JUDGE CLARENCE THOMAS' VIEWS ON THE FUNDAMENTAL RIGHT TO PRIVACY

A REPORT TO THE UNITED STATES SENATE JUDICIARY COMMITTEE, SENATOR JOSEPH BIDEN, CHAIRMAN,

September 5, 1991

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As teachers and scholars of constitutional law committed to the protection of constitutional liberty, we submit this report to convey our grave concerns regarding the nomination of Judge Clarence Thomas to be an Associate Justice of the United States Supreme Court. Careful examination of Judge Thomas' writings and speeches strongly suggests that his views of the Constitution, and in particular his use of natural law to constrict individual liberty, depart from the mainstream of American constitutional thought and endanger Americans' most fundamental constitutional rights, including the right to privacy.

Among the most alarming aspects of his record, and the primary focus of this report, are the numerous instances in which Judge Thomas has indicated that he would deny the fundamental right to privacy, including the right of all Americans, married or single, to use contraception and the right of a woman to choose to have an abortion. Judge Thomas has criticized the Supreme Court's decisions in the landmark privacy cases protecting the fundamental right to use contraception. He has endorsed an approach to overruling Roe v. Wade[1] that is so extreme it would create a constitutional requirement that abortion be outlawed in all states throughout the Nation, regardless of the will of the people and their elected representatives. Recent Supreme Court

[1] 410 U.S. 113 (1973).

decisions in Webster v. Reproductive Health Services[2] and Rust v. Sullivan[3] have seriously diminished protection for the right to choose. Replacing Justice Thurgood Marshall with Judge Clarence Thomas would likely result in far more devastating encroachments of women's rights, perhaps providing the fifth vote to uphold statutes criminalizing virtually all abortions. Such laws have recently been adopted in Louisiana, Guam and Utah and challenges to them are now pending in the federal courts.

We submit this report prior to Judge Thomas' testimony before the Judiciary Committee in the hope that it will assist the Committee, and the Nation, in formulating questions to discern Judge Thomas' views on fundamental rights to individual privacy and liberty. We urge the Committee to question Judge Thomas on these matters and to decline to confirm his nomination unless he clearly refutes the strong evidence that he is a nominee whose special concept of the Constitution "calls for the reversal of decisions dealing with human rights and individual liberties."[4]

I. THE SENATE'S ROLE IN THE CONFIRMATION PROCESS

A basic element of our constitutional system of checks and balances is the joint responsibility the Constitution confers upon the President and the Senate for the selection of Supreme Court Justices. In the words of Senator Patrick Leahy:

> When the Framers of the Constitution met in Philadelphia two centuries ago, they decided that the appointment of the leaders of the judicial branch of government was too important to leave to the unchecked discretion of either of the other two branches. They decided that the President and the Senate must be equal partners in this decision, playing roles of equal importance. The 100 members of the United States Senate, like the Chief Executive, are elected by all the people.[5]

The Senate's equal role in selecting Supreme Court Justices is

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[2] 492 U.S 490 (1989).

[3] 111 S.Ct. 1759 (1991).

[4] Senate Committee on the Judiciary, Nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court, S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess., Additional Views of Senator Heflin, 210 (1987).

[5] S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess., Additional Views of Senator Leahy, 193-94 (1987).

widely accepted by Senators of both parties. For example, Senator Arlen Specter has stated that the "Constitutional separation of powers is at its apex when the President nominates and the Senate consents or not for Supreme Court appointees who have the final word. The Constitution mandates that a senator's judgment be separate and independent."[6]

Although the precise wording has varied, a majority of the members of the Senate Judiciary Committee have indicated that to be confirmed a nominee must, at a minimum, demonstrate a commitment to protect individual rights that have been established as fundamental under the U.S. Constitution. For example, Senator Patrick Leahy described the standard as follows:

> The Senate should confirm [a nominee] only if we are persuaded that the nominee has both the commitment and the capacity to protect freedoms the American people have fought hard to win and to preserve over the last 200 years. . . . I cannot vote for [a nominee] unless I can tell the people of Vermont that I am confident that if he were to become [a Justice], he would be an effective guardian of their fundamental rights.[7]

Senators have often identified the right to privacy as among the fundamental rights that a nominee must recognize to meet the standard for confirmation. As Chairman Joseph Biden stated:

> A nominee who criticizes the notion of unenumerated rights, or the right to privacy, would be unacceptable in my view. A nominee whose view of the Fourteenth Amendment's Equal Protection Clause has led him or her to have a cramped vision of the court's role in creating a more just society would be unacceptable in my view. And a nominee whose vision of the First Amendment's guarantees of freedom of speech and religion would constrain those provisions' historic scope would be unacceptable in my view.[8]

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[6] S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess. Additional Views of Senator Specter, 213 (1987).

