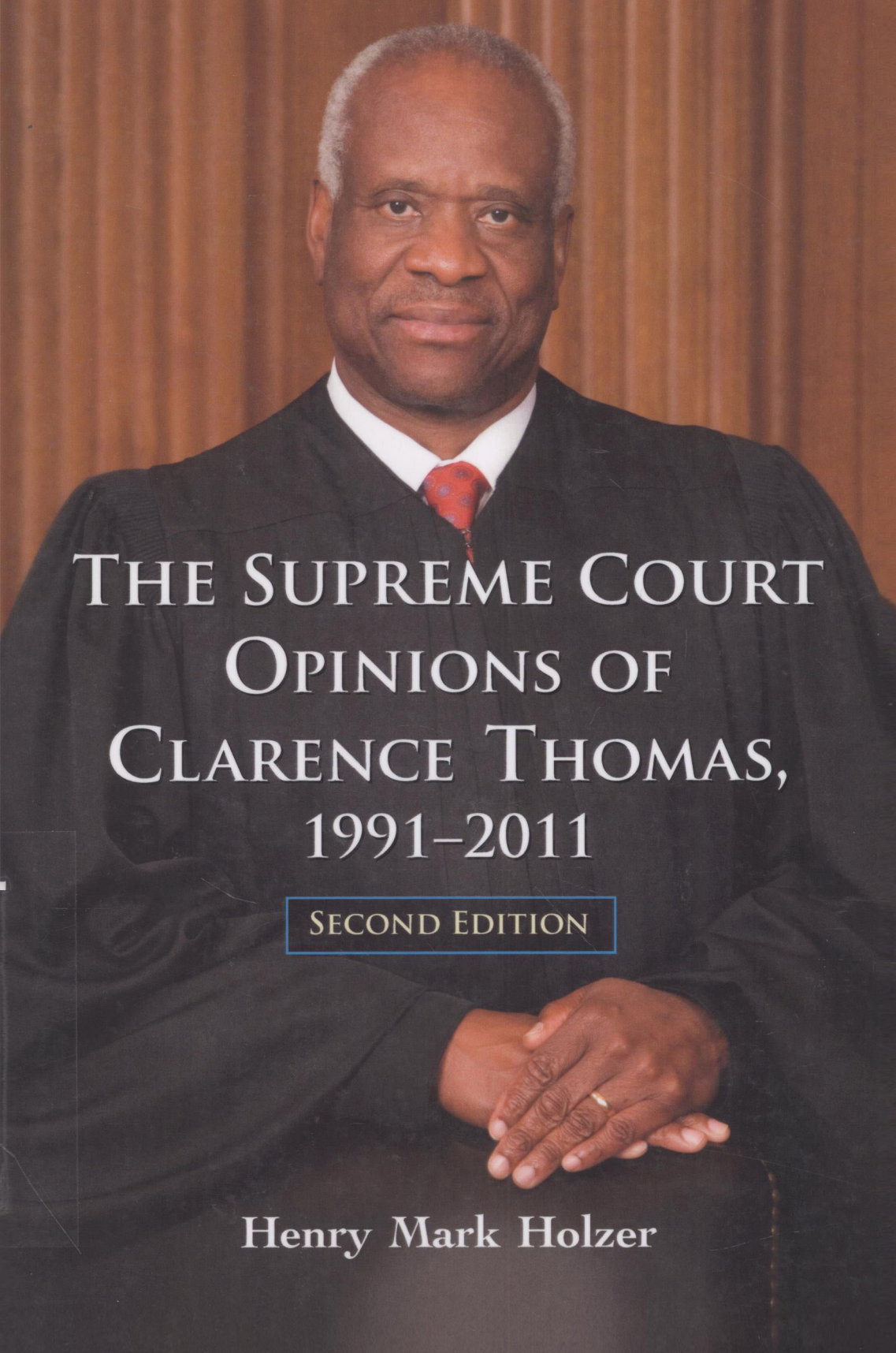

The Supreme Court Opinions of Clarence Thomas, 1991–2011

Second Edition

Henry Mark Holzer

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McFarland & Company, Inc., Publishers
Jefferson, North Carolina, and London

LIBRARY OF CONGRESS CATALOGUING-IN-PUBLICATION DATA

Holzer, Henry Mark, 1933–
The supreme court opinions of Clarence Thomas, 1991–2011 / Henry Mark Holzer. — 2nd ed.
p. cm.
Includes bibliographical references and index.

