Justice Thomas's Original Intentions

Adam J. White

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In recent pieces for the *Dispatch* and *Free Beacon*, I've alluded to essays that Clarence Thomas wrote in the late 1980s, during his service as chairman of the Equal Employment and Opportunity Commission. These three pre-judicial essays are eloquent and bracing introductions to his view of constitutional self-government. And they are well worth reading in the aftermath of his *magnum opus*—his concurring opinion in the Harvard and North Carolina civil rights cases.

The first essay, published in 1987, is "Toward a 'Plain Reading' of the Constitution—The Declaration of Independence in Constitutional Interpretation." The title itself was a provocation: as conservative judges, lawyers, and scholars coalesced around a constitutional jurisprudence to re-anchor judicial decisions in the original meaning of the Constitution's words, Thomas challenged them to recognize that the words could only be understood as embodying the nation's founding principles, best expressed in the Declaration.

Thomas read the Constitution as "the fulfillment of the ideals of the Declaration of Independence, as Lincoln, Frederick Douglass, and the Founders understood it." He explicitly rejected *Dred Scott*'s assertion that the Constitution gave no protection to black Americans. Even if early Americans failed to live up to their founding principles, "the Declaration's *promise* of equality of rights" was the timeless criterion by which government must be judged.

For Thomas, this was a fundamental matter of *republican* government, in the small-r sense. Liberty was a reflection of each citizen's equality. And the "principle of equality," in turn, "is contained within the republican principle of self-government," he wrote.

At a moment when conservatives were emphasizing constitutional institutions over merely "good intentions," Thomas rejected the false choice: "the problem is not *replacing* good intentions with good institutions but rather having good institutions that protect and reinforce good intentions," he wrote. "While appearing a fine point, in fact it is crucial for the way we view the Constitution and the influence the Constitution ought to have today."

His essay's ultimate goal was to reorient modern thinking on civil rights, and to lament *Brown v. Board of Education*'s "missed opportunity" to vindicate the Fourteenth Amendment's foundation in the Declaration. Vindicating the Amendment's original meaning would "inspire our political

and constitutional thinking," leading us "above petty squabbling over 'quotas,' 'affirmative action,' and race-conscious remedies for social ills."

He extended this theme in a second essay: "Civil Rights as a Principle Versus Civil Rights as an Interest." Published in a 1988 Cato Institute book reviewing the Reagan Administration (*alas, not available online*), Thomas criticized the Supreme Court for being "more concerned with meeting the demands of groups than with protecting the rights of individuals."

He did not downplay civil rights. "No other domestic issue of this century compares with it," he observed, "so conservatives should not be surprised at the ferocity with which the heirs of the civil rights movement react when they are attacked." (He made a similar point in his 1987 address to the Heritage Foundation.) But civil rights activists and the Court failed to recognize that civil rights were best protected through properly principled and limited government.

Criticizing the irresponsible Congress and aggressive administrative state that had allowed civil rights to become unmoored from the Fourteenth Amendment's original meaning and purpose, he concluded that "a civil rights policy based on principle, replacing the one based on interest-group advantages, would be a blessing not only for black Americans but for all Americans." And, in lines foreshadowing his Harvard concurrence, he warned that "[n]o one in this country should be made the fall guy for some other person's easy way of solving problems."

Finally, in 1989, he published "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment." Here he broadened his arguments beyond civil rights *per se*: "The best defense of limited government, of the separation of powers, and of the judicial restraint that flows from the commitment to limited government, is the higher law political philosophy of the Founding Fathers."

He urged conservative lawyers to broaden their appeal, too. "In defending these rights," he argued, "conservatives need to realize that their audience is not one composed simply of lawyers. Our struggle, as conservatives and political actors, is not simply another litigation piece or technique."

Above all, conservatives needed to root their arguments in the principles of equality and liberty that the Constitution embodies. "The higher-law background of the American Constitution, whether explicitly invoked or not, provides the only firm basis for a just, wise, and *constitutional* decision," he emphasized.

A year later, Thomas would be appointed to the Supreme Court. For three decades, his judicial opinions have embodied this approach, both in substance and in style—especially in the Harvard and UNC civil rights cases, the culmination of his judicial service.