Senator SIMON. Mr. Smith, we are happy to have you here, and let me add a personal note. Some years ago, I spoke at a commencement at Capital University and they, in a moment of weakness, gave me an honorary doctorate, so I can even claim to be an alumnus of Capital University. It is a pleasure to have you here, dean.

STATEMENT OF RODNEY SMITH

Mr. SMITH. Thank you, Senator Simon. My name is Rodney K. Smith. I am dean and professor of law at Capital University Law and Graduate Center in Columbus, OH. As one who has primarily written in the area of religious liberty, I am persuaded that, if confirmed, Judge Thomas will be sensitive to issues of religious liberty as they arise in the United States.

There are two types of conservatives in America today. Traditional conservatives are those who are committed to limited government. These conservatives are concerned with liberty, believing, as Madison recognized, that the Court and all branches of government should take an active role in protecting rights.

Another type of conservative, however, which developed in part 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 have come to espouse a broad theory of judicial restraint.

In refusing to scrutinize the acts of the democratic branches of government, particularly when those acts may implicate rights, these newer conservatives often find themselves supporting big government. Few individuals espouse a pure version of either brand of conservatism.

An important question, I believe, for this committee is which view is held by Judge Thomas. To answer that question, one must examine both Judge Thomas' theory of precedent and his theory of constitutional interpretation. 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 views: First, 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, second, the view that a Justice is bound both by the particular decision and by the doctrine espoused by the majority in prior case law.

The view that the Justice is only bound by the decision in a particular case provides very broad latitude or discretion in future cases. The view that a Justice is bound by 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 regarding precedent. Theories of precedent are related to theories of constitutional interpretation. A theory of constitutional interpretation provides a methodology for approaching constitutional analysis.

The dialogue fostered by the debate over originalism, the use of the intent of the framers and ratifiers in constitutional analysis

versus nonoriginalism, the use of other methodologies that rely on other items has been rich and has helped focus attention on theories of constitutional interpretation.

A theory of constitutional interpretation limits the subjective policy preferences of a Justice and legitimizes 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 constitutional issues.

In his writing, with emphasis on the role of the Declaration of Independence and natural rights, Judge Thomas placed himself on the side of the more libertarian strand of conservatism. He has stated that, "Natural rights arguments are the best defense of liberty and of limited government."

He has argued for restraint as well, stating that, "Without 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."

During the course of the hearings, Judge Thomas reiterated his commitment to a fairly stringent theory of precedent. He recognizes the binding authority of the specific holding in cases and the general doctrine 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 recognizes that the three-part *Lemon* test presents difficulties. Nevertheless, as demonstrated by his general acceptance of *Lemon,* he is willing to go beyond the mere holding in a case to general endorsement of the doctrines underpinning those decisions. 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.

Even a fairly stringent theory of precedent like that espoused by Judge Thomas, however, cannot be determined a 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.

Senator SIMON. If you could conclude your remarks?

Mr. SMITH. I will conclude by saying that it is my sense that Judge Thomas, in cases like *Oregon* v. *Smith* and in cases dealing with the establishment clause, will take a liberty-maximizing approach. I think that he is an apt and appropriate candidate to be a Justice on the Supreme Court and will make a meaningful contribution in the interests of religious liberty well into the 21st century.

Thank you.

[The prepared statement of Mr. Smith follows:]