ISBN 978-0-7864-6334-3
softcover : acid free paper ∞

1. Thomas, Clarence, 1948– 2. Constitutional law — United States. 3. Judicial opinions — United States. I. Title.
KF8745.T48H655 2012
347.73'2634 — dc23 2011050031

BRITISH LIBRARY CATALOGUING DATA ARE AVAILABLE

Front cover: Associate Justice of the Supreme Court of the United States Clarence Thomas

Manufactured in the United States of America

McFarland & Company, Inc., Publishers
Box 611, Jefferson, North Carolina 28640
www.mcfarlandpub.com

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To Clarence Thomas, the keeper of the flame
ignited on July 4, 1776, September 17, 1787,
and December 15, 1791

Acknowledgments

Without the wisdom and courage of those who understood Clarence Thomas's fundamental judicial philosophy and worked so diligently for his appointment as an associate justice of the Supreme Court of the United States, this book would never have been written. For their efforts, I am grateful—as should be our nation.

Nor would this book have been written without a great service done me by William Madison, Esq., of Albuquerque, New Mexico, and Lance Gotko, Esq., of New York City.

I practiced constitutional law beginning with my admission to the New York bar in 1959 until 1972, and have done so from 1992 to the present. During the two decades in between, I not only practiced constitutional law, I taught that subject and related courses at Brooklyn Law School. It was in the crucible of those countless hours of intellectual engagement in Socratic dialogue with students that my own constitutional jurisprudence crystallized. I am indebted to many of them, especially those who disagreed with me. I may have been the hammer, but they were the (mostly) willing anvil.

As she has done with my previous books, my wife, Erika Holzer, lawyer and writer, edited both editions of this book with her typical insight, skill, and dedication. It has been much improved by her ministrations, for which, as always, I am deeply grateful.

My thanks also to Angela and Richard Hoy for seeing the value of the first edition of this book.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.... — Article V of the Constitution of the United States of America

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Introduction

In his twenty terms as an associate justice of the Supreme Court, Clarence Thomas has written about 450 opinions.[1] Despite their consistency in showing him to be a formidable intellect and staunch defender of the Constitution, Justice Thomas's reputation among laypersons and members of the bar and judiciary is not nearly commensurate with his judicial achievements. I cannot count the times that people who should have known better have, simply upon hearing Clarence Thomas's name, immediately responded with ignorant derogatory comments about his abilities as a justice — even though they have never read a single opinion of the hundreds Thomas has written in his twenty years as an associate justice of the Supreme Court of the United States.

In the summer of 2005, when Associate Justice Sandra Day O'Connor announced her retirement from the Court and Chief Justice Rehnquist's illness worsened, those who feared that Clarence Thomas might be appointed chief justice launched a preemptive attack. Not only did Thomas's enemies disinter their ugly rhetoric from the early Nineties' confirmation hearings, they also impugned Thomas's then-fourteen term record on the Court. Their liberal/progressive, ideologically driven attack covered all areas of Supreme Court adjudication: federalism, separation of powers, judicial review — and worse, Justice Thomas's admirable opinions in Bill of Rights and Fourteenth Amendment cases.[2]

Attacks on Justice Thomas have been unconscionable distortions of an unambiguous and distinguished record of his twenty terms on the Court. Simple justice requires they be rebutted because his opinions, often eloquent, reveal him as a thoughtful conservative who understands the nature and meaning of the Constitution, the role of a Supreme Court justice, the methodology of proper constitutional and statutory adjudication, and the appropriate resolution of the many issues that have come to the Court during his now two-decade tenure.

To provide that rebuttal is the reason I wrote the first edition of this book, and why I have now updated it to include the Court's 2006–2010 terms. As far as I know, this book is the first to examine Justice Thomas's entire twenty term body of Supreme Court opinions[3]— majority, concurring,[4] and dissenting.[5]

I want to emphasize that this book is not a personal biography of Clarence Thomas, tracking his ascent from humble beginnings to the highest Court in the land. It does not revisit his bruising Senate confirmation battle, an ordeal that became an insulting and deplorable spectacle. It is not a commentary on the typically uninformed, and sometimes deliberately distorted, hearsay accounts of Justice Thomas's opinions.

To the contrary, this book is about the *jurisprudence* of Associate Justice of the Supreme Court Clarence Thomas, gleaned extensively *from his own words*. Not from what others have reported about what Thomas has written.

The cases and quotations I have selected are those most illustrative of Justice Thomas's jurisprudence. They have been culled from *every* opinion Justice Thomas has written during his twenty term tenure on the Supreme Court of the United States.

Many of Justice Thomas's words have been written in dissent.

