The CHAIRMAN. Thank you very much, Senator Danforth. I know the nominee knows how fortunate he is to have a friend like you.

While you are on your feet, Judge, we will swear you.

Senator DANFORTH. Can you still see the nominee, Mr. Chairman? [Laughter.]

The CHAIRMAN. Judge, while we are just passing some time here, I just want you to know up until a few nominees ago this is what you would have faced the entire time of your questioning. They are all gentle souls, but they are anxious to see you, and we agreed that we would do this so they could have you sworn in.

Judge Thomas, do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Judge THOMAS. I do.

The CHAIRMAN. Please be seated.

[Pause.]

The CHAIRMAN. Well, Judge, Jack Danforth said—talked about what is at issue. I want to make it clear at the outset of my questioning that there is a great deal more at issue than whether or not your view on how to deal with the civil rights of Americans deviates from the view of any single group of people.

I beg your pardon?

So I would now like to invite you to—having been sworn, to, if you would, please introduce your family to us, who have been waiting patiently all morning and the committee is anxious to meet them, as I am sure everyone else is. So, would you please introduce your family to us, Judge?

Judge THOMAS. Thank you, Mr. Chairman.

I would like first to introduce my wife Virginia.

The CHAIRMAN. Welcome, Mrs. Thomas. It is a pleasure to have you here.

Judge THOMAS. My mother, Leola Williams; my sister, Emma May Martin; and my son Jamal.

The CHAIRMAN. Jamal, welcome. You look so much like your father that probably at a break you would be able to come back in and sit in there and answer questions. So, if he is not doing it the way you want it done, you just slide in that chair.

Judge THOMAS. He may not take it as a compliment if you say he looks like me.

The CHAIRMAN. He is young. He has a chance to grow out of it, as my father says about my sons.

Judge THOMAS. I would like to also introduce my mother-in-law and father-in-law, Donald and Marjorie Lamp, who are in the audience here.

The CHAIRMAN. Would you please stand, Mr. and Mrs. Lamp. Welcome to the hearing. Thank you very much for coming.

Do you have an opening statement, Judge?

Judge THOMAS. Yes, Mr. Chairman.

The CHAIRMAN. Please.

TESTIMONY OF HON. CLARENCE THOMAS, OF GEORGIA, TO BE ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

Judge THOMAS. Mr. Chairman, Senator Thurman, members of the committee, I am humbled and honored to have been nominated

by President Bush to be an Associate Justice of the Supreme Court of the United States. I would like to thank the committee, especially you, Chairman Biden, for your extraordinary fairness throughout this process, and I would like to thank each of you and so many of your colleagues here in the Senate for taking the time to visit with me.

There are not enough words to express my deep gratitude and appreciation to Senator Danforth, who gave me my first job out of Yale Law School. I have never forgotten the terms of his offer to me: more work for less pay than anyone in the country could offer. Believe me, he delivered on his promise, especially the less pay.

I appreciate his wise counsel and his example over the years, and his tireless efforts on my behalf during the confirmation process.

And I would like to thank Senators Bond, Nunn, Fowler, Warner, and Robb, for taking the time to introduce me today.

Much has been written about my family and me over the past 10 weeks. Through all that has happened throughout our lives and through all adversity, we have grown closer and our love for each other has grown stronger and deeper. I hope these hearings will help to show more clearly who this person Clarence Thomas is and what really makes me tick.

My earliest memories, as alluded to earlier, are those of Pin Point, GA, a life far removed in space and time from this room, this day and this moment. As kids, we caught minnows in the creeks, fiddler crabs in the marshes, we played with pluffers, and skipped shells across the water. It was a world so vastly different from all this.

In 1955, my brother and I went to live with my mother in Savannah. We lived in one room in a tenement. We shared a kitchen with other tenants and we had a common bathroom in the backyard which was unworkable and unusable. It was hard, but it was all we had and all there was.

Our mother only earned $20 every 2 weeks as a maid, not enough to take care of us. So she arranged for us to live with our grandparents later, in 1955. Imagine, if you will, two little boys with all their belongings in two grocery bags.

Our grandparents were two great and wonderful people who loved us dearly. I wish they were sitting here today. Sitting here so they could see that all their efforts, their hard work were not in vain, and so that they could see that hard work and strong values can make for a better life.

I am grateful that my mother and my sister could be here. Unfortunately, my brother could not be.

I attended segregated parochial schools and later attended a seminary near Savannah. The nuns gave us hope and belief in ourselves when society didn't. They reinforced the importance of religious beliefs in our personal lives. Sister Mary Virgilius, my eighth grade teacher, and the other nuns were unyielding in their expectations that we use all of our talents no matter what the rest of the world said or did.

After high school, I left Savannah and attended Immaculate Conception Seminary, then Holy Cross College. I attended Yale Law School. Yale had opened its doors, its heart, its conscience to recruit and admit minority students. I benefited from this effort.

My career has been delineated today. I was an assistant attorney general in the State of Missouri. I was an attorney in the corporate law department of Monsanto Co. I joined Senator Danforth's staff here in the Senate, was an Assistant Secretary in the Department of Education, Chairman of EEOC, and since 1990 a judge on the U.S. Court of Appeals for the District of Columbia Circuit.

But for the efforts of so many others who have gone before me, I would not be here today. It would be unimaginable. Only by standing on their shoulders could I be here. At each turn in my life, each obstacle confronted, each fork in the road someone came along to help.

I remember, for example, in 1974 after I completed law school I had no money, no place to live. Mrs. Margaret Bush Wilson, who would later become chairperson of the NAACP, allowed me to live at her house. She provided me not only with room and board, but advice, counsel and guidance.

As I left her house that summer, I asked her, "How much do I owe you?" Her response was, "Just along the way help someone who is in your position." I have tried to live by my promise to her to do just that, to help others.

So many others gave their lives, their blood, their talents. But for them I would not be here. Justice Marshall, whose seat I have been nominated to fill, is one of those who had the courage and the intellect. He is one of the great architects of the legal battles to open doors that seemed so hopelessly and permanently sealed and to knock down barriers that seemed so insurmountable to those of us in the Pin Point, GA's of the world.

The civil rights movement, Rev. Martin Luther King and the SCLC, Roy Wilkins and the NAACP, Whitney Young and the Urban League, Fannie Lou Haemer, Rosa Parks and Dorothy Hite, they changed society and made it reach out and affirmatively help. I have benefited greatly from their efforts. But for them there would have been no road to travel.

My grandparents always said there would be more opportunities for us. I can still hear my grandfather, "Y'all goin' have mo' of a chance then me," and he was right. He felt that if others sacrificed and created opportunities for us we had an obligation to work hard, to be decent citizens, to be fair and good people, and he was right.

You see, Mr. Chairman, my grandparents grew up and lived their lives in an era of blatant segregation and overt discrimination. Their sense of fairness was molded in a crucible of unfairness. I watched as my grandfather was called "boy." I watched as my grandmother suffered the indignity of being denied the use of a bathroom. But through it all they remained fair, decent, good people. Fair in spite of the terrible contradictions in our country.

They were hardworking, productive people who always gave back to others. They gave produce from the farm, fuel oil from the fuel oil truck. They bought groceries for those who were without, and they never lost sight of the promise of a better tomorrow. I follow in their footsteps and I have always tried to give back.

Over the years I have grown and matured. I have learned to listen carefully, carefully to other points of views and to others, to think through problems recognizing that there are no easy answers

to difficult problems, to think deeply about those who will be affected by the decisions that I make and the decisions made by others. But I have always carried in my heart the world, the life, the people, the values of my youth, the values of my grandparents and my neighbors, the values of people who believed so very deeply in this country in spite of all the contradictions.

It is my hope that when these hearings are completed that this committee will conclude that I am an honest, decent, fair person. I believe that the obligations and responsibilities of a judge, in essence, involve just such basic values. A judge must be fair and impartial. A judge must not bring to his job, to the court, the baggage of preconceived notions, of ideology, and certainly not an agenda, and the judge must get the decision right. Because when all is said and done, the little guy, the average person, the people of Pin Point, the real people of America will be affected not only by what we as judges do, but by the way we do our jobs.

If confirmed by the Senate, I pledge that I will preserve and protect our Constitution and carry with me the values of my heritage: fairness, integrity, openmindedness, honesty, and hard work.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very, very much for a moving statement, Judge.

Let me begin at the very outset by pointing out to you I, for one, do not in any way doubt your honesty, your decency, or your fairness. But, if I could make an analogy, I am interested in what you think, how you think. I don't doubt for a moment the honesty, decency, or fairness of Senator Hatch. I don't doubt for a moment the honesty, decency, or fairness of Senator Metzenbaum. But I sure have a choice of which one I would put on the bench.

Because they are both honest—I mean this sincerely now. It is an important point. At least you understand what I have in mind. The fact you are honest and the fact you are decent and the fact you are fair, the fact you have honed sensibilities mean a lot to me. But what I want to do the next half hour and the next several days is to go beyond that.

I will concede easily those points because it is true. No question. As we lawyers say, let's stipulate to the fact you are honest, decent, and fair, and let's get about the business of finding out why anyone who ever had the nuns can remember their eighth grade nun. Mine was Mother Agnes Constance. I don't know why I remember it so vividly. I suspect we both know why we remember so vividly.

Judge THOMAS. Dare not forget.

The CHAIRMAN. And we both know they never forget.

I made a speech not too many years ago, a commencement speech, at St. Joseph's University. After the speech was over I felt that finger that I am sure you felt in the middle of your back, and I heard, "Joey Biden, why did you say 'I' instead of 'me' " in such and such a sentence. It is a true story. I turned around and it was my seventh grade nun. So we both have at least that in common, and let's see what we can find out about whether or not we have in common, if anything, about the broader philosophic constructs upon which the Constitution can and must be informed.

Judge, as Senator Danforth said, he hopes we have read your speeches. I assure you I have read all of your speeches, and I have

read them in their entirety. And, as I indicated in my opening statement, what I want to talk about a little bit is one of the things you mention repeatedly in your speeches so that I can be better informed by what you mean by it.

Whether you are speaking in the speech you delivered on the occasion of Martin Luther King's birthday, a national holiday and whether it should be one, to a conservative audience, making the point that he should be looked to with more reverence or whether or not it was your speech to the Pacific Institute or whether or not it is the Harvard Journal, whatever it is you repeatedly invoke the phrase "natural rights" or "natural law."

And, as I said at the outset, here is good natural law, if you will, and bad natural law in terms of informing the Constitution, and there is a whole new school of thought in America that would like very much to use natural law to lower the protections for individuals in the zone of personal privacy, and I will speak to those later, and who want to heighten the protection for businesses and corporations.

Now, one of those people is a Professor Macedo, a fine first-class scholar at Harvard University. Another is Mr. Epstein, a professor at the University of Chicago. And, in the speech you gave in 1987 to the Pacific Research Institute you said, and I quote: "I find attractive the arguments of scholars such as Stephen Macedo who defend an activist Supreme Court that would"—not could, would—"strike down laws restricting property rights."

My question is a very simple one, Judge. What exactly do you find attractive about the arguments of Professor Macedo and other scholars like him?

Judge THOMAS. Senator, again, it has been quite some time since I have read Professor Macedo and others. That was, I believe, 1987 or 1988. My interest in the whole area was as a political philosophy. My interest was in reassessing and demonstrating a sense that we understood what our Founding Fathers were thinking when they used phrases such as "All men are created equal," and what that meant for our form of government.

I found Macedo interesting and his arguments interesting, as I remembered. Again, it has been quite some time. But I don't believe that in my writings I have indicated that we should have an activist Supreme Court or that we should have any form of activism on the Supreme Court. Again, I found his arguments interesting, and I was not talking particularly of natural law, Mr. Chairman, in the context of adjudication.

The CHAIRMAN. I am not quite sure I understand your answer, Judge. You indicated that you find the arguments—not interesting—attractive, and you explicitly say one of the things you find attractive—I am quoting from you: "I find attractive the arguments of scholars such as Steven Macedo who defend an activist Supreme Court that would strike down laws resisting property rights."

Now, it would seem to me what you were talking about is you find attractive the fact that they are activists and they would like to strike down existing laws that impact on restricting the use of property rights because, you know, that is what they write about.

Judge THOMAS. Well, let me clarify something. I think it is important, Mr. Chairman.

The CHAIRMAN. Please.

Judge THOMAS. As I indicated, I believe, or attempted to allude to in my confirmation to the Court of Appeals, I don't see a role for the use of natural law in constitutional adjudication. My interest in exploring natural law and natural rights was purely in the context of political theory. I was interested in that. There were debates that I had with individuals, and I pursued that on a part-time basis. I was an agency chairman.

The CHAIRMAN. Well, judge, in preparing for these hearings, some suggested that might be your answer. So I went back through some of your writings and speeches to see if I misread them. And, quite frankly, I find it hard to square your speeches, which I will discuss with you in a minute, with what you are telling me today.

Just let me read some of your quotes. In a speech before the Federalist Society at the University of Virginia, in a variation of that speech that you published in the Harvard Journal of Law and Policy, you praised the first Justice Harlan's opinion in *Plessy* v. *Ferguson*, and you said, "Implicit reliance on political first principles was implicit rather than explicit, as is generally appropriate for the Court's opinions. He gives us a foundation for interpreting not only cases involving race, but the entire Constitution in the scheme of protecting rights." You went on to say, "Harlan's opinion provides one of our best examples of natural law and higher law jurisprudence."

Then you say, "The higher law background of the American Government, whether explicitly appealed to or not, provides the only firm basis for a just and wise constitutional decision."

Judge, what I would like to know is, I find it hard to understand how you can say what you are now saying, that natural law was only a—you were only talking about the philosophy in a general philosophic sense, and not how it informed or impacted upon constitutional interpretation.