[7] S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess., Additional Views of Senator Leahy, 193-94 (1987).

[8] Statement of Senator Joseph Biden, Chairman, Senate Judiciary Committee on Nomination of David Souter to be Associate Justice U.S. Supreme Court (Sept. 27, 1990).

Senator Herbert Kohl similarly stated:

> [A] Supreme Court Justice must, at a minimum, be dedicated to equality for all Americans, determined to preserve the right to privacy, the right to be left alone by the Government, committed to civil rights and civil liberties, devoted to ensuring the separation of Church and State, willing to defend the Bill of Rights and its applications to the States against all efforts to weaken it, and able to read the Constitution as a living, breathing document.[9]

Although Senator Howell Heflin indicated that he "would favor a conservative appointment on the Court," for him the question was "whether this nominee would be a conservative justice who would safeguard the living Constitution and prevent judicial activism or whether, on the other hand, he would be an extremist who would use his position on the Court to advance a far-right, radical, judicial agenda."[10] As Senator Heflin noted, if a nominee's "concept of the Constitution calls for the reversal of decisions dealing with human rights and individual liberties, then people's rights will be threatened."[11]

Judge Thomas' writings, speeches and professional activities do not statisfy this standard. They strongly suggest that, if confirmed, he would interpret the Constitution in a manner that would dangerously restrict constitutional protection for civil rights and civil liberties.

The threat Judge Thomas poses to our basic constitutional freedoms is well exemplified by his views regarding the fundamental right to privacy and the protection it affords reproductive rights, including the right to use contraception and the right to choose to have an abortion. The remainder of this report focuses on these alarming aspects of Judge Thomas' record.

II. THOMAS ENDORSES A NATURAL LAW "RIGHT TO LIFE" FROM CONCEPTION

At the core of Thomas' claims to constitutional authority and a dominant theme throughout his writings and speeches is a belief

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[9] Hearings of the Senate Judiciary Committee on the Nomination of Judge David Souter (Sept. 13, 1990) (Statement of Senator Kohl).

[10] S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess., Additional Views of Senator Heflin, 211 (1987).

[11] Id. at 210.

that the Constitution should be interpreted in light of "natural law" or "higher law." "[N]atural rights and higher law arguments are the best defense of liberty and of limited government."[12] "Natural law" is a slippery concept. It has been invoked in noble causes, for example, in opposition to slavery, genocide and torture. But it has also been used in invidious ways, for example, to defend slavery and to deny women the right to vote or participate in public life. The key questions that must be posed to a proponent of natural law are: What principles are dictated by natural justice? How do we know that these answers are correct?

Despite the central role natural law plays in his professional writings, Judge Thomas has said surprisingly little about the specific content of his natural law philosophy. His discussions of natural law, though numerous, tend to be abstract and repetitive, often confusing, and sometimes contradictory. Thomas routinely cites the Declaration of Independence as the primary source of the natural law values that should be promoted through constitutional interpretation, and he frequently refers to a religious basis for those values.[13] Beyond these general references, he has been remarkably vague about the content of those values.

One striking exception to Judge Thomas' general failure to provide specific examples of how natural law should be applied is his frequent criticism of the right to privacy. One specific application of Thomas' view of natural law is his enthusiastic endorsement of the assertion that the fetus enjoys a constitutionally protected right to life from the moment of conception. In a 1987 speech to the Heritage Foundation, he stated:

> We must start by articulating principles of government and standards of goodness. I suggest that we begin the search for standards and principles with the self-evident truths of the Declaration of Independence. . . . Lewis Lehrman's recent essay in The American Spectator on the Declaration of Independence and the meaning of the right to life is a splendid example of

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[12] Thomas, The Higher Law Background of the Privileges and Immunities Clause, 12 Harv. J.L. Pub. Pol'y 63, 64 (1989).

