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## Reading Clarence Thomas

Kendall Thomas

*Columbia Law School*, [kthomas@law.columbia.edu](mailto:kthomas@law.columbia.edu)

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# ESSAY

## READING CLARENCE THOMAS

Kendall Thomas\*

The state is INHERENTLY racial, every state institution is a RACIAL institution, and the entire social order is equilibrated (unstably) by the state to preserve the prevailing racial order.

—Omi & Winant<sup>1</sup>

Several years ago, a special issue of *The New Yorker* entitled “Black in America” included an extraordinary profile of U.S. Supreme Court Justice Clarence Thomas.<sup>2</sup> Authored by Jeffrey Rosen, the article begins with an account of Justice Thomas’s interventions in two of the most important cases decided during the Court’s previous term. In the first of these cases, *Missouri v. Jenkins*, the Court was called upon to define the constitutional scope and limits of the federal judicial power to address racial concentration in Kansas City’s public schools through salary increases and the creation of magnet programs.<sup>3</sup> In the second case, *Adarand v. Peña*, the Court was asked to determine the constitutionality of race-based affirmative action requirements in federal construction contracts.<sup>4</sup> Those of you who follow the Court’s work will recall that in both cases the Supreme Court struck down the programs in question on the ground that the affirmative action and school desegregation plans violated the equal protection components, respectively, of the Fifth and Fourteenth Amendments to the United States Constitution.

Rosen reports that in each case, Clarence Thomas played a crucial role in shaping both the Court’s reasoning and its result. Although Thomas had

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\* Nash Professor of Law and founding Co-Director of the Center for the Study of Law and Culture at Columbia University. B.A. Yale University, 1978; J.D. Yale Law School, 1982.

1. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1990s*, 77-94 (1994).

2. Jeffrey Rosen, *Moving On*, *THE NEW YORKER*, April 29 & May 6, 1996, at 66-73.

3. *Missouri v. Jenkins*, 515 U.S. 70 (1995) (striking desegregation plan that included racial balancing that went beyond restoring rights of victims of past discriminatory conduct). In *Missouri v. Jenkins*, the Supreme Court rejected a court-ordered “magnet school” remedy intended to attract students from outside a district with schools that were 80-90 percent African-American. The majority opinion found that the segregation to be alleviated was a result of post-Brown “white flight” and not of any de jure segregation that would justify a desegregation remedy. In a concurring opinion, Justice Thomas discussed Brown at length and rejected the view that there could not be an equal opportunity for education in a school that was predominantly or exclusively African-American. Justice Souter argued in the primary dissent that segregation which existed at the time of Brown was never corrected in this particular school district and that a “magnet school” remedy would be justified in addressing the remaining segregation.

4. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (condemning racial classifications in federal contracting programs).

declined to engage the lawyers in oral argument before the Court in the school desegregation case, when the Justices took up the case in private discussion, he intervened vigorously.

Interestingly, Thomas framed his case for invalidation of the Kansas City plan in the most personal and autobiographical terms. In Rosen's account, "Thomas spoke fervently of his own youthful struggles with the reality of Jim Crow. I am the only one at this table who attended a segregated school, Thomas reportedly said. And the problem with segregation was not that we didn't have white people in our class. The problem was that we didn't have equal facilities. We didn't have heating, we didn't have books, and we had rickety chairs. All society owed us was equal resources and an equal opportunity to make something of ourselves."<sup>5</sup> Rosen goes on to note that "Thomas invoked the famous footnote in *Brown v. Board of Education*,<sup>6</sup> in which Chief Justice Earl Warren cited works of social science to suggest that the greatest evil of segregation was the feeling of inferiority that it engendered in black students. Thomas disagreed."<sup>7</sup> For Thomas, "[t]he evil of segregation was that black students had inferior facilities, not that they were denied the chance to go to school with white students . . . . All my classmates and I wanted, Thomas concluded, was the *choice* to attend a mostly black school or a mostly white school, and to have the same resources in whatever school we choose."<sup>8</sup>

Rosen recounts that Justice Thomas made a similarly autobiographical appeal during the Court's deliberations in the *Adarand* case.

He talked about his grandfather, who ran an ice-and-oil delivery service in Jim Crow-era Savannah. His grandfather had worked hard, Thomas declared; he never asked for handouts from the state. He hadn't made a great living, and his business had been restricted to black neighborhoods, but he had not needed affirmative action to get his contracts. Thomas reportedly went on to say that affirmative action, like segregation, is inherently wrong, because it is premised on the patronizing belief that blacks are inherently inferior. Having survived the ordeal of segregation, Thomas . . . knew from experience that black communities and black families often flourished in the face of adversity. The best way to atone for the past wrongs, he insisted, was to take the state out of the business of racial classifications entirely. The Constitution, he said, should be color-blind.<sup>9</sup>

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5. Rosen, *supra* note 1, at 66.

