CONTENTS

PREFACE

Having written *Antonin Scalia's Jurisprudence: Text and Tradition*,[1] I thought it would be instructive to focus my research on the Supreme Court's other unabashed originalist, Clarence Thomas, and to compare and contrast the two jurists' approaches to constitutional and statutory interpretation. This book is the result of that research.

It is a detailed analysis of the close to 500 majority opinions, concurring opinions, and dissents Thomas has written during his twenty-two years of service on the Supreme Court. Thomas's opinions are invariably well crafted, extensively researched, and passionately argued. In them, as well as in his various speeches and law review articles, he has articulated a clear and consistent jurisprudence of constitutional restoration that seeks to restore the original general meaning of the Constitution. His original general meaning approach is considerably broader than Scalia's original public meaning approach. Thomas fully incorporates Scalia's narrower approach, and so he joins Scalia in asking what a particular constitutional text meant to the society that adopted it. But he then widens his originalist focus to consider evidence of the original intent of the framers of that text and the original understanding of those who ratified it so that he can answer the question of why the text was adopted. And if past precedents have departed from that original general meaning, Thomas understands that it is his "constitutionally assigned role" and responsibility to argue against them, to refuse to apply them in the case before him, and when appropriate to invite future cases that can overturn them so that the Constitution again means "what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean."[2]

In this book, I attempt to understand Thomas as he understands himself. The focus is on Thomas—on what he himself has written, not on what others have written about him. I try to state affirmatively his understanding of federalism through an examination of his opinions on the Interstate, "negative," and Indian Commerce Clauses; federal preemption; the Necessary and Proper Clause; the Tenth Amendment; and state sovereign immunity. I explore his understanding of substantive rights through a consideration of his opinions on the Religion and Speech and Press Clauses of the First Amendment, the Second Amendment, the Takings Clause of the Fifth Amendment, and the Court's abortion jurispru-

dence. I study his understanding of criminal procedural rights through an analysis of his opinions on the Ex Post Facto Clauses, the Fourth Amendment, the three "witness" clauses of the Fifth and Sixth Amendments, the various questions posed by the right to trial by jury, and the proper reach of the Eighth Amendment's prohibition of cruel and unusual punishments. And finally, I describe his understanding of race, equality, and civil rights though an explication of his opinions on desegregration, racial preference, and voting rights.

I wish to acknowledge my gratitude to Paul Jeffrey, a student at Yale Law School, for serving as my research assistant on the book when he was an undergraduate at Claremont McKenna College; Professor Michael Uhlmann of Claremont Graduate School for his careful reading of various chapters and for his insightful comments; Stanford Law School, Rutgers School of Law–Newark, and the University of La Verne Law School for invitations to speak on my research on Thomas and for the opportunity they provided for me to receive valuable feedback; the law review staff at the University of Detroit–Mercy School of Law for inviting me to prepare an article for its symposium issue commemorating Thomas's twenty years of service on the Court and for allowing me to include here a modified version of that article as chapter 2; and to Claremont McKenna College for granting me a full-year sabbatical to work on this project. I also want to give special thanks to Joan W. Sherman, copy editor; Kelly Chrisman Jacques, production editor; and Fred M. Woodward, director, who make publishing with the University Press of Kansas such an honor and pleasure.

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Claremont, California
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Introduction

When, on July 1, 1991, President George H. W. Bush nominated Clarence Thomas to serve as associate justice of the U.S. Supreme Court—predicting that he would be "a great justice," calling him "the best person for this position," and denying that Thomas's race had influenced his nomination—many Americans were skeptical. They doubted Bush's claims, just as they doubted his nominee. Among these doubting Thomas were individuals from the civil rights community, convinced that Thomas would abandon the lifelong campaign for racial justice undertaken by Thurgood Marshall, the first black justice, whose seat Thomas was to fill. Other skeptics included feminists, who thought that Thomas would vote in favor of overturning *Roe v. Wade*, and members of the political Left, who saw him as a partisan conservative of mediocre abilities whose originalist approach to constitutional interpretation was simply a cloak for his policy preferences. Those doubting Thomas even came from the political Right, especially individuals worried that his unequivocal commitment to the principles of the Declaration of Independence would make him a judicial activist.

During his confirmation hearing, those who doubted Thomas were quick to believe Anita Hill's unsubstantiated claims that he had sexually harassed her. As a result of their doubts, Thomas was confirmed by a razor-thin margin of fifty-two to forty-eight votes.

Even after his confirmation, his critics continued to doubt him. They doubted his intelligence and independence, dismissing him as Justice Antonin Scalia's "sock puppet," who mindlessly agreed with and repeated Scalia's arguments, and labeling him, in racially charged language, Scalia's "lawn jockey" and "shoeshine boy." They went so far as to doubt his very humanity, with the *New York Times* branding him "the Court's Cruelest Justice" during his first year on the bench. Left-wing law professors doubted his legitimacy, attempting to rescind invitations to speak that their law schools had extended to him and, if failing at that, boycotting his visits. One even argued that any five-to-four Supreme Court decision in which Thomas was in the majority should be regarded as nonbinding.

Thomas is now approaching a quarter century of service on the High Bench, during which he has written more than 475 majority, concurring, and dissenting opinions. This book undertakes a detailed analysis of these opinions, as well as of

his speeches and law review articles, and, on that basis, provides overwhelming evidence that there is no longer—and, in fact, there never was—any reason to doubt Clarence Thomas or what President Bush said about him. In these works, Thomas has articulated a clear and consistent jurisprudence of constitutional restoration that seeks to restore the original general meaning of the Constitution. It is an impartial, restrained jurisprudence that as often as not runs counter to the doubters' perceived sense of his policy preferences: his pro–criminal defendant opinions, his antibusiness preemption and negative Commerce Clause opinions, and his opinions interpreting various rights explicitly listed in the Bill of Rights, discussed in later chapters, will make this clear.

Clarence Thomas was born on June 23, 1948, in Pinpoint, Georgia, to M. C. Thomas and Leola Anderson. His people were Gullahs; they descended from West African slaves who lived on the barrier islands and coastal regions of South Carolina, Georgia, and Florida. As he reports in his memoir, *Gullah* was a derogatory term for those "who had profoundly Negroid features and spoke with a foreign-sounding accent similar to the dialects heard on certain Caribbean islands."[1] His father abandoned the family when Leola was pregnant with Thomas's younger brother, and Leola divorced him in 1950. Until his confirmation as a Supreme Court justice, Thomas had met his father only twice—once as a young boy, when M. C. broke his promise to send him a wristwatch, and then during a brief visit shortly after his graduation from high school.

Pinpoint was a town of no more than a hundred people on a tidal salt creek 10 miles southeast of Savannah. Until he was six, Thomas lived in "a shanty with no bathroom and no electricity except for a single light in the living room," but when his brother and cousin played with matches and burned the home down, he and his younger brother and mother were forced to move to Savannah, where Leola kept house for a man who drove a potato chip delivery truck. In Thomas's words, "Overnight, I moved from the comparative safety and cleanliness of rural poverty to the foulest kind of urban squalor."[2] He recalls, "I'll never forget the sickening stench of the raw sewage that seeped and sometimes poured from the broken sewer line." Unlike the shanty in Pinpoint, where rivers and the land provided his family "with a lavish and steady supply of fresh food: fish, shrimp, crab, conch, oysters, turtles, chitterlings, pig' feet, ham hocks, and plenty of fresh vegetables," their apartment in Savannah was often without food and adequate heat: "Never before had I known the nagging chronic hunger that plagued me in Savannah. Hunger without the prospect of eating and cold without the prospect of warmth—that's how I remember the winter of 1955." The apartment was also so cramped that his mother and brother shared the only bed, leaving him to

sleep in a chair "too small, even for a six-year old." Thomas was enrolled in the first grade at Florance Street School, the first public school in Savannah built specifically for black students, but he was bored by the slow-moving and repetitive lessons and started skipping school and wandering the neighborhoods.[3]

On the ten dollars a week his mother earned, she was unable to support Thomas and his brother, and so she sent them to live with their grandparents, Christine and Myers Anderson. In his memoir, Thomas attributes his ability to overcome the many hurdles that stood along the way to achieving tremendous success in life to the grandfather who raised him from the age of seven. Thomas calls him "the greatest man I have ever known."[4]

