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The Politicization of Clarence Thomas

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NOTICE

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CLARENCE THOMAS: A BIOGRAPHY. By *Andrew Peyton Thomas.* San Francisco: Encounter Books. 2001. P. 661. $29.95.

INTRODUCTION

Perception often shapes memory. In particular, the way one perceives a noteworthy public figure often shapes that figure's historical legacy. For example, history largely remembers John Coltrane as one of the greatest jazz saxophone players of our time. His improvisational skill, innovative style, and mastery over his instrument all serve to classify him in the public memory as the ultimate jazz performer.[1] Yet, as the example of Coltrane might demonstrate, perception is unjustly deficient. Coltrane was not merely a great saxophone player; he was first and foremost a religious figure whose spirituality drove his creativity and manifested itself in prayerful reflections of "be bop."[2] The failure to perceive of Coltrane as a spiritual man, as opposed to a musical one, has led to an inadequate understanding of his music and, consequently, his legacy.[3]

From Coltrane to the radically different Clarence Thomas, these very same issues of legacy and perception have arisen as legal scholars begin to assess the first decade of Justice Thomas's tenure on the Supreme Court. A recent proliferation of biographies,[4] jurisprudential critiques,[5] and symposia[6] have all aspired to ascertain Justice Thomas's

1. *See* Derek Kleinow, *John Coltrane*, *at* http://www.princeton.edu/~dkleinow/coltrane bio.html (last visited Mar. 10, 2003). For an insight into his performative abilities, see (or listen to) JOHN COLTRANE, BLUE TRANE (Blue Note Records 1957); JOHN COLTRANE, GIANT STEPS (Atlantic Records 1959); and JOHN COLTRANE, A LOVE SUPREME (Impulse! Records 1964).

2. *See* BILL COLE, JOHN COLTRANE 160 (1976) (describing Coltrane's *A Love Supreme* as a prayer).

3. *See generally id.* (arguing that Coltrane's music was a reflection of his spirituality).

4. *See* ARMIN COOPER & JOHN L. COOPER, THE PRINCE AND THE PAUPER: THE CASE AGAINST CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT (2001); ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY (2001).

5. *See* SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS (2002); SAMUEL A. MARCOSSON, ORIGINAL SIN: CLARENCE THOMAS AND THE FAILURE OF THE CONSTITUTIONAL CONSERVATIVES (2002).

impact on judicial history and the law. Of this literature, the most comprehensive work on Thomas is Andrew Peyton Thomas's *Clarence Thomas: A Biography*.[7] In his biography, Peyton Thomas[8] undertakes a detailed examination of the life and legacy of Justice Thomas.

Peyton Thomas begins by tracing Justice Thomas's slave roots (Chapter One) and argues that in order to "understand how Thomas became one of the great intellectual and political rebels in American history, one must recall, in the context of his life, the unique evils that he and his fellow black Americans surmounted with such great struggle" (p. 7). This opening sets the thematic stage for the rest of the book — that is, Peyton Thomas paints the portrait of a man whose life and beliefs have been shaped largely by his views on race, personal instances of racism, and the struggle against racist stereotypes. From this portrait, Peyton Thomas ultimately concludes that Justice Thomas is a man deeply affected by his race, difficult to stereotype, and fiercely independent in thought (pp. 581, 592).

Peyton Thomas traces Thomas's life from junior seminarian to Yale law student, from the chair of the Equal Employment Opportunity Commission ("EEOC") to the Anita Hill hearings, and from his early years on the Supreme Court to his potential legacy. Peyton Thomas's thematic focus throughout continues to be on the

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6. For example, *Regent University Law Review* held a symposium paying tribute to Justice Thomas in the 1999-2000 academic year. Symposium, *A Tribute to Justice Clarence Thomas*, 12 REGENT U. L. REV. 313 (1999-2000). Articles from that symposium included John D. Ashcroft, *Justice Clarence Thomas: Reviving Restraint and Personal Responsibility*, 12 REGENT U. L. REV. 313 (1999-2000); Judge Pasco M. Bowman II, *Justice Clarence Thomas: A Brief Tribute*, 12 REGENT U. L. REV. 329 (1999-2000); Thomas L. Jipping, *"Judge Thomas is the First Choice": The Case for Clarence Thomas*, 12 REGENT U. L. REV. 397 (1999-2000); Judge Edith H. Jones, *Justice Thomas and the Voting Rights Act*, 12 REGENT U. L. REV. 333 (1999-2000); Judge H. Brent McKnight, *The Emerging Contours of Judge Thomas's Textualism*, 12 REGENT U. L. REV. 365 (1999-2000); Edwin Meese III, *The Jurisprudence of Clarence Thomas*, 12 REGENT U. L. REV. 349 (1999-2000); and Clarence Thomas, *Personal Responsibility*, 12 REGENT U. L. REV. 317 (1999-2000).

The *American University Journal of Gender, Social Policy and the Law* held a Clarence Thomas symposium in 2002. Symposium, *Clarence Thomas After Ten Years*, 10 AM. U. J. GENDER SOC. POL'Y & L. 315 (2002). Articles from that symposium included Scott D. Gerber, *"My Rookie Years Are Over" Clarence Thomas After Ten Years*, 10 AM. U. J. GENDER SOC. POL'Y & L. 343 (2002); Nancie G. Marzulla, *The Textualism of Clarence Thomas: Anchoring the Supreme Court's Property Rights Jurisprudence to the Constitution*, 10 AM. U. J. GENDER SOC. POL'Y & L. 351 (2002); Mark C. Niles, *Clarence Thomas: The First Ten Years Looking for Consistency*, 10 AM. U. J. GENDER SOC. POL'Y & L. 327 (2002); and Stephen J. Wermiel, *Clarence Thomas After Ten Years: Some Reflections*, 10 AM. U. J. GENDER SOC. POL'Y & L. 315 (2002).

7. Andrew Peyton Thomas is an author whose works have appeared in the *Wall Street Journal*, *Weekly Standard*, and *National Review*. *Clarence Thomas: A Biography* is his third book.

8. This Notice refers to the author as "Peyton Thomas" in order to avoid confusion between the biographer and his subject.

impact of race and the independence of Thomas's beliefs as he chronicles each of these eras in Thomas's life.[9]

Peyton Thomas's ultimate conclusion about Justice Thomas is, admittedly, not very bold. Peyton Thomas generally refrains from making many broad conclusions — undoubtedly to remain as objective a biographer as possible.[10] Thus, the strength of his book is not in its arguments, but in its evidence. Peyton Thomas provides a comprehensive and extraordinarily detailed portrait of Justice Thomas. From this detailed framework, the reader is able to draw numerous inferences regarding the public perception and early legacy of Justice Thomas. This Notice uses Peyton Thomas's book as a backdrop for adducing some of those inferences.

