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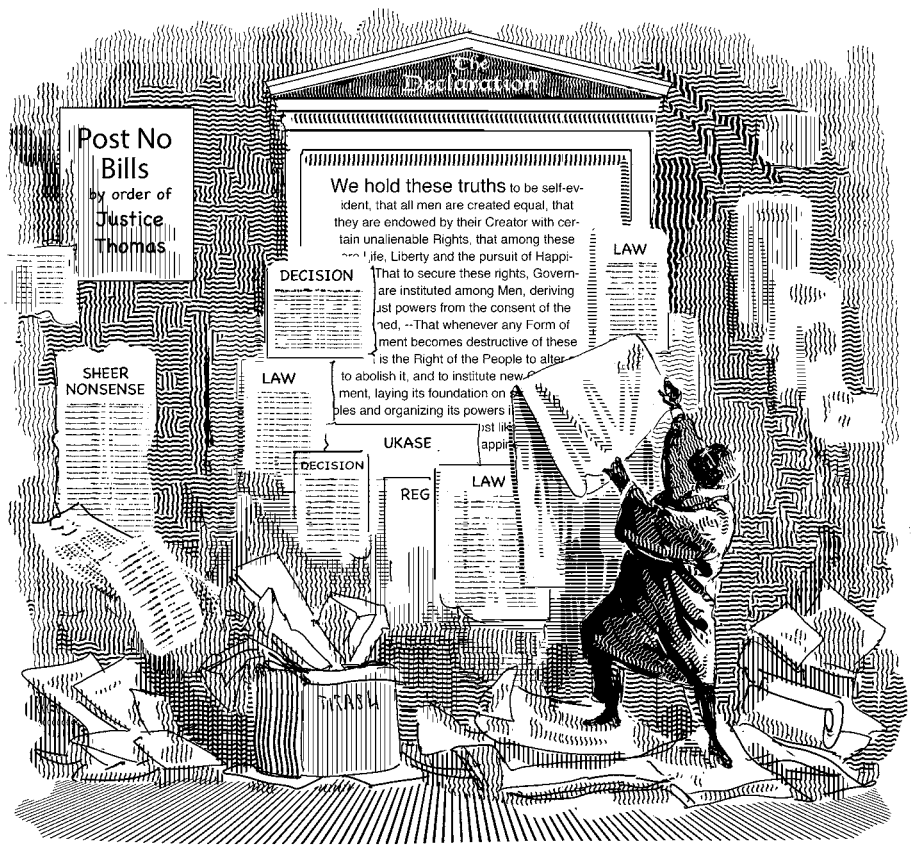
Book Review by John C. Eastman

Down to the Bare Wood

Understanding Clarence Thomas: The Jurisprudence of Constitutional Restoration, by Ralph A. Rossum.
The University Press of Kansas, 296 pages, $34.95



Understanding Clarence Thomas is Ralph Rossum's second study of the jurisprudence of "originalist" Justices on the Supreme Court. It will have to be next to his last, until there are some changes on the Court. Having covered Justice Antonin Scalia (in *Antonin Scalia's Jurisprudence: Text and Tradition*, 2006), and now Justice Thomas, he has nearly exhausted the genre for the time being. Rossum describes Thomas's jurisprudence as one of "original general meaning" that seeks to understand the Constitution's text as did those who ratified it and to give binding effect to that original understanding, overruling, if necessary, even long-established precedent. It is with respect to the latter point that Thomas's originalism on the High Court has been at odds (albeit rather rarely) with Scalia's. One senses that Rossum, the Henry Salvatori Professor of American Constitutionalism at Claremont McKenna College, places himself more in the camp of Scalia, but he does a marvelous job of capturing Thomas's position and letting Thomas make his case for himself.

Because Thomas is willing to overrule precedent—even long-standing precedent—that is at odds with the Constitution, he is criticized for "engaging in his own brand of judicial activism," as Rossum puts it. But this criticism is misdirected, as Rossum points out, because, for Thomas, "judicial restraint does not mean acquiescence in departures from 'the mandate of the Framers'; it means actively attempting to restore the Constitution's original general meaning"—that is, the plain meaning of the Constitution's text as it was understood by the people who ratified it.

