



**THE LIBERAL JUSTICE THOMAS: AN
ANALYSIS OF JUSTICE THOMAS'S
ARTICULATION AND APPLICATION OF
CLASSICAL LIBERALISM**

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INTRODUCTION

In both his public speeches and his Supreme Court opinions, Justice Clarence Thomas uses language that articulates a constitutional and political theory with roots in the ideas of classical

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liberalism.¹ Thomas frequently espouses normative ideals commonly associated with classic liberal, or libertarian, thought in his public speeches and writings²— limited government, the rule of law, personal responsibility, and freedom from restraint.³ In keeping with these principles, Justice Thomas often puts classical liberal theory into practice when writing judicial opinions in National Labor Relations Board and First Amendment cases.⁴ But Thomas's endorsement of class-based affirmative action programs to legally redress the social problems associated with chronic poverty stands in direct contrast to the tenets of classic liberalism. Similarly, his view that both a theory of justice and the best defense of limited government stem from the natural law principles embodied in the Declaration of Independence puts him at odds with contemporary libertarian theorists and conservative constitutional scholars.⁵ Finally, Thomas's positions in *Grutter v. Bollinger*, *Lawrence v. Texas*, and *Liquormart v. Rhode*

¹ See Clarence Thomas, *Addresses: Victims and Heroes in the "Benevolent State,"* 19 HARV. J.L. & PUB. POL'Y 671 (1996); see generally Joseph Carrig, *Introduction to JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT* (Barnes & Noble 2004) (1690).

² For the purposes of this paper, classical liberalism and libertarianism will be used interchangeably though it is not the case that the two are synonymous; if liberalism is thought of as a spectrum, libertarianism stands at one end with an emphasis on freedom from interference and property rights. These theoretical concepts will be fleshed out in Section I. The Stanford Encyclopedia of Philosophy offers a helpful overview of the differences between liberalism and libertarianism in its entry on liberalism. Liberalism, <http://plato.stanford.edu/entries/liberalism/>.

³ See Clarence Thomas, Lecture, *Freedom: A Responsibility, Not a Right*, 21 OHIO R. U. L. REV. 5 (1994); see, e.g., LOCKE, *supra* note 1, at ch. V § 30; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 33-35 (1974) (discussing the characteristics of the minimal and ultraminimal state); Isaiah Berlin, *Two Concepts of Liberty*, in THE PROPER STUDY OF MANKIND, 201 (1998) (defining negative liberty as freedom from constraints).

⁴ See generally *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (illustrating an unwillingness to push the boundaries of the law in favor of unions); See, e.g., *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Thomas, J., concurring) (articulating a view that equates commercial advertising with all other forms of constitutionally protected speech).

⁵ See Clarence Thomas, *The Higher Law Principles of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989); see, e.g., Lino Graglia, *How the Constitution Disappeared*, COMMENT. MAG, Feb. 1986, at 19, available at <http://www.commentarymagazine.com/viewarticle.cfm/how-the-constitution-disappeared-7091>.

Island show that he does not always apply his conception of classical liberal principles in a theoretically consistent manner.

Thus, although an analysis of Justice Thomas's speeches and writings suggest that he generally falls within the classic liberal paradigm, there are some surprising quirks in his thought. Using John Rawls' conception of "justice as fairness" as a foil for classic liberal theory, the goal of this note is to 1) identify, compare, and contrast the different strands of classical liberal political philosophy that feature prominently in Justice Thomas's political, constitutional, and judicial writings; and 2) assess how these philosophies become manifest in his judicial opinions. Section I will provide a sketch of the theoretical framework of classical liberalism, Nozick's property-based libertarianism, and Rawlsian liberalism; Section II will highlight instances in which Justice Thomas alludes to the theoretical concepts mentioned in Section I, noting the similarities and differences between Thomas's statements and the theoretical writings; and Section III will analyze Thomas's judicial opinions for evidence of conformity to, or disharmony with, different strands of liberalism.

I. THE THEORETICAL FRAMEWORK OF CLASSICAL LIBERALISM AND THE RAWLSIAN COUNTERPOINT

The foundation of classical liberalism stems from John Locke's *Second Treatise of Government*, a canonical text in Western political theory that has fueled ongoing scholarship, as well as influenced practical political undertakings. As Thomas is quick to mention, Locke's conception of natural rights heavily influenced the drafters of the United States Constitution.⁶ Further, Locke's theory of property rights offered a theoretical justification for English common law concepts that formed the basis of American common law. Locke begins by defining property: "the 'labour' of his body and the 'work' of his hands, we may say, are properly his."⁷ He then posits that in a state of nature, devoid of civil society or government, men have a "title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature, equally with any other man [and] hath by nature a power [to]

⁶ See Thomas, *supra* note 5, at 63.

⁷ LOCKE, *supra* note 1, at ch. V, § 26.

preserve his property – that is, his life liberty, and estate....”⁸ Building on Thomas Hobbes’ radical conception of equality, Locke believes that all men are born free and share equal rights to life, liberty and property.⁹ And, despite grounding his theory in biblical sources, conspicuously absent from Locke’s theory are laws of nature that espouse a teleological conception of human dignity or prescribe expansive moral duties. In the state of nature, radical equality, a right to preserve property, and a failure of the majority of men to be “strict observers of equity and justice” results in a tenuous social arrangement, rife with omnipresent uncertainties about property being “exposed to the invasion of others.”¹⁰ Thus, according to Locke, “[t]he great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property.”¹¹

Locke’s political theory lays the groundwork for four normative goals that are important to classical liberalism and libertarian theory: limited government, the rule of law, freedom from restraint, and personal responsibility. First, because preservation of property is paramount and the right to property is the fundamental law of nature, it follows from Locke that a system of government that meets this minimal requirement fulfills an essential criterion to being both legitimate and just. Second, the only substantive features of government that Locke deems necessary are what might be described as “rule of law characteristics”¹²: “whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws.”¹³ Third, that government only corrects those few “defects . . . that made the state of Nature so unsafe and uneasy [omnipresent uncertainty about invasion of property],”¹⁴ gives rise to the corollary that men are free insofar as they are not

⁸ *Id.* at ch. VII, § 87.

⁹ *Id.*

¹⁰ *Id.* at ch. IX, § 123.

¹¹ *Id.* at ch. IX, § 124.

¹² For an elaboration of rule of law characteristics and an interesting discussion of their normative significance within the framework of the legal positivism/natural law debate, see Jeremy Waldron, *Positivism and Legality: Hart’s Equivocal Response to Fuller*, 83 N.Y.U. L. REV. 1135 (2008).