This Notice argues that Justice Thomas's life is best understood by perceiving him as a political figure rather than as merely a jurist. Part I argues that Peyton Thomas's biography is valuable insofar as it provides a framework for the depiction of the political side of Justice Thomas. Part II then argues that once Justice Thomas is understood as a political figure, the controversial nature of both Thomas's jurisprudence and the scholarship surrounding his jurisprudence become explainable. In particular, Justice Thomas's seemingly divergent views on race can be perceived as partisan and his personal reliance on race

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9. For example, as a junior seminarian, Thomas was markedly influenced by the writings of Richard Wright — namely, *Native Son* and *Black Boy*. P. 92. According to Peyton Thomas, Wright's works "reinforced Thomas's wrath toward racism," p. 92, while creating an inner tension between Thomas's strong beliefs in racial justice and his allegiance to the Catholic Church. Of his years in seminary, Thomas would explain, "I could not understand why the Catholic Church would suffer and permit segregation in its schools, in its parishes and in its churches. I could not understand why the Church did not speak out against something so obviously immoral, wrong and in violation of our own religious beliefs." Pp. 92-93. That tenuous balance between racial justice and religious faith would come undone in the aftermath of Martin Luther King, Jr.'s assassination. While at seminary, Thomas overheard one of his fellow seminarians in reference to Martin Luther King, Jr. say, "I'm glad they shot that nigger." P. 105. Thomas's journey on the road to the priesthood ended soon thereafter. Pp. 105-07.

After his foray into the priesthood, Thomas left the South to attend Holy Cross on a scholarship. It was at Holy Cross, according to Peyton Thomas, where Thomas began to assert his independence. P. 116. Further, the Black Power movement and its tone of independence and separatism resonated with Thomas while at Holy Cross. P. 117. Thomas became a self-described "radical." Thomas would later say, " 'I was truly on the left. . . . there was nobody on the other side of me.' Not only that, 'I was never a liberal . . . I was a radical.' " P. 120. Although Peyton Thomas considers Thomas's views of his own politics as the "hyperbole of nostalgia and self-dramatization," p. 120, Thomas did immerse himself in the writings of his new favorite author, Malcolm X, during this time. P. 128. Although Thomas mellowed politically somewhat during the latter part of his time at Holy Cross, p. 129, these " 'years of rage,' " p. 129, show the side of Thomas that Peyton Thomas stresses throughout his book — Thomas, the independent thinker, the courageous leader, and a man motivated by race. In fact, Peyton Thomas's ultimate conclusion of Justice Thomas largely mirrors the character depiction of the young radical Thomas at Holy Cross.

10. Objectivity in writing about Thomas has been rare. *See* GERBER, *supra* note 5, at 3-35 (describing the biased biographical literature written about Clarence Thomas); *see also infra* Section II.B.

as an opportunistic trump wielded for political convenience. Moreover, the critical rhetoric of Justice Thomas's opponents takes on a political flavor that is akin to the banter associated with an elected official and not a Supreme Court Justice.

I. THE POLITICAL DIMENSIONS OF CLARENCE THOMAS

Traditionally, biography of a judicial figure discusses that judge's body of opinions and judicial philosophies.[11] Moreover, the arguably more provocative and legally relevant reviews of biography assess these sorts of jurisprudential critiques.[12] Yet, as this Part argues, the standard fare falls short of what is required in examining Clarence Thomas. This Part argues that Peyton Thomas's comprehensive examination of Thomas, apart from its jurisprudential utility, is crucial in understanding the perception of Clarence Thomas as a political figure[13] in current sociopolitical and legal discourse.

Three potential contributions exist to identify the value of Peyton Thomas's biography among the scholarship on Thomas. The first can be described as providing legal context. When examining the life of a public figure — in particular, a jurist — history is derived mostly from an objective record. It is a written historical record found within judicial opinions and embedded in the law. The life experience of a judge, however, can shape his judicial opinions[14] and thus provide a deeper contextual understanding[15] of the objective record.

In examining Andrew Peyton Thomas's biography of Justice Thomas, however, one finds a rather scant contextual analysis. Peyton Thomas's description of Justice Thomas's major opinions reads like a series of case briefs — summaries that only occasionally tie in the finer points of Justice Thomas's life or his originalist and natural-law-

11. *See, e.g.*, *supra* note 5; *see* Richard A. Posner, *Judicial Biography*, 70 N.Y.U. L. REV. 502, 512 (1995) (noting that the most common types of judicial biography are the ideological).

12. *See, e.g.*, Mathias Reimann, *Horrible Holmes*, 100 MICH. L. REV. 1676 (2002) (reviewing ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2000)).

13. The term "political figure" in the context of this Notice is defined in terms of the traditional views of the elected official — one who is a public persona, who has partisan or ideological leanings, who can operate shrewdly in attaining and maintaining office, etc. *See, e.g.*, RICHARD REEVES, PRESIDENT NIXON (2001).

14. *See* O.W. HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of the law has not been logic; it has been experience.").

15. *See* 2 RALPH WALDO EMERSON, ESSAYS — FIRST SERIES 15 (1888) ("We are always coming up with the emphatic facts of history in our private experience and verifying them here. All history becomes subjective; in other words, there is properly no history; only biography.").

interpretive paradigms.[16] Thus, Peyton Thomas, if striving to provide greater legal context to the opinions of Justice Thomas, fails to accomplish this purpose.

Peyton Thomas's biography might then serve to satiate a sense of public curiosity.[17] If a judicial figure has led an interesting life, then this seems like an appropriate reason to write a judicial biography.[18] As far as judicial life stories go, Clarence Thomas's — as a child of Jim Crow (Chapter Three), a controversial chairman of the EEOC,[19] and the target of publicized sexual harassment allegations (Chapters Twenty-One through Twenty-Three) — is arguably one of the more interesting. In particular, with the publicity of the Anita Hill hearings, the public's interest in Thomas was heightened.[20]

Peyton Thomas's biography, however, is not a valuable work[21] if viewed as providing a contextual understanding of the legal writings of Justice Thomas or satiating public curiosity over Thomas. Rather, Peyton Thomas's work provides the reader an opportunity to look past Thomas in his role as a jurist in order to uncover a wolf in sheep's clothing — Justice Thomas, the shrewd and effective politico. Thus, the value in Peyton Thomas's biography is not its legal analysis and criticism, but its detailed portrayal of Thomas that allows the reader to piece together a political portrait of Justice Thomas[22] and the ensuing legal ramifications arising from that portrayal.[23]

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16. *See, e.g.*, pp. 560-65. It should be emphasized that Peyton Thomas does *at times* discuss Thomas's experience and judicial philosophies in the course of Thomas's opinions. *See, e.g.*, p. 500 (discussing Thomas's originalism). Yet, such references seem like mere afterthoughts rather than the focus of discussion. For an example of a book designed to tie in Thomas's jurisprudence with his personal views and experiences, see GERBER, *supra* note 5.

17. *See* Posner, *supra* note 11, at 512 (noting that curiosity is a plausible, yet rare, justification for judicial biography).

