



WHY I ADMIRE JUSTICE THOMAS

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I begin with a disclaimer. I am not a scholar – of Supreme Court jurisprudence in general, or Justice Thomas’s jurisprudence, or anything else. And I have never met Justice Thomas, unless appearing before the Supreme Court as an advocate counts as “meeting” the Justices. I am just a former lawyer, now judge, who has read quite a few Supreme Court opinions and, in the course of doing so, has become a Justice Thomas fan. My purpose here is to tell you why.

I admire him most of all for the breadth of his vision. Again and again, I find in reading his opinions that he puts in perspective what a case is *really*, in a broad sense, about; what purpose the constitutional doctrine under discussion should serve or should not disserve; what good or evil can be expected from a particular rule of law. I think I could multiply examples almost indefinitely, but I will give you three.

A favorite of mine is Justice Thomas’s concurring opinion in *Graham v. Collins*.¹ That was a death penalty case, and in his concurrence, Justice Thomas addressed a disturbing fact often mentioned by death penalty opponents: according to much evidence, a black defendant is more likely, other things being equal, to be sentenced

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¹ 506 U.S. 461, 478–500 (1993) (Thomas, J., concurring).

to death than a white one.² Usually, of course, this fact is presented as a reason for abolishing the death penalty³ or for subjecting death sentences to a kind of racial proportionality review.⁴

Justice Thomas saw it differently. I will summarize freely what he said, warning you that here, as in all my summaries, the words are mine, not his. He said, in substance, that racial disparities in sentencing are absolutely inevitable where a sentencer has unfettered discretion.⁵ If jurors are instructed that they may choose to spare a defendant's life for any reason that seems good to them—that their power to show mercy is without constraint—then they will exercise that power more often in favor of people they can, to some degree, identify with: people they conceive as being like themselves.⁶ This suggests that, as long as most jurors are white, more mercy will be shown to white defendants, other things being equal.⁷

There is, Justice Thomas suggests, a cure for this problem: take away the jurors' unfettered discretion—even though that produces the disconcerting result that there will be cases where jurors do not have a free hand.⁸ Institute a death penalty that is governed by rigorous and predictable rules where jurors are instructed that, if they find certain facts, they *must* sentence the defendant to death.⁹ If you cannot accept this, Justice Thomas

² See *id.* at 480–83 (discussing precedent that relied upon and cited studies and reports showing racial bias).

³ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987) (citing a study “that purports to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and . . . the race of the defendant.”).

⁴ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (arguing the importance of proportionality review as a method to substantially reduce the possibility of a defendant being sentenced to death by an aberrant jury).

⁵ See *Graham*, 506 U.S. at 485, 496–97 (1993) (“For 20 years, we have acknowledged the relationship between undirected jury discretion and the danger of discriminatory sentencing . . .”).

⁶ *Id.* at 480, 483–84.

⁷ See *id.* at 480.

⁸ See *id.* at 486–87.

⁹ See *id.* at 484–85, 498–99.

implies, then you must accept racial disparities in sentencing if there is to be a death penalty at all.¹⁰

In his concurrence in *Morse v. Frederick*,¹¹ the “Bong Hits for Jesus” case involving the question of when public school students can be disciplined for expressive behavior,¹² Justice Thomas displayed his ability to understand and explain the deeper importance of a legal rule. The gist of Justice Thomas’s concurrence is that the Constitution should not govern this question, and that students should be disciplined when teachers and school administrators think the discipline is needed.¹³ Children, I take Justice Thomas to be saying, are not adults and schools are not mini-democracies or public forums. The purpose of schools is learning, not talking.¹⁴ No doubt it is sometimes good for children to speak their minds, but there are plenty of children who do that quite enough, and it’s sometimes also good for them to shut up and listen. When they should speak and when they should be quiet is, while they’re in school, for their teachers, and not the courts or the children themselves, to decide.¹⁵

My third example is a recent one—a case decided a couple of days after I presented the first version of this talk. Justice Thomas’s concurring opinion in *Wyeth v. Levine*¹⁶ addresses the question of when federal law preempts state law. In it, he attacks the idea that preemption exists when state law stands as an obstacle to the accomplishment of federal “purposes and objectives.”¹⁷ That rule, Justice Thomas says in substance, is so amorphous that it gives judges a license to legislate. If they like the state law, they will find no interference with federal purposes and objectives, and if they dislike it, they will find a hopeless inconsistency.¹⁸

¹⁰ See *id.* at 484, 496–97.

¹¹ 551 U.S. 393 (2007) (Thomas, J., concurring).

¹² *Id.* at 397, 400 (majority opinion).

¹³ *Id.* at 419–20 (Thomas, J., concurring).

¹⁴ *Id.* at 417 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 522 (1969) (Black, J., dissenting)).

¹⁵ *Id.* at 414, 419.

