

REAFFIRMING THE NATURAL LAW JURISPRUDENCE OF JUSTICE CLARENCE THOMAS

KIRK A. KENNEDY*

In only his seventh term on the United States Supreme Court, Associate Justice Clarence Thomas is leaving an indelible mark on the face of American law. The erudition and indefatigable intellectual energy manifested in Thomas' recent opinions and speeches are refreshing, especially in an age when the philosophy of law is being overwhelmed by various postmodern legal movements that challenge our most fundamental assumptions about the law as a conservative institution.¹ Under the rubric of normative legal philosophy, the ascendancy of such varied legal subdisciplines as law and economics, critical race theory, feminist jurisprudence, and law and literature permeate legal discourse to the point where heterodoxy is the new orthodoxy. Unfortunately, the time-honored classical jurisprudence exemplified in the writings of jurists like Blackstone, Kent, and Story is considered quaint at best by today's standards,² while the eclectic ruminations of postmodern theorists Ronald Dworkin, Cass Sunstein, and Catharine MacKinnon have captured the imagination of American legal scholarship.³ This development, however, should not be all that surprising if we begin from the premise that lawyers are indeed

* Attorney, Ryley, Carlock & Applewhite, Phoenix, Arizona; B.A., Northern Arizona University (1989); J.D., University of Nebraska (1995). I would like to thank Daniel Maldonado for his valuable research assistance and insightful comments on earlier drafts of this article.

1. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 243 (Phillips Bradley ed. 1945). DeTocqueville persuasively argued that America lawyers and American law generally were by nature conservative in their orientation and resistant to sweeping radical social phenomena – exemplified in the French Revolution—that sought to undermine societies committed to the rule of law. *Id.*

2. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1793-1795); JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (1839); JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (1833).

3. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) (advocating an approach to constitutional interpretation that would subject all government action to heightened judicial scrutiny); Catharine MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 *HARV. WOMEN'S L. J.* 5 (1994).

products of their philosophies. According to Alasdair MacIntyre, the prevailing methods of moral inquiry and their influence on jurisprudential development within the profession are ultimately determined by “who is performing these tasks and what his or her theological and moral standpoint and perspective is.”⁴

Against this backdrop, the emergence of Justice Thomas’ muscular, yet traditional jurisprudence demonstrates more than just the intellectual resiliency of first principles, but as MacIntyre correctly points out, it tells us much more. In particular, it highlights the moral and spiritual compass that has guided Clarence Thomas in producing an array of powerful opinions rooted in the history and tradition of the American legal experience. Just a quick perusal of Thomas’ bold dissent in *U.S. Term Limits v. Thornton*⁵ is enough to convince both friend and foe alike of his connectedness to both the mind and spirit of the Framers of the Constitution.⁶ By now it can certainly be said that Thomas has successfully demolished the hysterical prediction, made during his confirmation by the political and academic left, that he was destined to be an unimaginative Scalia clone.⁷ In fact, the opposite has proven to be true. Unlike Justice Scalia, whose jurisprudence exhibits a textualist orientation, Thomas is unapologetic in his defense and exposition of an original understanding of the Constitution, the Declaration of Independence, and the “higher law” principles that animate those documents. Not since the turn of the century, when members of the Supreme Court frequently appealed to the logic of natural rights and used the Declaration of Independence as a touchstone for interpreting the Constitution,⁸ has a single justice played such an

4. ALASDAIR C. MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY, AND TRADITION* 17 (1990).

5. 514 U.S. 779 (1995) (Thomas, J., dissenting).

6. Christopher E. Smith, *Bent on Original Intent*, A.B.A. J., Oct. 1996, at 48 (noting Justice Thomas’ distinctive vision of constitutional law based on an historical interpretive approach).

7. See JANE MAYER & JILL ABRAHMSON, *STRANGE JUSTICE, THE SELLING OF CLARENCE THOMAS* 358 (1994); TIMOTHY M. PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES: THE INSIDE STORY OF CLARENCE THOMAS, ANITA HILL AND A SUPREME COURT NOMINATION* 428 (1992).

8. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (Peckham, J.); *Gulf Colorado & Santa Fe Railroad v. Ellis*, 165 U.S. 150, 160 (1897) (Brewer, J.); *Plessy v.*

integral role in rekindling the seminal debate over the role of natural law and natural rights in constitutional adjudication.

Interestingly, it was the 1991 nomination of Clarence Thomas to the Supreme Court that precipitated the reemergence of natural law into contemporary legal discourse. In his pre-confirmation speeches and articles, Thomas argued passionately in favor of a clearly defined role for natural law in constitutional interpretation⁹—a view which his opponents believed would provide the ammunition to “bork” his nomination.¹⁰ Yet, when confronted by hostile members of the Senate Judiciary Committee, Clarence Thomas, the nominee, quickly disclaimed natural law as an acceptable basis for juridical decision-making.¹¹ Instead of affirming his previously stated position that “natural rights and higher law arguments are the best defense of liberty

Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting); *Butchers' Union Slaughter-House and Livestock Landing Co. v. Crescent City Live-stock and Slaughter-House Co.*, 111 U.S. 746, 754 (1884) (Field, J., concurring). See also C. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 200-210 (1930) (discussing the foregoing Justices' reliance on the Declaration of Independence for guidance in interpreting the Constitution). Cf. *Sandin v. Conner*, 115 S. Ct. 2293, 2303 (1995) (Ginsburg, J., dissenting) (arguing that a prisoner's liberty interest descends from the Declaration of Independence).

9. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989) [hereinafter *Higher Law Background*]; Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOWARD L.J. 983, 994 (1987) [hereinafter *Plain Reading*]; Clarence Thomas, *Why Black Americans Should Look to Conservative Policies*, Address Before the Heritage Foundation (June 1987), in POL'Y REV. Fall 1991, at 72 [hereinafter *Conservative Policies*].

10. The expression “to bork” became part of the political lexicon after the nomination of Judge Robert Bork to the U.S. Supreme Court was destroyed. It describes a political tactic whereby the opponents of a judicial nominee employ reckless and extreme hyperbole to characterize the nominee as outside the judicial mainstream. By making charges immediately after the nominee is announced and well before the confirmation hearings commence, the confirmation paradigm is altered such that it becomes a pure political exercise instead of a juridical one. See STEPHEN L. CARTER, *THE CONFIRMATION MESS* 49-51 (1994). In the case of Clarence Thomas, his adversaries tried to portray his judicial philosophy as outside the mainstream by mischaracterizing natural law. Mark Silk, *Nominee's Views Emanate From the Conservative Fringe*, LOS ANGELES DAILY J., Sept. 12, 1991, at 6; Laurence H. Tribe, *Natural Law and the Nominee*, N.Y. TIMES, July 15, 1991, at A20. But see Michael W. McConnell, *Showdown Over Natural Law: Thomas' Critics Distort His Unsurprising Views on Issue*, LOS ANGELES DAILY J., Sept. 12, 1991, at 6.

11. *Hearings On the Nomination of Clarence Thomas to Be Associate Justice of the Supreme Court of the United States, Senate Comm. on the Judiciary*, 102nd Cong., 1st Sess. 271 (1991) [hereinafter *Hearings*].

and limited government,”¹² Thomas did an about-face, specifically explaining to the Chairman of the Committee that his interest in natural law was limited to its utility as a political theory and not as a jurisprudential system.¹³ Although Judge Thomas had never explicitly used natural law as the basis for an opinion while serving on the D.C. Circuit, it was still disconcerting that he so quickly abjured much of the natural law philosophy he presented so articulately in his articles and speeches. On the other hand, when the showdown over natural law came to an abrupt and anticlimactic halt,¹⁴ it became apparent that any of Thomas’ momentary confirmation schizophrenia paled in comparison to the intellectual dishonesty of his detractors, who frantically searched for more damaging political ammunition to destroy his nomination.¹⁵ In the broadest sense, however, Thomas’ confirmation denial that normative legal philosophy should play an integral role in judicial decisionmaking, ultimately did little to quell the growing debate over the role of natural law and natural rights. As noted Ninth Amendment scholar Randy Barnett recently observed, “we are in the midst of a natural law revival.”¹⁶

Still, the dominant question remains and the central focus of this article is: In the wake of this natural law revival, to what extent (if any) has Justice Thomas reaffirmed his pre-confirmation inclination to use natural law as a jurisprudential tool? This article answers that question. For those who require a short answer to the foregoing question, it is this: Clarence Thomas, in his tenure as Supreme Court Justice, has continued to expound a jurisprudence entirely consistent with natural law theory. Indeed, Thomas’ limited renunciation of natural law in September 1991 has been thoroughly eclipsed by his utilization of interpretive constitutional strategies, manifested in various written

12. Thomas, *Higher Law Background*, *supra* note 9, at 63.

13. *Hearings*, *supra* note 11, at 237.

14. Realizing that Thomas’ affinity toward natural law would not derail his nomination, especially in view of Thomas’ natural law disclaimer, his opponents then leveled charges of sexual harassment. For an account of the political motivation behind such charges and the lack of factual support, see DAVID BROCK, *THE REAL ANITA HILL* (1994).

15. *Id.*

16. Randy Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMM. 93 (1995).

opinions, votes, and speeches, that are wholly consistent with his pre-confirmation writings and speeches on natural law. There is one caveat to this claim, however, that should be noted. As a member of the Court, Justice Thomas' natural law advocacy is appreciably more nuanced and subtle now, compared to his pre-confirmation treatment of the subject. In objective terms, his inclination toward a natural law theory of constitutional interpretation does not yet amount to a systematic and exhaustive theory of jurisprudence. But, when contrasted with the sterile positivism—almost tending toward nihilism—that characterizes the legal philosophy of many American judges¹⁷ and most of the legal academy,¹⁸ it is increasingly clear that Thomas' work on the Court is destined to be the vanguard of a powerful moral, philosophical, and legal counterrevolution steeped in the religious and moral traditions of Western Civilization. The end result is a reaffirmation of an approach to law and jurisprudence grounded not in the pragmatism or unbridled individualism of modernity, but rather grounded in what Blackstone described as the “law of nature . . . dictated by God himself [and] superior in obligation to any other.”¹⁹

As a background to making descriptive claims about Thomas' methodology, Part I of this Article provides a brief overview and definition of the natural law tradition. This is necessary to avoid the confusion over natural law generated by positivists, like Judge Bork, who tend to mischaracterize the essence of what natural law is and is not.²⁰ It is also necessary to distinguish traditional natural law systems with systems that claim to have a natural law basis, but are actually dressed-up, humanistic versions of natural law derived from assumptions that are singly the product of man's own inventions.²¹

17. *United States v. Lynch*, No. 96-6137, 1996 WL 717912 (2d Cir. 1996) (unpublished opinion) (holding explicitly that “natural law cannot furnish a valid basis upon which to nullify [a federal statute]”).

18. See John Stick, *Can Nihilism Be Pragmatic?* 100 HARV. L. REV. 332 (1986) (noting the predominance of nihilism among critical legal scholars).

19. 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 41.

20. ROBERT BORK, THE TEMPTING OF AMERICA (1991).

21. See Philip E. Johnson, *Some Thoughts About Natural Law*, 75 CAL. L. REV. 217, 219 (1987) (identifying natural law systems premised on single governing principles [e.g. economic efficiency, equality, neutrality, autonomy or utility]).

Part II proceeds from a classical understanding of natural law and demonstrates how Clarence Thomas' pre-confirmation legal philosophy incorporated natural law as a legitimate and necessary exegetical device. Along these lines, the penetrating historical application of natural law theory to the institution of slavery and Thomas' argument that the positive law of slavery could not be reconciled with the fundamental rights of liberty and self-determination embodied in the Declaration of Independence and incorporated into the U.S. Constitution²² is powerful evidence of Thomas' commitment to natural law.²³

Next, Part III critically examines Thomas' key opinions, votes, and speeches as a Supreme Court Justice that are useful in discerning a continued yet more subdued adherence to natural law principles. The linchpin of this section is an analysis of several key cases where the opinions of Thomas are juxtaposed with those of Supreme Court Justice David Souter, a jurist who has done much to demonstrate both the shocking limitations of noninterpretivist legal analysis and the need for law with a normative anchor. In particular, Justice Thomas' contributions to the Court's recent decisions in the areas of free speech, religious liberty, federalism, property rights, abortion and affirmative action will be discussed in terms of natural law. Finally, the article offers some general descriptive claims about the nature and content of Thomas' legal philosophy based upon the corpus of his work both on and off the Court and both pre-and post-confirmation. These claims are then harmonized with the normative underpinnings of natural law explained in Part I. Ultimately, this article concludes that the structure of Justice Thomas' jurisprudence undeniably has its foundation in "the laws of nature and nature's God."

22. Thomas concurs with Professor Harry Jaffa's argument that *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), was wrongly decided because the slave's right to assert his essential humanity trumps the slave holder's property right in another human being. Compare Harry V. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?* 10 U. PUGET SOUND L. REV. 351, 411 (1987) with Thomas, *Plain Reading*, *supra* note 9, at 984-86. Professor Jaffa is a natural law scholar at the Claremont Institute and a disciple of German philosopher, Leo Strauss.

23. HARRY JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 96-104 (1994); See generally Thomas, *supra* note 9.

I. THE REVIVAL OF NATURAL LAW

Beyond the simple truth of Randy Barnett's observation that we are seeing a renewed academic interest in natural law and natural rights, there is the need to discover the composition of this natural law revival and thus understand and define what is meant by the terms "natural law" and "natural rights." Two points of clarification need to be made to bring the issues of the natural law debate into sharper focus. First, the 1990s postmodern debate over the place of natural law is occurring on a different level than the seminal philosophical battle waged in 1958 between American legal scholar Lon Fuller and Oxford Professor H.L.A. Hart.²⁴ Even though the Hart-Fuller conversation represented the archetypal encounter between secular natural law (represented by the normative legal philosophy of Lon Fuller) and Professor Hart's European positivism, the contrast between those competing systems was still much less pronounced compared to the stark differences between Thomistic²⁵ or even Straussian²⁶ natural law, and the pure legal positivism championed by Holmes.²⁷ Notably, although Lon Fuller ably exposed the weaknesses of Professor Hart's positivism, he still rejected the providential origins of natural law.²⁸ Fuller's implicit

24. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (denying that the existence and legitimacy of law depends upon moral standards); Lon Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (rejecting Hart's position by arguing the rule of law is predicated on something more than law's existence).