Christine—Thomas and his brother always called her Aunt Tina—was small and thin, with a sixth-grade education. Myers—they called him Daddy, for he was the only father they knew—was tall, wiry, and "strongly muscled" and had a third-grade education, which really amounted to nine months of actual learning because he went to school for only three months a year. Myers ran a family business delivering fuel oil in the black community of Savannah; he made the deliveries, and Christine took orders over the phone and kept the books. This business allowed them to live in a two-bedroom, one-bathroom, cinder-block house with a kitchen filled with modern appliances. Myers raised Thomas and his brother with an "iron will" and by strict rules. Thomas concedes that it "would be too generous to call him semiliterate," but Myers did insist that the boys' first task was to get a good education so that they could get a "coat and tie job." And as Thomas recalls, "He wouldn't listen to any excuses for failure. 'Old Man Can't is dead—I helped bury him,' he said time and time again."[5]

And so, Myers, who had converted to Catholicism, sent Thomas to St. Benedict the Moor Grammar School, an all-black parochial school, and later to St. Pius X, Savannah's only Catholic high school for blacks. When Thomas was ten, Myers built a house on 60 acres of family land in Liberty County, Georgia, that had been passed down through the generations. And for the next decade, in an effort to keep Thomas and his brother off the alluring and dangerous streets of Savannah during the long, hot summer vacations, Myers saw to it that they spent their time, from the last day of one school year to the first day of the next, on the farm. There, he worked them hard, having them clear brush, build fences, hoe rows of corn, pick beans, and harvest sugarcane. "Our small soft hands blistered quickly at the start of each summer," Thomas writes, "[for] Daddy never let us wear work gloves, which he considered a sign of weakness. After a few weeks of constant work, the bloody blisters gave way to hard-earned calluses that protected us from pain." He would later reflect, "Long after the fact, it occurred to me that this was a metaphor for life—blisters come before calluses, vulnerability before maturity."[6]

After years of service as an altar boy, Thomas contemplated a religious vocation, and shortly before his sixteenth birthday, he decided to enter Saint John Vianney, a diocesan minor seminary located in Isle of Hope in affluent Chatham County, to prepare for the priesthood. The tuition at Saint John Vianney was four times as much as at St. Pius X, meaning Myers and Christine would have to make definite sacrifices for him to go there, but they agreed to the plan, with Myers laying down one condition: "If you go, you have to stay. You can't quit."[7]

Saint John Vianney was effectively an all-white boarding school (the only other black student when Thomas was there would drop out). It was a challenging experience for Thomas, in part because he still did not speak standard English, and he was required to repeat the tenth grade because he had not studied Latin at St. Pius X. But he mastered Latin, excelled in the classroom, and graduated with grades so good that the caption, courtesy of his classmates, under his yearbook photo for his senior year read: "Blew that test, only a 98."[8]

After Saint John Vianney, Thomas enrolled in Immaculate Conception Seminary in northwest Missouri, a Benedictine monastery. But he started to have second thoughts about the priesthood because of the failure of the Catholic Church to denounce racism with the same conviction that it denounced abortion. And when word spread in his dormitory that Martin Luther King had been shot, prompting a seminarian to shout, "That's good. I hope the son of a bitch dies," Thomas abandoned his vocation, lost his faith, and left the seminary at the end of the spring semester a month later. When he returned to Savannah and told his grandfather of his decision to leave the seminary, Myers reminded him of his pledge not to quit and ordered him to leave the house that very day.[9]

At the suggestion of Sister Mary Carmine, his chemistry teacher at Saint John Vianney, Thomas transferred to Holy Cross College in Worcester, Massachusetts, where he "excelled in his classes"[10] and majored in English "to fully master the fine points of standard English."[11] While there, he also embraced Black Nationalism, helped found the Black Student Union, lived on a black floor of a dormitory, became involved in the Black Panthers' free breakfast program for black children, and led a walkout over the issue of the college's divestment of funds from South Africa.[12] Accepted for admission by Harvard Law School, the University of Pennsylvania Law School, and Yale Law School, he chose Yale because it was smaller, more liberal, and "a better place for me to grow intellectually."[13] While at Holy Cross, he also met Kathy Ambush, a student at Anna Maria College; she accepted his proposal of marriage in Thomas's junior year, and they married the day after his graduation from Holy Cross on June 5, 1971.[14]

At Yale, their son, Jamal Adeen Thomas, was born.[15] Meanwhile, his militancy dwindled, and his opposition to affirmative action grew, for he felt

stigmatized, perceiving that his accomplishments, especially in his corporate law and tax law courses, were dismissed as not based on his merits but on his race—a feeling reinforced by his failure to receive a job offer from any major law firm as he neared graduation.[16] He ultimately was obliged to accept a job working for John Danforth, a Yale Law School graduate and the attorney general of Missouri. He served initially in the criminal division and later in the civil division, where he argued many cases before the Missouri Supreme Court, representing the Department of Revenue and the State Tax Commission.[17] Three years later, he left Danforth's office in Jefferson City and joined the law department of Monsanto, a global chemical company headquartered in St. Louis.[18] Bored with corporate law, he accepted an offer in 1979 from Danforth, then serving as senator from Missouri, to join his staff in Washington, D.C., with responsibility for energy and environmental policies and public works projects.[19]

In 1981, President Ronald Reagan nominated Thomas to the position of assistant secretary of education for civil rights. One year later, he nominated Thomas to serve as chairman of the Equal Employment Opportunity Commission (EEOC), an agency in total shambles, giving him only one order: "[Keep] EEOC off the front pages of the newspapers."[20] Thomas's service over two four-year terms came at the expense of his first marriage, but his efforts succeeded; late in his second term, the *Washington Post* praised him for his "quiet but persistent leadership" whereby he had shifted the agency's focus from emphasizing group rights and imposing racial quotas and timetables on employers to ensuring that justice was done for the individual victims of employment discrimination.[21] In his second term, he hired as special assistants Kenneth Masugi and John Marini—both former students of Harry V. Jaffa, the finest scholar on the natural law of his generation. Their assignment was to assist Thomas in thinking through and expressing in speeches and articles the meaning of equality as it was articulated by Thomas Jefferson in the Declaration of Independence, as it was reaffirmed by Abraham Lincoln, and as Thomas wanted to enforce it at EEOC.[22] It was also during his second term that he met Virginia Bess Lamp, a devout Catholic and a labor-relations lobbyist for the U.S. Chamber of Commerce; they married on May 30, 1987. She was instrumental in leading Thomas back to the Catholic Church and rekindling his faith.

With George H. W. Bush's election as president in 1988, Thomas was approached by Michael Uhlmann, a senior member of the president-elect's transition team, who asked if he would be interested in becoming a federal judge. After consulting with friends and associates, Thomas eventually agreed to have his name considered, and in June 1989, President Bush nominated him to the Court of Appeals for the District of Columbia Circuit, widely considered the second most important court in the land.[23] He was confirmed by a voice vote of the

Senate in February 1990 and took his oath of office on March 12 of that year. As it turned out, his tenure on the court of appeals was brief; it was also unremarkable. Thomas wrote a total of nineteen opinions as a court of appeals judge—sixteen majority opinions, two concurring opinions, and one dissent—in cases that, for the most part, addressed questions about the decisions and rulemaking authority of the regulatory agencies of the federal government.

Fifteen months after Thomas took his seat on the D.C. Circuit, Justice Thurgood Marshall, the attorney who successfully challenged racial segregation in public schools in *Brown v. Board of Education*[24] and later was the first black to serve on the Supreme Court, unexpectedly announced his retirement. President Bush turned to Thomas once again, nominating him as Marshall's successor. In his memoir, Thomas reports that Boyden Gray, White House counsel to President Bush, told him several years after his confirmation that Bush had nominated him to the D.C. Circuit to position him for an appointment on the Supreme Court. But the plan at that time, Gray said, was to have Thomas replace Justice William Brennan in order to avoid appointing him to what was considered the Court's "black seat," which would have made his confirmation more contentious. Brennan, however, upended this plan when he retired earlier than expected and before Thomas had acquired sufficient experience on the nation's second highest court to be a credible nominee. As a result, Bush went with David Souter, who, though he also had very limited experience on a court of appeals (in his case, on the First Circuit), had served for seven years on the New Hampshire Supreme Court. Some time later when Marshall became the next justice to retire from the Court, Bush overlooked the fact that Thomas's race actually worked against him and nominated Thomas to the High Bench, declaring him "the best qualified" person for the position.[25]

Thomas's race worked against him because his publicly stated views on race and equality were diametrically opposed to those of Marshall. On the Court, Marshall routinely supported aggressive efforts to integrate public schools, defended the use of racial quotas in university admissions and government contracting, and interpreted the Voting Rights Act and the Fifteenth Amendment as authorizing proportional representation based on race. By contrast, Thomas was on record criticizing affirmative action; insisting that, based on the principles of the Declaration of Independence, the Constitution is color blind; and criticizing the Warren Court for basing its decision in *Brown* on the findings of social science rather than on the claim that the Constitution is color blind. Not unexpectedly, his nomination unleashed a torrent of harsh personal attacks. Because of his belief in a color-blind Constitution and his opposition to affirmative action, the National Association for the Advancement of Colored People (NAACP) and other leading civil rights organizations came out in opposition to his confirmation.

