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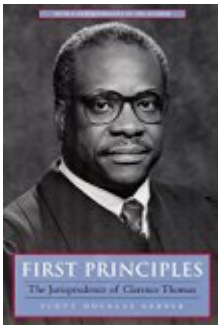
Scott Douglas Gerber. *First Principles: The Jurisprudence of Clarence Thomas.* New York and London: New York University Press, 1999. ix + 281 pp. $34.00 (cloth), ISBN 978-0-8147-3099-7.



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JUDGING JUSTICE THOMAS

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In an idiosyncratic, somewhat turgid book devoted to the jurisprudence of and literature about Clarence Thomas, Scott Douglas Gerber, a visiting professor at Roger Williams University School of Law, argues that, as a Justice, Thomas has been "his own man," making important intellectual contributions, although he continues to be observed by others through the lens of partisan politics.

First Principles is not a full-scale biography of Justice Thomas, but rather a personalized discussion of Thomas's jurisprudence in the areas of civil rights, civil liberties, and federalism. It is based primarily on a relative handful of Thomas's opinions in some areas of the law and an encyclopedic reading of the works about Thomas. Given that the book treats Thomas's work during his first five terms as a member or the Supreme Court, and that Thomas is now in the middle of his tenth term (and may well sit for at least thirty more), this work cannot be definitive. The book is not intended to shed light on the dynamics of the Rehnquist Court, nor on the personal factors that make this apparently quite complex man tick. Its value at this juncture is in suggesting what was unique about Thomas's jurisprudence during his early terms, as well as offering a kind of annotated review of books and articles about Thomas by others. A further contribution of Gerber's study is that, on many issues, it lays out the positions that Thomas took at his confirmation hearings and compares them with positions Thomas previously took and with Thomas's performance on the bench. One possible conclusion from this information is that Thomas engaged in an unusual amount of prevarication at his confirmation hearings. Gerber probably would not agree, but he also probably would add that this is only what could have been expected of a highly politicized confirmation process. Gerber has written about as neutral a book as possible under the circumstances. However, if it is possible to write both a neutral and an interesting book about Thomas, Gerber's book is not it.

Although *First Principles* is a book about Clarence Thomas, its focus changes continually, as Gerber shifts from Thomas's views to those of Thomas's critics and to Gerber's own judgments on both. We are in a sense treated to Gerber's own personal odyssey through the intellect of Clarence Thomas – an odyssey that began when he was a graduate student at the University of Virginia and became interested in Thomas's views on the links between the Declaration of Independence and the Constitution. This gained Gerber some notice during the confirmation fight and ultimately led to this book. It is Gerber's earnestness in trying to be fair to Thomas, as apparently few observers pro or con have been, that gives this book its particular flavor. Gerber rejects the conventional wisdom about Thomas's early years on the Court – that he did little; that what he did was shallow; and that his work amounted to little more than evidence that he was a clone of Antonin Scalia. Each passing term appears to bear out Gerber's judgment. Given the shrillness of Scalia's performance in recent years, it is not impossible that Thomas, though not nearly as brilliant as Scalia, may yet prove to be the more influential of the two within the

Court.[1]

One of Gerber's central themes is that Thomas's record as a Justice of the Supreme Court is almost always judged against the benchmark of partisanship. Gerber believes that the substance of what Thomas has had to say while on the bench is too important for the kind of partisan analysis that has prevailed (p. 4). Eschewing the alternative of a full-scale biography, Gerber chose to study aspects of Thomas's jurisprudential views, he says, to inform readers better about how the judicial process really works. It is not quite clear how analysis of Thomas's jurisprudential views illuminates the judicial process, though it does enlighten us about Thomas's views. Gerber, though, believes judging and writing about judging are both inherently "political" and states that "Justice Thomas is, in short, merely an especially fascinating example of the realist maxim that judges read their policy preferences into the law they are interpreting" (p. 198).

In his first full chapter, Gerber discusses over a dozen books on the Thomas-Hill hearings and the reception these books have received. We can only be bemused by learning that the literature on the Thomas hearings exceeds the total of books focusing on the careers of Chief Justices Morrison R. Waite, Melville W. Fuller, Edward Douglass White, Fred M. Vinson, and Warren E. Burger taken together.

Although Gerber acknowledges the significance of Thomas's alleged sexual harassment of Anita Hill, fortunately he finds no need to rehash the episode other than pointing to the vitriol used by many of those who have written about it. Gerber suggests that vitriol seems to attach to appraisals of Thomas as the result of his race, his opposition to affirmative action, and the explosive nature of the sexual misconduct charges against him.

In his second chapter, Gerber attempts to discern the connection between Thomas and natural law and to examine the ways in which Thomas distanced himself from his controversial pre-confirmation-hearing speeches and writings on many issues, including natural law. Whereas this is a subject of much interest to Gerber, it may not be of much interest to many others. Gerber's discussion of Thomas and natural law is also problematic. The potpourri of views ascribed to Thomas hardly amount to a natural-law jurisprudence, nor are they clearly derived from natural law. Instead, they seem to be an array of constitutional values that underlie Thomas's jurisprudence and amount to little more than snippets or "sound bites": his concept of civil rights as an individual rather than a group concern; his belief that economic rights are as important as political rights; his concern that recognizing unenumerated rights in the Ninth Amendment would give the Court a blank slate to write on; and his argument that society is better protected by holding people accountable for their behavior than by indulging their rights. Nothing at all is distinctive about such views; any observant reader of Linda Greenhouse's Court reporting in *The New York Times* or Federalist Society literature ought to be able to come up with as profound a foundation for his or her constitutional positions. However, Gerber's discussion of these views does show us the immense distance between Thomas's testimony at his confirmation about natural law and his views both before and after those hearings.

The three middle chapters examine Thomas's views on civil rights, civil liberties, and federalism. They introduce us to Thomas's textualism and originalism, including his views on judicial restraint. In Chapter Three, Gerber looks at Thomas's views on school desegregation, voting rights, and affirmative action. Perhaps the lodestone of Thomas's approach is his belief that the Equal Protection Clause guarantees that government must treat individual citizens equally, not as members of racial, ethnic, or religious groups (p. 80). Thomas resents the notion of black inferiority, which, he believes, was embodied in *Brown v. Board of Education* or at least in the social-science studies cited in *Brown* (p. 79). He has called into question the expansive equity powers that federal district courts have used to enforce *Brown* because they are grounded neither in the Constitution nor in statutes.

Where voting rights are concerned, Thomas opposes gerrymandering to increase minority influence. He strongly objects to the notion that the creation of primarily black districts will produce representatives who will espouse a black point of view, because this notion is predicated on the stereotype that all blacks think and vote alike – a notion that he terms "political apartheid." As with school segregation, Thomas emphasizes judicial restraint: "We would be mighty Platonic guardians indeed if Congress had granted us the authority to determine the best form of local government for every county, city, village and town in America" (p. 87, quoting Thomas in *Holder v. Hall*, 114 S. Ct. 2591, at 2602 [1994] [Thomas, J., with Scalia, J., concurring in the judgment). Of course, Thomas's well-known opposition to affirmative action seems derived from his belief that individuals should be treated as individuals, not as members of a racial group. Thomas stood with the Court in *Adarand Constructors v. Pena*, 512 U.S. 200 (1995), holding that all racial classifi-

cations by the government must be strictly scrutinized. Thomas also wrote separately in that case to make clear his view that there is no "racial paternalism" exception to the Equal Protection Clause. Alas, Gerber does not attempt to understand why Thomas, who profited so much from affirmative action, is so against it. That will undoubtedly make Thomas the subject of a psychobiography in years hence.

When Gerber examines Thomas's views on other civil liberties in Chapter Four, it is clear that Thomas's consistent conservative originalism *invariably* leads him to conservative results (p. 162). Thomas does not believe that the Eighth Amendment's Cruel and Unusual Punishment clause applies at all in the prison context, because "judges or juries – but not jailers – impose punishment." As Thomas sees it, the Eighth Amendment would not apply even to the tortuing of prisoners, although the Fourteenth Amendment might, and there also might be remedies under state law. Gerber considers Thomas's opinion on this issue correct as a matter of text and history (p. 128).

Where the religion clauses of the Constitution are concerned, Thomas's originalism leads him to an accomodationist viewpoint. In *Rosenberger v. University of Virginia,* U.S. _, 116 S. Ct. 2510 (1995), Thomas joined a five-four majority that held that the university could not deny funds to a student religious magazine. Regarding other civil liberties, Thomas has called for abandoning the distinction between commercial and noncommercial speech, seeing no philosophical or historical basis for the assertion that "commercial" speech is of "lower value" than noncommercial speech. After all, the Framers equated "liberty" and "property" (p. 158).

