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Shaun Ossei-Owusu

University of Pennsylvania Carey Law School

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RACIAL REVISIONISM

*Shaun Ossei-Owusu**

THE ENIGMA OF CLARENCE THOMAS. By *Corey Robin*. New York: Metropolitan Books. 2019. Pp. 301. \$30.

INTRODUCTION

Court watchers and political commentators have described Clarence Thomas as enigmatic for the majority of his judicial career. Consider some titles about the justice: *Clarence Thomas and the Tough Love Crowd: Counterfeit Heroes and Unhappy Truths*; or *Strange Justice: The Selling of Clarence Thomas*; or *Supreme Discomfort: The Divided Soul of Clarence Thomas*.¹ Before her recent death, Justice Ginsburg was the second-most senior member of the Court; Justice Ginsburg's notoriety, however, never matched that of Justice Thomas, her ideological opposite.² Today, Justice Thomas's public mystique arguably dwarfs that of any other justice on the Court.³

In some ways, the aura around Justice Thomas is deserved; in other ways, it is misplaced. It is warranted because of his uniqueness. Of the 115 people who have served as Supreme Court justices, he is 1 of 2 who were African Americans and 1 of 7 who were not white men.⁴ He is one of the most

* Presidential Assistant Professor of Law, University of Pennsylvania Carey Law School. J.D., University of California, Berkeley, School of Law; Ph.D., University of California, Berkeley. This Review benefited from helpful conversations with and feedback from Regina Austin, Guy-Uriel Charles, Trevor Gardner, Osamudia James, Jasmine Johnson, Melissa Murray, Dorothy Roberts, and K-Sue Park. All errors are my own.

1. RONALD SURESH ROBERTS, *CLARENCE THOMAS AND THE TOUGH LOVE CROWD: COUNTERFEIT HEROES AND UNHAPPY TRUTHS* (1995); JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994); KEVIN MERIDA & MICHAEL FLETCHER, *SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS* (2007).

2. See, e.g., IRIN CARMON & SHANA KNIZHNIK, *NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG* (2015).

3. Other justices have also been described in interesting, though less drastic, terms and not for as long. See, e.g., JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* (2019); RUTH MARCUS, *SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER* (2019); JOHN GREENYA, *GORSUCH: THE JUDGE WHO SPEAKS FOR HIMSELF* (2018).

4. Jessica Campisi & Brandon Griggs, *Of the 114 Supreme Court Justices in US History, All But 6 Have Been White Men*, CNN (Sept. 26, 2020, 5:29 PM), <https://www.cnn.com/2020/09/25/politics/supreme-court-justice-minoritieshistory-trnd/index.html> [<https://perma.cc/MNY3-AA84>]; Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020, 8:07 PM), <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court> [<https://perma.cc/E6PY-BCEJ>].

powerful Black people in the American legal system. Despite being a notably silent jurist,⁵ his legal opinions influence fields ranging from antitrust to criminal justice to administrative law.⁶ He became a Black conservative long before it was an area of serious scholarly inquiry or political interest. In fact, Thomas noted earlier in his career that such an amalgam was often dismissed by African Americans and conservatives.⁷ He was Donald Trump's favorite justice; the president's steady nomination of Thomas clerks confirms that preference.⁸

But there's also less mystery than is suggested. The facts of his biography are recounted in much of the scholarly and public writing about him. Thomas grew up in the Deep South as the country was transitioning out of Jim Crow's clutch. He was part of a cohort of Black college students who helped diversify white institutions during a 1960s period of Black power. Thomas graduated from Yale Law School in 1974. This was no small feat irrespective of the race-conscious policies detractors gleefully point to when discussing his anti-affirmative action positions. Thomas had a political metanoia in the 1970s and slowly transitioned into conservatism after being disillusioned with white liberals and the unfulfilled aspirations of the previous decade. In the 1980s, Thomas worked in different capacities in the Reagan Administration and was selected to replace Justice Thurgood Marshall on the Supreme Court after a nineteen-month stint on the United States Court of Appeals for the District of Columbia Circuit (pp. 3, 13–14). Critics complained that the nomination was unusually fast and evidence of undeservingness; nevertheless, Thomas's time on the D.C. Circuit still gave him more federal appellate judicial experience than some of his predecessors and colleagues.⁹ He sur-

5. RonNell Andersen Jones & Aaron L. Nielson, *Clarence Thomas the Questioner*, 111 NW. U. L. REV. 1185 (2017) (suggesting that notwithstanding the infrequency of his inquiries at the Court, Justice Thomas asks good questions).

6. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) (Thomas, J.) (ruling that steering provisions do not violate antitrust law); *Connick v. Thompson*, 563 U.S. 51 (2011) (Thomas, J.) (ruling that district attorneys cannot be held liable for a prosecutor's single violation of disclosure requirements); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 870, 873 (2020) (discussing Justice Thomas's questioning of *Chevron's* constitutionality and his once-fringe interest in the nondelegation doctrine, now shared by a number of other justices).

7. CLARENCE THOMAS, *WHY BLACK AMERICANS SHOULD LOOK TO CONSERVATIVE POLICIES* (1987), <https://www.heritage.org/political-process/report/why-black-americans-should-look-conservative-policies> [<https://perma.cc/3X85-3EDD>].

8. Nicholas Casey, *Passed By for Decades, Clarence Thomas Is a New Symbol of the Trump Era*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/politics/clarence-thomas-supreme-court.html> [<https://perma.cc/G9PX-WN5W>]; Emma Green, *The Clarence Thomas Effect*, ATLANTIC (July 10, 2019), <https://www.theatlantic.com/politics/archive/2019/07/clarence-thomas-trump/593596/> [<https://perma.cc/TTK2-HSAX>].

9. See Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 117–18 (2005) (noting that "one would be hard pressed to argue that Thomas was unqualified for a seat on the Court" since "there is no required set of qualifications"). Justices Hugo Black, Lewis Powell, and Elena Kagan were elevated to the Court with no prior judicial experience. See Bri-

vived a nomination process that included credible sexual harassment claims by Anita Hill, a former colleague from his time at the Equal Employment Opportunity Commission (EEOC). Those allegations, offered by a Black woman, were ultimately disregarded by a sociopolitical culture that had an impoverished intersectional vocabulary and a poor understanding of how race, gender, and power operate in the workplace.¹⁰ Thomas is adored by constitutional originalists and less embraced by Black Americans.¹¹ While these facts may be interesting to some and normatively undesirable for others, they are descriptively straightforward.

Corey Robin's *The Enigma of Clarence Thomas*¹² insists that there is more underneath the hood. Robin, a left-leaning scholar of the right, seeks to offer what the book flap describes as a "groundbreaking revisionist take on the Clarence Thomas, the Supreme Court justice everyone knows about but no one knows." His argument? Justice Thomas is a Black nationalist conservative who has been hiding in plain sight (p. 8). Justice Thomas, Robin contends, sutures the economic conservatism of Thomas Sowell and Friedrich Hayek with the Black nationalist insights of Malcolm X and the Black Panther Party. The result of this fusion is a distinctive legal worldview that has been underexamined. Although a political scientist by training, Robin takes an autodidactic approach to law to sustain his argument. He impressively wades through Thomas's opinions, speeches, public writing, and the niche area of scholarship on the Pin Point, Georgia-born jurist.

