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## A Humble Justice

Marah S. McLeod  
marah.s.mcleod.16@nd.edu

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## A Humble Justice

*Marah Stith McLeod*

Justice Thomas's criminal law opinions have provoked acerbic commentary in the press and academic writing.<sup>1</sup> Not even a year into his tenure on the Supreme Court, an editorial in the *New York Times* labeled him the "youngest, cruelest Justice."<sup>2</sup> A later media account branded criminal case opinions by Justice Thomas among the "meanest Supreme Court decisions ever," though for Justice Thomas, the writer made clear, these opinions were "cruel but not unusual."<sup>3</sup> The article accused Justice Thomas of "stak[ing] out positions that revel in the hyper-technical and deliberately callous."<sup>4</sup>

This unstudied denunciation of Justice Thomas's opinions imposes a high and unnecessary cost on law students and others who might otherwise profit from being exposed to Justice Thomas's brand of originalism as part of the broad spectrum of good-faith approaches judges may take to the law.

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1. See, e.g., Eric L. Muller, *Where But for the Grace of God Goes He? The Search for Empathy in the Criminal Jurisprudence of Clarence Thomas*, 15 CONST. COMMENT. 225 (1998).
  2. Opinion, *The Youngest, Cruellest Justice*, N.Y. TIMES (Feb. 27, 1992), <http://www.nytimes.com/1992/02/27/opinion/the-youngest-cruellest-justice.html> [<http://perma.cc/KK24-8K2T>] (condemning Justice Thomas's dissent in *Hudson v. McMillian*, 503 U.S. 1, 17 (1992)).
  3. Dahlia Lithwick, *Cruel But Not Unusual*, SLATE (Apr. 1, 2011, 7:43 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/04/cruel\\_but\\_not\\_unusual.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.html) [<http://perma.cc/AF8G-9ZMR>] (criticizing Justice Thomas's majority opinion in *Connick v. Thompson*, 563 U.S. 51 (2011)).
  4. *Id.*; see also, e.g., Joan Biskupic, *The Conservative Justice, Who Hasn't Spoken from the Bench in 5 Years, Takes a Hard Line on Criminal Defendants*, USA TODAY (June 13, 2011), at A1 (recounting cases in which Justice Thomas ruled against criminal defendants and asserting that "Thomas often separates himself from fellow justices with his lack of consideration for a defendant's plight.").

Moreover, the depiction of Justice Thomas's opinions as intentionally cruel is a mistake. Most obviously, it overlooks those that appear kind to defendants.<sup>5</sup> Furthermore, it creates an inexplicable divide between the Justice in person, whom many know to be humble and compassionate, and the Justice on paper, who is held to be callous and cruel.

Those who know Justice Thomas often describe his humility and his humanity toward those around him of every rank. Harvard Law Professor Noah Feldman, for example, recalls “seeing [Justice Thomas] greet by name the members of the maintenance staff at the Supreme Court”<sup>6</sup>; when asked about it, Justice Thomas told Feldman that he sometimes feels he has “more in common with [the staff] than with the other justices.”<sup>7</sup> And Justice Thomas describes his aim in life in markedly humble terms—to do “the right thing in the right way and for the right reason,” and to be remembered only as a “good and faithful servant.”<sup>8</sup> The humility reflected in these statements is likely rooted in Justice Thomas's Catholic faith, described further below,<sup>9</sup> which teaches that all persons are fundamentally equal and that our human duty is to serve others. Such core beliefs in equality and duty help influence the Justice to take a humble approach—one directed toward obligation rather than power and that sees others as children of the same God—both in his personal interactions and in