[13] See, e.g., Thomas, Why Black Americans Should Look to Conservative Policies, 119 Heritage Lectures (June 18, 1987); Thomas, Toward a "Plain Reading" of the Constitution -- The Declaration of Independence in Constitutional Interpretation, 30 Howard L.J. 983 (1987); Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest in Assessing the Reagan Years (D. Boaz ed.), 391, 398 (1989); Thomas, Notes on Original Intent.

applying natural law.[14]

The Lehrman article that Judge Thomas invokes as exemplary of his approach to natural law argues but one point: interpreting the Constitution, in light of natural law, as derived from the Declaration of Independence, requires that the fetus be protected as a full human being from the moment of conception. Lehrman states that the privacy right protected by the Court in Roe was "a spurious right born exclusively of judicial supremacy with not a single trace of lawful authority," and that even if such a right existed, it would be overridden by the natural, inalienable right-to-life of the fetus from the moment of conception.[15]

This view is far more extreme than that of any current Supreme Court Justice. The Declaration of Independence says nothing about abortion or the fetus. Abortion was then legal. An overturning of Roe premised on the supposed natural right of the fetus not only would strip women of constitutional protection for their reproductive autonomy, it would prohibit individual states or the Congress from allowing legal abortion as an option even in extreme cases. It would require that abortion be defined as murder. It would prohibit states from allowing abortion even where pregnancy resulted from rape or incest or posed grave risk to a woman's health. It would deny to women as responsible individuals the ability to exercise their own religious and moral beliefs concerning abortion.

The Lehrman article does little more than assert that it is a "self-evident" truth that the fetus possesses an "inalienable right to life."[16] We fear that Judge Thomas' strong praise of this application of natural law endorses this radical view on the critical issue of abortion on the basis of an approach to natural law that relies on fixed and unquestionable moral "truth" rather than reasoned debate over the application of American constitutional principles to the circumstances of our times.

Natural law protection of the right to life from the moment of conception has been cited in recent years by opponents of legal abortion, such as members of the group "Operation Rescue," in defense of their actions in violation of laws against trespass, destruction of property and assault and battery while attempting to obstruct women's access to reproductive health care

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[14] Thomas, Why Black Americans Should Look to Conservative Policies, supra note 13, at 8.

[15] Lehrman, The Declaration of Independence and the Right to Life, The American Spectator 21, 23 (April 1987).

[16] Id. at 22.

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facilities.[17] Natural law has further provided a basis for opposition not only to abortion, but to contraception by any means viewed as an interference with "natural" human reproduction.

III. THOMAS REJECTS UNENUMERATED RIGHTS AS ARTICULATED IN GRISWOLD, EISENSTADT AND ROE

The specific content of Judge Thomas' view of natural law can be seen, not only in the applications he praises, such as the "God-given" and "inalienable right to life"[18] of a fetus, but also in the rights and values he rejects. Although Thomas advocates constitutional protection for natural rights not specifically enumerated in the Constitution, he repeatedly attacks the recognition of unenumerated rights under the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment by what he dismisses as "liberal activist"[19] and "run-amok"[20] judges. Most prominent among the judicial opinions that Thomas has thus criticized are those in which the Supreme Court has protected the fundamental right to privacy.

For example, in a law review article he published in 1989, Thomas again selected decisions protecting the right to privacy to illustrate "the willfulness of both run-amok majorities and run-amok judges."[21] Thomas writes that the judicial decisions that "make conservatives nervous" are Roe v. Wade and Griswold v. Connecticut.[22] After describing Roe as "the current case provoking the most protest from conservatives," Thomas affirms

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[17] See, e.g. Senftle, The Necessity Defense in Abortion Clinic Trespass Cases, 32 St. Louis U.L.J. 523, 546 (1987); City of Kettering v. Berry, 57 Ohio App. 3d 66, 70 (1990) ("The law does not recognize political, religious, moral convictions or some higher law as justification for the commission of a crime"); Brief for Operation Rescue at 7, Roe v. Operation Rescue, No. 88-5157 (E.D. Pa., filed June 29, 1988); Brief for the Catholic Lawyers Guild of the Archdiocese of Boston, Inc., as Amicus Curiae supporting Appellants, Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (arguing that Roe v. Wade should be overruled).