6. See *Brown v. Board of Education of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 494 (1954). J. Warren notes that the extent of psychological knowledge has shifted dramatically since the Court's ruling at the time of *Plessy v. Ferguson*. To that end, he cites to a variety of authorities as partial justification for the Court's ruling in *Brown*. These authorities cited to in a footnote include: K. B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950); WITMER AND KOTINSKY, *PERSONALITY IN THE MAKING* (1952), c. VI; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT. J. OPINION AND ATTITUDE RES. 229 (1949); BRAMELD, *EDUCATIONAL COSTS, IN DISCRIMINATION AND NATIONAL WELFARE* (MacIver, ed., 1949), 44-48; FRAZIER, *THE NEGRO IN THE UNITED STATES* (1949), 674-681. See generally MYRDAL, *AN AMERICAN DILEMMA* (1944).

7. Rosen, *supra* note 1, at 66.

8. *Id.*

9. *Id.* at 66-67.

The most fascinating revelation in the Rosen account of Thomas's interventions in the Court's discussions of *Adarand* and *Jenkins* is the way his efforts to affect the outcome in these cases depended as much on autobiographical appeals to black identity and experience as they did on the content of his ideas and arguments. In this respect, Thomas' reported tactics during the Court's private conferences are at odds with the vision of the judicial role to which he has publicly claimed to be committed. Thomas has often complained that he has been subjected to unfair and illegitimate forms of criticism since his appointment to the Court, criticisms from which the other Justices have been spared. He has bitterly accused his detractors of underhanded *ad hominem* attacks, for unjustly focusing attention on who he is rather than what he says. During a speech in May of 1993 at Mercer University, for example, Thomas condemned the "new intolerance" of "damning the dissenters by skewering his character rather than by substantively criticizing his views."<sup>10</sup>

What I find so revealing about *The New Yorker* profile is the evident ease with which Justice Thomas forgets to practice what he preaches. The Rosen report thus confirms what some critics have suspected all along: Clarence Thomas owes his increasing influence over the Supreme Court's antidiscrimination docket to the very rhetoric of character and personality that he finds so objectionable when it is directed against him by his critics. To be sure, we have seen all this before. Thomas adopted much the same strategy during the explosive Senate Judiciary Committee hearings that ended in his appointment to the Court.<sup>11</sup> With his ascension to the Court, however, Thomas is now in a position to play the politics of personality on a much larger stage, and in a drama that involves nothing less than the fate of racial justice in American constitutional law.

The chief lesson I take from *The New Yorker* article is this: students of the Supreme Court cannot hope for anything like an adequate account of Clarence Thomas's racial jurisprudence if we restrict ourselves to substantive criticism of the views he expresses in this or that text. Simply put, it is not enough to read the formal language of Clarence Thomas's opinions. We must expand our interpretive horizon to encompass a reading of the figure himself. My purpose in these pages is to explore one itinerary such a double-reading might take.<sup>12</sup> I mean to show that the success of Justice

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10. Clarence Thomas, *Rule of Law: The New Intolerance*, WALL ST. J., May 12, 1993, at A15.

11. For an example of the role personal background and experience played in justifying the presidential nomination of Thomas, see Press Conference with President Bush and Supreme Court Justice Nominee Clarence Thomas, FED. NEWS SERVICE, July 1, 1991, available in LEXISNexis Library, FEDNEW File. Throughout the length of the confirmation proceedings, President Bush emphasized the fact that Thomas had grown up in the midst of poverty in the racially segregated South. Despite this background, Bush stated that Thomas had "excelled in everything that he has attempted." He also made extensive reference to Thomas' personal characteristics: "He is a delightful and warm, intelligent person who has great empathy and a wonderful sense of humor." He concluded by saying: "Judge Thomas' s life is a model for all Americans, and he has earned the right to sit on this nation's highest court." See also Catharine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L. REV. 117, 123 (1993) (noting that Bush hoped to undermine liberal opposition with the argument that, "[a] man like Thomas, who had personally experienced racism and discrimination, could surely be trusted to safeguard the civil rights of others.")

12. A rhetorical reading in this context will go beyond Clarence Thomas's doctrinal defense for a jurisprudential stance and instead examine the discursive strategies that underwrite that

Thomas's emerging agenda on the Court derives not only, nor primarily, from the propositional content of what he writes in his opinions and speeches. To the contrary, Thomas's project also depends very much on the identificatory positions from which his writings issue: we are dealing with the personal as professional. Indeed, as I shall argue, one might go so far as to say that the secret and the scandal of Thomas's authority in the current Court lies in his deft deployment of what might be called the 'identitarian' style of judicial argument. In what follows, I want to indicate some of the elements of this style, in the hope of shedding some light on two of Thomas' more remarkable recent jurisprudential performances.

My chosen conceptual compass here is Michel Foucault's richly suggestive work on the "discursive event".<sup>13</sup> I cannot hope to offer a detailed account of Foucault's theory of discourse, but I do need to rehearse the key elements of his work on which I shall draw here. Generally speaking, for Foucault, "discourse" refers to the practice of language, to the active work of making things mean; it is not limited to the study of the semantic or syntactical properties of verbal or written texts. For Foucault, the effective analysis of discursive formations requires attention to their performative dimensions. Foucault thus shifts his focus from a static model of the text as *object* to a dynamic model of the text as an *event*. This in turn implicates a host of issues such as the status of the speaker or writer, the circumstances in which the speaker or writer speaks or writes, and the social sites from which the speaker or writer launches an utterance or text.

