Clarence Thomas and the Tough Love Crowd

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Published by NYU Press


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Notes to Chapter 1

8. Tracy Ellis, “The New Black Aesthetic,” *Before Columbus* *Review*, May 14, 1989. Ellis dates the movement to the midseventies (specifically, the 1978 appearance of Toni Morrison’s *Song of Solomon*).
11. C. Thomas, address to the Pacific Research Institute, August 10, 1987, 2.
15. C. Thomas, “Are the Problems of Blacks Too Big for Government to Solve?” Washington Post, July 17, 1983, C3. Thomas ultimately accepted the job and it proved a stepping stone to the D.C. Circuit Court and ultimately the Supreme Court.
17. Paul A. Bove, In the Wake of Theory (Middletown, Conn.: Wesleyan University Press, 1992), 131.
18. Randall Kennedy, Reconstruction and the Politics of Scholarship, 98 Yale L. J. 521, 522 (1989) (the article is arguably agnostic, but suggests considerable comfort with originalism).
20. S. Steele, Content, 30.
22. Kennedy pleads that “acknowledging” the accuracy of Guinier’s opponents’ perceptions that she was outside the mainstream “does not mean siding with her opponents.” Kennedy, 15 American Prospect 40. Even Anthony Lewis, in a laudatory reference to this Kennedy article, was puzzled by Kennedy’s attribution of inaccurate Guinier commentary to “low intellectual standards” rather than what Lewis calls “ideological zealotry that had no concern for truth.” A. Lewis, “Depriving the Nation,” New York Times, September 27, 1993, A17. Lewis’s bemusement might have dissipated had he read Kennedy’s article closely. Having criticized Guinier for overplaying some “racial card,” Kennedy could hardly attack her opponents for distorting “truth.”
23. Washington Times, June 2, 1993. On the very day Guinier’s nomination was announced, Clint Bolick was quoted as saying that Ms. Guinier was “breathtakingly radical.” C. Bolick, quoted in Washington Times, April 30, 1993.
24. R. Kennedy, 15 American Prospect 46.


27. S. Carter, Reflections, 90; see, further, S. Carter, "Black Table," in Lure, 55, 57 ("the truth is that there is no time to worry, no time and no space, not for the professional.")


33. The New York Times reported that on September 30, 1993, the nomination of Janet Napolitano to be United States attorney for Arizona was delayed because of unconfirmed allegations that she "interfere[d]" with the Senate confirmation process in the Hill-Thomas affair by allegedly coaching a Hill witness, Judge Susan Hoerchner, about the dates of Hoerchner's phone conversation with Professor Hill, in the early eighties, in which phone calls Hill disclosed Thomas's harassment to Hoerchner. References to Brock's book comprise fully two paragraphs of the Times's eleven-paragraph account.

34. New York Times, October 1, 1993, A19. Controversy centered on whether the 25 percent figure should be measured in dollars (better for the Republicans) or personnel (better for Clinton)—and, if measured in terms of personnel, on which of the departed staffers were really White House staff as opposed to merely being on loan from other federal entities.

35. See Martin Kilson, Anatomy of Black Conservatism, 59 Transition 4, 12 (Fall 1993) (the new black conservatism rests on "ideological fetish").
Notes to Chapter 2


4. **Step One:** Society is inverteately race conscious. “The Constitution, by protecting the rights of individuals, is color blind. But a society cannot be color blind, any more than men and women can escape their bodies.”

   **Step Two:** The policymaker ought to resist race-conscious taint as the best way to restrain these inevitable, unfortunate passions. “When Founding Father James Madison spoke of the need for ‘the reason alone, of the public ... to control and regulate government,’ and for government to control and regulate the passions, he wanted exactly what Justice Harlan was pointing to when he endorsed a color-blind Constitution.”

   **Step Three:** The question of remedying the underlying grievances never arises because those grievances are not “rational,” merely passionate. “Obscuring the difference between public and private would allow private passions (including racial ones) to be given full vent in public life and overwhelm reason.”


10. This description is prompted by the critical legal scholars’ faith in their ability to provide knowledge for politics; their consequent and fruitless pursuit of a some-
how impeccable legal-scholarly "methodology"; and their sometimes collapse into something resembling a parlor game.


