On Race, It's Thomas v. an Old Ideal
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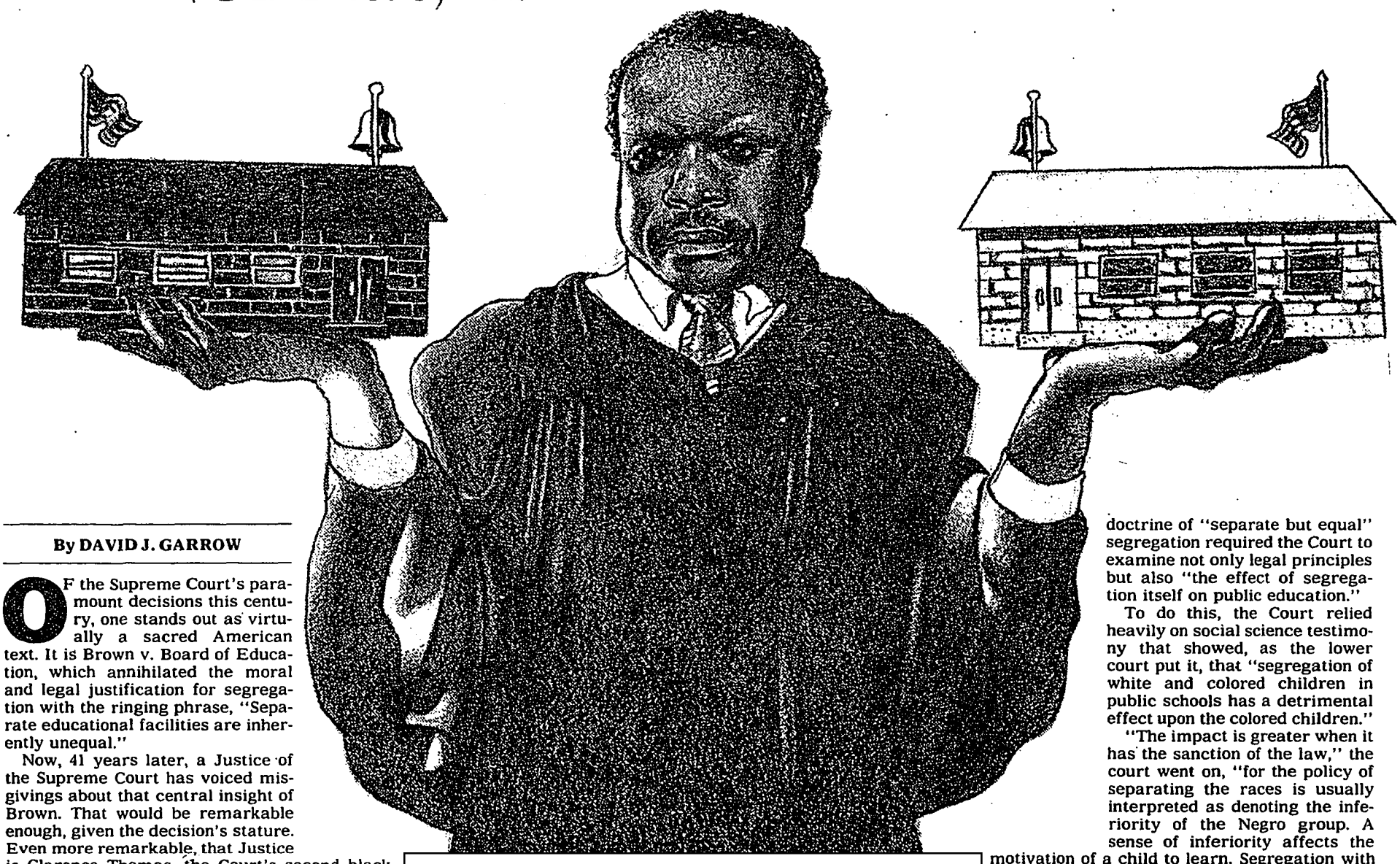

By DAVID J. GARROW

OF the Supreme Court's paramount decisions this century, one stands out as virtually a sacred American text. It is Brown v. Board of Education, which annihilated the moral and legal justification for segregation with the ringing phrase, "Separate educational facilities are inherently unequal."

Now, 41 years later, a Justice of the Supreme Court has voiced misgivings about that central insight of Brown. That would be remarkable enough, given the decision's stature. Even more remarkable, that Justice is Clarence Thomas, the Court's second black member. And in one more surprise, the critique of Brown by the Court's most conservative Justice owes much, whether knowingly or not, to a line of anti-Brown scholarship with respectable intellectual roots in the political left.

