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JUSTICE CLARENCE THOMAS: DOUBT, DISAPPOINTMENT, DISMAY AND DIMINISHING HOPE

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I was flattered when asked if I would be willing to publish the testimony which I gave in conjunction with the confirmation hearings regarding the nomination of Clarence Thomas to serve as an Associate Justice of the United States Supreme Court. Since that date, and with Justice Thomas's ascendancy to the Supreme Court, my initial delight has largely been supplanted with doubt, disappointment, and dismay: doubt, because Justice Thomas's activity on the Court has caused me to have significant second thoughts regarding the conclusions I drew during the course of my testimony; disappointment, because I have been saddened by Justice Thomas's unwillingness to adhere to views that I had believed he held prior to his ascendancy to the Court; and dismay, because I am concerned that Justice Thomas has fallen under the sway of Justice Scalia and the allure of what I have referred to as "deferentialism."[1]

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This essay is based on the testimony I gave on September 20, 1991, before the Senate Judiciary Committee on the nomination of Clarence Thomas to be an Associate Justice of the United States Supreme Court. I would like to thank David Mayer, Timothy Lytton, and Brian Freeman for their comments and Jane Underwood for her research assistance regarding the confirmation proceedings prior to September 20, 1991. I would be remiss, as well, if I did not acknowledge the support of my secretary, Linda Rodichok. The errors in my analysis, which I fear history is proving to be quite numerous, are all my own.

[1] With regard to Judge Bork and Justice Scalia, whom I have labelled "deferential originalists" or "deferentialists," I have noted that:

> [Deferentialists] use the ambiguity of the text and the history of the Bill of Rights to constrain the vision or aspiration of liberty held by many of the framers [of the Bill of Rights]. [Deferentialists] examine the text, history and structure of the Bill of Rights to ascertain whether those sources resolve specific questions. Not surprisingly, it is exceedingly rare to find that those sources yield specific interpretive answers to specific questions. The framers of the Constitution, the Bill of Rights and the Civil Rights Amendments largely were natural lawyers, who espoused broad principles and often eschewed the call to resolve specific issues in a specific manner

While Justice Thomas is new to the Court and has rendered few written opinions to date, my hope that he would be a bit more libertarian than his counterparts on the Court has diminished considerably. There is some hope, however, based on dicta in his opinions, that as he matures on the Court, Justice Thomas may free himself from the intellectual influence of Justice Scalia and his apparent attraction to deferentialism as a theory of constitutional interpretation.

To document adequately my doubt, disappointment, dismay and diminishing hope, I will divide this essay into three parts: Part One is the testimony that I gave on September 21, 1991 in support of Justice Thomas's nomination.[2] Part Two is a discussion of Justice Thomas's theories of precedent and constitutional interpretation as alluded to in his opinions during his short tenure on the Court. Part Three is a brief summary of the inconsistencies between my initial assessment of Thomas's likely theory of constitutional interpretation as well as his performance on the Court and an articulation of my remaining, yet diminishing, hope.

I.

I do not know Judge Thomas personally. I do have some familiarity with his writing and testimony, however, and I believe that he will be a force for liberty and equality on the Court. As one

> within the Constitution. Rather than seeking to find and apply broad principles, however, [deferentialists] use the ambiguity that appears in the text, history and structure of the Constitution to warrant recourse to their [theory] of deference to the legislative and executive branches of government. When [deferentialists] are unable to discover specific evidence sufficient to resolve clearly the particular issue before them, they provide the elected branches of government with license to effectuate policies adopted in the democratic process. In doing so, they minimize constitutional constraints on the actions of the legislative and executive branches [and, in the process, denigrate human rights].

Rodney K. Smith, *Establishment Clause Analysis: A Liberty-Maximizing Proposal*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 463, 469 (1990).

