



CLARENCE THOMAS'S JURISPRUDENCE UNEXPLAINED

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Review of: *The Supreme Court Opinions of Clarence Thomas, 1991–2006: A Conservative’s Perspective* by Henry Mark Holzer (Jefferson, N.C.: McFarland & Company, 2007)

INTRODUCTION

Clarence Thomas is the most interesting justice to sit on the Supreme Court in a generation. His opinions are rigorous, consistent, and unintimidated by the intellectual fads that have swept through the legal elite for the past half century. Despite what some have said, Thomas is not a libertarian by any stretch of the imagination.¹

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¹See, e.g., Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas? The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787, 788 (2005) (referring to “Justice Thomas’s ‘originalist’ interpretation of the Constitution and libertarian political philosophy”); William McGeeveran, *Mrs. McIntyre’s Checkbook: Privacy Costs of*

As his recent memoir made absolutely clear,² Thomas is a religious conservative whose views on law and politics are deeply influenced by his Catholic faith and by historical tradition. Yet his decisions bear a certain affinity with libertarian views, in which he is quite conversant. His jurisprudence is probably best described in Scott Douglas Gerber's term, as "liberal originalism"³: a version of originalism closer to the Jeffersonian principles of individual liberty articulated in the Declaration of Independence than the "conservative originalism" associated with Robert Bork and others who deprecate Jeffersonian principles and cling to the "civic republicanism" interpretation of the American Revolution.⁴

Justice Thomas's decisions are therefore not only intrinsically interesting, but they also offer an opportunity to evaluate some of the controversies within the category of conservative jurisprudence. One looks to Henry Mark Holzer's book,⁵ a revised edition of his earlier *The Keeper of the Flame: The Supreme Court Opinions of Justice Clarence*

Political Contribution Disclosure, 6 U. PA. J. CONST. L. 1, 40-41 (2003) (referring to "libertarians such as Justices Thomas and Scalia and possibly Justice Kennedy"); Melvin Simensky, *Does the Supreme Court Have a "Liberal" or "Conservative" Intellectual Property Jurisprudence?: An Evening with Kenneth Starr & Martin Garbus*, 11 MEDIA L. & POL'Y 116, 139 (2003) ("Justice Thomas . . . is just decidedly libertarian."); Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 6 ("Justice Thomas's conservatism has shown a libertarian streak . . ."). Probably most astonishing is Steven G. Calabresi's statement in Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1044 (2005), that Justice Thomas's dissent in *Lawrence v. Texas* was "a libertarian statement . . . in opposition to anti-sodomy laws which he called silly," and takes his dissent as "evidence of the current libertarian bent of the Supreme Court"! To be fair, Justice Thomas has never described himself as a libertarian. See Interview by Bill Kauffman, with Clarence Thomas, Chairman, Equal Employment Opportunity Comm'n, in D.C. (Nov. 1987), reprinted in *FREE MINDS & FREE MARKETS: TWENTY-FIVE YEARS OF REASON* 142, 146 (Robert W. Poole, Jr. & Virginia I. Postrel eds., 1993) (Q: "So would you describe yourself as a libertarian?" A: "I don't think I can.")

² CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* (2007).

³ SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 6 (1995).

⁴ See generally Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL'Y 489 (2004).

⁵ HENRY MARK HOLZER, *THE SUPREME COURT OPINIONS OF CLARENCE THOMAS, 1991-2006: A CONSERVATIVE'S PERSPECTIVE* (2007).

Thomas, 1991–2005,⁶ with hopes that it will enlighten on these matters. Unfortunately, the book is not a scholarly work but a polemic, which employs the language and analysis of partisan debates. It is a superficial, uncritical, occasionally misleading *apologia* for Justice Thomas as “a formidable intellect and staunch defender of the Constitution.”⁷ While that description is largely apt, Thomas’s jurisprudence does have significant blind spots, which an objective analysis could profitably illuminate. Holzer’s book lacks the necessary critical eye, and it appears that this is partly due to the fact that Thomas’s errors are shared by Holzer himself. Although he started out as Ayn Rand’s personal attorney, and published articles in her magazine, *The Objectivist*, Holzer is today a conservative, an opponent of abortion rights, an advocate of animal rights, and a defender of a vision of federalism and “judicial restraint” that at times elevates state power over liberty as a central constitutional value.⁸ Moreover, Holzer’s uncritical defense of Thomas provides little insight to those already familiar with the broad outlines of the justice’s views. Readers would be better served by other sources, such as Gerber’s *First Principles: The Jurisprudence of Clarence Thomas*, which although now outdated, provides an enlightening comparison of Thomas’s views with those of other conservatives such as Justice Antonin Scalia.⁹

In this review, I can focus only briefly on the subjects of unenumerated rights and substantive due process, federalism, and originalism. I hope to show how in each case, Holzer misses the bigger picture, and to explain how that failure is indicative of some of the weaknesses

⁶ HENRY MARK HOLZER, *THE KEEPER OF THE FLAME: THE SUPREME COURT OPINIONS OF JUSTICE CLARENCE THOMAS, 1991–2005* (2006).

⁷ HOLZER, *supra* note 5, at 1.

⁸ See, e.g., Henry Mark Holzer, *Barack Obama and Government-Mandated Infanticide [sic]*, NEW MEDIA JOURNAL, Sept. 19, 2008, http://www.newmediajournal.us/staff/h_holzer/2008/09192008.htm (visited July 20, 2009); A.M. Lamey, *From Ayn Rand to Animal Rights: An Interview with Henry Mark Holzer*, SANS EVERYTHING, Oct. 24, 2007, <http://sanseverything.wordpress.com/2007/10/24/from-ayn-rand-to-animal-rights-an-interview-with-henry-mark-holzer-2/> (visited Apr. 18, 2009).

