The Court’s majority concluded that the benefits did not extend to organizational litigants. Thomas, dissenting, argued that the benefits did so extend, and not because the result was a desirable policy outcome (he apparently thought the opposite), but because the result was dictated by plain language of the statute: “Congress has spoken, and we should give effect to its words.” The fact that parsing Congress’s language had split the Court five to four did not give Thomas pause.
Thomas objected that the majority, in reaching its decision, polluted what should be a pure language-parsing exercise with unnecessary and improper references to legislative history and policy reasoning. He rejected the reasoning that had moved the majority because that reasoning reflected "classic policy considerations—the concerns of a legislature, not a court." In fact, Thomas throughout apparently assumed that the conclusion he was "forced" by plain language to reach was an undesirable policy outcome. He speculated that "while it might make sense as a matter of policy to exclude associations and other artificial entities from the benefits of the in forma pauperis statute, I do not believe that Congress has done so."

Thomas's flight from policy moved Justice Kennedy (who, like Thomas, dissented from the result of the case) to write a separate opinion. Justice Kennedy emphasized that the majority's attempt to "uncover significant practical barriers to including artificial entities within [the benefits in question] is quite appropriate and ought not to be condemned as policymaking." For Kennedy, the problem was that the Court had failed to show that extension of the benefits in question was in fact unworkable. Kennedy's opinion clarifies that what was at stake in the case was not whether to undertake or to avoid policymaking, but rather which policy to make.

We are thus left with a paradox that illustrates an important problem. Thomas reached a result consonant with progressive policy, not because he thought it was good policy—he appeared to think it was bad policy—but because he claimed that it was compelled by plain language. The fact that Thomas thought that extending poverty benefits to inmates pressing a civil rights claim was bad policy is itself a paradox, given his espoused concerns. Moreover, while Thomas announced himself forced by language to reach this result notwithstanding his own personal and policy opposition to it, all judges inevitably make policy. No judges don't make policy. And Supreme Court justices make more policy than most.

A "Lexicon of Death."

Matters as serious as the fate of criminal defendants frequently hinge on word games. In *Smith v. U.S.* the Court faced the question of whether the reference to "use" of a firearm in federal sentencing guidelines required enhancement of a convicted felon's sentence where a gun was offered as payment for drugs. The felon had bought drugs from an undercover officer, tendering the gun in payment. To "use" a gun is, one may think, to menace
or to wound rather than to tender as payment. Yet this view was corralled into the dissenting opinion. O’Connor’s majority opinion conceded that the natural or plain meaning was to menace or wound, but denied that that meaning “excludes any other use.” O’Connor thus implicitly argued that the Court has the discretion to apply any meaning of a word not positively excluded by a statute (how a legislature is to exclude all imaginable meanings is not explained). 16

Again, in Arave v. Creech, a death-penalty case, Justice Blackmun made the point that language games ought not to become an end in themselves but should always be a means towards a right result. He remarked that it was weird to make a person’s life hinge on a dictionary: that there was “something absurd in the very project of parsing this lexicon of death.” But, he added, “as long as we are in the death business, we shall be in the parsing business.” 17 Thomas did not vote with Blackmun against death (the substance of Thomas’s death penalty jurisprudence is treated at length below).

While the foregoing discussion ought to fray the false distinction between unfettered subjectivity and disciplined rule application, Thomas and Scalia continue to rely heavily on this distinction. While others apparently impose their ungarished policy views, Scalia and Thomas claim to enforce the Word. They call a decision with which they disagree “wildly delirious” and beyond the imaginable. With zeal, they insist that their view of the Word is the only truth:

In the end nothing but personal intuition supports the dissent’s contention that the statute is [what they say it is]. . . . Like most intuitions, it finds Congress to have intended what the intuitor thinks Congress ought to intend. . . . Once text is abandoned, one intuition will serve as well as the other. We choose to follow the language of the statute. 18 (Emphasis added)

This passage is a replay of the Ronald Dworkin’s legal theory: the supposed evil of unfettered discretion is, for Thomas and Scalia, solved by the supposed constraints of language. Yet their claim that they follow language does not generate any effectual constraints. Dworkin’s theory merely furnishes a language for Thomas’s self-righteousness.

When’s an Old Rule New?

A final good example of the unbindingness of legal rules is the harshly criticized decision of Teague v. Lane. 19 The Teague rule holds that a person applying for habeas corpus relief must do so on the basis of the law at the
time of her trial. If the basis for the petition is a “new rule”—one that arose after a petitioner’s conviction and sentencing—the petitioner’s challenge will fail.

The Court, in *Teague*, has set itself a range of wonderful tasks. First, the Court must decide what the rule at the time of the trial was. Then it must decide whether a claim asserted by a petitioner can be said to be based on the law as it was at the time of the trial, or whether it is instead based on a “new” rule—which is in turn to be distinguished from a mere extension of an old rule. Finally, the Court must determine whether, even if its own view of what the old rule was is different from the version of the old rule enforced by the lower court, that lower court conclusion ought nevertheless to be respected as within the reasonable range of interpretation of the old law.

It should come as no surprise that Thomas and his colleagues have been able to pursue an untrammled counterprogressive agenda with *Teague*’s rhetoric. In *Gilmore v. Taylor* a petitioner who had been convicted of murder sought the benefit of a rule established in a case called *Falconer v. Lane*. That rule required that a jury expressly be told that it could not return a murder conviction if it found that the defendant possessed a mitigating mental state. The jury instruction under which Taylor was convicted clearly did not meet this standard and was therefore, by this standard, unconstitutional. But the *Falconer* case, establishing this standard, was decided after Gilmore’s conviction and sentencing (though while his appeal was pending). The question was therefore whether the *Falconer* rule, on which Taylor sought to rely, was “new” or not. If it was new, Taylor’s attempted reliance would fail.

The *Falconer* case announced itself as relying on the Supreme Court case of *Cupp v. Naughten*, a case that clearly preceded Gilmore’s own and so might seem an old rule, not new. The Court thus had to decide whether *Falconer* was “compelled” by the previous case of *Cupp* or was, rather, a new rule. The district court held that *Falconer* was new, not compelled by *Cupp*. The Court of Appeals reversed, concluding that *Falconer* was actually old, not new. Yet the Court of Appeals did not agree that *Falconer* was compelled by *Cupp*, since *Cupp* was “too general” to have compelled the *Falconer* result. Rather, the Court of Appeals found that *Falconer* was compelled by entirely different old cases: *Boyle v. California* and *Connecticut v. Johnson*.

The Supreme Court then tried its hand. Rehnquist, writing for Thomas, Scalia, and Kennedy, agreed with the Court of Appeals that *Cupp* was an “unlikely progenitor” of the *Falconer* rule. Did Rehnquist and Thomas then
agree with the Court of Appeals that the Boyd and Johnson cases compelled the result? Nope. The Court of Appeals, too, had gone astray. The cases it cited did not compel the Falconer rule. Falconer was clearly new and compelled by none of the three cases that two courts below held compelled the result.

The dissenters sensibly avoided unbinding wrangling over whether Falconer was really a new rule. Instead, they said that even assuming, for the sake of argument, that the rule was new, it was nevertheless within an exception to the Teague rule. Under Teague the petitioner may have the benefit even of a new rule, if the rule is of a special sort: if it either decriminalizes a class of conduct or is a “watershed rule of criminal procedure implicating the fundamental accuracy and fairness of the criminal proceeding.” The dissenters concluded that Taylor’s case was within the second exception.

This exception clearly lacks that crisp, binding bite that legal rules are supposed to have. In rejecting this exception Thomas and Rehnquist simply announced that misleading jury instructions were not within the small core of cases that were within the exception. They simply asserted that the exception is a narrow one. Yet, their assertion is not the result of the inner nature of the rule. It follows from nothing other than their ideological preconceptions.

The dissenters, Blackmun and Stevens, read the exception as clearly applicable and laid out cogent reasons why it was so applicable. Yet their opinion ultimately also hinged not on the inherent inner nature of the rule but, rather, on their own ideological conclusion that “the principle that [Taylor] asserts is a fundamental one.” The question of what is “fundamental” and what is not is patently a matter of straightforward moral reasoning and ideology. That process—not the competent divination of a thing called law—is what is unfolding in this decision, as the following battle confirms.

Justice BLACKMUN in dissent would elevate the instructional defect contained in the Illinois pattern jury instructions on murder and voluntary manslaughter not merely to the level of a federal constitutional violation, but to one that is so fundamental as to come within Teague’s second exception. He reaches this result by combining several different constitutional principles—the prohibition against ex post facto laws, the right to a fair trial, and the right to remain silent—into an unrecognizable constitutional stew.

Thomas and Rehnquist here adopt the posture that their ideological notion of the true nature of the rule is the only possible one. The dissenters join battle with the following offering:
The Court's [comment last-cited] ... added by THE CHIEF JUSTICE after the dissenting opinion circulated, hardly deserves acknowledgment, let alone comment. I had thought that this was a court of justice and that a criminal defendant in this country could expect to receive a genuine analysis of the constitutional issues in his case rather than the conclusory rhetoric with which Kevin Taylor is here treated. I adhere to my derided "constitutional stew."

On the most austere and magisterial judicial tribunal in the country, controversial "legal" decisions are generally little more than overt clashes over questions of value. Blackmun and Stevens lost the Taylor case not because they parsed a legal problem incorrectly but simply because they were outnumbered by ideological opponents.

**Thomas Choosing Cases—and Choosing Sides**

Every day, everywhere, people in community organizations, or on city councils, boards of directors, and councils of elders set agendas. They discuss the things they think are important or require urgent action; they ignore other stuff. They face up to the scarcity of time and resources. The Supreme Court of the United States does this too, mostly through a device called certiorari. The other way to get a case before the Court is by the "obligatory appeal" jurisdiction whereunder the Court theoretically has no choice but to take the case. But courts generally, and the Supreme Court in particular, never really have no choice and it is entirely uncontroversial that the only meaningful path to Supreme Court review of federal and state court decisions is certiorari. If the Court agrees to hear a case, it grants certiorari; if it refuses, certiorari is denied. The denial of certiorari is not, in theory, an endorsement of the lower court's decision. Yet, law happens. If the Supreme Court declines to review—potentially to disturb—the lower court's determination, that lower judge's word is final and settles what "law" is for the parties in that case and, possibly, for future parties with analogous disputes.

