Again, it is theory. It was an endeavor that I thought was an appropriate endeavor at that point in my career. I did not intend for it to involve constitutional adjudication.

The CHAIRMAN. Thank you.

Before we take a break, just out of curiosity, you keep talking about the need to get conservatives to be more supportive of civil rights. Does that mean they are not supportive of civil rights?

I am not being facetious, because it goes to the question of your intentions here. Are conservatives supportive of civil rights?

Judge THOMAS. I was giving them reason to be strongly supportive and more aggressively supportive of civil rights. I don't think they were necessarily against civil rights, but I thought that there was a comfort level in being opposed to quotas and affirmative action. And I thought that we should advance the ball, that the issue of race has to be solved in this country and that we have to stop yelling at each other and we have to stop criticizing each other and calling each other names. And I was involved in that debate, and I was a pretty tough debater, too. But at some point we have got to solve these problems out here.

The CHAIRMAN. I think the State Department is the place for you, Judge. [Laughter.]

We will recess, to give you a chance to have a break, for 10 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Senator Brown?

Senator BROWN. Thank you, Mr. Chairman.

Judge Thomas, I have heard a number of criticisms of the chairman's style of conducting this hearing. The substance of those criticisms have revolved around the fact that he clearly is too soft on you, has not brought the tough questions out. And I just wanted to serve notice on the chairman that this love-in that he seems to be presiding over will come to an end.

Reflecting on my own children—I have two daughters and a son—it is clear to me that if I want to get the inside information on my son, I ask one of his sisters, and we intend to call your sister as a witness later on, whenever the chairman will allow that measure. I don't know if that is——

The CHAIRMAN. You just scared the living devil out of him. He is not sure whether you are serious. [Laughter.]

See the look on his face. He is only kidding, Judge.

Judge THOMAS. I would be more concerned if he called my brother.

Senator BROWN. I think we can make arrangements for that, too.

Senator SIMPSON. Mr. Chairman, let me correct the record. That is Clarence's sister there and not his daughter. We want to get all this sibling stuff straightened out.

The CHAIRMAN. As far as his sister is concerned, she would rather it not be corrected, she would rather be a daughter.

Senator BROWN. Judge, earlier in this hearing you were asked about the right to privacy, and as I recall your answer, you indicated that you recognized a right of privacy within the Constitution. Since that is one of the cornerstones that leads to decisions in-

volved in *Roe* v. *Wade*, I think that was of some real significance and interest to this committee.

You have been asked specifically about *Roe* v. *Wade*, and you have declined to answer on the grounds that you may well be called upon to rule on those specific issues as a judge of the Court.

I would like to ask a related question that is slightly different. I can understand the reluctance to indicate how you would rule, but I would be interested to know if in your own mind you have come to a decision on the right to terminate a pregnancy. I am not asking what that decision is, but I would like to know within your own mind if you are at a point where you have decided that.

Judge THOMAS. Senator, I think, as I have noted earlier, that for me to begin to state positions, either personal or otherwise, on such an important and controversial area, where there are very, very strong views on both sides, would undermine my impartiality and really compromise my objectivity.

I think that it is most important for me to remain open. I have no agenda. I am open about that important case. I work to be open and impartial on all the cases on which I sit.

I can say on that issue and on those cases I have no agenda. I have an open mind, and I can function strongly as a judge.

Senator BROWN. Well, I thank you. I think that willingness to look at the facts and review them objectively is an important factor for us to look at.

Mr. Chairman, I think it is appropriate here to at least put into the record something that was said by Justice Marshall upon his confirmation. He was asked by a variety of Senators to indicate how he would have ruled on a number of cases. The *Miranda* case was brought up as well as several others.

In the *Miranda* case, or at least in response to the *Miranda* case, Justice Marshall said this, and I quote: "I am not saying whether I disagree with *Miranda* or not because I am going to be called to pass upon it. There is no question about it, Senator. These cases are coming to the Supreme Court."

Justice Marshall remarked at a different stage of the hearings, "My position is—which in every hearing I have gone over is the same—that a person who is up for confirmation for Justice of the Supreme Court deems it inappropriate to comment on matters which will come before him as a Justice." I thought it appropriate to have that in the record. The position you have taken with regard to announcing an opinion in advance of hearing the case is certainly in line with other people who have been advanced to the Supreme Court, and in this case specifically Justice Marshall.