Justice Thomas's critique of Brown was one of the many surprising developments of the Court term that ended last week, and was part of his full-throated emergence as a distinctive and articulate judicial voice. It is a voice that is scornful, sometimes indignant, coherent though not, so far, visibly persuasive to most of his colleagues. It is a voice for a formal, even rigid approach to constitutional interpretation, a rejection of the idea that modern influences might cast a new light on the intentions of the framers.

The criticisms of Brown offered by Justice Thomas last month, in a Kansas City school desegregation case, Missouri v. Jenkins, go directly to the heart of the integrationist ideal articulated by the Court in 1954.

In Brown, Chief Justice Earl Warren, speaking for a unanimous Court, emphasized that reconsideration of the previously sanctioned doctrine of "separate but equal" segregation required the Court to examine not only legal principles but also "the effect of segregation itself on public education."

To do this, the Court relied heavily on social science testimony that showed, as the lower court put it, that "segregation of white and colored children in public schools has a detrimental effect upon the colored children."

"The impact is greater when it has the sanction of the law," the court went on, "for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

Three years later, Chief Justice Warren quoted that finding in full — and added that it was "amply supported by modern authority" — in articulating the Supreme Court's constitutional conclusion that "separate educational facilities are inherently unequal."

Although Brown's mandate excited considerable segregationist opposition during the 1950's and 1960's, the decision itself was considered virtually unassailable. Yet by the mid-1980's more and more black voices began to question whether Brown's integrationist emphasis was really in black America's best interest.

Almost from the start, Brown's reliance on social science conclusions concerning educational effects had drawn sharp professional criticism even from the decision's supporters, for, as one commentator recently explained, "something that is 'inherently unequal' is not so because of empirical data, but because of its very nature, known through pure reason."

But the newly emerging black unhappiness with Brown goes deeper. In a 1987 book titled

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"Plural But Equal," Harold Cruse, a black intellectual, complained that Brown had wrongly presumed "that separateness is inherently to mean inferiority."

"Intrinsically," Mr. Cruse wrote, "it means no such thing. Legally imposed segregation was what rendered separateness implicitly inferior. Remove the legal sanctions of imposed segregation, and separateness has the potential of achieving equality in its own right."

Black Skepticism

Mr. Cruse's blunt comments were a harbinger of a growing black skepticism about Brown's integrationist underpinnings. Six years later, in 1993, a University of Virginia law professor, Alex M. Johnson Jr., writing in the California Law Review, declared that "Brown was a mistake" and that integrationism "has failed our society."

Voicing a preference for "the 'voluntary' integration that occurs when individuals are given the choice whether and when to integrate," Professor Johnson accurately noted that Brown had been "premised on the notion that we are but one community, geographically separated in major urban areas but culturally prepared to merge." Rejecting that premise, Professor Johnson asserted, "Brown failed because it did not acknowledge the prior development of a unique African-American community with its own cultures, languages, religions and territories."

> Not even Brown v. Board of Education is sacred anymore.

While the critiques by Mr. Cruse and Professor Johnson represent black nationalist views that most Americans would associate with the left end of the ideological spectrum, they are strikingly similar to the contrarian view of Brown expressed by Justice Thomas in his concurring opinion in Missouri v. Jenkins.

Mr. Cruse concluded "Plural But Equal" by observing, "The only hope left for the political, economic and cultural survival of blacks into the next century is self-organization." In Jenkins, Justice Thomas, writing from an ostensibly antithetical ideological pole, emphasized how "black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success and achievement."

It is here, too, that Justice Thomas departs from the usually dispassionate voice that he exhibited in the last term, that of the advocate of pure legal principles. "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior," he wrote, joining four of his conservative colleagues to void a magnet school program that a lower court judge had instituted in order to attract white students back to Kansas City's public schools.

Justice Thomas angrily said the lower court appeared to have been less interested in providing the best possible education for black students than in stimulating racial integration. The lower court's decision, he wrote, "appears to rest upon the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites." The district court's "willingness to adopt such stereotypes stemmed from a misreading" of Brown, he said, adding, "the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development ... not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority."

Segregation, he stressed, "was not unconstitutional because it might have caused psychological feelings of inferiority."

The most forceful passage in Justice Thomas's concurrence analyzes the courts' post-1954 experience with segregation so concisely and memorably that it is likely to be quoted for decades to come.

Jurisprudence of Inferiority

"Mere de facto segregation (unaccompanied by discriminatory inequalities in educational resources) does not constitute a continuing harm after the end of de jure segregation," he wrote. " 'Racial isolation' itself is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority."

Justice Thomas's proffered contribution to America's conversation about race reaches well beyond a judicial critique of Brown, for Justice Thomas, by bridging an old ideological chasm, is asking Americans to rethink basic presumptions about race. If Americans really do believe in fundamental racial equality, he says, then "there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment."