

Senator HATCH. I would also suggest that we not pluck a sentence out of context, none of us should do that, from 138 speeches that you gave. Gee, I would hate to remember all the speeches I gave in any given period of time, and I think we ought to have it all in context and you ought to be given a copy of it, so that you can refer to the actual language. I think that is the only fair way to do it. The committee has—

The CHAIRMAN. If the Senator would yield for a moment. Before the hearing even began, on Friday I told the witness that the first thing I would ask him about was Macedo. I specifically told him, so he understood that, even back then.

Senator HATCH. I am not suggesting the Chairman is unfair. I am saying that the process is unfair, if we do not do at least this. When we want to quote a line out of context, I am suggesting from here on in, let us give the Judge a copy of the speech and refer to the line that you are quoting on, because this one was clearly out of context, and clearly he was not endorsing the Macedo definition of an activist Supreme Court. I mean it is very clear to anybody who reads it.

This committee has obtained over 30,000 pages of documents or material from this nominee, and I think if he is asked about one of his writings, he at least ought to be able to see it in front of him, and I would suggest we follow that procedure.

Judge let me ask you this: Will any of the writings or speeches cited today affect you in your role as a judge or as a Justice in this particular case, or will you rely on the actual text of the law, the legislative history, prior case law, et cetera?

Judge THOMAS. Senator, as I noted, my interest particularly in the area of natural rights was as a part-time political theorist at EEOC who was looking for a way to unify and to strengthen the whole effort to enforce our civil rights laws, as well as questions, to answer questions about slavery and to answer questions about people like my grandfather being denied opportunities. Those were important questions for me.

When one becomes a judge—and I think I alluded to this in my confirmation hearing for the court of appeals—there are approaches to adjudicating cases and to understanding statutes, to analyzing statutes and determining meanings in statutes or your intent in statutes, as well as constitutional adjudication.

I do not see how my writings in a policy context, I do not see that they will affect anything that I do on the Supreme Court. As I noted that the whole notion of natural law, as our Founders believed it, is a background of our regime, and to the extent that it is used at all, it is an understanding of the way that they looked at our regime and at the way that they, in the Declaration of Independence, felt that our country should operate, and, of course, that then is translated into provisions that they drafted for the Constitution itself. It informs us as to the value that they put on individual freedom, for example. I think that is important, but that does not play a direct role in adjudicating cases on a constitutional basis.

Senator HATCH. I agree with that. In the November 1987 Reason article cited by Senator Kennedy, it was an interview, an off-the-cuff interview, I take it. Reason says, "I suspect that he might

think that the EEOC ought not to exist," talking about Thomas. The question put to you was this: "Why do you think that this agency should exist in a free society?" Your answer was, "Well, in a free society"—later today, you said, "Well, in a perfect society," I think that is what you meant by that—"Well, in a free or perfect society, I don't think there would be a need for it to exist. Had we lived up to our Constitution, had we lived up to the principles that we espoused, there would certainly be no need."

"There would have been no need for manumission either. Unfortunately, the reality was that, for political reasons or whatever, there was a need to enforce antidiscrimination laws, or at least there was as perceived need to do that. Why do you need a Department of Labor? Why do you need a Department of Agriculture? Why do you need a Department of Commerce?"

Those appear to me to be rhetorical questions, in light of the point you are making, in a perfect world you do not need them, but here was discrimination and we needed to enforce antidiscrimination laws.

You can go down the whole list of Federal agencies, you say, and you do not need any of them, really. But what you meant was, and it is apparent, as you read this carefully, in a perfect world. You go on to say, "I think, though, if I had to look at the role of Government and what it does in people's lives, I see the EEOC as having much more legitimacy than the others, if properly run." That's a hands-on person-to-person agency that is dealing with the most common problems in employment law and in discrimination and in opportunity.

Is that not correct?

Judge THOMAS. That is right.

Senator HATCH. Well, here is what you say: "Now, if you run the risk that the authority can be abused, when EEOC or any organization starts dictating to people, I think they go far beyond anything that should be tolerated in this society." That is a far cry from what was implied in the questions to you.

You go on to say other things that I think you make pretty clear. Still, it was an off-the-cuff interview with a publishing group. Frankly, I think it was pretty clear that you were not arguing we should do away with all of these agencies, unless we had a perfect world. Is that a fair summary of that?