But I must say I do appreciate your answer to my question. I think a critical issue for us here is to know that you are willing to listen to the facts in those cases.

The CHAIRMAN. If the Senator would yield, did you have more than you read that you want to place in the record?

Senator BROWN. I think I would leave it at that, Mr. Chairman.

The CHAIRMAN. Second, did the witness answer your question? I didn't think he answered your question. That is, did he make up his mind? Not what is it, but just has he made up his mind?

Judge THOMAS. I indicated that it would be inappropriate to explain to him or to say whether I did or not.

The CHAIRMAN. Thank you.

Senator BROWN. At least my interpretation—and I appreciate the chairman mentioning this. At least my understanding was that the judge indicated that his mind was—he was willing to listen to the facts on this, and his mind was open in terms of this particular case.

Have I——

Judge THOMAS. That is correct.

Senator BROWN. I am assuming that you have not made a final decision in your own mind on the *Roe* v. *Wade* case?

Judge THOMAS. That is right.

Senator BROWN. Earlier the chairman had brought up I thought some very important questions involving economic rights in the Constitution. I know you commented further on that and answered Senator Hatch's question specifically with regard to several lines of cases that I know our chairman was concerned about. In addition, you had commented with regard to whether or not you would be a disciple of several philosophers that were mentioned, indicating that you would not.

I would like your views, though, on a different aspect of this economic question. As I just glance through the Constitution, we have a variety of provisions in the Constitution that deal specifically with property rights: Articles I, IV, VI; amendments II, III, IV, V, VII, XIII, I suspect many others. These are property rights, economic rights if you will, that are specifically addressed in the Constitution and protection provided.

It has been suggested, I think by the chairman, or at least an observation, perhaps I should say, by the chairman, that in the past some Supreme Court cases have accorded property rights or economic rights a lesser degree of protection than other rights in the Constitution.

My own view of it is that it is very difficult to separate rights. It strikes me that if someone cuts off your salary because you have said something, you may have denied freedom of speech but you have done it through a deprival of economic rights, property rights. At least it occurs to me that if the 13th amendment means anything, it means that you have justifiable property rights in the fruits of your labor. And if you are not going to protect the property rights of your labor, then the 13th amendment doesn't mean much.

Now, I broach this subject because I think it is important. In my mind it is difficult to separate property rights and personal rights. It does appear to me that both are protected in the Constitution, and I guess I would like an indication from you as to whether or not you think property rights deserve a lesser protection in the Constitution, greater protection under the Constitution than other rights, or whether it is a balancing between rights when these questions arise. Would you share with us your view on that?

Judge THOMAS. Senator, my point has been that property rights, of course, deserve some protection, and I think they are, as are our other rights, important rights. The Court in looking at the economic regulations of our economy and our society has attempted to move away from certainly the *Lochner* era cases and not as a superlegislature. And I indicated that that is appropriate, particular-

ly in the area as I have noted—the health and welfare, wage and hour cases.

I think that some of those cases, the area, I think there is some developing in the taking area, and perhaps if I am fortunate enough to be confirmed to the Court, perhaps I would be called upon to rule on those issues. But I would be concerned about the diminishment or the diminishing, diminution of any rights in our society. But that is not to say in any way that I disagree with the standards that the Court applies to protecting those rights today.

Senator BROWN. Thank you. I wanted to address the subject of stare decisis. It has been raised by other members of this committee. I think the distinguished Senator from Ohio has discussed the concern about the overturning of previous decisions and precedents.

As I see the figures, from 1810 through 1953 we had a total of 88 cases that were overruled, where a previous decision of the Court was simply and flatly overruled by the Court. That is 88 cases in 143 years.

Interestingly, I think, in the next 36 years, 37 years, we had 112 cases overruled. Really starting with the Warren Court on, you had a much greater movement on the part of the Court to overrule previous decisions.

I mention that because apparently the modern courts, at least since the Warren Court, have been much more inclined to move in that direction, not less so, in terms of observing stare decisis. But at least I observe those cases as ones that were important landmarks: *Brown* v. *the Board of Education* addressing segregation; *Mapp* v. *Ohio*, an illegal search; the *Gideon* case, involving the right to counsel. These are areas where we have overturned precedent, but I think with a very significant and real reason behind those changes.