[2] My first inclination was to clean up my testimony, to cover up my disillusionment with Justice Thomas's tenure on the Court thus far, but I decided that I should leave the testimony intact, despite the chagrin I feel at having missed the mark. I have done so because I am convinced that covering up my initial error in assessing Justice Thomas would only compound the error and that my best posture would be to recognize the error and discuss what went wrong and what may be done to rectify matters. Thus, the only thing that I have added to my testimony is a series of footnotes that support conclusions drawn in the course of the testimony.

who has primarily written in the area of the religion provision of the First Amendment, I am persuaded that, if confirmed, Justice Thomas will be sensitive to issues of religious liberty as they arise in the United States.

To explain why I believe that Judge Thomas will be a positive voice for liberty on the Court, I will divide this testimony into the following parts: Part A will examine two versions of "conservatism" extant in American political and legal thought; Part B will examine the distinction between theories of precedent and constitutional interpretation; Part C will examine Judge Thomas's theories of precedent and constitutional interpretation and will support the proposition that Judge Thomas is well within the mainstream of constitutional thought in American legal thought; Part D will examine issues related to religious liberty, and Part E will serve as a conclusion and summary.

A.

There are two types of conservatives in America today. Traditional conservatives are those who are committed to limited government.[3] These conservatives are more libertarian in nature, believing, as Madison recognized, that the Court and all branches of government should take an active role in protecting human rights.[4] Another type of conservative, however, which developed largely as a response to judicial activity in the area of rights of criminal defendants and the right of privacy as applied to the abortion issue, has come to espouse a broad theory of judicial restraint. This theory has sometimes been criticized as being too

[3] "Traditional conservatives" is my own term. I use "traditional" because I believe that historically, conservatives were opposed to governmental largesse and the limitation of human rights by the government (e.g., they were more libertarian in outlook). "Contemporary conservatives" are less libertarian and anti-government, because their genesis may have been a result of concerns, or value preferences, held by many conservatives, which were challenged by judicial protection of rights that ran contrary to those value preferences (e.g., abortion rights and the expansion of the rights of the accused in the area of criminal procedure).

[4] In the area of religious liberty, for example, in his proposed version of the Virginia Declaration of Rights, Madison would only limit the "full and free exercise of it according to the dictates of conscience" when "under the color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered." Smith, *supra* note 1, at 471. This test severely restricts the role of government in regulating matters of conscience.

deferential to the power of government.[5] In refusing to scrutinize the acts of the democratic branches of government, particularly when those acts may implicate human rights, these newer conservatives often find themselves supporting "big" (or at least "bigger") government. Such support of government action, the action of the democratic branches of government, is anathema to more traditional conservatives. These two brands of conservatism might well be placed at ends of a continuum and often are a source of tension among "conservatives." Of course, few individuals espouse a pure version of either brand of conservatism—most individuals fall somewhere between the two ends of the continuum. An important question, I believe, for this Committee is where on the continuum Judge Thomas falls. Before that issue can be effectively explored, however, one must examine both Judge Thomas's theory of precedent and his theory of constitutional interpretation.

B.

Any Supreme Court Justice should develop both a theory of precedent—how he or she treats existing precedent—and a theory of constitutional interpretation—the methodology that he or she uses to interpret or examine constitutional issues. Theories of precedent fall along a continuum between two somewhat ill-defined viewpoints: (1) the view that a Justice is bound only by the decision in a case as it relates to the particular facts of that case; or (2) the view that a Justice is bound both by the particular decision and by the doctrine or theory espoused by the majority in prior case law. Given that the facts of a case are rarely replicated in precisely the same manner in a subsequent case, the view that the Justice is only bound by the decision in a particular case provides him or her with very broad latitude or discretion in future cases. The view that a Justice is bound by the principles articulated in the prior case, however, is more effective in limiting a Justice's discretion. While few Justices adhere to either of these views in the extreme, a Justice should develop some theory re-

[5] Smith, *supra* note 1, at 463-78.

garding precedent over time.