Supreme Court certiorari decisions are thus a very important part of its law-making function. The maneuvering that surrounds the granting or denial of certiorari in the thousands of cases the Court might possibly hear is probably at least as important as the coalition building that occurs in the much smaller number of cases the Court actually reviews every year. If it is, for instance, clear that the presiding members of the Court are likely to overturn or restrictively interpret *Roe v. Wade* if a relevant case comes before the Court, a prochoice justice's best option may be to prevent such a case
from reaching the Court’s docket. If she can persuade three other members to go along, the danger of overturning Roe might be averted. Conversely, when Thomas voted against the Court’s dissenting conservatives and instead joined the Court’s centrist majority to deny certiorari in the 1992 Guam abortion case, it was apparently to avoid what he saw as a likely reaffirmation of Roe (after the majority upheld Roe in Casey, Thomas knew how the vote on the merits would go).24

In this way, battles over certiorari resemble congressional filibusters. Whereas it takes fifty votes to carry the Senate, only forty are needed to maintain a filibuster. Similarly, it takes five votes to carry the Supreme Court but only four to deny certiorari. Moreover, just as a Senate filibuster can alter substantive outcomes by allowing time for political coalitions to shift or for scandals to break, the Court’s denial of certiorari can allow time for a shift of Court personnel (Thurgood Marshall out, Clarence Thomas in) that might significantly alter the outcome of a case.

Like other “legal” questions, certiorari is “governed” by a rule—in this case, Supreme Court Rule 10.1 (henceforth, Rule Ten Point One). Once this rule is unveiled, members of community organizations, city councils, boards of directors, councils of elders, comfortable with the straightforward agenda-setting exercise previously described, will be tempted to run for cover. Rule Ten Point One seems beyond the layperson’s competence. The truth is, it seems, really to be found in a remote text called the United States Code, Annotated. But wait. It turns out that Rule Ten Point One says certiorari is “a matter of judicial discretion, and will be granted only when there are special and important reasons therefore.” Then follows a list of three considerations (conflicts among federal courts of appeals; conflicts among states’ highest courts; issue of such importance that the Supreme Court ought to speak on it) that, “while neither controlling nor fully measuring the Court’s discretion, indicate the character of reasons that will be considered.” This is hardly the crisp, clear, binding guidance that intimidated laypersons imagine Rule Ten Point One to provide. It turns out that, by law, discretion is the heart of certiorari. The Court, like the rest of us, just does what seems to need doing.

The certiorari application of Haitian Refugee Center, Inc. v. James Baker, III25 arose because people fleeing tyranny in small boats inconveniently headed for America’s shores. The Bush administration argued that the refugees were faking it and decided to send them back. A dazzling legal battle ensued on two fronts—one in Florida, the other in New York. The Supreme Court refused to hear the Florida case; it took the New York case and reached a
result deferential to President Clinton (who, abandoning campaign pledges, cloned Bush’s policy and legal arguments). Heated dissents and conflicting decisions proliferated. The federal court of appeals in the New York case expressly disagreed with the federal court of appeals in the Florida case and openly hoped that this would make the Supreme Court see fit to grant certiorari in the New York case in contrast to its denial of certiorari in the Florida case.26

In denying the Baker certiorari application (the Florida case), Justice Thomas announced that “under the standards this court has traditionally employed, cf. S. Ct. Rule 10-1, the petition should be denied.” And far from expressing indifference to the plight of the Haitians, Thomas declared that he was “deeply concerned” about the treatment allegedly suffered by the returnees. Thomas’s stated reason for denying the Haitians relief was not that he didn’t care, but that he was bound by something called law.

Yet of all the rules that might conceivably be said to bind a judge, Rule Ten Point One, expressly preserving the judge’s discretion, is an unlikely candidate. Justice Blackmun, dissenting, experienced no such constraint. What went on here became clear as Thomas provided a second, different legal rationale for his denial of certiorari. He wrote that despite his own deep concern for Haitian well-being, “this matter must be addressed by the political branches, for our role is limited to questions of law.” This is the “political-question” doctrine, the argument that the Supreme Court, and courts in general, ought to eschew issues that are better decided by the nonjudicial branches and instead confine themselves to questions of law. This doctrine is extremely controversial and widely discussed in the legal community. It has been widely criticized, even ridiculed, for resting on a mythical separation of politics from law. Against a backdrop of such academic and professional controversy, the political-question doctrine is, within the legal community, hardly the type of legal principle that commands unthinking allegiance. If the doctrine is employed in the foreign relations context, it is employed with an awareness of its tendency to exalt executive prerogative above competing values (such as the well-being of Haitian refugees). Thomas’s resort to the doctrine is, thus, not driven by impartial legal analysis, by a constraint called law, or by concern for the Haitians. The conflicting value of executive prerogative is the only persuasive explanation of the case. The paradox is now clear: How is Thomas’s deference to the executive branch, to George Bush, consistent with his expressed concern for the Haitians?

The very existence of Justice Blackmun’s dissent is significant in assessing
Thomas’s decision. Even on the unlikely assumption that Thomas’s resort to Rule Ten Point One, and his invocation of the political-question doctrine, were the result of his best efforts to find a legal argument that would help the Haitians, why didn’t he simply, having failed to find good arguments, sign on to Blackmun’s dissent? Blackmun’s dissent is hardly outrageous, incompetent, or bizarre. Indeed, the legal community would probably be more surprised by Thomas’s failure to see how closely the Haitian refugee case matched the relevant criteria in certiorari cases—the criteria of divergent federal decisions in lower courts. Thus, whatever reasons Thomas has for rebuffing the Haitians, he does not have the excuse that law forced him to do it. The straightforwardness of the issue at stake is very clear in Justice Blackmun’s dissent:

A quick glance at this Court’s docket reveals not only that we have room to consider these issues, but that they are at least as significant as any we have chosen to review today. If indeed the Haitians are to be returned to an uncertain future in their strife-torn homeland, that ruling should come from this Court, after full and fair consideration of the merits of their claims.

The presence of such dissenting opinions will be a recurring problem for Thomas as this survey of his decisionmaking continues. Wherever there is a dissent that would avoid a result he laments, and he yet fails to vote with that dissent, he will find it difficult to explain his judicial decisionmaking in terms that keep him aboard the progressive project of which he wants to be part.

In the subsequent case of Chris Sale v. Haitian Centers Council, the Court granted certiorari because of the sudden “manifest importance of the case” and frontally faced the political-question doctrine. The Court overturned the New York federal court’s decision in favor of the Haitians. The “legal” questions at issue were no more binding than such language-parsing exercises ever are. The details of the Court’s analysis revolved around various questions of statutory, treaty, and case-law interpretation. There was a tremendous variety of opinion, at every level, among the courts that spoke on these issues (district court reversed in part by circuit court, itself reversed by Supreme Court). To parse those issues would be to replay the earlier discussion of whether legal language binds judges. In this setting, all that separated the Supreme Court’s view of “the” law from the contrary view reached by competent lower courts was the Supreme Court’s relative indulgence of claims of executive prerogative. Thomas and a majority of the current members of the Supreme Court took sides in a controversial political
argument over the scope of executive power. And despite Thomas's claim that he had somehow shed ideological baggage upon becoming a judge, he has long believed that the executive should exercise increased power in foreign affairs and beyond. In 1988, when Thomas was still at the EEOC, his speeches argued that Congress exercised "little deliberation and even less wisdom" in its affairs, and he lamented that "in many areas of public policy, including foreign policy-making, members of Congress can thwart or substitute their will for that of the executive." In 1988, a Thomas article also castigated the Supreme Court for pursuing a "voodoo jurisprudence" that had given the Court inordinate power "over the last 50 or so years." Only Oliver North, in Thomas's view, had stayed within constitutional bounds. In the aftermath of the 1987 Iran-Contra Senate hearings, Thomas suggested that North's attack on the Senate had furthered the cause of "limited government." 28

Such dizzying stuff was also at work in Chris Sales. President Bush's executive order, a central source of the alleged legal authority to send Haitians home, specifically stated that it was "intended only to improve the internal management of the Executive Branch." Yet the Court went out of its way to confer upon this housekeeping measure the controversial and arguably nonexistent plenary authority that some say the executive has in foreign affairs. Justice Blackmun, dissenter on the certiorari question in Baker, was again unsettled: "What is extraordinary in this case is that the executive, in disregard of the law, would take to the seas to intercept fleeing refugees and force them back to their persecutors—and that the Court would strain to sanction that conduct."

Conversely, the majority, including Thomas, found itself "bound" by law and unable to respond to what they conceded was a compelling human crisis. As in Thomas's opinion in the Baker certiorari decision, the majority here was both deeply concerned and ostensibly unable to help. Yet their failure to help was, whatever the reason, not dictated by a thing called law. Justice Blackmun pointed out that a legal ban on returning the Haitians was "easily applicable here, the Court's protestations of impotence and regret notwithstanding." And it was, in the words of the majority opinion that Thomas signed, an "uncontested finding of fact" that "since the military coup hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding."

Placing Thomas's espoused concern for Haitian well-being alongside his
voluntary elevation of executive prerogative, it is easy to argue that he betrayed the Haitians, choosing executive privilege over Haitian welfare. But this tempting accusation of treachery is unnecessary for a devastating moral critique. Even if one declines to question Thomas’s good faith, the conclusion can hardly be less scathing. One must then believe that Thomas really mistook the controversial “political-question” doctrine for settled law, binding on him, in a case where the president announced the disputed measure as a housekeeping regulation, not one of foreign affairs, and where there was a powerful dissent. Whether under the rubric of betrayal or of incompetence, Thomas is morally culpable.