⁹ SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999). Holzer claims that his book is “the first to examine Clarence Thomas’s entire body of Supreme Court opinions,” HOLZER, *supra* note 5, at 2, but he never cites Gerber’s 1999 book which, although it did not purport to examine *all* of Thomas’s decisions, did provide a critical and perceptive review of Thomas’s work up to that time.

of mainstream conservative jurisprudence. Mainstream conservatives could learn a great deal from Justice Thomas, if they apply a more critical eye to both his jurisprudence and their own.

I. UNENUMERATED RIGHTS AND SUBSTANTIVE DUE PROCESS

One of Holzer's primary themes is the constitutional theory known as "substantive due process." This is the theory under which the Supreme Court has often invalidated state laws for violating the Fourteenth Amendment's Due Process Clause. That Clause declares that "no person" shall be "deprived of life, liberty, or property without due process of law,"¹⁰ and controversy continues to swirl around whether this language "bar[s] certain government actions regardless of the fairness of the procedures used to implement them."¹¹ Since the Progressive Era, when criticisms of substantive due process theory began in earnest, its opponents have portrayed it as merely an excuse for judges to impose their personal political desires on states through strained interpretations. Its defenders point out that substantive due process is a longstanding theory resting on a solid theoretical framework.

However, in a manner common with conservative commentators, Holzer fails to provide any serious consideration of the meaning of substantive due process. He never mentions *Lochner v. New York*,¹² perhaps the most notorious of all substantive due process cases. Nor does he refer to *Loan Association v. Topeka*,¹³ *Hurtado v. California*,¹⁴ nor Justice Stephen Field's dissent in *Munn v. Illinois*,¹⁵ generally considered the three gateway decisions to the theory that only much later came to be called "substantive due process."¹⁶ Holzer instead starts his discussion with *Griswold v. Connecticut*,¹⁷ a case which found that the Due Process Clause was violated by a state law forbidding doctors from advising married couples about contraception. The Court found that although the Constitution does not

¹⁰ U.S. CONST. amend. XIV, § 1.

¹¹ *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

¹² 198 U.S. 45 (1905).

¹³ 87 U.S. (20 Wall.) 655 (1875).

¹⁴ 110 U.S. 516 (1884).

¹⁵ 94 U.S. 113 (1877) (Field, J., dissenting).

¹⁶ See G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 241-48 (2000).

¹⁷ 381 U.S. 479 (1965).

specifically protect the right of married couples to make intimate decisions without interference by the state, the Bill of Rights taken as a whole necessarily implies the existence of a zone of privacy which includes such a right. In the Court's words, this zone of privacy is formed by "penumbras," or shadows, that "emanate" from the specific guarantees of the Constitution.¹⁸

To focus on *Griswold* is a misleading way to approach this subject. *Griswold* is an easier target than its predecessors in the substantive due process tradition, given its eccentric language and the hypocrisy of its author, Justice William Douglas (who showed far less respect for such explicit constitutional guarantees as property rights). By attacking substantive due process theory through the relatively vulnerable *Griswold* opinion, Holzer evades more complex theoretical questions, and settles instead for repeating the hoary conservative myth that the theory is merely "a tool-for-all seasons" by which judges can "invent some constitutional peg on which to hang their hats, some hitherto unknown 'fundamental right,'" so as to nullify laws that they personally dislike.¹⁹

This is a caricature of a vital constitutional theory, a theory supported by a strong logical argument and at least a century and a half of compelling precedent. Substantive due process holds that certain enactments by legislatures are void because they lack either the formal or substantive ingredients necessary to qualify such enactments as "law." This point is easy enough to understand when a bill lacks the *formal* ingredients of law: imagine, for example, a bill passed by both houses of Congress but not signed by the president. Were the police to enforce this "law" by arresting people, those people would naturally protest because the bill had not been validly enacted, and was therefore not "law." It might be called a *bill*, or a *resolution*, or a *declaration*, or a *pronunciamiento*, but it could not be a *law*. Therefore, for people to be arrested pursuant to it would mean that they had been "deprived" of their "liberty" without "due process of law."²⁰

¹⁸ *Id.* Holzer appears to have changed his views with regard to *Griswold*. In 1967, he referred to the case as having "released a powerful freedom fighter in [the Supreme Court's] midst." Henry Mark Holzer, *The Constitution and The Draft (Part II)*, 6 THE OBJECTIVIST 361, 365 (1967).

¹⁹ HOLZER, *supra* note 5, at 134.

²⁰ KERMIT ROOSEVELT, THE MYTH OF JUDICIAL ACTIVISM 120-21 (2006).

But the same analysis applies when a legislative enactment lacks the *substantive* elements of law, as when it exceeds the legislature's constitutional authority. For example, the First Amendment prohibits Congress from making any law establishing religion.²¹ Were Congress to pass a bill declaring the United States to be a Christian nation, such a purported "law," even if satisfying every *formal* requirement, would exceed Congress's authority and would therefore still not qualify as a *law*. The term "law" is reserved for those Congressional enactments that are consistent with Congress's constitutional authority in both the formal and substantive dimensions. And, once again, any person arrested pursuant to such an enactment would rightly object that he was being deprived of liberty without due process of *law*. The *content* of legislation, therefore, can disqualify a legislative enactment from status as "law" just as easily as can any *formal* inadequacies. This is what Justice Field meant when he wrote that the Constitution "deals with substance, not shadows. Its inhibition[s] are levelled [sic] at the thing, not the name. It intended that the rights of the citizen should be secure against [certain usurpations] by legislative enactment, under any form, however disguised. *If the inhibition[s] can be evaded by the form of the enactment, [their] insertion in the fundamental law was a vain and futile proceeding.*"²²

Substantive due process recognizes the fact that mere enactment by a legislature is not sufficient to validate an item as "law."²³ It is not enough, therefore, for critics simply to cast aspersions on the theory, or reject it out of hand as mere politics. That would be the straw man

²¹ U.S. CONST. amend. I

²² *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866) (emphasis added).