The Latin word for "dissent" is "dissentire," which in turn comes from "dis," meaning "apart," and "sentire," meaning "to feel, think."[6] It is Clarence Thomas's "thinking apart" that is the *subject* of this book. Its *theme* is that Thomas's opinions reveal him to be a judicial conservative's conservative.[7] His jurisprudence can best be described as "conservative" because of Thomas's commitment to the Constitution's structural pillars of federalism and separation of powers, and to judicial restraint, and to his understanding that fidelity to those foundational principles can be achieved only by an "Originalist" interpretation of the Constitution and federal statutes. [8]

Thus, to understand Justice Thomas's constitutional jurisprudence it is essential that the reader understand precisely what is meant by the concept of constitutional "Originalism."

Although the principle of Originalism had been around for quite some time, not until 1985 was it formally presented to the organized bar. In July of that year, Attorney General of the United States Edwin Meese, III, delivered an historic speech to the American Bar Association at its meeting in Washington, D.C.[9] Meese's speech caused a constitutional explosion whose reverberations are still being felt, most notably in President George W. Bush's appointments of John G. Roberts, Jr., to be Chief Justice of the Supreme Court of the United States and Samuel Alito to be an associate justice.[10]

In his address to the ABA, Meese reminded the assembled lawyers and

judges of "the proper role of the Supreme Court in our constitutional system":

> The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.

After surveying the Court's October 1984 term's decisions in three subject areas[11] — federalism, criminal law, and religion — Meese asked:

> What, then, should a constitutional jurisprudence actually be? It should be a Jurisprudence of Original Intention. By seeking to judge policies in light of principles, rather than remold principles in light of policies, the Court could avoid both the charge of incoherence *and* [12] the charge of being either too conservative or too liberal.
>
> A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection. This belief in a Jurisprudence of Original Intention also reflects a deeply rooted commitment to the idea of democracy. The Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is why it is the fundamental law. To allow the courts to govern simply by what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered. The permanence of the Constitution has been weakened. A constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense.

Disabusing his audience of the notion that a Jurisprudence of Original Intention was some newfangled fad, merely an interpretive theory *du jour*, the Attorney General adverted to the words of legendary Supreme Court Justice Joseph Story, written in the nineteenth century, which were applicable not only to the Constitution generally but also to statutory interpretation in particular:

> In construing the Constitution of the United States, we are in the first instance to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole and also viewed in its component parts. Where its words are plain, clear and determinate, they require no interpretation.... Where the words admit of two senses, each of which is conformable to general usage, that sense is to be adopted, which without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument.

A few months later, the Attorney General elaborated his theme:

> In recent decades many have come to view the Constitution — more accurately, part of the Constitution, provisions of the Bill of Rights and the Fourteenth Amendment — as a charter for judicial activism on behalf of various constituencies. Those who hold this view often have lacked demonstrable tex-

> tual or historical support for their conclusions. Instead they have "grounded" their rulings in appeals to social theories, to moral philosophies or personal notions of human dignity, or to "penumbras," somehow emanating ghostlike from various provisions — identified and not identified — in the Bill of Rights.[13]

Meese was referring to the Supreme Court's liberal justices, and their allies in academia and the legal profession, who worship at the altar of a "Living Constitution." "One Supreme Court justice," Meese noted, "identified the proper judicial standard as asking 'what's best for this country.' Another said it is important to 'keep the Court out front' of the general society. Various academic commentators have poured rhetorical grease on this judicial fire, suggesting that constitutional interpretation appropriately be guided by such standards as whether a public policy 'personifies justice' or 'comports with the notion of moral evolution' or confers 'an identity' upon our society or was consistent with 'natural ethical law' or was consistent with some 'right of equal citizenship.'"

The Attorney General could have effectively quoted the "Living Constitution's" high priest, the late Supreme Court Associate Justice William J. Brennan, Jr. "[T]he Constitution," according to Brennan,

> embodies the aspiration to social justice,[14] brotherhood, and human dignity that brought this nation into being. * * *[15] Our amended Constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. * * * When Justices interpret the Constitution they speak for their community, not for themselves alone. The act of interpretation must be undertaken with full consciousness that it is ... the community's interpretation that is sought. * * * But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. * * * Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized.[16]

Not content to loose this blather, Brennan, in a not-so-veiled reproach to Originalists, referred to

> those who find legitimacy in fidelity to what they call "the intentions of the Framers." In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. *But in truth it is little more than arrogance cloaked as humility.*[17]

Twenty years after Meese's remarks, in an article for a leading Internet website, www.frontpagemag.com,[18] entitled "Originalism Above All Else," Steven Geoffrey Gieseler[19] explained originalism this way:

> Originalism alone produces a body of law evincing the will of America's citizenry. America has assented to the Constitution as the nation's supreme law, altered only by its own process of amendment. Every day that it remains unchanged, it is ratified again as our governing document. Any deviation from the Constitution that occurs outside of its own terms not only lacks the consent of the governed, but violates it. This includes deviation by judicial fiat. * * * An originalist judge's opinions are moored to the intent of the drafters of the Constitution and its amendments, not the faddish slogans of the day. His or her own predilections are subjugated to our nation's founding papers. This results in a coherent and consistent interpretation of laws. More importantly, originalism results in a canon blessed with America's consent via its adopted Constitution.

