

The Originalist and the Masses

When we follow the Constitution's text, a federal judge argues, the weak and the powerless stand to benefit the most.

The People's Justice: Clarence Thomas and the Constitutional Stories That Define Him

By Amul Thapar. Regnery Gateway, 273 pp., \$32.99

By David J. Garrow *Wall Street Journal*, July 20, 2023, p. A15.

When the U.S. Supreme Court's recent term concluded, Bloomberg Law highlighted how 75-year-old Justice Clarence Thomas, in his 32 years on the high bench, "has gone from outlier to ideological leader of the conservative majority." In particular, the Court's 6-2 ruling barring racial preferences in university admissions represented a historic "capstone" to Justice Thomas's career.

His resolute views about race long preceded his judicial service, for even as an undergraduate in 1969 at the College of the Holy Cross he demanded "complete liberation from the slavery that whites—whether knowingly or otherwise—persist in foisting upon the black man." Justice Thomas invoked the same principle early in his judicial service, declaring in a 1995 opinion that "racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination." As he later told a black lawyers' group, "to define each of us by our race" is "nothing short of a denial of our humanity."

Amul Thapar sits on the U.S. Court of Appeals for the Sixth Circuit. Now 54, he is widely viewed as a top contender for a future Supreme Court appointment by a Republican president, and in his off-hours he has written "The People's Justice," a compelling tribute to Justice Thomas's jurisprudence, aiming to highlight his "true character" and what he calls "Thomas's immense courage." Judge Thapar, like Justice Thomas, identifies as an originalist, explaining that "the core idea behind originalism is honoring the will of the people" as expressed both in the Constitution and in legislatively enacted statutes by venerating "what the words of those documents meant when they were enacted." He identifies Justice Thomas as "the most powerful originalist voice of our day" and contends that "when we actually follow the original meaning of the Constitution, the weak and the politically powerless stand to benefit the most."

Judge Thapar offers a dozen short, engaging histories of cases in which Justice Thomas authored an opinion, focusing on the participants' stories rather than the justice's reasoning. Some are obscure, such as a pair of rape cases that the Supreme Court declined to hear but in which Justice Thomas nonetheless wrote in advocacy of the two victims' claims. But most strongly support Judge Thapar's argument.

In 1999 in *City of Chicago v. Morales*, a 6-3 Court majority struck down a Chicago loitering ordinance targeting street-gang members as unconstitutionally vague. Justice Thomas dissented, arguing that “gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror that the Court does not give sufficient consideration.” He pointedly emphasized that “the people who will have to live with the consequences of today’s opinion do not live in our neighborhoods.”

In 2002 in *Zelman v. Simmons-Harris*, a 5-4 majority, including Justice Thomas, narrowly upheld a school-voucher program enacted by the city of Cleveland. Justice Thomas’s concurrence highlighted how “the promise of public school education has failed poor inner-city blacks.”

The next year, in *Virginia v. Black*, the Court rejected on free-speech grounds the prosecution of a Ku Klux Klan leader for burning a cross. Justice Thomas dissented, noting how state legislators had first enacted a ban on cross-burning “with the intent to intimidate” during the height of Jim Crow: “Even segregationists understood the difference between intimidating and terroristic conduct and racist expression.”

In 2003, in *Grutter v. Bollinger*, the Court grudgingly upheld the University of Michigan Law School’s affirmative-action admissions program, with Justice Sandra Day O’Connor writing that “we expect that 25 years from now, the use of racial preferences will no longer be necessary” to achieve a diverse student body. Dissenting, Justice Thomas argued that the Constitution “means the same thing today as it will in 300 months” and complained that Michigan “seeks only a facade” of diversity while championing policies that will “stamp minorities with a badge of inferiority.”

When *Students for Fair Admissions v. Harvard* was announced on June 29, Justice Thomas presented his long concurring opinion from the bench. He labeled it “an originalist defense of the colorblind Constitution.” In *Brown v. Board of Education* (1954), he pointed out, legendary civil-rights lawyer and future justice Thurgood Marshall argued that “the Constitution is color blind is our dedicated belief.”

“All racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person’s ideology, beliefs, and abilities,” Justice Thomas wrote. Thus racial preferences “strip us of our individuality and undermine the very diversity of thought that universities purport to seek.”

Justice Thomas’s *Harvard* opinion unsurprisingly validates Judge Thapar’s overarching theme in “The People’s Justice.” It bears emphasis too that among appellate jurists Judge Thapar is far from alone in his outspoken admiration of Justice Thomas’s jurisprudence. Another elegant encomium was penned some years ago by now-retired

New York Court of Appeals judge Robert S. Smith in the NYU Journal of Law & Liberty. Surveying a raft of sometimes arcane Thomas opinions, Judge Smith opined that “Thomas seems at times to display more analytical rigor than his colleagues” and asked, “Why does it seem, repeatedly, that Justice Thomas has simply out-thought his colleagues on a purely technical, analytical issue? I really don’t know.”

Judge Smith, like Judge Thapar, had a bigger target in mind, calling out “politically correct people who have never read a Justice Thomas opinion but are quite sure that he is an evil man.” Aimed at the general reader, “The People’s Justice” will disprove such notions if it’s read by those most in need of its message, and Judge Smith memorably described the educational effort that is slowly but increasingly taking place: “I enjoy seeing certain of my liberal friends scream and gag when I tell them that I think Justice Thomas is one of the greatest Justices who ever sat on the Supreme Court.” Amul Thapar must certainly share that pleasure.

Mr. Garrow’s latest book is “Rising Star: The Making of Barack Obama.”