Many of the adjectives reviewers have used to describe the book are spot-on: bold, provocative, and intellectually courageous.¹³ Robin, for the most part, avoids the accusations of bad faith that David Pozen has shown are an unpretty feature of constitutional discourse,¹⁴ and he generally refrains from the ideological gotcha-ism that one could easily engage in when it comes to Justice Thomas's legal oeuvre or that of any Supreme Court justice. Although political polarization is almost hackneyed as a description of

an P. Smentkowski, *Hugo Black*, BRITANNICA (Feb. 23, 2021), <https://www.britannica.com/biography/Hugo-L-Black> (on file with the *Michigan Law Review*); Joan Biskupic & Fred Barbash, *Retired Justice Lewis Powell Dies at 90*, WASH. POST, Aug. 26, 1998, at A1; Nina Totenberg, *Should Kagan's Lack of Judicial Experience Matter?*, NPR (May 12, 2010), <https://www.npr.org/templates/story/story.php?storyId=126764692> [<https://perma.cc/R948-QWW3>].

10. Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 402, 403–04 (Toni Morrison ed., 1992).

11. See Ken Blackwell, Opinion, *Don't Forget Justice Clarence Thomas in Black History Month Celebrations*, USA TODAY (Feb. 18, 2020, 6:00 AM), <https://www.usatoday.com/story/opinion/2020/02/18/dont-forget-clarence-thomas-black-history-month-celebrations-column/4741218002/> [<https://perma.cc/A8KV-VPU8>]; Casey, *supra* note 8.

12. Corey Robin is a Distinguished Professor of Political Science, Brooklyn College.

13. *The Enigma of Clarence Thomas*, MACMILLAN PUBLISHERS, <https://us.macmillan.com/books/9781627793834> [<https://perma.cc/Y5FA-R8Z7>].

14. David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016).

the current moment, it is also tangible and real. Robin, a prolific public writer and editor of the socialist magazine *Jacobin*, is no ideological companion of Thomas, which he makes clear at the outset (p. 15). Nevertheless, his efforts to take Thomas's jurisprudence seriously, on its own terms, is an important template for real intellectual engagement.

Notwithstanding the admirable intrepidity of *Enigma*, it is replete with substantive and normative challenges. The book illustrates the problem of racial revisionism, which might be understood as the obscuring of race and racial subordination by refining terms.¹⁵ Substantively, the book obfuscates racial inequality by imputing an underdeveloped and unrecognizable Black nationalism to Justice Thomas. Despite the jurist's rejection of the designation and some of its tenets, Robin insists on assigning the label to him. Robin implausibly argues that Thomas, a Black nationalist, retains a constitutional belief system that leads the jurist to conclude that carceral discipline is necessary to "re-create the conditions that made for black survival" (p. 191). Thomas, per Robin's logic, finds "black freedom possible through the instruments of policing, punishment, and prison" (p. 192).

This interpretation of Black nationalism presented in *Enigma* is historically unfamiliar, ideologically bizarre, and politically dangerous irrespective of whether Thomas actually holds these beliefs. If Thomas does not hold these beliefs, then *Enigma* obscures the discourse on racial justice by shoe-horning Black nationalism into a carceral politics based on some premise of benevolence. This diverts attention away from more likely sources of his judicial philosophy that many have argued produce racially disparate outcomes (e.g., law-and-order commitments or limited understandings of constitutional protections).

If Thomas indeed holds the view that Black people need carceral discipline in order to achieve "freedom" (p. 192), and understands this as a legitimate Black nationalist position, then there are normative questions that go unanswered and further obscure how to think about racial justice in the contemporary moment. Read this way, Robin is right and is simply the bearer of bad news. But discerning readers can disaggregate Justice Thomas's views—which many would understand as objectionable—from *Enigma*'s failure to offer meaningful enlightenment on what the public should do with said views. At a time when multiracial social movements are challenging the expansive scope of our criminal legal system, what are they supposed to do with this position? Assuming Robin is right, the earnest attempt to explain Justice Thomas's legal vision ultimately rehabilitates a destructive jurisprudence by rooting it in Black empowerment.

Underlying all of this is a lack of engagement with the scholarship on Black nationalism and race-specific takes on Justice Thomas. These litera-

15. See Darryl G. Barthé, Jr., *Racial Revisionism, Caste Revisited: Whiteness, Blackness, and Barack Obama*, in *OBAMA AND THE BIRACIAL FACTOR: THE BATTLE FOR A NEW AMERICAN MAJORITY* 81, 82 (Andrew J. Jolivette ed., 2012) (noting that racial revisionism "obscure[s] the realities of racism through a redefining of terms").

tures may have better informed parts of *Enigma* and mooted other aspects of the book. The claim of underengagement could be easily levied against much scholarly work, let alone public writing for broader audiences. But this version is troublesome because it offers a simplified analysis of racial politics (an issue the general public overestimates its understanding of) and does not wrestle with potentially clarifying issues that other scholars have addressed. This shortcoming is tragic because *Enigma* is animated by racial justice concerns and demonstrates a keen understanding of America's dreadful history of racial subjugation at many points in the book. Ultimately, the book's shortcomings are likely to dull its insights for serious readers of race and the law. More drastically, the book has the potential to dangerously confuse general readers who find the arguments ideologically attractive but do not have the legal acumen to evaluate the claims or are simply underread on issues related to race.

The remaining parts of this Review employ the spirit of serious engagement that *Enigma* brings to Justice Thomas's life and body of work. Part I provides a synopsis of the book. Part II offers a critical assessment of the project. Part III offers a short discussion on racial revisionism and the need for more scholarly care when it comes to literature on race for the general public.

I. SYNOPSIS

Enigma is organized in three parts that correspond with three themes that the author argues are "central elements of [Thomas's] jurisprudence": race, capitalism, and the constitution (p. 14). The aim of the book, Robin explains, "is to make the invisible justice visible, drawing on the facts of Thomas's biography to see how that biography, and the beliefs and ideologies that developed with it, have found their way into his opinions, structuring and informing his jurisprudence" (p. 11). Those three themes end up offering a window into a variety of legal issues that include, but are not limited to, voting rights, federalism, the Commerce Clause, freedom of speech, the Privileges or Immunities Clause, the right to bear arms, and the criminal justice system (p. 11). Robin makes it clear that he rejects "virtually all of Thomas's views" and believes that the jurist lied to the Judiciary Committee when he stated that he never sexually harassed Anita Hill (pp. 15, 163). At various points in the book Robin also highlights some of the contradictions of Justice Thomas's jurisprudence. But he informs the reader that his analysis is animated by "interpretation and analysis rather than objection and critique" (p. 15). Accordingly, the book hews to this interpretive position and avoids available critiques.

A. Race

The first part, "Race," consists of three chapters titled "Race Man," "Stigmas," and "Separate but Equal." In these three chapters, Robin walks the reader through Justice Thomas's upbringing in Georgia to his role on the

bench as an advocate for a specific brand of race jurisprudence. Thomas's three-year tenure at College of the Holy Cross, where he graduated ninth in a class of 521, is integral to this account (p. 33). In the three years he spent there, 1968 to 1971, he imbibed the Black Power ideology that was popular on college campuses.¹⁶ In addition to disavowing interracial sex and marriage (a position he held until meeting his current wife in 1986), he served as secretary-treasurer of the Black Student Union (BSU) (pp. 26–27). Robin recalls a playful story where one member breached parts of the organization's eleven-part manifesto that disapproved of dating white women.¹⁷ After a mock trial where the offending member was found guilty, his Afro comb was broken as a punishment (p. 27).