¹⁶ *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (Thomas, J., concurring).

¹⁷ See *id.* at 1217.

¹⁸ See *id.*

The line-up of Justice Thomas's colleagues in *Wyeth* seemed to prove his point. As everyone knows, eight of the nine Supreme Court Justices—all but Justice Kennedy—can roughly but accurately be classified as liberals and conservatives (with Justice Thomas in the conservative camp, of course). *Wyeth* was a product-liability case in which an injured plaintiff received a large verdict under state law against a defendant who claimed the state law was preempted by federal regulations.¹⁹ The four liberals, predictably, found no conflict between the state law and the purposes and objectives of federal law²⁰; the three other conservatives, with equal predictability, found an irreconcilable conflict.²¹ Justice Thomas, as it happens, voted in this case with the liberals, demonstrating, I think, that he saw more deeply into the issue than any of his colleagues. For him, whether the state rule of law in question was a good one or a bad one (and I have little doubt he thought it a bad one) was less important than respect for the sovereign power of states to make their own laws, unless something in federal legislation more specific than its “purposes and objectives” says they may not.²²

The President of the United States not long ago promised to seek a Supreme Court Justice “who understands that justice isn’t about some abstract legal theory or footnote in a case book” but “also about how our laws affect the daily realities of people’s lives.”²³ I am quite sure that the President was not suggesting he would seek a Justice like Justice Thomas, but he could have been suggesting it, for in a profound sense the words fit. Understanding how laws “affect the daily realities of peoples’ lives” does not mean making the more sympathetic party win in each case or using the law to advance a liberal or conservative political agenda. It means understanding the deep and long range implications of a legal rule

¹⁹ See *id.* at 1191–93 (majority opinion).

²⁰ See *id.* at 1204.

²¹ See *id.* at 1219–20 (Alito, J., dissenting).

²² See *id.* at 1207–08 (Thomas, J., concurring).

²³ Press Release, The White House, Remarks by the President on Justice David Souter (May 1, 2009) (available at http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-On-Justice-David-Souter/).

which will affect future cases that the rule's author will never see. It is here where Justice Thomas excels.²⁴

In a way it is not surprising that someone with Justice Thomas's unique life experience might have a broader perspective than some others.²⁵ He reminds me a bit of Justice Hugo Black, the former Ku Klux Klansman and liberal hero, who also seemed to see the big picture more readily than some others.²⁶ I am thinking especially of Justice Black at the end of his career, when he promoted the then-unfashionable idea that, if you want to know what the Constitution says, you might try reading it.²⁷

But another quality for which I admire Justice Thomas is one I would not have predicted from his background, and one he certainly does not share with Justice Black: Justice Thomas seems at times to display more analytical rigor than his colleagues. I am no longer talking about breadth of vision, but in a sense about its opposite, the ability to see and apply relatively fine, technical distinctions, the sort of thing the

²⁴ See, e.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002) (upholding the constitutionality of a school drug testing policy, noting the significance of detecting and preventing student drug use while observing the importance of preserving the confidentiality of student records and minimum intrusiveness of testing procedures).

²⁵ See CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* (2007) (describing Justice Thomas's life's fascinating trajectory since his humble beginnings in tiny Pinpoint, Georgia).

²⁶ See, e.g., Howard Ball, *HUGO L. BLACK, COLD STEEL WARRIOR*, 7 (1996) (detailing how Justice Black's reading of history influenced his vision of a democratic society); Tony A. Freyer, *HUGO L. BLACK AND THE DILEMMA OF AMERICAN LIBERALISM*, xviii (Mark C. Carnes ed., 2d ed., Library of American Biography Series 2008) (discussing the impact that democratic theory had on Justice Black's view of the court system generally); Roger K. Newman, *HUGO BLACK, A BIOGRAPHY*, 571 (2d ed., Fordham Univ. Press 1997) (1994) (lauding Justice Black for his ability to redirect the course of American law); see also Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 549 (1962) ("Hugo Black . . . belongs to a certain select company of heroes who . . . have created, nurtured, and preserved the essence of the American ideal."); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963) (praising Justice Black for producing a comprehensive and individual philosophy, and for seeing the Bill of Rights issues of his time before anyone else).

²⁷ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., concurring); see also Sotorios A. Barber & James E. Fleming, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTION* 68-70 (2007).

President called “abstract legal theory . . . in a case book.”²⁸ In contexts where no great breadth of vision is required, where the only problem is to get the law right, Justice Thomas is very good at getting it right.

