
BOOK REVIEWS

The Supreme Court Opinions Of Clarence Thomas, 1991-2006: A Conservative's Perspective

BY HENRY MARK HOLZER

*Reviewed by Jonathan H. Adler**

Since his nomination to the Supreme Court to replace Justice Thurgood Marshall in 1991, Justice Clarence Thomas has been a magnet for attention. His speeches and public appearances draw crowds and controversy, his principled jurisprudential philosophy both devotion and derision. After fifteen years on the Court, he is already one of the most studied Supreme Court justices of all time. Thomas has been the subject of more profiles, biographies, and book-length treatments than all but the most prominent jurists. Among the titles currently available on Amazon are Scott Michael Gerber's *First Principles: The Jurisprudence of Justice Thomas*, Ken Fostkett's *Judging Thomas: The Life and Times of Clarence Thomas*, Andrew Peyton Thomas' *Clarence Thomas: A Biography*, and the newly released *Supreme Discomfort: The Divided Soul of Clarence Thomas* by Kevin Merida and Michael Fletcher. Several more books were written about his epic confirmation battle, and more profiles are on the way. In 2003, Harper-Collins inked Thomas to a \$1.5 million book contract for *My Grandfather's Son: A Memoir*, due for release this October. This may seem a jaw-dropping sum for a Supreme Court Justice's memoir, but it was almost certainly a good investment.

A new addition to the shelf of books on and inspired by Justice Thomas is *The Supreme Court Opinions of Clarence Thomas: 1991-2006: A Conservative's Perspective* by Brooklyn Law School professor emeritus Henry Mark Holzer. Unlike other recent books, *Supreme Court Opinions* focuses exclusively on Thomas' work on the Court, eschewing biographical details or pop psychoanalysis of what makes the most enigmatic and admired Justice tick. Holzer provides a summary of the three-hundred-plus opinions authored by Justice Thomas during his first fifteen years on the Court (and includes a list of these opinions in an appendix), distilling Thomas' jurisprudence to its essentials.

Supreme Court Opinions provides a useful survey of Justice Thomas' judicial philosophy and its application to various issues, often through the language of Thomas' own opinions. As such, it succeeds in providing a highly sympathetic introduction to the jurisprudence of Justice Thomas. Those hoping for a rigorous academic treatment will be left disappointed, however, as the book lacks much critical analysis.

The book is organized by constitutional provisions, providing a tour of Thomas' opinions, virtually clause by clause. It is filled with extensive quotations and descriptions of Justice Thomas' opinions on various subjects. At times Holzer reproduces lengthy passages, or even whole paragraphs, "so that

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his words would, without need for anyone's 'interpretation,' speak for themselves." A consequence of this approach is that *Supreme Court Opinions* provides only limited explication of Justice Thomas' interpretive philosophy or its underlying rationale. For instance, Holzer notes that Thomas' dissent in *U.S. Term Limits, Inc. v. Thornton* provides the greatest insight into the Justice's "sophisticated federalism jurisprudence," but his discussion of the lengthy opinion covers less than a page.

Justice Thomas' opinions are remarkable for their philosophical and interpretive consistency. More than any other Justice on the Court—or in recent memory—Justice Thomas eschews silent acquiescence in opinions that do not track his jurisprudential views. Instead, he regularly authors short concurring opinions to qualify his support for his colleagues' interpretive conclusions. Whether or not one subscribes to Thomas' brand of originalism, his collected opinions have substantial jurisprudential force, and are worthy of searching analysis beyond the intended scope of the Holzer analysis. To probe and question Justice Thomas' opinions is to acknowledge the power and importance of his judicial philosophy and contribution to American law.

Holzer accurately describes Thomas as a "thoughtful conservative" whose "reputation among laypersons is not commensurate with his achievements." Justice Thomas has indeed distinguished himself on the Court as an able and articulate explicator of the original meaning of the Constitution. Thomas fans will not doubt enjoy Holzer's overview and summary of Thomas' unique contribution to the Court, and its hint at the further contributions that are yet to come. The substance of his distinctively conservative jurisprudence is worthy of more critical treatment and discussion. *Supreme Court Opinions* is a good reference work regarding the Justice's body of work—something like an annotated greatest hits—and should please Justice Thomas' many fans, but ultimately more work will be needed to earn more converts to his cause.

The Future of Marriage

BY DAVID BLANKENHORN

*First Review by Katherine S. Spabt**

*Second Review by Dale A. Carpenter***

David Blankenhorn's *The Future of Marriage* is an ambitious book—ambitious in its exploration of the question it takes seriously: "Will same-sex marriage strengthen or undermine the institution of marriage?" The author brings the prism of different disciplines to bear on the question, including biology, history, anthropology, sociology, and psychology. In doing so, he makes a unique contribution to the debate over "same-sex" marriage.

