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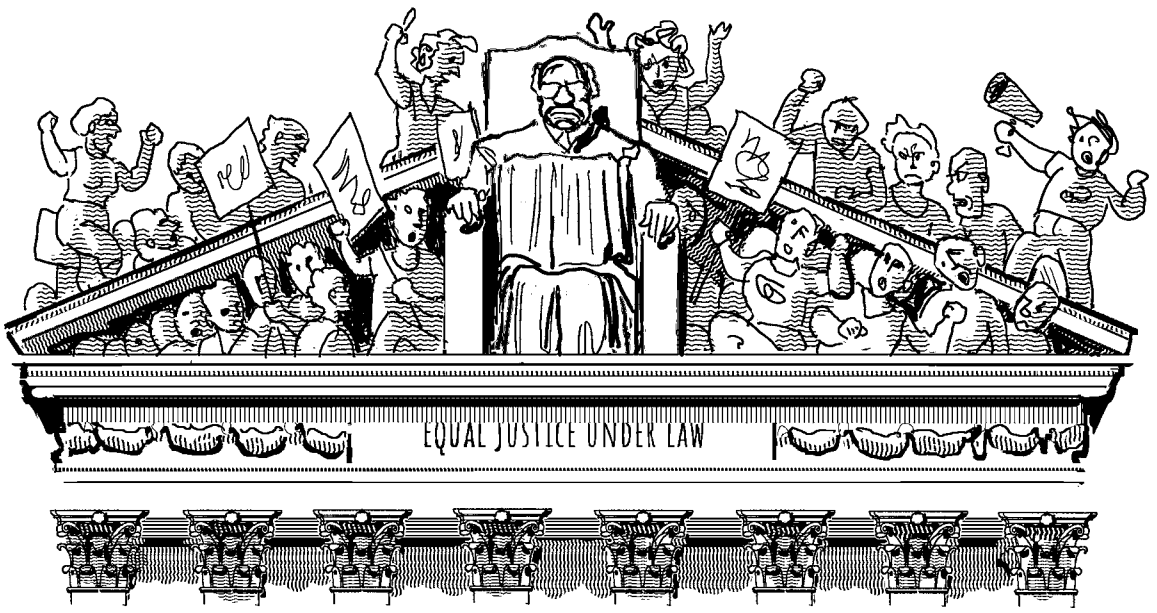
Book Review by John Yoo

Justice for All

The People's Justice: Clarence Thomas and the Constitutional Stories That Define Him, by Amul Thapar.
Regnery Gateway, 304 pages, $32.99



Justice clarence thomas has suffered more than his share of the slings and arrows of outrageous fortune. Opponents marred his confirmation hearings with Anita Hill's accusation that he had sexually harassed her years before when he had been her boss at the Equal Employment Opportunity Commission. That didn't work, and Thomas took his seat on the Supreme Court in October 1991.

Liberal critics next tried to ignore Thomas. They dismissed him as a mini-Antonin Scalia who couldn't think for himself and who would just add another vote to the Court's conservative bloc. That didn't work either. In fact, while liberals slept Thomas developed a more robust version of originalism that leaves behind Scalia's narrower legal positivism.

The Left has criticized Thomas for decades on the grounds that he was somehow a traitor to his race—which reveals how much freedom of thought progressives believe minorities should have. In his new book, *The People's Justice: Clarence Thomas and the Constitutional Stories That Define Him*, Judge Amul Thapar seeks to humanize Thomas by telling the stories of individuals personally affected by the Justice's opinions.

The past two years have been especially auspicious for Thomas's robust brand of originalism. In *Dobbs v. Jackson Women's Health Organization* (2022), the Supreme Court finally overruled *Roe v. Wade* (1973) and returned abortion to the states. Thomas was the only Justice from *Planned Parenthood v. Casey* (1992) still on the Court. He dissented in that case and had continued for three decades to attack the idea that the Due Process Clause created unenumerated rights (see Bradley C.S. Watson's "Restoring the Constitution," Fall 2022).