[18] Lehrman, supra note 15, at 23.

[19] Thomas, Notes on Original Intent, supra note 13.

[20] Thomas, Higher Law Background, supra note 12, at 64.

[21] Id.

[22] Id. at 63 n.2.

his "misgivings about activist judicial use of the Ninth Amendment."[23] But, he asserts, his proposed concept of "higher law" would restrain both legislative majorities and judges, and should hence appeal to those he calls "my conservative allies."

Thomas has described the protection afforded the right to privacy under the Ninth Amendment as an "invention" in an opinion in Griswold v. Connecticut, authored by Justice Arthur Goldberg and joined by Chief Justice Earl Warren and Justice William Brennan. Thomas further criticizes Justice Goldberg's opinion and rejects the Ninth Amendment as a source of constitutional protection for rights that are unenumerated in the Constitution, stating:

> A major question remains: Does the Ninth Amendment, as Justice Goldberg contended, give to the Supreme Court certain powers to strike down legislation? That would seem to be a blank check. . . . Unbounded by notions of obligation and justice, the desire to protect rights simply plays into the hands of those who advocate a total state. . . . Far from being a protection, the Ninth Amendment will likely become an additional weapon for the enemies of freedom.[24]

Judge Thomas offers no real explanation in these writings of how protecting the rights of individuals promotes a "total state" or how defining unenumerated rights by reference to "natural law" is either more determinate or less a "blank check" to judges than more traditional means of constitutional interpretation.

Elsewhere, Thomas described the views on the right to privacy of Judge Bork and other proponents of original intent as follows: "restricting birth control devices or information, and allowing, restricting, or (as Senator Kennedy put it) requiring abortions are all matters for a legislature to decide; judges should refrain from 'imposing their values' on public policy."[25] Thomas then criticized this view as leading to an "indifference toward or even contempt of 'values.' Far from being an alternative to leftist activism, it readily complements it, as long as a majority approves."[26]

Although Thomas' discussion of this point is confusing, there is reason to fear it may be another endorsement of the view set out

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[23] Id.

[24] Thomas, Civil Rights as a Principle, supra note 13, at 398-99.

[25] Thomas, Notes on Original Intent, supra, note 13.

[26] Id.

in the article by Lewis Lehrman in support of a natural right to life for the fetus. Thomas' discussion of the right to privacy in the context of arguing that the Constitution must be interpreted consistent with a particular moral view, and his expression that this moral view must be employed to constrain majorities that might otherwise engage in "leftist activism," may be a further indication that under Thomas' theory of natural law, the Constitution would not permit states to allow citizens to have access to abortion or use contraception if these activities are deemed to violate the natural order of things.

In 1986, Thomas participated as a member of a White House Working Group on the Family that produced a report on the family that severely criticized landmark constitutional decisions protecting the right to privacy. The report went so far as to excoriate a decision protecting a grandmother's freedom to open her home to her orphaned grandchildren, without government restriction.[27] It particularly targeted cases in the area of reproductive freedom, and called for them to be overruled.[28]

In addition to Roe v. Wade, the working group singled out as wrongly decided the Supreme Court's decision in Planned Parenthood v. Danforth, in which the Court struck down a Missouri law that required a woman to obtain the consent of her husband before she could obtain an abortion and a minor to obtain the consent of a parent. The report also criticized the Court's reasoning in Eisenstadt v. Baird, which protects the right of unmarried individuals to use contraception, and in particular the Court's statement that "the marital couple is not an independent entity with a mind and heart of its own."[29] The working group described these, and other cases protecting the fundamental right to privacy, as a "fatally flawed line of court decisions" and indicated that they "can be corrected, directly or indirectly, through . . . the appointment of new judges and their confirmation by the Senate . . . and . . . amendment of the Constitution itself."[30]

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[27] Moore v. City of East Cleveland, 431 U.S. 494 (1971). The Family: Preserving America's Future, A Report to the President from the White House Working Group on the Family 11 (1986).

[28] Id. at 11.