Theories of precedent, however, are related to theories of constitutional interpretation. Indeed, a theory of constitutional interpretation may well include or dictate a theory of precedent. It helps, however, to look at theories of precedent and constitutional interpretation separately. As an aside, it is worth noting that I know of no Justice, with the possible exception of Justice Felix Frankfurter, who came to the Court with a refined theory of precedent or constitutional interpretation.

A theory of constitutional interpretation provides a methodology for approaching and organizing constitutional analysis. The dialogue fostered by the debate over originalism (the use of the intent of the Framers and ratifiers in constitutional analysis) versus non-originalism (the use of other methodologies of constitutional analysis that rely on items other than or in addition to textual and other evidence of the intent of the Framers and ratifiers) has been rich and has helped focus attention on theories of constitutional interpretation. A theory of constitutional analysis or interpretation limits the purely subjective policy preferences of a Justice and helps to legitimize the independence of the Court.

Even originalism with its reliance on text and history rarely yields a clear-cut answer in significant cases. At best, it provides parameters—a canvas upon which the Court may legitimately do its work. It rarely dictates (although it often limits) constitutional choices. Like theories of precedent, theories of constitutional analysis, however well developed, rarely yield automatic answers to pressing constitutional issues. It is little wonder, therefore, that the Committee rightfully spends as much time as it does trying to get a sense of a potential Justice's temperament and character.

C.

The Committee has heard much during the course of the hearings regarding the character and temperament of Judge Thomas. The Committee, and thanks to television, the public at large, have been able to get a sense of Judge Thomas's sensitivity and humanity. Not knowing Judge Thomas, I can add little to the discussion

regarding his character.[6] I can, however, add some analysis regarding his temperament, as it has manifested itself in his writing and testimony.

In his writing, with his emphasis on the role of the Declaration of Independence and natural rights, Judge Thomas placed himself on the side of the traditional (more libertarian) strand of conservatism. For example, he has stated that "natural rights . . . arguments are the best defense of liberty and of limited government."[7] He has, however, argued for restraint, as well:

> [W]ithout recourse to higher law, we abandon our best defense of judicial review—a judiciary active in defending the Constitution, but judicious in its restraint and moderation. Rather than being a justification of the worst type of judicial activism, higher law is the only alternative to willfulness of both run-amok majorities and run-amok judges.[8]

At first blush, it is difficult to understand how Judge Thomas can combine notions of restraint with his libertarian leanings. A look at how restraint and libertarian notions potentially impact Judge Thomas's theories of precedent and constitutional interpretation will be helpful.

During the course of the hearings, Judge Thomas has reiterated his commitment to a fairly stringent theory of precedent.[9] He is

[6] It should be noted that my testimony was given prior to the debacle that occurred as a result of the very significant allegations raised by Professor Anita Hill.

[7] Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 63 (1989) [hereinafter Thomas, *Higher Law*]. Thomas has linked the natural rights theory of the Declaration of Independence to the Constitution in asserting that "[t]he first principles of equality and liberty should inspire our *political and constitutional* thinking." Clarence Thomas, *Toward a Plain Reading of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 983, 995 (1987) [hereafter Thomas, *Declaration*] (emphasis added).

[8] Thomas, *Higher Law*, *supra* note 7, at 63-64.

[9] During the confirmation hearings, one reporter noted that Judge Thomas said that "a judge considering overturning a precedent must show more than that the ruling is wrong." Linda P. Campbell, *Despite Murky Responses, Thomas's Conservative Bent Shows*, CHI. TRIB., Sept. 15, 1991, at C1. Elsewhere, it was reported that:

> Thomas even took a pot shot at views expressed in June by Chief Justice William Rehnquist. Rehnquist said that court precedents involving civil liberties were fair game for reversal, while court decisions affecting businesses were not—because businesses may have relied on past rulings in their dealings and should not have the rules of the game changed often. Thomas said just the opposite, that civil liberties decisions should be reversed only with great caution.