But Thomas took Black politics seriously; Robin describes how Thomas had Malcolm X's poster in his dorm room, loudly emphasized liberation for the Black man, and in conjunction with BSU, organized a breakfast program for poor children modeled after the Black Panthers (pp. 28–30). Things began to change when Thomas was confronted with white liberal snobbery and constant questioning of his credentials at Yale Law School (p. 33). It was there, Robin argues, that Thomas learned an unshakeable racial lesson: "Whites—southern and northern, liberal and conservative, rural and urban—are racists" (p. 34). Like many Black attorneys before him, Thomas suffered from a form of racial abuse and struggled to get the job he desired. Ultimately, he went on to work for Missouri Attorney General John Danforth and subsequently entered the federal government (p. 83). In Robin's telling, Thomas's experience at Yale and thereafter confirmed that racism was never going anywhere.

Race and stigma are powerfully tied for Justice Thomas in *Enigma*. Robin contends that the Court's only Black jurist believes that "the most pervasive and toxic expression of race" as well as "the most grievous and direct form of racism" is the "marking of individuals by the color of their skin in ways that diminish or deny their personal talents, capacities, skills, and strengths" (p. 54). Under his view, all mentions of race do not equate to racial stigma, but "every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."¹⁸

16. MARTHA BIONDI, *THE BLACK REVOLUTION ON CAMPUS* (2012); IBRAM X. KENDI, *THE BLACK CAMPUS MOVEMENT: BLACK STUDENTS AND THE RACIAL RECONSTITUTION OF HIGHER EDUCATION, 1965–1972* (2012).

17. The relevant sections are: "1. The Black man must respect the Black woman. The Black man's woman is the most beautiful of all women. . . . 9. The Black man does not want or need the white woman. The Black man's history shows that the white woman is the cause of his failure to be the true Black man." P. 27.

18. P. 59 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part)).

Justice Thomas's famous dissent in *Grutter v. Bollinger* illustrates his concerns around race and stigma.¹⁹ In *Grutter*, the Court ruled that the University of Michigan Law School's consideration of race in its admission process was constitutional.²⁰ In a meaty opinion, Justice Thomas essentially called the program a sham that was focused on racial aesthetics and protection of its elite status.²¹ He maintained that if the Law School was genuinely interested in diversity, it would reconsider its reliance on a standardized testing regime that produced racially skewed results.²² In Robin's account, Thomas believes affirmative action is like Jim Crow and premised on a racial paternalism that elevates whites as providers of scarce privileges to disempowered Blacks (pp. 63, 67). For Thomas,

[a]ffirmative action . . . is not only the product of liberals being unwilling to confront their own elitism; it is also a symptom of their desire to display that elitism through acts of beneficence to the less fortunate—acts that will not jeopardize their privilege, and the stigma of which will be borne by African Americans. (p. 72)

Robin ties Justice Thomas's suspicion of diversity to his skepticism of integration—noting two cases where the jurist questioned the presumed inferiority of Black institutions and praised their efforts.²³ After the first three chapters, the reader is left with a portrait of a justice whose “conservative black nationalism” considers integration as the “real harm to black people” and understands “the separation of the races” as the condition for “black flourishing” (p. 76).

B. Capitalism

The three chapters in “Capitalism” focus on Thomas's tenure in the EEOC and his judicial opinions on political-economy issues. Chapter Four, “White State, Black Market,” explains how Thomas absorbed himself in the work of Black economist Thomas Sowell while working in Missouri after law school. Sowell's book, *Race and Economics*, which Robin describes as a mix of Malcolm X and Milton Friedman, heavily influenced Thomas and pushed him to the right “without forsaking the race consciousness he had forged on the left” (p. 84–85). But Thomas's understanding of the left's shortcomings in the 1970s hardened his views about the state's inability to remedy social inequality, particularly for Black people (pp. 93–95). Economics would become more of a priority than racial politics. Thomas felt that African Ameri-

19. For takes on *Grutter* and explications of Justice Thomas's position on diversity, see Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425 (2014); Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221 (2004); Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003).

20. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

21. *See id.* at 356–57 (Thomas, J., concurring in part and dissenting in part).

22. *Id.* at 369–70.

23. Pp. 76–79 (discussing *Missouri v. Jenkins*, 515 U.S. 70 (1995) and *United States v. Fordice*, 505 U.S. 717 (1992)).

cans “should abandon protest in the streets and the pursuit of political power in favor of economic visions of development” (p. 97). The lessons from his grandfather—an entrepreneur who raised him in Georgia and emphasized self-sufficiency—would become more prominent (p. 98).

Chapter Five, “Against Politics,” continues the theme of economic primacy, but the claims become more peculiar. Robin begins by stating that “[t]he goal of Thomas’s conservative black nationalist jurisprudence is to limit the involvement of black people with the white state, to persuade black people to give up their illusion that politics can positively affect their condition and perhaps to abandon politics altogether.”²⁴ Two decisions are central to this argument. The first, *Holder v. Hall*, was a voter-dilution case brought under section 2 of the Voting Rights Act of 1965.²⁵ That case involved a Georgia county where whites were the overwhelming majority, and a single elected county commissioner held all the legislative and executive power.²⁶ Blacks were consistently outvoted, and they argued that this system limited their political influence and diluted their vote.²⁷ They desired a five-person commission that might allow them to elect a representative, but the Court upheld the single-commission practice and concluded that no standard could be used to establish the appropriate number of commissioners.²⁸ Justice Thomas’s lengthy concurrence rejected the idea of a Black voting bloc and argued that voting-dilution cases were not subject to judicial review.²⁹ Robin reads Thomas as believing that it is a “terrible illusion” for African Americans to believe they can exercise power in the political realm (p. 108).

The other decision that undergirds Robin’s economic-primacy argument is *Kelo v. City of New London*, which involved a government-takings claim brought by property owners whose land was condemned by a city hoping to complete a redevelopment project.³⁰ The Court upheld the taking, and in a lone dissent, Justice Thomas tethered the taking to urban renewal of the 1950s and 1960s (p. 116). He engaged in what Robin describes as a “sustained polemic against eminent domain as a tool of racial oppression” (p. 116). Pointing directly to Justice Thomas’s evocation of *Carolene Products*’s “Footnote 4” and the protection of insular minorities,³¹ Robin maintains that the justice was trying to invert the script and argue that if the Court cared about minorities it would scrutinize economic legislation

24. P. 105. This is accomplished, Robin argues, by (1) deemphasizing and diminishing the power of voting; (2) demonstrating the state’s inability to improve the lives of Blacks (and in some instances its active undermining of them); and (3) depriving the state of the legislative and regulatory tools that would intervene in the lives of Blacks. P. 106.

25. 512 U.S. 874 (1994).

26. *Holder*, 512 U.S. at 889.

27. *Id.*

28. *Id.*

29. *See id.* at 903 (Thomas, J., concurring in the judgment).

30. 545 U.S. 469 (2005).

31. 304 U.S. 144, 152 n.4 (1938).

(p. 117). The chapter is rounded out by a discussion of Justice Thomas's narrow and much debated view of the Commerce Clause³² as expressed in cases such as *United States v. Lopez*³³ and *Gonzales v. Raich*.³⁴ Justice Thomas's Commerce Clause jurisprudence, per Robin's account, is interested in limiting the expansive scope Congress has in its involvement of people's affairs (p. 124). This continues the theme of politics being a distraction from economics in Thomas's vision.