Rossum describes how, in area after area of law, Thomas has sought "to scrape away past precedents and go back to [the] bare wood" of the Constitution. In *Kelo v. New London, Connecticut* (2005), for example, the Supreme Court considered whether government could use the power of eminent domain to take property from one private owner and give it to another private owner merely because, in the government's view, the latter's use would be more beneficial to the public. In his dissenting opinion in that case, Thomas wrote that the principles to decide the case are to be found not in precedent, but in the meaning of the Constitution's Public Use Clause itself. The Justice took a similar tack in a series of opinions involving the First Amendment's prohibition on Congress passing a law "respecting an establishment of religion." In these opinions, Thomas almost single-handedly revived the notion that the clause was a federalism provision, intended to prevent *federal* interference with state policy with respect to religion, not to erect a wall between church and state as is commonly believed today. *Zelman v. Simmons-Harris* (the 2002 Ohio school voucher case) was Thomas's "breakthrough opinion" on the subject, Rossum notes, but Thomas elaborated on the original general meaning of the Establishment Clause in three other cases—*Elk Grove Unified School District v. Newdow* that same year (the Pledge of Allegiance case), *Van Orden v. Perry* in 2005 (the Ten Commandments case), and in 2011, *Davenport v. American Atheists, Inc.* In these cases, Thomas called for a "more fundamental rethinking of [the Court's] Establishment Clause jurisprudence," even to the point of overruling such widely respected but wrongly decided cases as *Lemon v. Kurtzman* (1971) and *Lee v. Weisman* (1992). Perhaps most boldly, Thomas invited reconsideration of the entire line of "substantive due process" cases in his concur-

ring opinion in *McDonald v. Chicago* (2010), in which he argued that the right to keep and bear arms was protected against state infringement by virtue of the Privileges and Immunities Clause of the 14th Amendment, not the Due Process Clause.

Thomas's "go back to bare wood" method has also been evident in 4th, 5th, and 6th Amendment criminal law cases, in cases dealing with the federal government's expansive claims of power under the Interstate Commerce Clause, and in free speech cases, among others. Thomas has even suggested he'd be willing to reconsider the holding in the 1798 case of *Calder v. Bull* that the Ex Post Facto Clause prohibits only retroactive criminal laws, not retroactive civil laws. Rossum carefully documents how Thomas's forays in several of these areas—frequently in concurring or dissenting opinions—increasingly serve as markers for future reconsideration by the Court. Indeed, one of the distinguishing features of a Thomas opinion is the phrase, "The parties do not request it here, but in an appropriate case, this Court should reconsider" one precedent or another that he believes is not consistent with the original meaning of the Constitution. A good example is his insistence—first in a concurring opinion in 2000, then in dissent in a 2002 case—that the 6th Amendment requires that any fact that increases a criminal sentence must be found by a jury and that the Court's precedent in *McMillan v. Pennsylvania* (1986) to the contrary had to be overruled. Thomas's position finally garnered a majority of the Court in the 2013 case of *Alleyne v. United States*, and the original meaning of the 6th Amendment's right to trial by jury, rather than the intervening erroneous precedent, is once again the binding law of the land even at the Supreme Court.

In short, Rossum shows that Thomas's understanding of the original meaning of the Constitution is both thorough and profound, and that he feels obligated by his oath of office to give that meaning effect whenever required to do so in a case that comes before him. Nonetheless, Rossum challenges some of Thomas's conclusions, taking him to task, for example, for his "powerful, but also somewhat myopic," view of the Commerce Clause, or more precisely, for his view that the Court has a duty to enforce the limits on Congress's authority under the Commerce Clause. Rossum asserts that the American Founders envisioned the Senate, not the Court, as the check against congressional abuse of the Commerce Clause power. Indeed, Rossum goes so far as to characterize Thomas's decisions in this field as "non-originalist." Rossum is undoubtedly correct that the founders envisioned the Senate—at the time chosen by state legislatures—as an important, perhaps even the primary, check on excessive claims of federal power, but he does not come close to demonstrating that the founders viewed it as the only check. It is not Thomas's Commerce Clause decisions, therefore, but Rossum's view of the Court—unfortunately shared by the Chief Justice—that is "somewhat myopic" here. In his decision upholding the Affordable Care Act, for example, John Roberts seems to have assumed that political process is the only appropriate check on power grabs by Congress, leaving no role for judicial enforcement of limits on the enumerated powers.