willing to recognize the binding authority of the holding or decision in cases *and* the general doctrine or principles elucidated in those cases. For example, he has noted his general support of the *Lemon* test, a test used in Establishment Clause decisions. Appropriately, however, Judge Thomas recognized that the three-part *Lemon* test presents difficulties in application.[10] Nevertheless, as demonstrated by his general acceptance of *Lemon*, he is willing to go beyond the mere holding in a case, as it relates to particular facts, to general endorsement of the doctrines set forth in prior precedent. His theory of precedent should be of comfort to those who are fearful that his personal policy predilections might dictate how he decides future cases. Of course, even a fairly stringent theory of precedent, like that espoused by Judge Thomas, cannot predetermine the decision in every case. Case law operates interstitially, leaving gaps even for those who closely follow precedent. Those gaps must be filled in subsequent cases. Thus, while Judge Thomas has a restrained theory of precedent, that restraint does not determine the "correct" decision in each new case.

How Judge Thomas fills those gaps will be influenced by his developing theory of constitutional interpretation. His theory of constitutional interpretation, at least as to cases implicating individual rights, has its roots in the Declaration of Independence. Thomas clearly believes that the Constitution is a logical extension of the principles of the Declaration of Independence.[11] It is at this point in his analytical matrix that Judge Thomas may po-

Tony Mauro, *Conservative Thomas Shows Some Liberal Leanings*, USA TODAY, Sept. 16, 1991, at 9A. In that article, however, Thomas also was described as enthusiastically adopting "judicial restraint—the idea that judges should not go out looking to create new rights, but should defer to the elected branches of government." *Id.*

[10] In response to Senator Simon's inquiry as to whether he thought the *Lemon v. Kurtzman* criteria were "reasonable criteria that should be used in the future," Judge Thomas responded that, "The Court has applied the tests with some degree . . . of difficulty over the years. I have no personal disagreement with the tests . . . ." Later in that same response, Thomas added, "I have an open mind with respect to the debate over the application of the *Lemon v. Kurtzman* test[,] [a]nd I recognize that the Court has applied it with some degree of difficulty. But, at the same time, I'm sensitive to our desire in this country to keep government and religion separated—flawed as may be . . . that Jeffersonian wall of separation." *Hearings on the Supreme Court Nomination of Clarence Thomas, Committee on the Judiciary, United States Senate*, 102d Cong., 1st Sess. 19 (1991) (testimony given September 11, 1991) [hereinafter *Thomas Hearings*], *available in* LEXIS, Legis library, Fednew file.

[11] *See* Thomas, *Declaration*, *supra* note 7, at 995.

tentially take a libertarian turn, where text and precedent permit such a turn. If precedent permits a liberty-maximizing result, Judge Thomas may be inclined to support the libertarian rendering. Indeed, he may justifiably conclude that the aspiration of liberty and equality espoused by the founders directs that such a route be taken.[12] As one who believes that such a course is appropriate and needed on the Court, I am heartened by the concern for liberty and equality expressed in Judge Thomas's writing.

At any rate, it is clear that Judge Thomas is in the mainstream in terms of his theory of precedent and his theory of constitutional interpretation. He may, however, be somewhat less "restrained" than some of the Justices currently serving on the Court. This would provide some welcome moderation on the Court—an intellectual moderation that would be complemented well by his social and educational background. A look at the way in which Judge Thomas might decide cases in the area of religious liberty will be helpful in demonstrating the preceding points.

D.

With the Supreme Court's fairly recent decision in *Employment Division v. Smith*,[13] in which the Court held that the Free Exercise Clause of the First Amendment did not protect a person's relig-

[12] In responding to questioning on September 12, 1991 by Senator Simpson regarding the interplay between his espousal of natural law and his constrained view regarding precedent, Judge Thomas stated that:

> [R]ecognizing that natural rights is a philosophical, historical context of the Constitution is not to say that I have abandoned the methodology of constitutional interpretation used by the Supreme Court. In applying the Constitution, I think I would have to resort to the approaches that the Supreme Court has used . . . I would look at the prior Supreme Court precedents.