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5. For example, Justice Thomas has advocated broader, and more “defendant friendly” interpretations of the Fourth Amendment, *see, e.g.*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting) (disputing the constitutionality of suspicionless searches at fixed roadside checkpoints to intercept illegal aliens); the Fifth Amendment, *see, e.g.*, *United States v. Hubbell*, 530 U.S. 27, 49 (2000) (Thomas, J., concurring) (reading the Self-Incrimination Clause to protect against production of incriminating evidence as well as testimony); the Sixth Amendment, *see, e.g.*, *Alleyn v. United States*, 133 S. Ct. 2151, 2155-56 (2013) (overruling precedent to bar a federal conviction for “brandishing” a weapon where the act of brandishing had not been proven to a jury); and the Eighth Amendment’s Excessive Fines Clause, *see United States v. Bajakajian*, 524 U.S. 321, 324 (1998) (holding that full forfeiture of respondent’s currency would be grossly disproportional to the severity of his offense). *See also* RALPH A. ROSSUM, *UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL REFORMATION 165-74* (2014) (exploring how Justice Thomas’s approach to the Constitution has led him to a broad understanding of certain procedural rights of criminal defendants).
  6. Noah Feldman, Commentary, *The Clarence Thomas Dissent That Broke My Heart*, CHI. TRIB. (May 24, 2016), <http://www.chicagotribune.com/news/opinion/commentary/ct-clarence-thomas-dissent-black-jurors-20160524-story.html> [<http://perma.cc/WMK2-M8GH>] (commenting on Justice Thomas’s dissent in *Foster v. Chatman*, 136 S. Ct. 1737 (2016)).
  7. *Id.* Feldman believes him. *Id.* (“I didn’t think it was a line then, and I don’t think so now.”).
  8. *Supreme Court Justice Clarence Thomas Inspires Nebraska Leaders*, NEB. UNIV. ATHLETIC COMM. (June 3, 2010), <http://www.huskers.com/ViewArticle.dbml?ATCLID=204953149> [<http://perma.cc/MY9D-RNMQ>].
  9. *See infra* Part V.

his professional life. Recognition of Justice Thomas's personal humility and its source in his faith makes more plausible the view that his criminal law opinions reflect a related judicial humility rather than an incongruous callousness.

The judicial humility<sup>10</sup> this Essay seeks to reveal in Justice Thomas's work has five core features: first, an insistence on reaching and pronouncing the correct interpretation of the law even when one disagrees with the result;<sup>11</sup> second, persistence in the correct interpretation despite potential or actual backlash; third, a recognition of one's own limitations and a resulting commitment to doctrines and practices that subordinate self to law; fourth, a willingness to admit mistakes; and finally, a foundation in faith.

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10. It may be helpful to distinguish this kind of judicial humility from judicial restraint. Judicial restraint might lead a judge to proceed incrementally toward correcting a law, lest the judge exercise too much power or appear "activist." Judicial humility requires something a bit different: most basically, it requires a subordination of self to some higher authority. In Justice Thomas's case, the subordination of self is to *law*, specifically to the original meaning of the Constitution. The judicial humility reflected in his opinions therefore is not a form of minimalism; nor does it reflect or require self-doubt or timidity. Indeed, Justice Thomas has stated that "too many show timidity today precisely when courage is demanded." Clarence Thomas, *Francis Boyer Lecture at the AEI Annual Dinner: Be Not Afraid* (Feb. 13, 2001), <http://www.aei.org/publication/be-not-afraid> [<http://perma.cc/N5VX-8W3K>].

Justice Thomas's humility contrasts with the kind of judicial "humility" that Chief Justice Roberts praised as a justification for *stare decisis* during his confirmation hearings. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts). Justice Thomas rejects constitutional *stare decisis*. He has described the Court's leading formulation of the doctrine as "a product of its authors' own philosophical views . . . , and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, . . . illegitimate." *Stenberg v. Carhart*, 530 U.S. 914, 982 (2000) (Thomas, J., dissenting) (referring to the *stare decisis* doctrine articulated in *Casey v. Planned Parenthood*, 505 U.S. 833 (1992)). For Justice Thomas, subordination of his "own philosophical views" to the law means returning to the original Constitution, not to the views of earlier Supreme Court peers. Thus, his judicial humility differs from judicial restraint or minimalism, and is compatible with the claim that he behaves as an "activist" judge regarding precedent. It is not compatible, however, with the claim that he is deliberately cruel.

11. In this sense, some critics of Justice Thomas have his approach exactly backward. See, e.g., Garrett Epps, *Justice Thomas's Unusual Evolution*, ATLANTIC (July 14, 2015), <http://www.theatlantic.com/politics/archive/2015/07/clarence-thomas-unusual-evolution/398471> [<http://perma.cc/A4J8-4J2Z>] ("He is, in other words, not a judge at all. He seems instead to operate as a kind of would-be Platonic guardian, eager to govern the nation according to his own personal opinions . . .").

**I. LAW OVER PREFERENCE**

Justice Thomas believes that the Supreme Court has a constitutional mandate to give the provisions of the Constitution the meaning they had to those who drafted and ratified them.<sup>12</sup> This “originalist” approach is a humble one, because it requires subservience to the original meaning regardless of whether that meaning supports one’s preferred results.

Judicial humility need not lead every judge to espouse originalism, of course; a humble judge might feel she ought to subordinate herself to something else, such as precedent. But note that, although the doctrine of stare decisis subordinates a judge to her past peers, it empowers her with regard to her future peers, making it a two-faced sort of humility. Originalism bows to the past without any claim to control the future. Justice Thomas’s fidelity to original meaning reduces the significance of his own rulings, as well as those of other judges. It is an especially constrained and humble approach.

A drug case involving the federal Sentencing Guidelines illustrates Justice Thomas’s subordination of his policy preferences to conflicting law. In *Pepper v. United States*, the defendant initially had received a below-Guidelines sentence, but after a series of appeals, the district court imposed a much higher, within-Guidelines sentence.<sup>13</sup> In imposing this new sentence, the court refused the defendant’s request for a downward variance based on his post-sentencing rehabilitation, because a provision of the Sentencing Guidelines forbade any variance based on a ground not relied upon at the prior sentencing. The Court of Appeals affirmed. The Supreme Court, however, ruled that the Guidelines provision at issue was unconstitutional. Justice Thomas dissented, stating that the law compelled his decision, though he personally disagreed with it:

Although this outcome would not represent my own policy choice, I am bound by the choices made by Congress and the Federal Sentencing Commission. Like the majority, I believe that postsentencing rehabilitation can be highly relevant to meaningful resentencing . . . I do not see what purpose further incarceration would serve. But Congress made the Guidelines mandatory, and . . . I am constrained to apply those provisions unless the Constitution prohibits me from doing so, and it does not here.<sup>14</sup>

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12. Thomas, *supra* note 10.

13. 562 U.S. 476, 481-86 (2011).

14. *Id.* at 519-20 (citations omitted).

This case reveals Justice Thomas's willingness to place law above preference. He personally preferred a kinder policy than his constitutional approach allowed him to espouse.

Justice Thomas displays such judicial humility even when the law touches on a deeply emotional issue for him, as two cases involving abortion demonstrate. In *Stenberg v. Carhart*, a majority of the Court held unconstitutional a Nebraska statute banning partial-birth abortion. Justice Thomas dissented. His arguments for constitutionality were grounded in the conviction that the Constitution neither prohibits nor requires states to allow abortion.<sup>15</sup> His words were colored with such emotion, however, that they suggested Justice Thomas's personal revulsion at "a method of abortion that millions find hard to distinguish from infanticide and that the Court hesitates even to describe,"<sup>16</sup> and his support for a law that expressed "a profound and legitimate respect for fetal life."<sup>17</sup> Seven years later, Justice Thomas joined a majority of the Court to uphold the *federal* Partial-Birth Abortion Ban Act against a constitutional challenge.<sup>18</sup> In a concurrence, Justice Thomas reiterated his disagreement with the Court's broader abortion jurisprudence. He then added a remark that must have cut deeply against his own result preferences. He wrote: "I also note that whether the Partial-Birth Abortion Ban Act of 2013 constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it."<sup>19</sup> This was not inconsequential talk; because *Gonzales* did not involve a Commerce Clause objection, parties would be free to raise one in a later case. Justice Thomas apparently felt that his obligation to abide by the original meaning of the Commerce Clause required him to articulate its possible limits even when that articulation might in the future undercut protections for fetal life he personally approved.

Other decisions suggest a similar fidelity to law over personal preference. In *United States v. Comstock*, for example, Justice Thomas wrote the sole dissent from a decision upholding a federal law allowing civil commitment of "sexually dangerous" federal prisoners who had finished their criminal sentences.<sup>20</sup> The majority concluded that the Necessary and Proper Clause gave Congress authority to impose such commitment. Justice Thomas disagreed:

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15. *Stenberg*, 530 U.S. at 980 (Thomas, J., dissenting) ("Although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so.").

16. *Id.* at 982.

17. *Id.*

18. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

19. *Id.* at 169 (Thomas, J., concurring).