The crucial distinction between Foucault's project and other recent explorations of linguistic performance to which it has often been compared, most notably the "speech act" theory of J.L. Austin and John Searle, lies in its sustained attention to the connections between (or I might say the co-dependence of) discourse and power.<sup>14</sup> Foucault develops a conception of discursive practice as an empirical phenomenon that is underwritten by and embedded in a complex field of social forces. Thus, he argues that "in every society the production of discourse is at once controlled, selected, organized and redistributed by a certain number of procedures."<sup>15</sup> One

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defense. Such a reading can help reveal the "unconscious" of the text. See Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1819-21 (1993).

13. MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 50-51 (A.M. Sheridan Smith trans., 1972).

14. The speech act theory first expounded by Austin, and later developed by Searle, is based on the idea that speech, like non-verbal acts, is used to accomplish a specific purpose for the speaker. For example, speech may be used to request, announce, frighten, convince, or promise. How a statement is actually used has a direct relationship to or bearing on its meaning. Speech act theory identifies three different elements of any speech act: (1) the locutionary act, which is the act of making the utterance; (2) the illocutionary act, which is the purpose of the utterance (e.g., to make a statement, an offer, a promise, etc.); and (3) the perlocutionary act, which is the effect of the utterance. The term "speech act" has come to be used as a short-hand reference to the illocutionary act. The purpose, once identified, is the illocutionary force of the statement. Speech act theorists are largely interested in the speaker's intentions in order to determine meaning. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969), and JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* (1979).

15. Michel Foucault, *The Order of Discourse*, in *LANGUAGE AND POLITICS* 109 (Michael J. Shapiro ed., 1984).

obvious instance of such a procedural constraint on discourse is the prohibition (*l'interdit*, which may be literally translated as "the interdict"): "[We] know very well that we do not have the right to say everything, that we can not speak of anything in any circumstance, that not just anyone, in a word, can speak of anything."<sup>16</sup> The combined prohibitive force of what Foucault calls the "taboo [regarding] the object [of discourse], the ritual of the circumstance [of discursive performance], [and] the privileged or exclusive right of the subject who speaks" operates to police the boundaries of discourse, restricting admission and conditioning effective participation in the "society of discourse" to those who adhere to the religious, political, or philosophical "doctrines" that make a particular discourse a "discipline" or body of knowledge.<sup>17</sup>

An example from our own 'discipline' might make these claims concrete. The dominant view of legal principles and propositions is that they are tools with which to analyze, anticipate, avoid, or adjudicate competing claims of right and duty. In the dominant view, the cognitive content of a legal proposition in no way turns on whether the site of its use is a court, a conference room, or a lecture hall. Consider the following sentence: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>18</sup> The dominant view holds that as a legal proposition, this rule retains its essential character no matter where it is uttered or written, no matter who reads or says it: whether a judge reads it in a brief, a legislative counsel puts it in a memorandum, a student memorizes it for an examination or recites it during a mock trial, or a maintenance worker finds it typed on a scrap of paper in a law library wastebasket. Proponents of this view would readily concede that the meaning and application of this proposition can be contested or, indeed, changed over time. They would agree that the different settings in which, and purposes for which, the rule is read or spoken do make a difference. But they think that the rule remains *essentially* the same as an ontological matter no matter what the social or constitutional context in which it appears. One crucial implication of this view is that the meaning of a text of a provision such as the Equal Protection Clause can be productively (if not exhaustively) discussed and analyzed apart from its context.

Foucault suggests another way to think about legal propositions and the "discipline" to which they belong. (Here we might note the intellectual and institutional resonance of this notion of organized conceptual practice as a "discipline.") His point of departure is the line that separates texts from contexts. In broad terms, Foucault distinguishes sentences from statements, syntactic form from signifying force. For Foucault, attention to a context reveals that the sentence used by a judge in a courtroom does not retain the same meaning when it is used by an actor playing the role of a judge in a courtroom. One cannot unilaterally decide that one's utterance of the words of the Equal Protection Clause will carry the binding authority of a judicial pronouncement; one cannot publish a commentary on the Equal Protection Clause in a privately printed newsletter and expect the

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16. MICHEL FOUCAULT, *L'ORDRE DU DISCOURS* 10-11 (1971).

17. *Id.* at 11, 41-45.

18. U.S. Const. amend. XIV.

fact of publication in itself to grant the status that the same words would have in a scholarly journal, or a speech by a Justice of the Supreme Court. We all know that there are practices of exclusion and inclusion which are *external* to texts. These externalities determine how much recognition, how much authority, a particular legal utterance will be accorded; indeed, this process of propositional accreditation represents much of the business of law.

Though obvious once said, left unsaid, the implications these ideas entail for an understanding of legal discourse are all too likely to be ignored. What they suggest is that the context of an utterance is not a contingent feature of discourse but a fundamental condition of its existence, its intelligibility and, most importantly, its power and effects. Because the powers immanent in the discursive situation and in the location or positionality of its participants elude a text-bound theory of discourse, we must always ask, as Foucault puts it in *The Archaeology of Knowledge*:

Who is speaking? Who, among the totality of speaking individuals, is accorded the right to use this sort of language [in what settings and with what consequence?] Who derives from it his own special quality, his prestige, and from whom, in return, does he receive if not the assurance, at least the presumption that what he says is true? What is the status of the individuals who—alone—have the right, sanctioned by law or tradition, juridically defined or spontaneously accepted, to proffer such a discourse?<sup>19</sup>

With this conception of legal discourse as an “*event* that includes speaker, words, hearers, location, language” and the like, we are now in a position to *read* Clarence Thomas, as well as the racial project in which he has become the most powerful figure.

