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## Rehabilitating Thomas Judging Thomas: The Life and Times of Clarence Thomas, by Ken Foskett, William Morrow (2004)

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## BOOK REVIEW

### REHABILITATING THOMAS

JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS. By Ken Foskett. William Morrow. 2004. Pp. xi, 339. \$24.95.

REVIEWED BY JOHN SANCHEZ\*

It is remarkable that a sitting fifty-five year old Supreme Court Justice would warrant a full-fledge biography. But when the reader discovers the drama that suffuses Justice Thomas's life, from the hard-scrabble poverty of his early years, the grueling timetable that his grandfather set up for him (accounting for virtually every minute of the day), the lonely years as the only African-American in the seminary, the reader discovers that the mere facts of Thomas's life make for the stuff of fiction.

Ken Foskett, an investigative reporter for the *Atlanta Journal-Constitution*, seems an unlikely author of Justice Thomas. First of all, Thomas holds a deep-seated distrust of the press. But Mr. Foskett forged a personal relationship with the Justice in the course of writing a three-part series, the first part is entitled *The Clarence Thomas You Don't Know*, published in the *Atlanta Journal-Constitution* in July 2001.<sup>1</sup> Mr. Foskett has done his homework; he has interviewed over three hundred people and has read several thousand pages of Thomas's speeches and legal writings. About the only source unavailable to the author were Thomas's private papers.

In earnest praise of Mr. Foskett's biography, the book's publisher cites a few talking points. Here we have a book that:

chronicles Thomas's contempt for upper-crust blacks who snubbed his uneducated, working-class roots; his flirtation with the priesthood and later Black Power; the resentment that fueled his opposition to affirmative action; the conservative beliefs that ultimately

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1. Ken Foskett, *The Clarence Thomas You Don't Know He's a Generous Mentor, a Talkative Friend, Amiable with Strangers, Proud, Complex—and an Enthusiastic Bus Driver*, ATLANTA J.-CONST., July 1, 2001, at A1; Ken Foskett, *Trials of Life: Racism was One Challenge. Another was Meeting His Grandfather's Expectations*, ATLANTA J.-CONST., July 2, 2001, at A1; Ken Foskett, *Refusing to Court Favor Youngest Justice Accepts Being 'A Thorn in the Side' of Those Who Vilify Him*, ATLANTA J.-CONST., July 3, 2001, at A1.

led him to the Supreme Court steps; and the inner resilience that propelled him through the doors.<sup>2</sup>

I am a fan of judicial biographies but I must say I was wary of reading one of a living justice. How can one assess the career of someone who is perhaps only a third of the way through his judicial career? Thomas has been on the Court fourteen years. If he stays until he is eighty-five, he could be on the Court another thirty years. In the end, however, there is enough evidence in this volume about just why Clarence Thomas is an important enough judge to deserve such a microscopic biography. Thomas is constantly in the news. Some in the Bush administration have floated Thomas's name as a likely successor to Chief Justice Rehnquist. Although a former clerk and current law professor, John C. Yoo, believes Thomas "can do more good for the country as an outspoken associate justice than he could as chief justice."<sup>3</sup> Thomas also made headlines recently when it was reported that he had accepted much more valuable gifts than his Supreme Court colleagues over the last six years.<sup>4</sup>

This book is not your traditional judicial biography. For starters, the book devotes several chapters to a fascinating look at Thomas's ancestors, all the way back to 1832. Thomas's fierce strain of independence is clearly foreshadowed by his great-great-grandfather, Sandy Wilson who, in 1867, paid \$100 cash for forty acres of Liberty County farmland and "never worked for a white man again."<sup>5</sup> The book also takes a deep look at the segregated south; from Sherman's march through Georgia, to Reconstruction and the hard road freed blacks traveled. This immersion is relevant because it unearths a strain that marks Thomas to this day—the yearning for independence, for the black man's need to survive in a white world without a handout from white society. Mr. Foskett argues that Thomas's life and work can be properly understood only in reference to race in America, particularly as it played out in his childhood.