Judge THOMAS. Well, let me attempt to clarify. That, in fact, though, was my approach. I was interested in the political theory standpoint. I was not interested in constitutional adjudication. I was not at the time adjudicating cases. But with respect to the background, I think that we can both agree that the founders of our country, or at least some of the drafters of our Constitution and our Declaration, believed in natural rights. And my point was simply that in understanding overall our constitutional government, that it was important that we understood how they believed—or what they believed in natural law or natural rights.

The CHAIRMAN. For what purpose, Judge?

Judge THOMAS. My purpose was this, in looking at this entire area: The question for me was from a political theory standpoint. You and I are sitting here in Washington, DC, with Abraham Lincoln or with Frederick Douglass, and from a theory, how do we get out of slavery? There is no constitutional amendment. There is no provision in the Constitution. But by what theory? Repeatedly Lincoln referred to the notion that all men are created equal. And that was my attraction to, or beginning of my attraction to this approach. But I did not—I would maintain that I did not feel that

natural rights or natural law has a basis or has a use in constitutional adjudication.

The CHAIRMAN. Well, Judge, let's go back to Macedo, then. What was the political theory you found so attractive that Mr. Macedo is espousing?

Judge THOMAS. The only thing that I could think of with respect to—and I will tell you how I got to the issue of property rights and the issue of the approach or what I was concerned about. What I was concerned about was this: If you ended slavery—and it is something that I don't know whether I alluded to it in that speech, but it is something that troubled me even in my youth. If you ended slavery and you had black codes, for example, or you had laws that did not allow my grandfather to enjoy the fruits of his labor, prevented him from working—and you did have that. You had people who had to work for $3 a day. I told you what my mother's income was. By what theory do you protect that?

I don't think that I have explicitly endorsed Macedo. I found his arguments interesting, and, again, that is the——

The CHAIRMAN. But he doesn't argue about any of those things, Judge.

Judge THOMAS. I understand that. I read more explicit areas. I read about natural law even though my grandfather didn't talk about natural——

The CHAIRMAN. But, I mean, isn't it kind of—I guess I will come back to Macedo. You also said in that speech out at the Pacific Research Institute, you said, "I am far from being a scholar on Thomas Jefferson, but two of his statements suffice as a basis for restoring our original founding belief and reliance on natural law, and natural law, when applied to America, means not medieval stultification but the liberation of commerce." You speak many times—I won't bore you with them, but I have pages and pages of quotes where you talk about natural law not in the context of your grandfather, not in the context of race, not in the context of equality, but you talk about it in the context of commerce, just like it is talked in the context, that context, by Macedo and by Epstein and others in their various books, a new fervent area of scholarship that basically says, "Hey, look, we, the modern-day court, has not taken enough time to protect people's property, the property rights of corporations, the property rights of individuals, the property rights of businesses." And so what we have to do is we have to elevate the way we have treated protecting property. We have to elevate that to make it harder for governments to interfere with the ability of—in the case of Epstein the ability to have zoning laws, the ability to have pollution laws, the ability to have laws that protect the public welfare.

Then you say in another place in one of your speeches, you say, "Well, look, I think that property rights should be given"—let me find the exact quote—"should be given the exact same protection as"—you say, "Economic rights are as protected as much as any other rights," in a speech to the American Bar Association.

Now, Judge, understand my confusion. Economic rights now are not protected as much as any other rights. They are not protected that way now. They are given—if they pass a rational basis test, in effect, it is all right to restrict property. When you start to restrict

things that have to do with privacy and thought process, then you have to have a much stricter test. And so you quote Macedo. You talk about the liberation of commerce and natural law, whatever you want to call it, natural law or not. And then you say economic rights—and, by the way, you made that speech to the ABA the day after you made the speech where you praised Macedo.

Can you tell me, can you enlighten me on how this was just some sort of philosophic musing?

Judge THOMAS. Well, that is exactly what it was. I was interested in exactly what I have said I was interested in. And I think I have indicated in my confirmation to the court of appeals that I did not see a role for the application of natural rights to constitutional adjudication, and I stand by that.

The CHAIRMAN. Judge, you argue Harlan did just that and that it was a good thing for him to have done. He applied this theory of natural rights, as you say, in his dissent in *Plessy* v. *Ferguson.*

Judge THOMAS. I thought that——

The CHAIRMAN. He should have, you say.

Judge THOMAS. Well, the argument was I felt that slavery was wrong, that segregation was wrong.

The CHAIRMAN. Right.

Judge THOMAS. And, again, I argue—and I have stood by that—that these positions that I have taken, I have taken from the standpoint of philosophical or from the standpoint of political theory.

The CHAIRMAN. Well, Judge, let me find——

Judge THOMAS. Let me, if I could have an opportunity.

The CHAIRMAN. Sure, oh, please.

Judge THOMAS. My interest in this area started with the notion, with a simple question: How do you end slavery? By what theory do you end slavery? After you end slavery, by what theory do you protect the right of someone who was a former slave or someone like my grandfather, for example, to enjoy the fruits of his or her labor?

At no point did I or do I believe that the approach of natural law or that natural rights has a role in constitutional adjudication. I attempted to make that plain or to allude to that in my confirmation to the court of appeals. And I think that that is the position that I take here.

The CHAIRMAN. OK, Judge. Well, look, let's not call it natural law, natural rights, whatever. What do you mean when you say economic rights are protected as much as any other rights in the Constitution? What do you mean by that?

Judge THOMAS. Well, the simple point was that notions like—for me, at this point—and, again, I have not gone back and I don't know the text of all those speeches. But there are takings clauses—there is a taking clause in the Constitution, and there is also a reference to property in our Constitution. That does not necessarily mean that in constitutional adjudication that the protection would be at the same level that we protect other rights. Nor did I suggest that in constitutional adjudication that that would happen. But it certainly does deserve some protection. Certainly the right of my grandfather to work deserves protection.

The CHAIRMAN. The right of my Grandfather Finnegan, too, deserved protection and your grandfather to work. But the issue here

is whether or—look, let me explain to you why I am concerned about this. You know why. Let's make sure other people know why.

There is a whole new school of thought made up of individuals that up until about 5 years ago only spoke to one another. That school of thought is now receiving wider credence and credibility, to the point that former Solicitor General Charles Fried, in his book "Order and Law,"—not a liberal Democrat, Reagan's Solicitor General—said in his book about this group of scholars to whom Macedo and others like you refer—maybe you didn't mean the same thing, but this group of scholars, meaning Macedo and Epstein and others who I will mention in a moment. He says, "Fledgling federalist societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein had a specific, aggressive and, it seemed to me, quite radical project in mind,"—meaning for the administration—"to use the takings clause"—I don't have much time so I won't go into it, but you and I both know the takings clause is that portion of the fifth amendment that has nothing to do with self-incrimination. It says if the government is going to take your property, they have to pay for it, except historically we have said if it is regulating your property, it is not taking it. If it is regulating under the police power to prevent pollution or whatever else, then it is not taking it and doesn't have to pay for it.

And what these guys want to do is they want to use that takings clause like the 14th amendment was used during the Lockner era. This is Fried speaking. It says "had a specific, aggressive, and, it seemed to me, quite radical project in mind to use the takings clause of the fifth amendment to serve as a brake upon Federal and State regulation of business and property. The grand plan was to make government pay compensation for taking property every time its regulation impinged."

Now, that is what this is all about, Judge. And, again, I am not saying that that is your view, but it seems to me when you say, which nobody else who writes in this area—I don't know anybody—and I have read a lot about this area. I don't know anybody else who uses the phrases "natural law," "property," "the takings clause," who doesn't stand for the proposition that Macedo and Epstein for, which is that we got this a little out of whack. We have got to elevate the standard of review we use when we look at property, just to the same standard, to use your phrase, the same rights as personal rights, that most Americans think to be personal, whether they can assemble, whether or not they can go out and speak, whether or not they can worship, whether or not they can have privacy in their own bedroom.

And so these guys want to change that balance, but that is why I am asking you this. I will come back to it in a minute in my second round. But let me shift, if I may——

Judge THOMAS. May I just respond?

The CHAIRMAN. Yes, please.

Judge THOMAS. First of all, I would like to just simply say, and I think it is appropriate, that I did not consider myself a member of that school of thought. And, secondly, I think that the post-Lockner era cases were correctly decided.

My interest in natural rights were purely from a political theory standpoint and as a part-time political theorist. I was not a law professor, nor was I adjudicating cases. And as I indicated and have indicated, I do not think that the natural rights or natural law has an appropriate use in constitutional adjudication.

The CHAIRMAN. Well, Judge, I would ask for the record, and I will make these available to you, that all the references you make that I have found—and there are pages of them—where you explicitly connect natural law with either specific cases or talk about informing specific aspects of constitutional interpretation be entered in the record. In my second round, I will be able to talk with you about them. You will have had a chance to read them.

[The documents follow:]

1

[THOMAS QUOTATIONS ON NATURAL LAW]

KEYNOTE ADDRESS, PACIFIC RESEARCH INSTITUTE'S CIVIL RIGHTS TASK FORCE, AUGUST 4, 1988

"THE AMERICAN CONCEPTION OF THE RULE OF LAW PRESUPPOSES APPRECIATION FOR THE POLITICAL PHILOSOPHY OF NATURAL RIGHTS IN ALL THE DEPARTMENTS OF GOVERNMENT. THE CONSERVATIVE FAILURE TO APPRECIATE THE IMPORTANCE OF NATURAL RIGHTS AND HIGHER LAW ARGUMENTS CULMINATED IN THE SPECTACLE OF SENATOR BIDEN, FOLLOWING THE DEFEAT OF THE BORK NOMINATION, CROWING ABOUT HIS BELIEF THAT HIS RIGHTS WERE INALIENABLE AND CAME FROM GOD, NOT FROM A PIECE OF PAPER. WE CANNOT EXPECT OUR VIEWS OF CIVIL RIGHTS TO TRIUMPH, BY CONCEDING THE MORAL HIGH GROUND TO THOSE WHO CONFUSE RIGHTS WITH WILFULNESS."

* SPEECH AT FEDERALIST SOCIETY FOR LAW AND POLICY STUDIES, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, MARCH 5, 1988

"HIGHER LAW PRINCIPLES HAD TO WORK THEIR WAY THROUGH THE CONSTITUTION'S TEXT. A NATURAL RIGHTS UNDERSTANDING OF THE CONSTITUTION DOES NOT GIVE JUSTICES A RIGHT TO ROAM. RATHER, IT POINTS THE ENTIRE GOVERNMENT TOWARD FREEDOM."

* KEYNOTE ADDRESS CELEBRATING THE FORMATION OF THE PACIFIC RESEARCH INSTITUTE'S CIVIL RIGHTS TASK FORCE, AUGUST 4, 1988

[WHAT MAKES THE FOLLOWING QUOTATION SIGNIFICANT IS THAT THOMAS IS CRITICIZING A SPECIFIC SUPREME COURT CASE ON THE BASIS OF NATURAL LAW -- INDICATING THAT NATURAL LAW IS NOT JUST A "PHILOSOPHY," BUT HELPS DECIDE -- AND EVEN CONTROLS JUDICIAL DECISIONS.]

"CONSERVATIVE HEROES SUCH AS THE CHIEF JUSTICE FAILED NOT ONLY CONSERVATIVES BUT ALL AMERICANS IN THE MOST IMPORTANT COURT CASE SINCE BROWN V. BD. OF EDUCATION. I REFER OF COURSE TO THE INDEPENDENT COUNSEL CASE, MORRISON V. OLSON. ... JUSTICE ANTONIN SCALIA'S REMARKABLE DISSENT IN [MORRISON] POINTS THE WAY TOWARD [THE CORRECT] PRINCIPLES AND IDEAS. HE INDICATES HOW AGAIN WE MIGHT RELATE NATURAL RIGHTS TO DEMOCRATIC SELF-GOVERNMENT AND THUS PROTECT A REGIME OF INDIVIDUAL RIGHTS.

"JUSTICE SCALIA'S DISSENT CITED THE MASSACHUSETTS BILL OF

RIGHTS, WHICH ARTICULATES THE FUNDAMENTAL BASES OF DECENT GOVERNMENT. HE QUOTED THE LAST OF THE 30 ARTICLES OF THAT DOCUMENT. ... BY RECALLING ARTICLE 30, THE SCALIA OPINION MAY PUT US ON THE WAY TO RECOGNIZING THE IMPORTANCE OF ARTICLE ONE OF THE MASSACHUSETTS BILL OF RIGHTS: QUOTE 'ALL MEN ARE BORN FREE AND EQUAL, AND HAVE CERTAIN NATURAL, ESSENTIAL, AND UNALIENABLE RIGHTS; AMONG WHICH MAY BE RECKONED THE RIGHT OF ENJOYING AND DEFENDING THEIR LIVES AND LIBERTIES; THAT OF ACQUIRING, POSSESSING, AND PROTECTING PROPERTY, IN FINE, THAT OF SEEKING AND OBTAINING THEIR SAFETY AND HAPPINESS.' END QUOTE ...

"THIS SHORT PASSAGE SUMMARIZES WELL THE TIE BETWEEN NATURAL RIGHTS AND LIMITED GOVERNMENT. BEYOND HISTORICAL CIRCUMSTANCE, SOCIOLOGICAL CONDITIONS, AND CLASS BIAS, NATURAL RIGHTS CONSTITUTE AN OBJECTIVE BASIS FOR GOOD GOVERNMENT. SO THE AMERICAN FOUNDERS SAW IT, AND SO SHOULD WE."