²³ In fact, "procedural due process" — the universally accepted notion that the government must take certain *procedural* steps before it may deprive a person of life, liberty, or property — is merely a subset of substantive due process, since it is the *content* of the procedures which determines whether they are the sort of procedures that are "due." This is for the simple, Aristotelian reason that a means can also be an end. Procedural steps (such as fair hearings before unbiased judges) are also ends, and contain content (such as the judge's lack of bias). Thus the procedural hearing is itself a substantive guarantee. This overlap is overlooked by those, including Justice Thomas, who support procedural due process guarantees but not the theory of substantive due process. In fact, to endorse procedural protections while denying substantive limits on government authority is to beg the question: to say that a fair *proceeding* is one with an "unbiased" judge is to endorse a *substantive* protection, and therefore to endorse the theory of substantive due process.

fallacy. Yet Holzer not only fails to put forth an honest assessment of the position he criticizes, he also dismisses *Griswold* and other privacy cases by reference to the Tenth Amendment, which reserves to the states all those powers which are not denied to them by the Constitution.²⁴ In Holzer's view, the Tenth Amendment reserves matters such as abortion or privacy to be dealt with by state governments, and the Supreme Court has exceeded its authority and frustrated the alleged right of a state's voters to determine their state law.²⁵ But this argument begs the question. If a state law violates the Due Process Clause, that means that it is "prohibited by [the Constitution] to the States," and therefore cannot be among the powers reserved to the states by the Tenth Amendment.

To put all this theory into practice, consider the Court's decision in *Lawrence v. Texas*,²⁶ invalidating a state law criminally punishing homosexual sodomy between consenting adults in the privacy of their own bedrooms. Under this statute, armed agents of the state could and did storm into private homes and tear innocent citizens from the arms of their loved ones, merely because other people were offended at the thought that homosexual sex might be taking place somewhere. Mr. Lawrence appealed his criminal conviction and the Supreme Court held the law substantively unconstitutional in an opinion that unfortunately lacks the clarity and theoretical consistency to which the justices ought to aspire.²⁷

Nevertheless, the outcome was correct as a matter of substantive due process theory. One of the features distinguishing laws from mere pronouncements is that the former are enacted to protect individuals or the public generally from harms, or to provide public

²⁴ U.S. CONST. amend. X.

²⁵ See HOLZER, *supra* note 5, at 36-41 .

²⁶ 539 U.S. 558 (2003).

²⁷ Most potentially confusing is the majority's failure to work the case into the existing scheme of standards of review. See *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting). Whether one accepts that scheme or not, the fact that the majority neither seeks to reconcile its holding with that scheme nor to explain the current scheme's inadequacies renders that decision a vulnerable outlier. As to clarity, the majority's vague reference to "defin[ing] one's own concept of existence, of meaning, of the universe, and of the mystery of human life," *id.* at 574, rather than to the simple, widely understood right to pursue happiness while respecting others' right to do the same, made the decision appear unserious.

goods for the people in society.²⁸ For an enactment to qualify as a *law*, therefore, it must contain, among other things, an element of generality.²⁹ Enactments proscribing rape, for example, are *laws* because they protect individuals from harm, and apply generally to all cases falling within their scope. Enactments which tax the public in order to provide public roads are also laws, because they are generally applicable, and do not confer special benefits or impose special burdens on particular individuals. A statute enacted out of mere spite—designed simply to impose a burden on a disfavored class for the sole reason that the target class is politically unpopular—is not a law; it is merely an arbitrary use of force.³⁰ And an enactment proscribing private acts by consenting adults—acts which have no repercussions on the general public—merely because knowledge of the existence of such acts offend the sensibilities of others, lacks the elements of generality, or a rational connection to public health and safety, that are required before an enactment can qualify as a “law.” Without these elements, the Texas sodomy statute was instead a mere enactment—a spiteful persecution aimed at an unpopular minority.³¹ As the Supreme Court put it in *Loan Association v. Topeka*: “This is not legislation. It is a decree under legislative forms.”³²

Although there is no question that most of the Constitution’s authors, and the authors of the Fourteenth Amendment, looked

²⁸ F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* 86–87 (1981).

²⁹ See generally H. L. A. HART, *THE CONCEPT OF LAW* (1960).

³⁰ See generally Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984). One example would be the San Francisco Queue Ordinance, enacted in the late nineteenth century, which specified that any person sent to the city jail would have his hair cut short. This law might seem as a sanitary measure, but in fact it was enacted as a spiteful measure to cut off the long braided queues of Chinese workers, who were a persecuted minority in California at the time. JEAN PFAELZER, *DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS* 75 (2007). The law was held unconstitutional in *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (D. Cal. 1879).

³¹ See also Peter Cicchino, *Reason and the Rule of Law: Should Bare Assertions of ‘Public Morality’ Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 178 (1998) (“bare public morality arguments support the legal enforcement of private bias, casting lawmaking as a kind of Nietzschean struggle of will, with various moral interest groups trying to gain legal enforcement of their beliefs without having to give reasons for those beliefs other than saying, ‘we believe it’”).