Looking at the facts of Thomas's life one is struck by the contradictions. He was a beneficiary of affirmative action yet he is devoted to the notion of a colorblind Constitution. He is the "uncompromising tough guy" who could dissolve "into an emotional, sensitive man."<sup>6</sup>

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2. KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS*, at front flap (2004).

3. John C. Yoo, *Clarence Thomas is in the Right Seat*, L.A. TIMES, Jan. 5, 2005, at B11.

4. Richard A. Serrano & David G. Savage, *Justice Thomas Reports Wealth of Gifts*, L.A. TIMES, Dec. 31, 2004, at A1.

5. FOSKETT, *supra* note 2, at 31.

6. *Id.* at 313.

I was familiar with the broad outlines of Thomas's life, from his journey from Pin Point, Georgia, to Yale Law School, to his tenure as head of the EEOC under Reagan, and his wrenching appearance before the Senate when he faced off with Anita Hill. But I was wholly unaware of certain parts of Thomas's life: his deep love of children, his love of NASCAR racing, and how he loves to roam the country with his wife in his forty foot mobile home.

What I especially like about the book is how the author does not try to whitewash Thomas's life. He boldly restates every criticism that has ever been lodged against Thomas: charges of opportunism, of turning his back on blacks, and of currying favor with important white people. Every charge is painstakingly dealt with. While it is clear that the author likes Clarence Thomas, he does not shrink from inspecting his every motive and action. For example, Mr. Foskett writes that Thomas's absolutist philosophy often blinds him to nuance.<sup>7</sup> In another instance, Mr. Foskett labels Thomas's denunciation of welfare as "shrill."<sup>8</sup> Moreover, when Thomas defended Republicans in Congress who were attacking President Clinton's judicial nominees, Mr. Foskett characterizes the tenor of Thomas's remarks as "petty, self-pitying."<sup>9</sup>

*Judging Thomas* spends considerable time identifying people and institutions that have influenced the thinking of Clarence Thomas. Myers Anderson, Thomas's grandfather who relentlessly dominated his early years, clearly shaped Thomas's libertarian political philosophy. The Catholic Church "gave him the courage to hold contrary beliefs—the character trait that defines him today."<sup>10</sup> After a twenty-eight year estrangement, from the assassination of Martin Luther King, Jr. in 1968, Thomas rejoined the Catholic Church in 1996. While the book claims that the "tumult of the Savannah civil rights struggle played a key role in shaping [Thomas's] beliefs about equality and discrimination,"<sup>11</sup> there is little direct evidence of this. As for writers, Thomas liked Richard Wright because "[h]e's an angry black novelist . . . and I was an angry black man."<sup>12</sup> He is also such a fan of Ayn Rand's *The Fountainhead* that he requires his law clerks to sit through a screening of the film adapted from the book.<sup>13</sup> Mr. Foskett cites the first Justice Harlan's

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7. *Id.* at 18.

8. *Id.* at 191.

9. *Id.* at 295.

10. FOSKETT, *supra* note 2, at 66.

11. *Id.* at 67.

12. *Id.* at 82.

13. *Id.* at 280.

dissent in *Plessy v. Ferguson*<sup>14</sup> as support for Thomas's color-blind view of the Constitution.<sup>15</sup>

The book properly investigates the roots of Thomas's invocation of natural law, a controversial "method of constitutional interpretation, even among conservative judges"<sup>16</sup> that posits "that a higher law, God's law, was the ultimate standard against which man's laws were to be judged."<sup>17</sup> According to Mr. Foskett, the only way Thomas could reconcile original intent with the existence of slavery in America was to focus on the natural law language in the Declaration of Independence.<sup>18</sup> "God's law taught Thomas to believe in his innate equality."<sup>19</sup> In support of this philosophy, Thomas also relied on Harry Jaffa, a German-born philosopher and Leo Strauss disciple, and on "Lewis Lehrman, a noted New York conservative, for an essay that used natural law to provide a moral basis for laws outlawing abortion."<sup>20</sup> Thomas's support for natural law almost cost him his seat on the Supreme Court and could still come back to haunt him should he be nominated to become the next Chief Justice.