Reapportionment

Having rejected the hopelessly political subject of refugee rights, Justice Thomas turned to the wholly apolitical task of invalidating electoral districts. The Supreme Court, in *Baker v. Carr*, long ago rejected arguments that redistricting raises nonjusticiiable political questions. The Court reviews these issues under the mandate and the framework established by the Voting Rights Act of 1965 (as amended in 1982). These reapportionment cases raise complex issues with no simple answers. Racial politics (whites versus blacks) has interacted with party politics (Republicans versus Democrats), creating unholy alliances and unsettling even the most agile analyses.

On June 28, 1993, Justice O’Connor, writing for Thomas and the majority in the controversial North Carolina reapportionment case of *Shaw v. Reno*, concluded that “racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions.” The redistricting plan in *Shaw* had, as noted in the dissent, placed black North Carolinian representatives in Congress for the first time since Reconstruction. In that setting, Thomas’s unprecedented discovery (following O’Connor) of equal-protection obstacles to the plan was particularly striking. The Court found that five white North Carolina voters who alleged a constitutional right to participate in a color-blind electoral process had stated a cognizable equal-protection claim because the challenged district was “so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for the purpose of voting, without regard for traditional districting principles and without sufficiently compelling justification.”

The dissenters emphasized the novelty of this equal-protection claim. O’Connor and Thomas were in no credible position to deny that the claim
was novel. Less than four months earlier, O’Connor had wondered aloud how an equal-protection claim might be evaluated. Thus, whatever reasons Thomas may offer for following O’Connor in her analysis of the North Carolina case, he cannot claim to have been bound by law. *Shaw v. Reno* was, in crucial respects, a case of first impression, where the Court must wrestle with issues that have not previously received significant treatment. In such cases the judge’s ability to do what seems best is acknowledged to be very broad. Moreover, it could be argued (as the dissent did) that the case was not at all one of first impression: that since the Voting Rights Act is intended to advance black political participation, the North Carolina plan, furthering that aim, was valid. Ultimately Thomas’s “neutral” equal-protection objection to the plan elevated two cosmetic claims above an actual enhancement of black representation in Congress. Thomas endorsed O’Connor’s distaste for odd shapes on electoral maps, as well as her independent distaste for race consciousness in American life.

Earlier cases invalidating boundaries of “uncouth shape” were motivated by a desire to prevent dilution of African American voters by white-dominated legislatures. They were not driven by an abstract aesthetic distaste for oddly shaped districts. For O’Connor, in contrast, odd shape became the legal issue. Justice O’Connor actually cited the *Wall Street Journal’s* complaint that the district resembled a “bug splattered on a windshield.” O’Connor (Thomas concurring) stated bluntly that “reapportionment is one area in which appearances do matter.” It was now not the disenfranchisement of blacks that mattered, but simply the irregular shape of the district itself.

Thomas faces an uphill battle in showing how the elevation of aesthetics above political representation advances the progressive ends he endorses in theory. Thomas’s probable explanation is not hard to imagine. While he was at the EEOC, Thomas lamented in 1988 that “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.” Consistent with his pre-judicial ideology, and notwithstanding confirmation-hearing assurances that he had shed such baggage, Thomas agreed with O’Connor that the challenged district in *Shaw* would reinforce

the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. [In the political context, by perpetuating such notions], a racial gerrymander [*sic*] may exacer-
bate the very patterns of racial block voting that majority-minority districting is sometimes said to counteract.

Thomas and O’Connor here assume that sharing political interests and acting on them certainly reflects a stereotype rather than the truth. They apparently assume that choosing among three or four candidates in an election is an exercise in nuanced self-expression rather than in rough-and-tumble self-preservation. “Racial block voting” itself suddenly becomes the enemy. Yet the symmetrical assumption that if white block voting is bad, black block voting is also bad, ignores both America’s history and the remedial purpose of the Voting Rights Act. It is what Stanley Fish has called a simplistic “moral algebra.” If one consults history rather than geometry, it turns out that American whites have not been a discrete and insular minority facing permanent political irrelevance because of the block-voting patterns of America’s black majority. Symmetrical application of the Voting Rights Act, to whites and blacks alike, makes as much sense as inflicting criminal sanctions, symmetrically, on the mugger and the mugged.

Unhappy Truth

Thomas thinks that the law in general and the Constitution in particular were not intended to solve all of society’s ills. This ideology is the basis of Thomas’s frequent alliances with Justice Antonin Scalia. In a widely criticized death-penalty case in January 1993, Thomas joined Scalia’s view that it is simply an “unhappy truth that not every problem was meant to be solved by the United States Constitution, nor can be.”33 In making this observation Scalia and Thomas cited a law review article, sarcastically entitled “Our Perfect Constitution,” by a Boston University law professor (henceforth, the Boston Scholar) who belongs to the original-intent school of constitutional interpretation. That article argues that most constitutional scholars unjustifiably stretch the actual “constitutional text” and the “structure it creates” beyond all recognition, preferring to give the true text twisted readings consistent with the commentator’s mere “principles of political morality.” The Boston Scholar urges his audience to discard its wishful perfectionism and instead face the fact that America just does not after all have a perfect Constitution. In a concluding section entitled “Our ‘Imperfect’ Constitution” the Boston Scholar asserts that “in its historical setting, the original document was remarkably democratic.” This is a problematic assertion given widely known facts. The document, far from dismantling slavery, arranged matters on the
assumption of its continued existence. It thus countenanced a perverted, not remarkably democratic, idea of representation. Clarence Thomas himself concedes that the original document “was tainted by a deeply rooted history of prejudice.”

It is, then, hardly overexact or perfectionist to leave the literal text of the document behind (assuming the impossible: that we could agree on a shared interpretation of it). Original-intent lawyers indeed generally concede that the document is, in some degree, an evolving one. Few of today’s originalists would, for instance, abolish the female franchise. But the Boston originalist puts a different twist on such concessions. He argues that the warts in the original document support the view that the Constitution is not perfect in the sense of guaranteeing a society consistent with prevailing conceptions of justice (then or now). The Bostonian has thus slid from the truism that the original text countenanced injustice, through the tendentious observation that the text was nevertheless somehow a remarkably democratic document, to the conclusion that the original presence of glaring injustice excuses today’s own glaring injustices—or at least makes them the concern of something other than the Constitution. He continues:

The constitution has very few ideas to contribute to the social equality, privacy and autonomy claims now pressed by perfectionist commentators. The ideology contained in the constitution is significantly less embracing in scope than the ideology of the American way of life at the end of the twentieth century. It is, therefore, fundamentally wrong to believe that one can ascertain the meaning of the constitution by asking: “Is this what America stands for?”

This is a lawyer’s version of Julien Benda’s article of faith: that inequality is an inevitable reality. If inequity is to go away, it is to do so through some other means. Yet this truth about the Constitution is not objective. It is ideological, and the Boston Scholar concedes as much: “To be sure, the Constitution embodies an ideology, but it is a limited one.”

The question of whether the Constitution countenances what we agree to be serious injustice cannot be solved by investigation, or by simple assertions that the document somehow “contains” tough ideology. The question is solved, rather, when we choose values. Thomas’s commitments to racial (and other) justice would suggest that, all things being equal, he ought to endorse the ideology that advances those commitments. Yet Thomas’s judicial decisionmaking instead reflects the hostile antiprogressive truths of the Boston Scholar.

Thomas is forever objecting to the use of the Constitution to “transform”
the courts into boards of supervisors of various sorts. In *Doggett v. United States*, he objected to “turning the courts into boards of law enforcement supervision.” In *Georgia v. McCollum*, Thomas objected to the “use of the constitution to regulate peremptory challenges” in criminal cases. In *Riggins v. Nevada*, he wrote that if a criminal defendant was forced to take medication against his will, that was a matter for some civil or other proceeding; it neither raised constitutional issues nor invalidated the defendant’s conviction. In *Wright v. West*, Thomas argued for deferential review of state court determinations. In *Hudson v. McMillian*, he protested the “pervasive view” that the Constitution addresses all ills. More of the same in *Helling v. McKinney*. And, despite his claim that, as a judge, he had somehow stripped away the baggage of ideology, Thomas’s view in these cases predates his becoming a judge. While at the EEOC Thomas objected, in 1988, that “the Supreme Court has used [the Constitution] to make itself the national school board, parole board, health commission and elections commission, among other titles.”

Thomas, on and off the Supreme Court, has lost sight of (or ignored) the possibility that, as a Supreme Court justice or as chief EEOC administrator, he is not merely dispensing parental platitudes. It is his job to pronounce on whether it is, as the Boston Scholar urges, fundamentally wrong to ascertain the meaning of the Constitution by asking, Is this what America stands for? Moreover, the Boston Scholar’s view is, it turns out, not widely held among legal scholars. The Bostonian openly rails against the legal academic consensus. Original intent is, it turns out, an eccentric constitutional theory nowadays. Yet Thomas and Scalia present it as truth in actual Supreme Court cases, wherein life is often literally at stake.

This is an important point because, although he frequently votes with the Court’s conservative wing, Thomas’s allegiance to racial justice puts an unusual spin on his adherence to original intent. If the unhappy truth of original intent is not objective truth—indeed, not even conventional wisdom within the legal community—Thomas has a problem. He faces an uphill battle explaining his vigorous allegiance to a beleaguered constitutional theory. Either the unpopular theory of original intent represents objective truth that Thomas just literally cannot avoid, or Thomas has been duped into thinking it does. If Thomas believes original intent represents objective truth, he has dropped the ball by failing to exploit the progressive possibilities opened up by contemporary skepticism about claims of objective truth. If
Thomas has been duped into this belief, he has dropped the ball in an even more obvious sense.

If, conversely, Thomas knows that original intent is not objective truth, and he has not simply been duped, then he must think that the outcomes generated by his chosen theory of original intent are themselves a benefit. However, neither Thomas nor Scalia nor their Boston Scholar even hazard the view that original intent generates preferable policy outcomes. They concede exactly the opposite. Original intent and the imperfect Constitution are, in their own words, unhappy truths. They’d love to help. Just can’t. Hands tied. By “law.”