¹³ LOCKE, *supra* note 1, at ch. IX, § 131.

¹⁴ *Id.*

restrained by the government, a position that has been dubbed “negative liberty.”¹⁵ Expressed simply, so long as adequate rule of law protections are in place, negative liberty is an important normative ideal for libertarians: less government intrusion results in more freedom. Thus, it is incumbent on individuals to take advantage of liberty, *i.e.* to acquire and preserve property. Given that “different degrees of industry were apt to give men possessions in different proportions,” Locke’s theory not only tolerates, but also appears to embrace, a certain amount of inequality regarding the distribution of property.¹⁶ Although people have an equal right to property, Locke’s use of the term “industry,” coupled with his belief in a minimal state, evidences an understanding that not everyone has the capacity to maximize the use of this right and suggests that the state should not be in the business of reallocating property.¹⁷

John Rawls’ theory of “justice as fairness” offers a forceful theoretical counterweight to Locke’s classical liberalism. Taking issue with the prospect that artificial inequalities would both pervade and become entrenched in a Lockean political system, Rawls believes that “institutions of society favor certain starting places over others. These are especially deep inequalities. Not only are they pervasive, but they affect men’s initial chances in life; yet they cannot possibly be justified by an appeal to the notions of merit or desert.”¹⁸ Rawls goes on to suggest that, “intuitively, the most obvious injustice of the system of natural liberty [such as Locke’s] is that it permits distributive shares to be improperly influenced by these factors [such as family wealth] so arbitrary from a moral point of view.”¹⁹ The free market and negative liberty are not an anathema to Rawls, but he remains adamant that “justice is prior to efficiency

¹⁵ Berlin, *supra* note 3. The term “freedom from restraint” will be used interchangeably with “freedom from interference” and “negative liberty”.

¹⁶ LOCKE, *supra* note 1, at ch. V, § 48 (“[A]s different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them.”).

¹⁷ *Id.* at ch. V, § 33 (“He that had as good left for his improvement as was already taken up needed not complain, ought not to meddle with what was already improved by another’s labour; if he did it is plain he desired the benefit of another’s pains, which he had no right to.”).

¹⁸ JOHN RAWLS, *A THEORY OF JUSTICE* 7 (5th ed., 2003).

¹⁹ *Id.* at 63.

and requires some changes that are not efficient in this sense.”²⁰ Thus, Rawls posits two principles of liberty that individuals would agree to if placed behind a “veil of ignorance,” *i.e.* stripped of any external characteristics such as personal wealth that might cloud their conception of justice. These two principles are:

“First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.”²¹

The second principle of justice is governed by what Rawls terms the “difference principle,” that is, that inequalities are “justifiable only if the difference in expectation is to the advantage of the representative man who is worse off, in this case the representative unskilled laborer.”²²

Accordingly, Rawls offers a conception of a far more active government that goes beyond the minimum structural requirements of Lockean rule of law principles.²³ For example, Rawls has a much more robust vision of the appropriate role of government institutions and agencies “each . . . charged with preserving certain social and economic conditions.”²⁴ The presence of government regulation becomes manifest from the operation of the difference principle at the legislative stage, which “dictates that social and economic policies be aimed at maximizing the long-term expectations of the least advantaged under conditions of fair equality of opportunity, subject to the equal liberties maintained.”²⁵ It should be noted, however,

²⁰ *Id.* at 69.

²¹ *Id.* at 53.

²² *Id.* at 68.

²³ See *id.* at 173-75 (indicating Rawls’s strong belief in the importance of “political liberty (the right to vote and hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person [...] the right to hold personal property, and free from arbitrary arrest and seizure as defined by the concept of the rule of law.”).

²⁴ *Id.* at 243.

²⁵ *Id.* at 175.

that Rawls' position is in some ways consonant with a theory of negative liberty — Rawls touts the importance of freedom from interference, particular in the realm of religious freedom, limited only by the "state's interest in public order and security."²⁶ But Rawls does envisage legitimate government interference to correct for what he believes to be artificial social and economic contingencies. He harbors no direct hostility towards capitalism, but stresses that rule of law characteristics (and basic civil liberties such as freedom of belief) are a floor, rather than a ceiling, for government activity.²⁷ Thus, Rawls' political theory, and his articulation of distributivist justice, or "justice as fairness," is often credited as offering a theoretical defense of "big government" policies such as welfare and the "rights revolution" of the Warren Court.²⁸

In the early 1970s, however, the emergence of the law and economics movement signaled a resurgence of classical liberal ideas in both academia and the judiciary, in opposition to Rawlsian political thought and the jurisprudence of the Warren Court. In the realm of political philosophy, Locke's conception of liberalism has an articulate contemporary defender in Robert Nozick, whose "entitlement theory" of justice provides a counterweight to Rawls's theory of justice as fairness. Nozick's primary theoretical target is the Rawlsian difference principle, which he attacks as under-protective of the individual.²⁹ Nozick favors a minimal government presence because he fears that Rawls theory "can succeed in blocking

²⁶ *Id.* at 186; see also Berlin, *supra* note 3 (citing Mill's harm principle, which is analogous to Rawls's first principle of justice, as illustrative of negative liberty).

²⁷ RAWLS, *supra* note 18, at 72 ("These arrangements presuppose a background of equal liberty (as specified by the first principle) and a free market economy. They require a formal equality of opportunity in that all have at least the same legal rights of access to all advantaged social positions.").

²⁸ See, e.g., DEMOCRACY AND THE WELFARE STATE 79 n.1 (Amy Guttmann ed., 1988) (offering a "partial list of those who view Rawls as offering a defense of welfare state capitalism" including, among others, Robert Paul Wolff, Brian Barry, Amy Guttmann, and Carol Pateman); see also LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 66 (1996).