I begin with Thomas’ concurring opinion in the *Adarand* case, to which I have already referred. You will recall that *Adarand* involved a challenge to race-based affirmative action policy adopted by an agency in the U.S. Department of Transportation. Acting under a Congressional directive, this agency included a provision in its contracts that provided financial incentives for contractors who sought to do business with the federal government to hire subcontractors who were controlled by socially and economically disadvantaged persons.<sup>20</sup> Under the governing agency regulations, contractors were required to presume that such individuals included minorities or other individuals found to be disadvantaged by the Small Business administration.<sup>21</sup> After it lost a government contract, the plaintiff in the case, *Adarand Constructors*, filed a suit attacking the constitutionality of the race-based presumptions used in the regulatory scheme, arguing

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19. Foucault, *supra* note 12, at 50.

20. The affirmative action policies at issue in the case, STAA and STURAA, sought to create federal programs designed to benefit socially and economically disadvantaged business enterprises. Section 105(f) of STAA and § 106(c) of STURAA both provide in pertinent part: “[e]xcept to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(a) of the Small Business Act.” See 15 U.S.C. § 637(a), Pub.L. 97-424 § 105(f), Pub.L. 100-17 § 106(c).

21. The category of disadvantaged individuals under the affirmative action policy, 49 C.F.R. § 23.62, was rebuttably presumed to include “women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, [and] Asian-Indian Americans.”

that these racial classifications ran afoul of the equal protection component of the Fifth Amendment's Due Process Clause. The Supreme Court agreed with this argument. In an opinion written by Justice Sandra Day O'Connor, the Court concluded that whenever government at any level, considers race in its decisionmaking, the courts must subject such a decision to "strict scrutiny," the most demanding level of constitutional review.<sup>22</sup> Two years before Thomas's appointment, the Supreme Court had all but foreclosed the adoption of race-conscious responses to racial inequity by state and local government. In a cramped conception of the scope of national power under the Fourteenth Amendment, the *Adarand* decision pressed further by imposing new limits on the federal government's authority to take race explicitly into account in addressing society-wide discrimination, unless the government could first show that it had acted to further a compelling state interest, and had sought to further that interest through the narrowest possible statutory or regulatory means. However, the Court took great pains to deny the conventional wisdom that "strict scrutiny is strict in theory, but fatal in fact." Noting that "[the] unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality," Justice O'Connor insisted that the Court's opinion not be read to mean that the federal government was categorically forbidden from adopting race-based policies in any and all circumstances.<sup>23</sup>

Apparently, O'Connor's moderate position was too radical for Clarence Thomas. In a concurring opinion that the other Justices pointedly declined to join, Thomas fiercely attacked his colleagues on the losing side, Justices Stevens and Ginsburg, who would have upheld the challenged affirmative action plan. "I write separately . . . to express my disagreement with the premise underlying Justice Stevens's and Justice Ginsburg's dissents: that there is a racial paternalism exception to the principle of equal protection."<sup>24</sup> From Thomas's vantage point, the "benign" discrimination which seeks to benefit racial groups that are "thought to be disadvantaged" is the moral and constitutional equivalent of the "malign" discrimination that aims to oppress a race: "In each instance it is racial discrimination, plain and simple."<sup>25</sup> Thomas invokes the by now familiar argument that the "benign" discrimination of affirmative action "[stamps] minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."<sup>26</sup> In language that bears an uncanny resemblance to the language of the notorious opinion in *Plessy v. Ferguson*,<sup>27</sup> Justice Thomas insists that "[government] cannot make us equal; it can only recognize, respect, and protect us as equal

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22. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (O'Connor, J., plurality) (noting that when race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases).

23. *Id.* at 202.

24. *Id.* at 240.

25. *Id.* at 241.

26. *Id.*

27. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (finding that state-mandated racial segregation on rail cars did not violate the equal protection clause).



before the law.”<sup>28</sup> (In *Plessy*, Justice Brown wrote that “[if] the two races are to meet upon terms of social equality, it must be the result of natural affinities . . . and a voluntary consent of individuals. Legislation is powerless to eradicate racial instincts, or to abolish distinctions based on upon physical differences . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane . . .”).<sup>29</sup>

What bears noting here is the degree to which the force of Thomas’s intervention comes in large measure from the subject-position of the “I” who writes these words. In an act of unmarked identification, the Thomas concurrence thus operates on a double register. That is, it simultaneously serves as an expression of race-neutral judicial umbrage *and* of race-conscious personal offense. Thomas attacks all but accuses the members of the Court who would uphold the affirmative action program of being racist, not just toward people of color in the construction industry, but toward him. The notion of a “racial paternalism exception” is simply another name for “black exceptionalism,” of the view that the “chronic and apparently immutable handicaps” of African Americans and other racial minorities render them unfit to compete for government contracts without the “patronizing indulgence” of whites.<sup>30</sup>