Notes to Chapter 3

“only when individuality is nurtured and developed apart from race.” S. Steele, Content, 29. What that means is anyone’s guess.


3. Steele, Content, 13, 91.


6. J. Joyce, Stephen Hero (Stephen Dedalus speaking) (New York: New Directions, 1944, 1963), 184; S. Steele, Content, x, xi-xii, 21, 40-41, 64, 89, 156-57; J. Joyce, Portrait, 381 (Cranley speaking).

Notes to Chapter 4


Notes to Chapter 5


5. R. Kennedy, McClesky, 1421, n. 157. The assertion that “individual rights” are “more familiar” is itself tendentious.
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45. Carter, Indeterminate Text, 845, n. 90.
50. Carter's vision of the state as the principal conduit for legitimate dialogue is, importantly, the exact opposite of what Robert Cover has in mind in his well-known essay. See, R. Cover, The Supreme Court 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 44 et seq. (1983).


Notes to Chapter 6

1. Whoopi Goldberg, reported in the New York Post, October 11, 1993, 5. Goldberg, an African American, defended her white lover, Ted Danson, after he appeared in blackface and performed a comedy routine that New York mayor David Dinkins, present at the event, described as “way, way over the line.”


Notes to Chapter 7


7. J. Williams, New Langdells, 429.

8. Wittgenstein’s work is notoriously controversial. The question is not what did “he” say, but which reading of Wittgenstein to prefer. Joan Williams cites and prefers Stanley Cavell’s (and Hanna Pitkin’s, which avowedly follows Cavell’s), So do I. She misreads Cavell. That is the subject of this section. See, A. C. Grayling, Wittgenstein (Oxford: Oxford University Press, 1988), vi (“The wide latitude for competing interpretations of Wittgenstein’s work . . . creates problems. Every commentator tries to give as accurate an account as he can, only to find himself charged with distorting Wittgenstein’s views by those who have a different response to them . . . . The views [one] attribute[s] to him are what [one] interpret[s] those views to be.”) Joan Williams champions a reading of Wittgenstein that is not supported by Stanley Cavell, whom she invokes, and that is unattractive (and wholly unargued) on its own merits.

9. Note Williams’s failure to distinguish two senses of “can.” The first (which she intends) translates “with likelihood of swaying the court.” The second, which
preserves for the judge, if not the advocate, a radical freedom as to the outcome of the case, connotes “without declining into conceptual gibberish.”


11. Roberto Unger is surely the last theorist one wants to cite in support of the idea that legal concepts legitimately derive determinacy from prevailing “forms of life.” Unger advocates a “deviationist” concept of legal doctrine that would integrate political controversy into standard doctrinal argument. He further advocates “expanded doctrine” in which “the class of legitimate doctrinal categories must be sharply enlarged.” R. Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561, 577 (1983). Unger’s concern is to “expose how power-ridden and manipulable materials gain a semblance of authority, necessity and determinacy” (579). Finally, Unger’s rejection of a judicial role in which prevailing “forms of life” bind judges is explicit:

[Judges] are neither servants of the state (not at least in the conventional sense) nor their technical assistants. We have no stake in finding a preestablished harmony between moral compulsions and institutional constraints. We know, moreover, that the received views of institutional propriety count for little except as arguments to use against those who depart too far from professional consensus. (581)

12. In a subsequent piece, *Culture and Certainty: Legal History and the Reconstructive Project*, 76 Va. L. Rev. 713, 743–44 (1990), attempting to show that she recognizes the contestability of culture, Joan Williams nevertheless ends by reasserting that “legal culture ‘makes thinkable’ a narrower band of political possibility than does political culture in general.”

13. S. Cavell, *The Claim of Reason*, 12–13 (Oxford: Oxford University Press, 1979). Cavell distinguishes the judge’s role in law as compared both to situations where there are “objective” external criteria and to cases where, through there aren’t “objective” criteria, Wittgensteinian criteria provide sufficient certainty. Law is, for Cavell, a special third class of case.


34. S. Fish, “Fish v. Fiss,” 136–37.

35. S. Fish, “Posner on Law and Literature,” in *Doing What Comes Naturally*.


Notes to Chapter 8


3. Timothy M. Phelps and Helen Winternitz, *Capitol Games* (New York: Hyperion, 1992), 83–84 (the Thomas-Parker memo was not released during the hearings); C. Thomas, speech to ABA Business Law Section, August 11, 1987, in *Clarence Thomas Sourcebook*, 93.