And making matters worse, Thomas also alarmed the defenders of *Roe v. Wade*, the 1973 decision holding that women have a fundamental right to abortion. Because of the views on natural law and the Declaration of Independence that he had expressed in speeches and articles during his tenure as chairman of EEOC, they feared he would provide the critical fifth Supreme Court vote to overturn this landmark decision.

A full-scale assault was mounted against his confirmation. Senator Joseph Biden, chairman of the Senate Judiciary Committee, delayed hearings for two and a half months, allowing ample time for Thomas's opponents to find any dirt on him and to lobby senators to oppose his confirmation. Thomas testified for three days before the Senate panel, and at the end, the committee split, with seven recommending his confirmation and seven opposing it. However, before the full Senate could vote on his confirmation, Anita Hill, a staff member Thomas was asked to hire when he was in the Department of Education—who had followed Thomas when he moved to the EEOC and whom Thomas had recommended for a faculty position at Oral Roberts Law School when she left government service—came forth with testimony that Thomas had sexually harassed her when she was in his employ. Thomas was obliged to spend two more days testifying that her allegations were utterly false and that he was the victim of "a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas."[26]

His final and powerful testimony ultimately won the day. Public opinion broke in his favor, and he was confirmed on Tuesday, October 15, 1991, by a vote of fifty-two to forty-eight, the narrowest margin for approval for a Supreme Court justice in more than a century. The final floor vote was mostly along party lines: forty-one Republicans and eleven Democrats voted to confirm Thomas, whereas forty-six Democrats and two Republicans voted to reject his nomination.[27] He was sworn in by Justice Byron White on Friday, October 18, and was administered the judicial oath by Chief Justice William Rehnquist on Wednesday, October 23.[28]

Using Thomas's speeches, law review articles, and majority, concurring, and dissenting opinions, the chapters that follow explore at length how Thomas employs an original general meaning approach to his interpretation of the Constitution and its various provisions. His nearly quarter century of service on the Supreme Court shows him to be an intelligent, hardworking, and conscientious justice who has a well-reasoned jurisprudential approach to constitutional and statutory interpretation, an approach that he consistently and often courageously pursues.

But for many, all of this has been overshadowed by his silence during oral argument, for he will go several years at a time without asking a single question

from the bench. This has led Michael Sacks, an attorney from Georgetown University Law Center and therefore someone who should know better, to suggest that Thomas is silent because he "either does not care about the cases or cannot intellectually compete with his colleagues."[29] Scott D. Gerber is someone who does know better:

> The *Los Angeles Times* commissioned me to write an op-ed on the subject [of Thomas asking several questions during the 2002 oral argument about the Virginia cross-burning case], apparently believing that I too would find it odd that he does not ask many questions. I did not. Instead, I pointed out that Oliver Wendell Holmes, Jr.—the most influential theorist in the history of American law—did not ask many questions, and that Thomas likes to let the lawyers get a word in edgewise.[30]

Thomas explained his silence during oral argument in an interview with Susan Swain on C-SPAN on July 29, 2009. Swain noted that, earlier in the interview, Thomas had referenced the fact that he listened during oral argument, and she pointed out that "much has been made of that by court observers. We've read and heard from other justices that sometimes the arguments are used for the justices to communicate with one another, telegraphing their opinions through the kinds of questions and areas they explore. . . . Do you pick up cues from other justices about where they're going with a particular case from the questions they ask?" Thomas's answer was revealing:

> Not really. I think, I guess I view oral argument a little bit differently. I think it's an opportunity for the advocates, the lawyers, to fill in the blanks, to make their case, to point out things perhaps that were not covered in the briefs or to emphasize things or to respond to some concerns, that sort of thing. In other words, to flesh out the case a little better, to get into the weeds a little more. I think we're here, the nine of us, and we can talk to each other any time we want to. I just wouldn't use that thirty minutes of the advocate's time to do that, to talk to each other. But again as I said earlier, we all learn differently . . . I don't learn that way. When I first came to the Court, the Court was much quieter than it is now. Then perhaps, it was too quiet. I don't know. I liked it that way because it left big gaps so you could actually have a conversation. I think it's hard to have a conversation when nobody is listening, when you can't complete sentences or answers—perhaps that's a southern thing. I don't know. But I think you should allow people to complete their answers and their thought, and to continue their conversation. I find that coherence that you get from a conversation far

> more helpful than the rapid-fire questions. I don't see how you can learn a whole lot when there are fifty questions in an hour.[31]

The fact that Thomas wants to give opposing counsel time to make their case does not mean that he takes oral argument lightly or that he fails to spend a great deal of time preparing for it. John Eastman, the former dean of the Chapman University Law School and a former Thomas law clerk, has offered this valuable insight:

> This may no longer be true because there are a number of Justices on the Court now who were not there when I was a clerk, but I can tell you that Justice Thomas had a process that better equipped him for oral argument in every case than any of the other Justices on the Court. Here is the way it worked. Most of the Justices would assign a case individually to one of their clerks, and then at some point that clerk and that Justice would have a short meeting to discuss the case based on the bench memo that the law clerk provided. . . . Justice Thomas also assigned each case to a single clerk, but . . . the clerk did not just give the bench memo to the Justice, he instead gave it to all four clerks as well as the Justice. On every single case, we would have a clerk conference discussing the case that would last several hours. . . . In every single case, we explored parallel bodies of law—the implications of the case, . . . thinking very broadly and strategically about the importance of the case—recognizing, in a way that many lawyers and lower court judges do not—that the role of the Supreme Court is not so much resolution of a particular case, but to address the tectonic shifts that are going on in our overall jurisprudence. . . . Justice Thomas engaged in a process of thinking through that with his clerks, and it was an honor to be part of it. . . . He has an unbelievable grasp of both the broad constitutional theories, but also the technical details of every case. You do not get that from somebody on the bench who is lacking in confidence or lacking in intellect.[32]

Understanding Clarence Thomas is organized as follows. Chapter 1 provides a detailed explication of Thomas's original general meaning approach to interpretation. It gives scores of examples of how Thomas employs this approach to interpret both the Constitution and statutory law; by contrast, the remainder of the book focuses almost exclusively on how he applies the approach to questions of constitutional interpretation. The few exceptions to this focus involve analysis of his opinions on federal preemption, ex post facto laws, and the Voting Rights Act.

Chapters 2 and 3 explore how he brings this approach to bear on questions of constitutional structure as they relate to federalism. Thomas has written extensively on the Commerce Clause, and chapter 2 is devoted exclusively to his opinions and writings on that subject. Chapter 3 addresses how his original general meaning approach informs his opinions on such other federalism-related topics as federal preemption of state laws, the Necessary and Proper Clause, the Tenth Amendment and the reserved powers of the states, and state sovereign immunity. The other critical aspect of constitutional structure is, of course, separation of powers. As James Madison noted in *Federalist* No. 51, federalism and separation of powers together provide a "double security" for "the rights of the people."[33] Interestingly, few significant separation of powers cases have come before the Court during Thomas's tenure except those regarding the George W. Bush administration's treatment of Guantanamo Bay detainees. As a consequence, Thomas's only opinions directly addressing separation of powers are his dissents in *Hamdi v. Rumsfeld*[34] and *Hamdan v. Rumsfeld*,[35] both of which are briefly addressed in chapter 2.

Chapters 4 through 6 move from constitutional structure to the substantive, procedural, and civil rights secured by the Constitution. Chapter 4 assesses how Thomas employs his original general meaning approach to interpret the substantive rights found in the First Amendment's Religion and Free Speech and Press Clauses, exploring in detail his influential opinions expanding commercial speech and challenging campaign finance regulations. This chapter also considers his interpretive approach in relation to the Second Amendment's individual right to keep and bear arms for self-defense, the Fifth Amendment's requirement that private property can be taken only for public use, and the Fourteenth Amendment in regard to abortion rights.