If one is mindful of who is speaking here, it becomes clear that much more at stake in Thomas’s *Adarand* concurrence than the constitutionality of the Department of Transportation’s subcontractor clause requirements. As is so often the case with Supreme Court opinions, the Thomas concurrence is the textual site of multiple and indeterminate meanings. Students of the Supreme Court have often observed the degree to which the public colloquy conducted in its published judgments is a *sub rosa* continuation of the more private ideological skirmishes that characterize everyday life on the Court.<sup>31</sup> The identitarian rhetoric to which Thomas resorted during the Court’s conferences on *Adarand* — the references to his grandfather, the recollections of his own experience of segregated economy and the like— are part of an unwritten intertext that is presupposed but never openly pronounced in the text of his official opinion. That experiential authority of that intertext is distilled indexically in the individual “I” who writes “separately” and from a singular perspective which gives him a special purchase on what it means to be a person of color in contemporary America. Thomas’s response to “racial paternalism” is to assert a judicial claim of “racial privilege”. Justice Thomas further authorizes his pronouncements on the impermissibility of racial consciousness by reference to his membership in a larger community which neither wants nor expects government to “make us equal.”<sup>32</sup> Without having to do so explicitly,

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28. *Adarand*, 515 U.S. 200 at 240.

29. *Plessy*, 163 U.S. at 551.

30. *Adarand*, 515 U.S. at 241.

31. See 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) (noting an expectation that Supreme Court Justices’ deliberations, votes, and opinions will reflect not just what they have learned from briefs and books, but also what they have seen in their personal and professional lives).

32. *Adarand*, 515 U.S. at 240.

Thomas thus suggests that the position from which he is speaking is not merely his own, but that of his entire race.

What makes this discursive strategy so effective is that Thomas NEVER HAS TO MENTION THE OBVIOUS FACT THAT HE HIMSELF IS BLACK. Since this is something we all already know, that fact can simply go without saying. The same holds true for the fact (to paraphrase Foucault) that it is Clarence Thomas alone of all the Court's personnel who can claim the "right . . . to proffer" and profit from this implicit discursive appeal to black identity and experience. This productive silence confers an unspoken "speaker's benefit" on Thomas that forecloses anything like an open rebuttal from his judicial opponents. Any effective attempt by Justices Stevens or Ginsburg to take Thomas on directly would require them call Thomas on the implicit identitarian appeal that underwrites his position. Such an exposure of Thomas's reliance on his racial identity is out of the question. It would not only violate the collegial protocols of the Court (Thomas proudly declared in a recent speech that in the Supreme Court, "[no] one is ever called a name")<sup>33</sup>; it would invite a charge of racism, which in any event Thomas comes just short of making. Justice Stevens is thus forced to restrict himself to two oblique responses. The first is a reply, buried in a footnote, to Thomas' claim that the challenged affirmative action program stamps minority contractors with a "badge of inferiority": "This is not an argument," writes Stevens, that "a white-owned business has standing to advance. No beneficiaries of the specific program under attack today have challenged its constitutionality— perhaps because their ability to opt out of the program provides them with all the relief they need."<sup>34</sup> The implication here is that it is not minority contractors, but his minority colleague who is obsessed with the specter of stigmatization. Stevens's second rejoinder is to an argument made not by Thomas, but by Justice O'Connor. That response takes the form of a charge that the alleged equivalence between "malign" and "benign" race-consciousness would "treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor."<sup>35</sup>

As an exercise in constitutional interpretation, we might say Thomas's *Adarand* concurrence thus cloaks his judicial practice of identity politics in the robes of impartial constitutional method. Within the space of a few paragraphs, Clarence Thomas repudiates, reverses and then relies on something very close to the "poisonous and pernicious" racial exceptionalism of which he accuses Justices Stevens and Ginsburg.<sup>36</sup>

Justice Thomas follows a similar strategy in his concurring opinion in *Missouri v. Jenkins*. In the *Jenkins* case, the Court attempted to resolve a school desegregation case which had been the subject of protracted litigation in the federal courts. In *Jenkins*, the district court had ordered the state of Missouri to fund salary increases and so-called "magnet" programs in the Kansas City Metropolitan School District, a system whose student

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33. Thomas, *supra* note 9.

34. *Adarand*, 515 U.S. at 249.

35. *Id.* at 245.

36. *Id.* at 240-241.

population was nearly seventy percent African-American.<sup>37</sup> The lower court's directives were part of an effort to prevent suburban "white flight" by enhancing what has come to be referred to as the "desegregative attractiveness" of inner city schools. Beginning in 1865, Missouri enacted a series of statutes and constitutional provisions mandating separate public schools for blacks that were not completely repealed until 1976, a mere nine years before the federal district court issued its first desegregative order. In an opinion by Chief Justice Rehnquist, the Supreme Court held that the lower court's continuing effort to dismantle segregation in the Kansas City schools was beyond the constitutional powers of the federal judiciary.<sup>38</sup>