²⁹ Nozick, *supra* note 3, at 190 ("we should question why *individuals* in the original position would choose a principle that focuses on *groups*, rather than *individuals*") (emphasis added); see also *id.* at 228 (expressing concern that an attempt to mitigate for natural human characteristics is a detriment: "[p]eople's talents and abilities are an asset to a free community; others in the community benefit from their presence and are better off because they are there rather than elsewhere or nowhere.").

the introduction of a person's autonomous choices and actions (and their results) . . . attributing *everything* noteworthy about the person completely to certain sorts of 'external' factors."³⁰ Whereas Rawls believes that the rule of law is only a foundation for justice, ensuring that basic rights are enforced but stressing that institutions must also play a role to further normative goals, Nozick argues that "[i]f the set of holdings is properly generated, there is no argument for a more extensive state based upon distributive justice."³¹ Building on Locke, Nozick's entitlement theory of justice assumes that in a free market, "the products of each person are easily identifiable, and exchanges are made in open markets with prices set competitively, given informational constraints, and so forth," prompting him to rhetorically ask, "In such a system of social cooperation, what is the task of a theory of justice?"³²

The major caveat is Nozick's concession that "past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them."³³ But the correction that Nozick envisions is markedly different from Rawls' theory of distributive justice. On Rawls' view, institutions exist to correct for what he believes are arbitrary "starting" positions of individuals in society, which he attributes to differences in wealth, education, etc. Nozick's entitlement theory of justice, however, is more concerned with the just acquisition and transfer of property over time.³⁴ Accordingly, Nozick eschews "end-state" goals such as equality and diversity, and

³⁰ *Id.* at 214.

³¹ *Id.* at 230.

³² *Id.* at 186 (arguing that in systems of mutual cooperation, i.e. political systems, "it is a clear case of application of the correct theory of justice: the entitlement theory"). It should be noted that in Nozick's later work, he revised some of his criticism of Rawls, notably conceding that individuals make decisions based on "symbolic" utility in addition to classic "causal" utilities that are associated with classical liberal philosophy and economics. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 66 n.228 (1995). Although this development might have important ramifications for a purely Nozickian analysis of social policies such as affirmative action, which emphasize the "expressive" value of diversity as opposed to quantifiable "material" benefits, ANARCHY, STATE, AND UTOPIA still stands as a canonical work of contemporary libertarian theory.

³³ Nozick, *supra* note 3, at 231.

³⁴ *Id.* at 232 ("It depends upon how the distribution came about. Some processes yielding these results would be legitimate, and the various parties would be entitled to their respective holdings.").

focuses on sketching out what types of property acquisitions and transfers are unjust.³⁵ Echoing Locke, Nozick cites those who “steal from others, or defraud them, or enslave them, seizing their product and preventing them from living as they choose, or forcibly exclude others from competing in exchanges” as illegitimate means of acquiring property. Yet unlike Locke, and in keeping with his criticism of Rawls, Nozick does not draw on natural law principles to bolster his argument. According to Nozick, a single unjust acquisition in the chain spawns injustice and might warrant correction by the state, though he wavers on how unjust the actions must be to spur the state to act.³⁶ Pervasive in Nozick’s theory is the suggestion that group-based legal remedies are inappropriate to correct for systematic injustice (or social problems). This premise stems from Nozick’s belief that injustice can, and should, be cured through the correction of unjust property transfer and acquisition.

Because Nozick’s entitlement theory of justice is predicated on discrete, individual instances of property transfer, he is likely to be prone to view the proper role of the judiciary as existing to adjudicate discrete, individual claims between private parties.³⁷ Although a similar jurisprudential theory could be attributed to Locke, a critical point of distinction is the primacy of natural law principles in Locke’s political theory. Interestingly, an analysis of Justice Thomas’s speeches and judicial opinions offers a method of parsing the natural law component of Locke’s classical liberalism from Nozick’s libertarianism.

II. ALLUSIONS TO CLASSIC LIBERAL THEORY IN JUSTICE THOMAS’S SPEECHES AND WRITINGS

Justice Thomas is an avowed fan of John Locke, citing him favorably as a thinker who influenced “the higher law political philosophy of the Founding Fathers” and stating that the “fundamental rights of the American regime [are] those of life, liberty, and

³⁵ *Id.* at 152, 199, 233.

³⁶ *Id.* at 151.

³⁷ *See id.* at 190 (This argument also has roots in Nozick’s questioning of Rawls’ “veil of ignorance” argument on the grounds that it is uncertain why “individuals in the original position would choose a principle that focuses upon *groups*, rather than individuals.” [emphasis added]).

property.”³⁸ This supports an initial hypothesis that Thomas favors the theories of government and justice attributable to classical liberalism. But because Thomas has argued for a defense of limited government based on natural law principles, it is unlikely that he would be amenable to the totality of Nozick’s theory. Furthermore, it might be possible to argue that Thomas harbors some sympathy with Rawlsian distributive justice in certain contexts, for example in his statements expressing support for class-based affirmative action.³⁹ This section will analyze the subject areas in which classical liberal theory and its critiques surface in Justice Thomas’s speeches and writings: freedom and personal responsibility, degrees of permissible government interference, and the role of rule of law. Although a relatively straightforward version of classical liberalism emerges from Thomas’s statements and writings, I will argue that his support for natural law principles and class-based affirmative action are characteristic of Thomas’s more nuanced account liberal theory.

First, as evidenced by his position on the welfare debate, Justice Thomas has a conception of freedom as liberty from restraints more closely in step with Locke’s and Nozick’s conception than Rawls’. Characteristic of Thomas’s outlook is his statement that “[t]he rights to life, liberty, and property were, in effect, transformed from freedom from government interference into a right to welfare payments.”⁴⁰ This critique of welfare evidences a concern that Americans *voluntarily* give up their liberty in return for the ability to make certain demands from the government. Welfare, Thomas suggests, is antithetical to freedom from restraint because it invites government intervention. The result is that individuals lose a significant aspect of their autonomy because “[w]hen the less fortunate do accomplish something [...] [t]hey owe all their achievements to the ‘anointed’ in society who supposedly changed the circumstances—not to their own efforts.”⁴¹ Implicit in this statement is a critique of the Rawlsian

³⁸ Thomas, *supra* note 5, at 63, 68.

³⁹ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 354–55 (2003) (Thomas, J., concurring in part and dissenting in part) (“Attaining ‘diversity,’ whatever it means, is the mechanism by which the Law School obtains educational benefits, not an end of itself.”). See *infra*, note 71 and accompanying text.

⁴⁰ Thomas, *supra* note 1, at 676.

⁴¹ *Id.* at 679.

difference principle. Thomas argues that minorities will be stripped of their autonomy because they will be viewed as the benefactors of paternalism, *i.e.* people will be unsure whether a minority's success is due to innate ability or a government handout. This mirrors Nozick's position that Rawls' theory trivializes the innate characteristics—such as ambition, focus, or intelligence—that allow some people to acquire more than others.⁴² Although talking about two distinct problems, their arguments converge in an important way insofar as both believe that Rawls' theory places undesirable restrictions on individual autonomy, resulting in a diminishment of liberty from constraint.