I was struck by this when, working on a case as a New York State Judge, I encountered *Howsam v. Dean Witter Reynolds, Inc.*,²⁹ a case you are unlikely to have heard of. The issue was whether a particular question should be decided by an arbitrator or a court.³⁰ The eight Justices who heard the case (one was recused) unanimously decided that the question was for the arbitrator.³¹ Seven of those Justices joined in an opinion by Justice Breyer—a former Harvard professor, not an intellectual slouch—applying federal precedents.³² Justice Thomas wrote a one-page concurrence, saying in effect, You’re wasting a lot of time and paper; this is a state law issue, and there is a state case directly on point.³³ He seemed right to me, and I handed the opinion to one of my law clerks (one less inclined to agree with Justice Thomas than I am) with the request, “Tell me why he’s wrong.” I got back the answer I expected: “He’s not wrong.” Justice Thomas had simply seen something that seven of his colleagues had missed.

I had a similar experience reading the seemingly endless opinions in *United States v. Booker*.³⁴ That is a case you have probably heard of—a very important one about the U.S. sentencing guidelines. But what interests me now is a rather obscure, technical aspect of the decision, the discussion of something called *application severability*.³⁵ I am not going to bore you with what application severability is. It has to do with statutes that are unconstitutional in some circumstances but not others, and take my word for it, it’s complicated.

²⁸ Press Release, *supra* note 23.

²⁹ 537 U.S. 79 (2002) (citations omitted).

³⁰ *Id.* at 81.

³¹ *Id.*

³² *Id.* at 84–85.

³³ *Id.* at 87 (Thomas, J., concurring in judgment).

³⁴ 543 U.S. 220 (2005).

³⁵ *Id.* at 247 (Breyer, J., giving the opinion of the Court in part).

Justice Stevens and Justice Thomas were on the same side in that case (the case was one of those odd ones, where the most liberal and most conservative Justices wound up voting together), and Justice Stevens wrote the principal opinion for that side.³⁶ His discussion of application severability seems to me convoluted and confusing, and Justice Thomas apparently thought so, too. In a separate opinion, Justice Thomas offered a lucid, compelling alternative explanation, reaching the same result as Justice Stevens in a more satisfying way.³⁷ In a footnote, Justice Stevens acknowledged “the intuitive appeal” of Justice Thomas’s approach but said he did not think the cases supported it.³⁸ I admit I have not read the cases, and perhaps Justice Stevens was right. If he was, I doubt that bothered Justice Thomas much.

Why does it seem, repeatedly, that Justice Thomas has simply out-thought his colleagues on a purely technical, analytical issue? I really don’t know. Before he became a judge, Justice Thomas spent most of his career working in state and federal government offices.³⁹ Among his colleagues on the Supreme Court are four former law professors and two others who were partners at high-powered law firms.⁴⁰ It is very obvious that Justice Thomas is a much smarter man than the average resume snob would assume, but it hardly seems likely that all the others are intellectual dwarves by comparison. When I gave the original version of this talk, one of my co-panelists, Professor Nicole Garnett (a former Justice Thomas law clerk), gave me part of the answer: “He does boring law,” she said. What I took her to mean is that Justice Thomas, unlike at least some of his colleagues, does not think that the technical intricacies of arbitration jurisprudence and application severability are

³⁶ *Id.* at 225. (Stevens, J., giving the opinion of the Court in part).

³⁷ *Id.* at 313 (Thomas, J., dissenting in part).

³⁸ *Id.* at 281 n.6.

³⁹ THOMAS, *supra* note 25 at 92–195.

⁴⁰ SUPREME COURT OF THE UNITED STATES, THE JUSTICES OF THE SUPREME COURT, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Oct. 7, 2009); THE WHITE HOUSE: PRESIDENT GEORGE W. BUSH, JUDICIAL NOMINATIONS: CHIEF JUSTICE JOHN G. ROBERTS, JR., <http://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/roberts.html> (last visited Oct. 7, 2009).

beneath the attention of a Supreme Court Justice. Even when he is writing something that will not be reprinted in a constitutional law casebook or analyzed in a law review article, he insists on getting it right. It's an attractive trait.

A third quality for which I admire Justice Thomas is his stubbornness. That's not always a virtue, of course—sometimes it's a fault—but it's a quality I have a soft spot for, perhaps because I have the same one. Justice Thomas shows no inclination at all to be a team player, to do what is expected of him, to win praise, or to still criticism. You could get the impression that criticism just makes him plant his feet firmer.

An example: it is well known that Justice Thomas almost never asks a question during oral argument. Many find this puzzling, as I admit I do (I go to the opposite extreme—I never shut up on the bench). And in conversations with politically correct people who have never read a Justice Thomas opinion but are quite sure that he is an evil man, you will hear this trait alluded to in a snide way as evidence that he is a judicial weakling, a mindless follower of Justice Scalia.⁴¹ Justice Thomas cannot be unaware of this sort of nastiness, and he cannot possibly like it. He could easily deprive his enemies of this weapon by the simple expedient of asking a question once in a while. He will not do it. He will not give them the satisfaction. I suspect that the abuse he gets for not asking questions makes him *less* likely to ask them. Perhaps I should not admire him for this orneriness, but I do.