* NOTES ON ORIGINAL INTENT, UNDATED (THOMAS IS QUOTING A LETTER WRITTEN BY ANDREW HAMILTON)

"THE YOUNG [ANDREW] HAMILTON DEFENDED AMERICAN RIGHTS AGAINST A TORY BY ARGUING 'THE FUNDAMENTAL SOURCE OF ALL YOUR ERRORS, SOPHISMS, AND FALSE REASONINGS IS A TOTAL IGNORANCE OF THE NATURAL RIGHTS OF MANKIND.' THIS COULD APPLY TO VIRTUALLY ANY JUDGE OR DARE I SAY ANY TEACHER OF

LAW TODAY. ... THE NATURAL RIGHTS, HIGHER LAW UNDERSTANDING OF OUR CONSTITUTION IS THE NON-PARTISAN BASIS FOR LIMITED, DECENT, AND FREE GOVERNMENT."

* FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES, U. VA. SCHOOL OF LAW, MARCH 5, 1988

"FAR FROM BEING A LICENSE FOR UNLIMITED GOVERNMENT AND A ROVING JUDICIARY, NATURAL RIGHTS AND HIGHER LAW ARGUMENTS ARE THE BEST DEFENSE OF LIBERTY, AND OF LIMITED GOVERNMENT. MOREOVER, WITHOUT RECOURSE TO HIGHER LAW, WE ABANDON OUR BEST DEFENSE OF A COURT THAT IS ACTIVE IN DEFENDING THE CONSTITUTION BUT JUDICIOUS IN ITS RESTRAINT AND MODERATION. HIGHER LAW IS THE ONLY ALTERNATIVE TO THE WILFULNESS OF BOTH RUNAMOK MAJORITIES AND RUNAMOK JUDGES."

* SPEECH BEFORE THE KIWANIS CLUB, WASHINGTON, JAN 14, 1987

"AS DR. KING MAINTAINED, AMERICAN POLITICS AND THE AMERICAN CONSTITUTION ARE UNINTELLIGIBLE WITHOUT THE DECLARATION OF INDEPENDENCE, AND THE DECLARATION IS UNINTELLIGIBLE WITHOUT THE NOTION OF A HIGHER LAW BY WHICH WE FALLIBLE MEN AND WOMEN CAN TAKE OUR BEARINGS. THAT IS WHAT I GREW UP ACCEPTING."

* "AFFIRMATIVE ACTION: CURE OR CONTRADICTION?" CENTER MAGAZINE, NOV/DEC. 1987.

"THE RULE OF LAW IN AMERICA MEANS NOTHING OUTSIDE

CONSTITUTIONAL GOVERNMENT AND CONSTITUTIONALISM, AND THESE ARE SIMPLY UNINTELLIGIBLE WITHOUT A HIGHER LAW. MEN CANNOT RULE OTHERS BY THEIR CONSENT UNLESS THEIR COMMON HUMANITY IS UNDERSTOOD IN LIGHT OF TRANSCENDENT STANDARDS PROVIDED BY THE DECLARATION'S "LAWS OF NATURE AND OF NATURE'S GOD." NATURAL LAW PROVIDES A BASIS IN HUMAN DIGNITY BY WHICH WE CAN JUDGE WHETHER HUMAN BEINGS ARE JUST OR UNJUST, NOBLE OR IGNOBLE."

* SPEECH AT FEDERALIST SOCIETY FOR LAW AND POLICY STUDIES, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, MARCH 5, 1988 (THE EMPHASIS IS THOMAS'S)

"HARLAN'S RELIANCE ON POLITICAL FIRST PRINCIPLES [AS EXPRESSED IN THE DECLARATION OF INDEPENDENCE -- SEE PRECEDING PARAGRAPH] WAS IMPLICIT RATHER THAN EXPLICIT, AS IS GENERALLY APPROPRIATE FOR SUPREME COURT OPINIONS. HE GIVES US A FOUNDATION FOR INTERPRETING NOT ONLY CASES INVOLVING RACE BUT THE ENTIRE CONSTITUTION AND ITS SCHEME OF PROTECTING RIGHTS. ... THE HIGHER LAW BACKGROUND OF THE CONSTITUTION, <u>WHETHER EXPLICITLY APPEALED TO OR NOT</u>, PROVIDES THE ONLY FIRM BASIS FOR A JUST, WISE, AND CONSTITUTIONAL DECISION."

6

[THOMAS ON ECONOMIC RIGHTS]

[IF THOMAS WAFFLES ON WHETHER HE THINKS ECONOMIC RIGHTS NEED MORE PROTECTION, THE FOLLOWING QUOTES INDICATED HIS DISSATISFACTION WITH THE EXISTING STATE OF AFFAIRS]

[THESE QUOTES SUGGEST THOMAS THINKS ECONOMIC RIGHTS ARE VITALLY IMPORTANT, AND UNDERAPPRECIATED]

* "REWARDS BELONG TO THOSE WHO LABOR," BY CLARENCE THOMAS, WASHINGTON TIMES, JAN. 18, 1988.

"TODAY WE ARE FAR FROM THE LEGAL INEQUITIES MY GRANDFATHER SUFFERED. INDEED, OUR CURRENT EXPLOSION OF RIGHTS -- WELFARE RIGHTS, ANIMAL RIGHTS, CHILDREN'S RIGHTS AND SO ON -- GOES TO THE POINT OF TRIVIALIZING THEM. FURTHERMORE, ECONOMIC RIGHTS ARE CONSIDERED ANTAGONISTIC TO CIVIL OR HUMAN RIGHTS -- THE FORMER BEING MATERIALISTIC AND DIRTY WHILE THE LATTER ARE LOFTY AND NOBLE. THE SPLIT HAS EVOLVED IN SUCH A WAY THAT SOME WHO CONSIDER THEMSELVES GREAT CHAMPIONS OF HUMAN RIGHTS CONTRAST THEMSELVES WITH ADVOCATES OF PROPERTY RIGHTS OR ECONOMIC RIGHTS."

* LETTER TO THE EDITOR, WASHINGTON TIMES, SEPTEMBER 2, 1987

"ABOVE AND BEYOND THE NEED FOR CONSTITUTIONAL AMENDMENTS (WHOSE MEANING CAN ALWAYS BE DISTORTED) IS A RENEWED UNDERSTANDING THAT THE FOUNDERS' CONSTITUTION INTENDED TO PROTECT INDIVIDUAL RIGHTS -- THE FULL INDIVISIBLE RANGE,

ECONOMIC AND CIVIL. THE FATHER OF THE CONSTITUTION, JAMES MADISON, PUT IT SUCCINCTLY: 'AS A MAN IS SAID TO HAVE A RIGHT TO HIS PROPERTY; HE MAY EQUALLY BE SAID TO HAVE A PROPERTY IN HIS RIGHTS.'"

* ABA BUSINESS LAW SECTION SPEECH, AUGUST 11, 1987.

[ECONOMIC RIGHTS] "ARE SO BASIC THAT THE FOUNDERS DID NOT EVEN THINK IT NECESSARY TO INCLUDE THEM IN THE CONSTITUTION'S TEXT, WITH THE IMPORTANT EXCEPTIONS OF THE CONTRACT CLAUSE AND THE LAST CLAUSES OF THE FIFTH AMENDMENT."

* PACIFIC RESEARCH INSTITUTE SPEECH, AUGUST 10, 1987.

"OF COURSE, THERE ARE SEVERAL DIFFERENT VERSIONS OF NATURAL LAW AND NATURAL RIGHTS, INCLUDING SOME IN SHARP CONFLICT WITH ONE ANOTHER. YET, I THINK ALL OF THEM WOULD HAVE TO AGREE ON CERTAIN ELEMENTS CONCERNING ECONOMICS. THESE ARE: FIRST, THE COMMON SENSE OF THE FREE MARKET; SECOND, AS LINCOLN PUT IT, 'THE NATURAL RIGHT TO EAT THE BREAD [ONE] EARNS WITH [ONE'S] OWN HANDS;' THIRD, THE DIGNITY OF LABOR."

* PACIFIC RESEARCH INSTITUTE SPEECH, AUGUST 10, 1987

"I WOULD ONLY ADD TO BLOOM'S WISE OBSERVATIONS HERE, THAT A

RENEWED EMPHASIS ON ECONOMIC RIGHTS MUST PLAY A KEY ROLE IN THE REVIVAL OF THE NATURAL RIGHTS POLITICAL PHILOSOPHY THAT HAS BROUGHT THIS NATION TO ITS SECOND BICENTENNIAL YEAR."

* NOTES ON ORIGINAL INTENT, UNDATED

"I WOULD ADVOCATE INSTEAD A TRUE JURISPRUDENCE OF ORIGINAL INTENT, ONE WHICH UNDERSTOOD THE CONSTITUTION IN LIGHT OF THE MORAL AND POLITICAL TEACHINGS OF HUMAN EQUALITY IN THE DECLARATION. HERE WE FIND BOTH MORAL BACKBONE AND THE STRONGEST DEFENSE OF INDIVIDUAL RIGHTS AGAINST COLLECTIVIST SCHEMES, WHETHER BY RACE OR OVER THE ECONOMY. MORALITY AND POLITICAL JUDGMENT ARE UNDERSTOOD IN OBJECTIVE TERMS, THE FOUNDERS' NOTIONS OF NATURAL RIGHTS."

[THESE QUOTES SUGGEST THOMAS WILL NOT SUPPORT RADICAL CHANGE IN THE COURT'S TREATMENT OF ECONOMIC RIGHTS]

* PACIFIC RESEARCH INSTITUTE SPEECH, AUGUST 10,1987.

"LET ME SAY THIS IN PASSING ABOUT RECENT ISSUES INVOLVING THE SUPREME COURT. I FIND ATTRACTIVE THE ARGUMENTS OF SCHOLARS SUCH AS STEPHEN MACEDO WHO DEFEND AN ACTIVIST SUPREME COURT, WHICH WOULD STRIKE DOWN LAWS RESTRICTING PROPERTY RIGHTS. BUT THE LIBERTARIAN ARGUMENTS OVERLOOKS THE PLACE OF THE SUPREME COURT IN A SCHEME OF SEPARATION OF

POWERS. ONE DOES NOT STRENGTHEN SELF-GOVERNMENT AND THE RULE OF LAW BY HAVING THE NON-DEMOCRATIC BRANCH OF GOVERNMENT MAKE POLICY."

* KEYNOTE ADDRESS, PACIFIC RESEARCH INSTITUTE'S CIVIL RIGHTS TASK FORCE, AUGUST 4, 1988

"UNFORTUNATELY, THE ATTACK ON JUSTICE COMES NOT ONLY FROM CONSERVATIVES BUT FROM LIBERTARIANS AS WELL. LIBERTY CANNOT BE PRESERVED SIMPLY BY DECLARING MORE RIGHTS OR GIVING MORE POWER TO A SUPREME COURT WHICH WOULD BE ENCOURAGED TO ZEALOUSLY PROTECT THESE PARTICULAR RIGHTS. THERE IS NO MORE A RIGHT TO USE DRUGS THAN THERE IS A RIGHT TO SELL ONESELF INTO SLAVERY. NOW, ECONOMIC LIBERTY OR PROPERTY RIGHTS IS CERTAINLY AN ESSENTIAL PART OF THE INDIVIDUAL RIGHTS WE AS AMERICANS CHERISH. ... YET TOO GREAT AN EMPHASIS ON ECONOMIC RIGHTS DISTORTS THE PRINCIPLES OF GOOD GOVERNMENT. IN FACT, TOO GREAT AN EMPHASIS ON RIGHTS CAN BE HARMFUL TO DEMOCRACY."

* ABA BUSINESS LAW SECTION SPEECH, AUGUST 11, 1987

"IF IT TAKES A JUDGE TO SOLVE OUR COUNTRY'S PROBLEMS, THEN DEMOCRACY AND THE RULE OF LAW ARE DEAD. AND I FOR ONE, ALONG WITH BOB BORK, AM NOT YET READY TO GIVE UP ON SELF-GOVERNMENT. IRONICALLY, BY OBJECTING AS VOCIFEROUSLY AS THEY HAVE TO JUDGE BORK'S NOMINATION, THESE SPECIAL INTEREST GROUPS UNDERMINE THEIR OWN CLAIM TO BE PROTECTED BY THE

COURT. THE COURT HAS ITS DIGNITY, AND ITS POWER, BY VIRTUE OF BEING ABOVE AND BEYOND SUCH CLAMORING. FOR SIMILAR REASONS I CANNOT ACCEPT THE LIBERTARIAN JURISPRUDENCE WHICH ARGUES THAT THE COURT SHOULD ONCE AGAIN EXPLOIT THE DUE PROCESS CLAUSES AND BECOME ACTIVE IN STRIKING DOWN LAWS WHICH REGULATE THE ECONOMY. THIS IS YET ANOTHER ASSAULT ON THE NOTION THAT THE WHOLE CONSTITUTION IS A BILL OF RIGHTS, AND THAT THE SEPARATION OF POWERS IS ESSENTIAL TO DEMOCRATIC REPUBLICANISM."

* SPEECH TO CATO INSTITUTE, APRIL 23, 1987

"IF YOU THINK SUCH AN APPROACH WILL LEAD TO INCONSISTENCIES, YOU'RE CERTAINLY RIGHT. BUT CONSIDER THE CURRENT EAGERNESS OF SOME LIBERTARIANS TO DEVELOP A JURISPRUDENCE WHICH JUSTIFIES JUDICIAL ACTIVISM BY THE COURTS TO STRIKE DOWN LAWS AND REGULATIONS CONCERNING ECONOMIC AND BUSINESS ACTIVITY. DO SUCH PEOPLE REALLY THINK SUCH A POWERFUL COURT WOULD STOP AT STRIKING DOWN ONLY THOSE LAWS? THAT DEFIES REALITY."