In 2005, Robert H. Bork, former law professor, judge of the United States Court of Appeals for the District of Columbia Circuit, and cruelly defeated nominee for a seat on the Supreme Court of the United States, observed that

> For the past 20 years conservatives have been articulating the philosophy of originalism, the only approach that can make judicial review democratically legitimate. Originalism simply means that the judge must discern from the relevant materials — debates at the Constitutional Convention, the Federalist Papers and Anti-Federalist Papers, newspaper accounts of the time, debates in the state ratifying conventions, and the like — the principles the ratifiers understood themselves to be enacting. The remainder of the task is to apply those principles to unforeseen circumstances, a task that law performs all the time. Any philosophy that does not confine judges to the original understanding inevitably makes the Constitution the plaything of willful judges.[20]

In other words, the concept of a "Living Constitution," so central to liberal jurisprudence and evident in so much Supreme Court adjudication, means no Constitution at all.

A "Living Constitution" is anti-democratic because it removes from the public forum and from those politically accountable, and thus from the electorate itself, important issues of social, economic, and other policy, and reposes those issues in nine unelected philosopher kings and queens appointed for life.

There is no worse example of the "Living Constitution" in action than the case of *Griswold v. Connecticut*,[21] to which Attorney General Meese alluded when he spoke of "penumbras."

A Connecticut statute provided that "[a]ny person who uses any drug,

medicinal article or instrument for the purpose of preventing contraception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned"—proving, once again, that in a democracy popularly elected legislators and governors can enact outrageous laws.

Because the federal Constitution does not prohibit the states from enacting outrageous laws—indeed, the Tenth Amendment expressly recognizes state power to enact laws, implicitly allowing them to affect public health, welfare, safety, and morals—the Warren Court had to find some other way to hold the Connecticut statute unconstitutional. The chief justice assigned the task to Associate Justice William O. Douglas, a darling of America's liberals.

In a barely three-page opinion, Douglas prospected his way through the Constitution. Although what he found was fools' gold, it glittered enough to satisfy six more of his colleagues.

According to Douglas, prior cases of the Supreme Court "suggested that specific guarantees in the Bill of Rights"—dealing with speech, press, association, quartering soldiers, search and seizure, self-incrimination, and the education of one's children—"have penumbras, formed by emanations from those guarantees that help give them life and substance." On the basis of these "penumbras" and "emanations"—but not a shred of constitutional precedent or other authority—the Warren Court simply invented a constitutionally guaranteed "right of privacy."

For the seven-justice majority, Douglas wrote:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage [about which the Connecticut law said nothing] is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred [said the oft-married Douglas]. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Despite this pretentious mumbo-jumbo, or perhaps because of it, neither Douglas nor any of his six colleagues had an answer to a simple question asked in Justice Stewart's dissent (in which Justice Black joined): "*What provision of the Constitution ... make*[*s*] *this state law invalid?* The Court says it is the right of privacy 'created by several fundamental constitutional guarantees.' With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."[22]

Despite the clarity of Stewart's persuasive dissent — and because the seven man Warren Court majority wanted to rid Connecticut of what Stewart rightly characterized as an "uncommonly silly law" — the *Griswold* majority simply invented an ersatz "right to privacy." In a barely three-page opinion, this anti-federalism judicial construct would later be used in *Roe v. Wade* as a constitutional rationale for invalidating the anti-abortion laws of virtually every state.

Thus, the notion of a "Living Constitution," the opposite of Originalism, is not only an anti-democratic and intellectually dishonest way to interpret our Constitution and federal statutes. It is also demonstrably capable of manufacturing dangerous ersatz "rights" that impose tremendous moral, social, economic, and political costs on this nation and its citizens.

It is *Griswold's* interpretive methodology — imposed on the basic Constitution, on the Bill of Rights, on the Fourteenth Amendment, and on federal statutes — and the invention and institutionalization of ersatz "rights," that has made possible the decades-long metastasis of the "Living Constitution's" malignant doctrines into most areas of American constitutional and statutory law.

In the name of our Founding Fathers, Justice Clarence Thomas has consistently fought against this anti-constitutional disease during his twenty terms as an associate justice of the Supreme Court. More than any other member of the Court in modern times Thomas has kept the constitutional faith.

To understand the jurisprudence that animates Justice Thomas, it is necessary to understand first the genesis and genius of the Constitution of the United States of America.[23]