Thomas Hearings, *supra* note 10, at 19 (testimony given September 12, 1991). Later in that same response, he clarified his views further by asserting that:

> The Founders, the Drafters of the 13th, 14th Amendments, abolitionists, believed in natural law, but they reduced it to positive law. The positive law is our Constitution. And when we look at constitutional adjudication, we look to that document. We may want to know, and I think it is important at times to understand what the drafters believed they were doing as a part of our history and tradition in some of the provisions such as the liberty component of the Due Process Clause of the 14th Amendment. But we don't make an independent search or an independent reference to some notion or a notion of natural law . . . . We look at natural law beliefs of the Founders as a background to our Constitution.

Id.

[13] 110 S. Ct. 1595 (1990).

iously motivated use of peyote from the reach of a state's general criminal law prohibition,[14] great concern has been expressed by those who believe that the freedom of conscience should be protected against general government limitation.

Given Judge Thomas's theory of precedent, it appears that he would reluctantly (I suspect) accept the Court's specific decision.[15] To the extent that the precedent or long-standing, established doctrine did not dictate the decision in a future case, however, Judge Thomas might well argue for a more libertarian result.[16] Indeed, I find Judge Thomas's favorable response to the *Sherbert* line of cases, and the doctrine which it spawned, to be encouraging. In all likelihood, he will reject the wizened approach espoused by Justice Scalia in *Smith*. Given the tenor of politics in America today, it is doubtful that anyone appointed to the Court would espouse a view more congenial to individual liberty than Judge Thomas. His form of moderate conservatism is more traditional or libertarian than many of the current members of the Court, his personal experience and background imply a sensitivity to individuals and minorities, and his writings are heartening. He is in the mainstream of American jurisprudence, but where permitted to do so in light of the constraints of his theory of precedent, Judge Thomas will no doubt take a welcome libertarian approach to issues.

[14] *Id.* at 1606.

[15] However, Judge Thomas did intimate that he might view *Smith* as an aberration, in his testimony on September 11, 1991. He stated that, "when the *Sherbert* test was abandoned or moved away from in the *Smith* case, I think that any of us who were concerned about this area, because, as we indicate, I think we all value our religious freedoms, I think there was an appropriate reason for concern . . . ." *Thomas Hearings, supra* note 10, at 19 (testimony given September 11, 1991). Thomas added that he "would be concerned that we did move away from an approach [*Sherbert*] that has been used for the past I guess several decades," and moments later emphasized that he was concerned that the Scalia approach in *Smith* "could lessen religious protections." *Id.*

Even if Thomas does not vote to limit or overturn the Court's holding in *Smith*, however, he appears inclined to circumscribe the Scalia approach articulated in *Smith*.

[16] Judge Thomas responded to continuing questioning on September 11th regarding his position relative to issues of religious liberty generally and the non-libertarian Scalia view by pointing out that he was "concerned about the approach taken by Justice Scalia [because] it could have the potential of lessening protection [of religious liberty], and I think the approach we should take certainly is one that maximizes those protections." *Id.*

E.

Judge Thomas should be confirmed. As one who has examined past confirmation hearings and the constitutional theories espoused by the various nominees, I am convinced that Judge Thomas is a fine nominee. When able to do so, I suspect he will find ways to keep the spirit of the Declaration of Independence alive in our constitutional jurisprudence. His own independence and his written, consistent commitment to the liberty and equality of others will, in all likelihood, benefit the American people well into the twenty-first century.

An important aside—a footnote to an academic like myself—is in order. I have long felt that Congress should be more aggressive in furthering human rights. Courts can only work on a piecemeal basis—addressing one case at a time, at great cost to the litigants. Congress, on the other hand, can fill broad gaps, as it did with civil rights legislation that made the decision in *Brown* a reality. Regardless of whether or not I am correct when I conclude that Judge Thomas will bring a respect for rights to the Court, the Court itself will not be significantly supportive of individual liberty. Thomas Jefferson argued that each branch of government should work to protect the rights of the American people. Congress should not abdicate its responsibility for respecting rights to the Court. The courage necessary to protect against the tyranny of the majority must be mustered by members of the majoritarian branches of government as well as by members of the judiciary.