18. For example, Justice Oliver Wendell Holmes. *See* John F. Hagemann, *Looking at Holmes*, 39 S.D. L. REV. 433, 436 (1994) (describing Holmes's life as "multi-faceted" and "exceptionally full"); Posner, *supra* note 11, at 512 (describing Holmes as a man of "towering greatness" who "lived an interesting life").

19. *See* Jipping, *supra* note 6, at 429-30.

20. *See* p. 434 (noting that the Anita Hill hearings brought extraordinarily high television ratings).

21. "Value" might be synonymous with "complete" when assessing biography. Unfortunately, a complete biography may be an impossibility. *See* VIRGINIA WOOLF, ORLANDO: A BIOGRAPHY 202 (1990) ("A biography is considered complete if it merely accounts for six or seven selves, whereas a person may well have as many thousand."). The "completeness" of Peyton Thomas's biography — as the term is defined by Virginia Woolf — arguably is in the detail that allows the reader to discover the political "self" of Thomas.

22. It should be noted from the outset that Peyton Thomas himself never draws the express conclusion of Thomas being a political figure. Rather, the detailed account of Thomas's life, as portrayed by Peyton Thomas, provides for this independent conclusion.

23. That is, the political portrait of Thomas still has legal import. As Part II *infra* argues, the political portrait informs Thomas's civil rights jurisprudence and how legal commentators engage Thomas's jurisprudence.

Four particular pieces of evidence, as proffered by Peyton Thomas, serve as the foundation for concluding Thomas to be a political figure. First, Peyton Thomas notes how maneuvering through the political climate was Thomas's forte. For example, Thomas excelled in the political climate of his various confirmation hearings. Peyton Thomas notes that during Thomas's EEOC confirmation hearing, Thomas's ability to spar with Senator Metzenbaum,[24] his "fancy political footwork" during the questioning, and his behind-the-scenes lobbying of committee members were all incredibly shrewd maneuvers that led to his eventual confirmation (p. 284). Similarly, in his confirmation hearings on his appointment to the D.C. Court of Appeals, Thomas excelled under the partisan grilling by the Senate Judiciary Committee (pp. 324-25). And, of course, the ultimate example of Thomas's ability to engage in the political shenanigans of a confirmation process was his remarkable ability to resurrect his Supreme Court bid amidst the allegations of sexual harassment.[25] In total, Peyton Thomas paints the picture of Thomas who succeeded[26] amidst the political hostility of his confirmation hearings.[27]

Second, Peyton Thomas focuses much of the book on Thomas's political occupations — as an assistant attorney general in Missouri,[28] a staffer for Senator Danforth (pp. 177-80), head of the Office of Civil Rights (Chapter Twelve), and chairman of the EEOC (Chapters Thirteen-Fifteen) — again, with the purpose of showing how Thomas excelled in these executive settings. Thomas's work at the EEOC, for example, demonstrated his apt executive ability to handle the agency's financial woes (p. 315) and to transform the agency's reputation from one of "criminality and ridicule" into "one of the jewels of the bureaucracy" (p. 325). While at the Office of Civil Rights, Thomas similarly gained the reputation as a motivator who inspired loyalty and managed skillfully (pp. 204-05). A fellow member at the Office of Civil Rights, Michael Middleton, commented on Thomas's managerial

24. P. 283 ("This was a public dressing-down to which Metzenbaum was not accustomed, and which he would never forget."); *see infra* Section II.A.

25. *See, e.g.*, p. 428.

26. Although Thomas excelled in the confirmation setting, Thomas himself quite naturally hated the process. *See* p. 285 ("The best thing that can be said about the confirmation process is, 'It's over,' Thomas remarked.").

27. Compare Thomas's political acumen during the confirmation hearings to that of fellow conservative and former Supreme Court nominee, Robert Bork. While Thomas tiptoed carefully around the abortion issue during his hearings, *see, e.g.*, Paul M. Barrett, *Thomas Softens His Remarks on Natural Law*, WALL ST. J., Sept. 11, 1991, at A3, *available at* 1991 WL-WSJ 592653, Bork fell squarely into the trap of boldly engaging the issue at his hearings, and his Supreme Court nomination was subsequently quashed. *See* R. Gaull Silberman, *The Canonization of Anita Hill*, WALL ST. J., Oct. 20, 1992, at A20, *available at* 1992 WL-WSJ 629405.

28. *See* p. 149 (noting how Thomas was wooed by then-Attorney General John Danforth and his message of, " 'Clarence, there is plenty of room at the top.' ").

prowess: "Paper moved; he set deadlines; he managed well. . . . He was forceful in trying to find problems from an efficiency standpoint and a public policy perspective" (p. 205). This aptitude for administrative efficiency became one of Thomas's strengths once he went to the bench, as well (p. 465). Peyton Thomas's focus upon Thomas within the political realm prior to his career on the bench paints an image of Thomas as a man who excelled at both political gamesmanship as well as executive administration.

Third, the political image of Thomas takes on public dimensions of celebrity and fame. That is, Justice Thomas is very much a public figure like that of a famous politician. This publicity stemmed initially from the coverage of the Anita Hill hearings.[29] Although Peyton Thomas recounts that after the Anita Hill incident Thomas retreated into a shell of privacy,[30] he does note that Thomas also later sought to redeem his reputation through a "campaign of public speeches" directed at friendly audiences (p. 485). As a result of this public persona, Thomas has achieved almost a celebrity status — having to dodge "fans" in public on one hand (p. 492), while also mingling in circles of celebrity that include Jerry Jones and Charles Barkley on the other (p. 499). This is not to say that other Supreme Court Justices are not public figures — only that they are public in very different ways than Thomas. Other Supreme Court Justices, while perhaps holding speaking engagements and judging moot court competitions,[31] generally do not hold press conferences[32] or have feature interviews in *People* magazine.[33] Peyton Thomas demonstrates that Thomas, in many ways, seems like more of a cultural icon than a Supreme Court Justice.[34]

Finally, the political portrait of Thomas is complete as Peyton Thomas notes the politically partisan nature of Thomas's judicial ideology. Peyton Thomas first quotes several of Thomas's confidants who assert that the Anita Hill hearings jaded Thomas to the point of

29. *See* p. 434 (noting that the Anita Hill hearings brought extraordinarily high television ratings).

30. Even when Thomas longed for privacy, it only stoked the public's interest all the more over his apparent enigma. *See* p. 560.

31. For example, whereas many of his Supreme Court colleagues would judge moot court competitions or speak at the Ivy League law schools, Thomas refused. In fact, Thomas shied away from any involvement with his alma mater, Yale Law School. *See* pp. 565-66.

32. *See* p. 501.

33. *See* p. 457 (describing *People* magazine as "devoted largely to fawning profiles of and gossips about celebrities" and noting how the magazine made the exclusive Thomas interview its feature story).