EMPHASIS IS THOMAS'S)

The CHAIRMAN. But let me move, if I may, for a second. As I said earlier, I mentioned that concomitant with those who want to sort of raise up the economic protections and business incorporation to make it harder for government to regulate them without paying them, which is a multibillion-dollar change in the law—not your view—where Mr. Epstein's views take place, the multibillion-dollar expense for the taxpayers if they wanted to continue to regulate the way we now regulate and consider reasonable. As I mentioned earlier, there is a second zone of individual rights, a zone which includes such rights as free speech, religion, and privacy in the family. These rights are also protected as informed by natural law principles.

Now, you say that is not what you mean, informed by natural law principles. But some of the specific protections are very specific. For example, the fourth amendment guarantees personal privacy in a particular context, illegal search and seizures, and other protections are more general, like the 14th amendment that says "nor shall any State deprive any person of life, liberty, or property without due process of law."

Now, Judge, in your view, does the liberty clause of the 14th amendment protect the right of women to decide for themselves in certain instances whether or not to terminate pregnancy?

Judge THOMAS. Senator, first of all, let me look at that in the context other than with natural law principles.

The CHAIRMAN. Let's forget about natural law for a minute.

Judge THOMAS. My view is that there is a right to privacy in the 14th amendment.

The CHAIRMAN. Well, Judge, does that right to privacy in the liberty clause of the 14th amendment protect the right of a woman to decide for herself in certain instances whether or not to terminate a pregnancy?

Judge THOMAS. Senator, I think that the Supreme Court has made clear that the issue of marital privacy is protected, that the State cannot infringe on that without a compelling interest, and the Supreme Court, of course, in the case of *Roe* v. *Wade* has found an interest in the woman's right to—as a fundamental interest a woman's right to terminate a pregnancy. I do not think that at this time that I could maintain my impartiality as a member of the judiciary and comment on that specific case.

The CHAIRMAN. Well, let's try it another way, Judge. I don't want to ask you to comment specifically on *Roe* there. What I am trying to get at, there are two schools of thought out there. There is a gentleman like Professor Michael Moore of the University of Pennsylvania and Mr. Lewis Lehrman of the Heritage Foundation who both think natural law philosophy informs their view, and they conclude one who strongly supports a woman's right and the other one who strongly opposes a woman's right to terminate a pregnancy.

Then there are those who say that, no, this should be left strictly to the legislative bodies, not for the courts to interpret, and they fall into the school of thought represented by John Hart Healy and former Judge Robert Bork, for example, who say the Court has nothing to do with that.

Now, let me ask you this: Where does the decision lie? Does it lie with the Court? For example, you quote, with admiration, Mr. Lehrman's article. Mr. Lehrman's article was on natural law and—I forget the exact title here. Let me find it. "Natural Law and the Right to Life." And you say when you are speaking at a gathering that you think that that is a superb application of natural law. You say, "It is a splendid example of applying natural law."

Now, what did you mean by that?

Judge THOMAS. Well, let me go back to, I guess, my first comment to you when we were discussing natural law—I think that is important—and then come back to the question of the due process analysis.

The speech that I was giving there was before the Heritage Foundation. Again, as I indicated earlier, my interest was civil rights and slavery. What I was attempting to do in the beginning of that speech was to make clear to a conservative audience that blacks who were Republicans and the issues that affected blacks were being addressed and being dealt with by conservatives in what I considered a less-than-acceptable manner.

The second point that——

The CHAIRMAN. In what sense? In that they were not——

Judge THOMAS. That they were not.

The CHAIRMAN [continuing]. Invoking natural law.

Judge THOMAS. No, that—no. The second point that I wanted to make to them was that they had, based on what I thought was an appropriate approach, they had an obligation just as conservatives to be more open and more aggressive on civil rights enforcement. What I thought would be the best way to approach that would be using the underlying concept of our Constitution that we were all created equal.

I felt that conservatives would be skeptical about the notion of natural law. I was using that as the underlying approach. I felt that they would be conservative and that they would not—or be skeptical about that concept. I was speaking in the Lew Lehrman Auditorium of the Heritage Foundation. I thought that if I demonstrated that one of their own accepted at least the concept of natural rights, that they would be more apt to accept that concept as an underlying principle for being more aggressive on civil rights. My whole interest was civil rights enforcement.

The CHAIRMAN. Judge, you said in that speech, "The need to reexamine natural law is as current as last month's issue of Time on ethics, yet it is more venerable than St. Thomas Aquinas. It both transcends and underlies time and place, race and custom, and until recently it has been an integral part of the American political tradition. Dr. King was the last prominent American political figure to appeal to it. But Heritage trustee Lewis Lehrman's recent essay in the American Sector on the Declaration of Independence and the meaning of the right to life is a splendid example of applying it. Briefly put, this thesis of natural law is that human nature provides the key to how men ought to live their lives."

And then Mr. Lehrman's article goes on, not you, Mr. Lehrman's article goes on and says, "Because it is a natural right of a fetus, there is no ability of the legislative body to impact in any way on whether or not there can or cannot be an abortion at any time for

any reason. And the Court must uphold applying natural law, the principle that abortion is wrong under all circumstances, whether it is the life of the mother, no matter what, all circumstances."

Judge THOMAS. It was not my intention, Mr. Chairman, as I have tried to indicate to you, to adopt—I think I have been explicit when I wanted to adopt someone or say something, adopt a position or say something. I think I have done that.

My interest in the speech I think is fairly clear, or is very clear. My interest was in the aggressive enforcement of civil rights. Remember the context. I am in the Reagan administration. I have been engaged in significant battles throughout my tenure. It is toward the end of the Reagan administration. And I feel that conservatives have taken an approach on civil rights where they have become comfortable with notions that it is okay to simply be against quotas or to be against busing or to be against voting rights and consider that a civil rights agenda.

What I was looking for were unifying themes in a political standpoint, not a constitutional adjudication standpoint, and I used themes that I thought that one of their champions had in a way adopted, not adopting his analysis or adopting his approach, but adopting a theme that he used to serve the purposes that I thought were very important.

The CHAIRMAN. Well, Judge, let me conclude this round by saying that—picking up that context, that you were a part of the Reagan administration. In 1986, as a member of the administration, you were part of what has been referred to here, the administration's Working Group on the Family. This group put out what I think can only be characterized as a controversial report. And you sign that report which recommends more State regulation of the family than is now allowed under the law. That report concludes that the Supreme Court's privacy decisions for the last 20 years are fatally flawed and should be corrected.

Judge, did you read this report before it was released?

Judge THOMAS. Well, let me explain to you how working groups work in the domestic policy context or the way that they worked in the administration. Normally what would happen is that there would be a number of informal meetings. At those meetings, you would express your—there would be some discussion around the table. My interest was in low-income families. I transmitted, after several meetings transmitted to the head of that working group, my views on the low-income family and the need to address the problems of low-income families in the report.

The report, as it normally works in these working groups in domestic policy, the report is not finalized, nor is it a team effort in drafting. You are submitted your document. That document is then, as far as I know, it may be sent around or may not be sent around. But there is no signature required on those.

The CHAIRMAN. Did you ever read the report, Judge?

Judge THOMAS. The section that I read was on the family. I was only interested in whether they included my comments on the low-income family.

The CHAIRMAN. But at any time, even after it was published?

Judge THOMAS. No, I did not.

The CHAIRMAN. You haven't to this moment read that report?

Judge THOMAS. To this day, I have not read that report. I read the sections on low-income families.

The CHAIRMAN. There was an awful lot of discussion in the press and controversy about it.

Judge THOMAS. There was controversy about it. I was interested in low-income families. If you work with the domestic policy group or the working groups at the White House, what one quickly learns is that you send your input, that that input is reduced to what they want it reduced to, and then the report is circulated in final.

The CHAIRMAN. Well, let me conclude. This is the last thing I will ask you. This report, which is only 67 pages long, of which your report is part of—and I acknowledge your suggesting, telling us that you did not read the report before or after, and your part was only a small part of this. But in this report, take my word for it, it says that one of these fatally flawed decisions—and they explicitly pick out one—is *Moore* v. *City of East Cleveland,* where the city of East Cleveland said a grandmother raising two grandchildren who are cousins and not brothers is violating the zoning law and therefore has to do one of two things: move out of the neighborhood or tell one of her grandchildren to leave.

As you know, that case, I believe, was appealed to the Supreme Court, that grandmother, and the Court said, "Hey, no, she has an absolute right of privacy to be able to have two of those grandchildren, even though they are cousins, to live with her and no zoning law can tell her otherwise."

Now, this report says, explicitly it says, that the city of East Cleveland and other cities should be able to pass such laws if they want and they should be upheld. And if we can't get them upheld, then we should change the Court. That is what this report says. And they say that the cities and States should be able to establish norms of a traditional family.

If you will give me the benefit of the doubt that I am telling you the truth and accurately characterizing the report on that point, do you agree with what I suggested to you is the conclusion of that report in the section you have not read?

Judge THOMAS. I have heard recently that that was the conclusion, but I would like to make a point there. I think—and I think the Supreme Court's rulings in the privacy area support—that the notion of family is one of the most personal and most private relationships that we have in our country. If I had, of course, known that that section was in the report before it became final, of course I would have expressed my concerns.

The CHAIRMAN. It is kind of outrageous, isn't it? Isn't it an outrageous suggestion?

Judge THOMAS. That would have had direct implications on my own family, that I could easily have been zoned out of my neighborhood should approaches like that take place. But my point to you—and I think it is very, very important, Senator—is this: That when you are involved or were involved in a working group in the White House, we were more in the nature of resource people. This was not a committee report. This was not a conference report which was circulated normally for comment. It was something generally that you provided your input, and I provided a significant memo, I believe, on low-income families and families that I felt

were at risk in the society and how we should approach resolving those families. I do not remember there being any discussion of the final draft.

The CHAIRMAN. Well, I have much more to ask you, Judge. We are going to go back, when I get a chance again, to the Macedo quote, the ABA speech, and the Lehrman speech, and this report. But, quite frankly, at this point you leave me with more questions than answers, but let me yield to my distinguished colleague, Senator Thurmond.

Senator METZENBAUM. Mr. Chairman, before proceeding forward—and I don't wish to interrupt my colleague, Senator Thurmond—would you be good enough to ask the Judge to read that report in order that we might inquire further of him tomorrow in our questioning period?

The CHAIRMAN. Well, if you plan on inquiring of him, I will make sure he has a copy available, and he can decide whether he wishes to read it or not.

Senator METZENBAUM. I do intend to inquire of him.

The CHAIRMAN. I will see to it that he has a copy, and he can make the judgment whether he wishes to read it.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Now, Judge, I think we can move right along. I have about 30 minutes here, and I have approximately 14 questions. I think we can finish them if you will just make your answers fairly brief.

Judge Thomas, the Constitution of the United States is now over 200 years old. Many Americans have expressed their views about the endurance of this great document. With the events in the Soviet Union, this document takes on an even greater significance as the foundation of our domestic form of government. Would you please share with the committee your opinion as to the success of our Constitution and its distinction as the oldest existing Constitution in the world today?

Judge THOMAS. Senator, I think it should be clear to all——

Senator THURMOND. Speak in the microphone. Speak out so we can all hear you.

Judge THOMAS. Senator, I think it should be clear to all of us that our Constitution, as it has endured, is one of the greatest documents, not only in our lifetimes, but certainly in the history of the world. It protects our freedoms as well as provides us with a structure of government that is certainly the freest government in the world, and it has certainly been a model for other countries.

Senator THURMOND. Second question: Judge Thomas, *Marbury* v. *Madison* is a famous Supreme Court decision. It provides the basis of the Supreme Court's authority to interpret the Constitution and issue decisions which are binding on both the executive and legislative branches. Would you briefly discuss your views on this authority?

Judge THOMAS. Senator, I think it is important to recognize—and we all do recognize—that *Marbury* v. *Madison* is the underpinning of our current judicial system, that the courts do decide and do the cases in the constitutional area, and it is certainly an approach that we have grown accustomed to and around which our institutions, our legal institutions have grown up.

Senator THURMOND. Judge Thomas, the 10th amendment to the Constitution provides that all powers are reserved to the States or the people if not specifically delegated to the Federal Government. What is your general view about the proper relationship between the Federal and State governments, and do you believe that there has been an substantial increase in Federal authority over the last few decades?

Judge THOMAS. Senator, I think that it is clear that our country has grown and expanded in very important ways. Through the commerce clause, for example, there has been growth in the national scope of our Government. Through the 14th amendment, there has been application of our Bill of Rights, or portions, to the State governments. Through the growth in communications and travel, of course, we are more nationalized than we were in the past.

I think what the Court has attempted to do is to preserve in a way as best it possibly could the autonomy of the State governments, but at the same time recognize the growth and expansion and the natural growth and expansion of our National Government.

Senator THURMOND. Judge Thomas, some have discussed your tenure as Chairman of the Equal Employment Opportunity Commission since your nomination to the Supreme Court. Although this committee thoroughly reviewed the issues raised about the EEOC when you were nominated for the D.C. Circuit Court, would you tell the committee what are the problems you encountered at the EEOC and the steps you took to resolve them? And if you care to discuss any major accomplishments now, I would be glad to have you do so.

Judge THOMAS. Senator, EEOC, of course, was a significant portion of my career in government. It was a most important part. When I arrived at EEOC in 1982, of course, we had some very, very difficult problems. We had problems with respect to the infrastructure of the agency. I felt that we should investigate more cases and that we should litigate more cases. We were immediately faced with problems of just managing our own money in the agency.

Over time, we were able to solve those problems. Over time, we were able to correct the infrastructure and to develop it and ultimately to improve our enforcement. We litigated more cases than ever in the history of the agency. We have been able to investigate cases, and we were able to do more with less in the agency with fewer resources. So I am very proud of my tenure at EEOC. I think we made great accomplishments. I think we made great strides. I think there was a lot to do after I left, and I felt that the agency was headed in a very positive direction.