25. Thomistic natural law philosophy is grounded in the work of St. Thomas Aquinas. See discussion *infra*, pp. 42-43. Thomism is characteristically definite and free from the moral ambiguities present in secular natural law systems constructed and defended by Fuller and other secular natural lawyers.

26. Straussian natural law is based on the writings and teachings of German philosopher Leo Strauss. Strauss borrowed heavily from the works of Aquinas, Plato, and Aristotle in articulating a sophisticated and traditional brief in support of natural law and against the nihilism and unqualified relativism that he saw invading Western and particularly American thought. See generally LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (1953).

27. Justice Holmes was the quintessential legal positivist and skeptic who ridiculed the notion that mere legislative or judicial enactments are ultimately subject to the laws of nature and nature's god. Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40 (1918).

28. Lon Fuller, *A Rejoinder to Professor Nagel*, 3 NAT. L. F. 83, 84 (1958) (rejecting the idea that there is a "higher law transcending the concerns of this life against

denial of god-made law makes the secular natural lawyer's case against positivism more tenuous, precisely because the secular natural lawyer must eventually concede to the positivist that there is no sovereign authority to evaluate the competing claims presented in their respective legal systems. On the other hand, the traditional, divine, natural law's noble simplicity is that it presents a fundamental and noticeable counter-position to those theorists—like Justice Holmes—that deny there are universally valid rules governing human conduct.²⁹

The philosophical gradations manifested in the positions of Hart and Fuller must be countenanced by a second point of clarification. In its most fundamental terms, the natural law debate is really one between the Judeo-Christian origins of our legal traditions and institutions, and the positivist, utilitarian systems that may or may not masquerade under the rubric of natural law theory. Senate Judiciary Committee Chairman Joe Biden's shrill and unprincipled invocation of natural law during the Bork and Thomas confirmation hearings is a prime example of how natural law is frequently misunderstood, distorted, and often invoked to justify partisan political ends or egalitarian policy objectives.³⁰ Legal philosophies based on equality, feminism, and vague notions of justice,

which human enactments can be measured").

29. See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (denying the presence of natural law by stating "[t]he fallacy and illusion that I think consist in supposing that there is this outside thing [body of law] to be found").

30. When Judge Bork explained that it is impossible to interpret the Ninth Amendment as guaranteeing unenumerated rights, Senator Biden responded with a forceful and unambiguous endorsement of natural law:

I believe we are just born with certain rights as a child of God having nothing to do whether the State or the Constitution acknowledges I have those rights; that they are given to me and you and each of our fellow citizens by our creator and it represents the essence of our human dignity.

Hearings on the Nomination of Robert Bork to be Associate Justice of the Supreme Court of the United States, Senate Comm. On the Judiciary, 100th Cong., 1st Sess. 729 (1987) (statement of Senator Biden).

Four years later, Senator Biden wrote an op-ed piece which suggested he experienced a profound conversion to a staunch legal positivism. He declared: "If Clarence Thomas believes the Supreme Court should apply natural law above the Constitution then in my view he should not serve on the Court." Joseph Biden, *Law and Natural Law: Questions for Judge Thomas*, WASH. POST, Sept. 8, 1991, at C1.

often attempt to cloak themselves with the mantle of natural law.³¹ At the core though, whether one subscribes to natural law as the necessary foundation for a comprehensive system of laws really depends on the type of natural law one is talking about. For purposes of this inquiry into Clarence Thomas' natural law jurisprudence, it is essential to define terms when making descriptive claims about the brand of natural law that animates Thomas' legal and philosophical worldview.³²

A. *Classical and Christian Natural Law*

Classical natural law is a prescriptive system that recognizes the existence of laws and rights antecedent to the creation of the state. These immutable laws and rights can be discovered by resort to human reason and by examining the fundamental nature of man and his environment.³³ It follows *a priori* that because the unchangeable law of nature does not trace its origins to legislative enactment or judicial mandates, human laws that clash with natural law must be considered a nullity. Natural law, as thus stated, while not a peculiarly Christian invention, traces its origins to the great thinkers and scholars of Western Civilization. The classical approach to natural law, as first articulated by the ancient Greeks, was essentially teleological and intellectualist.³⁴ That is, human action is considered good when it is directed toward fulfilling a purposeful existence and when man adheres to a course of conduct that is prescribed by objective and universal norms. Platonic and Aristotelian philosophies are fine exemplars of classical natural

31. See generally R. George Wright, *Is Natural Law Theory of Any Use in Constitutional Interpretation?* 4 S. CAL. INTERDISCIPLINARY L.J. 463 (1995) (arguing that natural law is indeterminate such that it can be used to justify a variety of moral and judicial outcomes).

32. A summary understanding of natural law and natural rights in historical context is provocative in that there are legal historians who violently object to the notion that the Framers broadly accepted natural law, much less incorporated natural law principles into the Constitution.

33. As stated by St. Thomas Aquinas, every man "has a share of the Eternal Reason, whereby [he] has a natural inclination to [his] proper act and end: and this participation of the eternal law in the rational creature is called natural law." 2 THOMAS AQUINAS, *SUMMA THEOLOGICA* II, Q. 91, Art. 2.

34. STRAUSS, *supra* note 26, at 7 (observing that classical natural right is "connected with a teleologic view of the universe").

law.³⁵ In the days of the Roman Republic, Marcus Cicero affirmed the idea that natural law and justice are innate to human existence. According to Cicero, what is right and true is also eternal, and does not begin or end with written statutes, "[l]aw is the distinction between things just and unjust, made in agreement with that primal and ancient of all things, Nature."³⁶

A purely Christian conception of natural law owes its existence to the singular contributions of St. Thomas Aquinas.³⁷ Aquinas, more than any other man in history, can be credited with successfully harmonizing the natural law theories articulated by the ancient Greeks and early Church Fathers into a single, systematic and intellectually coherent philosophy.³⁸ Borrowing heavily from Aristotelian ethics, Aquinas expounded the view that right reason and divine revelation are the tools whereby "we discern what is good and what is evil, which is the function of natural law."³⁹ Aquinas identified five fundamental attributes of man's nature which guide human action on a course consistent with natural law:

1. To do what is good and avoid what is bad.
2. To preserve life, man's own being, and his existence.
3. To preserve the species through sexual reproduction.
4. To live in community with other men.
5. To avoid ignorance and develop the intellect whose object is the search for truth.⁴⁰

35. In the *Laws* for example, Plato criticizes the claims of the Sophists that all law and legislation owes its essential being to the artifice of man rather than to natural law and justice. PLATO, *LAWS* x 889-890. Aristotelian philosophy, on the other hand, emphasizes man's capacity to engage reason and intellect in the process of discovering his ultimate nature and purpose. See ARISTOTLE, *NICOMACHEAN ETHICS* (T. Erwin ed., 1985).

36. MARCUS CICERO, *LAWS*, in *THE GREAT LEGAL PHILOSOPHERS* 51 (C. Morris ed. 1959).

37. Justice Thomas has on several occasions in his speeches and writings made approving references to St. Thomas Aquinas. See e.g. Justice Clarence Thomas, Address at The Federalist Society in Washington, D.C. (May. 16, 1994), reprinted in *LEGAL TIMES*, May 23, 1994, at 25; Clarence Thomas, *No Room at the Inn—The Loneliness of the Black Conservative*, *POL'Y REV.* Fall 1991, at 72, 78 [hereinafter *The Loneliness of the Black Conservative*]; Thomas, *Plain Reading*, *supra* note 9, at 989.

38. A.P. D'ENTREVES, *NATURAL LAW: AN HISTORICAL SURVEY* 38-40 (1965).

39. AQUINAS, *SUMMA THEOLOGICA*, *supra* note 33.

40. ETIENNE GILSON, *THE PHILOSOPHY OF ST. THOMAS AQUINAS* 328-29 (1993).

Although a comprehensive exposition of Thomistic philosophy is certainly beyond the scope of this article, there are two critical aspects of Aquinas' teachings that must be addressed to gain a full understanding of the hierarchical nature of sectarian natural law in the context of positivistic human or civil law. First, Aquinas postulated that human laws which fundamentally conflict with the law of God are *per se* unjust and, therefore, are no law at all.⁴¹ Second, as a corollary to this first proposition, Aquinas views the State—and therefore the civil law—as ordained by God to assist man in achieving both his eternal and earthly ends. Civil law declared by judges or legislators and sanctioned by the State is thus understood as complementary rather than antagonistic to natural law.⁴² Still, the fact that civil law is derived from the natural law also implies that the only certain restraint upon the excessive power of the State is natural law, for in the absence of the natural law, the State becomes the supreme arbiter of man's rights, purpose, and conduct.⁴³ Facing the specter of a state where man's rights in civil society are merely contingent upon the will of the lawmaker, the affirmation of natural law with a distinctive Christian orientation provides the best defense against legal tyranny.⁴⁴ On this point, Professor Charles Rice of Notre Dame University provides the best justification of orthodox natural law:

41. AQUINAS, *SUMMA THEOLOGICA*, *supra* note 33.

42. One of the best examples of this precept is illustrated in the historical claim that the Framers incorporated natural law into the Constitution and Bill of Rights to insure that transcendent higher law principles of natural justice and right would not be abridged by runaway constitutional positivism. See Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent,"* 15 HARV. J.L. & PUB. POL'Y 965 (1992) (presenting the historical case that the Founders were strong adherents of a natural law and natural rights philosophy that was consonant with the written Constitution). See also Douglas W. Kmiec, *America's Culture War*, 3 ST. LOUIS U. PUB. L. REV. 183, 192-93 (1993) (observing that natural law accords a substantial degree of deference to positive law and that positive law is made rational by natural law). This notion that natural law principals are embedded in the positive law of the United States Constitution is key to discerning the natural law jurisprudence of Clarence Thomas.

43. This is essentially the viewpoint expressed by Thomas Hobbes in *Leviathan*. See generally THOMAS HOBBS, *LEVIATHAN: ON THE MATTER, FORM AND POWER OF COMMONWEALTH ECCLESIASTICAL AND CIVIL* (M. Oakeshott ed., 1946).

44. The "lawful" rise to power of Adolph Hitler in 1933 and the legal sanction given to the slaughter of the unborn by the Supreme Court in *Roe v. Wade* are two powerful instances where bare legality becomes the only justification for state action.

[The state] which denies the spiritual nature and eternal destiny of man can offer no coherent security for rights, including the right to live. If man is nearly matter, with no destiny beyond the grave, there is no intrinsic reason for any absolute limits on what society and the State can do to him. The only intelligible basis for asserting absolute, inalienable rights against the State is that man is an immortal, spiritual creature, with an eternal destiny, made in the image and likeness of God whose law governs all. There are absolutes, which even the State and the lawyers cannot change.⁴⁵

B. Lockean Natural Law, the Framers, and the Constitution

The natural law tradition that emerged during the Enlightenment period, in large part, placed its emphasis on empiricism and rationalism. Although criticized by orthodox natural law theorists as highly individualistic and antagonistic to the revealed religion of the Church,⁴⁶ the natural rights philosophy that permeated the thinking of men like Locke, Montesquieu, and Jefferson still held much in common with the classical and Christian traditions of Cicero, Aquinas, and Richard Hooker.⁴⁷ The modern, rights-based version of natural law emphasized the inviolability of civil rights logically deduced from transcendent law that promote both individual and community virtue. This natural rights philosophy heavily influenced the American Founders because it provided them with a formidable and comprehensive intellectual basis that legitimated their rejection of English hegemony, and ultimately

45. Charles Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539, 557 (1989).

46. *Id.* at 552-53 (arguing the philosophy of the Enlightenment contributed to the ascendancy of moral relativism); Theodore P. Nebard, *A Few Words on John Locke*, 40 AM. J. JURIS. 199 (1995) (claiming John Locke is the "father" of legal positivism).

47. Robert P. George, *From Jefferson's "Letter to Henry Lee" to Martin Luther King's "Letter From Birmingham Jail"*, 43 CATH. U.L. REV. 143, 153 (1993). Englishman Richard Hooker was a natural law lawyer in the Anglican tradition who sought to synthesize Aristotelian and medieval natural law systems with the English common law. John S. Marshall, *Richard Hooker and the Origins of American Constitutionalism*, in ORIGINS OF THE NATURAL LAW TRADITION (A. Harding ed., 1954).

lead to American independence.⁴⁸

In the middle seventeenth century, English philosopher John Locke expounded a comprehensive political theory based on natural rights and natural law.⁴⁹ Locke's natural law theory can be reduced to three general yet fundamental principles from which man's specific rights and obligations can be inferred.⁵⁰ First, natural law imposes on man a duty to glorify God. Second, human action is circumscribed by the law of nature such that man, having the inalienable right to self-preservation, is constrained to act in accordance with Divine Law. And third, because man must live in community with humankind, he is duty bound to preserve society and not destroy it. To attain these ends and discharge his responsibilities, man therefore consensually "enters into political society and submits to its authority."⁵¹ Locke's ideas about the purpose of government eventually found their way into the Declaration of Independence⁵² in the oft-quoted passage where Jefferson declares:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness—that to secure these Rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.⁵³

There is ample historical evidence that the Declaration's natural law principles—as defined by Locke and then recorded by Jefferson—concerning the existence of self-evident truths and inalienable rights

48. FORREST McDONALD, *NOVUS ORDO SECLORUM, THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 58-59 (1985).

49. To glean a better understanding of Thomas' approach to natural law, a discussion of Locke is imperative, especially in view of Thomas' numerous references to the Declaration of Independence, which at its essence is a compact recordation of Locke's political theory. See generally JOHN LOCKE, *THE WORKS OF JOHN LOCKE* (10th ed. 1801) (explaining the natural rights of life, liberty and property); JAFFA, *supra* note 20, at 315 (noting Jefferson's reliance on the work of John Locke).

50. Jaffa, *supra* note 23 at 61-62.

51. *Id.* at 65.

