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New book explores one Supreme Court justice's jurisprudence

It's time for Supreme Court Quiz. Fill in the blanks with a name of a current justice of the Supreme Court.

1. Tom Goldstein is publisher and co-founder of SCOTUSblog, the leading website for Supreme Court news. He teaches Supreme Court litigation at both Harvard and Stanford. He has recently written: "[I]f you believe that Supreme Court decision-making should be a contest of ideas rather than power, so that the measure of a justice's greatness is his contribution to new and thoughtful perspectives that enlarge the debate, then Justice (BLANK) is now our greatest justice."

2. Sanford Levinson of the University of Texas states that although Justice Antonin G. Scalia is more influential because of his intense proselytizing both on and off the court, "[I]t would not surprise me if future historians find Justice (BLANK) to be the more intellectually serious of the two."

3. Journalist Nat Hentoff says that "Justice (BLANK) has written as boldly and uncompromisingly in celebration of the First Amendment as did Justices William O. Douglas and William Brennan Jr., in days of yore."

If you answered "Clarence Thomas" to each question, congratulations — you scored a lot higher than I did.

These are just a few of the surprises in Ralph A. Rossum's new book, "Understanding Clarence Thomas" (2014). As Thomas approaches nearly a quarter of a century on the Supreme Court, Rossum offers an assessment of his jurisprudence.

He begins by first distinguishing Thomas' theory of constitutional interpretation from that of Scalia's. Rossum recognizes that Thomas has often been characterized as a mere clone of Scalia's. Rossum believes this is simply wrong.

Scalia has described his theory

of interpretation as a search for the "original public meaning" of a text. The judge's job is to determine meaning solely from the clear textual language of the Constitution or statute. If the text is ambiguous, the judge must then try to determine what this language objectively meant to the society that adopted it.

Scalia relies on both dictionaries and other documents from the era when the text was adopted in order to determine the public meaning at that time. Scalia thus refuses to consider either the subjective intent of the drafters or any kind of legislative history. In Rossum's words, Scalia looks to the "text alone and nothing else."

Thomas, on the other hand, uses a much more capacious approach. Rossum refers to Thomas' theory of interpretation as a search for the "original general meaning." Rossum describes it as

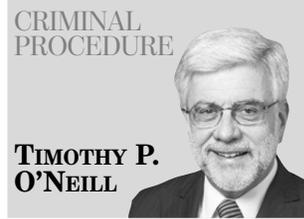
I cannot think of another judge who matches Thomas' willingness to go wherever reason takes him — and let precedent be damned.

encompassing three different approaches.

The first is Scalia's "original public meaning." But Thomas is also concerned with the "original intent" of the drafters of a law. Unlike Scalia, Thomas seeks out the records of the Constitutional Convention in 1787 to determine what the delegates thought they were accomplishing. For statutes, legislative history is likewise germane.

And Thomas adds yet another approach: the search for "original understanding." For issues of constitutional interpretation, this means Thomas seeks out the records of the 1788 state conventions to determine the understanding of the people who actually ratified the Constitution.

By using all three approaches, Thomas attempts to ascertain the "original general meaning" of the text.



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Thomas thus believes that interpretation can yield objectively correct answers. And if Thomas believes the court's interpretation has been wrong, he shows no hesitation in suggesting that a precedent be overruled.

Perhaps the most extreme example is the Supreme Court's interpretation of Article I's prohibition of ex post facto laws. The court in *Calder v. Bull* held that the doctrine applied only to criminal, but not civil, law. Thomas says this is wrong and contends that the original general meaning of the text is that civil law should also be included. Thus, he has expressed an interest in perhaps overruling *Calder* and its progeny. The fact that *Calder* was decided in 1798 — and has 216 years of progeny — does not faze Thomas in the least.

His theory of interpretation has led him to suggest the overruling of a number of pro-defense criminal decisions: *Estelle v. Gamble* (1976) (conditions of confinement apart from the sentence per se can violate the Eighth Amendment); *Griffin v. California* (1965) (adverse inference on failing to testify violates Fifth Amendment self-incrimination clause); *Taylor v. Louisiana* (1976) (recognizing "fair cross-section" as part of Sixth Amendment right to an impartial jury); *Powers v. Ohio* (1991) (white defendant can raise *Batson* issue

for prosecutor's improper exclusion of black jurors).

But he has also suggested overruling a significant number of pro-prosecution cases as well: *U.S. v. Martinez-Fuerte* (1976) (approving suspicionless searches of illegal immigrants at fixed checkpoints); *Michigan Dept. of State Police v. Sitz* (1990) (approving sobriety checkpoints); *Fisher v. U.S.* (1976) (limiting reach of self-incrimination clause to testimony); *Almendarez-Torres v. U.S.* (1998) (prior convictions are not elements for sentencing enhancement).

Thomas goes far beyond Scalia in his willingness to trash precedent. Scalia has famously described himself as a "faint-hearted originalist" and has conceded that Thomas has fewer qualms about overruling cases.

I cannot think of another judge who matches Thomas' willingness to go wherever reason takes him — and let precedent be damned.

But I can suggest a political theorist who shares much of Thomas' philosophy.

This theorist's respect for reason — and his disdain for precedent per se — is reflected in his comment, "[T]he question is not whether principles are new or old, but whether they are right or wrong." He asserts that "Government by precedent ... is one of the vilest systems that can be set up." The problem with precedent is that it falsely presumes "that wisdom degenerates in governments as governments increase in age." He objected to reliance on precedent not only in law, but in political life in general.

The theorist? None other than Thomas Paine, the author of "Common Sense," the 1776 tract that was so influential in gaining support for the American Revolution. He went on to be one of the earliest supporters of the French Revolution. (For background, see Yuval Levin's new book, "The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Right and Left" (2014).)

Politics — and law — make for strange bedfellows indeed.