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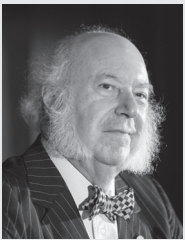
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September 2019 · Volume 48, Number 9

Clarence Thomas and the Lost Constitution

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The following is adapted from a speech delivered on September 17, 2019, at Hillsdale College's Constitution Day Celebration in Washington, D.C.

Clarence Thomas is our era's most consequential jurist, as radical as he is brave. During his almost three decades on the bench, he has been laying out a blueprint for remaking Supreme Court jurisprudence. His template is the Constitution as the Framers wrote it during that hot summer in Philadelphia 232 years ago, when they aimed to design "good government from reflection and choice," as Alexander Hamilton put it in the first *Federalist*, rather than settle for a regime formed, as are most in history, by "accident and force." In Thomas's view, what the Framers achieved remains as modern and up-to-date—as avant-garde, even—as it was in 1787.

What the Framers envisioned was a *self-governing* republic. Citizens would no longer be *ruled*. Under laws made by their elected representatives, they would be free to work out their own happiness in their own way, in their families and local communities. But since those elected representatives are born with the same selfish impulses as everyone else—the same all-too-human nature that makes government necessary in the first place—the Framers took care to limit their powers and to hedge them with checks and balances, to prevent the servants of the sovereign people from becoming their masters. The Framers strove to avoid at all costs what they called an “elective despotism,” understanding that elections alone don’t ensure liberty.

Did they achieve their goal perfectly, even with the first ten amendments that form the Bill of Rights? No—and they recognized that. It took the Thirteenth, Fourteenth, and Fifteenth Amendments—following a fearsome war—to end the evil of slavery that marred the Framers’ creation, but that they couldn’t abolish summarily if they wanted to get the document adopted. Thereafter, it took the Nineteenth Amendment to give women the vote, a measure that followed inexorably from the principles of the American Revolution.

During the ratification debates, one gloomy critic prophesied that if citizens ratified the Constitution, “the forms of republican government” would soon exist “in *appearance only*” in America, as had

occurred in ancient Rome. American republicanism would indeed eventually decline, but the decline took a century to begin and unfolded with much less malice than it did at the end of the Roman Republic. Nor was it due to some defect in the Constitution, but rather to repeated undermining by the Supreme Court, the president, and the Congress.

The result today is a crisis of legitimacy, fueling the anger with which Americans now glare at one another. Half of us believe we live under the old Constitution, with its guarantee of liberty and its expectation of self-reliance. The other half believe in a “living constitution”—a regime that empowers the Supreme Court to sit as a permanent constitutional convention, issuing decrees that keep our government evolving with modernity’s changing conditions. The living constitution also permits countless supposedly expert administrative agencies, like the SEC and the EPA, to make rules like a legislature, administer them like an executive, and adjudicate and punish infractions of them like a judiciary.

To the Old Constitutionalists, this government of decrees issued by bureaucrats and judges is not democratic self-government but something more like tyranny—hard or soft, depending on whether or not you are caught in the unelected rulers’ clutches. To the Living Constitutionalists, on the other hand, government by agency experts and Ivy League-trained judges—making rules for a progressive society (to use their language) and guided by enlightened principles of social justice that favor the

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ISSN 0277-8432

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“disadvantaged” and other victim groups—constitutes real democracy. So today we have the Freedom Party versus the Fairness Party, with unelected bureaucrats and judges saying what fairness is.

While the hallowed doctrine of *stare decisis*—the rule that judges are bound to respect precedent—certainly applies to the lower courts, Supreme Court justices owe fidelity to the Constitution alone, and if their predecessors have construed it erroneously, today’s justices must say so and overturn their decisions.

This is the constitutional deformation that Justice Thomas, an Old Constitutionalist in capital letters, has striven to repair. If the Framers had wanted a constitution that evolved by judicial ruling, Thomas says, they could have stuck with the unwritten British constitution that governed the American colonists in just that way for 150 years before the Revolution. But Americans chose a written constitution, whose meaning, as the Framers and the state ratifying conventions understood it, does not change—and whose purpose remains, as the Preamble states, to “secure the Blessings of Liberty to ourselves and our Posterity.”

In Thomas’s view, there is no nobler or more just purpose for any government. If the Framers failed to realize that ideal fully because of slavery, the Civil War amendments proved that their design was, in Thomas’s word, “perfectible.” Similarly, if later developments fell away from that ideal, it is still perfectible, and Thomas takes it as his job—his calling, he says—to perfect it. And that can mean that where earlier Supreme Court decisions have deviated from what the document and its amendments say, it is the duty of today’s justices to overrule them. Consequently, while the hallowed doctrine of *stare decisis*—the rule that judges are bound to respect precedent—certainly applies

to the lower courts, Supreme Court justices owe fidelity to the Constitution alone, and if their predecessors have construed it erroneously, today’s justices must say so and overturn their decisions.