Senator THURMOND. Judge Thomas, the Supreme Court has ruled that the death penalty is constitutional. There are hundreds of inmates under death sentences across the country. Many have been on death row for several years as a result of the endless appeals process. Recently the Senate passed legislation which would reduce the number of unnecessary appeals by giving greater deference to State decisions. Additionally, the Supreme Court has ruled in certain cases that there should be limits to the endless filing of habeas petitions, especially in death penalty cases.

Would you give the committee your views on the validity of placing some reasonable limitations on the number of post-trial appeals in death penalty cases?

Judge THOMAS. Senator, generally I think that there would be a concern among all of us. The death penalty is the harshest penalty that can be imposed, and it is certainly one that is unchangeable. And we should be most concerned about providing all the rights and all the due process that can be provided and should be provided to individuals who may face that kind of a consequence.

I would be concerned, of course, that we would move too fast, that if we eliminate some of the protections that perhaps we may deprive that individual of his life without due process. So I would be in favor of reasonable restrictions on procedures, but not to the point that individuals—or I believe that there should be reasonable restrictions at some point, but not to the point that an individual is deprived of his constitutional protections.

Senator THURMOND. Judge Thomas, I believe that tough sentences should be imposed in criminal cases, especially when the crime committed is one of violence. Over the years, I have favored tough criminal sanctions. Too often, unfortunately, victims of crime have not played a prominent enough role in the criminal justice system. However, recently the number of victims who participate in the prosecution of criminal cases has increased. In fact, the Court recently rules in the case of *Payne* v. *Tennessee* that the use of victim-impact statements in death penalty cases does not violate the Constitution.

In your opinion, should victims play a greater role in the criminal justice system? And if so, to what extent should a victim be allowed to participate, especially after a finding of guilt against an accused?

Judge THOMAS. Of course, Senator, that is a matter that the Court has, as you have noted, recently considered. My concern would be in a case like that that we don't in a way jeopardize the rights of the victim. Of course, we would like to make sure that the victims are involved in the process, but we should be very careful, in my view, that we don't somehow undermine the validity of the process; that an individual who is a criminal defendant is in some way harmed by that other than just simply getting it right and making sure that the total impact of the conduct is known.

I think that there are concerns on both sides. From the standpoint of the victims, that is important. But there are also the constitutional rights of the criminal defendant.

Senator THURMOND. Judge, if I propound any question you consider inappropriate, just speak out and tell me.

Judge, Congress established the U.S. Sentencing Commission in 1984. Its function is to promulgate sentencing guidelines for Federal judges to ensure uniform and predictable prison sentences. The Supreme Court ruled in the case of *United States* v. *Mistretta* that the sentencing guidelines are constitutional.

Judge Thomas, from your experience, do you believe that uniform sentencing is more fair to those individuals who commit similar crimes and in the long run that sentencing guidelines will create better competence in the criminal justice system?

Judge THOMAS. Senator, I think that the problem, the concern that many individuals had in the sentencing of criminal defendants was the apparent unfairness and the disparity of sentences. The approach and the effort, the purpose of the uniform guidelines, one of the purposes was to simply provide some sense or to eliminate that disparity and that sense of unfairness. To the extent that it has done that in eliminating that disparity, I think it has brought a sense of fairness to the process.

The concern, of course, of anyone who is involved in the criminal justice system is that we do not sacrifice justice or fairness for uniformity or for rigidity. But I think that most judges would agree that the guidelines have eliminated the disparity in sentencing.

Senator THURMOND. Judge Thomas, you are currently serving as a member of the U.S. Court of Appeals for the District of Columbia Circuit. You have participated in some 140 decisions. How beneficial, in your opinion, will your prior judicial experience be to you if confirmed to serve on the Supreme Court?

Judge THOMAS. Senator, I think that in my own career I have had the opportunity to work in a variety of positions. I have had an opportunity to work in the Federal Government, to be engaged in appellate work there, to represent agencies, as well as in the legislative and executive branches of the National Government. What has been important to me in those processes is that I have had the opportunity to grow, to learn, to expand, to mature, to make hard decisions, and to, I think, become a better person and to become certainly advanced as someone who is capable of deciding tough cases or making tough decisions.

When one moves to the—when I moved to the judiciary, I felt that I had matured rapidly. But when one goes to the judiciary, one puts on those robes and realizes the immense responsibility of being a judge; that at the end of a decision, something is going to happen. Perhaps a person may stay in prison longer or a person may leave prison. There may be some economic effects. There may be a change in a company. Somebody wins or someone loses. So one becomes more serious and one again matures greatly.

I think it is also important because one has to—a judge has to become accustomed to not having views, formed views on issues that may come before him or her. You become impartial or neutral. You begin to look at problems in a different way, and you recognize your fallibility.

I think that my tenure on the court of appeals has been of tremendous benefit to me, and it certainly provided me with an occasion to mature more rapidly and to a larger extent than even my process of maturation in my previous jobs.

Senator THURMOND. Judge Thomas, the doctrine of stare decisis is a concept well recognized in our legal system and the concept that virtually all judges have in mind when making decisions, especially in difficult cases. I am sure that the issue of prior authority has been a factor which you have considered while on the bench. Would you please briefly state your general view of stare decisis and under what circumstances you would consider it appropriate to overrule a prior procedure?

Judge THOMAS. I think overruling a case or reconsidering a case, Senator, is a very serious matter. Certainly, the case would have to

be—you would have to be of the view that a case is incorrectly decided, but I think even that is not adequate.

There are some cases that you may not agree with that should not be overruled. Stare decisis provides continuity to our system, it provides predictability, and in our process of case-by-case decisionmaking, I think it is a very important and critical concept, and I think that a judge has the burden. A judge that wants to reconsider a case and certainly one who wants to overrule a case has the burden of demonstrating that not only is the case indirect, but that it would be appropriate, in view of stare decisis, to make that additional step of overruling that case.

Senator THURMOND. Judge Thomas, under our Constitution, we have three very distinct branches of government. The role of the judiciary is to interpret the law. However, there have been times when judges have gone beyond their responsibility of interpreting the law and, instead, have exercised their individual will as judicial activists. Would you please briefly describe your views on the topic of judicial activism?

Judge THOMAS. I think, Senator, that the role of a judge is a limited one. It is to interpret the intent of Congress, the legislation of Congress, to apply that in specific cases, and to interpret the Constitution, where called upon, but at no point to impose his or her will or his or her opinion in that process, but, rather, to go to the traditional tools of constitutional interpretation or adjudication, as well as to statutory construction, but not, again, to impose his or her own point of view or his or her predilections or preconceptions.

Senator THURMOND. Judge Thomas, the exclusionary rule is well known in criminal law. At times, it is applied when there was no misconduct on the part of law enforcement. For this reason, the Supreme Court recognized a good-faith exception to the exclusionary rule in the case of *United States.* v. *Leon,* applying it to only searches made pursuant to a warrant. Judge Thomas, would you discuss the effect of the exclusionary rule in preventing police misconduct, and whether or not there is a varied basis for good-faith exception, especially when there is a search warrant.

Judge THOMAS. I think in the case of *United States* v. *Leon,* of course, the Court did find the good-faith exception, but the approach that the Court took and the concern was this, that the warrant and the requirement is to make sure that the law enforcement officials are deterred from pursuing in an unlawful way or obtaining evidence in an unlawful way, it will not be used in the process.

In *United States* v. *Leon,* as I remember it, the magistrate had issued a warrant and the police officers or the law enforcement officials had relied on that warrant in good faith. The Court is simply saying that it would serve no purpose of deterrence, by precluding the use of a warrant that was issued by a magistrate, perhaps by mistake, but relied on, then, in good faith by the law enforcement officials.

Of course, there are exceptions to that, but I think that the Court and the law enforcement community have come to accept the use of the exclusionary rule up to a point, and the Court is looking for ways to make sure that the purposes of the exclusion-

ary rule are advanced, as opposed to simply being used in a way that is rote.

Senator THURMOND. Judge, concerns have been raised about the high costs and sometimes lengthy delays to resolve cases in the Federal courts. Last year, Congress passed legislation that I introduced, along with Senator Biden, that requires each Federal district to prepare a proposal to reduce delay and costs in the Federal civil litigation process. In your view, is there a need to expedite civil cases and reduce costs, to insure that individuals have confidence in the courts to resolve disputes? And what would you recommend to improve handling of civil cases in the Federal courts?

Judge THOMAS. Senator, I think that the concern that any of us would have when the court has a crowded docket is that there would be individuals who most need the access to our judicial system who would be squeezed out of that system, and we would also be concerned that if the costs of civil litigation were to increase, once again, the individuals who most need access to our judicial system would be eliminated from that system.

I think that there have been some proposals by the Vice President, there have been approaches that involve dispute resolution in order to speed up the process. There have even been private individuals who have established ways to adjudicate cases.

My concern with the later approach, of course, would be that we would have separate judicial systems for those who can afford it, the private system, and for those who cannot, they would have to wait in line for a crowded governmental system.

But I think that there are some proposals. Of course, there is some discussion and I think that all times the judicial system should be open to all of our citizens. It is one common aspect that we all have the same judiciary.

Senator THURMOND. Judge Thomas, in an opinion written last year by Justice Scalia concerning the first amendment's freedom of religion, the Supreme Court ruled in *Employment Division* v. *Smith* that a law which is otherwise valid does not violate the first amendment if it incidentally affects religious practices. Would you please briefly discuss the impact this decision has on the compelling State interest test established in *Sherbert* v. *Verner* in 1963?

Judge THOMAS. Of course, Justice Scalia's decision was, in essence, that since the general criminal statutes outlaw the use of peyote, I think, in that case, that one could not claim that it was a violation of their first amendment right to exercise their religious beliefs, that this preclusion by statute had occurred or that you could not use it in a religious exercise of any sort or religious celebration.

What Justice Scalia did was actually use a different test than had been used in the past. He avoided using the *Sherbert* test. Justice O'Connor used the compelling interest test. She used the *Sherbert* test and reached the same result, if I remember the case right.

I think it is an important departure from prior approaches and it is one that anyone who approaches these cases should be concerned about or at least be watchful for.

Senator THURMOND. Judge Thomas, the issue of capital punishment is a controversial topic, with strongly held views on both sides. Now that the Supreme Court has ruled that the death penal-

ty is a constitutional form of punishment and provided steps to insure that it is not imposed as unfettered discretion, certainly there are judges who are personally opposed to the death penalty. Since the Supreme Court has ruled that the death penalty is constitutional, what role, if any, should the personal opinion of a judge play in decisions he or she may render in case such as the death penalty?

Judge THOMAS. Senator, I think as I have indicated, I do not think that a judge's personal opinions should play a role in deciding cases, and certainly if a judge has strongly held views to a point that he or she cannot be impartial or objective, then I think that judge should consider recusal.

I think, of course, that some judges believe that the death penalty per se may be violative of constitutional rights, and that is one form of analysis or approach. But I think that if your personal views are so strong in any area, you should consider recusal.

Senator THURMOND. Judge Thomas, there have been complaints by Federal and State judges regarding the inferior quality of advocacy before the courts. During your service on the bench, have you found that legal representation in the courts was adequate? And what in your opinion should be done to insure that individuals get quality representation in the courts?

Judge THOMAS. Senator, during my own law school years, I thought it was important that I be involved, as a law student, in providing some representation for individuals who could not afford lawyers. I think we would all agree, in our judicial process and in this complex world, that it is difficult to represent one's self. While I was in the Attorney General's office, as well as at the Monsanto Co., I attempted to provide services to individuals who needed assistance.

I think that the level of representation or the level of advocacy by the lawyers who have appeared before the court on which I currently sit has been very, very high. The lawyers' involvement in the process help us to sharpen the arguments, to understand the arguments, and certainly to sharpen our inquiry and our analysis of very, very difficult legal issues.

I think it is important not only from the standpoint, and I think it is critical that individuals be represented, but I think it is not only important from that standpoint, but also from the standpoint of judges being able to get the cases right.

Senator THURMOND. Judge Thomas, prison overcrowding is a major problem facing Federal and State institutions today. Several State systems are currently under Federal prisoner cap orders which limits committing additional inmates to certain prisons. At a time when violent crime and drug offenses are such a problem, what other alternatives are available to insure that prison space is available for those sentenced to serve time?

Judge THOMAS. That is a difficult question, Senator. I do not think that those of us in the judiciary have the ability to know exactly how to solve all of the prison overcrowding issues. That, of course, is a problem that is facing virtually all areas. There have been efforts to move individuals to areas other than where they are convicted, to areas where they have additional space, and there

have been efforts to use other facilities, perhaps military bases, et cetera.

But I think it is a problem that is worthy of reconsideration and it is one that, with the current prison population, has to currently be reexamined, not only by this body or similar bodies, but also law enforcement officials, as well as members of the judiciary.

Senator THURMOND. Judge Thomas, as you are aware, public liability cases often involve very complex issues, with large sums of money at stake. Many argue that Congress should pass reform legislation to modify the burden of proof in certain types of cases and to limit the amount of damages that jurists would be allowed to award.

Based on your experience as a judge, what is your opinion of the ability of a judge in such complicated trials to comprehend these intricate issues and award damages reasonably related to the injuries suffered by the plaintiff? And if juries grant unwarranted awards, can appellate courts correct them?

Judge THOMAS. Senator, those cases are very difficult cases. I think that when juries and when judges attempt to adjudicate those cases, they have to sort out a complex set of issues, as well as determine in difficult circumstances what the appropriate relief would be.

At the appellate level, our job is not simply to go back and impose our views on the trier of fact in those cases, but, rather, to assure that the appropriate standards of law were employed.