³² 87 U.S. (20 Wall.) 655, 664 (1875).

upon homosexuality with disdain and may have believed in its criminal proscription, the fact remains that such laws lack an objective constitutional or political basis and are instead leftovers from an era of ignorance and bigotry which our predecessors had at least the wisdom to repudiate in the abstract, whatever their failings in practice.³³ As Justice Breyer has put it, "a record of inconsistent historical practice is too weak a lever to upset . . . principle."³⁴ The principle involved, however, is the protection of individual freedom. While Holzer ridicules "a 'liberty' or 'privacy' right"³⁵ in constitutional law which he claims has "not a shred of constitutional precedent or other authority,"³⁶ the text of the Fourteenth Amendment expressly prohibits the government from depriving persons of "liberty . . . without due process of law," and "liberty" denotes an indefinite and broad array of potential acts. Indeed, as Holzer notes, the Ninth Amendment also protects an undefined swath of rights, including ones not explicitly specified in the Bill of Rights.³⁷ It is perplexing that Holzer would (rightly) use this Amendment as a textual basis for declaring "obscenely intolerable wrong[s] and ugly blemish[es] on our nation" (including the long-standing practice of

³³ Cf. HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 158 (University of Chicago Press, 1982) (1959) ("[M]en in 1776 subscribed to propositions which had consequences of which they were not fully aware and which they may not have accepted if they had been aware of them. That Jefferson intended the Declaration, or the philosophy it expressed, to have far more drastic consequences than were possible in 1776 is hardly open to question. And if the intention of the legislator is the law, then did not the historical meaning of the Declaration comprehend also its historic mission, and was not that mission the attainment as well as the promise of equality?").

³⁴ *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 879 n.25 (2005). As Tara Smith has explained, the mere fact that the authors of the Constitution's conceptual language may have been ignorant of the actual concretes subsumed by that concept does not mean that the Constitution fails to apply to those concretes; thus the fact that the framers may not themselves have understood the "liberty" mentioned in the Constitution to have included private, adult, consensual, homosexual acts, is actually irrelevant: the term does objectively include such acts and they therefore do enjoy constitutional protection. See Tara Smith, *Why Originalism Won't Die – Common Mistakes in Competing Theories of Judicial Interpretation*, 2 *DUKE J. OF CONST. L. & PUB. POL'Y* 159, 211 (2007).

³⁵ HOLZER, *supra* note 5, at 139.

³⁶ *Id.* at 22.

³⁷ See generally Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 *TEX. L. REV.* 1 (2006).

segregation) to be unconstitutional,³⁸ while simultaneously criticizing the *Lawrence* decision for allegedly “cook[ing] up” individual rights “in a social science laboratory.”³⁹

This analysis eluded Justice Thomas, and it eludes Holzer. Thomas dissented in *Lawrence*, on the grounds that while he personally would never endorse such a law, it nevertheless intruded on no federally protected right.⁴⁰ His two-paragraph opinion was silent as to the meaning of the Due Process Clause,⁴¹ but concluded that homosexual sex was not one of the acts included in the “liberty” protected by the Constitution because there is no constitutional right of privacy.⁴² Holzer praises Thomas’s superficial dissent, on the grounds that “Texas had a constitutional right to enact” the law in question, because state laws should be invalidated “only if [they] violate[] a provision of the federal Constitution, fairly interpreted according to its text and originalist principles.”⁴³ But, as we have seen, the Texas statute did precisely that, because it deprived people of one of their liberties, but lacked the elements that would have qualified it as a “law.”⁴⁴

One can defend the Texas law only in one of two ways: by denying that private adult consensual sexual acts are among the indefinite number of “libert[ies]” protected in the Constitution, or by

³⁸ HOLZER, *supra* note 5, at 164 n.16.

³⁹ *Id.* at 139.

⁴⁰ *Lawrence v. Texas*, 539 U.S. 558, 605–06 (2003) (Thomas, J., dissenting).

⁴¹ *Id.* Thomas, unfortunately, has never carefully discussed the theory of substantive due process, and has treated it dismissively, either contending that it is an “oxymoron,” *United States v. Carlton*, 512 U.S. 26, 39 (1994), or held that it is basically a historical accident. According to this narrative, after the Supreme Court essentially erased the Privileges or Immunities Clause from the Fourteenth Amendment in *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), the justices turned to the Due Process Clause as a substantive guarantor of individual rights under the Constitution. But while this theory has outspoken advocates, it is historically false. The Due Process Clause was understood to have a substantive dimension at the time that the Amendment was written, and while later courts did employ the Clause in ways that the Privileges or Immunities Clause would have been used had it not been for the *Slaughterhouse* calamity, it is not true that the Due Process Clause served as a mere substitute for the Privileges or Immunities Clause.

⁴² *Lawrence*, 539 U.S. at 605–06 (Thomas, J., dissenting).

⁴³ HOLZER, *supra* note 5, at 139. Note the question-begging nature of the phrase “fairly interpreted.” Does anyone advocate a jurisprudence based on “unfair” interpretations?

⁴⁴ See also Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold, and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045 (1990).

demonstrating that the Texas statute did contain such elements as generality and protection of the public which are required for a legislative enactment to qualify as a law. The latter was obviously not the case, since it proscribed wholly private activity. The former is the position only of the positivist, who holds that the Constitution protects only the rights explicitly specified in the Constitution, and that anything enacted by a legislature is *ipso facto* law; yet Thomas is not a positivist. His opinion in *Lawrence* is therefore unsatisfying and inconsistent with his basic jurisprudential framework.

Perhaps a word is in order here on the "right to privacy." This term is a highly misleading neologism formulated by Justice Louis Brandeis, an enthusiastic collectivist whose antagonism toward economic liberty and private property rights led him into some severe theoretical conflicts.⁴⁵ As even contemporaneous observers noted, Brandeis had a hard time formulating a critique of classical liberalism that would not also swallow up other kinds of rights which he did value,⁴⁶ and in fact he was never able to do so. Instead, he made do with an argument that degraded private property and economic freedom,⁴⁷ but simultaneously put value on the "right to be let alone" as "the most comprehensive of rights and the right most valued by civilized men."⁴⁸ The problem is that *all* rights are, by definition, "rights to be let alone," or to make private decisions without interference by the public. The term "right of privacy" is therefore essentially redundant and purposeless, except that it serves to obfuscate the connection between those rights (usually political-participation rights like speech, press, or suffrage) which progressives like Brandeis valued, and those rights they considered worthless (property, economic freedom).