To contemporary lawyers and law professors, this idea of annulling so-called settled law is shockingly radical. It explains why most of Thomas’s opinions are either dissents from the Court’s ruling or concurrences in the Court’s ruling but not its reasoning, often

because Thomas rejects the precedent on which the majority relies. Content with frequently being a minority of one, he points to Justice John Marshall Harlan’s lone dissent in the 1896 *Plessy v. Ferguson* case as his model. The majority held in *Plessy* that separate but equal facilities for blacks in public accommodation were constitutional. Harlan countered: “Our Constitution is color-blind and neither knows nor tolerates classes among citizens. . . . The law regards man as man.” “Do we quote from the majority or the dissent?” Thomas asks. Like Harlan, he is drawing a map for future justices, and he will let history judge his achievement.

Thomas’s opinion in the 2010 *McDonald v. Chicago* case takes us back to the first of three acts in the drama of constitutional subversion. In that opinion, Thomas agrees with the majority that Chicago’s ban on owning handguns violates the Fourteenth Amendment, but disagrees on why. The Fourteenth Amendment deems everybody born or naturalized in this country, and subject to its jurisdiction, to be a citizen of the United States and of the state where he lives, and declares that no state may “abridge the privileges or immunities of citizens of the United States.” What

the drafters meant by that language was that former slaves were full American citizens, and that no state could interfere with their federally-protected rights—including, said one senator in framing the amendment, “the personal rights guaranteed and secured by the first eight amendments of the Constitution.”

The rights guaranteed by the Bill of Rights, observed a typical commentator of the time, “which had been construed to apply only to the national government, are thus imposed upon the States.” And the feds, the amendment’s chief draftsman declared, have the power to enforce them.

Perfectly clear, right? Well, no—not once the Supreme Court got hold of it. As Thomas recounts in *McDonald*, the Court’s first pronouncement on the Fourteenth Amendment came in its 1873 *Slaughter-House Cases* ruling, which drew a distinction between the privileges and immunities conferred by state citizenship and those conferred by national citizenship. The latter, the Court held, include only such things as the right to travel on interstate waterways and not to be subject to bills of attainder. All the rights having to do with life, liberty, and property attach only to state citizenship, not national, so they *aren’t protected* by the Fourteenth Amendment. One of the four dissenting justices correctly noted that the majority opinion “turns . . . what was meant for bread into a stone.”

The day before the Court handed down its bizarre *Slaughter-House* decision, the worst atrocity of the terrorist campaign in the South to nullify Reconstruction had occurred. Black Louisianans, aiming to safeguard Republican victories in contentious recent elections, occupied the courthouse in the county-seat hamlet of Colfax. Mounted White Liners—an anti-black militia like the KKK—massed

in the surrounding woods, prompting more frightened blacks to crowd into the courthouse. On Easter Sunday, the White Liners set the courthouse ablaze and shot those who ran out the door or jumped out of the windows. That evening, they shot the captive survivors.

The Supreme Court, Thomas grumbles, has “overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure.”

No Louisiana district attorney was going to charge the murderers, so a federal prosecutor convicted three of them of violating a congressional enforcement act that made it a crime to conspire to deprive someone of the privileges or immunities of U.S. citizenship. But in its 1876 *Cruikshank* decision, the Supreme Court overturned the convictions. The rights enumerated in the Bill of Rights aren’t the privileges or immunities conferred by U.S. citizenship, the Court held, citing *Slaughter-House* as precedent. They come from the Creator, and the first eight amendments merely forbid *Congress* from abridging them. Moreover, the murderers were individuals, and the Fourteenth Amendment refers only to states. That was the end of the Fourteenth Amendment’s Privileges or Immunities Clause.

In time, the Court rigged a work-around. The Fourteenth Amendment forbids states from taking away a citizen’s life, liberty, or property without “due process of law”—which really means, the Supreme Court asserted out of the blue during the New Deal, that some liberties are so basic that no state can invade them, a doctrine dubbed “substantive due process.” Thomas calls this smoke and mirrors in his *McDonald* opinion. Even worse, the “substantive due process” doctrine

allows judges to conjure up imaginary rights out of thin air, *making law* instead of interpreting the Constitution. Why, Thomas asks, is the Court treating *Slaughter-House* and *Cruikshank* as sacrosanct? It doesn't hesitate to overturn laws passed by Congress and signed by the president when it thinks the Constitution doesn't allow them. Why should it treat the errors of previous Courts with any more respect? Yes, the Chicago handgun ban is unconstitutional, Thomas writes. But that's because it abridges citizens' Second Amendment right to keep and bear arms as guaranteed by the Privileges or Immunities Clause of the Fourteenth Amendment. Why not junk the mumbo-jumbo of "substantive due process," on which the majority of his colleagues are relying in this case, and return to the original text?