Whether it is by design, because of complexity, or lack of focus, the Black nationalist argument recedes to the background of the chapters on capitalism, particularly in the last installment, "Men of Money." This chapter focuses on Thomas's expansive understandings of commercial speech and support for the loosening of campaign finance laws via the First Amendment. Robin acknowledges that Thomas's decisions in this area "make no explicit mention of race" (p. 131). Instead, Fredrich Hayek, one of Thomas's significant influences, gets attention. Hayek argued that money is not only an instrument that allows for the pursuit of one's interest but also how people express their values and beliefs (p. 132). Accordingly, Thomas "defends the rights of the wealthy to donate unlimited sums to their favored candidates" and believes that economic-related speech—whether advertising or donations—deserves the same protections that literary and political speech receive (pp. 129–30). What emerges from these middle chapters is the portrait of a jurist who protects plutocracy so that rich people can economically assert political influence and insists that Black people are better served by retreating from the electoral domain and focusing on wealth accumulation and economic empowerment.

C. Constitution

The last Part, "Constitution," examines the development of Justice Thomas's political thinking and zooms in on his time in the Reagan Administration. During this period Thomas developed what Robin describes as a "Black Constitution" and a "White Constitution." The Black Constitution recognizes the violent, racist, and regressive nature of American society and has the individual's right to bear arms at its center (pp. 169–70). That individual is the authoritative Black man, who provides for his family, and wields his gun "to guard his family from marauding white supremacists" (p. 153). The Court's gutting of constitutional protections in the late nineteenth century provides more context for this Black Constitution. Most importantly, the *Slaughter-House Cases* ruled that the Privileges or Immunities Clause did not apply to states and essentially left the issues of rights and liberties to their

32. Compare Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) (supporting Justice Thomas's view), with Robert J. Pushaw, Jr. & Grant S. Nelson, Essay, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695 (2002) (rejecting it).

33. 514 U.S. 549 (1995).

34. 545 U.S. 1 (2005).

discretion.³⁵ Three years later, the Court limited federal oversight of civil rights by ruling that the Second Amendment also did not apply to states.³⁶ The *Civil Rights Cases* would rule that the Equal Protection Clause applied to government and not private actors,³⁷ and *Plessy v. Ferguson* would dull this provision further by approving state discrimination with the notorious trope of “separate but equal.”³⁸

Whereas the mid-twentieth-century Court would restore the Equal Protection Clause and deploy the Due Process Clause to protect Blacks from a racist criminal justice system, Thomas believes the Privileges or Immunities Clause should be revived instead (pp. 173–74). This belief, Robin explains, is best illustrated by Justice Thomas’s opinion in *McDonald v. City of Chicago*.³⁹ While the Court used the Due Process Clause to incorporate the Second Amendment against the states, Thomas believed that the Privileges or Immunities Clause was a better constitutional route toward that goal (p. 178). Thomas’s concurrence, which no other justice joined, focused heavily on Black violence and gun ownership, which Robin argues “are central both to the making of freedom and to its unmaking” (p. 179). But this masculinist-empowering vision of a Black Constitution is only half of the story.

The last substantive chapter culminates with a discussion of Thomas’s “White Constitution.” Whereas “the black man” in the Black Constitution is a protective patriarch, in the White Constitution, he is “an absent figure, abandoning his family for the pleasures of drugs, crime, and sex, leaving his children in the care of weak-willed black women who cannot supply the authority children need to grow up into the sturdy, proud folk their ancestors once were” (p. 153). Robin also notes the lack of accommodations for Black women in Justice Thomas’s bifurcated constitutional world (p. 164). They are either “victims of black male criminals and ne’er-do-wells empowered by the rights revolution to abandon their responsibilities,” or “like his mother or sister, treacherous sources of dependency and dissolution” (p. 164). Accordingly, this White Constitution is premised on the idea that Black people need the disciplining force of law to arrive at personal development and freedom. Black people need tension in this vision of legal ordering, but liberalism’s emphasis on selfhood and disinterest in punishment limits the exigency Black people need to thrive (p. 189–90).

The chapter explains Justice Thomas’s nostalgia for the world of racial struggle that predated the Civil Rights Movement. In Robin’s rendering, Justice Thomas believes that Black people “need to go back to the years of their greatest degradation and despair and to retrieve from that darkness the habits and virtues that enabled their ancestors to survive” (p. 191). The penal state, which is central to Thomas’s White Constitution, supplies the condi-

35. P. 172; 83 U.S. (16 Wall.) 36 (1873).

36. *United States v. Cruikshank*, 92 U.S. 542 (1876).

37. P. 173; 109 U.S. 3 (1883).

38. P. 173; 163 U.S. 537 (1896).

39. 561 U.S. 742 (2010).

tions for Black survival (p. 191). Put simply and harrowingly, the White Constitution “makes black freedom possible through the instruments of policing, punishment, and prison” (p. 192). Policing serves as the “structuring force that helps African Americans organize” and “even improve” their lives (p. 206). Robin argues that Justice Thomas does not meaningfully confront the reality of racism in the criminal justice system but suggests that, notwithstanding such racism, it serves a deterrent function: “[I]t provides African Americans with every reason they need to steer clear of trouble” (p. 201–02). The author explores this perspective by providing the reader with a glimpse of Justice Thomas’s decisions in cases involving prison conditions, the death penalty, unreasonable searches and seizures, and an anti-loitering gang ordinance.

After the substantive chapters of the book, the reader is left with a race-conscious jurist who prioritizes economic freedom for Blacks over political empowerment and holds unique views about how the Constitution should govern the lives of that community. The book’s epilogue concludes with a solemn recognition of Justice Thomas’s bizarrely mixed jurisprudence. It notes that some of Thomas’s beliefs are widely shared in American society—specifically the ideas that race is permanent, that politics cannot overcome despair, and that state action is ineffective (p. 221). “Perhaps that explains Thomas’s enigmatic silence on the bench,” Robin explains (p. 221). He adds, “What need is there to speak when the rest of us are saying his words?” (p. 221).

II. BLACK NATIONALISM ILL-ENGAGED

Enigma has received much laudatory attention in the press, particularly by journalists.⁴⁰ Scholars and writers have provided varied criticism. Professor Kenneth Mack identifies the methodological problem of focusing on Supreme Court cases and writes, “judicial opinion-writing is hardly a transparent vehicle for the explication of a judge’s social philosophy.”⁴¹ Moreover, “if Thomas has a philosophy,” Mack writes, “black nationalism is an odd name for it.”⁴² Professor Randall Kennedy questions the solicitude Robin offers the jurist in the book. Kennedy maintains that “Robin mostly accepts at face value Thomas’s portrayal of himself as a race man deeply in-

40. See, e.g., Jennifer Szalai, *The Enigma of Clarence Thomas’ Makes a Strong Case for Its Provocative Thesis*, N.Y. TIMES (Sept. 23, 2019), <https://www.nytimes.com/2019/09/23/books/review-enigma-clarence-thomas-corey-robin.html> [<https://perma.cc/7AT4-XUZQ>]; John W.W. Zeiser, “A Mix of Malcolm and Milton”: On Corey Robin’s “*The Enigma of Clarence Thomas*,” L.A. REV. BOOKS (Sept. 30, 2019), <https://lareviewofbooks.org/article/a-mix-of-malcolm-and-milton-on-corey-robins-the-enigma-of-clarence-thomas/> [<https://perma.cc/H87D-ZELV>].

41. Kenneth W. Mack, *The Contradictory Conservatism of Clarence Thomas*, WASH. POST (Sept. 26, 2019, 10:07 PM), https://www.washingtonpost.com/outlook/the-contradictory-conservatism-of-clarence-thomas/2019/09/26/05ad97a4-d325-11e9-9343-40db57cf6abd_story.html [<https://perma.cc/BU22-SYAL>].