As in *Adarand*, Justice Thomas filed a concurring opinion which the other majority Justices declined to join. Like the *Adarand* concurrence, Thomas's opinion in *Jenkins* is a case study in the venting of judicial spleen. In the first sentence, Thomas introduces what will become a recurring theme: "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."<sup>39</sup> A few lines later he argues that the district court's "experiment" with the "black youth" of Kansas City "rests on an assumption of black inferiority."<sup>40</sup> Again: "'racial isolation' itself is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority."<sup>41</sup> It soon becomes clear, however, that Thomas's real target is not the lower court, but one of the landmark decisions of the Court on which Thomas now sits: the 1954 opinion issued in *Brown v. Board of Education*. Although he directs his attention to what he describes as the trial court's "misreading of our earliest school desegregation case," Thomas leaves no doubt about his contempt for the justification Earl Warren offered for the Supreme Court's judgment in *Brown*. One passage in particular warrants special attention. In *Brown*, observes Thomas:

[T]he Court noted several psychological and sociological studies purporting to show that de jure segregation harmed black students by generating "a feeling of inferiority" in them. Seizing upon this passage in *Brown*, the District Court asserted that "forced segregation ruins attitudes and is inherently unequal." . . . The District Court suggested that this inequality continues in full force even after the end of de jure segregation [and] seemed to believe that black students in the [Kansas City Metropolitan School District] would continue to receive an 'inferior edu-

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37. *Jenkins v. State of Mo.*, 1991 WL 538841 (W.D.Mo. July 05, 1991).

38. *Missouri v. Jenkins*, 515 U.S. 70 (1995) (holding that (1) district court orders designed to attract nonminority students from outside the school district into the school district sought a type of interdistrict goal which was beyond the scope of the identified intradistrict violation; (2) the order requiring across-the-board salary increases for teachers and staff in pursuit of desegregative attractiveness was beyond the scope of the court's remedial authority; and (3) whether students in the district are at or below national norms is not an appropriate test to determine whether the previously segregated district has achieved partially unitary status).

39. *Jenkins*, 515 U.S. at 114.

40. *Id.*

41. *Id.* at 122.

cation' despite the end of de jure segregation, as long as de facto segregation persisted . . . Such assumptions and any social science research upon which they rely certainly cannot form the basis upon which we decide matters of constitutional principle."<sup>42</sup>

After dropping a long footnote to the "harsh criticism" scholars have directed against the studies the Court cited in *Brown*, Thomas returns to his main task—the ideological demolition of *Brown* itself:

Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. Public school systems that separated blacks and provided them with superior education resources—making blacks "feel" superior to whites sent to lesser schools—would violate the Fourteenth Amendment, whether or not the white students felt stigmatized, just as do school systems in which the positions of the races are reversed. Psychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause. The judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of the social sciences.<sup>43</sup>

Several points can be drawn from this argument. First, it is Justice Thomas, and not the district court in *Jenkins*, who is guilty of misreading *Brown*. I shall leave to one side the question whether the social science research marshaled by the proponents of desegregation was sound.<sup>44</sup> Thomas may be correct that the Court could have reached the same constitutional conclusion without the benefit of the research it cites in its famous footnote eleven. Even if he is right, however, this criticism arguably misunderstands the nature of the *Brown* Court's interest in the psychic impact of state-sponsored racial segregation in public education. Justice Thomas seems particularly incensed by Chief Justice Warren's assertion in *Brown* that the separation of black and white schoolchildren "solely because of their race generates a feeling of inferiority [among black children about] their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>45</sup> Thomas writes as though the *Brown* Court's conclusions regarding the constitutionality of race-based segregation in public school education turned exclusively on its concern with the inner lives of black schoolchildren. However, this language from *Brown* must be read against the backdrop of the Court's views about the *social* meanings and effects of racial segregation on African-Americans' subordinate "status in the community."<sup>46</sup> For the *Brown* Court, the subjective harm ("psychological feeling") of racial inferiority cannot be separated from the social totality ("status in the community") that is both its cause and consequence.

Second, Thomas's indifference to, indeed his open antagonism toward the notion that the specter of stigmatization may indeed be relevant in antidiscrimination analysis, stands in sharp contrast to his stated views in

42. *Id.* at 119-120.

43. *Id.* at 121.

44. See DARYL MICHAEL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880-1996 120 (1997); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955); GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

45. *Brown*, 347 U.S. at 494.

46. *Id.*

*Adarand*, a decision which was issued the same day as the judgment in *Jenkins*. You will recall that one of Thomas' chief arguments against the affirmative action program at issue in *Jenkins* was the rather speculative claim that the challenged policy stamps racial minorities with a "badge of inferiority" that "may" cause people of color in the construction industry to "develop dependencies".<sup>47</sup> One may rightly ask here whether Thomas can have it both ways. If the rhetoric of inferiority has no place in one area of constitutional discourse about race (segregation), what warrants its use in another (affirmative action)?