Judge THOMAS. That is the point in that interview that I was trying to make. The question—and that is Reason magazine, if I remember correctly, is a libertarian magazine, and some libertarians believe that there should be no organizations and no governmental agencies such as the EEOC, so the question then becomes how do you justify, if you are for the individual, how do you justify a governmental agency that, in affairs and relationships, the employment relationship between individuals, and the response is, well, if this were a perfect world, you might be right, but this is not a perfect world, and if there is a justification for any kind of an agency in our Government, and there are many, then EEOC is at the top of that list.

Senator HATCH. I suspect that you are going to be criticized for your tenure at the EEOC. I cited the Washington Post praise of you. I cited U.S. News & World Report's praise of you. As former

Chairman of the Labor Committee and currently ranking member, we had a lot to do with the EEOC, and I have to tell you, you did a good job running that agency. Was it perfect? No, but you did a good job. Frankly, you took it seriously and you brought more cases than any other EEOC Chairman in history, and you recovered over a billion dollars in those cases, and we could go on and on.

Tell me, generally, your reaction to these comments, Judge: "Natural law is not a theory of legal interpretation," according to Professor Robert George, of Princeton University, who is a lawyer and holds a doctorate in philosophy from Oxford University. "Rather," he goes on to say, "it is a theory of law that holds that there are true standards or principles of morality, that human beings are bound in reason to respect, and that among these are norms of justice and human rights that may not be sacrificed for the sake of social utility. Both liberals and conservatives share a belief in fundamental principles of justice and right, however much they disagree about the exact content and implications of some of these principles. The relevance of natural law to judging, it is that out of respect for the rule of law, judges are obliged to recognize the limits of their own authority. The scope of a judge's authority is settled not by natural law, but the constitutional allocation of political authority among the judicial and other branches of government."

Now, as Professor George has written, belief in natural law is perfectly consistent with fidelity to the Constitution, as the supreme law of the land and the commitment to judicial restraint. Now, whatever may be your views of the rights and wrongs of various social issues as a matter of natural law, it seems to me your commitment to natural law and natural rights neither permits you nor requires you to treat the Constitution as a vehicle for imposing those ideas on the rest of the country. Do you agree basically with that statement?

Judge THOMAS. Senator, I think that is, in part, the point that I was attempting to make. My interest, for example, was in the fact that, in our country, you had a stated ideal in the declaration, all men are created equal.

Senator HATCH. Natural law means there should not be slaves, right?

Judge THOMAS. That is the next step, that if that is true, then how can one person own another person, and yet you had slavery existing at the same time the declaration existed. In order to change that constitutionally, not as a matter of principle in our regime, but constitutionally you needed an amendment to the Constitution, and I indicated that. There is a difference between the ideal and the Constitution itself.

With respect to constitutional adjudication, I do not think that there is a direct role for natural law in constitutional adjudication. It is a part of our history and tradition. It is a part of our background and our country. It is a belief that a number of our drafters held. It is in our Declaration, and as I mentioned before, it is prominent in the brief filed by the NAACP in *Brown v. Board of Education*, to show the ideals of this country, but even there as an appendix, I think it is listed as a political philosophy section.

I do not know, I cannot remember whether it was advocated as a way to adjudicate, but my point is that it does not, it is not a method of constitutional adjudication. When I was speaking as Chairman of EEOC, again, I was a policymaker. I was not a litigator and I was not a constitutional law professor.

Senator HATCH. That is a good distinction, by the way.

Judge THOMAS. Well, it was an important one for me and it is an important one for me now. When one is a judge, from my standpoint, one does not go into one's own personal philosophies and apply those personal philosophies in one's effort to adjudicate cases. I think that there are principles, there are traditional approaches that have been used, and I have confined myself and would confine myself to that.

Senator HATCH. When you are talking about natural law, you are talking about equality?

Judge THOMAS. That all men are created equal, that is basic law.

Senator HATCH. That is right, and you are taking that from the Declaration of Independence.

Judge THOMAS. That is right.

Senator HATCH. And you are saying that is why we needed the 13th, 14th and 15th amendments.

Judge THOMAS. That was the most apparent and grossest contradiction in our society, that you had declaration declaring all of us to be equal, and yet the coexistence with that of slavery.

Senator HATCH. Well, I find it to be interesting, because Judge Bork was criticized because he did not particularly endorse the principle of natural law in constitutional adjudication, and now you are being criticized because you purportedly do. Frankly, it is a double standard, and, I might add, by the same committee.

What I interpret you to be saying—and maybe I am wrong, and you correct me if I am wrong—is that when it comes to natural law and the Constitution, the Constitution takes preeminence.

Judge THOMAS. The Constitution is our law, it is the law of our land. The natural law philosophy is a political theory, my interest was political theory, it was not constitutional law.