42. *Id.*

vested in black America” and “falls victim to a talented con artist who, over the course of his long career, has seduced and traduced.”⁴³ Professor Melissa Murray has noted the relative absence of Black women in Robin’s account and the inattention to reproductive rights.⁴⁴ Myron Magnet, editor-at-large of *City Journal* and author of a book about Justice Thomas released around the same time as *Enigma*, offers a more biting assessment from the right.⁴⁵ He believes Justice Thomas would “dismiss Robin’s conclusion that the civil rights movement failed” and maintains that “Thomas does *not* think that slavery and Jim Crow were any kind of boon to black Americans.”⁴⁶

The remaining portions of this Review extend these analyses by delving more deeply into *Enigma*’s claims about Black nationalism while breaking away from what have been mostly uncritical, liberal, and journalistic appraisals of the book. The most striking issues with *Enigma* are its treatments of previous scholarship and Black nationalism. These issues overlap, but they are also distinct. Section II.A considers *Enigma*’s treatment of previous scholarship that has focused precisely on the issues of race, Black nationalism, and Justice Thomas. Some important works are overlooked entirely; others are acknowledged but underengaged despite raising issues that speak directly to the book’s claims. Section II.B widens the critique to a broader discussion about the book’s lack of engagement with scholarship about Black nationalism—which spans disciplines and fields including history, political science, Africana studies, and critical race studies. The version of Black nationalism *Enigma* concludes with would be unfamiliar to people who work in this scholarly tradition and invites doubt into the accuracy of the book’s central thesis.

A. *Due Deference and Thin Engagements*

Robin unevenly engages previous writings about Justice Thomas in ways that may lead the untrained reader to believe that there is more novelty to *Enigma* than is the case. Consequently, some of Robin’s claims are unremarkable, while others are undermined or underdeveloped. Consider a few examples.

Writing a few years after Justice Thomas was confirmed, Catharine Pierce Wells, who is not a scholar of race but wrote thoughtfully about the justice, recognized many of the themes in *Enigma* without affixing the “black nationalist” label. Professor Wells explained Thomas’s racialized distrust of

43. Randall Kennedy, *The Apparatchik*, NATION (Oct. 29, 2019), <https://www.thenation.com/article/archive/enigma-clarence-thomas-book-review> (on file with the *Michigan Law Review*).

44. Melissa Murray, *Foiling Clarence Thomas*, HOUSE DIVIDED (Jan. 28, 2020), <https://www.ahousedividedapd.com/2020/01/28/foiling-clarence-thomas> [<https://perma.cc/575K-H64W>].

45. MYRON MAGNET, CLARENCE THOMAS AND THE LOST CONSTITUTION (2019).

46. Myron Magnet, *Misjudging Clarence Thomas*, CITY J. (Sept. 29, 2019), <https://www.city-journal.org/the-enigma-of-clarence-thomas> [<https://perma.cc/87NF-895W>].

government and preference for self-help as well as the overlap between conservative values and the Black community.⁴⁷ Her comments on the latter are worth quoting at length:

Republican thinking . . . emphasizes a number of themes that resonate with Black experience. For example, the Black community includes many religious organizations—both Muslim and Christian—that preach self-reliance, family values, and strong deterrence of criminal activity. It also includes political organizations that promote racial separatism and economic self-sufficiency. Ideologically, these organizations have more in common with the Republican emphasis on Black capitalism than they do with the liberal program of integration and affirmative action. Thus, within the Black community, Thomas’ conservatism is a familiar theme as millions of African Americans have adopted hard work and high moral standards as their response to racism.⁴⁸

This observation normalizes some of the conservative positions that Justice Thomas holds and makes some of the claims about Thomas less foreign. Yet *Enigma* makes a spectacle out of a set of positions that are familiar to Black people.

Enigma also missed out on opportunities to engage scholarship that could have shored up its thesis. The book identifies the relationship between Thomas’s ostensible resistance to integration and support for Black institutions. Scholars who made that early connection are not consulted. Eleanor Brown, writing twenty years ago in the *NYU Law Review*, commented on how the “dissatisfaction with the integrative ideal has come from various sources within the black community” and noted that “this disenchantment has been most prominently articulated by Justice Clarence Thomas.”⁴⁹ Professor Brown proceeded to link Justice Thomas’s rejection of integration with Black nationalist–styled, Afrocentric secondary education programs.⁵⁰ Robin’s lack of engagement with this piece (which actually supports part of his argument) results in a lost opportunity to go beyond the surface level of recognizing connections and press deeper into the stakes of Justice Thomas’s anti-integration impulses.

Existing scholarship, if *Enigma* consulted it, would also have allowed the book to raise essential questions about Thomas’s view of Black empower-

47. Catharine Pierce Wells, Essay, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L. REV. 117, 133, 140 (1993) (“Thomas’ conservatism is based upon a simple conclusion drawn from this experience: Do not, under any circumstances, trust government to improve the situation of Black people. For Thomas, it was clear that the hard work and determined efforts of Black people would never find their natural reward until racist white governments were confined to the bare essentials.” (footnote omitted)).

48. *Id.* at 140.

49. Eleanor Brown, *Black Like Me? “Gangsta” Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. REV. 308, 315 (2000).

50. *Id.* at 319; see also ALGERNON AUSTIN, *ACHIEVING BLACKNESS: RACE, BLACK NATIONALISM, AND AFROCENTRISM IN THE TWENTIETH CENTURY 170* (2006) (describing Afrocentrism as an integrationist Black nationalism).

ment. Writing between the analyses offered by Professors Wells and Brown, Dorothy Roberts discussed Justice Thomas's "separatist leanings" in the *Yale Law Journal*.⁵¹ One wonders how *Enigma* would have handled Professor Roberts's observation that Justice Thomas espoused the kind of Black separatism that fails to confront white supremacy or upset current power arrangements and ultimately becomes "quite acceptable to whites."⁵² If Professor Roberts is right, is Justice Thomas's purported version of Black nationalist conservatism that exceptional or newsworthy? If she is wrong, how does Justice Thomas's vision upset or challenge the racial order? A reader committed to the wellbeing of Black people will search *Enigma* for Justice Thomas's answers to these questions and find none. And *Enigma*'s oversights pose real risks for disinterested or distanced readers: for them, the question of maintaining racial order would go unnoticed because of *Enigma*'s failure to seriously engage scholars who have written thoughtfully about Justice Thomas.

There are previous examinations of Justice Thomas's opinions that *do* get cited but are not afforded enough room to breathe in *Enigma*. Most of these insights are relegated to simple, back-of-the-book citations. A few have the fortune of getting some explanatory exposition in the footnotes. Of course, space limitations allow for discussion of only a handful. 2004 is crucial here: that year, Kendall Thomas and Mark Tushnet attempted to explain how nationalism fits into Justice Thomas's legal thinking, but these important works are undertheorized by *Enigma*.⁵³

Professor Tushnet's analysis was arguably an explicit articulation of Justice Thomas's Black nationalism. His unambiguously titled article, *Clarence Thomas's Black Nationalism*, was written for the *Howard Law Journal* for a fifty-year commemoration of *Brown*. In those pages he wrote, "Thomas is only the most recent representative of a distinguished tradition of Black nationalism in its conservative variant."⁵⁴ *Enigma* cites Professor Tushnet and draws on his primary argument. However, the book does not grapple with an important point Professor Tushnet makes that is central to Black nationalism in the pages of *Enigma*. Portending Robin's claim that Thomas believes Black people must look internally at their own institutions, Tushnet writes that "black nationalism cannot be defended as a choice when the institutions involved are not black by choice."⁵⁵ In those specific circumstances, Tushnet argues, "black nationalism must be understood as a way for people to make the best of a bad situation."⁵⁶ At best, Robin does not contextualize the situa-

51. Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1600 (1996) (book review).

