



AN INTRODUCTION TO THE  
NYU JOURNAL OF LAW & LIBERTY  
SYMPOSIUM, "THE UNKNOWN JUSTICE"

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Most well-known public figures, in my experience, are considerably more complex than their conventional media portraits. I can only speculate why that might be. Perhaps risk-averse public figures exercise so much control these days over the sides of themselves to which they offer access that the media simply see less of this complexity. I have detected also a kind of risk aversion on the side of journalists. A standard set of images and perspectives on public figures seems to set in, and what economists call "herd behavior"<sup>1</sup> follows: many journalists seem cautious about stepping too far outside this shared professional consensus, particularly if the figure is politically controversial.<sup>2</sup>

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<sup>1</sup> See, e.g., Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 Wash. U. L.Q. 347, 355-56 (1996).

<sup>2</sup> I am reminded of an observation from Henry Fairlie, an independent political essayist if ever there were one: "I think [newspapers] are poor reading for a journalist. They are one reason journalists go on saying the same things." HENRY FAIRLIE, *BITE THE HAND THAT FEEDS YOU: ESSAYS AND PROVOCATIONS* 195 (Jeremy McCarter ed. 2009).

Justice Thomas is one of those figures I have in mind when I mention this greater complexity. Those of us who follow the Supreme Court closely have been aware for some time that Justice Thomas has been carving out a distinct set of ideas and approaches in many areas of the law, but among major journalists who cover the Court, the first who was prepared to offer the beginning of a portrait of Justice Thomas as an independent thinker on the Court was Jan Crawford Greenburg, in her recent book, *Supreme Conflict*.<sup>3</sup>

Justice Thomas has long had a special relationship with New York University School of Law. No doubt that fact alone will come as a surprise to many, and I have come to know an “unknown” Justice Thomas quite personally. As part of this Symposium, the student editors asked me to use this introduction to describe the basis and nature of this relationship and to say a bit concerning what it reveals about Justice Thomas that is not more widely known.

Justice Thomas’s relationship with NYU began eleven years ago as part of the creation of what is known as the AnBryce Scholarship Program. The program is designed to support NYU law students – not just financially, but even more importantly, professionally and personally – who come from exceptionally disadvantaged personal backgrounds and are often the first in their families to have gone to college, let alone to get a professional graduate education. The program’s conception originated in the experiences of the program’s founders, Anthony and Beatrice Welters, and that of Justice Thomas, as they worked their way from exceptionally difficult family backgrounds and the most limited socioeconomic circumstances through America’s most elite academic institutions for professional training, such as NYU and Yale law schools.

Tony and Bea are two of the most noble and inspiring people I have known. Tony graduated from NYU School of Law in 1977 and, after working as a staff attorney at the Securities and Exchange Commission right out of law school, went to work for Republican Senator

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<sup>3</sup> JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 109–37 (2007). Among legal academic writing, one of the more original works to assess Justice Thomas’s work is Mark Tushnet, *Clarence Thomas’s Black Nationalism*, 47 *How. L.J.* 323, 330–31 (2004) (comparing Justice Thomas to W.E.B. Du Bois in the struggle to reconcile a kind of black nationalism with a concern for individualism).

Jacob Javits of New York. Justice Thomas was then working for Republican Senator John Danforth; in the uncrowded pool of young African-American legal aides to Republican Senators, Tony Welters and Justice Thomas met then and began to forge their friendship. Tony eventually became one of the leading business figures in the United States and, just as important to him, devoted himself to enhancing opportunities for others by becoming a leading philanthropist in projects worldwide, such as water supply efforts in Kenya. He and Bea have given around \$20 million to NYU, including their creation and funding of the AnBryce program.<sup>4</sup>

Justice Thomas has been involved with the AnBryce Program, intimately and consistently, from the start. Two aspects of the program are particularly worth highlighting, both because of what they say about the program on its own terms—and for those who might consider adopting similar programs elsewhere—and for what they reveal about the “unknown” Justice Thomas. The Welters and Justice Thomas intentionally conceived and designed the program as a class-based, not identity-based, program. The program provides full tuition scholarships to students, admitted through the regular admissions process, who are among the first in their family to pursue a graduate degree and who have overcome significant economic hardship. A majority of the students in the program have been African American and Hispanic, but the program has included many white students as well.