34. *See* p. 492 (noting that the "confirmation hearings continued to resonate in the popular culture"); *see also* GERBER, *supra* note 5, at 14 (noting the literature dealing with the "cultural phenomenon that Clarence Thomas has become").

affecting his judicial philosophy. That is, according to one such individual, Thomas's thought process soon became:

> I'm gonna live long enough; I'm gonna stay on the Court long enough; and I'm gonna write the decisions that will get them. I don't think that's his conscious thinking, but that's his way of getting revenge. . . . He's very angry. It shouldn't affect his thinking on the Court, but it does.[35]

Thus, if Thomas were not a true political conservative before the Anita Hill hearings, he became one soon thereafter (p. 470). Peyton Thomas does not press the partisan angle of Thomas's jurisprudence. Scott Gerber, however, in his book on Justice Thomas does conclude that empirically Thomas has been the most politically conservative member of the Rehnquist Court.[36] This is not to say that Thomas's opinions are unprincipled and merely politically driven;[37] however, the distinct conservative outcome of the opinions coupled with Peyton Thomas's accounts of Thomas's ideological shift portray an image of Thomas that closely mirrors a partisan, political figure.

Peyton Thomas provides the proof for the political pudding. Peyton Thomas shows how Justice Thomas excelled in the political climate of his confirmation hearings and agency work. He further describes Thomas as a remarkably public persona — a sort of judicial celebrity. Finally, Thomas is shown to have conservative, ideological leanings that have manifested themselves along very consistent case outcome lines. The end result is that from Peyton Thomas's evidentiary framework, this Notice deduces the independent conclusion that Justice Thomas is a political man. Although perhaps an obvious conclusion at first glance,[38] its ramifications in how one perceives "Thomas, the Jurist" are potentially groundbreaking.

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35. P. 469; *see also* p. 479 (quoting one commentator who opined that Thomas's first year of jurisprudence on the Court served to " 'freeze his antipathy toward the left' ").

36. GERBER, *supra* note 5, at 212. Gerber describes the data as indicating

> that Justice Thomas was strongly conservative in every issue area during each of his first five terms on the Supreme Court. The data further indicate that Justice Thomas was typically the most conservative member of the Rehnquist Court in every issue area during each of the terms and that, in the aggregate, Justice Thomas was the most conservative Rehnquist Court justice.

Id. at 212-15 & tbl.3. In fact, one of Gerber's ultimate conclusions is the characterization of Thomas's jurisprudence as "political" in part. *Id.* at 196.

37. *Cf.* John O. Calmore, *Airing Dirty Laundry: Disputes Among Privileged Blacks — from Clarence Thomas to "The Law School Five,"* 46 HOW. L.J. 175, 180 (2003) (arguing that Thomas's jurisprudence masquerades as impartial).

38. Or perhaps it should not be so obvious. The very purpose of Article III judges is for political insulation. *See* STONE ET AL., CONSTITUTIONAL LAW 19-20 (3d ed. 1996) (noting the "existence of a realm of 'law' immune from 'politics' "). Moreover, Justice Thomas himself stated unequivocally that he appropriately left behind the political world and all political involvement once confirmed. P. 586. Yet, this divorce from political involvement does not foreclose the *perception* of Thomas as a political persona and the *characterization* of many of Thomas's views as politically opportunistic. *See infra* Part II.

II. RACE AND RHETORIC: LEGAL IMPLICATIONS OF POLITICIZING CLARENCE THOMAS

Once Justice Thomas is seen as a political figure, key perceptions regarding his judicial tenure are revealed. This Part examines two such revelations. Section II.A examines Justice Thomas's views on race and argues that a plausible way to explain them is in political terms. Section II.B then looks at the vitriolic criticism voiced by Justice Thomas's opponents and argues that such rhetoric becomes more understandable if viewed as a kind of political tenor rather than a judicial one.

A. *Undertones and Overtures: Perceptions of Race*

As aforementioned, a major theme of Peyton Thomas's biography is the role of race in Justice Thomas's life.[39] Peyton Thomas describes Thomas as a man deeply affected by racism of the past (p. 521); a man who early on embraced the angry Black Pantheresque views on race relations (p. 117); a man who then retreated from those views and turned hostile against affirmative action once his own credentials were questioned (pp. 141-43); and a man who, while both in the political and legal realms, has taken a very conservative stance on civil rights.[40] In spite of this retreat from civil rights activism, Peyton Thomas describes Thomas as a man striving for racial equality.[41] At first glance, Thomas's views seem paradoxical. On one hand, Thomas cares deeply about racial justice[42] while fully embracing his own race.[43] On the other

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39. *See supra* Introduction.

40. *See, e.g.*, pp. 286, 516-17.

41. *See* p. 550.

42. Thomas's own words prove as much. *See id.* (quoting a Thomas speech, " 'It pains me deeply, or more deeply than any of you can imagine, to be perceived by so many members of my race as doing them harm. . . . All the sacrifice, all the long hours of preparation were to help, not hurt.' "). In public remarks, Thomas exhorted blacks to take up the cause of racial justice by saying,

> A tremendous burden has been placed upon the righteous black man of today to rise above the wrongs done to him and help right America. Because of the history of suffering of black people — and there is redemption in suffering — black people have a critical role in bringing to fruition the promise of 1776. . . . We must have more strength than they had to do what is right.

P. 592. Similarly, Thomas encouraged black college students at Tuskegee, absent a formal invitation, by remarking,

> Many of you are the first in your family to go to college. I was there. Some of you have grown up in rural areas. I was there. Some of you were raised by one or neither parent. I was there. Some of you have barely or never seen your father. I was there. Some of you only have one pair of shoes. I was there. Some of you will be heavily in debt when you leave college. . . . I finished paying my student loans two years ago. So I was there. Some of you may be frustrated. Some of you may be angry. Some of you may be confused. I was there. . . . I am no better than you-all. I'm no smarter than you-all. I'm no more talented than you-all. I've never been No. 1 in my class.

hand, Thomas eschews the civil rights initiatives supported by the African-American community — in particular, affirmative action, quotas, and busing.[44] Upon further review, two plausible explanations exist to clarify the conundrum.

First, Peyton Thomas's own explanation is that Thomas is a man who simply cannot be stereotyped. His ultimate conclusion reinforces this: Thomas is a black man who cares about his race and Thomas is an independent thinker whose very raison d'être is to show that African Americans' views on civil rights need not be singular (p. 497). Justice Thomas, for example, believes that affirmative action does more harm than good for minorities.[45] He believes in values like hard work and personal responsibility[46] and believes that disadvantaged minorities — like himself — can attain any goal by utilizing these values rather than relying on their race for free and stigmatized handouts.[47] Peyton Thomas's explanation of Thomas on race makes sense. That is, it fits coherently with the picture of "Thomas, the independent thinker" that he paints.