52. See *id.* at 65, 145.

53. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

that are immutable and conferred upon man by God, predominated in the thinking of the Framers.⁵⁴ In turn, their favorable inclinations toward natural rights and natural law were incorporated both explicitly and implicitly into the Constitution.⁵⁵ Professor Harry Jaffa poignantly writes that “natural law principles are within the Constitution, as elements of positive law of the Constitution, and in accordance with the original understanding of those who framed and those who ratified the Constitution.”⁵⁶

Admittedly, the contours of the Framers’ natural law thinking were not fully developed into a systematic exposition of political philosophy unique to the American founding. Instead, the parameters of the Framers’ natural law theory was broad enough to encompass elements of both Enlightenment and sectarian interpretations of natural law to the point where a general consensus developed as to first principles. To the extent that Christian tradition and the Enlightenment tradition differ on matters of teleology and epistemology, they are unified in the sense that both reject the view that man lacks an intrinsic nature that gives rise to certain claims of right beyond the reach of civil government. Accordingly, the Framers recognized the following natural rights as derivative from natural law: (1) the rights revealed by nature including all rights under the rubric of the right to self-preservation; (2) the right to property; (3) freedom of conscience; (4) freedom of communication; (5) freedom from arbitrary laws; (6) the rights of assembly and petition; and (7) the right to self government.⁵⁷

While the preceding list of natural rights contains rights enumerated in the Constitution (albeit some in negative fashion), the acknowledgment of these rights by the Framers also serves an

54. Brennan, *supra* note 42, at 971-73 (concluding that George Washington, John Adams, James Madison, Thomas Jefferson George Mason, Edmund Randolph *et al.* recognized the principles of natural law and natural rights); JAFFA, *supra* note 23, at 34-35 (asserting that “without exception the [Founding] Fathers held that the only legitimate purpose of government was to secure rights whose origin is antecedent to all charters or human or positive laws”).

55. *See id.*

56. HARRY JAFFA, *STORM OVER THE CONSTITUTION: JAFFA ANSWERS BORK* 51 (1994).

57. Kmiec, *supra* note 42 at 191 (citing Chester James Antieau, *Natural Rights and the Founding Fathers—The Virginians*, 17 WASH. & LEE L. REV. 43 (1960)).

unintended harmonizing function. The political philosophy that composed the thinking of modern natural rights philosophers like Locke, Jefferson, and many of the Framers, was not formed out of thin air. Rather it rests upon the seminal arguments and ethical philosophy of medieval and premodern natural law theorists. Jefferson himself recognized this fact by noting that the Declaration of Independence found its authority in the works of Aristotle, Cicero, Locke and Sidney.⁵⁸ In terms of modern constitutional and civil law, this common ground between the ancients and the moderns is of vital importance. Both traditions share the notion that in civil society there exists a legal and moral objectivity that circumscribes both human and governmental conduct.

In political terms then, constitutions are merely manifestations of the social contract whose continued viability and authority ultimately depends on extra-legal phenomenon like the inalienable rights of human beings, and the values society regards as worthy.⁵⁹ The Constitution of the United States and American laws generally derive their legitimacy not from the fact of being, but because they represent and are consistent with the universal norms that assist men in achieving their ultimate ends. Accordingly, any theory of constitutional interpretation based on natural law and natural rights must have as its touchstone the following mandate: Judges must interpret the Constitution in a manner that is simultaneously compatible with a natural rights based approach to the Constitution while reaching results that do not transgress the objective and transcendent moral order which regulates societal ends.

C. *Holmes, Bork and the Positivist Fallacy*

As the father of American legal positivism, Oliver Wendell Holmes, and his jurisprudence stand in stark contrast to the natural law philosophy of Aquinas, Locke and Clarence Thomas. In Thomas' words, it is Holmes's nihilistic legal theory that "unites the

58. See THE POLITICAL WRITINGS OF THOMAS JEFFERSON 88 (Edward Dumbauld ed., 1955).

59. STRAUSS, *supra* note 26, at 136-37.

jurisprudence of the left and the right today.”⁶⁰ What is remarkable though is the degree to which respectable conservative legal scholars, most notably Judge Robert Bork, are captivated by Holmesian legal philosophy. On natural law, Justice Holmes and Judge Bork share more in common than Judge Bork would probably like to admit.⁶¹ Both are considered staunch apologists for a legal order based on positivism, a theory of law that enshrines legislative enactment and judicial practice as the ultimate authority over human relations.⁶² For Holmes, the quintessential moral skeptic, natural law and natural rights “are at the bottom of the philosopher’s efforts to prove that truth is absolute and for the jurists’ search for criteria of universal validity.”⁶³ Natural law is thus reduced exclusively to a construct of man’s experience. While Holmes’ views are not unique, in the sense that natural law has certainly been criticized before, neither can they be casually dismissed given Holmes’ considerable influence on the regression of American legal thought. This may be traced to the longevity of Holmes’ career, his prolific writing, and the degree to which legal education was seduced by his rejection of objective truth.

In fairness to Judge Bork, however, his rejection of natural law is grounded in the idea that the recognition of supra-constitutional norms is an open invitation for activist judges to subvert the democratic process.⁶⁴ He rejects the arguments propounded by natural lawyers (and presumably Justice Thomas) that the Constitution should be

60. Clarence Thomas, *How to Talk About Civil Rights: Keep It Principled and Positive*, Keynote Address before the Pacific Research Institute (Aug. 4, 1988).

61. Judge Bork’s aversion toward natural law jurisprudence is distinguishable from that of Holmes in that while Bork does not deny that there is a law of nature, he states that judges do not have the authority to enforce it. ROBERT BORK, *THE TEMPTING OF AMERICA* 66 (1990). Holmes, on the other hand, would find himself in agreement with Jeremy Bentham who described natural law as “nonsense on stilts.” *THE WORKS OF JEREMY BENTHAM* 501 (J. Bowring ed., 1962).

62. Professor Hart articulated five meanings of positivism: (1) laws are commands of human beings; (2) there is no connection between laws and morals; (3) the study of legal meaning should be divorced from historical inquiry or non-legal phenomena that influence law; (4) all legal systems are closed; and (5) moral systems cannot be defended like facts. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 601-602 n.25 (1958).

63. Holmes, *supra* note 27, at 40.

64. BORK, *supra* note 61.

interpreted as if the natural law principles embodied in the Declaration of Independence were written into it.⁶⁵ Responding to Professor Jaffa in the public policy magazine *National Review*, Bork leaves no doubt that in his view, the doctrine of original understanding leaves no room for the application of natural law: “We know, for example, that the ‘unalienable rights’ did not become constitutional absolutes . . . so far as the Constitution is concerned, these rights are unalienable unless society has reason to take them away.”⁶⁶

Bork’s conservative credentials notwithstanding, his fear that natural law will be used as a pretext for the creation of “new” rights misunderstands the relationship between natural law and natural rights. Natural law is not a license for judicial invention of rights that are not internally consistent with the natural law paradigm.⁶⁷ For example, in *Griswold v. Connecticut*,⁶⁸ Justice Goldberg made an illusory attempt based on the Ninth Amendment to recognize the right of a married couple to have unfettered access to contraceptive devices.⁶⁹ The defect in Goldberg’s unenumerated “rights” analysis, however, is found in the natural law itself. The prohibition against any artificial interference with man’s natural inclination to preserve the species is an overriding command of the natural law.⁷⁰ Therefore, natural law cannot be the foundation for recognizing a “natural” right that is incompatible with a fundamental law of nature. Certainly, the massive increase in abortions and sexually transmitted diseases occurring since the advent of *Griswold* is not indicative of a social good, not to mention its implication for public health. These staggering social pathologies strongly suggest that Goldberg’s assertion, that under the rubric of the right to privacy there exists some unenumerated natural right to birth control, is not internally consistent with natural law or natural rights

65. Robert Bork, *Mr. Jaffa’s Constitution*, NAT. REV., Feb. 7, 1994, at 61.

66. *Id.* (emphasis added).

67. Philip Hamburger, *Natural Rights, Natural Law and American Constitutions*, 102 YALE L.J. 907, 945 (1993) (explaining that “our natural rights are bounded and determined by the law of nature, which binds us to be subject to the will and authority of God”).

68. 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

69. *Id.* at 488-89.

70. GILSON, *supra* note 40 (see accompanying text).

principles.

It is, therefore, imperative to define natural law and natural rights narrowly enough to respond to Judge Bork's claim that natural law gives the judge *carte blanche* to invent new constitutional rights. The rejoinder though is not, as Judge Bork suggests, to engage in full scale retreat into a conservative brand of legal positivism. Instead, it is to carefully distinguish traditional natural law, with its foundation in the teachings of the Ancient Greeks, Aquinas, and Locke, from contemporary jurisprudential systems that champion legal norms based on abstract notions of justice, equality, or utilitarianism.⁷¹ When Justice Thomas, Professor Charles Rice, and Professor Jaffa speak of natural law, they are referring to natural law that is orthodox and rooted in our history, customs and traditions. This is not the natural law envisioned by Judge Bork that is a license for judges to create new rights where they did not previously exist.

II. THOMAS' PRE-CONFIRMATION APPEAL TO NATURAL LAW (1982-1991)

Prior to his nomination to the Supreme Court and while serving as Chairman of the Equal Employment Opportunity Commission (EEOC) in the Reagan and Bush Administrations, Clarence Thomas consistently articulated a strong commitment to a natural law jurisprudence. In numerous speeches and articles, Thomas reiterated a vision of natural law that integrated the philosophies of Aquinas, Locke, and the Framers into a unified theory of constitutional interpretation. The cornerstone of Thomas' appeal to natural law was the familiar and recurrent theme that the Constitution should be interpreted in a manner consistent with the higher law principles made manifest in the Declaration of Independence. As he explained in a 1989 article, that passionately argued in favor of reexamining the Slaughter-House Cases⁷² and adopting a natural rights interpretation of the Privileges or Immunities Clause of the 14th Amendment, "[i]f the Constitution is not the logical

71. See Johnson, *supra* note 21, at 218.

72. 83 U.S. (16 Wall.) 36 (1872). For an explanation of these cases, see *infra* notes 129-39 and accompanying text.

extension of the Declaration of Independence, important parts of the Constitution are inexplicable."⁷³ From this overarching rule of interpretation, Thomas cultivated a natural law and natural rights philosophy that profoundly governed his legal perspective in such discrete areas as civil rights enforcement, affirmative action, abortion, and property rights.

A. *Natural Law, Slavery, and Civil Rights*

During the 1980s, Thomas' natural law philosophy dovetailed nicely with his conservative political vision that championed individual liberty against the excesses of a large and intrusive federal government. The primary purpose of government, according to Thomas, is to secure and safeguard the inalienable rights of its citizens.⁷⁴ Borrowing from the Lockean notion that the state derives its legitimacy from the consent of the governed,⁷⁵ Thomas pictured natural law and natural rights as the bulwark that guarantees all Americans equal treatment under the law.⁷⁶ To illustrate this point, he frequently invoked the paradigm of President Abraham Lincoln's moral invective against the evils of slavery and specifically Chief Justice Taney's opinion in *Dred Scott v. Sanford*.⁷⁷ In particular, Thomas approvingly cited Lincoln's speech which criticized the Supreme Court's affirmation of a constitutional right to own slaves.⁷⁸ In this speech, Lincoln argued that Taney's opinion was contrary to the Constitution because it ignored the paramount principles of liberty and equality that flowed from the Declaration of Independence into the text and meaning of the Constitution.⁷⁹ The rights of Negro slaves to pursue the good and assert their basic

73. Thomas, *Higher Law Background*, *supra* note 9, at 65.

74. Thomas, *supra* note 60, at 6-8.

75. See THE SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME & ROUSSEAU (ed. E. Barker 1947).

76. Clarence Thomas, *No Room at the Inn - The Loneliness of the Black Conservative*, POL'Y REV., Fall 1991, at 72, 78.

77. 60 U.S. (19 How.) 393 (1857) (opinion of Taney, C.J.).

78. Thomas, *supra* note 76, at 69.

79. Thomas, *Higher Law Background*, *supra* note 9, at 65, citing Abraham Lincoln, Speech Delivered at Springfield, Illinois, (June 26, 1957), reprinted in, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 398 (R. Basler ed., 1946).

humanity were not contingent upon the recognition of those rights by government, but instead were inherent and permanent. Taney's decision was in deep conflict with natural law, the Declaration of Independence, and the Constitution precisely because it failed to acknowledge that fact. Lincoln, however, did:

Slavery is founded in the selfishness of man's nature—opposition to it in his love of justice. These principles are in eternal antagonism. Repeal the Missouri compromise, repeal all compromises, repeal the Declaration of Independence, repeal all past history, you still cannot repeal human nature.⁸⁰

Certainly, Lincoln's understanding of the Constitution countenances the conventionalist view that the rights of slaves were secured merely by the passage of the Thirteenth and Fourteenth Amendments. Such a positivistic claim ignores the centrality of Lincoln's and Justice Thomas' shared view that the "connection existing between natural law standards and constitutional government [is] the connection between ethics and politics."⁸¹ This was true in 1776 and more than ever, it is true today. Law and politics without a firm grounding in the objective morality compelled by natural law are made manifest in laws that permitted slavery, laws that sanction unnatural sexual conduct, laws that permit medical experimentation on human embryos, and in judicial decisions like *Dred Scott* and *Roe v. Wade*.⁸² In the face of these inhumanities, Clarence Thomas was surely correct when he proclaimed that "those who deny natural law cannot get me out of slavery."⁸³

Thomas' vision of the role of natural law, as applied to the historical context of slavery, is broad enough that it transcends any single historical application. During his tenure as Chairman of the

80. THE COLLECTED WORKS OF ABRAHAM LINCOLN 315 (Roy Basler ed., 1953).

81. Thomas, *The Loneliness of the Black Conservative*, *supra* note 37, at 78.

82. 410 U.S. 113 (1973).

83. Professor Robert George interview with Judge Clarence Thomas, Princeton, New Jersey, (June, 1991), *cited in*, Robert P. George, *From Jefferson's Letter to Henry Lee to Martin Luther King's Letter From Birmingham Jail*, 43 CATH. U.L. REV. 143, 145 (1993).