Muddled Partisanship

Thomas’s tied hands are problematic because often he is clearly attempting to pursue some version of racial justice. He goes wrong in ways that are more complex than would flow from a single-minded and consistent hostility to African America. The cases grouped in this section will address Thomas’s halting attempts to pursue the aims of racial justice within the ideological binds with which he fetters himself.

Most sensational is the Aryan Brotherhood case, *Dawson v. Delaware.* There the Court, led by Chief Justice Rehnquist, forbade admitting into evidence, at a criminal trial, a stipulation of a defendant’s membership in a white racist prison gang. Rehnquist held that the stipulation was not relevant to the defendant’s sentencing and should have been excluded from the trial. Rehnquist adopted a First Amendment argument—a novelty in this context—and held that as the stipulation merely disclosed abstract beliefs, it was not relevant to criminal sentencing since sentencing was properly confined to the defendant’s conduct. Rehnquist also denied that Aryan Brotherhood membership was “bad character” evidence in its own right. The *Dawson* majority’s decision gives new force to the view that the First Amendment has today become the First Refuge of Scoundrels.

Thomas dissented. First, he argued that since jurors don’t “leave their knowledge of the real world behind them,” they can themselves weigh the importance of Aryan Brotherhood affiliations—at least as easily as they can weigh the more charming affiliations (family ties, etc.) that the defendant had adduced to mitigate his sentence. Second, Thomas challenged the core idea of Rehnquist’s novel free-speech argument. Thomas argued that abstract
beliefs themselves could be relevant to the character inquiry in sentencing decisions; that racist beliefs themselves were probative of character; that the First Amendment had never previously been read to limit the scope of the character inquiry in penal sentencing; and that it was strange that the First Amendment should suddenly apply where racism was the character evidence in question. (Scalia did not join Thomas’s dissent but rather joined Rehnquist’s opinion in its entirety.)

Underlying Thomas’s disagreement with Rehnquist was the chameleonic manner in which free-speech analysis responds to the individual judge’s view of the values that are set up in opposition to the First Amendment. Rehnquist, Thomas implicitly argued, just didn’t think racist beliefs in themselves enough to enhance a criminal’s sentence. Thomas, placing a higher value on racial justice, disagreed. Yet when a white youngster burned a cross, Klan style, on a black family’s lawn in Minnesota, Thomas’s reckoning of the balance between “free speech” and racism changed. In that case, R.A.V. v. City of St. Paul, Minnesota’s highest court had upheld a hate-speech law as reflecting that state’s aversion to messages “based on virulent notions of racial supremacy.” And the Supreme Court, Thomas concurring, knocked it down.

Thomas’s conclusion in R.A.V. does not sit well with his arguments in Dawson. In Dawson, where Rehnquist required conduct, not mere gang membership, before “free speech” was overridden, Thomas was mystified. In Dawson, Thomas thought it absurd not to infer illicit conduct from gang membership. Conversely, in R.A.V. there was actual and overt conduct—cross burning—yet the guy who burned the cross escaped enhanced punishment. In Dawson, Thomas argued that racist ideology was, worse than valueless, positively evil: it was a reason to enhance a criminal’s sentence. One might, then, think that Thomas would agree with Justice Blackmun in R.A.V., who saw “no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but [who saw] great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community.”

Actually, Thomas took the opposite view, that the cross burning was worthy of constitutional protection. Thomas agreed with Scalia’s argument that the cases mentioned by the dissenters, in support of the Minnesota statute, didn’t mean what they said (were not “literally true”).

Conversely, the Scalia opinion was, in the dissenting Justice White’s
words, “an arid, doctrinaire interpretation [that is] mischievous at best and will surely confuse the lower courts.” The Scalia opinion, joined by Thomas, “casts aside long-established First Amendment doctrine without the benefit of briefing and adopts an untried theory,” said Justice White. Whatever explanation Thomas may have for his R.A.V. concurrence, it cannot be that he was bound by law. And a reason for Thomas’s discrepant behavior in Dawson as compared with his decision in R.A.V. is not difficult to uncover. The campaign against “political correctness,” the campaign to protect race baiters, was not a factor in Dawson. Thomas’s view in Dawson would have enhanced a prisoner’s sentence and so would have straightforwardly accorded with law-and-order ideology. In R.A.V., there was an additional issue: law-and-order concerns were complicated by concerns over whether to enable communities to address the harms inflicted by race baiters. Thomas thus faces another uphill battle in explaining how joining the anti-p.c. bandwagon in R.A.V. advanced racial justice. In contrast, in a subsequent case not involving a hate-speech statute, but rather a statute enhancing a felon’s sentence if he or she intentionally selected a victim on the basis of race, Thomas had no problem voting with a unanimous Court that the penalty enhancement was valid. In this case, Wisconsin v. Mitchell, Mitchell, the defendant, was black.

In summary, Thomas’s racial-justice partisanship in Dawson, appearing to suggest that racial animus is a distinct harm, quickly became muddled when subjected to the tensions of the anti-p.c. ideology in R.A.V.—then re-emerged, ironically, to the detriment of a black criminal defendant in Mitchell.

A further notable instance in which Thomas was responsible for significant, but again disappointing, infusion of racial-justice insight in Supreme Court deliberations was the case of U.S. v. Fordice. There a unanimous Court held that merely implementing race-neutral university standards did not necessarily fulfill a state’s duty to disestablish its prior segregated system, where the original enactment of those standards was meant to discriminate. Mississippi’s intransigence in dismantling segregation was well documented, and was noted by the Court. The unanimous decision of the Court is therefore relatively unsurprising. Even Justice Scalia, finding it impossible to resist the celebratory rhetoric that fuels the case law under Brown, entered a (tortured and extremely reluctant) concurring opinion.

Thomas’s separate concurring opinion emphasized the race-conscious point that the goal of desegregated education was not the simple elimination of all observed racial imbalance, especially if that would simply mean the
destruction of black colleges. Scalia, in contrast, speculated that the elimination of these colleges “may be good social policy.” Whereas Thomas embraced such colleges, Scalia merely noted that “the present petitioners ... would not agree” that elimination of these colleges was a good idea. Scalia was merely interested in defending the ideological position that few things under the sun are barred by the “imperfect” Constitution—and black colleges are not among the things barred. The contrast with Thomas’s affirmative concern for these colleges illustrates that Thomas is a partisan of racial justice. Yet, even here, Thomas dropped the ball.

The issue that none of the justices faced squarely in *Fordice*, and on which Thomas dropped the ball, was whether there might be a constitutional obligation, given Mississippi’s years of intransigence, to provide *restitutionary funds* to Mississippi’s historically black institutions. The Court’s self-styled centrists might perhaps be expected to recoil at constitutionally mandated funding of what they would see as balkanized higher education. Thomas, part of the antibalkanization crowd in the apportionment cases, momentarily defected in *Fordice*. Thomas invoked W. E. B. Du Bois’s clarion call to “repudiate this unbearable assumption of the right to kill institutions unless they conform to one narrow standard.” One way to kill institutions is to starve them of cash and strip them of functions. The Court found that Mississippi had done exactly that by manipulating the teaching and research functions (or “mission designations?”) allotted to the various state institutions:

The institutional mission designations adopted in 1981 have as their antecedents the policies enacted to perpetuate racial separation during the de jure segregated regime. . . . The inequalities among the institutions largely follow the mission designations, and the mission designations to some degree follow the historical racial assignments. . . . The mission designations had the effect of maintaining the more limited program scope at the historically black universities. (Emphasis added)

Yet remedial funding to rectify the deliberate prior deprivation of black public and private colleges was not even seriously on the Court’s agenda. The majority framed the issue in such a way as wholly to suppress this important remedial aspect of the petitioner’s claim, then icily dismissed it, implying that it was an instance of special pleading: “If we understand private petitioners to press us to order the upgrading of [the historically black colleges] solely so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request.”

In sending the case back to the lower court the majority opinion did,
however, leave open the question of whether “an increase in funding is necessary to achieve a full dismantlement” of segregation under the standards the Court had outlined. The issue of whether an enhanced funding claim could be pressed under the standard of “full dismantlement” thus remained tantalizingly open for the trial phase of the case. Thomas, far from prying this possibility further open in the separate concurrence he took the trouble to write, completely dropped the ball. He chose to address the issue of whether a state is constitutionally required to maintain its black colleges as such. And Thomas’s answer to this question flows inexorably from the familiar unhappy truth about the imperfect Constitution: “A state is not constitutionally required to maintain its historically black institutions as such.” Clarence Thomas, Supreme Court justice, included in his opinion a passionate *exhortation* that black colleges not be eviscerated, but could find no way to translate this eloquence into a legal command. Thomas’s legal decision is thus little more than an appeal to the empathy of the intransigent Mississippi administrators. And empathy is perhaps not a good legal-political strategy, especially in Mississippi.

Thus Thomas, hero of the black colleges, writing a separate concurring opinion for their ostensible benefit, addressing an issue that the Court’s majority left vague and thought should be “carefully explored on remand,” succeeded in conjuring a hostile certainty: he made it look as though the lower court, on remand, could not find a constitutional obligation to leave the black colleges intact. Justice White, by his more vague and cautious language, may well have been gently steering the reviewing court in the opposite direction. White left open the possibility that the lower court, after careful review on remand, validly could find that closing a historically black college as a “solution” to duplicative facilities would be unconstitutional because of the undue dislocation it would cause its ostensible beneficiaries (black students and faculty). Thomas’s would-be helpful concurrence actually clarified Justice White’s artful opinion to the detriment of the black colleges on whose behalf Thomas was apparently moved to write. Thomas dropped the ball because of the unhappy truth that the Constitution does not solve all the ills of historically black colleges.