The second aspect of the program is particularly unique and essential to the program's *raison d'être*. Based on their experiences of having been dropped into elite institutions from similar backgrounds as the students in this program, the Welters and Justice Thomas had come to the view, over many years of sharing their experiences, that these students needed more than financial assistance. Schools were often oblivious to the cultural chasms that such students were leaping by entering these institutions and to the students' lack of familiarity with the professional worlds they were about to confront, including various forms of “cultural knowledge” that other students might be able to take for granted. Put most charitably, institutions simply had little experience

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<sup>4</sup> For an interview in the National Law Journal with Tony Welters, which provides more background, see Thomas Adcock, *A Conversation with NYU Law's New Board Chair*, LAW.COM, Oct. 15, 2008, <http://www.law.com/jsp/article.jsp?id=1202425258985>.

with these issues and were not aware of any need to address them. Put more cynically, institutions were not willing to do the hard work, beyond admitting students and providing financial assistance, to recognize and address these students as the distinct individuals they were.

Thus, the most important element of this program is not the financial support, but the ongoing professional and personal support it seeks to provide, of various kinds, both during law school and after. Justice Thomas has been integral in that commitment. At the outset, applicants interview with a group of us, which includes Justice Thomas, the Welters, Professor Deborah Malamud, me, and others, to be admitted. When the program began, these interviews were in Justice Thomas's chambers at the Court. At the time, we were able to have only one student per class year in the program. Now, thanks to the commitment of the Welters family, we have interview panels at three different locations around the country, one of which is still held in Justice Thomas's chambers.

Justice Thomas exhibits a sensitive humanity and warmth in this setting that is very different from the silence on the bench that is all most people ever see of him. Not surprisingly, when conversation turns to the students' backgrounds, as it frequently does, we often touch on particularly difficult obstacles, moments, or enduring problems the students have had to overcome. The students mostly come in intimidated to some extent, of course, at being interviewed by Justice Thomas and in the Supreme Court. Yet at those moments, Justice Thomas is often extraordinarily revealing about parts of his past that presented similar struggles; he connects in an immediate, direct, personal, and very open way. He is constructive, encouraging, affirming, and fascinated with the life stories of the students. He offers advice and guidance, but with a light touch that is never didactic. He has a booming, deep-belly laugh (this will come across as heresy to some, but the only person I can recall with a similar laugh is my former boss, Justice Thurgood Marshall, for whom I clerked in 1984–85). After witnessing this process for many years, I am hard-pressed to imagine it possible to have a better touch, a more humane sensibility, a more supportive role than Justice Thomas does with these students.

Nor does Justice Thomas's commitment to this program or the students end with the interviewing process. During and after law school, he has offered professional advice to some of the students, has

called judges to suggest they take a serious look for clerkships at some of the students, and he has offered two graduates clerkships with him at the Supreme Court. One way to describe the program is that it is consistent with the views Justice Thomas has expressed in his opinions concerning affirmative action in educational institutions. It is a program based on actual economic disadvantage, not one based on race or identity, though the large majority of the students do turn out to be African American or Hispanic. And the program aspires not to leave the students stranded in the institution, but to provide them ongoing support, advice, and career development.

In addition to our mutual involvement with the AnBryce Program, Justice Thomas and I have co-hosted two multi-day academic conferences for NYU alumni, faculty, and students. The first, in 2003, was devoted to issues concerning the subjects reflected in the conference's title, *Property, Poverty, and Race*. This theme emerged from Justice Thomas's own longstanding interest in the material and economic dimensions of race-related issues. Consistent with his emphasis on class issues, Justice Thomas has long believed that far too little attention has been paid to the effects of the law on the poor, including on African Americans. The specific topics included legal barriers to property ownership in developing countries, as in the well-known work of Hernando De Soto;<sup>5</sup> the political economy of property regulation today, including issues such as the emergence of the "smart growth" property-regulation movement and its effect on the poor; the decline of black-owned family farms; and issues of property ownership and wealth accumulation in black families in the United States today.