Further, Thomas's statements counter Rawls' position that distributive justice must correct for artificial contingencies with a critique grounded in personal responsibility.⁴³ Thomas, like Nozick, believes that government should not mitigate for innate characteristics that result in "just" inequalities because, as Thomas states, "success (as well as failure) is the result of one's own talents, morals, decisions, and actions."⁴⁴ In keeping with Locke's position that individuals, free from extensive government interference, must assume responsibility for harnessing their labor, Thomas believes that "freedom and responsibilities are equally yoked."⁴⁵ That Thomas emphasizes personal responsibility in his critique of welfare also echoes Locke's maxim that individuals should not complain if they have the opportunity to acquire property and that if they are not industrious they have no right to meddle with another's justly acquired property.⁴⁶ Welfare, according to Thomas, is little more than government reacting to a certain subset of "whining" individuals

⁴² Nozick, *supra* note 3, at 214 (a paternal state "can succeed in blocking the introduction of a person's autonomous choices and actions (and their results) [. . .] attributing *everything* noteworthy about the person completely to certain sorts of 'external' factors.").

⁴³ Thomas, *supra* note 1, at 671-72. Particularly illustrative of this point is Thomas' reference to Horatio Alger: "The 'rags to riches' Horatio Alger stories were powerful messages of hope and inspiration to those struggling for a better life." *Id.* at 672 (citation omitted).

⁴⁴ *Id.* at 671.

⁴⁵ Thomas, *supra* note 3, at 8. See generally LOCKE, *supra* note 1 and accompanying text.

⁴⁶ See LOCKE, *supra* note 1, and accompanying text.

and meddling with the justly acquired property of others.⁴⁷ Relying heavily on the libertarian rhetoric of personal responsibility, Thomas believes that this government “meddling” fosters a culture of victims who refuse to accept responsibility for their freedom.⁴⁸

Because Thomas alludes to libertarian conceptions of freedom from constraints and personal responsibility, it is evident that he shares enmity for “big government” with Locke and Nozick. Particularly illustrative are his harangues against the welfare state, like those in a speech entitled “Victims and Heroes in the ‘Benevolent State’.”⁴⁹ Thomas’s sardonic usage of the “Benevolent State” alone illustrates the degree of esteem in which he holds the modern regulatory state. Further, Thomas spends considerable time defending a limited role for the judicial and legislative branches of government, largely based on Lockean conceptions of freedom, for example stating that “conservatives should criticize not only arbitrary courts, but also arbitrary or willful government in general.”⁵⁰

This apparent hard-line attitude, however, belies some of the complexity in Thomas’s thought. For example, although Thomas stresses personal responsibility, his statement that, “rather than provide individuals pity or handouts, we should provide them with the tools that may allow them to help themselves” echoes Rawls’ argument that individuals should be given an equal opportunity to overcome the odds against them and have a fair shot at success. Furthermore, there are a variety of unjust practices that Justice Thomas has little to no reservations about actively remedying. For example, as a child growing up in the South under Jim Crow, Thomas witnessed unjust racial discrimination that he has no qualms

⁴⁷ See Thomas, *supra* note 1, at 672–73 (“[L]egal systems now actively encourage people to claim victim status and to make demands on society for reparations and recompense.”).

⁴⁸ *Id.*; see also Thomas, *supra* note 3, at 8 (“I do hear quite a bit about freedom and rights but little about those awful responsibilities and consequences.”).

⁴⁹ See Thomas, *supra* note 1.

⁵⁰ See Thomas, *supra* note 5, at 69 (responding to examples of Congress’s “over-reaching”). That Thomas criticizes the ills of “arbitrary” government raises many interesting theoretical questions about liberty and submission to government given non-arbitrary rule. For a justification of government interference based on the principle of “non-domination,” *i.e.* freedom from arbitrary government actions, see PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (Oxford 1999).

about correcting, as evidenced by his support for laws that rectify the harmful results of *Plessy v. Ferguson*'s⁵¹ "separate but equal doctrine."⁵² Additionally, Thomas, as chairman of the Equal Opportunity Employment Commission, sought to redress the injustices inflicted on minorities by discriminatory employers, passionately writing that "[t]o those of us who consider employment discrimination not only unlawful but also a moral abomination, such measures are altogether fitting."⁵³ Thus, similar to Nozick's caveat that certain unjust property transfers may be corrected by a greater degree of state interference, Thomas articulates a more nuanced role for government to play than it seems at first blush.

It is evident, however, that Thomas's view of correcting past injustices is more analogous to Nozick's than to Rawls'. Significantly, the corrective measures that Thomas cites as most effective are contingent on evidence of *individual*, not *group* harm.⁵⁴ Like Nozick's questioning of why *individuals* would choose to allocate resources to the worst-off *groups*, Thomas questions why *group* remedies are the best remedy for *individual* harms. Thus, for Thomas, like Nozick, institutions exist to correct for instances of individual harm where injustice stems from the inability to freely enter the open market, rather than to "[preserve] certain social and economic conditions" via large government institutions.⁵⁵

Consistent with his views on limited government—as well as liberty and personal responsibility—Thomas invokes the libertarian tradition in his attitudes about the rule of law. Like Locke and Nozick, the rule of law is, for Thomas, a ceiling rather than a floor for both judicial and legislative rights protection.⁵⁶ This particular belief has important consequences for Thomas's jurisprudential outlook, namely, that the judiciary should not engage in sweeping, systemic social reforms. Instead, Thomas believes that proper function of the legal system is to decide cases involving a discrete harm, "circumscribed by a traditional

⁵¹ See Thomas, *supra* note 5, at 67–68.

⁵² Clarence Thomas, Commentary, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 410 (1987).

⁵³ *Id.* at 409.

⁵⁴ *Id.* at 405–06 (discussing the lax effects of "group-defined numerical relief" on employers).

⁵⁵ See RAWLS, *supra* note 18 and accompanying text.