First, he connects the dots of big ideas inherently contained in the recognition of "same-sex" marriage, such as the elimination of the legal categories of mother and father by replacement with "legal" parent (necessarily unconnected to

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biological parenthood). Secondly, he compares the attitudes of citizens of different countries towards the institution of marriage, as reflected in surveys based on whether those countries recognize or do not recognize “same-sex” marriage. Not surprisingly, Blankenhorn finds a *correlation* between the attitudes of citizens in countries that recognize “same-sex” marriage and their general lack of support for marriage as an institution. Finally, he identifies some of the most vocal supporters of “same-sex” marriage as those interested in “de-institutionalizing” marriage, replacing this social institution with arrangements or families that result from adult choices. These arrangements vary in form from cohabitation to polygamy and polyamory. For abandonment of the fundamental core of the institution of marriage recognizable across history and across cultures—that is the union of a man and a woman—means necessarily that nothing about the institution is immutable.

Let us examine what I consider to be these unique contributions one at a time.

1. *It recognizes big ideas inherently connected to the recognition of “same-sex” marriage.*

In Chapter 6, Blankenhorn argues that, conceptually, recognition of “same-sex” marriage communicates the following ideas: (1) Marriage is not connected to sex. (2) Marriage is not connected to bridging the sexual divide between male and female. (3) Marriage is not connected to rearing children. (4) Marriage is not connected to legal and biological parenthood. (5) Children do not need a father and a mother. These ideas are nothing less than radical; but of course, Blankenhorn is right. Clearly, changing marriage to permit two people of the same sex to marry changes motherhood and fatherhood. Ask the Canadians. Mothers and fathers as legal terms of art are replaced by the asexual legal term “parent.” “*Parent*” disconnected from biology, as it must be for one parent of a same-sex union (at least for now), becomes a flexible term that could conceivably extend to any third person with a psychological connection to the child. Currently, unregulated collaborative reproduction, depending upon whose gametes are used, scientifically assists the redefinition of parenthood. The result: *the child is denied the right to know and be cared for by his or her [biological] parents*. Article 7, United Nations Convention on the Rights of the Child.

For Blankenhorn, whose earliest and most influential work sounded the alarm about children reared without fathers, children will bear the brunt of one more disastrous adult experiment. In *Fatherless America* (1995), he marshaled evidence from different disciplines, much from the social sciences, to demonstrate that children suffered from the lack of father involvement across all measures of child well-being. From that vantage point, Blankenhorn recognized that marriage was the best vehicle for assuring that a father remained devoted to and invested in the rearing of his children. Marriage as a social institution united and theoretically bound the father to his children through their mother. As he phrases it, “there can be no fatherhood [a social definition] without marriage.”

2. *It compares the attitudes of citizens of different countries to establish a correlation between recognition of “same-sex” marriage and lack of support for the institution of marriage.*

Now that there exists some foreign experience with the legal recognition of “same-sex” relationships, especially in Europe, Blankenhorn utilizes two survey documents, both conducted within the last ten years: the ISSP, which reached twenty-four countries, and the World Values Survey of citizens in thirty-five countries. What he discovered was extremely interesting; there was a *correlation* in survey interviews between the weakest support for marriage in the seven countries that recognize “same-sex” marriage (essentially accord all the rights and privileges of marriage to same-sex unions). Residents of countries that recognize “civil unions” but not “same-sex” marriage express stronger support for the institution of marriage. In the two countries where only some regions recognize “same-sex” marriage, the United States being one, support for marriage is even stronger. Finally, in the thirteen countries surveyed that fail to recognize either same-sex marriage or civil unions, support for marriage was the strongest.

In his use of the survey data, Blankenhorn carefully distinguishes what he sees as a *correlation* between attitudes toward marriage in countries that recognize “same-sex” marriage from causation. He explains correlation as the result of “things that tend naturally to cluster together.” Judging from the response of critics of Blankenhorn’s book, it is this information and “the correlation” that is the focus of the ire of “same-sex” marriage proponents. It obviously hit a nerve. No doubt the reason is that it is the only information that suggests empirically a connection between the relatively new phenomena of legally recognized “same-sex” marriage and generally hostile attitudes toward the institution of marriage. Unlike accusations about the work of Stanley Kurtz, Blankenhorn is very careful to suggest only a correlation, not causation, but this has failed to spare him the same incensed criticism. In fact, his cautionary approach to the information and what can be learned from it may have engendered an even stronger reaction. He sounds (and is) so reasonable and careful.

3. *It identifies the goal of some of the most vocal supporters of “same-sex” marriage as the de-institutionalization of marriage.*

Those who professionally dislike marriage almost always favor “same-sex” marriage. In fact, recognition of gay marriage, according to Blankenhorn, constitutes a brilliant strategy for transforming or, in effect, (according to marriage advocates like me) abolishing the institution of marriage. The possibility of transformation naturally assumes that marriage is a social construct and thus capable of transformation by a certain amount of manipulation. Although Blankenhorn recognizes that humans constructed this social institution sanctioned by law and custom, he opines that it has natural roots (i.e. biochemical) and deep foundations. Yet, it is also, in his words, “fragile.”