I mention all of this because I wish you would share your view with us as to the kind of standards you are going to use in sitting on the Court as to whether or not you will choose to overrule a previous decision of the Court. What kind of standards are you going to be looking to apply?

Judge THOMAS. Senator, I think that the principle of stare decisis, the concept of stare decisis is an important link in our system of deciding cases in our system of judicial jurisprudence. The reason I think it is important is this: We have got to have continuity if there is going to be any reliance, if there is going to be any chain in our case law. I think that the first point in any revisiting of the case is that the case be wrongly decided, that one thing it is incorrect. But more than that is necessary before one can rethink it or attempt to reconsider it. And I think that the burden is on the individual or on the judge or the Justice who thinks that a precedent should be overruled to demonstrate more than its mere incorrectness. And at least one factor that would weigh against overruling a precedent would be the development of institutions as a result of a prior precedent having been in place.

But, again, I think the first step is that the precedent be incorrect, and the second step in the analysis has to be more than the mere incorrectness of that precedent.

Senator BROWN. I am wondering if the standards that you will be applying will vary depending on the constitutional issues involved. Is this the standard you would apply in every area?

Judge THOMAS. I think, Senator, that the standards that I gave you should be as uniform as possible. I don't think, for example, as I have read someplace, that the standard should be less for individual rights than for commercial cases. I did not understand that comment, but it would seem to me that individual rights deserve—or the cases in the individual rights area deserve the greatest protection and should be considered with the application of the highest standards of stare decisis.

Senator BROWN. Thank you.

I want to change subjects on you for a moment and take you back to the EEOC, during that 8-year period that you directed that agency, Commission. My recollection is that in 1983 you changed policy for the Commission, that the Commission adopted a resolution to shift its presumption in favor of rapid charge processing to one of case-by-case investigation.

I wonder if you would be willing to outline for us this policy initiative, and if you would relate what kind of results it achieved or didn't achieve. What kind of changes occurred?

Judge THOMAS. Senator, when I arrived at EEOC in 1982, among the many problems that I incurred—and, indeed, there were many—was that the existence of a rapid charge system, that system was designed to reduce the backlog that had plagued EEOC for so many difficult years. I felt that the system, which in essence brought the charging party who filed the claim of discrimination and the employer together and required them to reach a settlement, without investigating and determining whether or not there was actual discrimination, I felt that that system shortchanged both parties.

The Commission voted in the policy that as an ideal, felt that—or indicated that cases should be investigated as fully as possible before there is any determination. That took quite some time to implement. But the sense of it was this: That if someone—and there were approximately 60,000 charges filed a year. If someone filed a charge, that that person had the right to have it investigated and to have a determination made as to whether or not there was discrimination.

One of the results of this approach is the increased number of cases that were litigated. I think also an important result was that we were more consistent, and I think more faithful to the statute that required us to investigate these charges.

Again, this effort was not without its glitches, but I think it was a very important move in the right direction and brought about the appropriate results for an agency that enforces nondiscrimination laws.

Senator BROWN. One of the changes that at least I have understood that you focused on during that period was an effort to automate the office, adopt computers and computer systems. I wonder if you could summarize what you did and whether or not you thought it was a wise investment.

Judge THOMAS. Again, Senator, we automated in a number of ways. The first area that I was told when I was confirmed that I

had to clean up was the financial management area. The then-chairman of the Labor and Human Resources Committee told me that he would call me on the carpet if that was not done.

We were able to automate that area and as a result achieved savings that we could then use to automate other areas. And then that necessity for automating is quite simply that when you receive 60,000 charges a year in 50 offices across the country, in order to manage and in order to understand your agency and in order to be able to understand the type of discrimination that is taking place in this society, you have to have a database. You have to have a database in each of the offices, and you have to have a national database to manage that national workload from the central office here in Washington, DC.

One of the problems that you have when you don't have that database is simply you don't know what is going on in the agency. You don't know what changes there are, and quite frankly you have no idea what is in your workload except the most general of ideas. Without additional resources and over a period of time, we were able to build a database, to put the automated management systems in the offices across the country, and as well as develop a national database that is so important in managing our workload and actually enforcing the equal employment opportunity laws.