⁵⁶ See Thomas, *supra* note 5, at 63–64.

understanding of adjudication under the common law, where narrow disputes regarding traditional property rights were resolved among private parties who could not settle matters on their own.⁵⁷ This limited judicial role is consonant with Thomas's view of limited government in general and it is predicated on an account of limited, inalienable property rights. Further, in discussing the higher law principles of the Constitution—including those principles articulated by the founders in the Declaration of Independence, Thomas appropriates Locke's list of natural rights verbatim, rather than quote the actual language of the Declaration of Independence.⁵⁸ Thomas's allegiances, therefore, appear to be so strongly aligned with the tenets of classical liberalism that he feels comfortable substituting a right to "the pursuit of happiness" with a right to "property."⁵⁹

Interestingly, however, Thomas articulates an argument for limited judicial and legislative power that is grounded in "natural law" principles. That Thomas grounds his constitutional and political theory in the inalienable property rights "given to man by his Creator" does not dissociate his version of classical liberalism from Locke, who derives his entire conception of private property from biblical sources.⁶⁰ But a political theory with roots in "higher law" does distinguish Thomas from contemporary libertarian scholars such as Nozick who eschew metaphysical "end-states" as grounds for justice. Indeed, part of the appeal of Nozick's theory of justice is that it obviates the need to infuse judicial decisions with "fuzzy" moral principles. Thomas, however, does not reject the moral underpinnings of classical liberalism, instead using them to advocate his conception of constitutional interpretation. One of the best sources of these "fundamental," "American" higher law principles, Thomas argues, is the

⁵⁷ Thomas, *supra* note 1, at 675.

⁵⁸ Compare Thomas, *supra* note 5, at 68 (citing the "fundamental rights of the American regime—those of life, liberty, and property"), with Declaration of Independence of 1776 ("That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness") available at http://avalon.law.yale.edu/18th_century/declare.asp.

⁵⁹ This fact is all the more interesting given that Thomas explicitly posits that "the Constitution is a logical extension of the principles of the Declaration of Independence." Thomas, *supra* note 5, at 64.

⁶⁰ *Id.* at 68 (Thomas also believes that the "higher law political philosophy of the Founding Fathers" embodied these natural property rights. *Id.* at 63); see LOCKE, *supra* note 1, at ch. V § 24.

Declaration of Independence, which he believes must be used to interpret the open-ended provisions of the Constitution.⁶¹ Yet Justice Thomas's endorsement of "higher law principles" to guide constitutional interpretation and decision-making puts him squarely at odds with scholars, including many conservatives, who have deep reservations about judicial review.⁶² Facially, Thomas's belief that Constitutional interpretation must be attentive to the fundamental principles of the Declaration of Independence makes him sound strikingly similar to conservative *bête noir* Justice William Brennan, Jr., whose argument for a "Living Constitution" is predicated on incorporating the values of documents such as the Declaration.⁶³

Further, Thomas's natural rights reading of the constitution suggests an internal dissonance in his jurisprudential theory. On the one hand, Thomas is a fierce proponent of adjudicating only discrete cases arising out of instances of cognizable harms to individual plaintiffs. This side of Thomas, reflected in his preference for investigating individual cases as head of the EEOC,⁶⁴ is consonant with Lockean and Nozickian conceptions of adjudication that advocate judicial engagement only when a tangible harm to a private party's property rights are involved. On the other hand, Thomas suggests that the courts must play a role in shaping public policy if majoritarian enacted legislation violates core constitutional rights.⁶⁵ This side of Thomas, evident in his support of the outcome of *Brown v. Board of Education* and his moral indignation at segregation, suggests a Rawlsian affinity for rights protection that extends beyond property rights.⁶⁶

The apparent paradox in Thomas's thought may be resolved, however. First, as argued above, the natural rights that Thomas holds dear are exactly the same as those first articulated by Locke, and Thomas believes that they are entrenched in the meaning of the privileges

⁶¹ Thomas, *supra* note 5, at 64; *see also supra* text accompanying note 59.

⁶² *See, e.g.,* Graglia, *supra* note 5.

⁶³ *See To the Text and Teaching Symposium*, GEORGETOWN UNIVERSITY, Oct. 12, 1985, <http://www.fed-soc.org/resources/id.50/default.asp>.

⁶⁴ *See generally* Thomas, *supra* note 52.

⁶⁵ *See* Thomas, *supra* note 5, at 64 (arguing that an active judiciary interpreting "higher law is the only alternative to the willfulness of . . . run-amok majorities.").

⁶⁶ *See id.* at 68.

and immunities clause of the Fourteenth Amendment.⁶⁷ Second, Thomas does not ascribe any “end-state” significance to such open-ended Rawlsian values such as “diversity.”⁶⁸ Rather, Thomas’s embrace of “natural law” principles is only a reaffirmation of his commitment to the classical liberal principles of limited government and a theory of justice grounded in enforcing private property rights, just with fuzzy moral roots that are very un-Nozickian.⁶⁹ Thus, it is important that Justice Thomas takes issue with the reasoning employed by the Court’s majority in *Brown*. The statistical evidence of racial disparities in the segregated school districts was a non-issue for Thomas—rather, for Thomas, the “separate but equal” doctrine underscored how the policies of Jim Crow denied African-Americans their inalienable natural (Lockean) rights as citizens of the United States.⁷⁰ Whereas the social science based statistical argument sought to achieve racial balance as an “end-state” goal unto itself through group-based remedies, it can be contended that the privileges and immunities argument grounded in Lockean natural rights is, for Thomas, nothing more than a large-scale conferral of individual remedies to those who were denied their fundamental rights. Because every African American living under Jim Crow suffered a legal, constitutional (and moral) injury, an argument for overturning decisions such as *Plessy v. Ferguson* based on the privileges and immunities clause permits courts to redress these legal wrongs as such.

What cannot be resolved, however, is the difference between adjudicating only “cases and controversies” and implementing systematic reform via the judiciary (*e.g.* impact litigation). Although Locke and Nozick do not present well-developed views on judicial review, their preference for the traditional common-law principles of adjudicating private disputes concerning the violation of property rights illustrates the tensions that might arise in cases such as *Brown* and the problems that Thomas faced as the chairman of the

⁶⁷ See *id.* at 66–67 (referring to Justice Harlan’s dissenting opinion based on the privileges and immunities clause of the Fourteenth Amendment that “provides one of our best examples of natural rights . . .”).

⁶⁸ *Grutter v. Bollinger*, 539 U.S. 306, 354–55 (2003) (Thomas, J., dissenting) (“Attaining ‘diversity,’ whatever it means, is the mechanism by which the Law School obtains educational benefits, not an end of itself.”).

⁶⁹ Thomas, *supra* note 5, at 64.

⁷⁰ *Id.* at 68.