Chapter 5 considers how Thomas applies his approach to the criminal procedural provisions found in the Ex Post Facto Clauses of Article I, § 9 and Article I, § 10 and the Bill of Rights. Analyzing his opinions in this area—especially concerning the three "witness" clauses found in the Fifth and Sixth Amendments, the various questions posed by the right to trial by jury, and the proper reach of the Eighth Amendment's prohibition of cruel and unusual punishments—makes clear how his original general meaning approach constrains his discretion and fosters his impartiality.

Chapter 6 explores Thomas's approach to questions of race, equality, and civil rights. Thomas grounds his original general meaning approach in the Declaration of Independence and its "self-evident" truth that "all men are created equal": that truth, he insists, "preced[es] and underl[ies] the Constitution."[36] The chapter traces out the many consequences that, for Thomas, flow from the

centrality of that "self-evident" truth and how they shape his opinions in cases concerning desegregation, racial preference, and voting rights.

Chapter 7 reviews Thomas's voting patterns through the years and compares them with those of his colleagues. It highlights the areas of constitutional law on which Thomas has had a profound impact and provides evidence that his original general meaning approach not only has influenced his colleagues on the bench but also has won the respect and begrudging admiration of many of his onetime critics. The chapter closes confident that Justice Thomas will continue to guide in his direction "the tectonic shifts" occurring in the Court's overall jurisprudence.[37]

Chapter One

Thomas's Original General Meaning Approach to Interpretation

During his nearly quarter century on the Supreme Court, Justice Clarence Thomas has pursued an original general meaning approach to constitutional interpretation. He has been unswayed by the claims of precedent—by the gradual buildup of interpretations that, over time, can distort the original meaning of the constitutional provision in question and lead to muddled decisions and contradictory conclusions.[1] As with too many layers of paint on a delicately crafted piece of furniture, precedent based on precedent—focusing on what the Court said the Constitution means in past cases as opposed to what the Constitution actually means—hides the constitutional nuance and detail he wants to restore. Of all the justices on the Court, Thomas is unquestionably the most willing to reject this buildup, this excrescence, and to call on his colleagues to join him in scraping away precedent and getting back to bare wood—to the original general meaning of the Constitution.[2]

The two Supreme Court justices who unabashedly identify themselves as originalists are Antonin Scalia and Clarence Thomas. Though their approaches have much in common, Scalia has a narrower view of originalism. Thomas fundamentally accepts Scalia's original public meaning approach to constitutional and statutory texts but then adds to it his original general meaning approach.[3]

Professor Gregory E. Maggs has identified three approaches to originalism. The first centers on original intent. This approach seeks to identify what the delegates to the Constitutional Convention in Philadelphia collectively intended to accomplish when they drafted the Constitution in the summer of 1787. Those who adopt an original intent approach believe that "interpreting a document means to attempt to discern the intent of the author."[4] Therefore, they focus on the records of the Constitutional Convention and on what the delegates said about the Constitution as it was being drafted. Madison's Notes figure most prominently for these individuals, but other delegates also took notes, and many wrote letters and essays during and after the convention. For those pursing an original intent approach, such materials provide insight into the framers' intentions.[5]

The second approach to originalism centers on original understanding. Here, the focus is on identifying the collective understanding of what the various provi-

sions of the Constitution meant to the delegates of the state ratifying conventions of 1787 and 1788 that brought the Constitution into existence. Those who pursue an original understanding approach point out that delegates to the Constitutional Convention met in secret under a rule that "nothing spoken in the House be printed, or otherwise published, or communicated without leave,"[6] and as a consequence, the public did not become aware of the convention's records and what was said there until decades after ratification of the Constitution. Therefore, the best way to discern the original understanding of the Constitution, according to proponents of this second approach, is to look at what the delegates said at the ratifying conventions and at the arguments made by the various Federalist and Anti-Federalist writers attempting to influence the election of those delegates.[7] Advocates for an original understanding approach receive strong support from James Madison himself, who declared on the floor of the House on April 16, 1796:

> Whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.[8]

The third approach to originalism centers on original public meaning and is most closely associated with Justice Scalia. Proponents of this approach seek to ascertain the meaning of the particular constitutional text in question at the time of its adoption. They do so by consulting dictionaries of the era and other founding-era documents "to discern the then-customary meaning of the words and phrases in the Constitution."[9]

Thomas has incorporated all three of these approaches into his own distinctive original general meaning approach.[10] In a lecture entitled "Judging," delivered at the University of Kansas School of Law on April 8, 1996, as part of the Stephenson Lectures in Law and Government, Thomas declared, "I have said in my opinions that when interpreting the Constitution, judges should seek the original understanding of the provision's text, if that text's meaning is not readily apparent."[11] He went on to elaborate that for him, *original understanding* means what both "the delegates of the Philadelphia and of the state ratifying conventions understood it to mean."[12] He argued in *McIntyre v. Ohio Elections Commis-*

sion that this is the long-standing practice of the Supreme Court, quoting from an 1838 opinion: "We have long recognized that the meaning of the Constitution 'must necessarily depend on the words of the Constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states.' *Rhode Island v. Massachusetts*, 12 Pet. 657, 721 (1838)."[13]

So, in deciding cases, Thomas turns to founding-era documents not only to identify the original intention of the framers, the original understanding of the ratifiers, or the original public meaning of the Constitution's words and phrases but also to find agreement among these "multiple sources of evidence" and thereby ascertain the "general meaning shown in common by all relevant sources."[14] He does this because, although original intent, original understanding, and original public meaning typically lead to the same result, they do not always do so.[15]

Take, for example, Article III, § 2 of the Constitution. It declares, in part, that the judicial power shall extend to cases between a state and citizens of another state. The clear text would hold that the federal courts have jurisdiction whether the state is a plaintiff or a defendant; that is, the language does not announce the principle of state sovereign immunity. However, contrary to the original public meaning, the original understanding reaches a different conclusion. Alexander Hamilton, writing in *Federalist* No. 81, found the idea that Article III, § 2 implied the destruction of the principle of state sovereign immunity was altogether forced and unwarrantable, [16] and John Marshall declared in the Virginia Ratifying Convention, "I hope that no gentleman will think that a state will be called at the bar of the federal court. . . . The intent is, to enable states to recover claims of individuals residing in other states."[17] The issue was ultimately resolved by Congress and the states employing Article V of the Constitution. After the Supreme Court held in 1793 in *Chisholm v. Georgia*[18] that states could be sued in federal court without their consent, Congress began the process of repudiating that holding two years later by adopting the Eleventh Amendment to the U.S. Constitution—"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by the Citizens or Subjects of any Foreign State." The states completed the process of repudiation three years after that, in 1798, by ratifying the amendment by the requisite three-fourths of the state legislatures.

Another example is also telling, for it shows the tension between original intent and original understanding regarding the legal effect of treaties. James Wilson, one of the most prominent delegates to the Constitutional Convention (and the man who more than any other delegate shaped the executive branch),

chaired the important Committee on Detail that turned the various resolutions approved by the delegates into a draft of the eventual Constitution. Wilson considered treaties to be self-executing, having "the operation of law" without requiring implementing legislation.[19] His original intent position differed completely from Hamilton's original understanding view as expressed in *Federalist* No. 75, where he wrote that treaties "are not rules prescribed by the sovereign to the subject [that is, they do not apply directly to the people and therefore do not have the operation of law], but agreements between sovereign and sovereign."[20]

Turning simultaneously to original public meaning, original intent, and original understanding allows Thomas to find the maximum agreement among these various sources and to identify what is, in fact, the original *general* meaning.

The differences between Scalia's original public meaning approach and Thomas's original general meaning approach need to be elaborated.