6. Thomas said his sister “gets mad when the mailman is late with the welfare check, that is how dependent she is.” Thomas, quoted in Phelps and Winternitz, *Capitol Games*, 85.

8. Firefighters v. Stotts, 467 U.S. 561 (1981). See Phelps and Winternitz, Capitol Games, 103 (suggesting that the expansive reading of Stotts, championed by the Thomas EEOC, was the initiative of William Bradford Reynolds, a Reagan official with a tenacious anti–civil rights agenda).


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32. C. Thomas, speech at the Toqueville Forum, April 18, 1988, 17, Clarence Thomas Sourcebook, 57.
37. C. Thomas, speech at the Toqueville Forum, Wake Forest University, April 18, 1988, 8, Clarence Thomas Sourcebook, 56.
39. The description of the pro-hate-speech position as a “free speech” position is misleading. See, Stanley Fish, There’s No Such Thing As Free Speech, 102, 109, 110 (Fish suggests that the First Amendment has become the "First Refuge of Scoundrels"); that “free speech” fundamentalism rests on “the fiction of a world of weightless verbal exchange”; and that the phrase is merely a strategy to “delegitimize the complaints of victimized groups”).

44. Graham, 908. Yet elsewhere in this very opinion, Thomas rails against the “judicial activism” on which the death-penalty abolitionists, he thinks, depended in the sixties and seventies (905). Thomas can himself be read, in Graham, as urging states to enact mandatory death statutes. Thomas expressly acknowledged the role that the Supreme Court’s “prompting” can have in encouraging potential litigants. He asserts that the Legal Defense Fund did not in the 1960s itself seriously consider a broad offensive against the death penalty “until three Members of this Court, in an opinion dissenting from a denial of certiorari, offered strong foundation for such a strategy” (905 n. 3).

45. Graham, 912.

46. Graham, 909.


48. In Herrera O’Connor briefly raised the issue of whether Supreme Court review impinges on the states’ “powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations” (16). But each of these questions is clearly within the Supreme Court’s competence to decide. Moreover, these state-federal issues are entirely different from the originalist assertions, offered by Thomas and Scalia, about the supposed inherent limits of the Constitution.


50. Doggett v. United States, 2686, 2699, 2700.


52. Hudson v. McMillian, 995, 1003, 1005, 1005, 1010.


57. St. Mary’s Honor Center v. Hicks, 113 S. Ct. 2742 (internal brackets and quotation marks omitted).


60. Libertarian political philosopher Robert Nozick, critic of “paternalistic” state redistribution argues, in The Nature of Rationality (Princeton: Princeton University Press, 1993), that “symbolic utility” needs to be inserted into social science’s models of human behavior.


63. Ronald Reagan, July 1984. Reagan, in a widely quoted remark, referred to “San Francisco Democrats . . . so far left they’ve left America.” Michael Dukakis’s 1988 campaign, on “competence not ideology,” was a direct reaction to this successful Republican tactic.

64. C. Thomas, speech to the Heritage Foundation, June 15, 1987, 10; Speech at Suffolk University, Boston, March 30, 1988, 17, in Clarence Thomas Sourcebook, 57.


67. G. Spann, Race against the Court (New York: New York University Press, 1993), 21. Spann argues that since majoritarian infiltration of the Court is inevitable, minorities ought to abandon the Court for “pure politics.” Yet, political and legislative gains ultimately remain hostage to judicial interpretation, a pure politics is unattainable, and valuable arguments can be made that legitimate judicial review must be counter-majoritarian. We ought to press these arguments before abandoning the Court to its habitual, illegitimate, majoritarian ways.

Notes to Chapter 9


18. The blurb is drawn from Lelyveld's review of Naipaul's 1977 India: A Wounded Civilization, where Naipaul concludes that the only answer for India is further decay and total collapse and, perhaps, the hope of a phoenixlike rise from the
ashes. And this last hint of affirmation is reduced to mere rhetoric by the tenor of the book as a whole. Naipaul’s 1964 book, *India: An Area of Darkness*, more than bleak, evinces an outright disgust with the place.


Notes to Conclusion