EEOC. In both *Brown* and in the employment discrimination context, individual suits were illustrative of systemic problems—the endemic denial of rights to classes of citizens based on characteristics such as race and gender. A disciple of Locke and Nozick could be theoretically consistent and decry the moral failures of racial and sex discrimination. But, because the harm stems from a denial of property rights (e.g. liberty of contract), a Lockean/Nozickian remedy would award damages (e.g. back pay/front pay) in individual cases. Over time, enough cases decided in favor of individual litigants who were discriminated against would, for example, deter employers from instituting discriminatory policies. This process embodies what Nozick believes is a proper “correction” for widespread injustices that arise from unjust acquisitions and transfers of property, such as those that occurred during Jim Crow. The kinds of swift, sweeping, systematic reform that results from impact litigation, however, are inconsistent with Nozick’s version of classical liberalism. This is, in part, because impact litigation seeks to redress the harms incurred by groups, not individuals. And although Thomas often emphasizes the merits of the “cases and controversies” approach, his public statements indicate that he is not stringently opposed to group based legislation and remedies. Thus, Thomas offers a more nuanced version of classical liberalism—one that might be amenable to judicial review and group-based social policies.

In addition to Thomas’s support of a natural rights reading of the constitution, his support for group-based remedies such as class-based affirmative action poses a problem for any attempt to characterize him as an advocate of classical liberalism. Evidence of Thomas’s support for group-based remedies is not immediately apparent, especially considering his articulation of property-based natural rights and his exhortations for individuals to adopt the consequences of liberty. But, as some commentators have noted, it is possible to tease out a favorable opinion of economic affirmative action from Thomas’s public statements.⁷¹ For example, Justice

⁷¹ See, e.g., Richard D. Kahlenberg, *Class-Based Affirmative Action in College Admissions*, IDEA BRIEF NO. 9 (The Century Foundation, New York, N.Y.), May 2000, at 6, available at <http://www.tcf.org/list.asp?type=PB&pubid=290> (“Even the most conservative Supreme Court Justices, Antonin Scalia and Clarence Thomas, have endorsed [class-based affirmative

Thomas's statement that, "any preferences given should be directly related to the obstacles that have been unfairly placed in those individuals' paths, rather than on the basis of race or gender, or on other characteristics that are often poor proxies for true disadvantage," has been read as evidence of the Justice's support for class-based affirmative action.⁷² In light of Thomas's personal biography, that is, his childhood experience growing up in extreme poverty in Georgia, this reading of Thomas's statements is tenable because the phrase "true disadvantage" may plausibly be read as meaning economic disadvantage. And, despite the fact that Thomas strenuously emphasizes the virtues of a hard work ethic and personal responsibility, he is clearly attuned to the struggle of those who live in chronic poverty.⁷³ If Justice Thomas seriously entertains the idea that a system of educational preferences based on socio-economic status is both sound policy and constitutionally valid, it is a definitive Rawlsian departure from classical liberalism. That Thomas entertains the possibility of class-based socio-economic affirmative action illustrates at least a marked departure from a narrow construction of property rights and a strict "cases and controversies" theory of adjudication.

It is debatable, however, whether one can extrapolate from Thomas's veiled statements about the need for affirmative action preferences based on "true disadvantage" to a wholehearted legal endorsement of group-based remedies for systematic social problems. On the one hand, within the context of Thomas's tenure at the EEOC, it is apparent that he is not principally opposed to group-based remedies, citing their importance during the formative stages of employment discrimination litigation when blatant facial discrimination was rampant in many sectors of the American economy.⁷⁴ In that context, Thomas agreed that it was a necessary remedy to impose

action] as constitutional and as good policy"); Michele Sherretta, *An Alternative to Affirmative Action: Attributing Lack of Diversity in Undergraduate Institutions to a Failing Education System*, 65 U. PITT. L. REV. 655, 667 (2004) ("Supreme Court Justices Clarence Thomas and Antonin Scalia, prior to their ascension to the bench, both articulated their approval [of economic affirmative action]").

⁷² Sherretta, *supra* note 71, at 667. See also, Thomas, *supra* note 52, at 410-11.

⁷³ See Thomas, *supra* note 3, at 10 (simultaneously discussing the virtues of hard work that his grandfather imparted to him and detailing the plight of other poor community members from his childhood).

⁷⁴ See Thomas, *supra* note 52, at 403.

“goals and timetables” on employers in order to mitigate past discriminatory practices and integrate their workforces.⁷⁵ On the other hand, he seems to be dismissive of the effectiveness of the EEOC’s early strategy of “goals and timetables” based on statistical disparities between minorities and whites in the workforce rather than on evidence discrimination against individual employees.⁷⁶ Further, he questions the constitutional legitimacy of imposing goals and timetables as a remedy, stating that, “group-defined numerical relief is a somewhat imaginative extension of Title VII principles.”⁷⁷ Therefore, notwithstanding his insinuations that economic affirmative action might be both constitutional and good public policy, it is evident that Justice Thomas does not support group-based remedies in other areas of social welfare litigation.

III. THEORY IN PRACTICE: THOMAS’S JUDICIAL OPINIONS

Justice Thomas’s writings and public statements evidence an affinity for the classical liberal principles of freedom from constraints, personal responsibility, limited government, and the rule of law. Yet although Thomas appears to fit the mold of classical liberalism, his support of a natural rights reading of the Constitution and his implied endorsement of economic affirmative action color his constitutional and political theory. In his judicial opinions some of these quirks are reinforced and others emerge, all with the effect of problematizing a characterization of Justice Thomas as a rigid disciple of classical liberalism. First, the tension between Thomas’s support of class-based affirmative action and his allegiance to classical liberal principles becomes manifest in his *Grutter v. Bollinger* dissent. Second, Thomas’s vote to uphold the Texas sodomy statute stands in contrast to his avowed admiration for Lockean natural rights.

The most illuminating example of the tension between Justice Thomas’s support for economic affirmative action and his belief in personal responsibility appears in his dissent in *Grutter v. Bollinger*.⁷⁸

⁷⁵ *Id.* at 404.

⁷⁶ *Id.* at 406 (“Giving back pay to each actual victim can be quite expensive, but the cost of agreeing to hire a certain number of blacks or women is generally de minimis”).

⁷⁷ *Id.* at 405.

⁷⁸ 539 U.S. 306 (2003) (Thomas, J., concurring in part and dissenting in part).