Do I have criticisms of Justice Thomas? Of course. I will criticize anyone. He is by no means the Court's finest writer. His prose is straightforward and unadorned, temperate and dignified—much

⁴¹ The same sort of superciliousness is sometimes practiced by journalists. See, e.g., Maureen Dowd, Op-Ed., *Don't Torture Yourself (That's His Job)*, N.Y. TIMES, Jan. 6, 2005, at A27 ("Clarence Thomas follows Antonin Scalia's lead on the law."); Peter Lattman, *The When-Will-Justice-Thomas-Ask-a-Question Watch*, WALL ST. J. L. BLOG, Nov. 6, 2007, <http://blogs.wsj.com/law/2007/11/06/the-when-will-justice-thomas-ask-a-question-watch/>; Mark Sherman, *Thomas: No Questions in 2 Years*, HUFFINGTON POST, Feb. 25, 2008, http://www.huffingtonpost.com/2008/02/25/thomas-no-questions-in-2-n_88270.html.

like my impression of the man himself – but with no attempt at rhetorical elegance. I find his writing no better and no worse than that of most of his colleagues, but he has none of the literary flair of Justice Scalia or the Chief Justice.

Do I have substantive criticisms? Yes; Justice Thomas has, I suppose, the defects of his qualities. I sometimes think he is too bold – he is at least bolder than I would be – in putting forward his vision of the Constitution, in cheerful disregard of precedents he thinks misguided. In the three cases I mentioned at the beginning of this talk – *Graham*, *Morse* and *Wyeth* – Justice Thomas argued for discarding well-established precedents. He argued persuasively, and in those cases I tend to think he was almost entirely, or entirely, right. Perhaps he was right even in *Gonzales v. Raich*,⁴² the medical marijuana case, but there I admit his defiance of precedent took my breath away. The majority in that case upheld, against a Commerce Clause attack, federal statutes criminalizing the use and possession of marijuana for medical purposes.⁴³ The majority argued, I think persuasively, that the case was controlled by *Wickard v. Filburn*,⁴⁴ perhaps the Court's leading precedent on the Commerce Clause and certainly one of the most important Supreme Court decisions of the twentieth century. Justice O'Connor wrote a dissent in which she argued, I think unconvincingly, that *Wickard* was distinguishable.⁴⁵ Justice Thomas wrote a very persuasive dissent – made more persuasive by the fact that he never discussed *Wickard v. Filburn* and barely mentioned it.⁴⁶ To be fair, Justice Thomas did say that he left to O'Connor the task of dealing with the Court's "recent Commerce Clause jurisprudence," while he examined the majority opinion's "more fundamental flaws."⁴⁷ Unquestionably, this allocation of tasks suited him well.

⁴² 545 U.S. 1 (2005).

⁴³ *Id.*

⁴⁴ 317 U.S. 111 (1942).

⁴⁵ *Raich*, 545 U.S. at 42, 50–57 (O'Connor, J., dissenting).

⁴⁶ *Id.* at 57–74 (Thomas, J., dissenting) (mentioning *Wickard* in passing at 73).

⁴⁷ *Id.* at 67.

But I can admire Justice Thomas's boldness in a case like *Gonzales v. Raich*, even while I wonder whether it was too much of a good thing. It is very rare that I find myself thinking he is clearly wrong—indeed, I can think of only one example, *Gonzales v. Oregon*,⁴⁸ in which Justice Thomas dissented from an opinion holding Oregon's assisted suicide statute was not preempted by federal law. In his dissent, Thomas suggests that *Gonzales v. Oregon*, in its deference to state law, contradicted *Gonzales v. Raich*—that if the majority could not tolerate a medical marijuana law, it should not tolerate an assisted suicide statute either.⁴⁹ The distinction between the cases seems glaring to me: in *Gonzales v. Raich*, Congress had clearly sought to preempt state law, and the only question was whether it constitutionally could do so;⁵⁰ the preemption in *Gonzales v. Oregon* was tenuous at best.⁵¹ I suppose I must take the *Gonzales v. Oregon* dissent as proof that Justice Thomas is fallible.

That will not stop me, however, from continuing to sing his praises. I do it from the highest of motives, though I admit that I also have a lower one. I enjoy seeing certain of my liberal friends scream and gag when I tell them that I think Justice Thomas is one of the greatest Justices who ever sat on the Supreme Court. And that is indeed what I think.

⁴⁸546 U.S. 243, 299 (2006) (Thomas, J., concurring).

⁴⁹ *Id.*

⁵⁰ See *Raich*, 545 U.S. at 1, 28–33.

⁵¹ *Gonzales*, 546 U.S. at 251 (“The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision.”).