52. *Id.*

53. See Kendall Thomas, Essay, *Reading Clarence Thomas*, 18 NAT'L BLACK L.J. 224 (2004); Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 HOW. L.J. 323 (2004).

54. Tushnet, *supra* note 53, at 339.

55. *Id.* at 337.

56. *Id.*

tional nature of Black nationalism, specifically as it relates to Black institutions. At worst, Robin does not address a crucial condition that affects his argument.

Professor Kendall Thomas's contributions are subtler but no less powerful; Robin acknowledges his work (p. 163) but misses some of his crucial insights. Professor Thomas describes Justice Thomas's "black neo-conservative cultural nationalism."⁵⁷ He also suggests that Justice Thomas's appeal to racial identity, whether in Court conferences or in his opinions, worked as a "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."⁵⁸ Part of that project, Professor Thomas contends, "is not to abolish the color line, but to redraw it."⁵⁹ Read in this way, Justice Thomas's legal worldview, as rendered in *Enigma*, may not necessarily be unique, but it is a way of reordering "the fragile political settlement reached during the civil rights years."⁶⁰ Such a reordering limits race as a category of constitutional significance or remediation. Recognition of and engagement with this contention might have tempered some of the claims made in *Enigma*, nudged toward deeper analysis, or provided more fodder for prescriptive insights into how to think about Justice Thomas's role in our legal system.

One could go on with the list of scholars cited in *Enigma* whose ideas merit more space than was given. Manning Marable's analysis of Black nationalism in the Thomas confirmation is discussed. But Professor Marable also argued that Justice Thomas is a neo-accommodationist conservative who was unmoored from Black resistance politics and deployed race for career purposes (p. 8). This argument is not confronted. Following Marable's reading (and the lineage of Black nationalists *Enigma* links him to), one might query whether it is politically possible for a figure of Thomas's stature to be a Black nationalist yet unconnected to any identifiable Black nationalist organizations or organizing. Professor Stephen Smith, who served as one of Justice Thomas's first clerks on the Court, and Dean Angela Onwuachi-Willig have covered some of *Enigma's* ground.⁶¹ They raise thoughtful questions about the dynamism of racial identity that, if wrestled with, might have mooted

57. Thomas, *supra* note 53, at 235.

58. *Id.* at 237.

59. *Id.*

60. *Id.* at 238.

61. Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 965 (2005) ("[T]he mere existence of Clarence Thomas, one of the most prominent members of the Black Right, reflects exactly how a person who strongly identifies as a Black can cultivate values and beliefs in ways that differ from the vast majority of members in his or her racial group."); Stephen F. Smith, *Clarence X?: The Black Nationalist Behind Justice Thomas's Constitutionalism*, 4 N.Y.U. J.L. & LIBERTY 583, 625 (2009) ("Indeed, there may not be any one 'right' answer on an issue as complex as how best to advance the interests of a race comprised of tens of millions of people.").

some of the criticism that follows. Professor Guy-Uriel Charles has described the “epistemic authority” Justice Thomas commands on the Court as its only Black member.⁶² *Enigma* cites but does not engage this key feature of Professor Charles’s article, which could have supplied more normative insights on how to think about the role that Justice Thomas’s jurisprudence has on the Court (p. 9). Crucially, the issue I am pointing out is not of scholarly box checking or legal turf defending. Robin’s underengagement leads to overstated claims of novelty, precludes harder questions from being asked and answered in the book, and offers a representation of Black politics that does not approximate its complexity.

B. *Whose Black Nationalism?*

Despite being one of the core ideological features of *Enigma*, Black nationalism is inadequately defined due to the book’s failure to deeply employ the well-established interdisciplinary literature on the topic. *Enigma* only provides a few paragraphs on this multientury, multivalent ideological outlook. Black nationalism is a prominent theme in Africana studies—ironically, the field that Justice Thomas affirmatively encouraged a Black high school mentee to avoid.⁶³ Deep treatments of Black nationalism also span the social sciences and the humanities and include texts in history, literature, and political science.⁶⁴ *Enigma*’s interdisciplinarity bends toward

62. Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Critics?*, 93 GEO. L.J. 575 (2005).

63. Thomas mentored a Black high school student in D.C. and the summer before his enrollment at Brown told him:

No doubt one thing you’ll find when you get to a school like Brown is a lot of classes and orientation on race relations. Try to avoid them. Try to say to yourself, ‘I’m not a black person, I’m just a person.’ You’ll find a lot of so called multicultural combat, a lot of struggle between ethnic and racial groups, and people wanting you to sign on, to narrow yourself into some group identity or other. You have to resist that, Cedric. You understand?

Thomas proceeded to ask the student what he would be majoring in and he responded math. The jurist replied:

Good. Good. That’s what I look for in hiring my clerks—the cream of the crop—I look for the maths and the sciences, real classes, none of that Afro-American-studies stuff. If they’ve taken that stuff as an undergraduate, I don’t want them. You want to do that, do it in your spare time.

See Ron Suskind, *And Clarence Thomas Wept*, ESQUIRE, July 1998, at 70, 73. This is also discussed in Brown, *supra* note 49, at 319 n.32.

64. Some particular texts that may have provided historical, theoretical, and empirical insights into Robin’s project include RUSSELL RICKFORD, *WE ARE AN AFRICAN PEOPLE: INDEPENDENT EDUCATION, BLACK POWER, AND THE RADICAL IMAGINATION* (2016); MELANYE T. PRICE, *DREAMING BLACKNESS: BLACK NATIONALISM AND AFRICAN AMERICAN PUBLIC OPINION* (2009); ROD BUSH, *WE ARE NOT WHAT WE SEEM: BLACK NATIONALISM AND CLASS STRUGGLE IN THE AMERICAN CENTURY* (1999); WILLIAM L. VAN DEBURG, *NEW DAY IN BABYLON: THE BLACK POWER MOVEMENT AND AMERICAN CULTURE, 1965–1975* (1992); ALPHONSO PINKNEY, *RED, BLACK, AND GREEN: BLACK NATIONALISM IN THE UNITED STATES*

law but not this scholarship. Black nationalism deserves more independent attention in the book not because it is a worthwhile perspective (although I believe that to be so) but because it is a core feature of Robin's story. It is central to the Black nationalist conservatism Robin centers the project around. Except for some pat references to the multidimensionality of Black nationalism and the fact that Black people have drawn on different strands of this idea, readers are not forced to grapple with the depth of the concept (pp. 5–7, 31–32). Instead, readers get Black nationalism through the lens of Justice Thomas. This authorially mediated version of Black nationalism is not bankrupt, especially considering Robin's deep traversals into crevices of Thomas's jurisprudence. But the absence of a robust rendering of Black nationalism means that the reader cannot meaningfully assess the veracity of Justice Thomas's putative Black nationalist conservatism. *Enigma* grapples more thoroughly with other inputs—conservatism, constitutional clauses, life history—but Black nationalism gets short shrift.

The most explicit articulation of Black nationalism comes in the early pages of the book when Robin notes that Justice Thomas's Black nationalism is selective (p. 6). Justice Thomas, he argues, rejects the Third World internationalism and revolutionary rhetoric of Black nationalism (pp. 5–6). The aspects of Black nationalism that are central to Thomas's jurisprudence, the author notes, are “the celebration of black self-sufficiency, the scathing attack on integration, the support for racial separatism and black institutions, the emphasis on black manhood as the pathway to black freedom, the reverence for black self-defense” (p. 6).