Senator HATCH. So, when you become a Justice on the U.S. Supreme Court, and I believe you will, you intend to uphold the Constitution of the United States, is that correct?

Judge THOMAS. With every fiber in my body.

Senator HATCH. Above anything else?

Judge THOMAS. My job is to uphold the Constitution of the United States, not personal philosophy or political theories.

Senator HATCH. I think that is a pretty good way of putting it. Some have criticized natural law as being outside the mainstream. I have seen articles by some of our eminent law professors in this country, at least one in particular that I can see. If natural law is outside the mainstream, then so is the Declaration of Independence, and that is the point you are making, it seems to me. As Professor Robert George, of Princeton University, observed, if you believe that slavery was inherently unjust and should have been abolished, you believe in natural law of some sort. Throughout our American history, many of our greatest leaders, Thomas Jefferson, Abraham Lincoln, Martin Luther King, Jr., they have all invoked natural law in their struggles against injustices of their times.

Now, I think you are being accused, if you believe in natural law, then that means that would make you a conservative judicial activist. Now, I have to tell you, as much as I care for you and as much as I know you and believe in you, if you are going to go on the bench to be a conservative judicial activist, I am going to be against you as much as if you were a liberal judicial activist, because I do not think that is the purpose of that role on the court.

Judge THOMAS. Senator, I think that was the point, and I have to go back and read the speech involved, but that was the point of the criticism of Macedo, that he indeed was an activist and I think there was some debate about that, and I do not think the role of the Court is to have an agenda to say, for example, that you believe the Court should change the face of the earth. That is not the Court's role.

There are some individuals who think, for example, as the Chairman mentioned earlier, that the whole landscape with respect to economic rights should be changed, and I criticize that.

Senator HATCH. As I understand both of our personal discussions and also from reading some of the things you have written, you recognize the natural law principles of the Declaration of Independence as reflected in the written Constitution, that they constrain both legislative majorities and the courts. Am I correct on that?

Judge THOMAS. That is correct.

Senator HATCH. Moreover, many who criticize you today for acknowledging the existence of natural law were the most vociferous critics of Judge Bork 4 years ago for not acknowledging the existence of natural law. I just want to make that point.

By endorsing Lewis Lehrman's article in the American Spectator, some say that you have signaled that you would vote to overturn *Roe v. Wade*. Well, I think you have made it pretty clear. You were complimenting Lehrman as trustee of the Heritage Foundation in the Lehrman Hall when you made that particular remark in a nine, single-spaced-page talk that you gave. As Senator Danforth has said, to say that Judge Thomas thereby adopted or endorsed Lewis Lehrman's entire article is like suggesting that any of our references to a "distinguished colleague" in the Senate is a full-fledged endorsement of everything that "distinguished colleague" has ever said. Now, that is ridiculous, and I personally think the implication is ridiculous as well.

But let me just ask you the question. Have you made up your mind, Judge Thomas, on how you will vote when abortion issues are before the Court as a Justice on the Court?

Judge THOMAS. Senator, there is a lesson that I think we all learn when we become judges, and I think it happens to you after you have had your first case; that you walk in sometimes, even after you have read the briefs and you think you might have an answer. And you go to oral argument, and after oral arguments you think you might have an answer.

Senator HATCH. That is right.

Judge THOMAS. And after you sit down and you attempt to write the opinion, you thought you had an answer, and you change your mind.

I think it is inappropriate for any judge who is worth his or her salt to prejudge any issue or to sit on a case in which he or she has such strong views that he or she cannot be impartial. And to think that as a judge that you are infallible I think totally undermines the process. You have to sit. You have to listen. You have to hear the arguments. You have to allow the adversarial process to think. You have to be open. And you have to be willing to work through the problem.

I don't sit on any issues, on any cases that I have prejudged. I think that it would totally undermine and compromise my capacity as a judge.

Senator HATCH. I think that says it all. But let me just say this: I have been interested in some of these questions about substantive due process issues. As you know, the first substantive due process case was the *Dred Scott* case in 1857. That is where the Supreme Court held that the "Liberty prong" of the due process clause prevented Congress from forbidding slavery in the territories.

Now, later in the 19th century and the early 20th century, the Supreme Court employed substantive due process in *Lochner v. New York*—that is the case that came up earlier—to strike down astute law that limited the numbers of hours that bakery workers could work in a week. The New York legislature passed the law, and *Lochner* struck it down.

There were other substantive due process cases up until the 1930's, and all of those struck down efforts by the States to regulate the workplace and the economy. And substantive due process was basically dormant from that time until the early 1960's when the Court, of course, began to use substantive due process to achieve liberal results, or should I say liberal social policy results.