*Thomas’s Pursuit of Fair Death*

There is more Tough Justice in Thomas’s death penalty jurisprudence. Civil rights activists have long favored abolition of the death penalty, arguing that
it offends humanitarian principles and that the U.S. death penalty regime is not rational, is racially skewed, and is therefore unconstitutional. The late Justice Thurgood Marshall consistently spoke for this view on the Court. In 1976, however, three judges—Justices Stewart, Powell, and Stevens—rejected the view that state-imposed death is inherently unconstitutional, and the Court’s cases in this area continue to occasion some of its most bitter dissents and conflicting opinions.

In this setting—intense controversy over whether and in what circumstances the Court will allow death sentences imposed by states to proceed—Clarence Thomas might have continued Thurgood Marshall’s argument that death is an unconstitutional penalty in all circumstances. But Thomas’s view is different. Like Tough Love lawyer Randall Kennedy, Thomas assumes, without argument, that the death penalty is of benefit to the communities with which he is concerned. Alternatively, Thomas simply assumes that the question, Is death different? is settled law, beyond his power to affect. Finally, Thomas assumes that, even if death is somehow an unduly onerous or unjust punishment, that does not render it unconstitutional since, unhappily, our imperfect Constitution countenances injustice.

Thomas’s racially progressive concern is not to abolish death but to make its implementation racially fair. Numerous commentators, academics, judges, bar associations, public-interest groups, civil rights groups, and congressional committees have become convinced that this is a futile course. In early 1994 Justice Blackmun, who was among the Supreme Court’s upholders of the death regime in the mid-1970s, concluded that he could no longer in good conscience “tinker with the machinery of death” in the ostensible pursuit of fairness. To Thomas these views are all blind orthodoxy. Thomas goes further even than those who think that a discretionary death penalty is useful in extreme cases. In Graham v. Collins, Thomas went out of his way to advocate mandatory death sentences (the issue was, Thomas conceded, not before the Court). Thomas’s “fairness” approach to death is, theoretically, an effort to repair the administration of the death penalty so that it helps black and white citizens equally and punishes black and white offenders evenhandedly. That Thomas’s view, in practice, happens to coincide with the agenda of America’s Dan Quayles and David Dukes is, ostensibly, not a reflection on Thomas’s “authentic” commitment to racial (and other) justice. Thomas ultimately asserts that the death penalty is compatible with his allegiances to America’s dispossessed.

Thomas, urging that mandatory death sentences advance racial justice,
insists that a mandatory regime eliminates the jury’s otherwise “boundless discretion,” which the jury may exercise on the basis of any number of arbitrary or irrelevant factors, including that of race. Thomas objects to his opponents’ insistence that the jury must be able to express a “reasoned moral response.” He cautions,

Beware the word “moral” when used in an opinion of this Court. This word is a vessel of nearly infinite capacity—just as it may allow the sentencer to express benevolence, it may allow [her] to cloak latent animus. A judgment that some will consider a “moral response” may secretly be based on caprice or even outright prejudice.45

Thomas here argues that discretion is the enemy of the rule of law; that the rule of law, happily, conquers discretion and fend off racism. Thomas does not pause to consider whether the discretion ostensibly exiled from the courtroom is merely cast in another shape or shifted to other, equally arbitrary decisionmakers. Disabling a jury from reaching any sentence but death does not expunge that jury’s discretion. Instead, knowing that conviction will inexorably mean death, juries may simply decline to convict those with whom they empathize and disproportionately convict those with whom they don’t. Moreover, to the extent that the jury genuinely loses any discretion through Thomas’s mandatory statutes, that discretion does not itself disappear. It is merely handed to the prosecutors, who may then be as arbitrary as they wish in deciding whom to charge with mandatory death offenses and whom not so to charge. District attorneys, frequently selected in ordinary elections amid rhetoric resembling the Willie Horton campaign, could then easily place Negroes on a statutory conveyor belt to certain death. Moreover, this issue is such a conspicuous feature of lawyerly debate that to say Thomas has made a good-faith error is to displace an unseemly charge of betrayal with an unflattering claim of ineptitude. It may be, as Thomas suggests, that the power to be lenient is also the power to discriminate. But it is a strange solution to this problem to turn that discretion over to a single unaccountable prosecutor, having (supposedly) taken it away from twelve jurors supervised by a judge. The attempt to sanitize death by stamping out discretion is a fool’s errand.

The Unhappy Death of the Innocent

Thomas does not abandon, even in the death-penalty context, the unhappy truth that the American Constitution is imperfect. He laments that “the
Court has put itself in the seemingly permanent business of supervising capital sentencing procedures” and asserts that the Constitution simply doesn’t outlaw a fallible death-penalty regime. It was in the death-penalty case of *Herrera v. Collins* (Thomas and Scalia invoked the Boston Scholar in order to advance their criticism of the “reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man.”) It was in the sensitive context of state-sanctioned death that Thomas and Scalia cited someone called Professor Monaghan and his article, “which discusses the unhappy truth that not every problem was meant to be solved by the United States Constitution, nor can be.” It is important to be clear exactly what, in the context of the *Herrera* case, Thomas’s unhappy truth meant.

Petitioner Herrera asked the Court to grant him a new trial or at least to vacate his death sentence. Herrera claimed that new evidence (affidavits showing that someone else committed the killing) demonstrated he was actually innocent—a recognized legal basis for “habeas corpus relief.” The Supreme Court denied his petition, insisting that habeas corpus relief is designed merely to ensure that individuals are not imprisoned in violation of the Constitution, not to correct errors of fact. Rehnquist (Thomas concurring) wrote that habeas relief was concerned only with unconstitutional *detention*, not unconstitutional *conviction* of an accused. This distinction is eminently pedantic. The detention (in this case, *execution*) of the petitioner is entirely predicated on the conviction. If new doubts cloud the conviction, it is hard to see how the detention and execution retain their legitimacy. It is here that the specter of unhappy truth arises. Rehnquist (with Thomas) suggests the harsh truth that “due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.” The imperfect Constitution alas requires, said Thomas and Rehnquist, a showing of an “independent constitutional violation” in addition to mere innocence.

Justices O’Connor and Kennedy, who furnished two vital votes for Rehnquist’s opinion, wrote separately to emphasize a different view: that “the execution of a legally and factually innocent person would be a constitutionally intolerable event.” The O’Connor-Kennedy concurrence rested on the “fundamental fact” (persuasively rejected by the dissenters) that Herrera was actually “not innocent in any sense of the word,” since the new evidence “was bereft of credibility.”

Scalia and Thomas, meanwhile, urged the contrary gospel of the imperfect
Constitution. Their separate concurring opinion directly contradicted the O'Connor-Kennedy view that the Constitution precluded execution of the actually innocent. Thomas and Scalia plainly said the Constitution did not forbid "the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate." And they explicitly signaled lower courts not to adopt a "strange regime" that assumes that such a constitutional right exists. Invoking their Boston Scholar, they reminded lower courts of the "unhappy truth that not every problem was meant to be solved by the United States Constitution, nor can be" (emphasis added).

But what does this "can" mean? In other contexts it refers to the supposedly inherent limitations on what (e.g.) the state bureaucracy can do to raise the morale of black inner-city youth or to eliminate the despair of white Wall Street cocaine addicts. Here, however, the task is simpler. The Supreme Court is merely giving marching orders to lower courts about what to do in habeas corpus cases. The only question here is, What should the Supreme Court tell the lower courts to do? The "can" misleadingly suggests a nonexistent limit to the institutional competence of the Court in this area. Scalia and Thomas are no doubt in the habit of voicing such institutional pessimism. But whatever the slim validity of such reasoning in other contexts, it is strikingly out of place where the Supreme Court is simply doling out instructions to lower courts. Scalia and Thomas here presented ideological prescription as fact. They think habeas review ought to be narrow. They present this controversial opinion as though it represents neutrally discernable original intent and objective fidelity to the Constitution's "historical moorings." They went beyond the Rehnquist majority opinion, itself criticized by Justice Blackmun, dissenting, as "perilously close to simple murder." Blackmun's harsh comment on the majority opinion is actually overgenerous if applied to the Scalia-Thomas opinion. The Thomas-Scalia opinion took the remarkable view that, unhappily, the Constitution does not bar simple murder of the actually innocent, once it is performed by a state after compliance with certain procedures.

How can Thomas explain this suggestion in terms of loyal dissent? If Thomas simply thinks that original intent is the best neutral legal reading of the Constitution, he must explain why so few legal scholars take it seriously. Perhaps he thinks that his version of originalism leads to preferable outcomes in the cases before him, but this argument looks odd alongside his own description of originalism's limits as unhappy ones. Once we point out
that all interpretations of the Constitution are ideological, and no reading is privileged, we have cut Thomas some slack to pursue his values. He may now, as keeper of this improved and flexible Constitution, do more than he previously felt possible. Suddenly, it’s no problem for the Court to be a Board of Supervision of this and that—the only remaining question being whether supervising this or that is itself a good thing. Now Thomas must squarely face the question, Given the current state of affairs, would it be better or worse for the dispossessed in a fallible criminal-justice system if lower courts could rescue people from death upon the production of new evidence of their innocence? Thomas is forced to face that moral question, that ought. He can no longer hide behind unhappy truth.

Within this picture of justification, Thomas will have a hard time explaining the death penalty case of *Lockhart v. Fretwell,* where the facts were, in a crucial sense, the exact opposite of *Herrera v. Collins.* In *Herrera,* the majority felt that the petitioner’s evidence of actual innocence was flimsy—was unlikely to have affected anything even had it been available at trial (the dissenters disagreed). Conversely, in *Fretwell,* the Court did not doubt that the basis of the petitioner’s complaint could easily have changed the result of his trial. The petitioner was sentenced to death for murder committed during a robbery. Under the applicable sentencing statute, the fact that a defendant committed a crime for money was itself a reason (an “aggravating factor”) for the jury to impose a death sentence. Since pecuniary gain is, however, already an element of the crime of robbery, its reintroduction as an independent aggravating factor in determining the defendant’s sentence was double counting, and violated the applicable law at the time. But the prisoner’s lawyer did not raise this crucial issue at his trial, and the prisoner was sentenced to death. After his conviction and sentencing, the prohibition of double counting was overruled. The question before Justice Thomas and the Supreme Court was whether, against this backdrop, the petitioner’s death sentence could stand. The Court held that the sentence was valid even while conceding that the petitioner’s claim would actually have affected the outcome of the case.