There are some threshold questions worth considering before diving into issues. First, how does one square Robin's (and others') description of Thomas as a Black nationalist with Thomas's rejection of the term? In a 1987 interview with *Reason*, Thomas was asked plainly if he was a Black nationalist, to which he responded, “I'm not a nationalist.”⁶⁵ That is not dispositive but calls for explication. Robin describes this “downplay[ing]” and notes that Thomas has “never disavowed its role in his development” (p. 32). That may be right, but it gestures toward different claims: that either Thomas *was* a Black nationalist or that he has been *influenced* by Black nationalism. Neither of these necessarily mean Justice Thomas *is* a Black nationalist. As a scandal involving one of Justice Thomas's famous Yale Law School classmates highlighted, “is” is an operative word.⁶⁶

(1976); Daryl Michael Scott, *How Black Nationalism Became Sui Generis*, FIRE!!!, Summer/Winter 2012, at 6; Ray Block Jr., *What About Disillusionment? Exploring the Pathways to Black Nationalism*, 33 POL. BEHAV. 27 (2011).

65. Bill Kauffman, *Freedom Now II: Interview with Clarence Thomas*, REASON (Nov. 1987), <https://reason.com/1987/11/01/clarence-thomas/> [<https://perma.cc/CR3H-KC4S>].

66. See Timothy Noah, *Bill Clinton and the Meaning of “Is,”* SLATE (Sept. 13, 1998, 9:14 PM), <https://slate.com/news-and-politics/1998/09/bill-clinton-and-the-meaning-of-is.html> [<https://perma.cc/Y7MT-ZSMJ>] (discussing Bill Clinton's testimony to a grand jury regarding his relationship with Monica Lewinsky and the controversy regarding the precise meaning of the word *is*). Conceptually, Robin's argument might be particularized into three kinds of

Similarly, Robin does not explore the tensions between Thomas's professed views on separatism and the views Robin attributes to him. Discussing Thomas's shift from the tenets of Malcolm X and the Black Panther Party to the right, Robin argues that "Thomas has never lost touch with the racial separatism of his early encounters" (pp. 2–3). How is this reconciled with Thomas's own claim that he "never went along with the militant separatism of the Black Muslims" but admired their emphasis on self-determination?⁶⁷ Ultimately, what a reader is left with is Thomas's rejection of Black nationalism and its separatism on one hand and Robin's insistence of their presence in his legal thinking on the other. One is left to wonder: What is the value of imposing a set of politics on a person who rejects them? Why the adamance about categorizing a person as something he says he is not? Analytically, this categorization quandary prompts inquiry into the tensions between self-identification ("I am x"), imposed categories ("you are x"), and group consciousness ("we define ourselves as x"). This identification problem is larger than *Enigma's* objective but one Robin must confront to advance his bold claims.

Robin also does not dig deeply into Thomas's rejection of Black nationalism's internationalist component. For people who study Black nationalism or adhere to its tenets, this is not a meaningless excision. The Black nationalist thinkers that Robin argues influenced Thomas imagined themselves as part of a larger African diaspora.⁶⁸ Marcus Garvey's political project—embodied most in the Universal Negro Improvement Association (UNIA)—began in Kingston, Jamaica, and was premised on the idea of pan-African unity.⁶⁹ Stokely Carmichael, who makes a few appearances in *Enigma*, was born in Trinidad and Tobago.⁷⁰ He made Africa central to his conception of Black nationalism and insisted that "Black Nationalism is African Nationalism" and "[s]o too Black Power really means African Power."⁷¹ Discussing Malcolm X, Robin notes that Thomas was "one of 'Malcolm's children.'"⁷² Malcolm X's parents were Garveyites, and after his split with the Nation of

claims that take conservatism as a given and really imagine Black nationalism as the main event. The first is what he offers: that Justice Thomas is a Black nationalist. Robin also demonstrates how Justice Thomas was a Black nationalist, which is a simple issue of historical biography. Finally, there is a claim that straddles both: that there are traces of Black nationalist residue in his jurisprudence (which might be a product of Justice Thomas's current-day embodiment of Black nationalism or inspired by Justice Thomas's previous forays with black nationalism). Though Robin argues the first, portions of the book often seem to reference the latter two.

67. CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* 62 (2007).

68. See, e.g., pp. 26, 58, 105.

69. See COLIN GRANT, *NEGRO WITH A HAT: THE RISE AND FALL OF MARCUS GARVEY AND HIS DREAM OF MOTHER AFRICA* 54 (2008).

70. PENIEL E. JOSEPH, *STOKELY: A LIFE* 5 (2014).

71. STOKELY CARMICHAEL [KWAME TURE], *STOKELY SPEAKS: FROM BLACK POWER TO PAN-AFRICANISM* 224 (Chi. Rev. Press 2007) (1971).

72. P. 26 (quoting BIONDI, *supra* note 16, at 2).

Islam, he centered Africa and people of the diaspora in his politics.⁷³ Justice Thomas may cull from aspects of Black nationalism as he sees fit (to the extent that he does). Suggesting otherwise would come dangerously close to policing one's political orientation or suggest that one can identify a perfect version of Black nationalism (or politics more generally). But Thomas's selectivity raises hard questions about what could even constitute a Black nationalist jurisprudence. Are Black immigrants who are not descendants of Americans held in bondage, but are burdened by a racial caste system that slavery created, included in Thomas's legal vision? Are they something else or collapsed into the category of Black? *Enigma's* failure to interrogate Thomas's demographic understanding of Blackness understates the stakes of writing about Black nationalism and undermines the project of comprehending his jurisprudence more fully.

It is important to note that I do not aim to offer a prototypical version of Black nationalism or say that Justice Thomas is not a Black nationalist based on a preferred definition. Instead, my contention is that Robin does not engage the breadth and depth of scholarship on Black nationalism. However, if one accepts the book's limited conceptualization of Black nationalism, strict scrutiny would show that Justice Thomas's supposed subscription to that ideology is historically and sociologically unremarkable. Self-help and uplift politics—not unique to Black nationalism—have long been espoused by elite Blacks.⁷⁴ Widespread Black suspicion of whites has been subject to historical, sociological, and anthropological examination.⁷⁵ Self-defense and Black affinity for guns are also not specific to Black nationalism; Black gun ownership has been overshadowed by narratives of racial violence against Blacks and nonviolent political protest.⁷⁶ As Robin points out, Black nationalism's patriarchal emphasis on Black masculinity has been an obnoxious feature of this ideology (p. 6), but it has also been a general feature of Black politics notwithstanding Black women's invaluable contributions to both.⁷⁷ To ap-

73. See TUNDE ADELEKE, AFRICA IN BLACK LIBERATION ACTIVISM: MALCOLM X, STOKELY CARMICHAEL AND WALTER RODNEY 32, 37 (2017).

74. See generally KEVIN K. GAINES, UPLIFTING THE RACE: BLACK LEADERSHIP, POLITICS, AND CULTURE IN THE TWENTIETH CENTURY (1996).

75. See, e.g., SHAYLA C. NUNNALLY, TRUST IN BLACK AMERICA: RACE, DISCRIMINATION, AND POLITICS (2012); JOHN L. JACKSON, JR., RACIAL PARANOIA: THE UNINTENDED CONSEQUENCES OF POLITICAL CORRECTNESS (2008); MIA BAY, THE WHITE IMAGE IN THE BLACK MIND: AFRICAN-AMERICAN IDEAS ABOUT WHITE PEOPLE, 1830–1925 (2000).