Since his elevation to the Supreme Court, Scalia has assiduously and consistently employed an original public meaning approach to interpretation.[21] He argues that primacy must be accorded to the text of the document being interpreted and that the job of the judge is to apply the clear textual language[22] of the Constitution or statute, or the critical structural principle necessarily implicit in the text.[23] If the text is ambiguous, yielding several conflicting interpretations, Scalia turns to the specific legal tradition flowing from that text[24]—to what it meant to the society that adopted it.[25] In fact, the phrase *text and tradition* fills Justice Scalia's opinions: judges are to be governed only by the "text and tradition of the Constitution," in other words, by its original public meaning, not by their "intellectual, moral, and personal perceptions."[26]

Given his original public meaning approach, Justice Scalia totally rejects reliance on legislative history or legislative intent and invariably refuses to join any opinion (or part of an opinion) that employs it.[27] He routinely criticizes his colleagues for turning to "committee reports, floor speeches, and even colloquies between Congressmen" to ascertain what a law means because, as he declared in *Thompson v. Thompson*, these "are frail substitutes for a bicameral vote upon the text of the law and its presentment to the President."[28] As he declared in *Crosby v. National Foreign Trade Council*,[29] these sources are not "reliable indication[s] of what a majority of both Houses of Congress intended when they voted for the statute before us. The *only* reliable indication of *that* intent—the only thing we know for sure that can be attributed to *all* of them—is the words of the bill that they voted to make law."[30]

Scalia argues, therefore, that the Court is to interpret the text alone and nothing else. Though he will occasionally turn to founding documents, especially *The Federalist*, he is quick to point out that he does so for a very narrow purpose. As he put it in *A Matter of Interpretation*:

> I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton's and Madison's writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus, I give equal weight to Jay's pieces in *The Federalist*, and to Jefferson's writings, even though neither of them was a Framer. What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.[31]

Scalia's refusal to consult even the debates over the drafting of the Constitution and the Bill of Rights occasionally keeps him from making as strong an argument as he otherwise could make.[32] One recent and high-profile example is his majority opinion in *District of Columbia v. Heller*.[33] In that case, Scalia gave a lengthy and detailed original public meaning argument that the Second Amendment "conferred an individual right to keep and bear arms" for purposes of self-defense.[34] In dissent, Justice John Paul Stevens argued that the Second Amendment protected only a "collective right" to possess and carry a firearm in connection with militia service; therefore, he said, the District of Columbia's total ban on handguns was constitutional, as was its requirement that lawfully owned long guns in the home be kept nonfunctional even when necessary for self-defense. Stevens insisted that the Second Amendment "was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States"[35] and that Madison, who had offered in the First Congress a series of amendments that ultimately became what we refer to as the Bill of Rights, had intended it merely to amend the Militia Clauses of Article I, § 8, cls. 15 and 16.

Stevens knew better. He knew that Madison intended for his set of amendments to be incorporated into the text of the original Constitution—not appended at the end. Madison explained why in a speech on the floor of the House of Representatives on August 13, 1789: "There is a neatness and propriety in incorporating the amendments into the Constitution itself; in that case the system will remain uniform and entire; it will certainly be more simple, when the amendments are interwoven into those parts to which they naturally belong, than it will if they consist of separate and distinct parts. We shall then be able to determine its meaning without references or comparison."[36] Madison failed, however, to persuade his colleagues to do so. Roger Sherman successfully argued that the amendments should be added at the end of the Constitution, as any attempt to

"interweave" these amendments into the Constitution itself would "be destructive of the whole fabric. We might as well endeavor to mix brass, iron, and clay."[37] Had Madison prevailed in his efforts to incorporate the amendments into the text of the Constitution, "the right of the people to keep and bear arms" would have been included in Article I, § 9 alongside other provisions securing individual rights, including the habeas corpus privilege and the proscriptions against bills of attainder and ex post facto laws, and it would have been there together with his proposed protections for speech, press, and assembly. Stevens knew all this because the respondent's brief expressly made this argument.[38] So, too, did Solicitor General Paul D. Clement during oral argument in response to a question from Stevens: "If the Second Amendment had the meaning that the District of Columbia ascribes to it, one would certainly think that James Madison, when he proposed the Second Amendment would have proposed it as an amendment to Article I, § 8, cl. 16. He didn't. He proposed it as an amendment to Article I, § 9, which encapsulates the individual rights to be free from bills of attainder and ex post facto clauses."[39]

This "placement" argument is powerful, but Scalia never used it in his majority opinion to refute Stevens's claim. Scalia's original public meaning approach keeps him from consulting any form of legislative history (including the debates in the Constitutional Convention or the state ratifying conventions or the work of the First Congress),[40] even when doing so would allow him to strengthen his overall argument.

Thomas, pursuing an original general meaning approach,[41] incorporates Scalia's narrower original public meaning approach, and thus he also asks what the text meant to the society that adopted it. But he then widens his originalist focus to consider evidence of the original intent of the framers and the original understanding of the ratifiers and to ask why the text (either constitutional or statutory)[42] was adopted. Concerning the Constitution and the Bill of Rights, Thomas reinforces Scalia's textualism by asking, when necessary to make his case most persuasively,[43] what ends the framers (and members of the First Congress) sought to achieve, what evils they sought to avert, and what means they employed to achieve those ends and avert those evils when they proposed and ratified those texts. To answer these questions, he readily turns to Farrand's *Records*, *The Federalist*, Elliot's *Debates*, *The Founders' Constitution*,[44] *The Complete Anti-Federalist*,[45] *The Documentary History of the Ratification of the Constitution*,[46] and the *Annals of Congress*. He then incorporates what he finds in these and other founding-era sources into his opinions.

For example, in his opinion for the Court in *United States v. International Business Machines*,[47] Thomas turned to Farrand's *Records* to refute the federal government's claim that the Export Clause of Article I, § 9, cl. 5 ("No Tax or

Duty shall be laid on Articles exported from any State") should not be understood to prohibit the assessment of nondiscriminatory federal taxes on goods in export transit. The government argued that the Export Clause should be sustained by the justices because it was originally proposed by delegates to the Federal Convention from the southern states, who feared that the northern states would control Congress and use taxes and duties on exports to raise a disproportionate share of federal revenues from the South, and because the nondiscriminatory tax in question before the Court did not conflict with the policies embodied in the Clause. But Thomas insisted,

> While the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language. See, Mr. King: "In two great points the hands of the Legislature were absolutely tied. The importation of slaves could not be prohibited—exports could not be taxed;" "Mr. Mason urged the necessity of connecting with the power of levying taxes . . . that no tax should be laid on exports;" Mr. Elseworth [*sic*]: "There are solid reasons agst. Congs taxing exports;" "Mr. Butler was strenuously opposed to a power over exports;" Mr. Sherman: "It is best to prohibit the National legislature in all cases;" "Mr. Gerry was strenuously opposed to the power over exports."[48]

In his concurring opinion in *Cutter v. Wilkinson*,[49] Thomas turned to the *Annals* of the First Congress to contradict Ohio's contention that § 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) impermissibly advanced religion by giving greater protection to religious rights than to other constitutionally protected rights, thereby violating the Establishment Clause. Thomas noted that the Establishment Clause "prohibits Congress from enacting legislation 'respecting an *establishment* of religion'; it does not prohibit Congress from enacting legislation 'respecting religion' or 'taking cognizance of religion.'"[50] He pointed out that "an unenacted version of the [Establishment] Clause, proposed in the House of Representatives," demonstrated the opposite of what Ohio was arguing: "It provided that 'Congress shall make no laws touching religion, or infringing the rights of conscience.' 1 *Annals of Cong.* 731 (1789)." The "original understanding"[51] of the Establishment Clause, based on the words that were ultimately adopted, was much "narrower" and simply declared that "'Congress shall make no law respecting an establishment of religion.'"[52] As Thomas saw it, that meant:

> Even when enacting laws that bind the States pursuant to valid exercises of its enumerated powers, Congress need not observe strict separation between church and state, or steer clear of the subject of religion. It need only refrain from making laws "respecting an establishment of religion"; it must not interfere with a state establishment of religion. For example, Congress presumably could not require a State to establish a religion any more than it could preclude a State from establishing a religion.[53]

Scalia would view all of this as legislative history and outside his original public meaning approach. But there is perhaps an even bigger difference between Scalia's and Thomas's originalism—the Declaration of Independence.[54] In *A Matter of Interpretation*, Scalia derisively dismisses what he calls Professor Laurence Tribe's "aspirational" theory of constitutional interpretation by declaring: "If you want aspirations, you can read the Declaration of Independence, with its pronouncements that 'all men are created equal' with 'unalienable Rights' that include 'Life, Liberty, and the Pursuit of Happiness.' Or you can read the French Declaration of the Rights of Man." But, he continued, "there is no such philosophizing in our Constitution, which, unlike the Declaration of Independence and the Declaration of the Rights of Man, is a practical and pragmatic charter of government."[55]