II.

In this section, I will discuss Justice Thomas's theories of precedent and constitutional interpretation, as they have developed during his brief tenure on the Court. I will look first at his theory of precedent and then at his theory of constitutional interpretation.

A. Thomas' Theory of Precedent

As anticipated in my testimony, in his few constitutional decisions to date, Justice Thomas has largely espoused a restrictive view of precedent—a view that evidences an unwillingness to ex-

pand precedents in any substantial sense. For example, in *Hudson v. McMillian*,[17] in which the Court held that the use of excessive physical force against a prisoner may constitute cruel and unusual punishment for Eighth Amendment purposes, even though the prisoner does not suffer serious injury, Thomas advocated a very constrained view of precedent in his dissent. In this regard, he asserted that:

> [A] use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not 'cruel and unusual punishment.' In concluding to the contrary, the Court today goes far beyond our precedents.[18]

Justice Scalia joined in Justice Thomas's dissent. In *Hudson*, Thomas added:

> Today's expansion of the Cruel and Unusual Punishment Clause beyond all bounds of history and precedent is, I suspect, yet another manifestation of the pervasive view that the Federal Constitution must address all ills in our society . . . . To reject the notion that the infliction of concededly "minor" injuries can be considered either "cruel" or "unusual" (much less cruel and unusual punishment) is not to say that it amounts to acceptable conduct. Rather, it is to recognize that primary responsibility for preventing and punishing such conduct rests not with the Federal Constitution but with the laws and regulations of the various States.[19]

Justice Thomas's inclination to read precedent in a circumscribed fashion—in a manner that largely defers to the majoritarian branches of the federal and state governments—manifested itself in other cases as well. In *White v. Illinois*,[20] the Court held that the Confrontation Clause does not require that prior to the admission of testimony by the trial court

[17] 112 S. Ct. 995 (1992).
[18] *Id.* at 1005.
[19] *Id.* at 1010.
[20] 112 S. Ct. 736 (1992).

under the spontaneous declaration and medical examinations exception to the hearsay rule, the court must find the declarant to be unavailable or the prosecution must produce the declarant at trial.[21] Justice Thomas, who was joined by Justice Scalia, concurred in part and concurred in the judgment.

In his opinion, Justice Thomas noted that, "our own earlier decisions . . . suggest that a narrower reading of the Clause than the one given to it since 1980 may well be correct."[22] In blending the "relevant historical sources" with the Court's "own earlier decisions," Justice Thomas seems to be backing away from post-1980 precedents. This may indicate some willingness on Justice Thomas's part to trump, or at least restrict or modify, precedents that deviate from his strict reading of the "relevant history."[23] This seems to intimate, as well, that his allegiance to a theory that calls for rigid or strict adherence to precedent is questionable. His theory remains underdeveloped.[24]

B. Thomas's Theory of Constitutional Interpretation

Justice Thomas also has offered some hints as to his theory of constitutional interpretation during his short tenure on the Court. In *White v. Illinois*, Justice Thomas opined that:

> There appears to be little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common law right of confrontation. The Court has never explored the historical evidence on this point. As a matter of plain language, however, it is difficult to see how or why the Clause should apply to hearsay evidence as a general proposition.[25]

[21] *Id.* at 741-42.

[22] *Id.* at 745.

[23] *See infra* notes 29 & 30 and accompanying text (discussion of Justice Thomas's seemingly restrictive use of "relevant history" in *Hudson* and other cases).

[24] Given the inconsistencies in his opinions to date, Justice Thomas would do well to reflect a bit more deeply about his developing theory of precedent in constitutional adjudication. There is much that has been written on this area. For an excellent recent article, see generally Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991).