[29] Id., at 12 quoting, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[30] Id. at 12. The Republican Party platforms for 1980, 1984, and 1988 contained strikingly similar language, pledging to work for "the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity

IV. THOMAS' NATURAL LAW THEORY

As we have noted above, Thomas' approach to constitutional interpretation is highly unusual in its invocation of a body of natural law.[31] Appeals to natural law in constitutional interpretation do not necessarily portend decisions that would restrict the rights of individuals and overturn core constitutional values. Depending on how its methodology and content are specifically understood, natural law might point in various directions. But Thomas' approach to natural law is disturbing, both as a matter of methodology and as a matter of content.

As a matter of constitutional method, natural law is disturbing when invoked to allow supposedly self-evident moral "truth" to substitute for the hard work of developing principles drawn from the American constitutional text and precedent. As we have noted, Judge Thomas has not sought to explain the social and historical reasons supporting the conclusions to which "natural law" leads him. The more traditional common law and constitutional method of open-ended, case-by-case development is a core strength of the American judicial approach to justice for a diverse and ever-evolving country. Natural law norms are not necessarily antithetical to a reasoned, case-by-case approach. But Judge Thomas seems to invoke "higher law" as a substitute for explanation. His concept of natural law appears to mean strict adherence to a perceived set of fixed and undoubtable normative truths. As such, it does not accommodate the principle and precedent exemplified in the work of conservative Justices such as John Harlan and Lewis Powell.

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of innocent human life." Thomas listed the Republican Party's position on abortion as the first in a list of conservative positions that he believed should attract African Americans to the Republican Party. Thomas, "How Republican can Win Blacks," Chicago Defender, February 21, 1987.

[31] For at least the last fifty years, constitutional interpretation on the basis of natural law has been conspicuously absent from American legal philosophy and judicial opinions. Professor Laurence Tribe commented that Clarence Thomas "is the first Supreme Court nominee in 50 years to maintain that natural law should be readily consulted in constitutional interpretation." Tribe, "Natural Law" and the Nominee, N.Y. Times, July 15, 1991. As Professor John Hart Ely noted, "[t]he concept of [natural law] has . . . all but disappeared in American discourse." J.H. Ely, Democracy and Distrust 52 (1980).

When natural law was last in vogue some eighty years ago, it was employed by the Supreme Court to strike down state laws providing basic health and safety protection to working people. The Court asserted a natural law right of employers to be free of minimum wage laws and health and safety regulations.[32] Natural law has been particularly disabling for women. In 1873, the Court upheld the exclusion of women from the practice of law.[33] Justice Bradley wrote that the "civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[34]

The impact that the application of natural law would have on core constitutional principles thus depends on the particular proponent's personal views of the content and source of the natural law principles to be applied. It is therefore imperative that the Senate Judiciary Committee determine with specificity which fixed principles Judge Thomas has in mind when he advocates the use of natural law in constitutional interpretation and how they will affect the Court's role as guardian of American's fundamental rights. As the preceding analysis indicates, Thomas' record contains compelling evidence that the substantive content of his natural law theory is incompatible with continued protection for the fundamental right of privacy, including the right to choose.[35]

V. CONCLUSION

Particularly given the critical moment in the history of the Supreme Court at which this nomination has occurred, the Senate should reject any nominee who is not committed to protecting fundamental individual liberties. We urge the Senate to shoulder its responsibility to determine whether the nominee "has both the

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[32] See, e.g., Lochner v. New York, 198 U.S. 45 (1905).

[33] Bradwell v. Illinois, 83 U.S. 130 (1872).

[34] Id. at 141-42 (Bradley, J., concurring).

[35] In addition to Thomas' writings and speeches discussed above, Thomas has disparaged those who have used natural law arguments in support of unenumerated rights, including the fundamental right to privacy. Thomas, "How to Talk About Civil Rights: Keep it Principled and Positive," keynote address celebrating the Formation of the Pacific Research Institute's Civil Rights Task Force, August 4, 1988; Speech of Clarence Thomas at Harvard University Federalist Society Meeting, April 7, 1988. (This speech was prepared but apparently not delivered.)

commitment and the capacity to protect freedoms the American people have fought hard to win and to preserve over the last 200 years."[36] Our analysis of Judge Thomas' writings and speeches raises serious questions about whether he meets this standard. We exhort the Committee to probe these questions and to approve the nomination only if satisfied that Judge Thomas has the commitment and ability to contribute to the wise elaboration of our Constitution.

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[36] Statement of Senator Patrick Leahy, supra n. 7.