Blankenhorn observes that the most vocal proponents of “same-sex” marriage define *marriage* for purposes of public debate in terms that reflect relatively superficial sentiments when

compared to the richly complex structure of the social institution of marriage. For example, consider this definition of marriage: it is an expression of love and commitment between two people. Or, marriage constitutes social approval and validation of a couple's love. Or, marriage civilizes relationships between adults, especially men. Or, marriage constitutes a means of distributing benefits for those who make a commitment. Such definitions of marriage conjured up by proponents of "same-sex" marriage reflect a relationship that is fragile indeed and surely not the historically robust social institution we have called marriage.

To his credit, David Blankenhorn does not ignore what evidence exists that challenges his own arguments and definition of marriage. For example, he carefully examines the few social groups that scholars cite as departing from the traditional definition and purpose of marriage—the Nayars (southwest India), the Nuers (southeastern Sudan and western Ethiopia), the Navajo, and certain formal "homosexual unions" in Africa and Melanesia. In each case he finds that marriage patterns may differ but not fundamentally and that the formal "homosexual unions" do not constitute the equivalent of marriage.

Although I do not agree with all statements in *The Future of Marriage*, I agree with most of them. I know David Blankenhorn and know how reluctant he has been to publicly engage this difficult topic. His struggle is obvious throughout the book. He respects the human dignity of all persons but nonetheless refuses to capitulate to demands to change marriage as a means of affording it. Opposition to "same-sex" marriage from marriage proponents like David Blankenhorn and me center on one fundamental proposition: "For every child, a mother and a father."

On March 28, I addressed part of David Blankenhorn's argument, relying on international survey data, that support for same-sex marriage ("SSM") is part of a "cluster" of "mutually reinforcing" beliefs that are hostile to traditional marriage. "These things do go together," he writes.

I responded by saying that a correlation between the recognition of SSM in a country and the views of its people on other marital and family issues (1) could not show that SSM in that country caused, or even contributed to, those other views, and (2) did not tell us anything very important about whether, on balance, SSM is a good policy idea. SSM might be a small part of a project of reinstitutionalizing marriage—despite what those who hold a cluster of non-traditional beliefs about marriage may hope for.

I do not deny that people who hold non-traditionalist views about family life and marriage also tend to be more supportive of SSM; I simply maintain that the existence of this cluster in some people is not very important in the public policy argument about SSM. By itself, it tells us nothing about what the likely or necessary *effects* of SSM will be. It would similarly not be very useful in the debate over SSM to note the existence of other correlations more friendly to the case for SSM, like the fact that countries recognizing SSM tend to be wealthier, more educated, more democratic, healthier, have lower infant mortality rates, longer life expectancy, and are more devoted to women's equality, than countries that refuse to recognize gay relationships.

The second half of Blankenhorn's argument that supporting SSM and opposing marriage "go together" boils down to this:

[P]eople who have devoted much of their professional lives to attacking marriage as an institution almost always favor gay marriage.... Inevitably, the pattern discernible in the [international survey data] statistics is borne out in the statements of the activists. Many of those who most vigorously champion same-sex marriage say that they do so precisely in the hope of dethroning once and for all the traditional "conjugal institution."

In a move that has become common among anti-gay marriage intellectuals, Blankenhorn then quotes three academics/activists who do indeed see SSM as a way to begin dismantling traditional marriage and undermining many of the values associated with it. There are many more such quotes that could be pulled from the pages of law reviews, newspaper op-eds, dissertations, college term papers, and the like. They have been gathered with great gusto by Maggie Gallagher and especially Stanley Kurtz, who regards them as the "confessions" of the grand project to subvert American civilization. (Remember the "Beyond Marriage" manifesto that excited Kurtz so much last summer? Not many people do.)

I do not deny that there are supporters of SSM who think this way, including some very smart and prominent academics. I wince when I read some of what they write; in part because I know these ideas will be used by good writers like Blankenhorn to frighten people about gay marriage, in part because I just think they're wrong normatively and in their predictions about the likely effects of SSM on marriage. But mostly I wince because if I believed they were correct that SSM would undermine marriage as an institution, if I thought there was any credible evidence that this was a reasonable possibility, I would oppose SSM—regardless of whatever help it might give gay Americans and the estimated 1-2 million children they are raising right now in this country.

So I wince, but I am not persuaded that either correlations from international surveys or statements from marriage radicals show that "gay marriage clearly presupposes and reinforces deinstitutionalization [of marriage]."

First, as Blankenhorn well knows, it is not *necessary* to the cause of gay marriage to embrace the "cluster" of beliefs he and I would both regard as generally anti-marriage. One could, as many conservative supporters of gay marriage do, both support SSM and believe that (1) marriage is not an outdated institution, (2) divorce should be made harder to get, (3) adultery should be discouraged and perhaps penalized in some fashion, (4) it is better for children to be born within marriage than without, (5) it is better for a committed couple to get married than to stay unmarried, (6) it is better for children to be raised by two parents rather than one, and so on.

Second, a policy view is not necessarily bad because some (or many) of the people who support it also support bad things and see those other bad things as part of a grand project to do ill. Some (many?) opponents of gay marriage also oppose the use of contraceptives (even by married couples), would recriminalize sodomy, would end sex education in the schools, and would