[25] *White*, 112 S. Ct. at 746.

After indicating that the "Court has never explored the historical evidence on this point,"[26] Justice Thomas proceeded to examine the history in a very cryptic and abbreviated manner. Indeed, Justice Thomas actually refrained from examining anything but secondary sources in concluding that:

> This analysis *implies* that the Confrontation Clause bars only unreliable hearsay. Although the historical concern with trial by affidavit and anonymous accusers does reflect concern with the reliability of the evidence against a defendant, the Clause makes no distinction based on the reliability of the evidence presented. Nor does it seem likely that the drafters of the Sixth Amendment intended to permit a defendant to be tried on the basis of *ex parte* affidavits found to be reliable.[27]

Ultimately Justice Thomas concluded that, "it is possible to interpret the Confrontation Clause along the lines suggested by the United States in a manner that is faithful to both the provision's history and text."[28] This restrictive interpretation, based on an abbreviated historical analysis, and on a restrictive rendering of the text, evidences Justice Thomas's disinterest, or perhaps even disdain, for a more libertarian, principled reading of the historical evidence. He appears inclined to inquire whether a specific issue was considered historically—in this case, he asked whether the Framers of the Confrontation Clause intended to limit the admission of hearsay under the Confrontation Clause—rather than dealing with the broader principles that might underlie such a clause. In other words, Justice Thomas seems to be inclined to inquire as to whether *a particular practice* was considered and disposed of, as an historical matter, by the Framers rather than endeavoring to apply the broad and often libertarian *principles* intended by the Framers. By looking restrictively at the particular practices clearly covered by a provision at its genesis, as an historical matter, Justice Thomas evidenced that he is inclined to disavow a natural law reading of the Bill of Rights and to espouse a deferentialist reading of those provisions. It is little wonder, there-

[26] *Id.*
[27] *Id.* at 746-47.
[28] *Id.* at 747.

fore, that he so often joins with, or is joined by, Justice Scalia.

There is an exception to this restrictive reading of the provisions of the Bill of Rights, however, that is implied in Justice Thomas's opinion in *White*. In that opinion, he added that "[r]eliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them."[29] In this brief aside, Justice Thomas intimates that he might read broader provisions like the Due Process Clause in a more libertarian and less wizened manner.[30]

In *Hudson*, Justice Thomas further evidenced his propensity to read clauses restrictively and may have cast doubt on his willingness to read provisions like "due process" broadly. In *Hudson*, Thomas resisted applying an "evolving standards of decency approach" to interpreting the "cruel and unusual punishment" provision. In that regard, he argued:

> Surely prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment.[31]

Again, Justice Thomas read the relevant history in a restrictive fashion, limiting his analysis to the particular practice involved, rather than examining the underlying principle embodied in the cruel and unusual punishment provision. He noted, however, that a broader right might be found to "be remediable under other provisions of the Federal Constitution . . . ."[32]

[29] *Id.*

[30] This aside may well foreshadow a less restrained and consequently more libertarian rendering of the Due Process Clause by Justice Thomas. This may comport with Thomas's testimony to the effect that, "We may want to know and I think it is important to understand what the drafters believed they were doing as a part of our history and tradition in *some of the provisions* such as the liberty component of the Due Process Clause of the Fourteenth Amendment." *Thomas Hearings, supra* note 10, at 19 (emphasis added). I emphasized the language "some of the provisions" to highlight the point that Justice Thomas may take a less deferential view regarding some clauses of the Constitution.

[31] Hudson v. McMillian, 112 S. Ct. 995, 1005 (1992).