In this sense, the idea of a "right of privacy" deserves criticism, but not, as Holzer would have it, because such a right imposes too many restrictions on government; on the contrary, the problem with the term is that it is not comprehensive enough to ensure respect for the full measure of individual rights. Holzer asserts that the alleged

⁴⁵ See Amy Peikoff, *Beyond Reductionism: Reconsidering the Right to Privacy*, 3 N.Y.U. J.L. & LIBERTY 1, 40 (2008).

⁴⁶ ALPHEUS THOMAS MASON, *BRANDEIS AND THE MODERN STATE* 206 (1936).

⁴⁷ See, e.g., *Truax v. Corrigan*, 257 U.S. 312, 376 (1921); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (1921).

⁴⁸ *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

“manufacturing [of] dangerous ersatz ‘rights’” has “tremendous moral, social, economic, and political costs,”⁴⁹ but he fails to make the case for this assertion, except in a passage describing the nauseating practice of partial birth abortion. Even assuming that pure physical revulsion can establish Holzer’s case that this practice is a “moral cost” attributable to an expansive interpretation of the word “liberty” in the Constitution, Holzer fails to compare these consequences to the costs of an overly *restrictive* interpretation of these clauses. In fact, as I have argued, the costs of construing liberty too broadly are vastly outweighed by the costs of construing it too narrowly.⁵⁰ The latter is, alas, all too common thanks to the judiciary’s practice of presuming the validity of laws in all but rare circumstances—a practice which is a legacy of the Progressive Era assault on individual rights, and one which Holzer appears to endorse.

In fact, Holzer’s attack on privacy rights is aligned with those Progressive Era thinkers like Oliver Wendell Holmes who viewed Brandeis as overly protective of individual freedom.⁵¹ Brandeis was a dualist, whose “right of privacy” drew an untenable distinction between protected “privacy” in the “personal” sphere while deferring to government control over “public” matters including economics. For Holzer to criticize the right of privacy for unduly restricting the ambit of government is to ally himself with the most authoritarian strands of the Progressive legacy—with those who argue that freedom is merely the exception to the general rule of government control.⁵² Whatever the merits of this view, it is certainly not “originalist.”⁵³

Holzer’s hostility to the “manufacturing” of “dangerous ersatz ‘rights’”⁵⁴ raises problems elsewhere in the book. In his discussion of the Fourteenth Amendment’s Privileges or Immunities Clause, he quickly skims over Thomas’s view that courts *ought* to protect

⁴⁹ HOLZER, *supra* note 5, at 8.

⁵⁰ Timothy Sandefur, *The Wolves and the Sheep of Constitutional Law: A Review Essay of Kermit Roosevelt’s The Myth of Judicial Activism*, 23 J.L. & POL. 1, 30–33 (2007).

⁵¹ See, e.g., SAMUEL J. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS* 237–43 (1961).

⁵² See Sandefur, *Wolves and Sheep*, *supra* note 50, at 16–17.

⁵³ See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2003); HARRY V. JAFFA, *STORM OVER THE CONSTITUTION* (1999).

⁵⁴ HOLZER, *supra* note 5, at 8.

unenumerated rights against state interference, a view Thomas expressed most clearly in *Saenz v. Roe*,⁵⁵ but hinted at in other cases, including *Troxel v. Granville*.⁵⁶ But Thomas's belief in a reinvigorated Privileges or Immunities Clause requires closer examination.

In *Saenz*, Thomas argued that the notorious *Slaughterhouse Cases*⁵⁷ ought to be overruled.⁵⁸ *Saenz* was the decision which declared that the Privileges or Immunities Clause only protects a narrowly specified class of federal constitutional rights against interference by states; a decision that rested on the Court's aversion to interfering with state sovereignty. Contrary to the holding of *Slaughterhouse*, the Fourteenth Amendment was intended *precisely* to allow courts to interfere with state autonomy in this respect.⁵⁹ But while there is broad consensus today that *Slaughterhouse* was wrongly decided, overruling it would require the Court to inquire into what sorts of "privileges or immunities" are guaranteed against the state—that is, it would invite judges to examine the natural rights background of the Constitution, or, as conservatives like Robert Bork would put it, to "manufacture rights." This is why many such conservatives continue to defend the *Slaughterhouse* decision.⁶⁰

In *Troxel*, the Court was asked to decide whether a state can require parents to allow grandparent-child visitation, or whether such a law interferes with a parent's right to raise a child without unreasonable interference. Thomas held the law unconstitutional, and although he expressed his skepticism regarding substantive due process theory, he strongly hinted that unenumerated parental rights should be protected under the Privileges or Immunities Clause.⁶¹ Justice Scalia took issue with this suggestion in language

⁵⁵ 526 U.S. 489, 521–23 (1999) (Thomas, J., dissenting).

⁵⁶ 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment).

⁵⁷ *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

⁵⁸ *Saenz v. Roe*, 526 U.S. at 527–28 (1999) (Thomas, J., dissenting) (arguing that the *Slaughterhouse Cases* "sapped the [Privileges or Immunities] Clause of any meaning" and that he "would be open to reevaluating its meaning in an appropriate case.").

⁵⁹ See, e.g., Kimberly Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 20 (1998).

⁶⁰ See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 47–50 (1990).