20. 560 U.S. 126, 158 (2010) (Thomas, J., dissenting).

To be sure, protecting society from violent sexual offenders is certainly an important end. Sexual abuse is a despicable act with untold consequences for the victim personally and society generally . . . . But the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it.<sup>21</sup>

Justice Thomas's disagreement stemmed from his reading of the Constitution and not from his preference for a result—namely, that sexually dangerous persons go free. (Indeed, his reading of the Constitution decreed the opposite result for civil commitment of sexually dangerous individuals by the *states*—a practice the Court upheld in *Kansas v. Hendricks* in a majority opinion authored by Justice Thomas.<sup>22</sup>) In *Comstock*, Justice Thomas proved that he would turn to the Constitution as his touchstone, even when it meant going against a policy he considered important and siding with a group of people who had committed acts he found “despicable.”<sup>23</sup>

It is, of course, difficult to prove that a judge has ruled against his personal preferences about the result or the law. A judge might approve the claims of a party whom he disfavors because the party's victory means the success of some larger principle he favors. (In *Comstock*, for example, that principle might be a limited federal government.) This Essay seeks only to offer examples that suggest Justice Thomas is subordinating his personal moral convictions to his understanding of the Constitution, rather than exhibiting the sort of pernicious motive of which he has been accused. Interpreting these examples as instances of judicial humility becomes still more reasonable when considered in light of the additional character evidence described below.

## II. LAW OVER SELF

Throughout his time on the Supreme Court, Justice Thomas has been willing to write opinions that are virtually certain to generate severe public backlash. For example, just a few months after he joined the Court, *Hudson v. McMillian*<sup>24</sup> presented the claim of a prisoner who had been shackled and beaten by prison guards. Citing precedent, the majority concluded that the guards

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21. *Id.* at 165 (Thomas, J., dissenting). Only Justice Scalia joined the dissent—and then only in part. *Id.* at 158.

22. *Kansas v. Hendricks*, 521 U.S. 346 (1997) (rejecting constitutional due process, *ex post facto*, and double jeopardy challenges to Kansas's civil commitment statute).

23. 560 U.S. at 165 (Thomas, J., dissenting).

24. 503 U.S. 1, 17 (1992) (Thomas, J., dissenting).

had violated the prisoner's Eighth Amendment rights.<sup>25</sup> Justice Thomas authored a dissent after parsing the history of the Eighth Amendment. He concluded that the original meaning of the Eighth Amendment was limited to punishments imposed as part of a sentence by a court, casting doubt on existing precedent that extended the term to afflictions suffered in prison.<sup>26</sup> He persuaded only Justice Scalia to join his dissent. The backlash was immediate in the public media. The *New York Times* lashed out at this “youngest, cruelest justice” and described Justice Thomas's dissent with “alarm[]” and “crashing [sic] disappointment.”<sup>27</sup>

Yet Justice Thomas did not allow the backlash to change his approach to the law, as another judge might have done in response to the sting of wounded vanity. He did not give up despite the fact that he had little chance of ever winning a Court majority or public approval for his view that the meaning of the word “punishments” was limited to “penalties” imposed by law for crimes committed and did not encompass harms attributable only to prison officials.<sup>28</sup> For the next twenty years, he stood by his unpopular interpretation of the Eighth Amendment in *Helling v. McKinney* in 1993,<sup>29</sup> *Farmer v. Brennan* in 1994,<sup>30</sup> *Erickson v. Pardus* in 2007,<sup>31</sup> and *Wilkins v. Gaddy*<sup>32</sup> in 2010. He never won more than Justice Scalia's vote (and sometimes not even that).<sup>33</sup>

Nor did he seek to mitigate the angry attacks from the press, though no doubt he was pained by them. In a lecture years later, in which he addressed the vitriolic reaction to his *Hudson* dissent, he reminisced, “Who wants to be

25. *Id.* at 4-5.

26. *Id.* at 18 (Thomas, J., dissenting) (“Until recent years, the Cruel and Unusual Punishments Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime. For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration.”).

27. *The Youngest, Cruelest Justice*, *supra* note 2.

28. See *Hudson*, 503 U.S. at 18 (Thomas, J., dissenting); see also, e.g., *Helling v. McKinney*, 509 U.S. 25, 38 (1993) (“At the time the Eighth Amendment was ratified, the word “punishment” referred to the penalty imposed for the commission of a crime . . . . And this understanding of the word, of course, does not encompass a prisoner's injuries that bear no relation to his sentence.”).

29. 509 U.S. at 37 (Thomas, J., dissenting).

30. 511 U.S. 825, 858 (1994) (Thomas, J., concurring in judgment).

31. 551 U.S. 89, 95 (2007) (Thomas, J., dissenting).

32. 559 U.S. 34, 40 (2010) (Thomas, J., concurring in judgment).

33. See *id.* (joined by Justice Scalia); *Erickson*, 551 U.S. at 95 (solo dissent); *Farmer*, 511 U.S. at 858 (solo concurrence); *Helling*, 509 U.S. at 37 (dissent joined by Justice Scalia).



denounced as a heartless monster? . . . Who wants to be calumniated?”<sup>34</sup> Yet he resisted the urge to protect himself and his image by changing his opinions. He said that judges must have “the courage to assert [the right] answer and stand firm in the face of the constant winds of protest and criticism,” and he described fortitude as “fundamental to [his] philosophy of life.”<sup>35</sup>

A vain judge might not be able to withstand such strong and personal criticism. He or she would be tempted to retract or at least to explain and excuse the apparent harshness of his or her opinions. Justice Thomas, however, does not try to distance himself from the conclusions he believes the Constitution mandates. This requires not only the virtue of fortitude that he described, but subordination of any prideful desire for a good reputation, which could make him vulnerable and responsive to the public criticism leveled at his “cruel” opinions.

### III. LAW OVER DISCRETION

A deep sense of judicial humility requires more than subservience of preferences and self to law. It requires an awareness both of one’s own limitations and of myriad temptations to exceed one’s proper role. In this sense, Justice Thomas has embraced a jurisprudence that is deeply humble. Recognizing that he and other judges might be tempted in the moment of deciding a case to act on their preferences or to claim too much power, Justice Thomas has argued that “judges should adopt principles of interpretation and methods of analysis that reduce judicial discretion.”<sup>36</sup> He has explained: “The greater the room for judicial discretion, the greater the temptation to write one’s personal opinions into the law.”<sup>37</sup> The idea that one must take affirmative steps to ward off temptation is a core part of Catholic teaching,<sup>38</sup> in which Justice Thomas was trained.<sup>39</sup> But it is an uncommon principle to hear from a judge, one that reflects unusual awareness of personal weakness and susceptibility. Doctrines of restraint that counter-balance the temptation to interpret the law to reach pre-

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34. Thomas, *supra* note 10.

35. *Id.*

36. *Id.*

37. *Id.*

38. Catholic doctrine speaks of a duty to avoid “occasions of sin.” *Occasions of Sin*, NEW ADVENT CATHOLIC ENCYCLOPEDIA (2012), <http://www.newadvent.org/cathen/11196a.htm> [<http://perma.cc/B45L-BD47>] (“Occasions of sin are external circumstances . . . which . . . incite or entice one to sin.”).

39. Justice Thomas studied at Saint John Vianney and Immaculate Conception seminaries in Georgia, before transferring to Holy Cross College. CLARENCE THOMAS, MY GRANDFATHER’S SON: A MEMOIR 30-65 (2007).

ferred or popular results are especially necessary at the pinnacle of the judiciary, where national attention creates extreme pressures and temptations. Justices know that reactions from the media and elite observers can cement or destroy their legacies in the court of public opinion, and doctrines that limit their discretion prevent them from twisting the law in order to impress or to please.

One way that Justice Thomas reduces his judicial discretion in an even-handed way is through deference. Deference may be given to lower courts, administrators, or other judges. A good example of Justice Thomas's use of this doctrine to limit his own discretion appears in his granting of deference to finders of fact at trial, and to lower courts in general.<sup>40</sup> While all appellate judges grant some degree of deference, Justice Thomas has been willing to do so to a remarkable degree, and even when all his fellow Justices have refused to defer.