By contrast, Justice Clarence Thomas takes seriously the Declaration of Independence and its claim that all men are created equal. In his Senate confirmation hearings, he explained why: "My interest started with the notion, with the simple question: How do we end slavery? By what theory do you end slavery? After you end slavery, by what theory do you protect the right of someone who was a former slave or someone like my grandfather, for example, to enjoy the fruits of his or her labor?"[56] Thomas believes that the Declaration's principles are foundational to the Constitution—they "preced[e] and underl[ie] the Constitution"[57]—and he grounds his opinions explicitly in them. In a 1987 article in the *Howard Law Journal*, he declared that "the 'original intention' of the Constitution [was] to be the fulfillment of the ideals of the Declaration of Independence, as Lincoln, Frederick Douglass, and the Founders understood it."[58] He noted that "the Constitution makes explicit reference to the Declaration of Independence in Article VII, stating that the Constitution is presented to the states for ratification by the Convention on 'the Seventeenth Day of September in the Year of our Lord one-thousand seven-hundred and eighty-seven and of the Independence of the United States of America the Twelfth.' . . . The Declaration marks a *novus ordo seclorum*, a new order of the ages."[59] And in a 1989 article in the *Harvard Journal of Law and Public Policy*, Thomas argued that the Declaration is

the "higher law background" of the Constitution and that "if the Constitution is not the logical extension of the Declaration of Independence, important parts of the Constitution are inexplicable."[60]

For Thomas, the higher law principles of the Declaration not only offer insight into how to interpret the Constitution but also provide the "best defense of limited government, of the separation of powers, and of the judicial restraint that flows from the commitment to limited government."[61] They also offer "our best defense of judicial review—a judiciary active in defending the Constitution, but judicious in its restraint and moderation. Rather than being a justification of the worst type of judicial activism, higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges."[62]

Thomas asserts that "the fundamental principle of equality, one of the higher law principles [manifest in the Declaration and] informing the Constitution,"[63] requires a "color-blind" Constitution. In *Adarand Constructors v. Pena*, in which the Court held that the strict scrutiny standard applies to *all* government classifications based on race, Thomas declared in his opinion concurring in part and concurring in the judgment in part: "As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged." He pronounced "the paternalism that appears to lie at the heart of this [racial preference] program" to be "at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ('We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.')."[64] He elaborated in his dissent in *Grutter v. Bollinger*,[65] noting that "the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause"[66] was correctly identified by Justice John Marshall Harlan in his famous dissenting words in *Plessy v. Ferguson*: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[67] His fullest statement to date in a Court opinion is his opinion concurring in part and concurring in the judgment in part in *McDonald v. City of Chicago*:

> As was evident to many throughout our Nation's early history, slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights *proclaimed by the Declaration of Independence and embedded in our constitutional structure*. See, e.g., 3 Records of the Federal Convention of 1787, p. 212 (M. Farrand ed. 1911) (remarks of Luther Martin) ("[S]lavery is inconsistent with the genius of republicanism, and has a tendency to destroy those

principles on which it is supported, as it lessens the sense of the equal rights of mankind"); A. Lincoln, Speech at Peoria, Ill. (Oct. 16, 1854), reprinted in 2 The Collected Works of Abraham Lincoln 266 (R. Basler ed. 1953) ("[N]o man is good enough to govern another man, *without that other's consent*. I say this is the leading principle—the sheet anchor of American republicanism. . . . Now the relation of masters and slaves is, *pro tanto*, a total violation of this principle").[68]

Thomas employs his original general meaning approach as a means of constraining judicial discretion and encouraging judicial restraint. In his University of Kansas lecture on "Judging," he declared that "judges should adopt principles of interpretation and methodology that reduce judicial discretion." He explained why this is so important: "Reducing judicial discretion is one of the keys to fostering impartiality among the judiciary. The greater the amount of judicial discretion, the greater the freedom to write one's personal preferences into the law. Narrow judicial discretion, and you reduce the temptation for judges to ignore their duty to be impartial." He noted that constraining discretion and fostering impartiality were especially important for justices on the Supreme Court, for whom "the usual limitations on judicial discretion, such as authority from a superior court or stare decisis, do not exist, or do not exist with the same strength as with other courts."[69]

Thomas continued by observing that "in order to maintain our impartiality, judges must also adopt methodologies and principles that encourage judicial restraint."[70] That methodology for Thomas is original general meaning. As he stated in his concurring opinion in *Lewis v. Casey*, "It is a bedrock principle of judicial restraint that a right be lodged firmly in the text or tradition of a specific constitutional provision before we will recognize it as fundamental. Strict adherence to this approach is essential if we are to fulfill our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views."[71]

In his lecture on "Judging," Thomas declared that his original general meaning approach "works in several ways to reduce judicial discretion and to maintain judicial impartiality."[72] He mentioned three in particular. To begin with, "it deprives modern judges of the opportunity to write their own preferences into the Constitution by tethering their analysis to the understanding of those who drafted and ratified the text." Additionally, "it places the authority for creating legal rules in the hands of the people and their representatives rather than in the hands of the nonelected, unaccountable federal judiciary."[73] Thomas flatly rejected the famous words of Charles Evans Hughes, the New York governor who later became chief justice of the Supreme Court: "We are under a Constitution, but the

Constitution is what the Court says it is."[74] Thomas instead insisted that "the Constitution means not what the Court says it means, but what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean."[75] Finally, he noted, his original general meaning approach "recognizes the basic principle of a written Constitution. We as a nation adopted a written Constitution precisely because it has a fixed meaning that does not change." He contrasted the U.S. Constitution with "the British approach of an unwritten, evolving constitution. Aside from an amendment adopted pursuant to the procedures set forth in Article V, the Constitution's meaning cannot be updated, or changed, or altered by the Supreme Court, the Congress, or the President."[76]

Thomas also explained how his original general meaning approach not only encourages self-restraint but also discourages the adoption of multipart balancing tests, favored by many of his colleagues. As he observed, his approach lends itself to bright-line rules that find a law or action to be consistent or inconsistent with the original general meaning of the Constitution. He pointed out that "it is always tempting to adopt balancing tests or to rest one's decision on the presence or absence of various factors," for this allows judges to say that "they decided the case on its facts" but also to preserve "some degree of flexibility for future cases." While acknowledging that "this may be appropriate for trial courts," Thomas said it is not appropriate for the Supreme Court or an appellate court, which should, "whenever possible," adopt "clear, bright-line rules that, as I like to say to my clerks, you can explain to the gas station attendant as easily as you can explain to a law professor." Clear, bright-line rules "provide private parties with notice" even as they "limit judicial discretion by narrowing the ability of judges in the future to alter the law to fit their policy preferences."[77]

Thomas's lecture on "Judging" was delivered just a year after he issued an opinion concurring in the judgment in *McIntyre v. Ohio Elections Commission*.[78] In that case, he argued that "the phrase 'freedom of speech, or of the press,' as originally understood, protected anonymous political leafleting."[79] Thomas used that case and his conclusion to make a key point: "If the Court holds broadly today, for example, that all anonymous leafleting is to be given First Amendment protection, then a future Court will not have wiggle room to reverse course to remove that protection for leaflets that turn out to be written by an unpopular group, like the Nazis. Broader rules are more likely to be impartial in their impact on and application to specific parties." Thomas then added to the mix other elements that promote impartiality, stating, "Thus, clear rules along with life tenure and an irreducible salary encourage judges to maintain their impartiality."[80]

The subsequent chapters in this book provide numerous examples of how Thomas's faithful adherence to his original general meaning approach helps him maintain his impartiality and keeps him from writing his own preferences into

the Constitution. The list of cases in the following paragraph is not exhaustive but merely illustrative.

Thomas's original general meaning approach led him in *Gonzales v. Raich*,[81] discussed in chapter 2, to vote to uphold California's medical marijuana law. It led him in the negative Commerce Clause cases of *Hillside Dairy v. Lyons*[82] and *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*,[83] both also discussed in chapter 2, to uphold economic protectionist measures by states rather than to eliminate undue burdens on the free market. It led to his antibusiness federal preemption opinions in *Pharmaceutical Research and Manufacturers of America v. Walsh*[84] and *Wyeth v. Levine*,[85] discussed in chapter 3. It led to his opinion in *Federal Communications Commission v. Fox*,[86] discussed in chapter 4, to extend full First Amendment protection to indecent broadcast speech. It led him in the partial-birth abortion case of *Gonzales v. Carhart*,[87] also discussed in chapter 4, to question whether Congress had the power to enact a federal law on this subject. And it led him to vote on behalf of a wide range of criminal defendants concerning a wide variety of Bill of Rights guarantees in cases such as *Georgia v. McCollum*,[88] *Wilson v. Arkansas*,[89] *Lynce v. Mathias*,[90] *United States v. Hubbell*,[91] *Apprendi v. New Jersey*,[92] *Harris v. United States*,[93] *Blakely v. Washington*,[94] *United States v. Booker*,[95] and *Shepard v. United States*,[96] all discussed in chapter 5.