One of the few important cases in which Thomas differed from Rehnquist and Scalia was _McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995). The writer of an anonymous pamphlet was fined $100 for violating an Ohio statute prohibiting the distribution of anonymous campaign literature. Thomas joined the seven-Justice majority that protected the anonymous pamphleteer, but wrote a separate opinion. That originalist opinion pivoted on the position that members of the founding generation engaged in anonymous political writing and that and other historical evidence outweighed a century of practice. Dissenting, Chief Justice Rehnquist and Justice Scalia said that Thomas was erroneously conflating the practice of anonymous pamphleteering in the founding era with whether the Framers considered that practice to be a constitutional right.

Chapter Five deals with Thomas and federalism. Thomas's views on federalism are in the tradition of the Thomas Jefferson of 1798, Judge Spencer Roane, St. George Tucker, President James Buchanan, and Justice James C. McReynolds. His view of the national government's powers under the Constitution is very narrow. In his concurring opinion in *United States v. Lopez*, *U.S.* , 115 S. Ct. 1626, 1642 (1995), likely his most important opinion to date, Thomas set his sights on the Commerce Clause line of cases dating back to 1904 and argued that the Constitution does not give Congress "police power." Thomas's views come, at least in part, from his perspective on the struggle for ratification of the Constitution. He takes seriously the concessions that Federalists made to Anti-Federalists during the ratification campaign. The Anti-Federalists argued strongly that the new government ought not to be one in which the national government was empowered to "regulate" just about anything. The Federalists attempted to assuage such concerns by insisting that the Constitution did not grant Congress such authority. Thomas would rely on that understanding as denying Congress police power.

Gerber's book has two appendices on Justice Thomas's voting. Through them, he demonstrates that the "freshman effect" did not seriously affect Thomas; that he pulled his oar quantitatively in his first five terms, writing his share of important opinions and concurring and dissenting often in important cases; and, rather than vacillating, that he quickly found the Court's conservative wing and planted himself there. Furthermore, on virtually every issue, Thomas was the Rehnquist Court's most conservative member. Gerber strongly rejects the view that Justice Thomas is "little more than Judge Scalia's loyal apprentice"; if his research has convinced him "of anything, it is that he [Thomas] has his own jurisprudence" (p. 193).

Among the major conclusions of *First Principles* are (1) that people judge *Justice* Thomas as they judged *nominee* Thomas; (2) that Thomas is a liberal originalist in regard to racial civil rights (leading him to Lockean results) and a conservative originalist on other civil liberties and federalism; (3) that his judicial opinions read "the same as his policy speeches and articles" (p. 194); and, as already indicated, (4) that Justice Thomas thus is, in short, "merely an especially fascinating example of the realist maxim that judges read their policy preferences into the law they are interpreting" (p. 198).

Didactic and tendentious, *First Principles* is not a "page turner." Its organization is awkward and its prose

unexciting. The reader's yearning for a pithy sentence is never realized. Although an author is entitled to write the book he wants to write, concomitantly, a reader is entitled to yearn for a book that is an interesting read. That goal ought to be possible without being unfair to the subject. Gerber, however, chose neither to write a biography nor to examine the role of Clarence Thomas on the Rehnquist Court. At virtually every turn, he shies from what might be lively. Choosing not to interview anyone for the book (including Thomas), Gerber chose instead to examine every scrap of paper that others have devoted to Thomas. Thus, he may have been punished more severely than his reader.

Certainly, Gerber sought to write a book fair to Thomas and to his critics, and he has done that – no small accomplishment. One might quibble that Gerber would have improved his book by deleting all references to himself (although, if less earnest, it would not have been as honest). The book is an honorable, if colorless (no pun intended), introduction to a Justice who may be with us for decades to come. Gerber's annotation of the Thomas literature is and will be useful, and the rest of the book may well be a benchmark allowing future observers of the Supreme Court to compare Thomas's work in his first years on the Court with that of his later years, when other issues will have supplanted many of those of his early terms.

NOTES

[1]. Since, according to Gerber, reactions to Justice Thomas are seen through the prism of the battle over his confirmation, perhaps a brief statement of my views is in order. At the time the appointment was announced, not only was I incredulous at President George Bush's statement that Thomas was the best qualified person in the country for the High Court – I could have named a dozen jurists, equally conservative, who were far better qualified for the Court. Surely, at the time only Charles Whittaker and G. Harrold Carswell rivaled Thomas in having the thinnest qualifications for the Supreme Court of any appointee in the twentieth century. Thomas's performance during his confirmation hearings did nothing to change that assessment. I have no idea whether Anita Hill or Clarence Thomas – or both or neither – were telling the truth; had I been a member of the Senate, I would have voted against confirmation in any case because of Thomas's lack of distinction. Nevertheless, in staying abreast of the work of the Supreme Court – as those who teach constitutional law must do – I have found some of Thomas's work quite intriguing.

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