EEOC from 1982 to 1990, natural law principles guided Clarence Thomas as he employed the same natural law paradigm used to defend the equal rights of slaves in the cause of modern civil rights enforcement.⁸⁴ As head of what Thomas denoted as “one of the most visible and controversial agencies in the United States Government,”⁸⁵ he was charged with the daunting task of enforcing federal civil rights laws at a time when conservatives were calling for a reexamination of the policies of affirmative action, quotas, and racial set-asides. Thomas’ effectiveness at the EEOC was maximized not merely because his conservative political philosophy meshed nicely with that of other conservatives in the Reagan Administration, but primarily because his civil rights philosophy manifested a deep intellectual coherence that was well grounded in the natural law and natural rights tradition.⁸⁶ Chairman Thomas expressed his view that

[n]atural law . . . is indispensable to decent politics. . . . [It] allows us to reassert the primacy of the individual, and establishes our inherent equality as a God given right. This inherent equality is the basis for aggressive enforcement of civil rights laws and equal employment opportunity laws designed to protect individual rights. Indeed, defending the individual under these laws should be the hallmark of conservatism rather than its Achilles’ heel.⁸⁷

That natural law and natural rights have profoundly influenced Thomas’ position on civil rights is evidenced in at least two ways. First, Thomas takes the position that the Civil War Amendments, specifically the Privileges or Immunities Clause of the Fourteenth Amendment, were archetypes of the Declaration of Independence and its clarion call for recognizing the equality of each human being’s inalienable, pre-

84. Clarence Thomas, *The Equal Employment Opportunity Commission: Reflections On A New Philosophy*, 25 STETSON L. REV. 29 (1985).

85. *Id.* at 76.

86. *See generally*, Thomas, *Higher Law Background*, *supra* note 9.

87. Thomas, *Conservative Politics*, *supra* note 9, at 78.

societal rights.⁸⁸ By skillfully contrasting Justice Harlan's dissenting opinion in *Plessy v. Ferguson*,⁸⁹ with the jejune reasoning of Justice Warren in *Brown v. Board of Education*,⁹⁰ Thomas demonstrates the vitality of a jurisprudence grounded in "political freedom, which rests in a view of man as being capable of reasoning and choosing objectively."⁹¹ Thomas maintains the Court's reasoning in *Brown* was flawed because it exalted dubious social science and empiricism above the natural law doctrine that through objective reason, one can conclude that laws which deny the universal civil rights of equality before the law and liberty are inconsistent with the Constitution.⁹² In contrast, Justice Harlan's logic in *Plessy* was powerful precisely because it connected the Civil War Amendments to the spirit of the Founding, thus providing a measureless normative rationale for civil rights laws that recognized the basic civil rights of all citizens irrespective of color, creed, gender, or religious belief.⁹³ Here, Thomas demonstrates both the subtlety and the complexity of his natural law jurisprudence when he states that Harlan's reference to a "color-blind" Constitution is really much more than a hackneyed battle cry for the opponents of affirmative action. Rather, the value of "color blindness" in constitutional adjudication is understood as an extension of the Framers' view that all men are created equal and, therefore, laws which effectively parcel out political rights based on race (or gender) violate the normative underpinnings of natural law, natural rights, and natural justice.

The second way in which former Chairman Thomas manifested his

88. Thomas, *Plain Reading*, *supra* note 9, at 994. See also Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and the Fourteenth Amendment*, 66 TEMP. L. REV. 361 (1993) (arguing that the principles of the Declaration of Independence were incorporated into the Constitution when the Civil War Amendments were enacted).

89. 163 U.S. 537 (1896) (Harlan, J., dissenting).

90. 347 U.S. 483 (1954).

91. Thomas, *Plain Reading*, *supra* note 9, at 991.

92. See *id.* at 990-91. In *Lamprecht v. F.C.C.*, 958 F.2d 382, 398 (D.C. Cir. 1992), Judge Thomas criticized the practice of using sociological evidence as incompatible "with the normative philosophy that underlies the Equal Protection Clause." See also *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995) (Thomas, J., concurring) (arguing that social science is misleading and should not be the basis for interpreting the Constitution).

93. See *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

reliance on natural rights principles was his exacting approach to civil rights enforcement at EEOC. For instance, in cases where violations of Title VII or other federal civil rights laws were discovered, Thomas rejected broad-based group remedies in the form of quotas and timetables and instead focused on legal relief that would make whole the individual victims of discrimination. Civil rights enforcement was redirected from a social engineering project that in Thomas' words focused on "remedies for a theoretical group that had not filed charges. . . [and] who may have been hurt as a result of some attenuated, historical events,"⁹⁴ to an enterprise that concentrated on vindicating the basic rights of individuals in a multiracial, pluralistic society.⁹⁵ Thomas believed policies that accentuated group rights to achieve racial justice were misdirected because of their tendency to foster interest group politics in the public realm and he openly criticized "left-wing black thinking on law and race-relations."⁹⁶ In his view, when public reason is subordinated to racial passion, the rule of law loses its moral authority and legitimacy.⁹⁷

The natural law principles that underlie the equal treatment of individuals before the law eventually found their way into one of Thomas' judicial opinions that he wrote while serving on the D.C. Circuit Court of Appeals.⁹⁸ Then-Circuit Judge Thomas held that a federal licensing scheme for radio broadcast stations that favored women violated the Fifth Amendment.⁹⁹ The touchstone for his opinion was the notion that laws that classify people in groups and ascribe to those groups inherent traits, characteristics, and abilities that justify differences in treatment, violate the Constitution and the principles of equal protection.¹⁰⁰ In granting preferences to women based upon

94. Thomas, *supra* note 84, at 33.

95. *Id.*

96. Clarence Thomas, *The Black Experience: Race and Reality*, WALL ST. J., Oct. 12, 1987 (reviewing Harvard Professor Derrick Bell's book, *And We Are Not Saved: The Elusive Quest for Racial Justice*, wherein Bell articulates his provocative version of critical race theory).

97. *Id.*

98. *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992).

99. *Id.* at 399.

100. *See id.* at 393 (stating that "predictive judgments concerning group behaviors and the differences in behavior among different groups at the very least must be sustained by

generalized, preconceived assumptions about female thinking patterns, the F.C.C. broadcast licensing policy ignored the intrinsic worth of the individual, while augmenting the collectivist state.¹⁰¹ Although the court's holding did not contain explicit references to natural law, it still reaffirmed natural law principles, including the uniqueness of the individual and the right to be free from arbitrary laws. Judge Thomas' recognition in *Lamprecht* that a system of laws should not expand group entitlements at the expense of equal rights for the individual, is a theme entirely consonant with Locke's position that in the state of nature, men enjoy a natural equality among themselves. Locke defends this idea in the following account:

A state of equality, herein all power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than the creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection.¹⁰²

The natural rights emphasis placed on civil rights law and policy by Clarence Thomas did much more than merely infuriate the old guard of the civil rights establishment. It signaled a renaissance in the way organized society views modern civil rights policy by demonstrating that the application of civil rights laws—in a manner which acknowledges the universality of man's inherent nature and rights—could be based on higher law principles instead of conventionalist aspirations toward egalitarianism or redistributionist ends. For this, Justice Thomas deserves praise.

meaningful evidence.”). Clarence Thomas has consistently opposed race and gender preferences claiming they “are an affront to the rights and dignity of individuals—both those individuals who are directly disadvantaged by them, and those who are their supposed beneficiaries.” Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!* 5 YALE L. & POL'Y REV. 402, 403 n.3 (1987).

101. *Id.*

B. *Life, Liberty, and the Pursuit of Property*

Beyond the fault-lines of affirmative action and antidiscrimination laws, meaningful insight into Justice Thomas' pre-confirmation understanding of natural law is also evidenced by his commentary on the issues of abortion and property rights.¹⁰³ To a natural lawyer like Justice Thomas, the rights to life, liberty, and indirectly property, proclaimed by Jefferson in the Declaration of Independence and incorporated into the Constitution, are the cornerstones of organized government.¹⁰⁴ Equally important, these rights are considered by Thomas to be fundamental, inalienable, God-given rights that neither originate from a piece of paper nor are contingent upon a special dispensation by the state.¹⁰⁵

1. The Natural Right to Life

The implications of natural law jurisprudence on the abortion question are dramatic, especially given the constitutional close-out of legislative attempts to protect unborn life that occurred in *Roe v. Wade*.¹⁰⁶ Unquestionably, the right to self-preservation and hence the right to life is an intuitive and logical extension of natural law¹⁰⁷ that counters the artificially created right to kill a pre-born human being. This conclusion is exactly why, during Thomas' confirmation hearings, abortion rights advocates and opponents of the nominee generally feared that his faithful adherence to natural law would provide both the legal and moral justification necessary to not only overturn *Roe*, but also find a constitutional right to life that would trump state laws

102. 5 THE WORKS OF JOHN LOCKE, OF CIVIL GOVERNMENT II 339-40 (1963).

103. See *infra* notes 108-12 & 120-28 and accompanying text.

104. According to Founding Father James Madison, "government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property . . ." First Proposed Bill of Rights (June 8, 1789), reprinted in, 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 234 (1971).

105. Thomas, *Higher Law Background*, *supra* note 9, at 68.

106. 410 U.S. 113 (1973).

107. GILSON, *supra* note 40, at 328-29.

permitting abortion.¹⁰⁸ The speculation was based on a 1987 speech by Thomas where he praised Heritage Foundation Trustee Lewis Lehrman's essay in the *American Spectator* which closely analogized the right to abort a human fetus and the white man's property right in the black slave.¹⁰⁹ According to Lehrman, such "rights" are extra-constitutional and collide with the natural and inalienable rights of life and liberty set forth in the Declaration of Independence and Constitution.¹¹⁰ Expressing his agreement with Lehrman's constitutional analysis, Thomas lauded Lehrman's "essay on the Declaration of Independence and the meaning of the right to life as a splendid example of applying natural law."¹¹¹

Standing alone, it would be ludicrous to suggest that a single remark praising Lehrman's article amounts to a systematic exposition of natural law jurisprudence as it pertains to the legal arguments surrounding abortion. So too, it would be equally naive to suggest that Thomas' comment means nothing, especially when read in context with his other numerous references to natural law.¹¹² There are, however, several reasons why it is reasonable to conclude that Thomas' position on the right to life at the time of his confirmation closely mirrored the natural law position. First, Lehrman's article was not merely an offhand reference to a natural right to life, but rather it presents a compelling case why the right to life for unborn children is a constitutionally protected right rooted in the natural rights tradition of

108. Tribe, *supra* note 10 (predicting Thomas would "replace *Roe* . . . with a decree that abortion is murder."); See also PHELPS & WINTERNITZ, *supra* note 7, at 18-21 (documenting the efforts of abortion rights organizations to derail Thomas' nomination).

109. Lewis Lehrman, *The Declaration of Independence and the Right to Life: One Leads Unmistakenly From the Other*, THE AMERICAN SPECTATOR, April 1987, at 21-23.

110. *Id.*

111. Thomas, *Conservative Policies*, *supra* note 9, at 78 (emphasis added).

112. When confronted by hostile members of the Senate Judiciary Committee about his seemingly unqualified endorsement of Lehrman's article, Thomas unconvincingly disclaimed any agreement with the substance of Lehrman's position by explaining that his comments were merely intended to garner support for civil rights. See *Hearings*, *supra* note 11, at 128. This author sympathizes with Thomas' predicament, in that the success or failure of his nomination rested in large part with a Senate Committee that was about as receptive to criticism of *Roe v. Wade* as the Diet of Worms was willing to accept the remonstrances of Martin Luther. Still, Thomas' disavowal of Lehrman's natural law arguments against abortion can be viewed as a concession to confirmation politics.

the Declaration of Independence.¹¹³ Not coincidentally, this argument is conceptually similar to the argument Thomas makes in a 1987 law review article in which he criticizes the *Dred Scott* decision and the institution of slavery as incompatible with the higher law background of the Constitution.¹¹⁴ For as Justice Taney interpreted the Constitution in a manner that denied the essential personhood of black slaves, Justice Blackmun in *Roe* wrote that the Constitution had nothing to say about whether a fetus is indeed a human being.¹¹⁵

Second, the fact Clarence Thomas was inculcated with the moral teachings and high values intrinsic in Catholic pedagogy, beginning in grammar and high school and then at Holy Cross College,¹¹⁶ suggests that his position on life would not depart substantially from Catholic teachings on the subject. Justice Thomas' recent return to full communion with the Roman Catholic Church after spending a period of years in the Episcopal Church is further evidence that he is in one accord with the Church's position on the sanctity of human life as announced by Pope John Paul II in *Evangelium Vitae*.¹¹⁷ This assertion,

113. Lehrman, *supra* note 109, at 21-23.

114. Compare Thomas, *Plain Reading*, *supra* note 9, at 985 (proclaiming "the jurisprudence of original intention cannot be understood as sympathetic with the *Dred Scott* reasoning, if we regard the original intention of the Constitution to be the fulfilment of the ideas in the Declaration of Independence.") with, Lehrman, *supra* note 109, at 25 (questioning whether "an expressly stipulated right to life, as set forth in the Declaration and the Constitution, [can] be set aside in favor of the conjured up right to abortion in *Roe v. Wade*.").

115. Compare *Dred Scott v. Sanford*, 60 U.S. (19 How.) 396, 404 (1856) (opinion of Justice Taney (declaring that black slaves "are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides and secures for citizens of the United States"), with *Roe v. Wade*, 410 U.S. 113, 157-58 (1973) (opinion of Justice Blackmun) (stating that "the use of the word [person] is such that it has application only postnatally. . . . [T]he word 'person' as used in the Fourteenth Amendment does not include the unborn"). By implication, Thomas criticizes *Roe* when he criticizes Justice Goldberg's recognition of the right to marital privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Griswold, J., concurring) because the right to abortion recognized in *Roe* is derivative of the rights the Court discovered in *Griswold*. See Clarence Thomas, *Civil Rights as a Principle Versus Civil Rights as an Interest*, in *ASSESSING THE REAGAN YEARS* 391, 398 (D. Boaz ed., 1988). See also Thomas, *supra* note 10, at 63 n.2 (observing that *Roe* has evoked considerable protest from conservatives).