Whereas the Court in *Herrera* treated the petitioner’s new evidence as a mere formality because it would have had no actual impact on the result, the Court in *Fretwell* argued that although the petitioner would actually have escaped death but for the proven defect, this too was an insufficient basis for invalidation of a death sentence. Rehnquist in *Fretwell* suddenly rejected “an
analysis focusing solely on mere outcome determination without attention to whether the result of the proceeding was fundamentally fair."

Placing Herrera alongside Fretwell, both decided by the Supreme Court on the same day, suggests the following: a petitioner who raises a procedural challenge must also show that the alleged failure of procedure actually affected the substance of the result; yet a petitioner who proves that her challenge would actually have changed the result must, additionally, show a procedural deficiency—and one that is not merely technical, but "fundamental." The only apparent principle here is the dismantling of protections afforded individuals accused of crimes. Justices Stevens and Blackmun dissented, emphasizing that the Court’s doctrinal zig-zags “cannot be reconciled with [its] duty to administer justice impartially.” Justice Thomas, for his part, “join[ed] the Court’s opinion in its entirety.”

The Unhappy Truth of Imperfect Trials

The Court’s maneuverings continued in Doggett v. United States, where Thomas (joined by Scalia and Rehnquist) wrote a dissent from Souter’s decision. The Souter majority held that an eight-and-one-half-year delay between a person’s indictment and arrest violated the Constitution’s speedy-trial clause and that long delay was presumptively prejudicial to the defendant’s ability to defend himself.

Thomas, dissenting, stood by the unhappy truth that the courts simply are not “boards of law enforcement supervision.” Thomas cited British case law from a nineteenth-century treatise and proclaimed—overlooking 1776—“Time doesn’t run against the King.” Thomas argued that the Sixth Amendment simply doesn’t protect against mere prejudice to a party’s defense or mere disruption of a party’s now-law-abiding life. While the petitioner had undisputedly become a model citizen, Thomas insisted that “however uplifting this tale of personal redemption, our task is to illuminate the protections of the Speedy Trial Clause, not to take the measure of one man’s life.” Unhappily, the accused’s personal story, and his admitted present rectitude, were irrelevant to matters of crime and punishment.

Yet in the days immediately following his nomination to the Court, amid all the anecdotes about growing up in Pin Point, Georgia, Thomas told another story. He told of arriving to serve in Washington, D.C., and seeing, outside his office window, handcuffed blacks being put in prison vans. His
widely broadcast response: "There but for the grace of God go I." Remarks like this furthered the disarray of Thomas's opponents and fanned the hopes of some that, on the bench, Thomas would be unable to renounce his "life experiences." They felt he would inevitably decide cases in accord with the empathy obviously reflected in this anecdote. But now that Thomas has the judge's job, justice is apparently someone else's work.

In _Riggins v. Nevada_, a handcuffed man petitioned for a fair trial—including a fair chance to press his mental-illness defense—in which the jury might observe his natural demeanor. The state insisted on drugging him. When he just said no, they went ahead anyway, claiming the drug was necessary to render him competent for trial. The man argued that since his defense was mental incompetence (insanity), and the state wished to drug him in order, precisely, to render him competent for trial, the state was seeking to disable his defense. The Court's majority agreed and rejected the view that expert testimony was an adequate stand-in for an unexpurgated display of the defendant's drugless demeanor. Justice Kennedy, writing separately, doubted that a state could ever make the "extraordinary showing" necessary to render constitutional forced drugging intended to secure the accused's trial competence. Justice Kennedy suggested that a state's force-feeding of drugs for the "avowed purpose of changing the defendant's behavior" was like tampering with trial evidence.

Justice Thomas, with Scalia, dissented. Thomas, ignoring Kennedy's powerful evidence-tampering analogy, suggested that the forced drugging did not derogate from a "fundamentally fair hearing." It was evidently not Thomas's job to require that trial courts prevent the state from force-feeding drugs to prisoners it is trying to convict. Thomas urged that even if the state improperly force-fed the drug, that was a matter for a separate civil lawsuit. In Thomas's view, the defendant ought, once convicted andcomfortably settledd in his jail cell, to retain an attorney and initiate a brand-new lawsuit against the state.

Unhappy Prison Conditions

According to Thomas prisons are, unhappily, uncomfortable places. In _Hudson v. McMillian_, the majority (Thomas dissenting) held that excessive physical force by prison guards is unconstitutional cruel and unusual punishment, even in the absence of serious injury. The absence of serious injury, wrote Justice O'Connor, does not end the constitutional inquiry. Thomas
(Scalia concurring) disagreed. Invoking once again the unhappy truths of original intent and of the imperfect Constitution, Thomas again railed against the pervasive view that the Constitution addresses all of society’s ills. The truth is, Thomas assured us, that excessive force occasioning “insignificant harm” is not within the reach of the Constitution. Such force may be immoral, tortious, criminal, or even unconstitutional in some (unspecified) way. It simply isn’t a violation of the cruel and unusual punishment clause. Thomas asserted that “punishment,” in its original meaning, refers strictly to pain inflicted as “part of the sentence for a crime . . . and not generally to any hardship that might befall a prisoner during incarceration” (emphasis added). Excessive force at the hands of a prison guard is, apparently, a random misfortune: like winning the lottery, except less fun. Just one of life’s hard knocks. On this view, guards could beat prisoners and blame fate. Justice Blackmun, concurring in the opinion from which Thomas dissented, offered an unsettling list of punishments that might inflict pain without leaving traces of serious injury: leather straps, rubber hoses, naked fists, electric current, asphyxiation short of death, intentional exposure to heat or cold, and injection with psychosis-inducing drugs. And Blackmun cited cases where U.S. courts have found that such abuse has actually occurred in U.S. prisons.

Faced with this litany of pain, Thomas deferred to (his version of) the historical moorings of the Eighth Amendment. He lectured that “historically, the lower courts routinely rejected prisoner grievances by explaining that the courts had no role in regulating prison life.” Thus, while “abusive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt, that does not mean that it is invariably unconstitutional. The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulations.”

Thomas continued: the “primary responsibility for preventing and punishing such conduct rests not with the Federal Constitution but with the laws and regulations of the various states.” Someone else’s job. And if they don’t do it, nothing. Yet isn’t it the role of courts to make stuff happen when it should happen but, for whatever reason, isn’t happening? Thomas pronounces himself unhappily bound to allow prison-guard violence, even as he dissents from the outcome he ostensibly wants to reach. Yet few criticized the Court’s majority for violating the true Constitution when they voted the happy way in Hudson.

Months later, the Court revisited prison conditions in Helling v. McKin-
ney.\textsuperscript{53} There a prisoner said that the state, by confining him to a cell with a smoker, unconstitutionally exposed him to passive smoking and its attendant health risks. A magistrate dismissed the case without a hearing. The Court of Appeals reversed, directing a full hearing on the merits. A majority of the Supreme Court (Thomas and Scalia dissenting) declined to reverse the Court of Appeals and remanded the case for a hearing on the merits. In \textit{Helling}, Thomas conceded that contemporary popular and legal culture both adopt a broader view than his own of the Constitution’s scope, yet he stood by his narrower opinion, saying that it was dictated by the dictionary and by history. Indeed, Thomas stood by his narrow reading while conceding that it was \textit{not} dictated by dictionary and history. While conceding that “the evidence is not overwhelming” in favor of his narrow view, Thomas claimed to find sufficient support in the history of the Eighth Amendment so as to “shift the burden of persuasion to those who would apply the Eighth Amendment to prison conditions.” Thomas insisted that the burden had not yet been discharged, even while conceding that the view he opposes represents consensus. The idea that law forces a reluctant Thomas to abuse the disppossessed is perhaps wearing thin.

\textbf{Civil Rights: The Unhappy Absence of Meaningful Evidence}

Thomas has not yet confronted a Supreme Court case in which the validity of an affirmative action or set-aside program was directly in issue, but there is already much in his record on the Court (to say nothing of his extensive extrajudicial pronouncements) to foreclose optimism. During his brief tenure on the Court of Appeals for the District of Columbia Circuit, before he was nominated to the Supreme Court, Thomas wrote the opinion of the Court of Appeals in \textit{Lamprecht v. FCC.}\textsuperscript{54} That decision reflects Thomas’s indifference to gender discrimination.

In \textit{Lamprecht}, Thomas’s task was to apply the landmark Supreme Court case of \textit{Metro Broadcasting, Inc. v. FCC.}\textsuperscript{55} In \textit{Metro Broadcasting}, the Supreme Court upheld the FCC’s policy of promoting broadcast diversity by awarding “enhancement” for minority status when issuing licenses. The FCC also permitted a certain limited category of existing licenses (those subject to “distress sales”) to be sold only to minority-controlled firms. The pre-Thomas Supreme Court, reversing the D.C. Circuit Court where Thomas was then tenured, held in \textit{Metro Broadcasting} that these FCC policies did not violate the Constitution because they had been specifically mandated by
Congress and served the important governmental purpose of broadcast diversity.

In the subsequent *Lamprecht* case Thomas wrote an opinion enforcing a narrow construction of *Metro Broadcasting*. Thomas upheld a male complainant’s claim that an award of extra credit to a female applicant for a license “deprived him of his constitutional right to equal protection of the laws.” Voting with Thomas was the D.C. Circuit Court’s Judge Buckley, brother of William F. Buckley of *National Review* and talk-show fame. Judge Mikva, the final vote on the three-judge panel, dissented.