Rossum repeats the error when describing Justice Thomas's opinions on the Indian Commerce Clause, stating flatly that Thomas was "wrong on the original meaning" of it. That clause, Rossum assures us, "conferred an explicit, broad, and exclusive grant of power to the federal government to deal with Indian tribes"; indeed, the federal government has "plenary power" over them by virtue of the power given to Congress to "regulate commerce…with the Indian tribes," according to Rossum. But none of the examples from the First Congress that Rossum relies upon proves his claim; indeed, they prove just the opposite. Congress's power over Indian tribes does not stem from the Indian Commerce Clause alone, but from the power to declare war, to regulate in federal territories, to spend money for the general welfare, and to give effect to the president's significant powers to enter into treaties with the Indian tribes. It is the latter powers, not the Indian Commerce Clause, that give rise to a "plenary" or police power on Indian reservations. And Rossum's reliance on *Cherokee Nation v. Georgia*, decided in 1831, more than 40 years after the adoption of the Constitution, is an example of the very overweighting of precedent that in the rest of the book Rossum praises Thomas for eschewing.

Rossum's criticism that Thomas's decisions in the State Sovereign Immunity cases are not in accord with the original general meaning of the Constitution, and, in particular, of the 11th Amendment, is probably correct, however. "A faithful employment of Thomas's original general meaning approach would require" a different outcome in those cases, Rossum asserts, and I am inclined to agree. Both the text and theory of the Constitution seem to support the notion that, for matters involving federal law (as opposed to state law, heard in the federal courts by way of diversity jurisdiction), the states are not sovereign and cannot

claim sovereign immunity, the people having delegated sovereign authority over such matters to the federal government. But maybe Justice Thomas has seen something that Rossum and I do not yet see.

Rossum gives Thomas high marks for being willing to reconsider even his own prior opinions when, after further reflection, he determines that they are not consistent with the Constitution. For example, he originally embraced the Court's precedent (from 1980) considering commercial speech as speech that was of "lower value" and therefore entitled to less protection under the First Amendment. Later, in *44 Liquormart v. Rhode Island* (1996), in a concurring opinion Rossum describes as displaying "a matured understanding of the issue of commercial speech," Thomas repudiated his earlier opinion and the precedent. Rossum also praises Thomas for his change of heart on the so-called dormant Commerce Clause doctrine, describing the Justice's decision in *Camps Newfound/Owatonna v. Town of Harrison* (1997) as "an impressive illustration" of his "original general meaning jurisprudence."

Finally, it is important to note why "original general meaning jurisprudence" is a good thing, why it is good to scrape away precedent down to the bare wood of the original Constitution. After all, the general view in the legal academy today is that the American Founding was flawed, and that "progress" away from the founders' constitutional design, from the Constitution's original general meaning, is therefore a good thing. The entire school of "living constitutionalism," born in the Progressive movement a century ago, is grounded on such a belief. The counter view is that the founders' original Constitution was the result of a combination of extensive practical experience in governing and an understanding of certain self-evident truths that was perhaps unique in human history and is worth preserving or restoring. The key ingredient in that counter view is the role of the Declaration of Independence in providing the moral foundation for the Constitution. As Abraham Lincoln beautifully put it, employing an image from the book of Proverbs, the Constitution is the picture of silver made to protect and preserve the apple of gold, which is the Declaration of Independence and its principles.

This is a point on which Claremont originalists disagree not only with the "progressive" liberal elites of our day, but with a good number of conservatives as well. Ralph Rossum makes a passing reference to Justice Thomas's alliance with the Claremont view on this score by noting his concurring opinion in *Adarand Constructors v. Peña* (1995), in which he describes the pernicious paternalism that lies at the heart of race-based affirmative action programs as "at war with the principle of inherent equality that underlies and infuses our Constitution," citing only the Declaration of Independence in support of that proposition. What Rossum omits is that Thomas's citation of the Declaration of Independence was an exclamation point to a long-running dispute with his fellow originalist Justice Scalia about the role of the Declaration in constitutional interpretation. Having written major works assessing the jurisprudence of these two leading originalist jurists, Ralph Rossum is perhaps uniquely qualified to tease out the nature of that dispute. Because he chooses not to do this, his exploration of Thomas's original general meaning jurisprudence remains more descriptive than normative. But *Understanding Clarence Thomas* has laid the groundwork quite nicely for future inquiries into the beauty and liberation to be found in the "bare wood" Thomas is seeking to uncover.

John C. Eastman is the Henry Salvatori Professor of Law & Community Service and former dean at Chapman University's Fowler School of Law, and founding director of the Claremont Institute's Center for Constitutional Jurisprudence. He served as a law clerk with Justice Thomas during the Court's 1996-97 term.