Thomas's more stalwart originalism also shone in last year's *New York State Rifle & Pistol Association, Inc. v. Bruen*. He had pressed the Court for years to recognize the Second Amendment's breadth beyond the right to bear arms in the home, which has been identified in 2008 (in *District of Columbia v. Heller*) and 2010 (*McDonald v. City of Chicago*). In a 2020 dissent (in *Rogers v. Grewal*), for example, he had expressed his doubt that "the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen." Now, confidently in *Bruen*, Thomas could quote Justice Alito in *McDonald*, affirming that the right to defend oneself with a gun is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." He declared that any modern restrictions on gun ownership must survive the same scrutiny that the courts apply to protect other basic rights:

> That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.

And this summer, Thomas achieved perhaps his greatest victory by leading the Court to strike down racial preferences in colleges and universities. Thomas had fought for a color-blind Constitution—to use the immortal words of Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* (1898)—long before he had joined the federal judiciary. Upon joining the Court, he made his views known early in *Adarand Constructors, Inc. v. Peña* (1995), which banned racial preferences in government contracting as a violation of the Equal Protection Clause. Thomas used his concurrence to declare his fundamental understanding of race and the state: "Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law." Racial preferences designed to help, he made clear, violated the same constitutional principle as racial preferences designed to hurt. "There can be no doubt that the paternalism that appears to lie at the heart of this program is

at war with the principle of inherent equality that underlies and infuses our Constitution." Thomas then did a remarkable thing—as far as I know, the first time any Justice had done it—he quoted the Declaration of Independence, not as a rhetorical device, but as legal authority apparently on par with the Constitution itself.

But Justice Thomas had to endure a sad litany thereafter of the Court's experiments with racial balancing. In 2003, the Supreme Court ruled in *Grutter v. Bollinger* that the University of Michigan could take race into account in law school admissions if it was narrowly tailored to further the school's "compelling interest" in a diverse student body. Thomas observed in dissent that Michigan only wanted "to obtain their aesthetic student body." Ten years later, in *Fischer v. University of Texas* (2016), the Supreme Court again upheld racial preferences. But finally, in *Students for Fair Admissions v. President and Fellows of Harvard College*, Justice Thomas prevailed and, in a 6-3 opinion, the Court finally cut the cancer of racial preferences out of the Constitution. Thomas not only wrote a concurrence that declared the Court had lived up to the principle of a color-blind Constitution, he went beyond the facts of the case to take issue with the claim that systemic racism in American society justified race-based preferences. "All forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution," he wrote, emphasizing "the pernicious effects of all such discrimination."

The latest attacks on Justice Thomas come not from law professors but from the world of partisan politics. Leading Democratic members of Congress, aided by nonprofit organizations such as ProPublica, have launched a series of ethics investigations of Thomas and other conservative Justices for allegedly benefitting from favors from wealthy friends and acquaintances. In particular, Democrats have introduced several judicial ethics bills in the wake of reports that Texas billionaire Harlan Crow had taken Thomas on luxury vacations, bought Thomas's childhood home, and paid the private school tuition of Thomas's grandnephew.

Thomas complied with the Supreme Court's self-reporting requirements and neither Crow nor any other friend had business before the Court. But that has not stopped Democratic senators, such as Sheldon Whitehouse—himself the member of a whites-only country club in Rhode Island—from demanding a system that would allow anyone to seek to have a Justice removed from a case because of an alleged conflict of interest. It seems obvious that progressives not only want to create a system to harass sitting Justices because of disagreement with their decisions, but also to deter future conservatives from seeking a judicial career. These efforts smack of similar recent progressive proposals to undermine the institutional stability of the American political system: enlarging the size of the Supreme Court, ignoring the Electoral College, ending the filibuster, and adding the District of Columbia and Puerto Rico as states.