Senator THURMOND. Judge Thomas, many people have supported the enactment of alternative dispute resolution measures such as arbitration in products liability lawsuits. Do you believe that these alternative dispute resolution measures will work in a fair manner and be helpful in resolving complicated issues that are usually considered by a jury, as well as helping to expedite the handling of such cases?

Judge THOMAS. We used, Senator, the alternative dispute resolution process. We began during my tenure at EEOC to begin to take a look at those sorts of approaches to resolving very difficult problems, and I believe that they should be explored. In our own court, we have explored the use of that process in resolving some of the appellate cases.

Again, I think is necessary to make sure that the cases that are allowed to go through that process are those that are susceptible to resolution in that manner. I would be concerned that any individual is deprived of his or her day in court, by using mechanisms that are not directly in the judicial process.

Senator THURMOND. Judge Thomas, the Sentencing Commission is considering whether current Federal criminal sentences are adequate. In fact, the Commission has promulgated new guidelines for white collar and corporate offenses. Congress has also seen fit to increase the term of imprisonment for various white collar crimes, including those involves financial institutions.

From your experience, have penalties for white collar crime and corporate defendants been sufficient, and do you anticipate tougher penalties for white collar criminals in the future, as a result of the recent savings and loan offenses and securities related crimes?

Judge THOMAS. Senator, certainly I have not sat as a trial judge imposing those sentences. I think that the sentences under our guidelines in the areas in which I have been involved certainly seem to be adequate. I would be concerned that there would be significant differences between serious crimes in one area and serious crimes in another area, and I think that this body, as well as individuals who have studied this area, have attempted to reduce the disparity in those sentences and I think that is an important project and endeavor.

Senator THURMOND. Judge Thomas, the caseload of the Supreme Court has grown rapidly over the past several decades. Part of this increase is a result of more cases being filed in the lower courts. Cases today are more complex, as our laws have become far more numerous and intricately fashioned. Would you please give the committee your thoughts on the current caseload of the Supreme Court and comment briefly on any innovative methods which could be utilized at the Federal level for handling this increased caseload?

Judge THOMAS. I certainly could not, Senator, as much as I probably would like to advise the Supreme Court on its workload. I think that the judges on my court, and I would assume that Justices on the Supreme Court, are working at a level that is very, very significant. I know that our own investment of time on our court usually involves 6 or 7 days a week. Of course, we do not have the option of screening the cases, as the Supreme Court does.

I think the Supreme Court has the awesome task of making some of the most difficult decisions in our Nation, and certainly the most difficult decisions in our judicial system, and it is important that they control their workload, I think, in a way that they can make these decisions in an appropriate manner.

Senator THURMOND. Judge, the light is red and my time is up. Thank you very much.

The CHAIRMAN. Judge, you have been sitting there a long time. I am going to try to get finished by 5:30, so why don't we come back at 20 after. We will recess until 20 after.

[Recess.]

The CHAIRMAN. The hearing will come to order.

The Chair recognizes Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

First of all, Judge Thomas, I want to commend you for an extremely moving description about your early years, your relationship with your family, your grandfather, and really describing a situation which has existed for far too many people in our society. And I found it extremely moving and a very fair characterization in terms of your own integrity and fairness.

And I commend my colleague and friend, John Danforth. I had the good opportunity to serve in the Senate for many years and I have heard many of the Senate introduce nominees for various positions and I have never heard one that has been more eloquent or heartfelt than Senator Danforth's statement. For those of us who have respect for him and for his values, I want to say how much I certainly appreciate it.

As you understand, we have questions of you or about your views of the Constitution and the role of Government, and I would like

to, if I could, start out with the issue of the role of government in our society.

In several of your speeches and articles you have taken a broad view of business rights, of an employer's interest in being free——

The CHAIRMAN. Would the Senator hold for a second?

Would you close that door, please? Tell people in the hall to come in or stay out for a while. OK? The Senator cannot be heard.

Thank you very much. Excuse me.

Senator KENNEDY. I thank the Chair. Right.

Well, in a number of speeches and articles you have taken a broad view of business rights, of an employer's interest in being free of government regulation. If confirmed, you will be called upon to interpret the Federal, State and local laws protecting employees and regulating workplaces. And, if you were hostile to these efforts and construed them narrowly as a result, you could seriously undermine our efforts to correct unsafe and unhealthy conditions that endanger millions of working men and women across the country, and I would like to ask you about some of your statements on this important issue.

In a 1987 interview with a publication called Reason you question the need for many important Federal agencies. You said, and I quote: "Why do you need a Department of Labor? Why do you need a Department of Agriculture? Why do you need a Department of Commerce? You can go down the whole list, you don't need any of them really."

You were quoted correctly, were you not?

Judge THOMAS. Senator, I again don't know the context of that quote. I don't know what I said before or after. Of course, I think all of us would certainly be in favor of, and I certainly count myself among those Americans who are for safe working environments and who are strongly for protections from abuses and exploitation from individuals who have more clout and more power.

I am for a safe working environment and I am for the standards that protect workers. And I am certainly, as I have made clear during my tenure at EEOC, strongly in favor of laws hat prevent employers from discriminating against individuals.

Senator KENNEDY. Well, I will put the full interview in the record. You were asked about various departments and agencies and the necessity for your own agency, I believe, as a matter of fact, and the response to the—do you remember at all the interview? I have it and I will put it in the record.

The inquiry is "Should I suspect that we might think that the EEOC ought not to exist. Why do you think that this agency should exist in a free society?"

"While in a free"—this is your answer—"free 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 espouse there would certainly be no need. There would have been no need. Unfortunately, the reality was that for politics reasons or whatever there was a need to enforce antidiscrimination laws, or at least there was a 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? You can go down the whole list, you don't need any of them."

Judge THOMAS. From that quote, Senator, I think the point that I was trying to make, there are certain individuals who think you don't need any government involvement, who felt that EEOC should not exist, for example. Well, in a perfect world you don't need EEOC. But this is not a perfect world. In a perfect world you probably wouldn't need a Department of Labor or Department of Agriculture. This is not a perfect world.

Senator KENNEDY. Well, why—if you take Department of Labor with enforcement of, say, OSHA regulations, or Department of Agriculture trying to deal with food inspection, Department of Commerce trying to ensure that American workers are going to be competing or the fair playing field, I just wondered even why you might suggest that those agencies as well as others.

Judge THOMAS. Well, let me explain I think the point that I was trying to make. I believe, and I would have to go back and look at the entire question, but the point is this. There are some individuals who say: "Well, we don't need any government." "You don't need EEOC." "Why should there be an EEOC?"

Well, if there were no discrimination in the world, I don't think you and I would think that there was a need for EEOC. The reality is, though, that there is discrimination in the world.

You could ask rhetorically what is the need for other departments if this were a perfect world. The answer is this is not a perfect world. If this were a perfect world, you wouldn't have to enforce health and safety laws. But the answer is that there are some people who violate health and safety laws, and you and I, and I think many others, think that people should be protected from those sorts of individuals.

Senator KENNEDY. Well, don't statements like these suggest hostility on your part to attempts by Government to help people that can't help themselves?

Judge THOMAS. No, Senator. I think I was actually defending the effort in instances where there is a need for the Government to participate and for the Government to have a role. There were many individuals—I remember sitting down with an individual early in my tenure at EEOC, and his first words were to me, in a very pleasant way but firm, "You know, I don't think this agency should exist." But I spend a considerable amount of time defending the need for this agency and defending the need a specific role of the Government in certain areas.

And I think that was the point I was trying to make there.

Senator KENNEDY. Just to read these final words of yours, after you said you don't need any of them, "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. Now you run the risk that the authority can be abused when EEOC or any organization start dictating to people. I think they go far beyond anything that should be tolerated in this society."

Well, now in a speech at the Pacific Research Institute, in 1987, you criticized entitlement programs. This is what you said: "The attack on freedom and rights had to be accompanied by their redefinition. In the socialist view the new freedom was thus only another name for the old demand for an equal distribution of wealth.

The new freedom meant freedom from necessity and it was a short road to what we call today entitlements. Before a right meant the freedom to do something. Now a right has come to mean, at least in some unfortunately growing circles, the legal claim to receive and demand something."

Which entitlements were you referring to as socialism—Social Security or Medicare or unemployment insurance?

Judge THOMAS. I don't think I referred to any of them specifically, Senator. I think I was trying to make the distinction between what we traditionally consider rights and freedoms versus programs that are specifically implemented or initiated by the government.

I don't think that my comment there was one where I was looking at a specific governmental program and saying that this is an entitlement program that I think is bad or good. I think there is a comparison, there is a debate, and I thought it was a vibrant debate, about what our rights and what our freedoms were.

Senator KENNEDY. Well, what is your view about entitlements?

Judge THOMAS. I think that I have said in speeches and I think that it is appropriate that many of us——

Senator KENNEDY. Excuse me. I didn't understand.

Judge THOMAS. I think that I have said in speeches and I think that programs, there are certain programs in our society that have helped. I remember visiting my mother in Fellwood Homes, which is a Federal housing project in Savannah, GA. Fellwood Homes was seen as what? It was seen—we lived in a tenement. She moved to a lane, a dirt street and a move up in the world. A steppingstone was Fellwood Homes before she could then move to something better. I thought that those programs were good.

I think we all though in a pluralistic society are concerned that sometimes when we do something that we hope is good that it may on some occasions have a negative impact, and I think that it is not illegitimate to say that some of these programs, or at least some of the ramifications, may not be what we expected and some of the consequences may be unintended consequences.

But I certainly believe that the efforts on behalf of providing public housing to my mother or the efforts of providing relief to individuals who could not receive jobs, et cetera, in my neighborhood were very, very good efforts.

Senator KENNEDY. Well, of course, as you know, there are certain programs which are entitlements and other programs which are not, and I think all of us understand some, various programs work well, others do not. And I am sure we as an institution don't do as well as we should in sorting out the ones that do not.

But entitlements have a special position. They certainly do from a budgetary position, and they have been selected by the Congress basically in a bipartisan way because they have a certain relevancy, because they have had an evaluation, and when you mention something like Social Security, student loan programs, various—crop insurance programs, some of the other half a dozen or so, because there is only that many, some of the particular programs for children, those are considered entitlements. And I didn't know—your bunching those together within the same paragraph that is talking about the socialist view, the need freedom, was that thus

only another name for the old demand for equal distribution, effectively entitlements?

Judge THOMAS. Well, certainly I again don't remember the full context of that, but let me just say this, Senator. I was not speaking in a budgetary sense or a more technical sense. I think I was comparing two views of what rights are today and I thought it was, as I said, an important discussion and an important debate.

Senator KENNEDY. In a 1988 article you stated that, and I quote, "Our current explosion of rights, welfare rights, animal rights, children's rights, and so on, goes on to the point of trivializing them."

You know, which children's rights do you object to?

Judge THOMAS. I guess I don't object to rights. I was just—the only point I was making, Senator, and it wasn't in any way undermining the need to be concerned about these problems in our society. I certainly have been involved with organizations to make sure that kids are not abused, and I certainly spend my time trying to make sure that kids are given guidance and help. I think that is very, very important in our society.

But my point was that when we talk about rights, rights that we consider basic or fundamental or freedoms, that when you begin to attach the word "right" to a particular effort or cause or a program that you believe in that then the notion of rights becomes one that is commonly used, as opposed to reserve for these very, very important rights that we believe in.

Again, that is not putting, not in any way saying that there is no problem, but simply saying that it becomes a common experience to simply, say, declare a particular right.

Senator KENNEDY. Well, the reason I am pursuing this line of questioning is to get some kind of sense about your view about various statutes that will be approved by the Congress to address what the Congress believes are areas of need, and whether from these statements that it is fair to draw any implications of some hostility to statutes which would be drafted by the Congress to try and focus in the areas of particular needs or protections, for example, the OSHA for protecting the workplace, or whether it is the food inspections, or whether it is in terms of trade, or whether it is in terms of even parental leave, which you have expressed some degree of hostility to in your statements.

The real question is whether we can—we draw any conclusion as to the degree of hostility that you might have by yourself in interpreting statutes given these kinds of statements when perhaps there is an approach to trying to deal with these kinds of conditions that you may or may not agree with.

Judge THOMAS. Well, Senator, I think that when one is in a policymaking function, just as if I were in this body, I could debate with you on, and I think quite legitimately, about my concerns in particular areas. I think you have a sort of role, or at least a part of your function would be an advocate for a particular point of view.

But when you make a decision, when you write a statute, when this body deliberates and concludes, whether I agreed or not in the policymaking function, when I operate as a judge or when I decide a case and look at it as a judge, I am no longer an advocate for

that policy point of view. My job is to interpret your intent, not to second-guess your intent. It is not to second-guess what you think is the appropriate policy. It is not to second-guess whether or not you are right, not to second-guess whether I think it would be better to have 10 more rules as opposed to the 5 that you have, but simply to determine what you felt was right, what you felt was correct, and what your intent was and to apply that. And that is the way I see my role now as a judge.

Senator KENNEDY. Well, it is helpful because many of the decisions that are going to be made by the Court over the period of these next years are going to reflect the basic tension that exists between an executive and the Congress in the development of legislation and what the Court is going to say on many of these matters that are increasingly de facto at the present time. So your view about how you approach this is I think very important, and particularly in light of these earlier comments.

Let me move to another subject area, and this is referring to an article about you in the Atlantic Monthly in 1987. You said that hiring disparities could be due to cultural differences between men and women. This is the article "A Question of Fairness," by Juan Williams.

That article states that you said that it could be that women are generally unprepared to do certain kinds of work by their own choice, it could be that women choose to have babies instead of going to medical school. Do you still think that that explains the underrepresentation of women in so many jobs in our economy today?