116. ALMANAC OF THE FEDERAL JUDICIARY (1997).

117. Thomas' Journey Leads Back to Rome, WASH. TIMES, June 8, 1996.

that the structure of Thomas' moral and theological understanding of the abortion question has been and will continue to be influenced by the Catholic tradition, is entirely consistent with Alasdair MacIntyre's maxim that man's world view is shaped by his most intimate social, cultural, and theological associations.¹¹⁸

Finally, given Thomas' near unqualified endorsement of natural law in his speeches and writings, especially as applied in the contexts of civil rights and property rights, it is difficult to imagine that he would intellectually sever the natural law affirmation that abortion is murder from the entire corpus of natural law jurisprudence and philosophy. Arguably, when Thomas declared that "according to our higher law tradition, men must acknowledge each other's freedom, and govern only by the consent of others [and] *all* our political institutions presuppose this truth,"¹¹⁹ he *ipso facto* embraced the notion that our legal institutions also have a duty to acknowledge the fundamental freedoms and rights of all men—including the right to life of the unborn.

2. Property

The natural law foundations of the law of property are another area central to Thomas' jurisprudence. In this age of progressively worsening collectivism, the brilliance of Thomas' understanding of private property, both as a constitutional right and as a natural and necessary predicate to ordered society, manifests the fullness of his commitment to a system of rights that are unalienable. Thomas makes clear his view that economic liberties and the right to acquire, enjoy, and use the fruits of one's labor descend from natural law principles:

Today we are comfortable referring to civil rights. But economic rights are considered antagonistic to civil rights—the former being venal and dirty, while the latter is lofty and

118. MacIntyre observes that "[t]here is no standing ground, no place for inquiry, no way to engage in the practices of advancing, evaluating, accepting, and rejecting reasoned argument apart from that which is provided from some particular tradition or another." ALASDAIR C. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 350 (1988).

119. Thomas, *Conservative Policies*, *supra* note 9, at 78 (emphasis added).

noble. This, as I have noted, is not the way I was taught. After all, aren't free speech and work both means to a higher end. . . . Natural law when applied to America means not medieval stultification but the liberation of commerce.¹²⁰

That the economic and property rights defended by Thomas are *a priori* derived from the natural law is consistent with both Catholic and Lockean teachings. For example, natural law scholar Doug Kmiec of the University of Notre Dame observes that "the right of private ownership flows out of natural law not as a primary right, but as a conclusion necessary for the encouragement of personal initiative, for public order, and for public peace."¹²¹ Similarly, the Enlightenment perspective, as articulated by Locke, postulates that both property and labor are ordained by God for the improvement of man in his community, for the preservation of life, and to assist in directing man toward useful ends.¹²² For Locke then, the role of government is to secure and protect property in the hands of the individual from the arbitrary power of the collectivist state.¹²³ These natural law precepts that regard property rights as natural rights also dominated the political thinking of the Founders (most notably James Madison), who envisioned the Constitution, positive law, and government generally as a fortress erected to guard the benefits that flow from a system of laws recognizing robust property rights.¹²⁴ Unsurprisingly, Clarence Thomas' concurrence with this pre-American understanding of private

120. Thomas, *supra* note 60.

121. Douglas W. Kmiec, *The Higher Law Background of the Notre Dame Law School* 37 AM. J. JURIS. 213, 232 (1992) (quoting W. Doheny, *Materials for Legal Ethics* (C. Sheedy ed., 1950)). See also *Miloszewski v. Sears & Roebuck Co.*, 346 F. Supp. 119, 122 n.3 (W.D. Mich. 1972) (noting property is a derivative natural right but not on the same level as the rights of life and liberty).

122. STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY* 150-51 (1991).

123. *Id.* at 168. Locke's view of property is quite broad and not limited to material possessions. His definition begins with the idea that man has a property right in his own person which extends to all life, liberty, and estate that is a product of "the Labour of his Body, and the Work of his Hands." *Id.* (quoting JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 24 (Peter Laslett ed., 1967)).

124. See generally Douglas W. Kmiec, *The Coherence of the Natural Law of Property* 26 VAL. U. L. REV. 367-73 (1991) (documenting the Founders' understanding of the role of government *vis a vis* the regime of private property).

property is consistent with his overarching embrace of the Framers' political and legal philosophy.

In various pre-confirmation writings and speeches, Thomas emphasizes the importance of property and economic rights by characterizing them as "fundamental," "inalienable"¹²⁵ and "a vital part of the rights protected by constitutional government."¹²⁶ Interestingly though, the constitutional basis for Thomas' vision of a natural right to property is not found in some renascent version of substantive due process on the order of *Lochner v. New York*.¹²⁷ Instead, for Thomas, the confluence of natural law, property rights and economic liberty is found in the Privileges or Immunities Clause of the Fourteenth Amendment which he states is "a foundation for interpreting . . . the entire Constitution and its scheme of protecting rights."¹²⁸ But, recognizing the higher law principles embodied in the Privileges or Immunities Clause requires both a reexamination and revitalization of the *Slaughter-House Cases*,¹²⁹ since it is there that the Court, in Thomas' words, "gutted" an explicit provision of the Fourteenth Amendment, thereby rendering it permanently disabled.¹³⁰

The *Slaughter-House Cases*¹³¹ of 1873, to which Thomas refers, found their way to the Supreme Court when a group of butchers challenged a Louisiana law granting the Crescent City Live-Stock Landing and Slaughterhouse Company an exclusive meat processing monopoly in greater New Orleans.¹³² The economically disenfranchised butchers argued that the law violated the Privileges or

125. Thomas, *Higher Law Background*, *supra* note 9, at 68.

126. *Lamprecht*, 958 F.2d at 398.

127. 198 U.S. 45 (1905) (recognizing the liberty to contract as a fundamental economic right emanating from the due process clause of the Fourteenth Amendment).

128. See Thomas, *Higher Law Background*, *supra* note 9, at 68. For a discussion and explanation of how the Privileges and Immunities Clause provides for the protection of property rights, see *infra* pp. 63-64. See also HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND* 62-66 (1994) (explaining Justice Field's dissent in the *Slaughter-House Cases* and Field's natural rights interpretation of the Privileges or Immunities Clause).

129. 83 U.S. (16 Wall.) 36 (1873).

130. Thomas, *Plain Reading*, *supra* note 9, at 994.

131. 83 U.S. (16 Wall.) 36 (1873).

132. *Id.*

Immunities Clause of the Fourteenth Amendment¹³³ because it prevented them from exercising their fundamental rights as citizens of the United States, which included the right to pursue lawful employment in a profession or trade of one's own choosing (in this case the trade of butchery). Justice Miller's majority opinion, however, held that the privileges and immunities mentioned in Fourteenth Amendment merely referred to the privileges and rights each person enjoyed as citizens of the individual states.¹³⁴ In Miller's mind, these prescriptive rights were already protected by the Article IV of the Constitution. Justice Miller's strained construction, that ignored the words "citizens of the United States," rendered of an entire clause in the Fourteenth Amendment superfluous.¹³⁵

The separate dissents of Justices Field, Bradley, and Swayne embraced the natural rights jurisprudence that Thomas finds so appealing. In their view, the Louisiana legislation that prevented all but a few of its citizens from voluntary entry in the meat processing business was plainly unconstitutional.¹³⁶ The dissenters argued that the privileges and immunities of United States citizenship are not as circumscribed as the majority suggested, but rather encompass the fundamental rights that we, as American citizens, inherited from our English forbearers.¹³⁷ Federal and State government merely recognize, but do not confer the natural rights of life, liberty, and property, the latter of which includes the "right to pursue a lawful employment in a lawful manner."¹³⁸ Moreover, the following passage of Justice Bradley's opinion strongly indicates that the Constitution implicitly

133. Section one of the Fourteenth Amendment provides in relevant part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the *privileges or immunities of citizens of the United States.*" U.S. CONST. amend. XIV, § 1 (emphasis added).

134. 83 U.S. at 76 (Miller, J.).

135. In Thomas' words, the decision "trivialized" the privileges or immunities clause. Clarence Thomas, *A Second Emancipation Proclamation*, 45 POL'Y REV. 84, 85 (1988) (book review).

136. 83 U.S. (16 Wall.) 36, 83 (1873) (Field, J., dissenting).

137. *See id.* at 103-105 (Field, J., dissenting) (noting that the common law of England is the basis for the jurisprudence of the United States).

138. *Id.* at 97.

requires recognition of the natural law of property:

But, even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real than they now are. It was not necessary to say in words that the citizens of the United States should exercise all the privileges of citizens; the privilege of buying, selling, and enjoying property; the privilege of engaging in any lawful employment for a livelihood; Their very citizenship conferred these privileges, if they did not possess them before.¹³⁹

Quite clearly, the natural rights political theory trumpeted by the dissent not only embraces an elevated view of property rights, but as Thomas correctly points out, it “goes to the fundamental rights of the American regime.”¹⁴⁰ And although the dissent’s natural law interpretation of the Privileges or Immunities Clause may never be resurrected in an era dominated by a mechanistic and pragmatic jurisprudence, the *Slaughter-House Cases* are useful in illuminating the natural law legal philosophy held by Justice Thomas prior to his appointment to the Supreme Court.¹⁴¹

139. *Id.* at 118 (Bradley, J., dissenting).

140. Thomas, *Higher Law Background*, *supra* note 9, at 68. Some natural law scholars have characterized the dissent’s property rights jurisprudence in the *Slaughter-House Cases* as contrary to natural law because it substituted mechanistic formulations for natural reason. See, e.g., Kmiec, *supra* note 124, at 378-80 (citing Edward Corwin, *The Natural Law and Constitutional Law*, in 3 NATURAL LAW INSTITUTE PROCEEDINGS 47, 72 (1949)). However, here Professor Kmiec’s critique is off the mark. For example, Justice Field employs natural reason to conclude that a monopoly sanctioned by the state would interfere with the right of a man to provide for himself and his family. While recognizing the legitimate police power of the state, Field carefully distinguishes legal rules that serve salutary community purposes from those that unduly restrict natural rights that are internally consistent with universal moral truths. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1873) (Field, J., dissenting).

141. While serving on the D.C. Circuit, Judge Thomas wrote the majority opinion in one case that indirectly demonstrates an expansive view of property rights. In *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990), Thomas ruled that antitrust law does not require defendants accused of anticompetitive business practices to “clearly disprove” the future anticompetitive effects of the practice in question to successfully rebut the government’s *prima facie* antitrust case. In so holding, Thomas adopted a “natural market forces” approach to antitrust law that is consistent with the natural right of property. See *id.*

To summarize: the pre-confirmation jurisprudence of Clarence Thomas is a matrix of natural law and philosophy that produces legal rules anchored by moral truths. Thomas' advocacy of a constitutional paradigm that safeguards the natural rights of life, liberty, and property (in their various forms and applications), is not as some commentators suggest an exercise in raw judicial power. Rather, it is a wonderful example of natural law apologetics.¹⁴² Precisely because the rights protected and the prohibitions proclaimed by natural law are based upon self-evident truths within the realm of legitimate freedom, one can embrace the jural world of Thomas while rejecting a liberal scheme of aberrant rights divorced from any claim of objective and universal norms. In articulating his pre-confirmation position on natural law and natural rights, Thomas recognized that the rule of law cannot, by definition, be transitory and shifting with the currents of popular opinion. As a natural lawyer, Thomas would certainly reject claims that there are no fixed ideas, traditions, and moral truths that bind the law-finding function of judges and legislators. As for the judiciary, Thomas is resolute that the natural law "principles of liberty and equality should inspire our . . . constitutional thinking."¹⁴³

III. THE SUPREME COURT YEARS (1991-1997): RECONCILING JUSTICE THOMAS' NOTABLE OPINIONS, JURISPRUDENCE, AND EPISTEMOLOGY WITH NATURAL LAW

After his appointment to the Supreme Court in 1991, it remained to be seen whether the depth and complexity of Thomas' pre-confirmation appeal to natural law would manifest itself. Certainly, those conservatives expecting a renaissance in conservative legal thought based upon natural law principles, were concerned when Thomas distanced himself from the natural law theory he so brilliantly

at 991 (stating the "economic concept of competition shall guide the contemporary application of the antitrust laws.").

142. Judge Bork characterizes natural rights based jurisprudence as the "incessant quest for the judicial holy grail." BORK, *supra* note 61, at 39 (quoting, DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888* (1985)).

143. Thomas, *Plain Reading*, *supra* note 9, at 995.

articulated for an entire decade.¹⁴⁴ Most likely though, legal historians will not judge Thomas by the brief and cursory commentary on natural law he delivered to a skeptical Senate Judiciary Committee during his confirmation hearings. Rather, Thomas' enduring legacy will be his work on the Court and the resultant plentitude of landmark Supreme Court opinions spanning several decades where he explores the original understanding of the Constitution with an eye toward natural law and natural rights. As a Supreme Court justice, the manner in which Clarence Thomas incorporates natural law into his legal decision-making and jurisprudence is predictably more subtle. This is to be expected, though, because he no longer occupies a political position in the executive branch where forceful public advocacy of natural law and natural rights was an effective tool in promoting his civil rights agenda at the EEOC. Like any other justice, Thomas' jurisprudence is circumscribed by the subject matter and legal issues in the cases before the Court. Just as liberal Justice Ruth Bader Ginsburg, no matter how hard she labors, would find it difficult to develop a feminist jurisprudence in the context of a bankruptcy case, so too, it would be unrealistic to expect Thomas to invoke natural law principles in every case that involves a constitutional question.

A. *Natural Law and the Supreme Court*

Justice Thomas is not the first member of the Supreme Court to integrate natural law and natural rights principles into a method of constitutional interpretation. As far back as 1798, in *Calder v. Bull*,¹⁴⁵ Justice Samuel Chase argued that natural law is an appropriate

144. Apparently, Thomas' retreat from natural law was part of a Machiavellian strategy orchestrated by Ken Duberstein, former White House Chief of Staff, who was brought in to "handle" the nomination. The Duberstein strategy was designed to make Thomas look bland, uncontroversial, and hence confirmable. This "see no conservatism," "hear no conservatism," and "speak no conservatism" approach is not that surprising, given the structural bias of the nomination process against sophisticated conservative jurisprudence and the dearth of constitutional knowledge among many members of the Senate Judiciary Committee. See Kirk A. Kennedy, *Book Review, The Confirmation Mess* 41 LOYOLA L. REV. 375 (1995).