Now, according to some of my liberal colleagues that was all right, but the earlier use of substantive due process was wrong. I am telling you both of them are wrong. The fact of the matter is that nobody in his right mind believes that you are going to go strike down all of the social policy results that the Congress has passed, including OSHA, food safety laws, child care legislation, welfare laws, fair housing laws, low-income housing, and so forth.

Is there even any shred of evidence or any shred of thought that you would be the type of judge that would be a substantive due process judicial activist that would take us back to the *Lochner* days?

Judge THOMAS. To my way of thinking, Senator, there isn't. I think that the post-*Lochner* era cases were correct. I think that the Court determined correctly that it was the role of Congress, it was the role of the legislature to make those very, very difficult decisions and complex decisions about health and safety and work standards, work hours, wage and hour decisions, and that the Court did not serve the role as the superlegislature to second-guess the legislature.

I think that those post-*Lochner* era cases were correctly decided, and I see no reason why those cases and that line of cases should have been or should be revisited.

Senator HATCH. Well, I agree with you. I have to note that it is somewhat ironic for my liberal colleagues to express concern that judges might start striking down economic regulations the way the

liberal judges in some ways have invented criminal rights, struck down pornography restrictions, have run local high schools, and imposed taxes on cities and local governments. And you could go on and on with some of these things that activist courts have been doing up to today. And I too think that it would be wrong for judges to strike down economic regulation, just like you do.

But what the liberals really ought to understand is that no one is safe when judges depart from the text of the written Constitution, and that is what has been happening from time to time. What we need are judges that won't make up the law in order to institutionalize their own social policy ideas or to impose their own values, liberal or conservative, on the American people.

I think the people can choose between liberal and conservative policies, but they should choose between them where they ought to choose between them, and that is in the elective process. That is what we are here for. They can choose by voting for whoever they want to in the elective process to make these laws, not judges on the bench. And that is what really is at stake in this.

I could go on and on. I notice that everybody is probably pretty tired by now, but let me just say this: In fulfillment of your duties as a Justice on the Supreme Court, are you going to be guided by Stephen Macedo and his ideas?

Judge THOMAS. Absolutely not.

Senator HATCH. I didn't think so. And I don't think anybody else thought so.

Do you intend to elevate property rights over individual rights and liberties, as was done in the early part of this century under the *Lochner* case its whole progeny of cases?

Judge THOMAS. I certainly have no intention of doing that, Senator. The Court has attempted to approach rights such as on the economic decisions of the legislature, the classifications according to race, et cetera, in a way that I think is appropriate. It attempts to accord a value to these.

The point that I was making is that the notion of property is in the Constitution. That in no way says how those cases should be adjudicated.

Senator HATCH. Well, you know, in those days they elevated the so-called right of contract above the individual rights of individual human beings. And the right of contract took precedence over individual rights and freedoms where the right of government to ease the burdens and the pains and the difficulties of the working-class and the poor through health and welfare programs, wage and hour legislation, and other matters that they chose to do. The Court at that time said that that was all outweighed by the right of contract.

Well, I don't know of anybody that wants to go back to those days. Now, some can misconstrue Professor Epstein to believe that that is what he wants to do. I don't believe he wants to do that.

But to make a long story short, Judge Thomas, I personally am very proud of your nomination, and I believe that you will bring a dimension to this Court that really hasn't been there before, because I don't think you are going to be characterized in any particular pocket of anybody. And I know you well enough to know that you are fiercely independent and that you will do what you

believe is right within the Constitution. And I believe we have covered this principle of natural law, at least as much as we could here today.

I want to commend you for this opportunity. A lot of us intend to see that you have this opportunity, and I sure wish you the best in being able to serve on that Court and to do it in the best interest of all Americans and in the right way, and within the confines of the Constitution, and in the way that I think you have been chatting with us today. So I commend you for what you have said, and I hope we can enjoy the rest of your testimony tomorrow.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Let me conclude today by pointing out one thing. No one, notwithstanding my distinguished friend, thus far has criticized your view on natural law or whether or not natural law is beneficial. We are just trying to find out if you have a view on natural law and what it is. For the record, no one is criticizing your view. Professor Bork criticizes natural law. I do not. No one has criticized your view. We are just going to try to find out what it is.

Senator HATCH. I am sure glad to have that on the record, I will tell you.

The CHAIRMAN. With that, the hearing is adjourned until tomorrow at 10 o'clock.

[Whereupon, at 5:30 p.m., the committee recessed, to reconvene at 10 a.m., Wednesday, September 11, 1991.]