As Thomas pursues his original general meaning approach, he rejects past decisions that depart from that meaning. He wants to return to bare wood, and he invites his colleagues to join him by engaging in the hard jurisprudential work of scraping away the excrescence of misguided precedent and restoring the contours of the Constitution as it was generally understood by those who framed and ratified it. He has done so since early in his first year on the High Bench.[97] In *White v. Illinois*,[98] decided on January 15, 1992, Thomas, in an opinion concurring in part and concurring in the judgment, "respectfully suggest[ed] that, in an appropriate case, we reconsider how the phrase 'witness against' in the Confrontation Clause pertains to the admission of hearsay."[99] Likewise, in another early criminal procedure case, *Helling v. McKinney*,[100] he declared:

> To state a claim under the Cruel and Unusual Punishments Clause, a party must prove not only that the challenged conduct was both cruel and unusual, but also that it constitutes punishment. The text and history of the Eighth Amendment, together with pre-*Estelle* [*v. Gamble*[101]] precedent, raise substantial doubts in my mind that the Eighth Amendment proscribes a prison deprivation that is not inflicted as part of a sentence. And *Estelle* itself has not dispelled these doubts. Were the issue squarely presented, therefore, I might vote to overrule *Estelle*.[102]

Thomas wants to remove excrescence as well from the First Amendment. In his concurring opinion in the 2005 Ten Commandments case of *Van Orden v. Perry*,[103] Thomas condemned the "incoherence of the Court decisions" that had rendered "the Establishment Clause impenetrable and incapable of consistent application," called for a "return to the views of the Framers,"[104] and argued for the adoption of physical coercion "as the touchstone for our Establishment Clause inquiry."[105] And, as noted earlier, in his opinion concurring in the judgment in *McIntyre v. Ohio Elections Commission*,[106] he argued that "the phrase 'freedom of speech, or of the press,' as originally understood, protected anonymous political leafleting."[107] Scalia dissented from the Court's invalidation of Ohio's statute prohibiting the distribution of anonymous leaflets on the grounds of "the widespread and longstanding traditions of our people." He pointed out that the earliest statute prohibiting this practice was adopted by Massachusetts in 1890; that by the end of World War I, twenty-four states had such bans; and that in 1995 (the year of the Court's decision), "every State of the Union except California has one, as does the District of Columbia, and as does the Federal Government where advertising relating to candidates for federal office is concerned." Scalia asserted, "A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality. And that is what we have before us here."[108] Thomas disagreed.

> While, like Justice Scalia, I am loath to overturn a century of practice shared by almost all of the States, I believe the historical evidence from the framing outweighs recent tradition. When interpreting other provisions of the Constitution, this Court has believed itself bound by the text of the Constitution and by the intent of those who drafted and ratified it. It should hold itself to no less a standard when interpreting the Speech and Press Clauses.[109]

Thomas's dissent in *Kelo v. City of New London*[110] is worthy of mention in this respect as well. In this case involving the Takings Clause of the Fifth Amendment (which reads "nor shall private property be taken for public use without just compensation"), Thomas observed that "something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not."[111] He regretted that the Court majority relied not on the constitutional text but "almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result." The principles the Court should have employed to dispose of this case, he argued, are not to be found in precedent but rather "in the Public Use Clause itself." And,

he concluded, "when faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning."[112]

Thomas's dissent in *Utah v. Evans*[113] is another superb example of his original general understanding approach to the text of the Constitution itself. The Court in this case approved the use by the 2000 census of "hot-deck imputation"—a way by which the Census Bureau imputed the population of a particular address or unit about which it was uncertain by inferring that it had the same population characteristics as those of a nearby sample address or unit. The result of the Census Bureau's use of this imputation was that North Carolina instead of Utah gained a congressional district. Utah filed suit, claiming that this imputation technique violated the constitutional command of Article I, § 2, cl. 3, requiring the census to apportion congressional seats among the states based on "an actual enumeration." Utah, however, lost before the Supreme Court on a five-to-four decision. Justice Stephen Breyer held for the majority that the Constitution is not violated if all efforts have been made to reach every household, if the methods used consist not of statistical sampling but of inference, if that inference involves a tiny percent of the population, if the alternative is to make a far less accurate assessment of the population, and if manipulation of the method is thus highly unlikely.

Thomas filed a dissent, joined by Justice Anthony Kennedy. He began with a statement that fully articulated his original general meaning approach: "The Constitution apportions power among the States based on their respective populations; consequently, changes in population shift the balance of power among them. Mindful of the importance of calculating the population, the Framers chose their language with precision, requiring an 'actual Enumeration.'" He noted that the framers "opted for this language even though they were well aware that estimation methods and inferences could be used to calculate population." Furthermore, he continued, "if the language of the Census Clause leaves any room for doubt, the historical context, debates accompanying ratification, and subsequent early Census Acts confirm that the use of estimation techniques—such as 'hot-deck imputation,' sampling, and the like—do not comply with the Constitution."[114]

Thomas noted that the Census Bureau referred to hot-deck imputation procedures as "estimation," and he stated, "Whether this 'estimation' technique passes constitutional muster depends on an evaluation of the language of the Census Clause and its original understanding."[115] He began this evaluation by exploring the Clause's original public meaning, which prescribed both "counting the whole numbers of persons" and an "actual Enumeration." He noted that dictionaries of the era

inform our understanding. "Actual" was defined at the time of the founding as "really done": T. Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796) (defining "actual" as "really in act, not merely potential; in act, not purely in speculation"). Sheridan defined "enumeration" as "the act of numbering or counting over" and "to enumerate" as "to reckon up singly; to count over distinctly." See also 1 S. Johnson, *A Dictionary of the English Language* 658 (4th rev. ed. 1773) . . . [and] 1 N. Webster, *An American Dictionary of the English Language* (1828).[116]

Thomas then widened his interpretive focus to include comments in *The Federalist*, debates during the First Congress, and early practice. Thus, he pointed out that population estimates, rather than an "actual enumeration," could be "skewed for political or financial purposes" and lent themselves to "political chicanery" and that Hamilton in *Federalist* No. 36 remarked that the Constitution's Census Clause "effectually shuts the door to partiality and oppression."[117] He noted that in the debate in the First Congress over the first Census Act, Madison drew a sharp distinction between "conjecture" and "estimation" and "an exact number of every division."[118] And he turned to the "early Census Acts" that imposed "a series of requirements for how to accomplish the census; none mention[s] the use of sampling or any other statistical technique or method of estimation."[119]

He concluded: "The text, history, and a review of the original understanding of the Census Clause confirm that an actual enumeration means an actual count, without estimation." Although the framers were well aware of estimation, he said, they "chose to make an 'Actual Enumeration' part of our constitutional structure. Today, the Court undermines their decision, leaving the basis of our representative government vulnerable to political manipulation."[120]

Other illustrative examples of Thomas's original general understanding approach to the text of the Constitution itself come from his Commerce Clause opinions. For instance, in *United States v. Lopez*,[121] Thomas wrote a concurring opinion in which he declared, "Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause."[122] In his concurrence in *United States v. Morrison*,[123] he took a harder line: "The very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. . . . Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding,

we will continue to see Congress appropriating state police powers under the guise of regulating commerce."[124]

In his dissenting opinion in *Camps Newfound/Owatonna v. Town of Harrison*,[125] Thomas urged his colleagues "to abandon th[e] failed jurisprudence" of the negative Commerce Clause;[126] quite interestingly, however, he then offered a thoughtful alternative and invited them "to consider restoring the original Import Export Clause check on discriminatory state taxation to what appears to be its proper role."[127] He intensified his attack on the negative Commerce Clause in his opinion concurring in the judgment in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*:[128] "As the debate between the majority and dissent shows, application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence."[129]

In his concurrence in *United States v. Lara*, Thomas won the begrudging admiration of many Native American tribal leaders. He did so by pointing out that the Indian Commerce Clause did not confer upon Congress plenary power to extinguish tribal sovereignty and by declaring that the Court had to "reexamine the premises and logic of our tribal sovereignty cases."[130]

In his 1998 concurring opinion in *Eastern Enterprises v. Apfel*,[131] Thomas even indicated his willingness to overturn a 200-year-old precedent, the 1798 decision in *Calder v. Bull*[132] that held that the Ex Post Facto Clause of Article I, § 9 applied only to criminal, not civil, matters. He indicated that he was writing "separately to emphasize that the Ex Post Facto Clause of the Constitution, even more clearly reflects the principle that 'retrospective laws are, indeed, generally unjust.'" Since *Calder v. Bull*, however, the Court has considered the Clause to apply only in the criminal context. But, he averred, "I have never been convinced of the soundness of this limitation, which in *Calder* was principally justified because a contrary interpretation would render the Takings Clause unnecessary. In an appropriate case, therefore, I would be willing to reconsider *Calder* and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the Ex Post Facto Clause."[133]

As mentioned earlier, Thomas employs the original general meaning approach not only to constitutional texts but also to statutory texts.[134] He begins with the text of the statute—as he said in *United States v. Alvarez-Sanchez*, "When interpreting any statute, we look first and foremost to its text."[135] With the assistance of dictionaries and canons of construction,[136] Thomas asks whether the text has an unambiguous meaning. If so, his job is done. In *Connecticut National Bank v. Germain*, he noted that "when the words of a statute are unambiguous, then, the

first canon is the last; judicial inquiry is complete."[137] In other words, where the text is clear, he considers it conclusive evidence of legislative intent. In his dissent in *McFarland v. Scott*, he observed that "in any case of statutory interpretation, our primary guide to Congress' intent should be the text of the statute."[138] If, however, the text is ambiguous and it appears likely that Congress had no relevant intent, Thomas will reluctantly turn to legislative history.