[32] *Id.* This also intimates that Justice Thomas may read some provisions more broadly

Justice Thomas appears to apply the relevant history and the text of the Constitution in a restrictive manner, largely deferring to the majoritarian branches of government in matters related to liberty. His deferentialism has been clearly evidenced in two other recent opinions. In his concurrence respecting the denial of certiorari in *Haitian Refugee Center, Inc. v. Baker*,[33] Justice Thomas stated that "[t]he affidavits filed throughout this litigation have sought to describe the conditions in Haiti and the treatment the returnees have received there. I am deeply concerned about these allegations. However, this matter must be addressed by the political branches, for our role is limited to questions of law."[34] Thus, despite the fact that Justice Blackmun argued with some force in his dissent in *Haitian Refugee Center* that constitutional issues were presented,[35] Justice Thomas deferred to the "political branches."

In *Wyoming v. Oklahoma*,[36] a case raising possible Commerce Clause and standing issues, Justice Thomas, again joined by Justice Scalia, further demonstrated his commitment to a deferential theory of judicial restraint in constitutional adjudication. In that case, he argued that the Supreme Court should use its discretion in refusing to exercise its original jurisdiction. He cited a prior case for the proposition that "[i]t has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.' "[37] Thus at nearly every turn, when a right or constitutional issue was arguably implicated, Justice Thomas deferred to the political branches, by reading the text and history restrictively.

Despite his possible willingness to read the Due Process Clause broadly, it appears that Justice Thomas is unwilling to look to underlying principles—principles that may have their origin in the Framers' concept of natural rights or law—and apply them in a

than others.

[33] 112 S. Ct. 1245 (1992).

[34] *Id.* at 1245-46.

[35] Justice Blackmun stressed, for example, that the issue of "whether the United States Government is violating the First Amendment by denying lawyers from the Haitian Refugee Center a right of access to the Haitians at Guantanamo Bay," *id.* at 1246, remained unresolved. Thus, there were potential constitutional issues involved in the case, although Justice Thomas was unwilling to recognize them.

[36] 112 S. Ct. 789 (1992).

[37] *Id.* at 789.

more aggressive manner. He may well have disclosed this propensity when he noted in his testimony, that he believed that once a provision which was based on some natural law principle, was placed in the Constitution, it became positive as opposed to natural law. Thus, once in place, the provision loses its natural law underpinnings and is to be read restrictively. In a sense, and contrary to the Framers' sense of natural law,[38] he freezes a principle in its explicit historical context, despite the fact that such a wizened view may be contrary to the intent of the Framers. In this regard, and as further demonstrated by his continual kinship with Justice Scalia and his deferentialism, Justice Thomas's theory of constitutional interpretation (or lack thereof) is a source of disappointment and increasing dismay for people like myself who believed that he might be a traditional conservative, a conservative concerned about excessive government intervention in the lives of individuals.

III.

While his opinions to date leave little reason to believe that Justice Thomas will adhere to more libertarian, traditional conservative views, some glimmer of hope remains that he will not fall utterly under the sway of Justice Scalia's deferentialist spell. Justice Thomas has noted that he might give the Due Process Clause a broader reading, perhaps on the ground that it is the sort of clause that was not intended to be read in a restrictive, positivist fashion. In his testimony, he also expressed his concern for issues of religious liberty and his apparent disagreement with Justice Scalia's deferentialist opinion in the *Smith* case. Finally, and perhaps most importantly, in his testimony and in his writing prior to the confirmation process,[39] Thomas indicated that he believes the Framers of the Fourteenth Amendment were natural lawyers, who were sensitive to broad issues of racial equality and were setting in motion a principle of "equality."

If Justice Thomas breaks with Justice Scalia on due process, reli-

[38] Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1146 (1987).

[39] *See supra* notes 8, 12 & 31 (noting Thomas's writings).

gious rights and equality issues, issues he appears to be particularly sensitive to, he might begin to develop his own coherent theory of constitutional interpretation. Under that theory, he might argue that broad provisions of the Constitution were to be interpreted in a more libertarian fashion—consistent with a natural rights theory—than provisions that are by their nature more restrictive and positivist in their etymology or origin. If he begins to chart such an independent course, Justice Thomas may yet surprise his detractors and please this commentator.