NATIONAL REVIEW

Understanding — and Appreciating — Clarence Thomas

Walter Olson

July 12, 2021

Social media is, let's face it, excitable. On June 28 it went wild at the report — to quote a typical headline, from NBC — that "Clarence Thomas says federal laws against marijuana may no longer be necessary." OMG, the Twitterverse exclaimed. The most right-wing justice on a conservative Supreme Court, ready to throw pot law into the ashcan of history! What more proof could you need that the world has changed?

Except that if anything had changed, it wasn't Thomas. A decade and a half earlier, in *Gonzales v. Raich*, he'd argued in dissent that the federal government lacks constitutional power to ban locally grown and used pot. In the new case, the Court had declined to take up the plight of a cannabis business whipsawed between the federal government's "recent laissez-faire policies on marijuana and the actual operation of specific laws" in such areas as taxes and financial regulation. In a statement commenting on the Court's refusal to wade in, Thomas reminded his colleagues that one of the premises of the *Raich* majority was that the feds had sought to pursue a comprehensive ban that might be undermined by inconsistent enforcement. That rationale, Thomas pointed out, had been badly undercut by the evolution in recent years of today's "half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana." It was, in effect, a tactfully phrased "I told you so."

So to recapitulate:

2005: Justice Thomas says the feds lack authority under the Constitution to ban marijuana.

2021: Justice Thomas again says the feds might lack authority to ban marijuana. Twitter collectively freaks out.

It's like one of those interstellar events where the light takes 16 years to reach Earth.

But then, if there's any one justice whose image has been shaped by those who don't understand him, it's Thomas. Supposedly overly reliant on Scalia, he soon emerged as the high court's most

independent-minded member. (He's known for his separate concurrences, and wrote seven of them this term — more than any other justice.) Portrayed by his most obtuse critics as an indolent time-server, the real Clarence Thomas outpaces his brethren as an exponent of original and incisive historical research, while yielding to none in his willingness to call even long-accepted law into question.

Since his nomination 30 years ago this month, Thomas has taken immense pains to make his positions clear. And while he has won respect from some liberal and left-wing academics, much of the pop commentariat still seems reluctant to take his ideas seriously.

Consider last month's *TransUnion LLC v. Ramirez* decision, in which a 5–4 majority ruled that class-action lawyers may sue a credit-reporting service only on behalf of customers concretely injured by its actions. Even if Congress wishes to empower a larger group of uninjured consumers to sue, the majority decided, suits from them fail to meet the constitutional requirement of a "case" or "controversy." Nonlawyers may find the standing questions here somewhat abstruse — you can read more about them here — but suffice it here to say that Thomas broke from the conservative camp to write the main dissent, mostly joined by the three liberals.

The progressive reaction was led by *Slate*, on a theme of "Look! What the conservative majority did today was too extreme even for Clarence Thomas!" This was, as you might guess, a thoroughly bad take on multiple levels.

First, Thomas had telegraphed his view of the general subject in a concurrence breaking from the conservatives in a similarly themed 2016 case, *Spokeo v. Robins*. In that case, Justice Samuel Alito's majority opinion, which picked up votes from Stephen Breyer and Elena Kagan as well as from conservatives, was if anything rather mushy, not "extreme." But it gave Thomas a chance to lay down his general position. It hasn't changed. Both times Thomas parted ways because he disagreed with his colleagues on substance, not because he found them to have gotten too extreme.

As for the *TransUnion* case, Kagan's opinion for the three liberal justices mostly joined Thomas but still left some crucial distance. It disagreed with his willingness to give Congress a free hand to invent no-injury claims (and thus, on that point, sided with the conservative majority), but nonetheless found that in this case lawmakers deserved deference. To put it differently, the liberals were left occupying a middle position, while Thomas — as is his wont — chose to stake out an endpoint on the relevant spectrum. How many clues do we need that he votes because he's persuaded by principle, not because he starts maneuvering or triangulating on finding the other side too extreme?

There are, to be sure, justices who do flinch at the prospect of being seen as extreme, or who are uncomfortable with sweeping rulings. But it is peculiarly difficult to attribute that psychology to Thomas, the arch-advocate of sticking with his convictions about the Constitution wherever they might lead, and of letting justice be done even when the inconveniences of doing so are many.

Press bias aside, faulty coverage of the Court tends to lead novice readers into faulty predictions. If you believed the pundits who railed against "Trump judges" as a sinister breed unlike all others on the bench, you may have been dumbstruck when the last president's appointees uniformly refused to rule in his favor after the election. If you bought into the "Oligarchy's Court" folderol about how the majority is supposedly held captive by the business lobby, you will struggle to understand (unless you simply ignore) the many cases that turn out otherwise.

Imagine yourself a novice Twitter user who takes seriously a trending theme suggesting that even Thomas has jumped off the train of today's Roberts Court, finding it too extreme. You might start expecting that Thomas will begin to seek the sheltering embrace of the Left in other cases, too. This will probably not serve you well when it comes to predictive value.

Thirty years on, it's time for all of us to set aside the old stereotypes, and — in understanding how Thomas seeks to decide cases — allow ourselves the pleasure of listening to his own words.

Walter Olson is a senior fellow at the Cato Institute and the author of several books.