⁶¹ *Troxel*, 503 U.S. at 80 (Thomas, J., concurring in the judgment).

which emphatically declared that “the power which the Constitution confers upon me as a judge” did not include the power “to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.”⁶² Thomas’s rejection of *Slaughterhouse* should, in Scalia’s eyes at least, raise exactly the same danger that courts will “manufacture rights” under the Privileges or Immunities Clause that Holzer finds worrisome in due process cases.

But Holzer flies past this controversy. While he praises Thomas for rejecting substantive due process, he fails to explain why enforcing the same sorts of unenumerated rights under the Privileges or Immunities Clause would be acceptable. It is not clear that conservatives can have it both ways: either unenumerated natural rights have a role to play in constitutional jurisprudence (as the framers of the Constitution and the framers of the Fourteenth Amendment believed) or they do not.

II. FEDERALISM

Given the weakness of Holzer’s analysis of substantive due process, it is unsurprising that his book contains little insight on the legal controversies surrounding federalism as well. The Constitution’s assignment of authority to the state and federal government is a source of constant turf battles between bureaucrats’ dispute about the proper interpretation of substantive powers, and fundamental questions about the Constitution’s purposes. The fundamental question here is, to what extent should federal authorities intervene to protect individuals against oppression by states?

Between the 1870s and the opening years of the twentieth century, this question was answered by reference to substantive due process: certain rules of fairness, and some of the substantive guarantees that those rules implied, were held to be essential to the “due process” which the Fourteenth Amendment secures against state intervention. In *Chicago, Burlington & Quincy Railroad*,⁶³ for example, the Court held that it violated a person’s right to due process of law for a state to take private property without compensation. Contrary to

⁶² *Id.* at 92 (Scalia, J., dissenting).

⁶³ *Chi., Burlington, & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

popular myth, this case was not the first case to “incorporate” one of the Bill of Rights guarantees to the states; it was instead a pure substantive due process case that happened to hold that uncompensated takings were violations of the Fourteenth Amendment’s Due Process Clause.⁶⁴ In the 1900s, this somewhat amorphous understanding was gradually superseded by the “incorporation” doctrine, which held that the Due Process Clause incorporated the specific guarantees in the Bill of Rights to the states.⁶⁵ The incorporation doctrine differed from its predecessor in being more specific and limited, but it led later generations of lawyers to think of the Due Process Clause as a mere doorway, through which the substantive guarantees of the Bill of Rights, once applicable only against the federal government, now stepped in to bar state governments as well.

The problem with this more rigid notion of incorporation, as Akhil Amar has pointed out,⁶⁶ is that simply translocating Bill of Rights guarantees to the states often makes no literal sense. Take, for example, the Establishment Clause.⁶⁷ If the Clause had merely declared that “Congress shall not create an established church,” it would be easy enough to “incorporate” this against the states by merely substituting the word “states” for “Congress.” But the Clause does *not* prohibit Congress from establishing religion—it prohibits Congress from enacting legislation which interferes with a state’s decision to create, or to not create, an established church. As originally written, it did not protect an individual right; it protected federalism, by simply leaving it to the states to decide whether or not to establish religion.⁶⁸ Incorporating the Clause directly to the states—erasing “Congress shall make no law” and replacing it with “States shall make no law”—would be incoherent, since it would allow the states both total discretion and no freedom on the matter.

On the other hand, there is overwhelming evidence that the authors of the Fourteenth Amendment did intend to apply the *substance*, if not

⁶⁴ U.S. CONST. amend. XIV, § 1; see Michael Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, But the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729 (2008).

⁶⁵ *Gitlow v. New York*, 268 U.S. 652, 664 (1925).

⁶⁶ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 215–218 (1998).

⁶⁷ U.S. CONST. amend. I.

⁶⁸ See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 32–42 (1998).

the form, of the Bill of Rights to the states,⁶⁹ including even confusing instances like the Establishment Clause. At the very least, it is clear that the Amendment protects the “privileges or immunities of citizens of the United States” against interference by state government, and that these privileges or immunities would include at least *some* of the substantive guarantees of the Bill of Rights, such as freedom of speech. It is difficult to imagine what else that Clause *could* possibly mean except that traditionally recognized rights of Americans should also be guaranteed against state interference. And, as Amar points out, by the time the Fourteenth Amendment was ratified, the Establishment Clause was widely interpreted as a guarantee of one of these traditional, fundamental rights, rather than as the federalism guarantee that it originally was. Amar concludes that the Fourteenth Amendment therefore *does* protect an individual’s right to be free from established religions in their home states, even though that had not been the intent when the Establishment Clause itself was written, almost a century earlier.

These are complex questions, and in his concurring opinion in *Zelman v. Simmons-Harris*,⁷⁰ Justice Thomas opened the debate by arguing that the direct incorporation of the Establishment Clause is incoherent and ought to be abandoned. But he failed to address Amar’s point about how the understanding of that Clause had changed by the time the Fourteenth Amendment was written. Along the same lines is his opinion in *Morse v. Frederick*,⁷¹ in which he argued that the First Amendment’s free speech clause should not apply at all to public schools, because at the time of ratification, it was not understood as limiting the degree to which schools could restrict student speech. This is a radical but reasonable argument. One obvious objection to it is that the same is true of segregation: in 1868, government schools were racially segregated, and there is not clear evidence that the authors of the Fourteenth Amendment intended to change that fact. Thomas certainly does not believe that the Amendment allows government schools to segregate on the basis of race.⁷² So while Thomas’s opinions on these matters are original and raise fascinating questions, they still leave

⁶⁹ See MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* (1986).

⁷⁰ 536 U.S. 639, 676–80 (2002) (Thomas, J., concurring).

⁷¹ 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring).