In the face of such openly partisan attacks on the Supreme Court's independence, Judge Thapar's book provides a welcome, though probably only a short-term, salve. *The People's Justice* charmingly profiles several individuals from some of the great cases during Justice Thomas's time on the Court, including Susette Kelo, who lost her home to New London's urban redevelopment plans; Barbara Grutter, who was rejected by the University of Michigan law school because she was white; Angel Raich, convicted under the federal drug laws for using medical marijuana; and Otis McDonald, who wanted a gun to defend his home against Chicago's gangs. The book also covers several people who will be unfamiliar even to most lawyers, students, and judges: a "Jane Doe" who could not sue for rape at West Point; David Baugh, a black attorney who defended a member of the Ku Klux Klan for burning a cross; and NFL great Warrick Dunn, whose mother's murderer received a stay of execution from the Supreme Court.

In telling these stories, Thapar, who has served on the Sixth Circuit Court of Appeals since 2017, wishes to dispel the notion that Justice Thomas and other originalists like him are heartless legal technocrats. Thapar defines originalism as the idea that "the American people, not nine unelected judges, are the source of the law that governs us—through the Constitution and statutes enacted by our elected representatives." Originalism teaches judges "to determine what the words of those documents meant when they were enacted and to apply them to the cases in front of him or her. Nothing more, nothing less."

Critics might claim, too, that that means instructing judges to elevate the wishes of long-dead white men over the need to correct society's current injustices and inequities. Judge Thapar denies that. "As an originalist, Justice Thomas is committed to applying the law equally to all, come what may. Sometimes that will mean that the less

sympathetic party triumphs. But more often, the opposite is true." What's more, Thapar argues, Thomas's own combination of his impoverished childhood and his commitment to originalism means that he is well positioned to give "a voice to those forgotten" in his opinions.

Empiricists will interject that *The People's Justice* could suffer from selection bias. Judge Thapar has chosen well-known cases, but it is not clear how he selected them. Importance of the substantive legal issue or the high profile of the parties may not provide a reliable measure of originalism's overall consequences. Thapar suggests that originalism may provide a greater defense to the weak than to the strong in society, and offers this book as a kind of evidence for that inference. "The Founders set up American law to protect the citizens from government," he writes, "and to ensure that law-abiding citizens could protect themselves from predatory ones." But he leaves for another day the steps in this argument. The principled originalist, one hopes, will interpret the Constitution based on the understanding held by its drafters and ratifiers. An originalist jurist should only favor "the little guy" when the Constitution requires it.

To be sure, the Constitution contains provisions that recognize individual liberties, and although interpreting these provisions based on their original understanding might help the weaker party, I am not sure it always will. Readers familiar with Harry V. Jaffa's criticism of William Rehnquist, Robert Bork, and Justice Scalia, or those familiar with Hadley Arkes's new book, *Mere Natural Law*, might respond that originalism needn't be morally neutral. Instead, a truly originalist jurisprudence must situate the positive law within the natural law, just as the Constitution is informed by the Declaration of Independence. These conservatives recall Abraham Lincoln's saying that the Declaration is the "apple of gold" and that the Constitution and the laws

> are the picture of silver, subsequently framed around it. The picture was made, not to conceal, or destroy the apple; but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture.

If natural law protects individual liberty, properly defined, then, these scholars argue, the positive law itself must do so, too. The originalist must read the Constitution's ambiguous phrases and silences in light of the natural law, which will have the effect of protecting the natural rights of the weak, whether the slave, oppressed minorities under segregation, or unborn babies.

That is the only way, it seems to me, that originalism is compatible with concern for the little guy. I do not find such a statement in *The People's Justice*, though I think it is the unstated assumption behind its approach. The relationship of natural law to constitutional interpretation raises other difficult questions, addressed recently by Adrian Vermeule's *Common Good Constitutionalism* (2022). It would be unfair to expect Judge Thapar to answer these questions in a book that focuses on individuals affected by Justice Clarence Thomas's judicial rulings, but we may hope it will be the subject of his next book.

John Yoo is a professor at the University of California, Berkeley, School of Law, a nonresident senior fellow at the American Enterprise Institute, a visiting fellow at the Hoover Institution, and the co-author (with Robert J. Delahunty), of The Politically Incorrect Guide to the Supreme Court *(Regnery Publishing).*