Senator BROWN. Thank you.

Judge, I must say I was shocked at hearing comments that you had made about Congress. Those harsh views are ones, of course, we have never heard before. As one who came to Congress some 11 years ago with the thought that we would balance the budget within a couple of years, the concept that perhaps a $250 billion to $300 billion deficit a year leaves something to be desired I suspect is not new to the American people. But sometimes saying the emperor has no clothes is not always the greatest help for you in the confirmation process.

Be that as it may, I think the underlying question is an appropriate one, and that is: What will your attitude be as a Justice of the Supreme Court in reviewing the constitutionality of legislation in which you find yourself in disagreement with the policy judgments of Congress? Are you going to be able to separate out your objections to congressional policy in making the determination of whether or not that law is judged constitutional?

Judge THOMAS. Senator, I think it is one thing to be in the executive branch and to come back and forth to oversight hearings and budget hearings and to disagree on policy decisions and to argue and debate and advocate for a particular point of view. There is a tension there, and sometimes those of us who have been nominated and needed to be confirmed have deep regret about negative comments about this body or any body, but the appropriate role for a judge totally precludes being a part of that tension and that debate and that advocacy.

A judge must determine what the will of this body is. A judge does not have to agree, a judge does not have to think it is the most wonderful legislation in the world. Indeed, that is irrelevant. The judge's role is, as impartially as possible, to determine what the will of this body is, and that is precisely what I have attempted to do in my current position as a judge on the U.S. Court of Ap-

peals for the D.C. Circuit, and never to supplant my personal views.

As I indicated earlier, when I pick up a case for consideration, the first question I ask myself is what is my role as a judge in this case, and that role never includes bringing personal views or predilections to that case.

Senator BROWN. I appreciate that. I expect that is not the easiest portion of your duties or task. It would not be for me.

You have mentioned several times in the course of these hearings your experiences in dealing with congressional inquiries involved in the various agencies you have either directed or been involved in. It is my understanding that you have appeared and responded some 57 times, in addition to the I guess 5 times you have been up for confirmation. I wonder if you would give us an idea, in those 57 inquiries, how much time was involved, what it involved on your part, your agency's part in terms of staff time, commitment of resources.

Judge THOMAS. Well, Senator, I would have to put that inquiry into two separate categories. The least amount of involvement are the instances in which there is significant cooperation between the staff of a particular committee and the agency. The difficulty arises when there is, in the second category, significant disagreements or where there is significant information or document requests involved.

But as a rule of thumb, when I prepared for a hearing, any of the hearings other than my own confirmation hearings, I would allow, at a minimum, 4 to 8 hours of personal preparation, in addition to whatever staff time it took to gather documents and to address the issues that concern the committee involved.

Senator BROWN. What about the agency itself?

Judge THOMAS. The involvement of the agency, again, depends on the range of the inquiry. There have been instances when the involvement has been quite overwhelming, as a result of the amount of data involved.

Generally, however, the agency's involvement has been sometimes exacting, it has been within manageable ranges.

Senator BROWN. Judge, in the past you have expressed some concerns about racial quotas. If I understand your position as it has been articulated at this hearing, it has been an interest or an advocacy of affirmative action, but an opposition to racial quotas as a method of achieving those advances. I wonder if you could articulate the differences you see and the reasons for them.

Judge THOMAS. As I indicated earlier, Senator, throughout my adult life, I have advocated the inclusion of those who have been excluded. I have been a strong advocate of that. I advocated that in college and I advocated that in my adult life, and I certainly practiced that during my tenure at EEOC.

I felt, for example, that there were many opportunities to include minorities and women and individuals with disabilities in our work force, and I took every occasion to do that in the Senior Executive Service Program, the top level of Government managers, our record is superb on the efforts that I was able to achieve in agreements, scholarships for minorities and women across the country,

colleges and universities programs, internship programs, mentor programs, stay-in-school programs, et cetera.

I think that many of us of good will and many of us who, though we do not necessarily share the same approach, agree with that goal that we have to include individuals who have been left out for so long.

The difficulty comes with how far do you go without being unfair to others who have not discriminated or unfair to the person who is excluded, and at that range I thought—and, again, this was the policy position that I advocated—that it was appropriate to draw the line at preferences and goals and timetables and quotas.