Act Two of the great constitutional subversion stars Franklin Roosevelt, who wrongly diagnosed the cause of the Great Depression as a crisis of overproduction and thus wanted to seize control of the whole U.S. economy to regulate output. For years the Court resisted this power-grab, but it buckled under Roosevelt's threat to enlarge its membership and pack it with judges who would go along. The "Court's dramatic departure in the 1930s from a century and a half of precedent," Thomas says, was a fatal "wrong turn" that marks the start of illegitimate judicial constitution-making.

In his 2005 dissent in *Gonzales v. Raich*, Thomas cites the New Deal Court's zaniest decision: *Wickard v. Filburn*, a 1942 ruling in which the Court abjectly capitulated to the federal government's takeover of the economy under the pretext of the Constitution's commerce power. *Wickard* held that Congress's authority to regulate interstate commerce could even forbid a farmer from growing grain only to feed to his own livestock. In his *Gonzales* dissent, Thomas hints that the Court should overturn the whole tangle of Commerce Clause cases related to *Wickard*.

The majority ruling in *Gonzales* held that federal agents had the authority,

under the interstate commerce power—and despite California's legalization of medical marijuana—to punish two ill Californians who grew and used pot to control their pain. Interstate commerce? Hardly, Thomas demurs. Like farmer Filburn's grain, the pot was never bought or sold, never crossed state lines, and did not affect any national market. "Not only does this case not concern commerce," Thomas writes, "it doesn't even concern economic activity." Next thing you know, the feds will be raiding potluck suppers.

Thomas understands that the New Deal gave rise to an even more powerful device for constitutional demolition than the engorged commerce power—a whole set of administrative agencies like the NLRB and the SEC. The Supreme Court, Thomas grumbled in the first of a series of 2015 administrative state opinions, has "overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure."

For starters, the Constitution vests all legislative powers in Congress, which means that they cannot be delegated elsewhere. As the Framers' tutelary philosopher John Locke wrote, the legislature can make laws but it cannot make legislators—which is what Congress does when it invests bureaucrats with the power to make rules that bind citizens. Nor can the courts delegate judicial power to bureaucrats, as the Supreme Court began doing in a World War II case when it ruled that courts must defer to agencies' interpretations of their own regulations. The Court's rationale was that agencies have technical expertise that judges lack. That's not the relevant issue, Thomas contends: "The proper question faced by courts in interpreting a regulation is not what the best policy choice might be, but what the regulation means." And who better to interpret the meaning of words, Thomas asks in *Perez v. Mortgage Bankers Association*, than a judge?

Worsening this problem, Thomas argues in *Michigan v. EPA*, is the deference doctrine that the Court hatched in *Chevron v. Natural Resources Defense Council* in 1984. This doctrine requires courts to assume that Congress intended that any ambiguity it left in a statute under which an agency operates should be resolved by the agency, not by the courts. Consequently, Thomas exasperatedly observes, not only do we have bureaucrats making rules like a legislature and interpreting them like a judge, but also the interpretations amount to a further lawmaking power, with no checks or balances whatever.

A not untypical result of all this administrative might, to cite an example recently in the news, was an EPA ruling that a Montana rancher polluted the navigable waterways of the United States by digging two ponds to be filled by a tiny trickle on his land, 40 miles from anything resembling a navigable waterway. For providing reservoirs to fight potential forest fires, the rancher was fined \$130,000 and sentenced to 18 months in prison. (The rancher served his time in prison but continued his legal fight until he died at age 80. A month after his death, the Supreme Court vacated the ruling against him. The Trump administration recently revoked the regulation under which he was convicted.)

In a virtuoso dissent last year in *Carpenter v. U.S.*, Thomas takes on the third and last act of the Court's attack on the Framers' Constitution—the license with which the Court presumes to make up law out of whole cloth, with no prompting from either Congress or the president. The best recognized example of this is the 1973 *Roe v. Wade* abortion decision. *Carpenter* is less incendiary, but it is deliciously instructive.