A recent case illustrates this point and demonstrates that Justice Thomas is willing to go to substantial lengths to defer to a finder of fact below. In *Foster v. Chatman*, the Court reviewed a death penalty case in which the prosecution had used its peremptory strikes to remove all black members of the jury pool.<sup>41</sup> Noting that the prosecutor's file included a list of the jurors with each black juror's name marked with a "B" and "NO," a super-majority of the Court ruled that the strikes violated the constitutional prohibition on racial discrimination.<sup>42</sup> Justice Thomas dissented based on a close reading of the factual and procedural record. He concluded that the state courts had sufficient grounds to conclude that the strikes were not discriminatory.<sup>43</sup> His opinion was condemned in the press; it was labeled "bizarre" by a long-time Supreme Court analyst writing for the *New York Times*,<sup>44</sup> and described as sad and inexplicable by an academic observer.<sup>45</sup>

In a critique of the dissent, law professor Noah Feldman asked: "Why, exactly, did Thomas bend over so far backward to argue for sending inmate Timothy Foster to his death?"<sup>46</sup> But this question by Feldman was misleading. It suggested without proof that Justice Thomas had pursued a result rather than

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40. See, e.g., *Wright v. West*, 505 U.S. 277, 296 (1992) ("[The Supreme Court has] emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review.").

41. 136 S. Ct. 1737 (2016).

42. *Id.* at 1749, 1755.

43. *Id.* at 1761 (Thomas, J., dissenting).

44. Linda Greenhouse, Opinion, *Justice Clarence Thomas's Solitary Voice*, N.Y. TIMES (June 8, 2016), <http://www.nytimes.com/2016/06/09/opinion/justice-clarence-thomas-solitary-voice.html> [<http://perma.cc/P6R5-8N4R>].

45. See Feldman, *supra* note 6.

46. *Id.*

abided by a consistent methodology. It is more plausible to think that Justice Thomas followed a strict and consistent principle of deference, even when its result was a bitter pill to swallow, than that he gratuitously reached out to embrace lethal racial discrimination.

Perhaps one may not wish for a judge to be so humble or so deferential. That view would be reasonable. But if one understands Justice Thomas's *Foster* opinion to have reflected humility and not cruelty or callousness, one at least can have a thoughtful conversation about what level of deference was appropriate. By choosing to demonize Justice Thomas as a person, the press and commentators missed out on the important jurisprudential discussion his dissent could have generated.<sup>47</sup>

That discussion might have included an inquiry as to why Justice Thomas advocated deference in *Foster*, but has refused to embrace certain other doctrines of deference. Most notably, Justice Thomas has rejected the doctrine of constitutional *stare decisis*, which mandates deference to prior Supreme Court decisions.<sup>48</sup> And more recently, he has challenged the *Chevron* doctrine, which requires deference to certain decisions and interpretations of statutes by federal administrative agencies.<sup>49</sup>

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47. Perhaps the press can be absolved for ignoring the important but academic question of deference. But academic commentators bypassed it, too. Law professor Noah Feldman's refusal to even consider Justice Thomas's case for deference is evident in his commentary:

Where Thomas really made me sad was in his attitude toward the underlying issue of whether the conviction was tainted. He went through the black potential jurors excluded and systematically accepted the prosecutors' excuses for challenging them. He urged deference to the trial judge's judgment (!), and he discounted the documentary evidence, saying it wasn't clear who had highlighted or marked the black potential jurors' names on the list that was in the prosecutors' files.

To all this I can only say: Really?

Feldman, *supra* note 6. In a separate commentary on the case, law professor Garrett Epps noted that Justice Thomas dissented because "the Supreme Court of Georgia decided the trial court's findings were worthy of deference," but instead of addressing whether deference to the state courts was appropriate, he went on to criticize Justice Thomas (though not by name) for being "all undone" by a "hint" of racism in school admissions but "unperturbed" by obvious racism in the execution process. Garrett Epps, *The Passive-Aggressive U.S. Supreme Court*, ATLANTIC (May 23, 2016), <http://www.theatlantic.com/politics/archive/2016/05/im-not-saying-the-supreme-court-is-passive-aggressive-but/484007> [http://perma.cc/4THA-HN3Z].

48. *Stenberg v. Carhart*, 530 U.S. 914, 982 (2000) (Thomas, J., dissenting) (describing constitutional *stare decisis* as constitutionally "illegitimate"). *See also* Thomas, *supra* note 10.