I also felt that those approaches, the objectionable approaches had their own consequences, and that is I felt that they had the tendency of undermining the self-esteem and dignity of the recipients. That is again something that others can debate, but I thought it was a valid point of view, and that those approaches, if we went too far, actually could be harmful to the very individuals whom we all care so much about.

But I am very firmly for programs to include those who have been excluded. That has been a passion of mine throughout my adult life.

Senator BROWN. In describing your views on racial quotas, unless I have missed it, you have not anchored them based on constitutional arguments, but anchored them in your own feelings about what makes sense, what makes the reason.

Yet, I notice the *Plessy* v. *Ferguson* dissent that you have referred to, or at least it has been attributed to you, that you found some interest in Justice Harlan's dissent there in that case includes this quote:

> But in view of the Constitution, in the eye of the law there is in this country no superior dominant ruling class of citizens, there is no cast here, our Constitution is color blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

Now, my recollection is I did finish saying I understand your reluctance to rule on cases in advance, but do you attribute your concern over racial quotas to reading the Constitution, as well?

Judge THOMAS. I think, Senator, in the appropriate circumstances, we all are concerned with the underlying value of fairness that is expressed in our Constitution, as well as in our statutes. But I would like to make one comment with respect to that quote, and I think it is an important comment, that we have to remember that, even though the Constitution is color blind, our society is not, and that we will continue to have that tension.

Senator BROWN. Judge Thomas, I bring this subject up not to cause you personal concern, but because it has become part of the debate over your nomination. I preface it that way, because it is not normally the type of thing that I guess I would bring up at a hearing of this kind.

But one of the charges that has been brought against you in this nominating process is that you benefited by quotas or affirmative action, but do not support them. I guess the question is directly in entry to Yale, were you part of an affirmative action quota, were you part of a racial quota in terms of entering that law school?

Judge THOMAS. Senator, I have not during my adult life or during my academic career been a part of any quota. The effort on the part of Yale during my years there was to reach out and open its doors to minorities whom it felt were qualified, and I took them at their word on that, and I have advocated that very kind of affirmative action and I have done the exact same thing during my tenure at EEOC, and I would continue to advocate that throughout my life.

Senator BROWN. Mr. Chairman, my time is up. I would merely note for the record that the judge was an honors graduate of Holy Cross undergraduate school.

The CHAIRMAN. We will suspend just for a moment.

[Pause.]

I was just conferring with staff about the timing. Just so you have a sense of how much longer you are going to sit there, I think we should go with one more Senator. Today we will hear from the Senator from Illinois, and then we will take up tomorrow morning at 10 o'clock with the Senator from Wisconsin, followed by a second round beginning with me.

The Senator from Illinois, Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Judge Thomas, I will try to avoid doing what Senator Danforth said we should not do and just read little snippets from what you have written and said. I have read now over 800 pages of Clarence Thomas' speeches and opinions. I have read more of Clarence Thomas than any author I have read this year. I regret to say I do not think you have a best seller in the works. [Laughter.]

But it is important, because when you say you have no agenda or when you say you are not a policymaker, the reality is you become a policymaker on the U.S. Supreme Court. If I may quote from Justice Frankfurter, "It is the Justices who make the meaning," talking about the law and the Constitution. "They read into the neutral language of the Constitution their own economic and social views. Let us face the fact that five Justices of the Supreme Court are molders of policy, rather than the impersonal vehicles of revealed truth."

If, for example, in this committee, my colleagues, Senator Heflin and Senator Hatch, have a disagreement and work out a compromise and the law is not completely clear, then ultimately you may have to decide and make policy. That may be a 5-to-4 decision of the Court.

I mention this, because, generally, while it is not always true, you can usually tell where a Justice of the Court is going to go by looking at his record. For example, Justice Marshall has been talked about here. Generally, we can say there were no great surprises in Thurgood Marshall's record on the Court, because we knew where he had been.

When I look at your writings, I find a somewhat different tone, frankly, than the response to questions here, or a somewhat different tone in the quotes Senator Danforth read—with great respect to my colleagues, Senator Danforth, who gave as strong and eloquent an endorsement as I have ever heard of any candidate. But what I read is somewhat different from the tone of the remarks, the quotes that he made there. And when I read attacks on mini-