145. 3 U.S. (3 Dall.) 386 (1798).

unwritten restraint upon the excesses of positive law.¹⁴⁶ Although the Court upheld the law in question, the internal debate between Justice James Iredell and Justice Samuel Chase was a striking harbinger of the twentieth century clash between two competing, irreconcilable jurisprudential systems: legal positivism and natural law.¹⁴⁷ Only two decades later, Chief Justice John Marshall inveighed against the omnipotence of positive law and argued in favor of natural rights in both *Fletcher v. Peck*¹⁴⁸ and then again in *Ogden v. Saunders*.¹⁴⁹ And in 1836, perhaps the greatest Justice in early American history, Joseph Story, published his magisterial work on natural law which explained fully the interplay between the divine law of God and the law of contracts, marriage, and property.¹⁵⁰ For nearly half a century, Lincoln appointee Steven J. Field authored and joined opinions that interpreted the Fourteenth Amendment as fulfilling libertarian ideals in the

146. *Id.* at 391 (Chase, J.). The facts of *Calder v. Bull* are rather unremarkable. When a Connecticut court declined to probate a will, the legislature intervened by enacting a law that nullified the court's decision. After the will was then accepted into probate, the disinherited party appealed to the Supreme Court asking the Court to strike down the law. *Id.* For an historical account of how early federal judges relied upon, debated, and incorporated natural law into their jurisprudence see STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICAN, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* (1991).

147. Justice Chase declared:

There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the Legislature (for I cannot call it law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.

Id. at 388. Justice Iredell responded by claiming "The ideas of natural justice are regulated by no fixed standard: the ablest and purest of men have differed on the subject. *Id.* at 398-99.

148. 10 U.S. (6 Cranch) 87 (1810).

149. 25 U.S. (12 Wheat.) 213, 232 (1827) (Marshall, C.J., dissenting).

150. Joseph Story, *Natural Law*, 9 *ENCYCLOPEDIA AMERICANA* 150-58 (F. Lieber ed., 1836), reprinted in, JOSEPH STORY AND THE AMERICAN CONSTITUTION (James McClellan ed., 1971). McClellan contends that "among American lawyers and judges, Justice Story stands out as possibly the most learned and influential defender of the natural law tradition." James McClellan, *Joseph Story's Natural Law Philosophy*, 5 *BENCHMARK* 85 (1994).

Declaration of Independence.¹⁵¹ In the twentieth century, the erudite Justice George Sutherland displayed a disciplined natural rights jurisprudence that found a compelling moral justification for striking down state minimum wage laws.¹⁵² However, while each of these Justices operated within a unique natural rights and natural law paradigm, each espoused a view of the Constitution and the law which generally recognized that fundamental moral, objective and divine truths cannot be eviscerated by positive law. Now, in the tradition of these great natural law jurists, enters Justice Thomas, whose orthodox jurisprudence is again reviving and building upon natural law's intellectual heritage, a heritage once cultivated, yet long dormant within the Court.

B. *Freedom of Conscience, Freedom of Speech*

Justice Thomas' implicit use of natural rights concepts in legal reasoning is evident in his interpretation of the First Amendment's guarantee of freedom of expression.¹⁵³ For example, in *McIntyre v.*

151. See, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 82-83 (1873) (Field, J., dissenting); *Butchers' Union Slaughter-House and Livestock Landing Co. v. Crescent City Live-stock and Slaughter-House Co.*, 111 U.S. 746 (1884) (Field, J., concurring); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

152. See *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). See also HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND* (1994) (concluding that Supreme Court Justices who employed natural rights to strike down laws that impinged on economic liberties were not blinded by economic determinism but rather were merely enforcing the moral norms that government has no superior claim to the fruit of an individual's labor than a common thief would have to the contents of one's wallet. For example, Arkes writes that "to bar a person from shining shoes on a public street may be no less grave a matter of civil liberties than restraining the same person from standing on his shoeshine box and delivering a speech.") *Id.* at 72-80.

153. The natural rights of freedom of conscience and freedom of speech are deductively implied from natural law and the explicit natural rights of life, liberty, and property. Kmiec, *supra* note 42, at 191 n.33; PAUL CONKLIN, *SELF-EVIDENT TRUTHS* 99 (1974) (observing that the freedom of speech, press, and assembly, are associated with natural rights). Cf. *Whitney v. California*, 274 U.S. 357, 375 (Brandeis, J., concurring) (citing Thomas Jefferson for the proposition that freedom of speech, assembly, and discussion are fundamental principles of American government); *Pierce v. United States*, 252 U.S. 239, 273 (1920) (Brandeis, J., dissenting).

Ohio Elections Committee,¹⁵⁴ the Court decided whether the State of Ohio could prohibit the anonymous distribution of campaign literature. Justice Stevens's majority opinion, which struck down the Ohio law, resorted to a conventional interest balancing approach to the issue that, according to Thomas, "superimposes modern theories concerning expression upon the constitutional text."¹⁵⁵ Thomas' concurrence, on the other hand, analyzed the case in terms of what the Framers understood when they crafted the First Amendment.¹⁵⁶ By utilizing a powerful mix of history and tradition that specifically referenced the Anti-Federalists' arguments that anonymous political discourse was necessary for the protection of other natural rights, Thomas concluded that the right to engage in anonymous political speech was at the core of the Framers' thinking and thus protected by the First Amendment.¹⁵⁷

The contradistinction between Stevens' *ad hoc* reasoning and Thomas' reliance upon the original understanding of the Framers and their respect for natural rights, could not be more obvious. Justice Thomas' confidence in the Framers' natural law and natural rights thinking produces consistent and coherent analysis in First Amendment interpretation, while the result-oriented methodology of liberal Justices Stevens and Souter puts their legal analysis on a collision course with itself.¹⁵⁸ Moreover, the consistency between Thomas' approach to the First Amendment in *McIntyre* and traditional natural rights theory is evidenced by his prior repudiation of radical judicial interpretations of

154. 115 S. Ct. 1511 (1995) (Thomas, J., concurring).

155. *Id.* at 1529.

156. *Id.* at 1527-28.

157. *See id.* at 1527-28; *See also* Chester J. Antieau, *Natural Rights and the Founding Fathers – The Virginians*, 17 WASH. & LEE L. REV. 43, 71-74 (1960) (showing that the Founding Fathers considered freedom of communication a natural right).

158. For example, Thomas' decision to uphold free speech rights in *McIntyre* is not surprising when one considers that he joined with Justice Scalia in warning that a viewpoint based injunction against pro-life demonstrators "ought to give all friends of liberty great concern." *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2534 (1994) (Scalia, J., dissenting). On the other hand, it is difficult to reconcile Justice Stevens' approach to the First Amendment when one compares his reasoning in *Texas v. Johnson*, 491 U.S. 397, 436 (1988) (Stevens, J., dissenting) (burning the American flag not constitutionally protected speech) and *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994) (Stevens, J., concurring) (concluding that restrictions on pro-life demonstrators' speech and assembly rights are not violative of Constitution) to his position in *McIntyre*.

the right to self-expression. In a 1994 speech to the *Federalist Society*, Justice Thomas astutely argued that judicial invalidation of panhandling, vagrancy, and loitering laws under the First Amendment had impaired society's ability to dictate social norms.¹⁵⁹ Thus, proper application of a free speech jurisprudence based on natural rights will lead to decisions that uphold the right to engage in anonymous political pamphletering, but will not constitutionalize aberrant rights such as panhandling and vagrancy.¹⁶⁰

C. *Natural Law and Government's Accommodation of Religion*

Sectarian natural law and orthodox Christianity share an epistemology that presupposes objective truth based on the laws of God.¹⁶¹ Both have profoundly influenced the development of American law. It is no small coincidence then that the exiling of religion from the public square coincides with the demise of natural law as a universally accepted jurisprudential system.¹⁶² In the constitutional realm, a major consequence of the modern Court's secularization of the Establishment Clause is that civil government has become the fountainhead for the increasing pragmatism and relativism that pervades most social institutions touched by government. Whether it be public education or public assistance to the poor, the influence of religion's objective moral content has been nearly eviscerated by ideologies premised not on divine providence, but on the exaltation of the individual. Indeed, if a basic tenet of natural law is its objective moral content and its prescription that man is to seek good and live in community with other men, it is axiomatic that judicial and legislative efforts to excise religion from public life are antagonistic to natural law.

Justice Thomas' Establishment Clause jurisprudence has a natural

159. Associate Justice Clarence Thomas, Remarks before the Federalist Society for Law and Public Policy (May 16, 1994), *reprinted in* LEGAL TIMES, May 23, 1994, at 25.

160. *But cf.* Kreimer v. Bureau of Police for Morristown, 958 F.2d 142 (3d Cir. 1992) (case that recognized a right to panhandle).

161. Rice, *supra* note 45, at 557-58 (explaining the natural law foundations of Catholicism and Reformed Christianity).

162. See Harold Berman, *The Secularization of American Legal Education in the Nineteenth and Twentieth Centuries*, 27 J. LEG. EDUC. 382, 384 (1976).

law basis precisely because it challenges the notion that government institutions may never accommodate, or be influenced by, the objective morality intrinsic in revealed religion. In a series of cases implicating the Establishment Clause, Thomas has consistently voted to uphold laws that recognize the virtue of religion in the public square.¹⁶³ In *Rosenberger v. Rector & Visitors of the University of Virginia*,¹⁶⁴ the Court held that the University of Virginia violated the free speech rights of a student-run Christian newspaper when it denied funding for the newspaper's printing costs solely on the basis of its religious content.¹⁶⁵

In so holding, the majority determined that the University's neutral accommodation of a religious organization was not a violation of the Establishment Clause.¹⁶⁶ Not surprisingly, Justice Souter dissented from the majority opinion. Remaining true to his secularist pedigree, he united the liberal wing of the Court behind his position that a university student's religious speech must give way to a separationist interpretation of the Establishment Clause.¹⁶⁷

Although Justice Thomas was in complete agreement with Justice Kennedy's majority opinion in *Rosenberger*, he wrote a separate concurrence specifically aimed at correcting the revisionist historical analysis offered in Justice Souter's dissent.¹⁶⁸ In Thomas' view, the historical and constitutional debility of Souter's argument was manifested in two ways. First, Souter's account of the intellectual, religious, and political traditions of the Framers and James Madison in

163. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995); *Board of Educ. of Kiryas Joel v. Grumet*, 114 S. Ct. 2481 (1994); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992).

164. 115 S. Ct. 2510, 2528 (1995) (Thomas, J., concurring).

165. *Id.* at 2520.

166. *Id.* at 2524-25.

167. *Id.* at 2533 (Souter, J., dissenting) (asserting that "[b]ecause there is no warrant for distinguishing among public funding sources for purposes of applying the First Amendment's prohibition of religious establishment, I would hold that the University's refusal to support petitioners' religious activities is compelled by the Establishment Clause.").

168. Thomas argued that the dissent's faulty construction of the Establishment Clause was based on Souter's misunderstanding of James Madison's *Memorial and Remonstrance Against Religious Assessment*. Madison never espoused the position taken by the dissent that religious organizations are absolutely prohibited from participating in neutral government benefits programs. See *id.* at 2528-31.

particular, was terribly inaccurate. Contrary to Souter's assertions, Thomas showed that there is "no evidence that the Framers intended to disable religious entities from participating on neutral terms in evenhanded government programs."¹⁶⁹ Thomas demonstrated that as far back as the Northwest Ordinance of 1787, religion enjoyed broad governmental support.¹⁷⁰ Second, Thomas correctly points out that under the guise of government neutrality between religion and irreligion, Justice Souter's interpretation of the Establishment Clause necessarily requires outright government discrimination against religion. Therefore, according to Souter, any aid to religious organizations, no matter how small or attenuated, would be constitutionally forbidden. Souter's position is neither historically nor constitutionally grounded as evidenced by the fact that Americans have universally "accepted and practiced governmental aid to religion."¹⁷¹ As Justice Scalia made clear in his opinion,¹⁷² that Justice Thomas joined,¹⁷³ legislative accommodation of religion "follows the best of our traditions."¹⁷⁴

This sharp divide between Justices Souter and Thomas on the proper interpretation of the Establishment Clause in cases involving commencement prayer,¹⁷⁵ aid to religious schools,¹⁷⁶ and equal access to government funds,¹⁷⁷ reveals a much larger issue. As society collectively acts through government institutions and is continuously

169. *Id.* at 2533 (Thomas, J., concurring).

170. *Id.*

171. *Id.* (citing natural law scholar Chester J. Antieau).

172. Board of Educ. of Kiryas Joel v. Grumet, 114 S. Ct. 2481 (1994). In *Kiryas Joel*, the Court held that a New York statute creating a school district for an Hasidic sect was not a permissible accommodation of religion but instead violated the Establishment Clause). *Id.* at 2494.

173. *Id.* at 2511-12 (Scalia, J. dissenting) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

174. *Id.* at 2505 (Scalia, J., dissenting).

175. *Lee v. Weisman*, 505 U.S. 577 (1992). In *Lee*, Souter argues in his concurring opinion that the Establishment Clause is violated when a public school sanctions graduation prayer. *Id.* at 609 (Souter, J., concurring). Thomas agrees with Justice Scalia's dissent that non-sectarian graduation prayer is a longstanding American tradition that does not offend the Constitution. *Id.* at 631-32 (Scalia, J., dissenting).

176. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

177. *Rosenberger*, 115 S. Ct. 2510 (1995).

faced with hard moral questions, what philosophical framework will guide the decision-making processes of those charged with providing solutions to today's moral crises? If religion and its subsidiary philosophy natural law, are constitutionally disestablished from the realm of law and public policy, nothing will be left to counter today's increasingly relativistic politics and jurisprudence. To the extent religion's influence in modern American society is determined by the Court's interpretation of the Establishment Clause, natural law philosophy will either flourish or fade. Here again, the struggle between legal positivism and natural law reappears. When Justice Thomas argues for a constitutional symmetry between religion on the one hand, and secularism on the other,¹⁷⁸ he not only counters the secular legal tradition represented by Justice Souter,¹⁷⁹ but he implicitly argues that the truth of natural law is as valid and legitimate a legal system as its positivistic alternative.