Judge THOMAS. I think, and I think it is important to state this unequivocally, and I have said this unequivocally in speech after speech. There is discrimination. There is sex discrimination in our society. My only point in discussing statistics is that I don't think any of us can say that we have all the answers as to why there are statistical disparities.

For example, if I sit here and I were to look at the statistics in this city, say with the example of number of blacks, I couldn't—and compare the number of blacks that are on that side of the table, for example. I cannot automatically conclude that that is a result of discrimination. There could be other reasons that should be explored that aren't necessarily discriminatory reasons.

I am not justifying discrimination, nor would I shy away from it. But when we use statistics I think that we need to be careful with those disparities.

Senator KENNEDY. Very little I could differ with you on the comment. But I was really driving at a different point, and that is whether you consider women are generally unprepared to do certain kinds of work by their own choice; it could be that women choose babies instead of going to medical school.

Let me just move on to your comments about Thomas Sowell, an author whose work you respect and many—whose ideas you have stated that you agree with. Mr. Sowell wrote a book called the Civil Rights Rhetoric: A Reality. You reviewed that book for the Lincoln Review in 1988 as part of a review of the works of Thomas Sowell, and in particular you praised Mr. Sowell's discussion, chapter 5 of his book entitled "A Special Case of Women," and you called it a

much needed anecdote to cliches about women's earnings and professional status.

Mr. Sowell explains that women are paid 59 percent of what men receive for the same work by saying that women are typically not educated as often in such highly paid fields as mathematics, science, and engineering, nor attracted to physically taxing and well-paid fields, such as construction work, lumberjacking, and coal mining, and the like.

As a matter of fact, there were no women employed in the coal mine industry in 1973. In 1980, after the Federal Government had begun an effort to enforce antidiscrimination laws, that 3,300 women are working in coal mines.

Does that surprise you at all?

Judge THOMAS. If there is discrimination, it doesn't surprise me. There were lots of places I think in our society. You know, I used to when I—I can remember in my own classrooms looking around and realizing that 7 or 8 of the top 10 students in my classroom in grammar school were the smartest students and wondering at that age, If 8 of the 10 of them are the brightest, then why aren't there women doctors and why aren't there women lawyers.

But the point that I was making with respect to Professor Sowell again is a statistical one. There is a difference between the problem that, say, a 16-year-old or 18-year-old minority kid, female, in this city or in Savannah or across the country, who is about to—who has dropped out of high school, there is a difference between the problems of that child or that student than there is for someone who has a Ph.D. or someone who has a college degree.

And I thought that it would be more appropriate, again referring back to the programs that you talked about, that we talked about earlier, in looking at how to solve these problems that you disaggregate the problems and you be more specific instead of lumping it all into one set of statistics.

Senator KENNEDY. Mr. Sowell goes on to suggest that employers are justified in believing that married women are less valuable as employees than married men. He says that if a woman is not willing to work overtime as often as some other workers or needs more time off for personal emergencies, then they may make her less valuable as an employee or less promotable to jobs with heavier responsibilities.

He says the physical consequences of pregnancy, childbirth alone are enough to limit a woman's economic option, and then he reaches some troubling conclusions about women in the workplace based on stereotyped gender roles. Yet you call those descriptions of women workers a much needed antidote to cliches.

Aren't those views the very cliches that women have been trying to escape for so long?

Judge THOMAS. Senator, I think that someone like a Tom Sowell is certainly one who is good at engaging a debate, and I think it is important that there be individuals who look at statistics in his way.

I did not indicate that, first of all, that I agreed with his conclusions. But I think this is an important point. I had during my tenure, I think, the majority of the members of my own personal staff and the—were women, and the conclusion, for example, about

married women I found certainly not supported by my experience with married women on my staff. That was not the point.

The point is that I think sometimes that we can be involved in debate and make generalizations, and it is always good to have someone who has a different point of view and have some facts to debate that.

Senator KENNEDY. Well, the reason I raise this is because with regards to this particular description of women you described that chapter as a much needed antidote to cliches, and I think many women would read his description, particularly in that chapter, as being really a description of the stereotype which—attitude which has really kept them back in too many instances.

I am sure you are commendable for what you have done and that is a powerful factor in relationship, obviously, with other statements or speeches. But nonetheless, that chapter really stands out and that is why I wanted to bring this up.

Judge THOMAS. Well, I think that—again, Senator, I think it is important that in our society and as a policymaker that you have debate. I don't think that Professor Sowell or others are in any way sexist or in any way people who would discriminate. I made it a point, it was very important to me during my tenure at EEOC and it has been very important to me during my life, to make sure that these arbitrary stereotypes or these arbitrary discriminatory barriers were knocked down, and I think you can simply look at my record in promoting women to the Senior Executive Service. I think it is second to none in the Federal Government. Similarly, with respect to my personal staff.

I think it is important. I do think that discrimination exists and I think it needs to be eradicated. But at the same time, when we do have approaches in our society, I think that reasonable people can disagree, and reasonable people of good will can disagree, without being characterized in a negative way.

Senator KENNEDY. In my final area of questioning, I would like to come back to just an area that was raised by Chairman Biden in the concluding part of his questions, and that was with regard to the Lehrman essay.

In the speech in 1987, called Why Black Americans Should Look to Conservative Policies, you spoke about natural law, you said, Heritage Foundation Trust, Lew Lehrman's recent essay, "An American Spectator," on the Declaration of Independence and the meaning of the right to life, is a splendid example of applying natural law.

The title of the Lehrman article you endorsed is "The Declaration of Independence and the Right to Life: One Leads Unmistakably From the Other." The article makes only one argument and it is about only one subject, that natural law protects the right to life and that, as a result, the Constitution must be interpreted to protect the right to life.

So, Lehrman's basic position is that abortion violates the constitutional right to life, and he argues that when the Supreme Court decided *Roe* v. *Wade*, it simply conjured up a right of abortion, and he calls it a spurious right borne exclusively of judicial supremacy, with not a single trace of lawful authority. He also draws a parallel between those who support abortion and those who supported slav-

ery. He says the decision to protect a woman's right to abortion has resulted in a holocaust.

These extreme statements about a woman's right to choose were all expressed in that article, and you called that article splendid, is that correct?

Judge THOMAS. Senator, again, I did not endorse the article, but I would like to make this point, and it is very important and perhaps it is one that was missed earlier. My interest toward the end of the Reagan administration was an important interest to me, and that was that I had spent almost a decade of my life battling with individuals who were conservative, and I felt that they should not be antagonistic to civil rights, and I felt that, in fact, they should be very aggressive on civil rights.

In exploring, on a part-time basis during my busy work day, a unifying theme on civil rights and on the issue of race, I was looking for a way to unify and find a way to talk about slavery and civil rights, the way that the abolitionists used, the very same approach that was used and offered in the *Brown* v. *Board of Education* brief, authored, among others, by my predecessor, by Justice Marshall, whose seat I am nominated to fill.

My point was that I figured or I concluded that conservatives would be skeptical about the notion of natural law, but one of their own had endorsed it, and I simply wanted to give some authenticity to my approach, so that I could then move on and get them to consider being more aggressive on the issue of civil rights. That was very, very important to me.

Senator KENNEDY. Well, have you ever publicly stated that you disagree with the article?

Judge THOMAS. I have never been called on, it has never been raised as an issue. It was considered, I think by many, as a throwaway line. I saw it as that, as something to convince my audience and it has never really come up.

As I indicated, I don't think that you can use natural law as a basis for constitutional adjudication, except to the extent that it is the background in our Declaration, it is a part of the history and tradition of our country, and it is certainly something that informed some of the early litigation, I guess, with respect to the 14th amendment, but it is certainly something that has formed our Constitution, but I don't think that it has an appropriate role directly in constitutional adjudication.

Senator KENNEDY. Well, do you disagree with the article now?

Judge THOMAS. I do disagree with the article and I did not endorse it before. My point was simply—and I think it was an important point—that I endorse natural law, but I use natural law to make the point that conservatives should aggressively enforce civil rights.

Senator KENNEDY. Well, do I understand now that you do disagree with the article?

Judge THOMAS. I disagree in the manner that he used it, yes. I disagree with the article, yes.

Senator KENNEDY. Can you elaborate on what——

Judge THOMAS. Well, to the extent that he uses natural law to make a constitutional adjudication, in that sense, or to provide a moral code of some sort, I disagree with it.

Senator KENNEDY. But with regards to the other features of the article?

Judge THOMAS. I don't know all the other features of the article. My interest was a very single-minded interest, Senator, and that was in trying to convince a conservative audience in the Lew Lehrman Auditorium of the Heritage Foundation, with a concept that Lew Lehrman adopted, to make my point, and it was an important point to me.

I did not endorse, nor do I now endorse other portions of his article.

Senator KENNEDY. Did you mention in that speech, did you say anything else about Lew Lehrman, I mean he is a trustee of the Heritage Foundation, or the work that he has done? Did you say anything else, other than endorsing this—like most of us in these kinds of circumstances, you know, perhaps looking about gilding the lily or so, but there are different ways of doing it, and I am just asking whether you talked about his work as a trustee of the Heritage Foundation or other work that he has done, or was the only reference to Mr. Lehrman about this article?

Judge THOMAS. His use of natural law was the only reference. Again, Senator, this has not been something that has come up in a way that required explication. The important point for me was a very simple point, and that was that I was attempting to convince conservatives, individuals whom I thought would be skeptical about the notion of natural law and skeptical about aggressive enforcement of civil rights the way that I believe that civil rights should be endorsed, that here was a basis on which they could be aggressive, and I think it was an important speech, and I saw it, the manner in which it was quoted prior to my nomination to this Court was one in which I was criticizing the administration and criticizing conservatives.

Senator KENNEDY. Well, I did not find any reference to civil rights in the Lehrman article.

Judge THOMAS. But throughout my speech there is reference.

Senator KENNEDY. I have read that. Finally, did you agree with any parts of the article, the Lehrman article?

Judge THOMAS. My only interest, again, was in the notion that he used natural law. I do not think that natural law can be used to adjudicate the issue that he adjudicated.

Senator KENNEDY. My time is up, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Hatch, and then we will end today's hearing.

Senator HATCH. Thank you, Mr. Chairman.

In all due respect, let me just start with the Chairman's excerpt that he cited to you earlier. That excerpt from the Pacific Research Institute speech is, in my view, completely out of context, and let me just read it to you, starting on page 16 of the speech:

"I find attractive the arguments of scholars such as Stephen Macedo, who defend an activist Supreme Court which would strike down laws restricting property rights." You immediately take on that statement. "But the libertarian argument overlooks the place of the Supreme Court in the scheme of separation of powers. One does not strengthen self-government and the rule of law by having the nondemocratic branch of the government make policy."

Now, in all honesty, I would ask that the entire speech be placed in the record, and I would——

The CHAIRMAN. Without objection, it will be placed in the record.

[The article referred to follows:]

SPEECH BY

CLARENCE THOMAS

BEFORE THE

PACIFIC RESEARCH INSTITUTE

SAN FRANCISCO, CALIFORNIA
AUGUST 10, 1987

THANK YOU, CHIP. I AM HONORED TO HAVE BEEN INVITED TO ADDRESS YOU. GROUPS LIKE THE PACIFIC RESEARCH INSTITUTE ARE A VITAL PART OF AMERICAN DEMOCRATIC LIFE. YOU ENRICH THE DEBATE WITH YOUR THOUGHTFUL, INDEPENDENT VIEWS ON IMPORTANT PUBLIC POLICY ISSUES.

I AM PARTICULARLY GRATEFUL TO ADDRESS SUCH A REFLECTIVE AUDIENCE, SOME OF WHOM APPRECIATE AN AUTHOR I AM FOND OF, AYN RAND. AS YOU CAN IMAGINE, SHE IS NOT HIGHLY HONORED IN WASHINGTON, D.C. NONETHELESS, HER BOOKS CONTINUE TO SELL, AND THAT'S SUCCESS, AT LEAST BY HER STANDARDS.

IN THE LAST FEW MONTHS WE HAVE SEEN A PERHAPS MORE AMAZING BEST-SELLER, ALLAN BLOOM'S THE CLOSING OF THE AMERICAN MIND. IT HAS BEEN NUMBER ONE ON BEST-SELLER LISTS FOR SEVERAL WEEKS. NOW THIS IS CERTAINLY A DIFFICULT BOOK--AT LEAST FOR SOMEONE LIKE ME WHO IS NOT SPECIALIST IN POLITICAL PHILOSOPHY. IT IS, HOWEVER, A REWARDING, REASSURING ATTACK ON THE MORAL RELATIVISM THAT TYPIFIES AND CORRUPTS OUR AGE. BUT WHY SHOULD HIS ARISTOCRATIC VIEW OF AMERICAN LIFE--IN MANY WAYS MORE ARISTOCRATIC THAN AYN RAND'S-- BE SO POPULAR? WHAT DO PEOPLE FIND APPEALING ABOUT HIS ATTACK ON THE UNIVERSITIES?

SURELY MUCH OF THE BOOK'S SUCCESS IS DUE TO ITS PUBLICATION DURING A LONG-SIMMERING DEBATE OVER THE GOALS OF EDUCATION.

BLOOM'S UNCOMPROMISING TOUGHNESS, HIS OBVIOUS LEARNING, CONTRASTS WITH THE MUSH THAT SO MANY WRITERS ON EDUCATION TYPICALLY DOLE OUT.