Peyton Thomas's explanation, although holding currency, is incomplete. Although the conclusion of Thomas as an independent thinker who cares about racial justice is probably accurate, it does not entirely fit with the portrait of the political Thomas deduced from Peyton Thomas's depiction. Justice Thomas's beliefs on race should

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Pp. 501-02; *see also* p. 487 (recounting Thomas encouraging black youths in Atlanta); p. 552 (recounting Thomas encouraging black students in Denver); p. 550 (citing Thomas preaching the message of complete racial integration).

43. *See* p. 550 (quoting a Thomas speech, " 'Despite some of the nonsense that has been said about me by those who should know better, and so much nonsense, or some of which subtracts from the sum total of human knowledge, despite this all, I am a man, a black man, an American.' ").

44. *See* p. 165 (noting how "Thomas became a vociferous critic of liberal remedies proposed in Congress and the federal courts to ameliorate race relations. He fulminated against the civil rights agenda of most black politicians and interest groups such as the NAACP: busing, quotas, affirmative action"); *see also* Missouri v. Jenkins, 515 U.S 70, 114-38 (1995) (Thomas, J., concurring); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring); Grutter v. Bollinger, 123 S. Ct. 2325, 2350-65 (2003) (Thomas, J., concurring in part and dissenting in part).

45. Thomas notes that affirmative action programs:

> can be as poisonous and pernicious as any other form of discrimination. So-called "benign"discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.

See Adarand, 515 U.S. at 241 (Thomas, J., concurring).

46. *See* Thomas, *supra* note 6.

47. P. 517 (quoting Thomas's *Adarand* concurrence in which he refers to affirmative action as " 'programs [which] stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences' ").

instead be explained in political terms. Two points serve to illustrate this characterization.

First, Justice Thomas's jurisprudence on race departs from the originalism that undergirds most of his jurisprudence (p. 517). For example, as Peyton Thomas notes, Thomas in *Adarand Constructors, Inc. v. Pena*[48] relied on natural-law principles of the Declaration of Independence rather than an originalist construction to voice opposition to an affirmative action program (p. 516). Peyton Thomas's explanation is that Justice Thomas realized that "[a]pplying originalism to the Fourteenth Amendment would have required Thomas to admit that the Constitution was, in a fundamental sense, racist in conception" — something Thomas would not and could not do (p. 517). Yet, what Peyton Thomas fails to realize is that the result of Thomas's paradigmatic departure in civil rights cases[49] was the politicization of Thomas's jurisprudence. In essence, Thomas's jurisprudence was no longer intellectually consistent along originalist lines; instead, it fell right down partisan lines. The conservative right applauded Thomas while the liberal left decried him.[50] Thomas's departure from originalism, even if based on sincere personal beliefs about race, the Constitution, and natural law, cemented a perception of Thomas as a political actor.[51] This perception is significant in terms of the discourse

48. 515 U.S. at 240 (Thomas, J., concurring).

49. Affirmative action cases like *Adarand* illustrate most vividly the perceived politicized civil rights jurisprudence of Thomas. Yet, other civil rights cases are also illustrative. For example, Thomas's concurring opinion in *Holder v. Hall*, 512 U.S. 874 (1994), a Voting Rights Act case, was perceived as a politically conservative anthem and a liberal blow. *See* GERBER, *supra* note 5, at 94. In his *Holder* concurrence, Thomas called into question the entire edifice of the Court's voting-rights jurisprudence. *See id.* at 87. Thomas argued that the Voting Rights Act did not cover second-generation claims and that "as far as the Act is concerned, an effective vote is merely one that has been cast and fairly counted." *Holder*, 512 U.S. at 919 (Thomas, J., concurring); *see also* GERBER, *supra* note 5, at 87. It is arguable that Thomas remained intellectually faithful to his usual paradigmatic preference of textualism. *See id.* at 89. Yet, Justice Stevens in dissent branded Thomas's concurrence as a "radical" reading of the Act, *Holder*, 512 U.S. at 963 (Stevens, J., dissenting), and essentially accused Thomas of reading his own policy preferences into the Act. *Id.* at 966 (Stevens, J., dissenting). Whether or not Stevens was correct in his accusation, Thomas's concurrence was met with politically partisan praise and criticism — evidence that many at least perceived Stevens to be right that Thomas's opinion was policy-guided. *See* GERBER, *supra* note 5, at 94.

50. GERBER, *supra* note 5, at 102-03.

51. This Notice only argues that the *perception* of Thomas's race jurisprudence has been political; it does not argue that Thomas has in fact been motivated by unprincipled, political reasons. This latter argument — as with most forms of motive review — is simply too speculative and therefore too difficult to make convincingly one way or the other. Peyton Thomas refers to commentators who believe Thomas has adopted a bitterly partisan jurisprudence. *See* pp. 469, 479. On the other hand, Scott Douglas Gerber makes an argument that one can classify Thomas's jurisprudence on race as a principled "liberal originalism" and an extension of Harlan's view of a colorblind Constitution, GERBER, *supra* note 5, at 109, 193, or in the context of voting-rights cases, as "dedicated textualis[m]." *Id.* at 89. Yet, then again, Gerber argues that most of Thomas's jurisprudence — particularly his civil rights jurisprudence — mirrors the political beliefs that Thomas expressed as a member of the ex-

surrounding Thomas's jurisprudence.[52] Peyton Thomas's failure to account for it in his explanation of Thomas's civil rights views is a serious oversight.

Second, from the description of Thomas's life by Peyton Thomas, Justice Thomas can be seen as opportunistically wielding his race as a trump for political convenience. Peyton Thomas never draws this conclusion;[53] however, he lays out enough evidence for a persuasive circumstantial case. For instance, during Thomas's first EEOC confirmation hearing, Thomas was questioned on his civil rights stance and his apparent lack of support from the civil rights community (p. 282-83). Thomas responded, not by discussing his position on the issues, but by relying on his experience as a child of Jim Crow. He stated:

> Well, all I have to offer is the fact that I grew up under segregation . . . and I was the only black in my high school for 2 years of high school. And I am not used to walking in step with anybody because I was the only one of my kind, normally, wherever I was. (p. 283)

Thomas made his point by relying on his race and was subsequently able to gain confirmation.

Similarly, Thomas responded to the Anita Hill allegations at his Supreme Court hearings by again relying on his race as a rebuke to the Committee's investigation. He memorably stated:

> And from my standpoint, as a black American, as far as I am concerned, it is high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that, unless you kow-tow to an old order, this is what will happen to you, you will be lynched, destroyed, caricatured by a committee of the U.S. Senate, rather than hung from a tree. (p. 428)

Thomas would later reprise his "high-tech lynching speech" during the hearings as he discussed the history of lynchings and its relationship to sexual accusations against the black man (p. 435). According to

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ecutive branch. *See id.* at 198 ("Justice Thomas is, in short, merely an especially fascinating example of the realist maxim that judges read their policy preferences into the law they are interpreting."). In the end, it is too difficult to definitively classify Thomas's reasons, as opposed to the perception of Thomas's reasons, as political. In any event, as this Notice argues, perception matters more. That is, most Thomas commentators refuse to dig beneath the political perception and engage his jurisprudence regardless of the political perception. *See infra* notes 82-86 and accompanying text.