Fittingly, the most dramatic chapters in the book are those chronicling Thomas's nomination to the Supreme Court. Even though most are familiar with the broad outlines of Thomas's traumatic experience appearing before the Senate, Mr. Foskett's account captures the mini-dramas of belt-way politics with photographic intensity. Mr. Foskett's account is never less than compelling as he describes the pounding Senator Biden gave Thomas about natural law during his twenty-five hours of testimony, "the second longest grilling of a Supreme Court nominee in history."<sup>21</sup> While Thomas delivered almost a "carbon copy of Souter's responses"<sup>22</sup> when he sailed through the Senate, Mr. Foskett describes Thomas's performance as "too cautious, too programmed."<sup>23</sup> "The strategy of vague answers, so effective for Souter, made Thomas appear dumb, shiftily and evasive."<sup>24</sup>

While Thomas insisted he had no position on *Roe v. Wade*,<sup>25</sup> senatorial questioning returned more than seventy times to abortion over the course of

14. 163 U.S. 537 (1896).

15. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting); FOSKETT, *supra* note 2, at 190–91.

16. FOSKETT, *supra* note 2, at 219.

17. *Id.* at 190.

18. *Id.* at 189–90.

19. *Id.* at 190.

20. *Id.* at 188, 190, 214.

21. FOSKETT, *supra* note 2, at 229.

22. *Id.* at 228.

23. *Id.* at 229.

24. *Id.* at 261.

25. 410 U.S. 113 (1973).

the hearings.<sup>26</sup> When Thomas learned of Anita Hill's testimony before the Senate, accusing him of sexual harassment, "I felt like throwing up,"<sup>27</sup> he told his most ardent supporter, Senator Danforth. If there is any weakness in this account of the "he said/she said" dispute, it is that Mr. Foscett never discloses his own opinion on who he thinks was lying.<sup>28</sup> In effect, he throws up his hands and concludes, "[t]he contradictions between" Hill and Thomas "were never resolved."<sup>29</sup> Not once did the author ask Thomas whether he enjoyed pornography, as Hill alleged. (Not that there is any necessary correlation between liking porn and committing sexual harassment or being deeply religious, as Thomas is portrayed throughout the book). In the end, Thomas squeaked through the Senate, fifty-two to forty-eight, with "the highest number of negative votes for any Supreme Court justice in American history."<sup>30</sup>

While Mr. Foscett devotes a chapter to analyzing key judicial opinions by Thomas on matters of race, religion, affirmative action, and criminal law, serious students of Justice Thomas's legal writings should consult Scott Douglas Gerber's *First Principles: The Jurisprudence of Clarence Thomas*.<sup>31</sup> Mr. Foscett clearly endorses Mr. Gerber's conclusion "that Thomas's most significant impact on the Court was in the area of race and his insistence on a color-blind reading of the Constitution."<sup>32</sup> While Thomas likes bright line rules and is clearly drawn to constitutional textualism, Mr. Foscett makes clear that the "integrity of [Thomas's] methodology becomes murkier when the cases involve issues close to [his] heart, such as race and the law, or religion in school."<sup>33</sup>

The figure who finally emerges in Mr. Foscett's rich, enveloping story is a proud, sensitive, brooding man who is still deeply scarred by his humiliating Supreme Court confirmation. Mr. Foscett finds just the right words to sign off with, quoting Thomas in summing up his life thus far: "[a]t bottom, I merely tried to do as my grandfather advised: make the best of the hand that had been dealt me."<sup>34</sup> The eventfulness of Thomas's extraordinary life and the refreshing intelligence and craft of the author make this book a pleasure to read.

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26. FOSKETT, *supra* note 2, at 224, 228.

27. *Id.* at 234.

28. *Id.* at 235.

29. *Id.* at 250.

30. *Id.* at 253.

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

32. FOSKETT, *supra* note 2, at 298.

33. *Id.* at 279.

34. *Id.* at 319.