76. See, e.g., NICHOLAS JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS (2014); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

77. See, e.g., KEISHA N. BLAIN, SET THE WORLD ON FIRE: BLACK NATIONALIST WOMEN AND THE GLOBAL STRUGGLE FOR FREEDOM (2018); ULA YVETTE TAYLOR, THE PROMISE OF PATRIARCHY: WOMEN AND THE NATION OF ISLAM (2017); NIKKI BROWN, PRIVATE POLITICS AND PUBLIC VOICES: BLACK WOMEN'S ACTIVISM FROM WORLD WAR I TO THE NEW DEAL (2006).

preciate the plasticity of Robin's Black nationalism, and its wide applicability, consider this: many of these features are found in hip-hop culture.⁷⁸

The most striking feature of the version of Black nationalism Robin ascribes to Thomas is its lack of consonance with the "Black" and "White" Constitutions discussed in Part III of the book. Black nationalism certainly changes across time. However, I'm fairly confident that the people Robin traces Justice Thomas's Black nationalist genealogy to would likely reject the idea that Black people need to recreate the conditions of slavery and Jim Crow—worlds that they endured and challenged—to conjure up some special racial resolve. In addition to rejecting the appellation of Black nationalist (conservative), I suspect that Justice Thomas himself would reject this imposed vision, as would some of his supporters. Instead, law and order, originalism, moral responsibility, and a limited vision of how the federal government can remedy racial discrimination probably provide better clues to his judicial politics than Black nationalism. Robin attempts to take Justice Thomas seriously in many places and that effort shows. Nevertheless, a more earnest approach would not have linked the jurist to a Black nationalist tradition that Thomas explicitly rejects and relevant scholarship suggests he is not a devotee of.

III. RACIAL REVISIONISM

While Robin displays some deftness with his braiding of Thomas's history, jurisprudence, and understanding of political economy, it is less clear what readers are supposed to do with the book's arguments, assuming they believe the account offered in *Enigma*. The substantive chapters offer mostly descriptive analysis. The three-page epilogue that serves as the conclusion offers some keen insights on the antidemocratic nature of the Supreme Court and the Electoral College but is otherwise thin.

Importantly, Robin is not a legal scholar per se. Normativity is something that legal academics are uniquely, though not exclusively, sensitive to—some legal scholars believe their intellectual work should focus on truth seeking; others insist that legal scholarship should aim at social betterment.⁷⁹ If *Enigma* is interested simply in ascertaining the truth, the analysis offered in Part II of this Review has particular salience. If Robin has some prescriptive or normative drive to his project, I struggled deeply to understand what purpose is served by a talented scholar of the right telling mainstream white audiences that Justice Thomas has Black folks' best interest in mind.

Assuming Robin is right, what does this mean for the Black people that are seemingly at the center of Thomas's juridical world? What should they be doing with this information, if anything? What about white audiences? People of other racial backgrounds? Ultimately, I must admit that my reac-

78. See generally LAKEYTA M. BONNETTE, *PULSE OF THE PEOPLE: POLITICAL RAP MUSIC AND BLACK POLITICS* (2015).

79. Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6, 7 (2016).

tion upon completing the book was not that different from Professor Girardeau Spann's response to the earliest iterations of *Fisher v. University of Texas*: "whatever."⁸⁰ That remark was not animated by dismissiveness of the project: *Enigma* tees up some good questions, is replete with fascinating tidbits of information, and, again, is a quasi model for how to have an extended scholarly engagement with ideas that are anathema to the author. But it is the uncritical consumption of half-baked work on race, during a moment of unique racial strife, that inspires some of the prescriptive questions in these pages.

Enigma is stylized as a revisionist project, but it is closer to a kind of racial revisionism, which historian Darryl G. Barthé, Jr. has argued "obscure[s] the realities of racism through a redefining of terms."⁸¹ The concept can be widened and understood as the intentional or unintentional obscuring of racial subordination through the redefining of terms. The "terms" might be actual words or phrases or might refer to terms in racial discourse. At the most basic level, racial revisionism takes place via racial rhetoric that is sometimes coded and, in other instances, explicit. Some of the many keywords include "all lives matter," "colorblind," "handout," "model minority," and "war on cops."⁸² These words, and many others, do little to advance racial-justice imperatives.

But the more subtle form of racial revisionism, likely unintentional, is exemplified by *Enigma* and is tied to the book's understanding of Black nationalism and Black politics. The concern here is the potential confusion and harm that might emanate from simplified renderings of Black politics under the presumed guise of complication. On the left, the possible objections are plentiful. If Justice Thomas is a Black nationalist and harbors the belief that Black people need carceral discipline, then, by implication, this correctional impulse might be understood as an appropriate ingredient of Black nationalism. Besides being ideologically bizarre, this belief, which again is premised on the idea that Justice Thomas believes that police are a "structuring force" that helps Black people "organize" and "improve," might be uncritically consumed as a legitimate perspective. This is not to say that people will adopt these politics as their own. But this Black-empowerment rationale for carceral subjugation—which *Enigma* brings into the public sphere precisely when social movements are organizing against the penal state's anti-Black violence—is deeply troubling and distracting. The response might be that *Enigma*'s project is explicative. But even that endeavor could be read as dis-

80. Girardeau A. Spann, *Whatever*, 65 VAND. L. REV. EN BANC 203 (2012); 565 U.S. 1195 (2012).

81. Barthé, *supra* note 15, at 82. Howard Winant has discussed racial revisionism in the context of Brazil but has defined it as the tendency to reduce class to race. HOWARD WINANT, RACIAL CONDITIONS: POLITICS, THEORY, COMPARISONS 132 (1994).

82. See generally IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS (2014).

torting the jurisprudence of a person whose politics many liberals believe have been injurious notwithstanding his admiration for Black nationalism.

The potential objections on the right are strong too. The undertheorized version of Black nationalism offered in *Enigma* means that much of Justice Thomas's jurisprudence is reduced to race. Put another way, Justice Thomas is racialized in severe ways that are undersubstantiated. The irony of this racial project is that it provides fodder for Justice Thomas's suspicion of white liberals and his critique that Black people are often understood in ways that are racially demeaning. Moreover, the racial portrait of Justice Thomas offered in the book validates conservative claims that liberals carelessly inject race in places where it may not be relevant. They might argue that the spectacular and nostalgic White Constitution described in *Enigma* is a transmutation of garden-variety law and order, one that fundamentally misunderstands how criminal law signals communities' moral condemnation.⁸³ Whether it is conservatives of all racial stripes who are in denial about the empirically demonstrated biases in the criminal justice system on one end, or austerity-loving conservatives rethinking the shape of the penal system on the other,⁸⁴ there is a strong likelihood that some on the right may object to the analysis offered in *Enigma* as racially confusing and distorting.

The Enigma of Clarence Thomas demonstrates the importance of critical engagement with reserved judgment. But it creates a political and jurisprudential portrait that clashes with scholars of relevant fields and the figure at the center of the inquiry. I am not of the belief that this book only obscures.⁸⁵ It does, however, displace more careful inquiries into race and racial subjugation. The best books on law and inequality marshal intellectual traditions that force general audiences and intellectual travelers to think more deeply about how categories like race (among others) govern our lives. *Enigma's* politically simplified version of Black nationalism and engagement with Clarence Thomas's jurisprudence takes us only to a partial arrival.

83. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

84. HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 11 (2015).

85. Magnet, *supra* note 46 ("Some books enlighten. This one obscures.").