Thomas held that there was no “substantial” relation between the goal of broadcast diversity and the FCC’s gender-based preferences because the alleged connection was not supported by “meaningful evidence.” At a glance Thomas’s opinion appears preoccupied with the parsing of statistics. It contains a four-page appendix of numerical tables, and Thomas repeatedly disparages his dissenting colleague, Judge Mikva, for the alleged weakness of the empirical case underlying Mikva’s finding of a sufficient link between gender preference and broadcast diversity.

Yet Thomas’s empirical edifice comes crashing down in footnote 9 of his opinion. Thomas there addresses Judge Mikva’s argument that “judges have no basis, except their own policy preferences,” for concluding that there is an insufficient connection between gender diversity and programming diversity. Mikva emphasized that the Constitution does not identify the “mystical point” at which a statistical correlation is sufficient to survive equal-protection challenge. Thomas, far from resisting this direct challenge to the empirical edifice upon which he built his argument, simply agreed. In fact Thomas, sounding momentarily like a member of the Critical Legal Studies movement, affirmed that Mikva “is not the first to criticize the [applicable legal] test for its indeterminacy.” Thomas then admitted that the line he chose to draw in invalidating the program was different from the line drawn by the *Metro Broadcasting* Court, was also different from the line drawn in another similar case, and was, too, different from the line drawn by his very own dissenting colleague, Judge Mikva, in the case at hand.

Thomas’s response to this realization was simply to assert that “the line that we draw is neither more nor less principled than the line that he draws; *our lines are merely grounded in different exercise of judgment*” (emphasis added). This confession that his own decision is ultimately a straightforward value judgment is seriously at odds with the empirical paraphernalia (the charts and such) and the empiricist rhetoric that clutter the main text of Thomas’s
opinion. Despite all those numbers, the question was simply one of moral and political values: Which judgment, whose line drawing, was better? This question is not amenable to a “competent” legal answer. In ostensibly focusing on an empirical exercise in the main body of his opinion, Thomas merely glossed over the straightforward value judgment suppressed in footnote 9. This ideological choice—who would you prefer to win the case?—is always central to allocating burdens of proof in law, since when courts make “findings of fact” they are not finding objective fact, but constructing legal truth. It is thus no accident, shifting our attention, that the most controversial aspect of Title VII civil rights litigation is the allocation of the burden of proof as between the defendant-employer and the plaintiff-employee. The Rehnquist Court’s case law in this area is responsible for much of its reputation for right-wing activism.

In *Haazen Paper Co. v. Biggins,* Kennedy’s concurring opinion (joined by Thomas and Rehnquist) labored the point, extraneous to the facts of the case, that the Court was not extending the “disparate impact” theory of Title VII to the new context of age-discrimination law. Disparate impact analysis allows a plaintiff to rely on statistical imbalances to raise a presumption of discrimination against her employer. Thomas, at the EEOC, criticized such theories as a surreal departure from reality. The question at stake in such cases, however, is not “reality” but, rather, which party ought to bear the risk of inevitable difficulties of proof in Title VII cases. That choice is, patently, one of value judgment as much as factual investigation. It presents a straightforward clash between favoring business defendants or favoring plaintiffs who can point to racial imbalances.

Moreover, in the Title VII case of *St. Mary’s Honor Center v. Hicks,* issues of broad statistical analysis were absent, and Thomas nevertheless reached an unhappy conclusion. *Hicks* was exactly the kind of case—where a person is “individually discriminated against”—that Benjamin Hooks, NAACP leader at the time of the Thomas hearings, suggested that Thomas would “go to the ends of the earth” to remedy. Thomas didn’t.

The Court in *Hicks* faced the question of who must prove what in Title VII cases. Thomas and the majority held that where the employee alleges discrimination, and the employer comes forth with alleged legitimate reasons for the firing, which the employee in turn proves to be a sham, the employee is still not entitled to judgment as a matter of law. The employee still faces a further hurdle: the “ultimate burden of persuading the trier of fact that he has been the victim of intentional discrimination.” And even though Scalia
agreed that the employee had proven "the existence of a crusade to terminate him," he still had further to prove "that the crusade was racially rather than personally motivated." Scalia, Thomas, and the majority gave the employee a rather full plate of proving to do.

Faced with the argument that an employer who proffers fraudulent non-discriminatory rationales for a firing can hardly complain if judgment goes against her, Scalia (Thomas concurring) responded with the simple truth that dealing with dishonesty was not the Court's job under Title VII: "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that." The majority result in *Hicks* was, as the dissenting Justice Souter pointed out, that even where an employee discredits an employer's nondiscriminatory explanations, a lower court, hostile to civil rights claims, may continue "to roam the record" to find some possible nondiscriminatory reason that may support an assertion that the employee had failed to make an affirmative showing that race was the reason for adverse treatment.

Perhaps Thomas's view in *Hicks* simply reflected the true legal nature of Title VII, but others differed. The dissenters argued persuasively that the Court was abandoning "decades of stable law." Given this existence of controversy (three justices voted against the result), Thomas cannot claim that he was bound to reach a result onerous to the civil rights plaintiffs for whom we'd been assured he'd go to the wall. Thomas is thus thrown back upon nonlegal arguments. He must argue that the result reached was the ethically right result. This is likely to be an uphill battle for him. In the disparate-impact situation, Thomas's ideological position—itsel _f_ questionable—is that reliance on broad statistics and group claims is a departure from reality. Thomas opposes disparate-impact analysis because, he says, he prefers individual claims over "surreal" statistical games. Yet the employee in *Hicks* did not invoke broad statistical arguments (themselves entirely desirable). He, rather, specifically showed that there was a "campaign" against him. He very specifically showed that the employer's explanations were lies. All this was, unhappily, not enough to support a legal finding of discrimination.

*Civil Rights: The Unhappy Absence of Real Harm*

In *Associated General Contractors v. City of Jacksonville, Florida*, Thomas wrote for the majority that a contractors' association had the legal right ("standing") to challenge a minority set-aside program, without any need to show
that one of its members would have received a contract absent the program. The standing doctrine ensures that a party seeking to invoke the machinery of the courts has suffered a material harm going beyond that suffered by persons in general. Standing doctrine denies legal recourse to busybodies and to those with trivial injuries.

Yet the rules governing standing are notoriously unpredictable. In *General Contractors*, the association had not shown that the program it sought to challenge deprived it or any of its members of a construction contract. Moreover, the particular regulation the association sought to challenge had been repealed and replaced, making the whole case, in the eyes of two members of the Court, an impermissible academic exercise (O'Connor and Blackmun, dissenting).

There were thus plausible arguments that the “right” the contractors’ association sought to enforce in *General Contractors* was, less than trivial, nonexistent. Justice Thomas nevertheless wrote that the relevant “injury in fact” for the standing analysis was present. In stark contrast, Thomas elsewhere wrote that where a civil rights plaintiff wins an actual legal victory, “mere moral satisfaction” would not meet the standard for a recovery of attorney’s fees. Mere moral vindication without a money award was simply too trivial a victory to support an award of attorney’s fees. In the latter case, *Farrar v. Hobby*, the Court faced the question of whether a civil rights plaintiff who wins a nominal award of money damages is a “prevailing party” in the sense that would entitle her to an award of attorney’s fees under the civil rights statute. The prospect of such a fee award is all, frequently, that induces a lawyer to take a poor person’s case.

While Thomas held that Farrar’s nominal monetary-damages award satisfied the “prevailing party” analysis because it involved an actual money victory (however small), Farrar was ultimately denied a fee award anyway because, Thomas said, the smallness of the damages award affected the “propriety” of an attorney’s fee award. This decision was Tough in two senses.

First, the requirement of actual monetary loss (however small) before a legal victory is considered real for purposes of a fee award would exclude many of the most striking civil rights cases. Many such cases were fought and won over precisely symbolic issues (where’s the money damage in being denied service at a lunch counter in Alabama?). A widespread criticism of orthodox economics and other social sciences is that these disciplines assume that all motives are monetary and so oversimplify the complex reasons why
people do the things they do. While arguments favoring legal recognition of symbolic harms are strongly supported by those opposed to hate speech, such arguments are not the sole property of the Left.\textsuperscript{60} Justice Thomas, in \textit{Farrar}, entirely dropped the ball on this issue. While he accepted aesthetic and symbolic harms in \textit{Shaw v. Reno} in order to invalidate a black congressional district, he here rejected symbolic victories and enforced instead the old idea that a legal victory means a monetary award.

Second, the plaintiff’s showing, in \textit{Farrar}, of an actual (nominal) monetary award was itself of no avail. Thomas went on to hold that while the nominal-damages award satisfied the “prevailing party” requirement of an attorney’s-fee award, the smallness of the victory could nevertheless render a fee award improper. O’Connor stated the Court’s view bluntly: “If ever there was a plaintiff who deserved no attorney’s fee at all, that plaintiff is Joseph Farrar.” Despite his money award, Farrar got no fee.

To Thomas the plaintiffs in \textit{General Contractors}, who had not proven—not even \textit{alleged}—monetary damages deserved legal standing. Farrar, who had vindicated a legal right that was difficult to quantify in money, did not deserve an attorney’s-fee award. The ultimate issue in \textit{Farrar} was, Should the Court encourage or deter lawsuits like his by holding out to plaintiffs and their potential attorneys the carrot of an award of fees? Thus stated, the fees issue in \textit{Farrar} was very similar to the issue of standing in \textit{Associated General Contractors}: Should the Court encourage or deter challenges to municipal set-aside programs by sending a signal that the Court would be willing to entertain challenges by local business groups, even if they could show no monetary loss? Thomas answered nay on the first, yea on the second. This is not a happy juxtaposition.