Thomas shares much of Scalia's aversion to the use of legislative history in statutory construction and for many of the same reasons. To begin with, consideration of legislative history makes it too easy for the Court to abandon the text as a guide. Thus, in his majority opinion in *Shannon v. United States*, Thomas rejected the petitioner's reliance on a Senate report to support his argument by noting that this "single passage of legislative history . . . is in no way anchored in the text of the statute. On its face, the passage Shannon identifies does not purport to explain or interpret any provision" of the act in question. "Rather, it merely conveys the Committee's 'endorsement' of [a] 'procedure'—a procedure that Congress did not include in the text of the Act. To give effect to this snippet of legislative history, we would have to abandon altogether the text of the statute as a guide in the interpretative process."[139]

Additionally, Thomas opposes using legislative history because doing so grants it the force of law. *United States v. R.L.C.*[140] is a perfect example of how this happens. In his judgment for the Court, Justice David Souter relied on legislative history to construe an ambiguous federal law and, in the process, to bar a juvenile from being sentenced to a prison term longer than a court could impose on a similarly situated adult. In his opinion concurring in part and concurring in the judgment, Thomas began by noting that Souter's "use of legislative history to construe an otherwise ambiguous penal statute against a criminal defendant is difficult to reconcile with the rule of lenity"[141]—that is, a canon of construction that requires a court, when construing an ambiguous criminal statute, to resolve the ambiguity in favor of the defendant.[142] He continued by noting that the Court had "developed innumerable rules of construction powerful enough to make clear an otherwise ambiguous penal statute," and, he added, those rules were far superior to the use of legislative history.[143] But Thomas then proceeded to his main point: "Like Congress' statutes, the decisions of this Court are law, the knowledge of which we have always imputed to the citizenry." At issue in *R.L.C.*, however, was a rule that would also require knowledge by the citizenry "of committee reports and floor statements, which are not law."[144] As Professor H. Brent McKnight has put it so well: "Because the citizenry is presumed to know the law, using legislative history to resolve ambiguity gives a Senate Report or other form of legislative history the force of law, a status never intended. Granting legislative history this status usurps the legislative process."[145]

Nonetheless, there are occasions when Thomas will turn to legislative history; they arise when the text is so ambiguous that there is no legislative intent to discern.[146] He did this, for example, in his dissent in *Commissioner of Internal Revenue v. Lundy*,[147] which addressed the question of whether Congress intended to adopt two different "look-back" periods (two years in Tax Court, three years in federal district court) depending on where the refund petition was filed, during which a refund can be claimed by a delinquent taxpayer for overpayment of federal income taxes after the Internal Revenue Service has mailed a delinquency notice. Justice Sandra Day O'Connor wrote for a seven-member majority concluding that Congress had. Thomas, joined in his dissent by Justice Stevens, concluded to the contrary. He found nothing in the text of the relevant tax code sections to suggest "that Congress intended to *shorten* the look-back period in a proceeding in Tax Court,"[148] especially since the text in question "was meant to be *more* protective of the taxpayer litigating in the Tax Court."[149] In the absence of clear textual language that reflected Congress's intent, he stated that it did not make sense that that body would deliberately adopt a two-year look-back period

> only in Tax Court proceedings—i.e., to punish only the taxpayer whose cash reserves make it impossible for him to provide the Government a still larger loan in any amount it demands while the taxpayer pursues relief in the district court or Court of Federal Claims, the taxpayer who is too unsophisticated to realize that a suit in district court could preserve his right to a refund, and the taxpayer whose expected refund is too small in relation to attorney's fees and other costs to justify a suit in district court. Obviously Congress could constitutionally have adopted such a strange scheme, but I will not simply presume that it has done so.[150]

Thomas was convinced that "Congress quite likely was simply not thinking about the[se] effects on delinquent filers. Or, to put it another way, Congress may have had *no* intent regarding" this issue.[151] And in the absence of any congressional intent, he turned to legislative history. "To my mind, then, the question is whether . . . the statute's legislative history, or other related statutory provisions indicate that Congress meant to prevent a taxpayer from receiving his refund from the Tax Court, even though the other courts could have ordered the refund."[152] To answer that question, he looked to a 1962 Senate report explaining the text in question and quoted the following: "Your committee believes it is desirable to amend the language of present law to make it clear" that the same three-year look-back period applies in all courts.[153] McKnight has argued that *Lundy* "suggests legislative history has a limited 'last resort' role" in Thomas's jurisprudence, observing, "Thomas believes the text is the guide in statutory construction. How-

ever, his *Lundy* opinion demonstrates that where the text is ambiguous and it is likely Congress had no relevant intent, rules of construction are powerless, making resort to legislative history necessary. Canons of construction help to discern congressional intent from the text, but they do not apply where there is no intent to discern."[154]

Thomas not only employs the same original general meaning approach to constitutional and statutory texts but also seeks to remove the buildup of precedent in the statutory realm as well. Perhaps his most determined and extensive effort in this regard is his opinion concurring in the judgment in *Holder v. Hall*,[155] in which he harshly criticized the Supreme Court's interpretation of § 2 of the Voting Rights Act in *Thornburgh v. Gingles*.[156] Convinced that the Court's voting rights "jurisprudence has gone awry,"[157] he called for "a systematic reexamination of the Act."[158] He wrote:

> The "inherent tension"—indeed, I would call it an irreconcilable conflict—between the standards we have adopted for evaluating vote dilution claims and the text of the Voting Rights Act would itself be sufficient in my view to warrant overruling the interpretation of § 2 set out in *Gingles*. When that obvious conflict is combined with the destructive effects our expansive reading of the Act has had in involving the federal judiciary in the project of dividing the Nation into racially segregated electoral districts, I can see no reasonable alternative to abandoning our current unfortunate understanding of the Act.[159]

Thomas has been criticized for his willingness to differ with past decisions that depart from the Constitution's original general meaning and has been charged with "engaging in his own brand of judicial activism." Stephen J. Wermeil, for example, argues that "Thomas is gradually building up, in concurring and dissenting opinions, an impressive array of invitations to litigants to bring cases to the Supreme Court and raise specific Constitutional issues he would like an opportunity to decide."[160] By so doing, Wermeil suggests, "Thomas hardly promotes the image of a classic conservative justice who sticks to the issues raised in the cases before him and does not go roaming over the landscape of the Constitution. . . . It is somewhat surprising to see Thomas profess a form of constitutional restraint . . . and meanwhile, reach out beyond the issues presented to the Supreme Court for opportunities to advance his views of the Constitution."[161]

This criticism is misdirected. As Thomas said in *Lewis v. Casey*, judicial restraint is, for him, fulfilling "our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views."[162] If past Courts have departed from the original general

meaning of the Constitution, Thomas understands that it is his "constitutionally assigned role" and responsibility to argue against these precedents, to refuse to apply them in the instant case, and when appropriate to invite future cases that can overturn them so that the Constitution again means "what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean."[163] For Thomas, judicial restraint does not mean acquiescence in departures from the "mandate of the Framers"; it means actively attempting to restore the Constitution's original general meaning.[164]

Chapters 2 and 3 move from providing an overview of Thomas's original general meaning approach to an examination of how he brings it to bear on questions of constitutional structure as they relate to federalism. Chapter 2 is devoted exclusively to Thomas's extensive writing on and understanding of the Interstate, "negative," and Indian Commerce Clauses. His other federalism opinions are addressed in chapter 3, which concludes with an overall assessment of his federalism jurisprudence.