Writing in opposition to the University of Michigan School of Law's affirmative action policy, Thomas expresses a conflicted attitude towards the policy of giving students preferential treatment on a basis other than merit. In the course of highlighting the constitutional problems of creating a preference system based on race, Thomas alternately opines about the lack of a true meritocracy and echoes his public statements about economic affirmative action.⁷⁹ Part of his core argument is that universities employ several preference systems in their admissions policies, and that although some preference policies such as holding spaces for "legacy" students clearly thwart the operation of a well-function meritocracy, the constitution only prohibits racial preferences.⁸⁰ Thomas's tirade against the practice of reserving "legacy" slots comports with his attitudes about personal responsibility and is congruent with a Nozickian conception of justice because admitting an underqualified student as a "legacy" does not reflect the true market "price" of admission, which, in the absence of "legacy" status, imposes higher qualification standards. His statement that "the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher educations and therefore presents only an illusory solution to the challenges facing our Nation,"⁸¹ however, reinforces his public support for class-based affirmative action and suggests an affinity for Rawlsian redistribution to the least advantaged members of society.

Thus, although Thomas rejects the Rawlsian "end-state" principle that diversity is a worthwhile goal unto itself, his expression of sympathy for those who cannot afford to "participate in elite higher education" suggests a belief that government may play a legitimate role in correcting the effects of chronic poverty. But there are several problems with this thesis. First, it is uncertain at what stage of the educational process Thomas would support, as both constitutional and good policy, the operation of a class-based affirmative action plan. If such a plan were imposed at the primary or secondary school level, it would not conflict with his emphasis on personal responsibility or meritocracy. Because public education is largely viewed as a social good, school districts might hold that integration on the basis

⁷⁹ *Id.* at 354 n.3.

⁸⁰ *Id.* at 368.

⁸¹ *Id.* at 354 n. 3.

of economic status, such that the district's student populations are not disproportionately wealthy or poor, has both pedagogical and moral benefits.⁸² Meritocracy at the public primary and secondary school levels plays an insignificant role and would not be hindered by integrating schools on the basis of socio-economic status. Further, rather than claiming that the ultimate goal is economic "diversity" among the students, economic preferences can be justified at the primary school level on moral grounds concerning equal access to a constitutionally guaranteed education.⁸³ Moreover, this moral argument for equal access is consonant with a Lockean base level of equality and natural property rights.

By contrast, a class-based, socio-economic affirmative action program instituted in higher education would distort a meritocratic system. Institutions of higher education stratify along a spectrum from community colleges to the "elite" institutions such as the University of Michigan School of Law. As Justice Thomas states in *Grutter*, elite institutions, in order to preserve their elite status, impose much more stringent requirements on candidates for admission.⁸⁴ Accordingly, imposing a class-based affirmative action plan would thwart the operation of a meritocracy in a similar way that racial affirmative action would because membership in a minority economic caste would derogate from other "meritocratic" standards such as test scores. In this context, unlike the primary and secondary public school context, the desired goal is economic diversity.

⁸² For example, the pedagogical benefits might mirror the benefits associated with racial diversity, *i.e.* having enrollment reflect a balanced socio-economic cross-section of the community engenders the knowledge of diversity necessary in a heterogeneous society; the moral benefits would stem from the relative equality in the education that children would receive, assuming that the districts/schools do not receive disproportionate funding. Theoretically, if enrollment were socioeconomically balanced, the practice of funding of public schools through local property taxes would disappear and a more centralized distribution scheme would arise in its place.

⁸³ The policy argument for socio-economic based integration plans is particularly compelling in the wake of the Court's ruling in *Parents Involved in Community Schools vs. Seattle School District No. 1*, 551 U.S. 701 (2007), that voluntary racial integration plans are unconstitutional. Although the Supreme Court implied that there is no constitutional right to a public education in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), state courts such as New Jersey's have held that, under the state constitution, education is a fundamental right. *See Abbott v. Burke* 100 N.J. 269, 495 A.2d 376 (1985).

⁸⁴ *See Grutter*, 539 U.S. at 355-56.

As evidenced by Thomas opinion in *Grutter*, the end state goal of an economically diverse student body would be incompatible with his personal preference for true meritocracy, but because preferences based on socio-economic status are not explicitly forbidden by the constitution, Thomas would likely uphold such measures if legislatively enacted.

Thomas's personal qualms with preferences in higher education and the prospect of legislatively enacted economic affirmative action programs give rise to another source of tension for Thomas. As discussed earlier, Thomas believes that natural law principles offer an argument for limited government, that is, that Lockean natural law principles present an argument against judicial abuse of judicial review and legislative overreaching in the form of regulation. Because Thomas's personal affinity for pure meritocracy and personal responsibility are grounded in the same theories of natural law that he believes underlie the text of the constitution, it must be considered whether or not Thomas would, in the absence of a clear constitutional provision, divine a constitutional argument from his classical liberal conception of natural law along the lines of Justice Peckham's infamous opinion in *Lochner v. New York*.⁸⁵ Thus, it could be argued that Thomas might find economic affirmative action programs in higher education unconstitutional based on the congruence between his personal beliefs and his constitutional theory. Although it is a difficult argument to make,⁸⁶ it evokes the specter of judicial activism from the political "right," which, according to some commentators, is a very real possibility.⁸⁷ In other words, whereas Rawls is associated with the Warren Court and "leftist" judicial activism, Thomas may be characterized as a Lockean inspired judicial activist, notwithstanding the paradox of using expansive judicial power to limit the reach of government.

⁸⁵ 198 U.S. 45, 57-58 (1905).

⁸⁶ This is especially true because Thomas applies his natural law reading of the constitution to the Privileges and Immunities clause of the Fourteenth Amendment and it is not clear if he would imbue the Due Process or Equal Protection clauses with the same natural law content. See Thomas, *supra* note 5 at 66-67.

⁸⁷ Paul Gewirtz and Chad Golder, *So Who Are the Activists?*, Op-Ed, N. Y. TIMES, July 6, 2005, available at <http://www.nytimes.com/2005/07/06/opinion/06gewirtz.html>. See also, THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz, ed.) (2002).