Third, Thomas betrays a decidedly narrow conception of the epistemology of legal knowledge in his belief that *Brown* did not "need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental truth that the Government cannot discriminate among its citizens on the basis of race."<sup>48</sup> The Supreme Court has used scholarly research to inform its decisionmaking since the beginning of this century.<sup>49</sup> At one level, one might read Thomas's concurrence as an injunction for a return to doctrine and black letter law (a campaign he has recently begun to wage throughout the nation's law schools). I suspect, however, that there is something more at stake here than mere skepticism about theory.<sup>50</sup> What Justice Thomas is urging is a return to the golden age of judicial "know-nothingism" in racial equality jurisprudence.<sup>51</sup> Thomas seeks to secure this revanchist ideological agenda by appealing to "the simple, yet fundamental truth[s]" of the color-blind "common sense" that has increasingly come to govern the legal and political discourse on racial power in the post-civil rights era.

However, Thomas's case for race neutrality in his *Jenkins* concurrence is undermined by the racial register of the language he uses to make it, which is decidedly closer to the surface of the text than it is in *Adarand*. To my mind, Thomas's rhetorical strategy here has little to do with the specific facts of the case. After all, one can easily imagine an opinion in which Thomas might have used the term "racial minority" to refer to the black Kansas City schoolchildren whose educational future was at stake in *Jenkins*. As I read it, Justice Thomas's repeated use of explicit and specific references to black racial identity serves at least two purposes. The first, as in *Adarand*, is to mark—again, implicitly—his own proximate racial position in the *Jenkins* case. The second is to build what amounts to a brief for black neo-conservative cultural nationalism. Consider in this connection Thomas's comparison of predominantly black elementary and secondary schools with historically black colleges: "Because of their 'distinctive histories and traditions,' black schools can function as the center and symbol of

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47. *Adarand*, 515 U.S. at 241.

48. *Jenkins*, 515 U.S. at 120.

49. See *Muller v. Oregon*, 208 U.S. 412, 419 at n1 (1908) (referencing the brief filed by soon-to-be Justice Louis D. Brandeis in support of the claim that long hours are dangerous for women. The brief "extract[ed] from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe.")

50. Thomas is not arguing, in other words, for the superiority of undertheorized argument in judicial decisionmaking. See Cass Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 6, (1996).

51. Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1959-60).

black communities and provide examples of independent black leadership, success, and achievement."<sup>52</sup> In his zeal to defend the ideals of black neo-conservative cultural nationalism, Thomas refuses to let the stubborn facts of racial inequity get in his way. As the District Court emphasized in its opinion, the public schools Justice Thomas holds up as a model of racial pride provide a textbook study in material realities of urban public education: inadequate lighting; peeling paint and crumbling plaster on ceilings, walls and corridors; loose tiles, torn floor covering, odors resulting from unventilated classrooms; a lack of off-street parking and bus loading for parents, teachers and students; an absence of appropriate space for many cafeterias, libraries and classrooms; faulty and antiquated heating and electrical systems; damaged and inoperable lockers; and inadequate fire safety systems. In short, Justice Thomas is either unwilling or unable to acknowledge that by objective measure, the Kansas City public school system remained plagued by massive and continuing racial inequality. This "simple, yet fundamental truth" cannot be allowed to intrude upon Thomas's dream of a new, neo-conservative Black nationalist order. Thomas's discursive *modus operandi* in *Jenkins* and *Adarand* is thus fully compatible with his recent extra-judicial campaign to promote his vision of muscular self-help as the royal road to racial uplift in the post-civil rights era.<sup>53</sup>

When read against the backdrop of his extra-judicial pronouncements, the logic of Thomas's identitarian discourse in *Adarand* and *Jenkins* is thrown into sharp relief. I might frame what I'm trying to get at here by way of the following formulation: Although Clarence Thomas may believe that our Constitution is color-blind, he has consistently made the case for this color-blind vision in terms that are fully (and unapologetically) race-conscious. In a sense, then, to view Thomas as an "Uncle Tom Justice" is entirely to misunderstand the meaning of the racial project for which he has come to be the chief figure.<sup>54</sup> Let me explain what I mean.

I noted earlier in this essay that Thomas's insistent and recurrent references to Kansas City's black public schoolchildren in *Jenkins* are neither unintentional nor insignificant. As he himself notes, the essential constitutional question (at least in his conception of the Equal Protection Clause) is not the pigmentation of the children. I read the references to the Kansas City schoolchildren as "black" rather than minority students as a textual marker of Thomas's importance to the new right. As the sole black Justice, Thomas is the only member on the Court's conservative flank who can use

52. *Jenkins*, 515 U.S. at 122.

53. Thomas's views thus bear a striking resemblance to and consistency with those of Booker T. Washington. See Address by Booker T. Washington, Opening of the Cotton States' Exposition in Atlanta, Ga., September, 1895, in *SELECTED SPEECHES OF BOOKER T. WASHINGTON* 32-36 (E. Washington ed. 1932); see also Gary Peller, *Race Consciousness*, 1990 Duke L.J. 758 (1990); KEVIN K. GAINES, *UPLIFT THE RACE* (1996).