49. *See, e.g., Michigan v. E.P.A.*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("I write separately to note that [the Environmental Protection Agency's] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."); *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1240-41 (2015) (Thomas, J., concurring) ("The Constitution does not vest the Federal Gov-

A closer look at Justice Thomas's refusal to adopt these other doctrines of deference reveals its constitutional roots. His rejection of constitutional *stare decisis* reflects his belief that no judge—not even Justice Thomas himself—may issue a decision that will supplant a faithful reading of the Constitution.<sup>50</sup> With regard to *Chevron* deference, historical research has led Justice Thomas to conclude that the administrative state has exceeded its permissible authority under the constitutional separation of powers.<sup>51</sup> Preferencing administrative interpretations of law would abandon the Court's supreme duty to read and apply the Constitution. Justice Thomas's principles of deference and his principles of non-deference thus reflect a consistent subordination of discretion to law.

These principles of deference are not merely consistent. They have a necessary relationship that Justice Thomas himself has explained:

[Reducing discretion] is especially important at the Supreme Court, where many of the usual limitations on judicial discretion, such as authority from a superior court or *stare decisis*, either do not exist, or do not exist with the same strength as with other courts. Hence, other doctrines and principles designed to narrow discretion and to bolster impartiality assume greater significance for the Court.<sup>52</sup>

It is precisely because he believes that some doctrines of deference are constitutionally illegitimate that he believes other doctrines designed to limit judicial discretion are so important.

#### IV. LAW OVER ERROR

A fourth measure of judicial humility can be seen in Justice Thomas's willingness to admit and correct his errors. In *Apprendi v. New Jersey*,<sup>53</sup> for example, Justice Thomas conceded a significant error in his earlier decision in *Almendarez-Torres v. United States*.<sup>54</sup> In *Almendarez-Torres*, he had joined a majority opinion holding that a prior conviction constituted a sentencing factor that

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ernment with an undifferentiated 'governmental power.' Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government."); *Chevron U.S.A. Inc. v. Nat'l Resources Def. Council*, 467 U.S. 837 (1984).

50. *Stenberg*, 530 U.S. at 982 (Thomas, J., dissenting).

51. See Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J. F. 94 (2015) (describing Justice Thomas's systematic challenge to the authority of the administrative state based on an originalist understanding of the Vesting Clauses).

52. Thomas, *supra* note 10.

53. 530 U.S. 466, 499 (2000) (Thomas, J., concurring).

54. *Id.* at 520 (criticizing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

could be found by a judge rather than a jury.<sup>55</sup> In *Apprendi*, Justice Thomas admitted that the Sixth Amendment did not support that view; instead, he wrote in *Apprendi*, a prior conviction constituted an element of the crime that only a jury could be authorized to find.<sup>56</sup>

Justice Thomas has been willing to correct errors of legal interpretation even when that means disavowing majority opinions he himself wrote. For example, he wrote the majority opinion in *National Cable & Telecommunications Association v. Brand X Internet Services*, which upheld as authoritative an administrative agency's interpretation of the law based on the *Chevron* doctrine.<sup>57</sup> Ten years later, Justice Thomas had grown skeptical of agencies' constitutional authority to interpret law, and wrote a separate opinion rejecting the *Chevron* doctrine as he had pronounced it in his own opinion in *Brand X*.<sup>58</sup> Such admissions of error require judicial humility, particularly where they require Justice Thomas to relinquish his own encouraged practice of judicial deference because of higher fidelity to the Constitution.

Justice Thomas's work thus may be seen to reflect faithfulness to law over preference, self, discretion, and error. These four features depict a humility that undergirds Justice Thomas's entire spectrum of criminal law opinions. Unlike a narrative of cruelty, humility can account for Justice Thomas's decisions that appear kind to criminal defendants,<sup>59</sup> including constitutional decisions that protect suspects from warrantless searches and seizures<sup>60</sup> and those that forbid sentences from being enhanced by facts found by judges rather than by juries.<sup>61</sup> A narrative of cruelty, in contrast, can explain only those decisions that seem cruel, and does not explain them well.

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55. *Almendarez-Torres*, 523 U.S. at 226-27.

56. 530 U.S. at 520 (Thomas, J., concurring).

57. 545 U.S. 967, 974 (2005).

58. *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (citing his own opinion in *Brand X*, 454 U.S. at 983, as an example of how the *Chevron* doctrine illegitimately "wrests from Courts the ultimate interpretative authority to 'say what the law is,' . . . and hands it over to the Executive.").