In light of the success of this conference, about which I will say more in a moment, we hosted a five-year anniversary event, in the form of a second conference, this past summer. That multi-day event was titled *Presidential Powers, Presidential Elections*. The four specific sessions were "Wartime: The Powers of the President, Congress, and the Supreme

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<sup>5</sup> See, e.g., HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM*, 131-87 (2nd ed. 2002); Hernando de Soto, *The Mystery of Capital*, FIN. & DEV., Mar. 2001, at 29.

Court"; "Elections, Speech, and Money: The Constitution and Campaign Finance"; "Political Parties, Democracy, and the Constitution"; and "Elections and the Court: *Bush v. Gore* and the 2000 Presidential Election Revisited." I will not discuss the substantive content of these discussions, of course, here or elsewhere. What I do want to discuss are the general qualities Justice Thomas brings to these conferences, again because the contrast between that and what the public sees or hears is so striking.

In these sessions, Justice Thomas could not be more direct, expansive, even effusive, and engaged in talking about the opinions he has written or joined. Indeed, I would say he is more open and expansive than most Justices in similar settings (many Justices prefer not to participate in such sessions at all). Many Justices are extremely cautious in talking about their opinions, but Justice Thomas clearly relishes discussion of legal issues and the cases. Needless to say, those who ask questions run the gamut in terms of how much they agree or not with his views, but he is equally responsive and respectful. The audience contains some non-lawyers and few specialists (outside the faculty) in constitutional law, and there is a good deal of back-and-forth. Justice Thomas takes all questions and engages them fully (of course, he does not comment on issues that might come before the Court). He is comfortable with disagreement. We provide a good deal of background reading outside the cases, such as academic articles, and it would be perfectly understandable were Justice Thomas not to read that material or not to read it closely. But quite the opposite is the case: he reads everything the audience is asked to read, which is clear because he comes in with the work marked up and he talks about it freely.

Justice Thomas is also an egalitarian on the social level. It is easy to imagine Justices who would keep their distance from those who attend these events, but Justice Thomas talks to everyone, all the time, in a direct, open, completely engaging way. By now I have come to expect being told how surprised people are to discover how different Justice Thomas is from their prior expectations. They might or might not agree with his views—indeed, most of them probably disagree more than they agree—but most come away with a good deal of warmth and appreciation for the person. He wears the status of a Supreme Court Justice lightly, by which I mean he engages with everyone without making anyone self-conscious about his formal position.

Despite the close relationship Justice Thomas and NYU have developed, I should note that the students conceived the idea for this Symposium on their own. The idea seems fitting for the *Journal of Law & Liberty*, but more than that, the timing is particularly apt as well. The recent publication of Justice Thomas's autobiography, *My Grandfather's Son: A Memoir*,<sup>6</sup> has brought greater attention to the relationship between Justice Thomas's personal journey and his views. In addition, the independence of Justice Thomas's thought, which began to receive some public awareness with Jan Crawford Greenberg's book,<sup>7</sup> has become unmistakable over the last few years. Justice Thomas's opinions have presented novel, independent views in recent years on subjects ranging from preemption, to voting rights, Indian law, administrative law, issues of privacy and information disclosure, and many other subjects. Many of these opinions have forced, or are going to force, other Justices to come to terms with issues and approaches that the Court has sometimes bypassed or avoided. If the Court has muddled through an area for a number of years, Justice Thomas's voice has usually been the most forceful in demanding that the Court confront the inconsistencies in its doctrine and bring greater clarity to its analysis. To be sure, there can be virtues to muddling through, but Justice Thomas at least presses the Court to recognize that it is doing so and to confront the costs.

I have tried to open a small window, based on my experience, into the "unknown" Justice Thomas on a personal level. In the pages that follow, the Symposium authors will do that when it comes to the eighteen years of substantive work reflected in Justice Thomas's tenure on the Court.

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<sup>6</sup> CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* (2007).

<sup>7</sup> CRAWFORD GREENBURG, *supra* note 3.