52. *See infra* Section II.B.

53. In fact, Peyton Thomas would likely disagree, as most of the book is spent revealing Thomas's personal and genuine experiences involving his race. *See, e.g.*, p. 105 (recounting a racist remark in the wake of Martin Luther King, Jr.'s assassination and the significant impact it had on Thomas); p. 123 (noting Thomas's disgust with a disparate punishment leveled at some black students while at Holy Cross and Thomas's "act of solidarity" in withdrawing from school with fellow Black Students' Union members); p. 141 (noting that "Thomas would later say that the worst experience of his life was when whites at Yale told him he was admitted there only because of racial quotas" and that the stigma of affirmative action called Thomas's accomplishments into question).

Peyton Thomas, the high-tech lynching speech and its reprise would prove decisive as a turning point in the confirmation battle (p. 434).

The move by Thomas to racialize the hearings demonstrated a sense of political shrewdness; in effect, he changed the tone of the hearings from a sexual harassment investigation a racist manhunt for Thomas by fiendish political lynchers.[54] As even Peyton Thomas admits, the effect on the public was unmistakable — the African American community embraced Thomas in the common sentiment of, " 'I don't think blacks should be against blacks' " (p. 448). Further, according to Peyton Thomas, "In the end, the proud nonconformist who bucked racial solidarity would find his political salvation in the black community" (p. 448).

Peyton Thomas, although never drawing the conclusion himself, provides instances of Thomas wielding his race to serve certain political ends. This is not to say that Thomas did so disingenuously or even consciously. Yet, if image is really everything, the perception of Thomas using his race as a political trump did resonate with the public and a political perception of Justice Thomas was given further credence. This perception, coupled with Thomas's distinct jurisprudence in race cases, demonstrates that Thomas views and uses race like the traditional political figure. As Section II.B argues, this perception, as partially constructed by Thomas, has been his public undoing.

B. *Off-Color Rhetoric: Fit for a King Yet Aimed at a Judge*

The criticism voiced by Thomas's opponents against him has been largely preposterous.[55] The attacks have often been unreasoned, bitterly partisan, and grossly propagandized.[56] Furthermore, the tenor of the criticism has been deplorably personal — in the form of ad hominem attacks and often racist name-calling.[57] At first glance, Clarence Thomas looks like the whipping boy for the left — the lone opportunity for the left to have license to be racist without ever

54. Claude McKay's poem, *The Lynching*, vividly depicts an image-laden parallel to that of Thomas's high-tech lynching: a sexualized accusation followed by an opportunistic and shockingly joyous lynching.

> The ghastly body swaying in the sun.
> The women thronged to look, but never a one
> Showed sorrow in her eyes of steely blue.
>
> And little lads, lynchers that were to be,
> Danced round the dreadful thing in fiendish glee.

See CLAUDE MCKAY, THE LYNCHING, SPRING IN NEW HAMPSHIRE AND OTHER POEMS 11 (1920).

55. *See, e.g.*, *infra* note 65 and accompanying text.

56. *See, e.g.*, *infra* note 62 and accompanying text.

57. *See, e.g.*, *infra* note 64 and accompanying text.

engaging in Thomas's actual ideas.[58] Yet, once the politicized version of Thomas is revealed, the critics' attacks — albeit still inexcusable in tenor — become easier to explain. Section II.B proceeds in three parts by first examining specific anti-Thomas remarks; second, identifying and critiquing two commentators' plausible explanations for the rhetoric; and finally, arguing that the critical rhetoric is a direct result of Thomas's politicization.

Peyton Thomas provides many examples of the critical rhetoric aimed at Justice Thomas. For instance, he recounts how critics often refer to Thomas as a "Scalia clone" due to the fact that both frequently vote together.[59] Moreover, he notes the *New York Times* reaction to Justice Thomas's infamous *Hudson v. McMillian*[60] dissent where the *Times* labeled Thomas "The Youngest, Cruelest Justice."[61] He then mentions numerous personal attacks on Thomas, ranging from critics calling him "bizarre" (p. 479) to "Uncle Tom Justice" (p. 519). He also discusses the anti-Thomas book *Strange Justice* where Thomas is termed a bastard who grew up in a "shack" (p. 503).

In addition to these examples listed by Peyton Thomas, numerous others exist. One law professor referred to Thomas in the wake of Thomas's *Hudson* dissent, as " 'about as warm to the plight of criminal suspects and prisoners as that frosty can of Coke on his desk at E.E.O.C.' "[62] A Playboy article dubbed Thomas, "the Angriest Man

58. *See* John A. Foster-Bey, *Supreme Justice: Ten Years of Justice Thomas — and Thomas Bashing*, NAT'L REV. ONLINE, Oct. 18, 2002, *at* http://www.nationalreview.com/comment/comment-foster-bey101802.asp.

59. Pp. 499-500. Peyton Thomas, however, argues that such a moniker is patently unfair. He notes how empirically Souter and Breyer actually vote together more often than Scalia and Thomas. *Id.*

60. 503 U.S. 1 (1992). *Hudson* was a case about a prisoner who had been beaten by prison guards and had brought a § 1983 suit claiming a violation of his Eighth Amendment rights against cruel and unusual punishment. *Id* at 4. The Court held that the guard's use of force was objectively and subjectively excessive and thus constituted cruel and unusual punishment. *Id.* at 8-10. Thomas, in dissent, argued that the "use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not cruel and unusual punishment." *Id.* at 18 (Thomas, J., dissenting). Yet, Thomas went further by calling the Court's Eighth Amendment precedents into question, arguing that the amendment did not apply in the prison context. Rather, the history of the amendment had shown its application only where "tortious punishments [had been] meted out by statutes or sentencing judges." *Id.* at 18-19.

61. Justice Thomas himself was shocked by the media's reaction. He would later state,

> I must note in passing that I can't help but wonder if some of my critics can read. One opinion that is trotted out for propaganda, for the propaganda parade, is my dissent in [*Hudson*]. The conclusion reached by the long arms of the critics is that I supported the beating of prisoners in that case.... How can one extrapolate these larger conclusions from the narrow question before the Court is beyond me, unless, of course, there's a special segregated mode of analysis.