59. See *supra* text accompanying note 5 (citing examples of opinions by Justice Thomas that aided criminal defendants).

60. See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting) (rejecting the constitutionality of suspicionless searches at roadside checkpoints set up to intercept illegal aliens).

61. See, e.g., *U.S. v. Booker*, 543 U.S. 220, 313 (2005) (Thomas, J., dissenting) ("The Constitution prohibits allowing a judge alone to make a finding that raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant. Application of the Federal Sentencing Guidelines resulted in impermissible factfinding in Booker's case . . . ."); see also *supra* note 5 (citing *Alleyn v. United States*, 133 S. Ct. 2151 (2013)).

## V. FAITH OVER THOMAS

Justice Thomas's judicial humility offers a powerful counter-explanation for those of his opinions that have been labeled "cruel." And it offers a narrative that is consistent with Justice Thomas's already-mentioned personal demeanor. Moreover, it fits with Justice Thomas's deeply entrenched personal convictions, in particular his Catholic faith<sup>62</sup> and his firm commitment to the human equality professed in the Declaration of Independence,<sup>63</sup> which offer powerful reasons to be humble—both in one's personal life, and in one's work. Thus, it may come as no surprise that Justice Thomas treats with equal respect and friendship the staff at the Court, or that he is willing to defer to lower-court or state-court judges on questions which some of his peers feel they might more intelligently or morally resolve.

A "Litany of Humility" hangs behind the door to Justice Thomas's chambers. It calls the reader to accept mortification of self in order to serve God and one's higher purpose.<sup>64</sup> Justice Thomas keeps this call to painful subordination of self at his place of work, where he encounters a constant temptation to react to public pressures, and faces a real and proven risk that he will be "denounced as a heartless monster"<sup>65</sup> if he remains obedient to his understanding of the original meaning of the Constitution.

There is a great power in Justice Thomas's kind of humility—a resilience that makes a judge nearly impervious to condemnation. Many might not want such humility on the Supreme Court. The Court is already a powerful body insulated from public demands. Life tenure and ample compensation ensure that Supreme Court Justices may decide cases as they see fit. With a Constitution that is so difficult to amend, some might think self-conscious vanity to be a beneficial trait in Supreme Court Justices, for it may nudge them to transform the Constitution in incremental ways responsive to changing social norms.

Yet vain judges may be lured by the desire for public praise to give up their duty to rule objectively on the law. And once their vanity is known, they may

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62. Justice Thomas has spoken publicly about his Catholic upbringing, his loss of faith, his ultimate return to faith, and the influence of his faith on his approach to his work. See, e.g., THOMAS, *supra* note 39; *Religion in the Public Service: A Conversation with Justice Clarence Thomas '74 and Ambassador John Danforth '63*, YALE LAW SCHOOL (Feb. 12, 2015), <http://law.yale.edu/yls-today/news/religion-public-service-conversation-justice-clarence-thomas-74-and-ambassador-john-danforth-63> [<http://perma.cc/CD68-KD79>].

63. See, e.g., ROSSUM, *supra* note 5, at 5.

64. For the words of the prayer, see Merry Cardinal del Val, *Litany of Humility*, CATH. NEWS AGENCY, <http://www.catholicnewsagency.com/resources/prayers/other-prayers/litany-of-humility> [<http://perma.cc/4SYD-CVE8>].

65. Thomas, *supra* note 10.

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be consciously manipulated by the elite and the influential, those who can promise them glory.

Even those who disagree with the “cruel” results that Justice Thomas sometimes condones on constitutional grounds may thus come to respect and accept the humility with which he approaches his task. Though they might wish for a Justice who shares their views and produces their preferred results, they may be content with a Justice whose humility protects against political fiats that could easily turn against them as times change.

*Marah Stith McLeod is an Associate Professor at Notre Dame Law School. She graduated from Yale Law School in 2002 and clerked for Justice Clarence Thomas for the 2009 Court term. She is grateful to Yale Law School, the Yale Federalist Society, and the students who organized the conference, Celebrating Justice Thomas: 25 Years on the Supreme Court, held at Yale in February 2017, which invited serious and candid analysis of Justice Thomas’s work. For comments and insights that deepened her own understanding, she thanks Kate Stith and the other conference participants.*

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