Finally, in pronouncing Farrar undeserving of a fee, the Court placed enormous emphasis on the difference between the plaintiff’s original claim (\$17 million) and the actual award ten years later (one dollar). Yet Thomas and the Court’s majority are not consistently disturbed when money awards (fees or otherwise) exponentially exceed actual damages. In \textit{TXO Production Corp. v. Alliance Resources Corp.}\textsuperscript{61} Thomas concurred in the Court’s upholding of a \$10-million punitive-damages award in a case where actual damages were merely nineteen thousand dollars. In \textit{TXO}, the beneficiary of the award was a corporation, not a civil rights plaintiff. And the money went to the party, for its own enjoyment, not to a needy litigant trying to pay his lawyers.
Impartiality Is Zealotry

An important goal of the Negro Criticism woven throughout the discussion of Clarence Thomas and the rest of this book is to expose America’s hidden ideology of whiteness, of which judicial impartiality is an important hiding place. The white norm is, in America, a powerful idea that often seems beyond question. And this fact has political consequences. Many have argued that black conservatives fall prey to this powerful idea. Stephen Carter, in his habitually self-incriminating fashion, has placed this point beyond dispute. In declining to join the challenges being launched by Negro Crit lawyers, Carter had this to say: “If one wants to move upward in the professions one must accept that most of the rewards one seeks will be distributed by white people according to rules they have worked out.”

Carter’s habitual settling of controversy with Tough fact ought by now to be familiar. And capture by an unseen ideology also affects his vision of the judicial role, as evidenced anew by his discussion of the federal confirmation process in “The Confirmation Mess.” The heart of Carter’s thinking on the issue is simple: an ideal of politically insulated judges, and the idea that two wrongs don’t make a right. Though Carter admits that presidents Bush and Reagan packed the courts by appointing ideological kinsfolk, Carter argues, in 1994, that it would be wrong for Clinton to follow suit, because when the next Republican comes, Democrats will lack a basis for “principled opposition.” But where was Carter’s own principled opposition during the Reagan-Bush eighties? Carter’s confession of Reagan-Bush sins is, conveniently, announced with a Democrat in office. And notwithstanding this confession, Carter never met a Reagan-Bush Supreme Court nominee worth opposing, not even Robert Bork. After commenting, first, that the conduct of some of Bork’s opponents was “shameful” and, second, that he personally “never did discover [a] compelling case against [Bork’s] confirmation,” Carter continued:

Third, I have no illusions that a Justice Bork would have voted in all important cases in the way that I believe the Constitution requires. . . . Fourth . . . I have no illusions that a Justice Bork would have voted in all the important cases in the way that I believe morality compels. Fifth, I do not think that Bork’s constitutional theory as he explains it can serve as the basis for a judicial philosophy that is consistent with and serves the needs of the Constitution. Sixth, I do not believe that Bork’s judicial philosophy was remotely close to any sort of extremism that has no place in legitimate constitutional theoretic debate. Seventh, none of the matters covered [in this quotation] are legitimate matters of inquiry when the president selects a nominee or when the Senate votes on confirmation.
Despite this litany of serious disagreement, Carter ultimately found common ground with Bork on the "method" of original intent as the basis for constitutional interpretation, though "differ[ing] sharply about what the method entails." And while this method of constitutional interpretation remains obviously flexible, the one thing that Carter is clear it excludes from constitutional debate is rancorous public campaigning ("it is not clear why public support for [a] right translates into [its] existence"). In the eighties, Carter's commitment to judicial neutrality displayed that "marketable goodness which makes it possible to give comfortable assent to propositions without in the least ordering one's life in accordance with them" (James Joyce). Suddenly, with Clinton in office, Carter's propositions about judicial neutrality ought to influence a president's choice of real-life nominees.

This is important because, as Negro Cits have shown, the ideology of whiteness continues to have disproportionate sway in popular debate over who can pass as an impartial judge or as a nonideological litigator. Nominees and candidates whose perceptions about racial justice mirror America's unspoken whiteness can better present themselves as mainstream, their opponents as special interests. The idea that impartiality has a place in our politics, our law, even our literature, helps those who want stuff to stay like it is. In the words of the truth master himself, those clamoring for change depart from objectivity and dispassion and are "so left they've left America." Reagan's more-of-the-same crowd regularly launches vicious skirmishes over values under the soothing cover of neutrality and truth.

In this setting, the Tough Love Crowd's advocacy of dispassionate ideals is self-maiming. It is widely recognized, for instance, that the rhetoric of impartiality played a central role in the attacks on civil rights nominee Lani Guinier. Less noticed is an important subtext: Guinier's opponents openly championed an ideal of an "impartial" judiciary as the best way to stall what they viewed as formidable pressures for fair courts and disagreeable social change.

Although Guinier emphasized that issues like civil rights enforcement are by their very nature controversial, an ideal of impartiality nevertheless came to dominate the debate. Under the headline "The Last Frontier," the Wall Street Journal, launching the paper's first editorial attack on Guinier's nomination, warned of a "gathering gerrymander of the judiciary" as the Voting Rights Act was extended to elected judges. To fend off the encroaching NAACP "wagon trains" (the Journal's phrase), the editorial urged an ideal of
“judges as impartial arbiters of law” to displace the powerful competing ideal of *fairness* in judicial appointments.

The casual reader might easily assume that the *Journal* thinks impartiality just is the true nature of a judge’s job. The *Journal*, however, was aware that it was entering a battle over “the way we see the judicial branch of government.” Under the suggested “impartial” strategy, the *Journal* reassured its readers in what was ostensibly an attack on the Guinier nomination, “There isn’t much case for bringing about a ‘fair’ mix among the robed.” By opposing a “fair mix” the *Journal* was objecting to the commonsense notion, already endorsed by the Supreme Court, that elected judges, like other elected officials, ought to reflect the diversity of the communities over which they sit in judgment. The *Journal* frankly called for a rehabilitation of the old ideal of judicial impartiality, not because that ideal was intrinsically attractive, but exactly because it would provide an apparently reasoned basis for an otherwise indefensible distaste for a fair mix among judges.

This impartial view of judging is (Stephen Carter’s confessions are legion) not widely accepted within the legal community. It is, moreover, contradicted by the fact that many judges are chosen in the ordinary rough and tumble of popular elections. And it is contradicted by the Supreme Court’s view that the 1982 Voting Rights Act (which governs the roly-poly of ordinary politics) applies to such judicial elections. The *Journal* editorialist actually mentioned all of these facts. The *Journal*’s editorializing was not ill informed but was, rather, a straightforward opposition to these well-established policies. Clarence Thomas has described the 1982 amendments as “unacceptable.” 64 Guinier opponents successfully recast existing law and policy to resemble threatened and cataclysmic innovation—and their principal weapon was the rhetoric of impartiality.

Like the nation in the Guinier affair, the Toughs are duped into (or, worse, pretend) an allegiance to ideals of impartiality. Stephen Carter’s preference for politically insulated justices is a functional variant of the *Journal*’s preference for an “apolitical” selection process. Carter has lamented that “the electoral ethos so pervades the selection and the confirmation of justices that one is moved to wonder why we do not dispense with all the cumbersome constitutional rigor of presidential nominations and Senate hearings and proceed directly to an election.” 65

Carter intends that the idea of straightforwardly elected Supreme Court justices should strike the reader as obviously absurd. He assumes that some impartial depoliticized process is obviously desirable. The foregoing discus-
sion suggests the opposite. An acknowledgment that judicial power is political power forces the debate onto the preferable terrain of “fairness”—a battleground that terrifies the *Journal*.

Moreover, acknowledging that judicial power is political power does not mean abandoning the Court to majoritarianism. As has been well said, “Constitutional review is intended to be antimajoritarian,” and so “to argue against it based on majoritarian principles is pointless.” To the extent that judicial review, in practice, is overwhelmed by majoritarian principles, judicial review can be said to be malfunctioning.

Finally, one defense of Guinier offered by some, notably Attorney General Janet Reno, was that the *Journal*’s fears were misplaced because Guinier would not be free to enforce her admittedly radical ideas. She would be a member of the Clinton administration, and so bound by its policies. If one bought this argument, one might go on to point out an even more impressive constraint on both Guinier and the Clinton administration: the rule of law. For neither Guinier nor the Clinton administration would ever have had the last word on anything. They would all be mere parties before a court. So, why worry? Indeed, if Clint Bolick was right that Guinier was, objectively, an exotic civil rights ideologue, why was he hyperventilating? Surely the supposed objective rule of law would rebuff her zealotry? In fact, the *Journal* was canny enough to know that the law means nothing more nor less than the extent to which it is enforced. Bolick feared adverse political results for causes dear to him should Guinier get her hands on what he called “the civil rights arsenal.” Now dawns the reason why the *Journal*, in what was ostensibly its opening salvo against Guinier as an individual appointee and litigator, actually spent most of its energy on the NAACP “wagon trains” seeking fairness among judges. What the *Journal* wanted to avoid was a two-pronged danger. The first: an aggressive, articulate, experienced litigator (Guinier) taking civil rights cases before the courts. The second: fair courts that might listen to strong argument. The *Journal* alluded to supposed evils wreaked by some of the state laws requiring that judges reflect the diversity of the communities over which they preside. These laws had, said the *Journal*, “provided an open door for yahoos and stooges of the trial lawyers.” Fair judges are the feared “yahoos” and Guinier’s civil rights division, the feared trial lawyers.

The *Journal* placed the word “fair” in skeptical question marks, presumably indicating that its opponents’ claims for the fairness of the new judge-selection procedures were not objective, and implying that its own call for
judges as impartial arbiters was objective. Clint Bolick objected that the Guinier appointment would "blur the lines between advocacy groups and government agencies, as they were in the pre-Reagan years, when the executive branch subordinated law enforcement to its ideological agenda" (emphasis added). Bolick’s presentation of right-wing zealotry as impartiality is transparent, yet it worked.

All this success (scuppering Guinier, capturing Justice Thomas, capturing Carter, Randall Kennedy, Sowell, Shelby Steele, making Justice O’Connor seem a “centrist,” making Clinton’s continuity seem like cathartic change) attests to the continuing influence of the abstract ideal of disinterest in American politics. People remain uneasy with the frank and noisy brokering of values. People prefer to pretend that value conflicts don’t exist. This uneasiness is itself a valuable political tool for the politically comfortable. The ideal of impartiality is itself a partisan weapon in American politics.