D. *Life, Liberty, and Property Revisited*

The provocative and complex legal issues surrounding abortion, homosexual rights, and private property unquestionably implicate natural law and the natural rights of life, liberty, and property. During his tenure on the Court, Justice Thomas has cast crucial votes in cases dealing with these difficult and controversial issues. In each case his position is compatible with natural law. In the abortion case, *Planned Parenthood v. Casey*,¹⁸⁰ Justice Thomas joined two separate dissenting opinions by Chief Justice Rehnquist and Justice Scalia, each arguing for the correction of the monumental constitutional error committed in *Roe v. Wade*.¹⁸¹ Justice Thomas agrees with the proposition that the Constitution and the Bill of Rights do not contain the right of a woman to abort her unborn child. At first blush, this interpretation would seem

178. *Id.* at 2528 (Thomas, J., concurring).

179. *Id.* at 2533 (Souter, J., dissenting); see also *Zobrest v. Catalina Foothills Sch. Dist.* 509 U.S. 1 (1993).

180. 505 U.S. 833 (1992).

181. 410 U.S. 113 (1973). Professor Charles Rice of Notre Dame describes *Roe v. Wade* as the case that "established the right to procure and to perform the intentional, direct killing of innocents as a constitutional right." Rice, *supra* note 45, at 546.

like a position consistent with natural law, which at its core acknowledges the sanctity of human life in all stages of development. However, there is a huge difference between saying the Constitution does not protect the right to abortion, and the argument that abortion is constitutionally prohibited.¹⁸² The former is a perfectly honed states-rights argument, while the latter is an application of natural law.

Nevertheless, when Justice Scalia asserts (and Justice Thomas agrees) that the status of the developing fetus as a human life is a value judgment and not a legal question, this can arguably be interpreted as a question of procedure rather than substance.¹⁸³ For example, one may conclude that based on fetology, right reason, and revelation, the fetus is a human life and that, as a normative matter, the law should recognize the personhood of the fetus. However, it would not be inconsistent to hold the position that the judiciary is not the proper entity to make such a proclamation. Admittedly, for natural law purists, this explanation of Thomas' position in *Casey* begs the question if by signing on to Scalia's dissent, Thomas fully committed himself to approaching the issue of abortion in terms of natural law. On the other hand, Thomas' call for the nullification of *Roe*, a case entirely antithetical to natural law's directive that life should be preserved, is still much closer to the natural law position than the position held by a majority of the present Court, because it recognizes the state's interest in safeguarding human life.¹⁸⁴

As in *Casey*, Thomas assumes a similar posture in *Romer v.*

182. Rice, *supra* note 45, at 546.

183. See *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).

184. In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), Thomas voted with the majority in holding that 42 U.S.C. § 1985(3) does not provide a federal cause of action for civil conspiracy against pro-life demonstrators who engage in civil disobedience to protect unborn life. Although the opinion of Justice Scalia does not mention natural law, he does state that "there are common and respectable reasons for opposing [abortion] . . ." *Id.* at 270 (Scalia, J.). Thomas' vote in *Bray* is compatible with natural law in that Thomas refuses to punish the conduct of those pro-life advocates who are protesting against what Aquinas referred to as an "unjust law." In the last term, Thomas voted to overturn the 9th and 2nd Circuit opinions striking down laws against physician-assisted suicide. *Washington v. Compassion in Dying*, 117 S. Ct. 2258.

Evans,¹⁸⁵ a case where the Court struck down an amendment to the Colorado Constitution that prohibited the enactment of special preference legislation for homosexuals. According to the majority opinion of Justice Anthony Kennedy, the Equal Protection Clause of the United States Constitution does not allow the citizens of Colorado to single out homosexuality for disfavorable treatment.¹⁸⁶ Once again, Justice Thomas joined a vigorous, cogent dissent by Justice Scalia. Although the dissenting Justices state explicitly that “it is no business of the courts to take sides . . . in this culture war,”¹⁸⁷ they also recognize the eminent reasonableness of laws animated by society’s moral disapproval of homosexuality.¹⁸⁸ The dissent’s argument, that Colorado’s effort to circumscribe the powerful political influence of homosexuals is constitutionally permitted, is consistent with natural law. Many homosexual political activists view antidiscrimination laws as a vehicle to morally legitimize their destructive sexual behaviors.¹⁸⁹ Prohibiting such legislation coincides with natural law’s constructive function, which guides the state’s effort to protect public health and safety in the community by limiting sexually transmitted diseases.¹⁹⁰ Thus, by recognizing Colorado’s interest in seeking the common good and preserving man’s existence, Thomas’ position in *Romer* is an echo of natural law.

In the area of property rights, Thomas’ voting record is harmonious

185. 116 S. Ct. 1620 (1996).

186. *Id.* at 1629. Amazingly, *Romer* is one of the few cases where the Court subjects a state law to rational basis review yet still invalidates the law by rejecting the state’s justificatory rationale for enacting it. *Id.* In this case, the Court refused to find any rational basis for Colorado’s Amendment 2 notwithstanding the fact it was offered to protect to the freedom of association and the religious rights of landlords—two seemingly rational if not compelling interests. *Id.*

187. *Id.* at 1637 (Scalia, J., dissenting).

188. *Id.* at 1633.

189. See Richard Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 397-399 (1994) (citing evidence that a quest for cultural, social, and political acceptability is the driving force behind antidiscrimination laws and the homosexual movement generally).

190. See Kmiec, *supra* note 42, at 192 (observing that laws which restrict homosexual conduct promote natural law by reducing the transmission of the virus that produces AIDS, and that this, in turn, preserves human life).

with natural law. In *Lucas v. South Carolina Coastal Council*¹⁹¹ and *Dolan v. City of Tigard*,¹⁹² Thomas voted with the majority to vindicate aggrieved landowners' property rights protected by the Takings Clause of the Fifth Amendment.¹⁹³ In *Lucas*, Thomas joined Justice Scalia in holding that the state of South Carolina could not impose a building restriction that completely diminished the value of beachfront property without compensating the owner.¹⁹⁴ *Dolan*, on the other hand, was an unconstitutional conditions case where a city government demanded that the property owner cede a portion of her property to the city as a condition for the receipt of a building permit.¹⁹⁵ Here, Justice Thomas agreed with Chief Justice Rehnquist that the municipality's nearly unlimited discretion in granting or denying a land-use permit could not be sanctioned unless the city demonstrated some rough proportionality between the exaction and the need for the property.¹⁹⁶

Beyond the nuances and complexities of the Court's takings jurisprudence there is a larger point to be made. The significance of the decisions in *Lucas* and *Dolan* is their legitimization of judicial review of land-use regulation as a means of striking a reasonable balance between state police power and the individual's fundamental natural right to property.¹⁹⁷ By voting in favor of the proposition that government restrictions on land use are subject to a higher level of scrutiny, Justice Thomas declared that there are certain limits to unbridled regulatory activism and that those limits are given teeth in the just compensation requirement of the Takings Clause. Moreover, the compensatory arrangement behind that provides insight into Thomas' understanding of property rights. Perhaps the best explanation of the principles that undergird the just compensation requirement is given by

191. 505 U.S. 1003 (1992).

192. 114 S. Ct. 2309 (1994).

193. U.S. CONST. amend. V. Professor Kmiec correctly points out that the Takings Clause "fulfills the natural law principle of full indemnification." Kmiec, *supra* note 124, at 367-382.

194. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (Scalia, J.).

195. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2312-14 (1994).

196. *Id.* at 2319-20.

197. See Douglas W. Kmiec, *Alas, The Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147, 152 (1995).

Professor Kmiec:

The [Fifth Amendment's] natural law requirement of compensation gives honor to the proposition of Locke and Madison that the principal end of government is the preservation of property. Obviously, to allow government to unduly burden any citizen would diminish, rather than preserve, property and would be destructive of government's own end. In this, it can be seen that it is misleading to describe eminent domain as an inherent or reserved sovereign power, since such *inherence or reservation could only be true where property was not a pre-societal, natural law claim*.¹⁹⁸

Thomas' votes in *Lucas* and *Dolan* represent an explicit endorsement of the compensatory function of the Fifth Amendment in terms of the justificatory rationale provided by Professor Kmiec. Interpreting the Takings Clause to require government restrictions on property use to be subject to a higher level of judicial scrutiny aligns with the Lockean notion that the purpose of government is to protect and preserve private property.¹⁹⁹ Thus, Justice Thomas' endorsement of heightened judicial scrutiny for takings strongly indicates that his property rights jurisprudence is rooted in natural law.

E. Justice Thomas' Natural Law: A Restoration of Federalism and State Sovereignty

A fundamental principle of natural law is the doctrine of subsidiarity. Subsidiarity presupposes that society should not arrogate a social responsibility to a higher level of civil government that could be better carried out at a local level.²⁰⁰ Thus, centralization of a function or

198. Kmiec, *supra* note 124, at 382 (emphasis added).

199. STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY* 150-51 (1991).

200. Pope Pius XI defined the doctrine of subsidiarity by stating that "it is an injustice, a grave evil and a disturbance of rights order for a larger and higher organization to arrogate to itself functions which can be performed efficiently by smaller and lower [governmental] bodies." Pope Pius XI, *Quadragesimo Anno* (1939). See also Douglas W. Kmiec, *Liberty Misconceived: Hayek's Incomplete Relationship Between Natural and*

responsibility of the State is contrary to the natural law doctrine of subsidiarity. Likewise, if the function of government is to secure natural rights and establish a system of law based on general principles of natural law, it follows that a government which exceeds the scope of this mandate violates natural law. Professor Charles Rice, using this logic, claims that the constructive role of natural law means it “is a prescription for limited government.”²⁰¹ In terms of American constitutional government, natural law scholarship (most notably at Notre Dame Law School) teaches that there are prescribed limits to the scope of government power and the “[u]surpation by the government of authority beyond the constitutional document was termed ‘a violation of law and duty to the people, not less than an invasion of their fundamental rights.’”²⁰² This dimension of natural law is also consistent with Lockean social contract theory. Lockean theory proclaims that a large, centralized state which intrudes on its citizen’s natural rights breaches the contract which sanctioned its formation. Using these principles, it is possible to harmonize Justice Thomas’ jurisprudence with the doctrine of subsidiarity and the notion that federalism and limited government stem from natural law as its proximate conclusion.

Three cases stand out as exemplars of Thomas’ view of the proper relationship between national and local government. Justice Thomas’ powerful dissent in *U.S. Term Limits, Inc. v. Thornton*,²⁰³ masterfully showcases his high view of federalism. In *Thornton*, the Court held, in a five-to-four decision that the citizens of Arkansas could not impose additional qualifications, beyond those mentioned in Article I, on candidates for the United States Congress. Justice Stevens, writing for the majority, concluded that the Qualification Clauses are the exclusive benchmark that determine whether a candidate is eligible for membership in Congress. Thus, according to Stevens, term limits are void as a matter of constitutional history because they are “inconsistent

Customary Law 40 AM. J. JURIS 209, 215 (1995) (explaining that the Tenth Amendment to the U.S. Constitution incorporates the doctrine of subsidiarity).

201. Rice, *supra* note 45, at 566.

202. Kmiec, *supra* note 121, at 221 (quoting *Bulletin of the University of Notre Dame Law Department* 1907-08, 7).

203. 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting).

with the Framers' vision of a uniform National Legislature representing the people of the United States."²⁰⁴

Justice Thomas disposed of these arguments impressively. First, he reintroduced the majority to political first principles by noting that "[o]ur system of government rests on one overriding principle: *all power stems from the consent of the people.*"²⁰⁵ This includes federal power, which only exists to the extent specifically granted by the Constitution whose authority "was 'given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong.'"²⁰⁶ Next, Thomas argued persuasively that the people of Arkansas did not consensually delegate the power to impose additional qualifications to the national government²⁰⁷ and, therefore, consistent with the Tenth Amendment, the power to limit the terms of congressmen and senators still resided at the state level.²⁰⁸ By focusing his opinion on whether the people, as individuals, voluntarily and affirmatively surrendered a measure of state sovereignty to a larger unit of government, Thomas' position implicitly yet perfectly reflects the natural law's inherent principle of subsidiarity.

Thomas' concurrence in *United States v. Lopez*²⁰⁹ was his second formidable opinion of the 1995 term that reiterated the nearly forgotten proposition that "the Constitution created a Federal Government of limited powers. . . ." ²¹⁰ While no one disputes that banning gun possession at elementary schools is sound public policy, the actual

204. *Id.* at 1845.

205. *Id.* at 1875 (Thomas, J., dissenting) (emphasis added).

206. *Id.* at 1875-76 (quoting THE FEDERALIST NO. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961)).

207. See *Thornton*, 115 S. Ct. at 1878.

208. Viewing *Thornton* as a case merely about term limits would obscure the import of Thomas' dissent. As Thomas aptly demonstrates, the case is really about the proper distribution of power in our federal system between state and national government and whether, by negative inference, the Constitution eviscerates state sovereignty in areas specifically mentioned in the Constitution's text. See *Thornton*, 115 S. Ct. at 1878 (Thomas, J., dissenting).

209. 115 S. Ct. 1624, 1642 (1995) (Thomas, J. concurring).

210. *Id.* at 1642 (quoting *New York v. United States*, 112 S.Ct. 2408, 2417 (1992)) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

underlying question in *Lopez* was whether that policy objective is within the purview of Congress's power to regulate interstate commerce.²¹¹ Although Chief Justice Rehnquist's majority opinion soundly rejected this unlawful extension of Congress' power, it was Thomas' detailed reexamination of the Court's ever malleable definition of "commerce" that was exemplary.²¹² In Thomas' view, the Court desperately needs to return to a narrower definition of commerce "that does not tend to 'obliterate the distinction between what is national and what is local [thereby] creat[ing] a completely centralized government.'"²¹³ As in *Thornton*, Thomas challenged the parameters of federal power and questioned whether those parameters have expanded beyond their constitutional moorings.²¹⁴ If Congress cannot pass laws regulating the intrastate transportation of sick chickens,²¹⁵ it follows *a fortiori* that Congress does not have the power to ban gun possession within 1000 ft. of a school. Thomas conceded that *Lopez* was not the case to reverse the highly suspect and economically disastrous Commerce Clause jurisprudence of the New Deal Court; however, he clearly is ready in a future case to delineate a comprehensive interpretation of the Commerce Clause that is historically aligned with the Framers' traditional conception of commerce.²¹⁶ Interpretation of the Commerce Clause in a manner that puts a check on expanding federal power is consistent with natural law because it reinforces the natural law doctrine of subsidiarity.

