TESTIMONY OF RODNEY K. SMITH
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF CLARENCE THOMAS
TO BE AN ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT
September 20, 1991

Chairman Biden and Members of the Committee, my name is Rodney K. Smith. I am Dean and Professor of Law at the Capital University Law and Graduate Center in Columbus, Ohio. I am honored to have been asked to offer this testimony in support of the confirmation of Judge Clarence Thomas as an Associate Justice on the United States Supreme Court.

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 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 I will examine two versions of "conservatism" extant in American political and legal thought; Part II will examine the distinction between theories of precedent and Constitutional interpretation; Part III will examine Judge Thomas'

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 IV will examine issues related to religious liberty; and, Part V will serve as a conclusion and summary.

I

There are two somewhat divergent types of conservatives in American today. Traditional conservatives are those who are committed to limited government. 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. 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, have come to espouse a broad theory of judicial restraint. This theory has sometimes been criticized as being too deferential to the power of government. 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' theory of precedent and his theory of constitutional interpretation.

II

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 categories: (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 analysis or theory (the principle(s), if you will) 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 regarding 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 nonoriginalism or 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.

Originalism as a theory of constitutional interpretation, like textualism, rarely yields a clear-cut answer in significant cases that come before the Court. Indeed, I have argued that, at best, it provides parameters -- a canvas upon which the Court may

legitimately do its work -- and 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.

III

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' sensitivity and humanity. Not knowing Judge Thomas, I can add little to the discussion regarding his character. 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." 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."

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' 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. He is 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 support of the Lemon test, a test used in establishment clause decisions. Thus, he is willing to go beyond the mere holding in a case, as it relates to particular facts, to general endorsement of the doctrines underpinning those decisions. In this regard, his theory of precedent should be of comfort to those who are fearful that his personal policy predictions 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. Law operates only 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.

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How Judge Thomas fills those gaps will in significant part be dictated 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. In his words, "the Constitution is a logical extension of the principles of the Declaration of Independence." It is at this point in his analytic matrix that Judge Thomas may potentially take a libertarian turn. If precedent permits a libertarian or 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. 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' 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.

IV

With the Supreme Court's fairly recent decision in Employment Division v. Smith, in which the Court held that the free exercise clause of the First Amendment did not protect a person's religiously motivated use of peyote from the reach of a state's general criminal law prohibition, much concern for the status of religious liberty has been expressed by those who believe that the freedom of conscience should be protected against general government limitation.

Given Judge Thomas' theory of precedent, it is fairly clear that he would reluctantly (I suspect) accept the Court's decision. To the extent that the precedent or established doctrine did not dictate the decision in a future case, however, Judge Thomas might well argue for a more libertarian decision. 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.

V

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. 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 libertarian. Thomas Jefferson argued that each branch of government should work to protect the rights of the American people. Congress should not abdicate the 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.

Thank you.