A career armed robber, Carpenter claimed that police use of cell phone location data in convicting him violated his Fourth Amendment protection against unreasonable search and seizure. The Framers, of course, had no

cell phones. But, Thomas notes, Chief Justice William Howard Taft had shown as early as 1928 how to adapt to new circumstances, in a case concerning a telephone wiretap. The phone lines were outside the convicted bootleggers' premises, and conversations aren't papers, so federal agents had not invaded their Fourth Amendment-protected "persons, houses, papers, [or] effects." Thus, Taft held, no Fourth Amendment-banned search had occurred.

But in a 1967 wiretapping case, the Supreme Court decreed that what the Fourth Amendment really protects is a person's "reasonable expectation of privacy." With this "reasonable expectation," on which the *Carpenter* majority rests, Thomas has a field day. Dictionaries from 1770 to 1828 define a "search" as a looking into suspected places, he notes; transferring Fourth Amendment protection from places to people reads that word out of the text. And "their . . . papers," he points out, can't mean *someone else's* records, so what does the Fourth Amendment have to do with a subpoena for the phone company's files? And finally, Thomas asks, who's to decide what a "reasonable" expectation is? That is a policy determination, not a judicial one—so shouldn't Congress decide? Nevertheless, Chief Justice Roberts cast the deciding vote to uphold this nonsense, in line with half a century of Court-created rights that subverted the authority of the police to fight crime and of teachers and principals to discipline disruptive students.

In conclusion, let me shift my focus from constitutional law to ethics. It takes a certain kind of character to be capable of liberty, and Clarence Thomas embodies that character. Indeed, his character is bound up with his jurisprudence in an exemplary way.

Born in a shanty in a swampy Georgia hamlet founded by freed slaves, Thomas enjoyed a few Huck Finn-like years, until his divorced mother moved

him and his younger brother to a Savannah slum tenement. On her meager maid's wages, her children knew "hunger without the prospect of eating and cold without the prospect of warmth," the Justice recalls. After a year of this, Thomas's mother sent her two little boys a few blocks away, to live with her father and step-mother, a magical, *Oliver Twist*-like transformation.

Regardless of race, everybody faces adversity and must choose whether to buckle down and surmount it, shaping his own fate, or to blame the outcome on powerful forces that make him ineluctably a victim—forces that only a mighty government can master. The Framers' Constitution presupposes citizens of the first kind.

Thomas's grandfather, Myers Anderson, the self-made if semi-literate proprietor of a modest fuel oil business, lived in a sparkling clean cinderblock house with porcelain plumbing, a full fridge, and a no-excuses childrearing code that bred self-discipline and self-reliance. A convert to Catholicism, Anderson sent his grandsons to a strict parochial school—segregated like everything else in mid-century Savannah, but teaching that all men are created equal—and he put them to work delivering oil after school and on weekends. Summer vacation was no holiday for the boys: with their grandfather, they built a house on 60 rural acres. Thereafter they tilled the fields every summer, harvested the crops, and butchered livestock for winter food. Anderson urged them on with his rich stock of moral maxims, including, "Where there's a will, there's a way." There wasn't a spare minute in the year for the boys to fall into street culture, which Anderson feared.

These lessons in self-reliance formed the bedrock of Thomas's worldview. He temporarily flouted them, he recounts, during his student black-radical phase, when he and his college comrades spouted off about how they

were "oppressed and victimized" by "a culture irretrievably tainted by racism." Visits home became "quite strained," he recalls. "My grandfather was no victim, and he didn't send me to school to become one."

By Thomas's senior year, he had snapped out of it. His old self-reliance expanded from a personal creed to a political one, as he reflected upon how much his college stance of victimhood had threatened to diminish and impede him, especially compared to his grandfather's heroic independence. He also pondered deeply the harms that affirmative action—purportedly America's atonement for its historic sins—

had done to his black classmates at Holy Cross and Yale Law. Thomas saw that it led to failure and grievance by placing smart but ill-prepared kids in out-of-their-league institutions and branding successes like him with the imputation of inferiority. His nine years as a federal civil rights panjandrum, running the civil rights division of President Reagan's Department of Education and then the Equal Employment Opportunity Commission, confirmed his impression that "there is no governmental solution" to black America's problems—a conclusion underlying the anti-affirmative action opinions he has written on the Court. In this equal opportunity nation, black citizens must forge their own fate, like all other Americans. Where there's a will, there's a way.

Regardless of race, everybody faces adversity and must choose whether to buckle down and surmount it, shaping his own fate, or to blame the outcome on powerful forces that make him ineluctably a victim—forces that only a mighty government can master. The Framers' Constitution presupposes citizens of the first kind. Without them, and a culture that nurtures them, no free nation can long endure. ■