54. See, e.g., JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE, THE SELLING OF CLARENCE THOMAS* 175 (1994) (indicating that 30% of African Americans "branded" Clarence Thomas an "Uncle Tom"); Derrick Bell, *Racial Realism*, 24 *CONN. L. REV.* 363, 370 (1992) ("[T]he choice of a black like Clarence Thomas replicates the slave masters' practice of elevating to overseer and other positions of quasi-power those slaves willing to mimic the masters' views, carry out orders, and by their presence provide a perverse legitimacy to the oppression they aided and approved."); Jack E. White, *Uncle Tom Justice*, *TIME*, June 26, 1995, at 36 (labeling Clarence Thomas "Uncle Tom Justice").

his racial identity to argue against the recognition of racial identity as a positive element in constitutional anti-discrimination law. To paraphrase Foucault, we might say that of all the Justices who sit on the Supreme Court, it is Thomas alone who has the "right" to invest his interpretation of the anti-discrimination principle with an implicit appeal to his own racial identity. Thomas's willingness to engage in what might be called "identitarian argument" (openly in the Court's conferences, obliquely in his opinions) has made him a singularly valuable weapon in the right-wing campaign to reconfigure the constitutional politics of race and reestablish the racial state on a new cultural and ideological foundation.

In a brilliant essay, Cindy Patton has recently described this form of racial politics in the following terms:

The new right [has neutralized] identity by taking up identity against identity, instead of taking it up in order to gain civil rights, breaking the calculus that linked identity claims with access to civil rights<sup>55</sup> . . . . The new right [has] severed the claim to identity from the claim to rights by denying the relation of each to the crucial term which had come to link them — minority. By breaking the logic that enabled historically oppressed groups to mark themselves as political subjects — and under the very sign, culture, that had once generated community and radical opposition — the new right [has] destroyed part of the basis for civil rights as we know them.<sup>56</sup>

I would suggest that a similar logic informs Justice Thomas's rhetorical strategy in *Adarand* and *Jenkins*. Despite his claimed commitment to the ideal of color-blindness, the unacknowledged subject position from which Thomas's identitarian jurisprudence derives its force necessarily and normatively presupposes that race continues to matter in American constitutional politics and law. The ideological aim of this jurisprudential project is not to abolish the color line, but to redraw it.

It would be a mistake, then, to construe Thomas's identitarian color-blindness as a judicial episteme in which the notion of race has no meaning. What Thomas's jurisprudence disavows is any meaningful constitutive relationship between race and RACISM. This disavowal, of course, requires a categorical denial of the historical and contemporary connections between racial identity, on the one hand, and racial power and powerlessness (supremacy and subordination), on the other.

Thomas reductively refigures race to produce what appears to be an abstracted, etiolated understanding of constitutional equality. "Race" is no longer an arena or instrument of political domination, but the mere marker of benign cultural difference. The contraction of race to a purely cultural signifier is Thomas's first, crucial move. This rearticulated conception of "culture-race" divests racial significations of political content or consequence. The second important move is to declare that this depoliticized definition of "culture-race" (to borrow a term from Neil Gotanda) signifies nothing for (or in) constitutional law.<sup>57</sup> Race and racial identity are pre- or

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55. Cindy Patton, *Refiguring Social Space*, in *SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS* 216, 217 (Linda Nicholson and Steven Seidman eds., 1995).

56. *Id.* at 241.

57. Neil Gotanda catalogued four concepts of race that are dominant in Supreme Court ideology: status-race, formal-race, historical-race, and culture-race. Culture-race "refers to African-American culture, community, and consciousness. Culture refers to broadly shared beliefs and

extra-political matters that lie beyond the domain of the Constitution, and thus cannot sustain a cognizable claim of rights under it. Indeed, race consciousness and judicial consciousness are hostile to one another at all points. The third, decisive move is to read the Fourteenth Amendment as a rule of racial non-recognition. Under this norm, a judge who pierces the veil of color-blindness betrays her oath to support and uphold the Constitution. In this vision of the Constitution, the discourse of race-consciousness is always already racist, regardless of the context in which or purposes for which it is introduced.

I have tried to indicate how the judicial performance that both enables and exceeds the text of Thomas's public remarks in *Adarand* and *Jenkins* allows him to transgress the "law" of color-blindness without openly violating the rhetorical taboo on racial rhetoric. I hope by now to have shown that an adequate account of the strategies through which Clarence Thomas has sought to rearticulate the relationship between race and rights in American constitutional law requires a reading not only of what he says, but of who and what he is. A recent book has described and defended Justice Thomas's opinions as elaborating a jurisprudence of "first principles".<sup>58</sup> My claim in these pages is that Thomas's more significant contribution has been his considered and consistent practice of what might be called a "first person" jurisprudence.<sup>59</sup> In the reading I have offered of his opinions, "Clarence Thomas" is less the name of an actual individual than it is of a complex set of institutional subject-positions and identitarian subject-effects. This Clarence Thomas is a racial performance, which artfully sets identity against identity in order to dismantle the fragile political settlement reached during the civil rights years. A reading of this Clarence Thomas suggests that for contemporary critical scholarship on race in American constitutional law, the currently fashionable pronouncements about the death of identity politics are not only premature, but dangerous.

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social practices; community refers to both the physical and spiritual senses of the term; and African-American consciousness refers to black nationalist and other traditions of self-awareness, as well as to action based on that self-awareness." See Neil Gotanda, *A Critique of "Our Constitution is Color-blind"*, in *CRITICAL RACE THEORY* 257, 258 (1995).

58. SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999).

59. The singularity of this jurisprudence is perhaps further underscored by the fact that Thomas so often writes for himself alone.