Finally, in *Seminole Tribe v. Florida*,²¹⁷ Thomas joined an opinion by Chief Justice Rehnquist that struck a substantial blow against national power and in favor of renewed federalism. In *Seminole Tribe*, the State of Florida argued that the Eleventh Amendment prevented the federal courts from exercising subject matter jurisdiction over a suit brought against it by the Seminole Indian Tribe. This action was

211. *Id.*

212. *Id.*

213. *Id.* at 1643 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

214. *Lopez*, 115 S. Ct. at 1642.

215. *See Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

216. *Lopez*, 115 S. Ct. at 1642.

217. 116 S. Ct. 1114 (1996).

instituted notwithstanding the fact Congress had explicitly intended to abrogate Florida's sovereign immunity. The Court held that the Eleventh Amendment prevents Congress from abrogating a State's sovereign immunity even when acting pursuant to its lawmaking authority specifically conferred by Article I.²¹⁸

Chief Justice Rehnquist, in explicitly overruling *Pennsylvania v. Union Gas Co.*,²¹⁹ drew the ire of liberal Justices Stevens and Souter whose low view of federalism and veneration of federal power led them to characterize the majority opinion as "shocking," "misguided,"²²⁰ and a throwback to the *Lochner* era.²²¹ Justice Souter's dissent is noteworthy for his artless denigration of natural law. Souter accused the majority of nullifying explicit congressional powers in Article I by constitutionalizing common law doctrines regarding the sovereign immunity of the states.²²² In a fit of positivism, Souter compared the majority's legal reasoning to that adopted by Justice Chase in *Calder v. Bull*,²²³ concluding that "[l]ater jurisprudence vindicated Justice Iredell's view, and the idea that 'first principles' or concepts of 'natural justice' might take precedence over the Constitution or other positive law 'all but disappeared in American discourse.'"²²⁴ Aside from the flaws in Souter's historical claim, his opinion is important because it exposes his guiding paradigm that judges are never justified in

218. *Id.* at 1127-28.

219. 491 U.S. 1 (1989) (holding that the amended version of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 clearly evinces Congressional intent to hold States liable for damages in federal court).

220. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1168 (1995) (Souter, J., dissenting).

221. *Id.* at 1176-77 (referring to *Lochner v. New York*, 198 U.S. 45 (1905)).

222. *Id.* at 1173-78 (Souter, J., dissenting). *But see* *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (recognizing that each State in the federal system is sovereign and that the authority of Article III courts to entertain suits against nonconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States").

223. 3 U.S. (3 Dall.) 386 (1798).

224. *Seminole Tribe*, 116 S. Ct. at 1177 (1996) (Souter, J., dissenting) (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 52 (1980)). Justice Souter's claim that natural rights jurisprudence has vanished is not entirely accurate. *See* *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1219-20 (9th Cir. 1988) (recognizing that right of Mexican national to be free from unreasonable search and seizure is a "natural right"); *In re Dobric*, 189 F. Supp. 638, 639-640 (D. Minn. 1960) (denying application for admission to citizenship because of father's failure to abide by natural law that requires a parent to support and care for his children).

departing from positive law when that law conflicts with first principles. This reduces legal reasoning to a purely pragmatic exercise.

Although Justice Souter's dissent in *Seminole Tribe* is indicative of his legal thinking, only when those opinions are contrasted with those of Justice Thomas does the enormous chasm between the competing legal paradigms of positivism and natural law become readily apparent.²²⁵

Insofar as Justices Thomas and Souter are intellectual antagonists, a comparison of their jurisprudence elucidates the higher law legal philosophy that Thomas employs to counter the staunch positivism of Justice Souter. In key cases addressing issues of federalism and the parameters of congressional power, Thomas has consistently adhered to a position that mirrors the natural law doctrine of subsidiarity.²²⁶ Souter has done just the opposite, even going so far as to deliver a stinging critique of natural justice in his *Seminole Tribe* dissent.²²⁷ While Justice Thomas' jurisprudence is marked by its originalism, conservatism, and traditionalism, Souter's legal thought is characteristically conventional, liberal, and atomistic.²²⁸ The debate between Souter and Thomas in key constitutional cases suggests these two Justices are treading much the same ground as Justices Chase and Iredell tread over one hundred years ago. Arguably, Justice Thomas has done much to vindicate Justice Chase.

F. *Individual vs. Group Rights: Thomas' Natural Law Critique*

Justice Thomas' jurisprudence is especially reflective of natural law and natural rights in the area of civil rights and affirmative action. Here, a distinct convergence exists between Thomas' pre-confirmation articles and speeches on natural law (which explain its role in issues of race and rights) and his subsequent Supreme Court opinions. Thomas'

225. See generally John O. McGinnis, *Original Thomas, Conventional Souter*, POL'Y REV., Fall 1995, at 24 (comparing and contrasting the work of the two Justices (Thomas and Souter) that President George Bush appointed to the Court)).

226. See generally *Lopez*, 115 S. Ct. 1624 (1995); *Seminole Tribe*, 116 S. Ct. 1114 (1995); and *Printz v. United States*, 117 S. Ct. 2365 (1997).

227. *Seminole Tribe*, 116 S. Ct. at 1177.

228. McGinnis, *supra* note 225.

natural rights *tour de force* on the issue of equality was a short but powerful concurrence he authored in *Adarand Constructors, Inc. v. Peña*,²²⁹ a 1995 case where the Court held that federal affirmative action programs are subject to strict judicial scrutiny.²³⁰ In comparison to Justice Sandra Day O'Connor's timid majority opinion and the dissent's continued endorsement of what Thomas refers to as "benign discrimination," Thomas explicates a strong natural rights justification for the proposition that law *per se* is not the force that makes men free and equal.²³¹ Addressing the federal government's invidious attempt to make its citizens equal by distributing benefits on the basis of race (in this case, government construction contracts), Thomas stated that "there can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution."²³² This statement is profound in that Thomas explicitly articulates the natural law position that man's rights and the very essence of who man is precede the Constitution. The natural law underpinnings in the opinion are especially evident when Thomas cites and quotes the Declaration of Independence in support of his argument that "the Constitution embodies the fundamental and self-evident principle that 'all men are created equal and are endowed by their Creator with certain inalienable rights.'"²³³

Justice Thomas reiterated the moral argument for rejecting racial preferences as an affront to the dignity and self-worth of the individual in a 1995 keynote address to the Federalist Society.²³⁴ Rejecting the cult of victimology from which racial preferences flow, Thomas

229. 115 S. Ct. 2097 (1995).

230. *Id.* at 2117-18.

231. *Id.* at 2119 (Thomas, J. concurring in part and concurring in the judgment).

232. *Id.* at 2119 (Thomas, J., concurring) (emphasis added). *Cf.* Holder v. Hall, 114 S. Ct. 2581, 2599 (1994) (Thomas, J., concurring) (criticizing the notion that differences in race correspond to differences in political preferences); *Northeastern Fla. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (Thomas, J.) (concluding that affirmative action programs disadvantage third parties in a "fundamental" way).

233. *Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

234. Justice Clarence Thomas, *Victims and Heroes in the "Benevolent State,"* Address at the Federalist Society for Law and Public Policy in Washington, D.C. (Sept. 22, 1995) in 19 HARV. J.L. & PUB. POL'Y 671 (1996).

declared that “success (as well as failure) is the result of one’s own talents, morals, decisions, and actions. . . . Overcoming adversity not only gives us our measure as individuals, but it also reinforces those basic principles and rules without which a society based upon freedom and liberty cannot function.”²³⁵ The foregoing passage provides sharp insight into the natural law foundations of Justice Thomas’ legal, political, and philosophical worldview, because he affirms that ordered society depends on certain rules and principles that are fundamental. In turn, by stating that man’s moral capacity as an individual reinforces those basic principles that advance the commonweal, Thomas completely obliterates the case for government policies that group people by race.

G. *Recent Speeches: The University of Kansas Address*

In April 1996, Justice Thomas delivered a speech to the University of Kansas Law School faculty and student body.²³⁶ What is remarkable about the University of Kansas address is that, compared to prior speeches Thomas has given since becoming a Justice, the topic and content of the Kansas Address resonate with natural law principles. Entitled *Judging*, the address focuses on the role of the judge and the theory of judging, which Thomas admits has preoccupied his thinking during the past several years on the Court.²³⁷ The speech begins by offering a critique of judging that is rooted in politics and policy preferences.²³⁸ Thomas understands this type of judicial process to be a threat to the rule of law. Instead, Thomas proposes that judges should be law-finders and not lawmakers who are guided by reason and judgment.²³⁹ Justice Thomas’ emphasis on human reason and intellect

235. *Id.* at 671-72 (emphasis added).

236. Justice Clarence Thomas, *Judging*, Address at the University of Kansas School of Law (Apr. 8, 1996), in 45 U. KAN. L. REV. 1 (1996).

237. *Id.*

238. *Id.* Judges are not to be policy makers and if they do depart from the positive law such departure must be consistent with the natural law. *Id.*

239. *Id.* at 3-4. This is not the first time Justice Thomas has acknowledged man’s capacity for reason. In his critique of the rights revolution, Thomas reiterated the natural law principle that “[u]nlike any other living creature in the world, humans are moral, rational, and thinking beings.” Justice Clarence Thomas, Address at a conference of The Federalist

(as opposed to passion and emotion) as the legal tools for judicial decision-making is a wonderful restatement of the natural law consistent with Thomistic philosophy.²⁴⁰ For just as reason enables the scientist to discover truths about nature and the physical world in which we live, that same reason empowers judges to find and apply specific legal rules that are ultimately derived from the natural law.

In the University of Kansas address, Justice Thomas also spoke about the source of law, which for federal judges is the Constitution and federally enacted statutes. He elaborated on this point by stating that in terms of constitutional adjudication, the judge can distinguish between right and wrong legal conclusions precisely because the Constitution is imbued with certain clear, *eternal* principles:

Unfortunately, the Constitution does not come with Cliff's Notes or a glossary. When it comes to interpreting the Constitution's provisions, such as, for instance, the Speech or Press Clauses of the First Amendment, reasonable minds can certainly differ as to their exact meaning. But that does not mean that there is no right or correct answer; that there are no clear, eternal principles recognized and put into motion by our founding documents. . . . The law is a distinct, independent discipline, with certain principles and modes of analysis that yield what we can discern to be correct and incorrect answers to certain problems.²⁴¹

Justice Thomas' recognition of fixed and unchanging eternal principles that lead to correct constitutional decisions is certainly consistent with natural law. This is not to say, however, that the natural law is a substitute for the Constitution, but only that it provides the judge with a larger and permanent framework from which to interpret constitutional provisions.

Society and the Manhattan Institute, Washington, D.C. (May 16, 1994), in *Thomas Critiques the 'Rights Revolution'*, LEGAL TIMES, May 23, 1994, at 23-24.

240. In the *SUMMA THEOLOGICA*, St. Thomas Aquinas stated that the "natural law is nothing else than the rational creature's [judge] participation in the eternal law." THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. I-II, Q. 91, Art. 2.

241. Thomas, *supra* note 236, at 5-6.

In addition to the Kansas address, Justice Thomas has made statements in other speeches where the currents of natural law swell in noticeable fashion. In a 1994 address at Samford University, Thomas reminded the audience of law's permanency by describing the law as "an edifice with a mighty foundation upon which we can make additions and subtractions, so long as they are in keeping with the great principles and structures that have kept the building up for all this time."²⁴² In a more recent speech at the New England School of Law, Justice Thomas explained that the foundation of American government is rooted in the self-evident truths of the Declaration of Independence.²⁴³ From the collective content of these remarks, it cannot be denied that Justice Thomas is quietly yet deliberately reaffirming his professed commitment to a moral, political, and legal philosophy based on natural law.

IV. CONCLUSION

In examining Justice Clarence Thomas' work on the Supreme Court, especially during the last several terms, it is apparent that the same natural law that served as the pillar of his conservative legal and political thought before coming to the Court, is reappearing in his constitutional jurisprudence. In important cases that touch the boundaries of natural law (most notably cases involving religion, abortion, property rights, limited government, and civil rights), Justice Thomas has demonstrated that his approach is consistent with natural law both as a philosophy and legal system. As Justice Thomas continues to gain confidence that the intellectual and legal tradition he is building will resonate far beyond the Court itself, it should be expected that his jurisprudence, based on natural law and natural rights, will become more apparent in the text of his opinions. On his present course, Thomas will inevitably capture and redirect American jurisprudence as modern, and now, postmodern legal systems collapse

242. Justice Clarence Thomas, Address at Samford University, Cumberland School of Law (Nov. 17, 1994), in 25 *CUMB. L. REV.* 611, 617 (1995).

243. Justice Clarence Thomas, Address at the New England School of Law (Nov. 21, 1996), in 31 *NEW ENG. L. REV.* 515, 518 (1997).

under the weight of their own weaknesses. Such systems fail to acknowledge that particularized legal claims that deviate from general principles of natural law eventually prove unworkable, yielding chaos and disorder.²⁴⁴ One need only reference the disastrous social consequences stemming from the proliferation of laws rooted in unrestrained personal autonomy to see that this is true. Still, contemporary lawyers, judges, and academics continue to offer diverse and competing normative claims about law based on nothing more than personal predilections. Justice Thomas correctly identifies Critical Legal Theory and its progeny, including Critical Race Theory and Critical Feminist Theory, as schools of legal thought based on personal preference that decidedly reduce law to force and will.²⁴⁵ Yet the real beauty of Thomas' legal insight and normative vision is seen not primarily in his explication of the failings of the legal realists and their progeny, but is instead revealed in Thomas' positive, alternative project which is the natural law. As it is very likely that Justice Thomas will continue on the Supreme Court well into the next millenium, he will certainly continue to bring his natural law approach to bear on the entirety of American law and jurisprudence.

244. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 396 (1856) and *Roe v. Wade*, 410 U.S. 113 (1973) are examples of opinions that conflict with the natural law and have produced social and political disharmony.

245. Thomas, *supra* note 236, at 3.