⁷² See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748–82 (2007) (Thomas, J., concurring).

sticky problems to be addressed, and Holzer fails to discuss any of them. Instead, he flippantly rejects the entire incorporation doctrine as a “dogma”⁷³ and the “wellspring of twentieth century judicially created... ‘rights,’”⁷⁴ and leaves it at that.⁷⁵

One other problem with critiques of unenumerated rights and of the incorporation doctrine is that they often make a fetish out of state autonomy that trumps individual rights, thereby perverting the constitutional scheme of federalism. Federalism is not an end in itself; it is a means to the accomplishment of ends specified in the Constitution's preamble: in particular, to “secur[ing] the blessings of liberty.”⁷⁶ The fact that federalism is an instrumental good for the preservation of liberty is made clear by Madison's statement in Federalist No. 45 that when state sovereignty intrudes on liberty, “let the former be sacrificed to the latter.”⁷⁷ But without a clear focus on the organizing purpose of securing individual rights, it is all too easy to fall into a habitual perspective of exalting state power (the means) over individual liberty (the end). That approach to federalism, common among many of today's leading conservative thinkers, would allow states to determine the content of the liberty guaranteed or not guaranteed by government. Some conservatives have indeed such a taste for state power that they even subscribe to a Calhounian “compact” theory,⁷⁸ which holds that the Constitution essentially creates a treaty between largely independent and sovereign states, states which have autonomy to curtail individual freedom almost at will. This view is fundamentally flawed, not least because the Constitution is instead a government of the whole people of the United States, deriving its

⁷³ HOLZER, *supra* note 5, at 71.

⁷⁴ *Id.* at 153.

⁷⁵ Thomas himself does not ever appear to have criticized the incorporation doctrine *per se*.

⁷⁶ U.S. CONST. pmbi.

⁷⁷ THE FEDERALIST NO. 45, at 229 (James Madison) (Lawrence Goldman ed., 2008).

⁷⁸ John C. Calhoun, the intellectual godfather of the Confederacy, articulated the compact theory in his early writings. Calhoun, however, claimed with some plausibility to have derived his interpretation of the Constitution from the writings of Thomas Jefferson and James Madison. See HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR 403–71 (2000).

authority from a different source than do the state governments.⁷⁹ But because these conservatives hold that states created the Constitution, they also believe states have great power to fend off interference by the federal government.

One might expect Justice Thomas to oppose this latter view, given the profound influence on his thought by Harry Jaffa, who more than any thinker in recent conservative history has articulated the case for federal union against the Calhounian compact theory. Yet in *U.S. Term Limits, Inc. v. Thornton*,⁸⁰ Thomas did just the opposite.

In that case, the Court was asked to decide whether states could limit the terms of Congressional representatives. The majority held that congressmen are federal officers whose powers exist independently of state restrictions, so that states could not limit the number of terms that members of Congress could serve. Justice Thomas dissented, adopting essentially the compact theory of the Constitution and declaring that “[t]he ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.”⁸¹ Thomas’s dissent, while sophisticated and highly intelligent, demonstrated a profound misunderstanding of the nature of the federal union, but Holzer is again silent about this controversy. Holzer simply emphasizes the importance of the Tenth Amendment and the concept of state autonomy.⁸² Once again, this is disappointing, because a serious debate over the nature of federal and state sovereignty plays an important role in constitutional debates even within conservatism, let alone between conservatives and other groups. Thomas’s position within this controversy would be a fascinating subject for discussion, but that discussion is missing in Holzer’s book.

⁷⁹ See Timothy Sandefur, *How Libertarians Ought to Think About the U.S. Civil War*, 28 REASON PAPERS 61, 66–73 (2006); AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 5–53 (2005).

⁸⁰ 514 U.S. 779 (1995) (Thomas, J., dissenting).

⁸¹ *Id.* at 846.

⁸² See, e.g., HOLZER, *supra* note 5, at 152.

III. ORIGINALISM

A running theme in Holzer's book is that Justice Thomas is a strong and consistent practitioner of "originalism" in constitutional interpretation.⁸³ This is true, but it raises three obvious questions which Holzer does not adequately address: (a) if Thomas is a competent originalist, why do his opinions at times differ from those of Justice Antonin Scalia, widely regarded as an originalist also?; (b) what, precisely, *is* originalism?; and (c) why should originalism guide our interpretation of the Constitution in the first place?

Holzer does note the many instances in which Thomas and Scalia have diverged, particularly the *Troxel* case and *Gonzales v. Raich*,⁸⁴ which upheld the federal government's power under the Interstate Commerce Clause to regulate the possession of marijuana that is not involved in commercial transactions and does not cross state lines. Holzer notes that part of the difference between Scalia and Thomas on this score was Scalia's greater willingness to accept the continuing validity of court decisions which may have themselves ignored the Constitution's original meaning.⁸⁵ But Scalia's greater reliance on *stare decisis* is not the only, or even the most interesting, source of dispute between the two justices.

As their opinions in *Troxel* reveal, their differences center largely on their different views of the proper role of natural rights in an originalist interpretation. Although both describe themselves as originalists, the justices disagree about whether originalism is limited to an interpretation of the Constitution's language only, or whether the political-philosophical context of the Constitution's framing should also factor into the analysis. While Scalia does not reject the doctrine of natural rights entirely as many conservatives do, he believes that natural rights are political concepts that can only be interpreted or relied upon by the elected, political branches of the government and not by courts.⁸⁶

For example, with regard to abortion, Scalia has repeatedly declared that it is up to the democratic process to provide or to deny a

⁸³ *Id.* at 155.

⁸⁴ 545 U.S. 1 (2005).

⁸⁵ HOLZER, *supra* note 5, at 67–68, 83.