P. 479.

62. GERBER, *supra* note 5, at 28 (quoting professor Craig Bradley).

on the Supreme Court."[63] An article in *Emerge*, the self-proclaimed "Black America's Newsmagazine," called Thomas, "Uncle Thomas: Lawn Jockey of the Far Right" and displayed a caricature of Thomas shining Justice Scalia's shoes.[64] An ACLU of Hawaii board member refused to invite Thomas to speak, arguing it would be akin to "inviting Hitler to come speak on the rights of Jews."[65] Another commentator actually wished physical harm upon Thomas by stating, "I hope his wife feeds him lots of eggs and butter and he dies early, like many black men do, of heart disease."[66] Admittedly, some critics attempt to critically engage Thomas's ideas,[67] yet the aforementioned examples of petty and hurtful ad hominem attacks dwarf those tidbits of intellectual discourse.[68]

Although Peyton Thomas fails to explain the reason for such a vitriolic discourse in judging Thomas, other commentators do. Donna Brazile, for instance, argues that Thomas's critics are motivated by his failure to properly fill the shoes of Justice Thurgood Marshall — a liberal and a strong intellectual figure.[69] Since Thomas does not step in line with the liberal establishment on civil rights issues, he has been crucified by that establishment.[70] On the other hand, Scott Douglas Gerber hypothesizes that most people judge "Justice Thomas" as they judged "Nominee Thomas."[71] That is, most people take issue with Thomas down partisan lines for reasons stemming largely from the Anita Hill hearings.[72]

Both Brazile's and Gerber's explanations ring true in part. Yet, Brazile's theory only explains why the critics have voiced opposition to Thomas; it fails to explain why that criticism has taken on such a personal tenor. Other prominent African Americans who have been associated with a legacy and have taken conservative civil rights positions certainly have been criticized, but not with the widespread,

63. *Id.* at 30.

64. *Id.* at 31. The Editor later apologized for being *too* compassionate with the lawn-jockey imagery (and also with a previous caricature of Thomas wearing an Aunt Jemima handkerchief). *Id.*; *see also* p. 549.

65. Kevin Merida & Michael A. Fletcher, *Supreme Discomfort*, WASH. POST, Aug. 4, 2002, (Magazine), at 11.

66. *Id.* at 10.

67. *See, e.g.*, Eleanor Brown, *Black Like Me? "Gangsta," Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. REV. 308 (2000).

68. *See, e.g.*, Edwin M. Yoder, Jr., *Ask Why His Black Critics Are Angry at Justice Thomas*, WASH. POST, Aug. 12, 1994, at A27 ("None of Thomas's disappointed critics went beyond ad hominem comments to meet his arguments [in *Holder v. Hall*] head-on.").

69. Foster-Bey, *supra* note 58.

70. *Id.*

71. GERBER, *supra* note 5, at 192.

72. *Id.* at 33-34, 192.

persistent, and harsh language of personal animus directed at Thomas.[73] Similarly, Gerber's explanation is insufficient. Although it seems right in part, it tends to overemphasize the impact of the Anita Hill hearings. People undoubtedly still judge Thomas as the "Nominee Thomas," but not solely because of what happened at the hearings. Rather, the perception built at the hearings matters only as to its role in constructing the politicized Thomas.

The political explanation of Thomas best explains the flavor of the rhetoric. Thomas has simply been attacked in the same manner as any public political figure. Brazile's race explanation and Gerber's partisan explanation both are components to this formula. That is, Thomas's views on race and the partisanship associated with his confirmation and his jurisprudence partially serve to comprise the Political Thomas. Yet, as this Notice has argued, Thomas's own public persona and his own use of race as a political trump have helped to build his political image.[74] The result is an attack that can be described as "presidential" — Nixonian in degree of vitriol,[75] Clintonian in terms of character assassination,[76] and parallel to George W. Bush on questions of intellectual capacity.[77] Similarly, Thomas's responses to these "presidential" attacks have often been couched in political terms. To illustrate, Thomas, at a press conference — again, a highly unusual and public event for a Supreme Court Justice — declared to a group of black

73. For example, Roy Innis, the national director of the Congress on Racial Equality ("CORE"), inherited a legacy organization in 1968 with a rich history of civil rights involvement. CORE staged the first sit-ins in Chicago; CORE members were the first to go on freedom rides in the South; the three civil rights workers murdered in Mississippi in 1964 were all CORE members. Needless to say, CORE is a legacy civil rights institution and arguably as important as the NAACP in the civil rights struggle. *See* Gregory Kane, *It's Time to Honor the Alternative to Jackson, Sharpton as Leaders*, BALT. SUN, Jan. 26, 2003, *available at* http://www.sunspot.net/news/local/balmd.kane26jan26,0,3825134.column?coll=bal-home-columnists. Yet, under the leadership of Roy Innis, CORE has eschewed affirmative action and taken more conservative stances on civil rights positions. *See* Niger Innis & Roy Innis, *Ending Race-Based Politics*, AMERICAN OUTLOOK, Summer 2000, at 45. Rather than getting berated by the civil rights establishment for abandoning a legacy, Innis has been honored for his part in the struggle. *See* Kane, *supra*, *available at* http://www.sunspot.net/news/local/balmd.kane26jan26,0,3825134.column?coll=bal-home-columnists.

74. *See supra* text accompanying notes 29-34; Section II.A.

75. *See* Patrick J. Buchanan, *Yes, Watergate Was a Coup D'Etat*, WATERGATE.INFO, June 17, 1997, *at* http://www.watergate.info/analysis/buchanan.shtml (positing that the attacks on Nixon were motivated by hatred).

76. Compare Clinton's famous, "I did not have sexual relations with that woman" to the Senator Hatch/Clarence Thomas exchange at his confirmation hearings (Hatch: "Did you ever say in words or substance something like there is a pubic hair in my coke?" Thomas: "No, Senator"). P. 431.

77. Compare the image of an intellectually deficient Bush, *see* Eric Alterman, *Left in Shambles.(Ralph Nader's failed bid for presidency still had impact)*, NATION, Nov. 27, 2000 (noting the media script during the campaign of portraying Bush as dumb), *available at* 2000 WL 17719128, with the description of Thomas as a "clone" of Scalia. P. 499.

journalists, "I am not an Uncle Tom."[78] He could very well have been saying, "I am not a crook." Thomas, in way of response, consciously adopted the same political rhetoric that had been heaped upon him.[79] Thus, rather than explaining the strange critical tenor surrounding Justice Thomas as an Anita Hill result or a partisan manifestation, it is more accurate to describe it[80] as politically flavored and directed at a political figure.

In the end, the legal and historical implications of this politicized rhetoric are disheartening. Thomas's jurisprudence — particularly his civil rights jurisprudence — is rarely engaged and hastily dismissed. The perception of a politicized Thomas obscures any value of his judicial philosophy. For example, Thomas's civil rights jurisprudence could easily be described as a form of "liberal originalism" or classically liberal.[81] Instead, it is dismissed as "ideologically driven partisan jurisprudence that masquerades as judicial impartiality."[82] Other Supreme Court Justices, who have been described as deciding cases based on political reasons,[83] have nonetheless had their bodies of opinions assessed on the merits.[84] Yet, with Thomas, his political

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78. P. 501 (Peyton Thomas describes the statement quite appropriately as "an unfortunate Nixonian formulation").

79. Peyton Thomas recounts a speech of Thomas's that demonstrates the Justice's consciousness of the rhetoric. Thomas stated,

> "In my humble opinion, those who come to engage in debates of consequence, and who challenge accepted wisdom, should expect to be treated badly." . . . "Even if one has a valid position, and is intellectually honest, he has to anticipate nasty responses aimed at the messenger rather than the argument." "[A]ctive citizens are often subjected to truly vile attacks; they are branded as mean-spirited, racist, Uncle Tom, homophobic, sexist, etc."

P. 590.

80. To reiterate, it is accurate to describe it as political, not to rationalize or justify it as such.

81. GERBER, *supra* note 5, at 193-94.

82. *See* Calmore, *supra* note 37.

83. Look no further than to the entire Rehnquist Court in *Bush v. Gore*, 531 U.S. 98 (2000). *See* Peter Gabel, *What It Really Means to Say "Law is Politics": Political History and Legal Argument in* Bush v. Gore, 67 BROOK. L. REV. 1141, 1144 (2002) ("By going so far beyond the legitimate limits of constitutional interpretation, the Court made transparent what is usually mystified — the political nature of all legal reasoning."). *But see* Erwin Chemerinsky, *How Should We Think About* Bush v. Gore*?*, 34 LOY. U. CHI. L.J. 1, 6 (2002) ("I truly believe that each of the nine Justices deeply believed that he or she was making a ruling on the law, not on partisan grounds.").

84. Again, using the example of the Rehnquist Court in *Bush v. Gore*, the Court's per curiam opinion and various concurrences and dissents all came down along Republican v. Democrat grounds. *See* Tony Auth, Cartoon, *Why They Don't Want Cameras in the Supreme Court*, L.A. TIMES, Dec. 15, 2000, at B9. Yet the decision, apart from its fairly obvious partisan foundation, has been thoroughly engaged on its legal merits. *See, e.g.*, Lani Guinier, *Supreme Democracy:* Bush v. Gore *Redux*, 34 LOY. U. CHI. L.J. 23 (2002); Steve J. Mulroy, *Lemonade from Lemons: Can Advocates Convert* Bush v. Gore *into a Vehicle for Reform?* 9 GEO. J. ON POVERTY L. & POL'Y 357 (2002); Louis Michael Seidman, *Democracy and Legitimation: A Response to Professor Guinier*, 34 LOY. U. CHI. L.J. 77 (2002).

perception almost acts to disrobe him entirely of his role as a jurist, as commentators rarely dig beneath the perception[85] or, as with other politically behaving Justices, hold constant the legal-realist notion that policy often is interwoven with constitutional interpretation.[86] Thomas's body of opinions — particularly his concurrences and dissents — lose their historical value once Thomas is dismissed as a politico. Thomas has been vociferous in dissent — while critics might deem many of these opinions as largely irrelevant, one lone commentator argues that they constitute "a lasting legacy" appealing to the "intelligence of a future day."[87] Finally, and perhaps most importantly, there remains Thomas's personal legacy. As history has largely failed to recognize John Coltrane as a spiritual icon due to the obvious perception of him as purely a musician,[88] likewise, the politicized perception of Thomas could inaccurately shape his own legacy. History will unlikely remember Thomas as a fiercely independent legal theorist and a courageous moral agent, as Peyton Thomas describes Thomas's potential legacy (p. 592). Instead, Thomas unfortunately may well be remembered in the colorful and politicized language of his detractors: as "a Negrophobic, self-loathing [historical] blip."[89]

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85. Thomas's concurrence in *Holder v. Hall*, a Voting Rights Act case, again proves illustrative. *See supra* note 49. Thomas's concurrence was perhaps the lengthiest concurrence in Supreme Court history. P. 495. His analysis was principled in that he remained faithful to the statutory paradigm of textualism. GERBER, *supra* note 5, at 89. Although Justice Stevens argued Thomas's reading of the Act was radical, *Holder*, 512 U.S. at 963 (Stevens, J., dissenting), it was a well-reasoned, novel, and passionate reading of the text. Pp. 495-97. Despite this, critics — presumably dismissive due to the conservative outcome of the concurrence — initially attacked the opinion by engaging in ad hominem attacks against Thomas rather than criticizing the opinion and its reasoning on the substantive merits. *See* Yoder, *supra* note 68, at A27 ("None of Thomas's disappointed critics went beyond ad hominem comments to meet his arguments [in *Holder v. Hall*] head-on."). Arguably, beneath the sands of political perception laid the solid legal foundation of *Holder* shamefully untouched. As *Holder* and its scholarship demonstrate, the political perception of Thomas acts effectively as a barrier, preventing an accurate and thorough understanding of his jurisprudence. Ultimately, this is the concern with politicizing Thomas.

86. *See* Christopher Wolfe, *The Senate's Power to Give "Advice and Consent" in Judicial Appointments*, 82 MARQ. L. REV. 355, 366 (1999) ("The predominant lens through which legal history is viewed today is legal realism, which, in varying degrees according to its more or less extreme forms, holds that judges are basically 'politicians in robes.' ").

87. *See* David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 343 n.14 (1996):

> Even if Justice Thomas' views do not sway the other Justices on the Court in the near future, his dissenting and concurring opinions constitute a lasting legacy. He may be regarded as one of those "prophets with honor" who appeal to " 'the brooding spirit of the law, to the intelligence of a future day' " and who "stir the sensibilities and prod the conscience of the country, eventually leading the Court — which is, in a true sense, the custodian of the country's conscience — 'to correct the error into which [he] believes the Court to have been betrayed.' "

88. *See supra* notes 1-3 and accompanying text.

89. Barry Saunders, *No Need to Protest Thomas*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 8, 2002, at B1.

CONCLUSION

Peyton Thomas, in his biography, examines Thomas's life in great detail and attempts to explain the man as independent in both spirit as well as in legal thought. Yet, the strength of Peyton Thomas's book lies not in this conclusion, but rather in the detail. From his comprehensive biography, several major inferences can be drawn. As this Notice has argued, Peyton Thomas provides the evidence for making a compelling case that Justice Thomas has been entirely politicized in perception. Thomas's past experiences, his jurisprudence, and his views on race all are part of his political make-up. In addition, the bitter rhetoric aimed at Thomas becomes more understandable if viewed as the language of petty political discourse as opposed to engaging legal critique.

Perhaps a final question then is: Will it ever be possible for Thomas to be de-politicized? Peyton Thomas, noting recent critics' eschewal of the "Scalia Clone" moniker and the recognition of Thomas's clearly independent jurisprudence, suggests as much (p. 581). And although Thomas can never change his race and he remains steadfast in his politically conservative views on civil rights, a recent glimpse of tolerance — or perhaps the white flag of surrender — by the liberal civil rights community suggests that the process of de-politicization has already begun.[90] Yet, only time will tell if the process will run to completion and Thomas can be viewed as purely a judicial figure and not as a political one.

90. GERBER, *supra* note 5, at 34 (quoting NAACP president Kwesi Mfume as saying, "I think we must end the Clarence Thomas fixation in our community and use that energy to change things around us").