But Thomas's allegiance to the natural law principles of classical liberalism may be called into question by his dissent in *Lawrence v. Texas*,⁸⁸ the Supreme Court opinion that overturned the Texas sodomy ban. Although he finds the law "uncommonly silly" he is unwilling to hold that the Constitution protects "a general right of privacy" or the "liberty of the person both in its spatial and more transcendent dimensions."⁸⁹ His concise dissent illustrates a reversion to strict textualism rather than a creative natural law inspired argument that might flow from a libertarian position. Further, his dissent appears to reject the classical liberal commitment to the right to freely contract and exchange property, as well as the conception of freedom from restraint and the principles of limited government. Apparently, for Thomas, the Texas sodomy ban does not violate the basic rights of "life, liberty, and property" that he trumpets as permeating the Declaration of Independence and underlying the Constitution. If Thomas maintains that these natural law principles are the best means to protect citizens against "arbitrary or willful government in general,"⁹⁰ it follows that a legislature must have some compelling interest in the regulation. That Thomas asserts that the Texas sodomy law is "uncommonly silly" implies an admission that there is no compelling interest to regulate this sphere of individual conduct. This tacit admission, coupled with his professed allegiance to the natural law principles of classical liberalism, should, in theory, spur him to hold that laws such as the Texas sodomy ban are unconstitutional.

Yet Thomas draws from his "higher law" conception of natural property rights in other constitutionally indeterminate contexts, which typically address questions that have more bearing on economic issues. For example, Thomas has little problem finding constitutional support for overturning bans on commercial advertising. In his concurring opinion in *Liquormart Inc. v. Rhode Island*, Thomas construed the open-ended language of the first amendment to argue that state regulation of commercial advertising is "*per se* illegitimate" where the "government's asserted interest is to keep legal users of a product or service ignorant."⁹¹ The regulation at issue in *Liquormart*

⁸⁸ 539 U.S. 558 (2003) (Thomas, J., dissenting).

⁸⁹ *Id.* at 606.

⁹⁰ Thomas, *supra* note 5, at 69.

⁹¹ 517 U.S. 484 (1996) (Thomas, J., concurring).

was a ban on all price advertising for alcoholic beverages sold in the state, with the exception of the price tags attached to the items for sale in licensed retail stores.⁹² Thomas, echoing a libertarian position, described Rhode Island's regulation as an attempt to manipulate the choices of consumers in the marketplace.⁹³ The language of marketplace manipulation is analogous to Lockean and Nozickian conceptions of limited government, freedom from restraint, and personal responsibility. Underlying Thomas's concurrence is a belief that the Rhode Island regulation is an impermissible government intrusion that limits the freedom of citizens to acquire and exchange property. Further, Thomas rejects the state's asserted interest as a paternalistic attempt to "manipulate" choice, implying that individuals must bear the burden of making responsible choices. The free availability of information in the commercial context is integral to allowing citizens to make informed choices.⁹⁴ Yet, although there is judicial precedent to support Thomas' concurrence, the rhetoric that he uses in *Liquormart* highlights the contrast with his dissent in *Lawrence*, in which similar libertarian arguments could be made in holding the Texas sodomy ban unconstitutional.

Further, in *Liquormart*, unlike *Lawrence*, Thomas has no reservations about overturning the regulation on the grounds that the state's asserted interest is flimsy. Additionally, although the divided plurality in *Liquormart* shared Thomas's belief that the state's proffered interest was insufficient,⁹⁵ Thomas went much further than the other justices in seeking to abolish the jurisprudential distinction between "commercial" and "noncommercial" speech in first amendment cases.⁹⁶ Because the text of the first amendment provides no definitive answer to the question of whether commercial speech is entitled to less deference than political speech, the Court created an artificial "two-tier" analytic structure for first amendment cases in which commercial speech was deemed "low-value" when compared with "high value," core,

⁹² *Id.* at 489.

⁹³ *Id.* at 519.

⁹⁴ *Id.* at 519 (citing *Virginia Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748 (1976)).

⁹⁵ *Id.* at 501-02.

⁹⁶ *Id.* at 522-23.

political speech.⁹⁷ Thus, Thomas must look outside the text of the constitution in order to arrive at his conclusion that the protection of commercial speech stands on par with the protection of political speech. His natural rights reading of the constitution, through the lens of Lockean natural rights, offers an explanation. Yet, the classical liberal principles that Thomas champions in *Liquormart* could easily be extended to cases like *Lawrence* through a similarly creative “natural rights” reading of open-ended constitutional provisions. That Thomas ruled differently in the two cases illustrates an interesting disjoint in the application of his theoretical proclivities as a Supreme Court Justice.

CONCLUSION

With roots in Locke’s conception of natural property rights and a modern expression in Nozick’s entitlement theory of justice, the principles of limited government, the rule of law, freedom from restraint, and personal responsibility feature prominently in Justice Thomas’s public speeches and writings, as well as his judicial opinions. Thomas holds the view that these principles are reflected in the theory that the judiciary must only decide cases and controversies dealing with discrete, individual violations of fundamental property rights. For Thomas, like the classical liberal theorists, the enforcement of these rights is a ceiling beyond which further government intrusion is largely illegitimate.

By contrast, Rawls’ theory of justice as fairness, although not inconsistent with negative liberty, posits that equality and the enforcement of property rights articulated by classical liberals should be a floor, rather than a ceiling, of protection for individual rights. Because the acquisition and transfer of property over time may lead to entrenched and morally unfair inequalities, Rawls believes that government must play a role in mitigating the harms incurred by minority groups over time. For Rawls, both the legislature and the judiciary must be actively involved in protecting individual rights and correcting for disparities in treatment between different groups. Thomas’s implied support for economic affirmative action problematizes a characterization of the Justice as a devout classical liberal. Yet because

⁹⁷ See *id.* at 498–500.

Thomas is dismissive of group-based remedies, it is difficult to argue that there is a “soft” Rawlsian side to this thought. Additionally, although Thomas displays enmity for “big government,” he nonetheless employs the power of judicial review to further his conception of Lockean natural rights, illustrating the tension between a plea for less government interference and the use of significant judicial power and raising the specter of *Lochner*-esque judicial activism from the right.

Justice Thomas is not a political theorist, but, like many justices, he draws on history and philosophy to articulate a jurisprudence that shapes his court opinions. An analysis of the theoretical references in his public speeches and writings illustrates that Justice Thomas may be fairly characterized as a proponent of the principles associated with classical liberalism. And, in many instances, Justice Thomas’s preference for Lockean natural rights becomes manifest in his judicial opinions. His implied support for class-based affirmative action, as well as his opinion in *Grutter*, however, raises questions about how far Justice Thomas is willing to extend the principles of Lockean natural rights in his judicial rulings. Further, the discrepancies between cases like *Lawrence* and *Liquormart*, evidence a disjoint in the application of libertarian principles, raising questions about other theoretical or moral principles that may influence his rulings. Thus, an examination of Thomas’s conception of classical liberalism both affords a characterization of the Justice within a larger historical and theoretical framework and provides an illustration of the complexities that arise when an attempt is made to put theory into practice.