⁸⁶ See Harry V. Jaffa, *The False Prophets of American Conservatism*, THE CLAREMONT INSTITUTE, Feb. 12, 1998, available at http://www.claremont.org/publications/pubid.670/pub_detail.asp.

right to abortion⁸⁷—a thoroughly positivistic view that cannot be reconciled with a natural rights analysis (whether that analysis be “pro-choice” or “pro-life”). While he has sometimes recognized the validity of natural rights (*Troxel*), he more often has declared that the rights courts protect are those that have been *given* to minorities as an act of political *choice*, rather than being pre-political endowments by which we are endowed by our creator: “Do you want a right to abortion? Create it in *the way that most rights are created in a democratic society*: persuade your fellow citizens and enact a law.”⁸⁸ This theory has been labeled “conservative originalism,”⁸⁹ although given the Founders’ emphasis on the importance of natural rights—both inside and outside the courtroom—one can question whether an “originalism” that rejects natural rights can really be called “originalism” at all.⁹⁰

Thomas’s willingness to rely on the natural rights tradition has been called “liberal originalism”—liberal in the classical sense, as aiming toward the protection of individual liberty, rather than upholding the authority of government to prevent social disruption.⁹¹ Thomas’s liberal originalism is imperfect, as I have indicated—his failure in *Lawrence* to delve into whether one’s natural right to liberty includes the right to engage in private, adult, consensual sexual acts is one serious flaw—but it is far truer to the genuine meaning of a Constitution that is emphatically a natural rights document. This dispute as to the real “original meaning” is a central controversy in the contemporary development of conservative jurisprudence, and some observers have even suggested that Thomas’s more robust understanding has prodded Scalia’s jurisprudence in a more natural rights-friendly direction. Any “conservative perspective” on Justice Thomas’s jurisprudence ought to address these disputes—particularly given that arguments about the proper role of natural rights

⁸⁷ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979–980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

⁸⁸ See Smith, *supra* note 34, at 206 (emphasis added) (quoting an interview of Justice Scalia).

⁸⁹ See GERBER, *supra* note 3, at 4; Sandefur, *Liberal Originalism*, *supra* note 4.

⁹⁰ Sandefur, *Liberal Originalism*, *supra* note 4, at 490–510.

⁹¹ *Id.*

in constitutional jurisprudence are almost as old as the republic itself.⁹² Yet Holzer, once again, fails to provide such a discussion.⁹³

Equally central to any vindication of Clarence Thomas's jurisprudence is the question of why the framers' original understanding should matter in the first place. Originalism has strong intuitive appeal, in large part because it seems to offer an *objective* interpretation which is not subject to the subjective, policy-oriented, political, unpredictable decision-making which has so justly injured the reputation of "living constitutionalism." But the degree to which it accomplishes this is questionable, particularly given disputes as to the meaning of originalism itself. Moreover, objectivity in interpretation appears to be a feature that can be separated from the other elements of originalism. As Tara Smith recently observed, an originalist like Scalia, who defines a constitutional term (like "liberty") by inquiring into the specific acts that the Constitution's framers believed were denoted by that term, is not really accomplishing objectivity at all, but merely excavating the *subjective* motivations of past generations.⁹⁴ Asking whether the Framers believed that private consensual homosexual acts between adults would be included within the word "liberty" is an epistemological error: the words in the Constitution are *concepts*, which refer not to a precise list of specified percepts, but to an open-ended series of concretes sharing certain qualities.⁹⁵ A judge's task in defining a constitutional term is not a matter of simply transcribing the list of concretes that past generations thought would be denoted by that term, but instead a matter of understanding the objective meaning of the concept and then bringing to it the particular facts of a given case to see whether they are included within that concept.⁹⁶ This is what courts already do when deciding whether a given set of facts constitute "murder"

⁹² See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

⁹³ Indeed, Holzer shows signs of being insensitive to these nuances. In the passages defining originalism he quotes Edwin Meese, Robert Bork, and my colleague Steven Geoffrey Geiseler, three writers whose views on natural rights and originalism diverge widely. Holzer appears to define originalism either by the vague standard of "what the founders thought" or simply by contrast with "living constitutionalism." HOLZER, *supra* note 5, at 3–6.

⁹⁴ See Smith, *supra* note 34, at 206–07.

⁹⁵ See AYN RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY 65–69 (Harry Binswanger & Leonard Peikoff eds., expanded 2d. ed. 1990) (1967).

⁹⁶ Smith, *supra* note 34.

or “burglary,” which are also concepts. Scalia’s approach therefore fails on epistemological grounds.⁹⁷ Yet neither Thomas nor Holzer have provided a more well-grounded alternative, which would necessarily involve courts in more abstract thinking than originalists have yet done. And while a more solid approach would redress these problems, it is questionable whether that approach would rightly be called “originalism.” Its distinguishing feature, after all, would be conceptual objectivity, not adherence to the “original” Constitution.

IV. CONCLUSION

The main virtues of Clarence Thomas’s jurisprudence are his fearlessness with regard to various fetishes of modern law and his greater willingness to consult the natural rights tradition which today lies sleeping under the snow of decades of sometimes perverse precedent. For that alone, Thomas deserves the praise of modern defenders of freedom. But at times, his innovations have been inconsistent, as in the case of substantive due process, or halting, as in the case of his dissent in *Lawrence*. Equally interesting, Justice Thomas’s views are in many ways opposed to mainstream conservative constitutional thought, as articulated by Robert Bork and Justice Scalia. On matters of unenumerated rights, federalism, and the nature of originalism, Justice Thomas’s “liberal originalism” differs significantly from their “conservative originalism.” To learn what Justice Thomas has to teach us requires a more in-depth examination of these matters than Professor Holzer has provided us.

⁹⁷ I express no opinion on whether courts should adopt an objective conceptual approach to constitutional terms *even given* its superiority in epistemological terms. Courts are involved not only in epistemology, but also in the application of the state’s coercive force, so their decisions might also properly be affected by prudential considerations.