I SHOULD ADD THAT I HEARTILY APPROVE OF HIS CRITIQUE OF BLACK STUDIES AND THE DEBILITATING EFFECTS OF PREFERENTIAL TREATMENT ON BLACK STUDENTS, ESPECIALLY THOSE AT ELITE UNIVERSITIES. BLOOM'S REFLECTIONS ON THE TAKE-OVER ALMOST TWENTY YEARS AGO AT CORNELL UNIVERSITY COINCIDE WITH THOSE OF ANOTHER FACULTY MEMBER AT THE TIME, MY FRIEND TOM SOWELL. AS CHAIRMAN OF THE EEOC I HAVE TRIED TO BASE THE FIGHT AGAINST DISCRIMINATION ON RECOVERING RIGHTS OF THE INDIVIDUAL. IT DOES NOT HELP THE INDIVIDUAL WHO HAS BEEN DISCRIMINATED AGAINST FOR THAT COMPANY IN THE FUTURE TO HIRE X NUMBER OF PEOPLE OF HIS OR HER RACE. JUSTICE BY THE NUMBERS IS GUARANTEED TO PRODUCE INJUSTICE. FOR EXAMPLE, I THINK WE MAY WELL HAVE SEEN THIS IN DISCRIMINATION AGAINST ASIAN-AMERICANS AT TOP UNIVERSITIES. BUT I DIGRESS.

THERE IS A SIDE TO BLOOM'S BOOK WHICH I AM SURE IS NOT FULLY APPRECIATED. AND IT IS CRUCIAL. LET ME READ A BRIEF PASSAGE FROM EARLY IN THE BOOK:

> "THE UNITED STATES IS ONE OF THE HIGHEST AND MOST EXTREME ACHIEVEMENTS OF THE RATIONAL QUEST FOR THE GOOD LIFE ACCORDING TO NATURE. WHAT MAKES ITS POLITICAL STRUCTURE POSSIBLE IS THE USE OF THE RATIONAL PRINCIPLES OF NATURAL RIGHT TO FOUND A PEOPLE, THUS UNITING THE GOOD WITH ONE'S OWN."

NOW NATURAL RIGHT IS THE CENTRAL THEME OF AMERICAN POLITICS, FROM THOMAS JEFFERSON TO MARTIN LUTHER KING. UNFORTUNATELY, KING WAS THE LAST GREAT PUBLIC SPOKESMAN TO ARTICULATE THIS THEME OF A HIGHER LAW UNDERLYING OUR POLITICAL INSTITUTIONS. BLOOM'S SUB-THEME OF NATURAL RIGHT IS NOT ONLY APPROPRIATE BUT ESSENTIAL FOR THE CELEBRATION OF OUR CONSTITUTION'S BICENTENNIAL. BUT WHERE DO WE RECEIVE EDUCATION IN THE HIGHER LAW? COULD WE DO BETTER THAN TO RE-READ THE DECLARATION OF INDEPENDENCE, AND TAKE SERIOUSLY THE IDEA OF FOUNDING A NATION BASED ON "THE LAWS OF NATURE AND OF NATURE'S GOD," ESTABLISHED ON SELF-EVIDENT TRUTHS OF HUMAN EQUALITY AND NATURAL RIGHTS?

THIS MUST BE OUR ULTIMATE RESOURCE, IF WE ARE TO PRESERVE POLITICAL FREEDOM. BUT HOW DO WE LEARN ABOUT NATURAL RIGHTS AND NATURAL LAW? HOW DO WE RESPECT SUCH AN OUTMODED NOTION?

HERE I THINK BLOOM SELLS THE COUNTRY SHORT. AS IMPORTANT AS THE UNIVERSITIES ARE, THERE ARE INDEED OTHER SOURCES FOR TEACHING PEOPLE ABOUT THE MOST IMPORTANT THINGS FOR LIVING. CAREFUL STUDY OF THE GREAT BOOKS CAN COMPLETE WHAT A DECENT UPBRINGING HAS BEGUN, BUT IT CANNOT TAKE THE PLACE OF REARING.

BEAR WITH ME A MINUTE AS I REFLECT BACK ON MY EARLY LIFE. PICTURE A POORLY EDUCATED, RECENTLY MARRIED YOUNG BLACK MAN DURING THE DEPRESSION IN SAVANNAH, GEORGIA. ENVISION HIM

STARTING A WOOD-DELIVERY BUSINESS THEN ADDING COAL, THEN ADDING ICE, THEN MOVING TO FUEL OIL. PICTURE HIM RISING AT 2:00 OR 3:00 IN THE MORNING TO CUT WOOD AND DELIVER ICE. PICTURE HIM GETTING ONLY TWO OR THREE HOURS SLEEP PER NIGHT. GO FORWARD IN TIME WITH HIM AS HE BUILDS HIS OWN HOUSE WITH HIS OWN HANDS AND AS HE ACQUIRES A MODEST AMOUNT OF PROPERTY. THAT IS THE BRIEF ENCAPSULATED STORY OF MY OWN GRANDFATHER WHO DURING THE MOST REPRESSIVE PERIOD OF JIM CROW LAW AND RACIAL BIGOTRY WAS ABLE TO GAIN SOME DEGREE OF FINANCIAL AND ECONOMIC SECURITY BECAUSE THERE WAS AT LEAST SOME ECONOMIC LIBERTY, SOME ECONOMIC FREEDOM, EVEN THOUGH POLITICAL AND SOCIAL FREEDOM WERE DENIED.

DO YOU THINK THIS MAN WOULD RAISE HIS GRANDSONS TO IGNORE ECONOMIC FREEDOM AS A MAJOR PART OF THEIR LIVES? THIS MAN WHO BELIEVED THAT YOU SHOULD LIVE BY THE SWEAT OF YOUR BROW, THAT YOU MUST EARN A LIVING, THAT YOU MUST LEARN HOW TO WORK! I REMEMBER ONE CHRISTMAS WHEN ALL THE OTHER KIDS WERE RUNNING UP AND DOWN THE ROAD AND ENJOYING THEIR TOYS, SHOOTING FIRECRACKERS, AND GENERALLY HAVING A GREAT TIME, MY GRANDFATHER CAME TO ME AND MY BROTHER (WE WERE 8 AND 9 YEARS OLD) AND SAID THAT HE HAD WORK FOR US TO DO. SO, AS USUAL, WE PILED INTO THE 1951 PONTIAC AND RODE. HE TOOK US TO A FIELD THAT HAD LAID FALLOW FOR YEARS AND HAD GROWN UP. HE DROVE DOWN THE REMNANTS OF AN OLD ROAD. WE MADE OUR WAY ACROSS THE FIELD TO AN OLD OAK TREE. HE LOOKED AT IT, SURVEYED IT, PACED PENSIVELY AND ANNOUNCED THAT WE WOULD BUILD A HOUSE THERE. AND, HE MARKED THE SPOT. ON MAY 17, FIVE MONTHS LATER, WE WERE FINISHING THE STEPS TO THE HOUSE THAT WE BUILT.

THEN WE FARMED, BUILT FENCES AND BARNS. WE PLANTED MORE AND MORE EACH YEAR. WE ACQUIRED PIGS, COWS, CHICKENS AND DUCKS. THE ACHIEVEMENTS GO ON AND ON.

IN MY GRANDFATHER'S VIEW, A MAN HAD A RIGHT AND AN OBLIGATION TO PRODUCE. AND THE RIGHT TO KEEP WHAT HE PRODUCED. THAT IS NOT TO SAY THAT THIS MORAL, GOD-FEARING MAN WAS NOT GENEROUS. INDEED, HE WAS EXTREMELY GENEROUS WITH ALL THAT HE HAD. BUT, THERE WAS NO SHAME ABOUT WORK, ABOUT THE FREEDOM TO WORK AND PRODUCE.

ON THE CONTRARY, IT WAS NECESSARY TO BE FREE TO PRODUCE AND FREE TO KEEP WHAT HE PRODUCED, TO BE SELF-SUFFICIENT AND, HENCE, PROTECTED FROM SOME OF THE EFFECTS OF BIGOTRY. TO MY GRANDFATHER, SELF-SUFFICIENCY IN AN OTHERWISE HOSTILE WORLD, WAS FREEDOM. WITH FREEDOM TO PRODUCE AND TO OWN, HE COULD AT LEAST SURVIVE.

AS THE EVENTS OF THE SIXTIES SWIRLED ABOUT US, PROVISION FOR SURVIVAL WAS MADE POSSIBLE BY A FAMILY FARM, A FAMILY BUSINESS, AND A FAMILY EFFORT. THOUGH FULL PARTICIPATION IN THE FREE ENTERPRISE SYSTEM WAS LIMITED IN MUCH THE SAME WAY, AND FULL PARTICIPATION IN A FREE SOCIETY WAS LIMITED, MY GRANDPARENTS FELT THAT THE OPPORTUNITIES WE HAD HERE WERE GREATER THAN ANYWHERE IN THE WORLD. AND, IN SPITE OF THE CONTRADICTIONS, WE FAITHFULLY RECITED THE PLEDGE OF ALLEGIANCE AND SANG THE STAR SPANGLED BANNER AT OUR SEGREGATED SCHOOLS. AS WE WERE REMINDED

EVERY DAY AT THE DINNER TABLE, HARD WORK PRODUCED THE HOUSE WE LIVED IN, THE CLOTHES WE WORE AND THE FOOD WE ATE. EVEN THOUGH WE KNEW WE COULD SURVIVE AND DO WELL, IT WAS COMMON KNOWLEDGE WHY IT WAS SO DIFFICULT -- WHY THE REWARDS OF OUR EFFORTS WERE NOT COMMENSURATE WITH THOSE OF WHITES.

REMINDING OURSELVES THAT BLACKS HAD TO WORK TWICE AS HARD TO GET HALF AS FAR, MY GRANDPARENTS ALWAYS KNEW THEY WOULD MAKE IT. THEY KNEW WE WERE INHERENTLY EQUAL UNDER GOD'S LAW -- THE HIGHER LAW-- AND THAT THE WAY WE WERE TREATED WAS A CRIME AGAINST GOD EVEN IF NO LAWS OF MAN WERE VIOLATED. THIS BELIEF IN A HIGHER LAW THAT GUARANTEED OUR NATURAL RIGHTS ENABLED US TO REAFFIRM THE EXISTENCE AND PRIMACY OF THESE RIGHTS EVEN AS WE WERE BEING PREVENTED FROM EXERCISING THEM.

TODAY, THERE APPEARS TO BE A PROLIFERATION OF RIGHTS-- ANIMAL RIGHTS, CHILDREN'S RIGHTS, WELFARE RIGHTS, AND SO ON. WHAT IS MEANT BY RIGHTS? TODAY, WE ARE COMFORTABLE REFERRING TO CIVIL RIGHTS. BUT ECONOMIC RIGHTS ARE CONSIDERED ANTAGONISTIC TO CIVIL RIGHTS -- THE FORMER BEING VENAL AND DIRTY, WHILE THE LATTER IS LOFTY AND NOBLE. THIS, AS I HAVE NOTED, IS NOT THE WAY I WAS TAUGHT. AFTER ALL, AREN'T FREE SPEECH AND WORK BOTH MEANS TO AN EVEN HIGHER END?

NOW NO ONE WOULD DARE ATTACK MY GRANDFATHER AND HIS ACHIEVEMENTS. INDEED, PEOPLE MARVEL AT HIM, AND JUSTLY SO. BUT CONSIDER THE ATTACK ON THE WEALTHY, OR "THE RICH." WE SEE IT IN INTELLECTUALS LIKE JOHN KENNETH GALBRAITH OR IN POPULAR

DEPICTIONS OF AMERICAN BUSINESS. FRANKLIN ROOSEVELT DENOUNCED THE "MALEFACTORS OF GREAT WEALTH." HIS LATTER-DAY POLITICAL HEIRS SIMPLY DENOUNCE THE CORRUPTION OF THE WEALTHY. BUT IN FACT WHAT THE CRITICS REALLY WANT TO DO IS ATTACK THE SOURCES OF WEALTH, EVEN INCLUDING THE RIGHT TO ACQUIRE WEALTH. AND THE ATTACK ON ECONOMIC RIGHTS IS AN ATTACK ON ALL RIGHTS. OR AS JAMES MADISON PUT IT IN HIS FAMOUS FEDERALIST PAPER NUMBER 10: THE FIRST OBJECT OF GOVERNMENT IS THE "PROTECTION OF DIFFERENT AND UNEQUAL FACULTIES OF ACQUIRING PROPERTY." NOTICE HE DOES NOT SAY THAT GOVERNMENT SHOULD PROTECT AN ALREADY EXISTING, UNEQUAL DISTRIBUTION OF PROPERTY. MADISON LOOKS FORWARD TO A DYNAMIC ECONOMY WHICH WOULD UNLEASH HUMAN CAPABILITIES, DESTROYING OLD ARISTOCRACIES, AND ERECTING NEW ONES, WHICH IN TURN WOULD BE SUPPLANTED. HENCE IT IS, THAT SOCIALISTS AND THEIR APOLOGISTS HAVE TO ATTACK THE NOTION OF INDIVIDUAL RIGHTS AND REPLACE IT WITH NOTIONS OF "GROUP RIGHTS" AND "SOCIAL MAN" AND ALL SORTS OF PRINCIPLES JUSTIFYING ECONOMIC REDISTRIBUTION. AS NOBEL LAUREATE FRIEDRICH HAYEK SUCCINCTLY PUT IT, "THE STRIVING FOR SECURITY TENDS TO BECOME STRONGER THAN THE LOVE OF FREEDOM.... WITH EVERY GRANT OF COMPLETE SECURITY TO ONE GROUP THE INSECURITY OF THE REST NECESSARILY INCREASES." ODDLY ENOUGH SOME CONSERVATIVES AID AND ABET THE CRITIQUE OF RIGHTS BY AN IRRATIONAL EMBRACE OF TRADITION AND A MEDIEVAL UNDERSTANDING OF SOCIETY, ANTITHETICAL TO THE PROTECTION OF RIGHTS.

IN THIS CONNECTION IT IS INTERESTING TO OBSERVE THAT FOR ALL SOCIALISTS TALK ABOUT EQUALITY, KARL MARX HAD ONLY CONTEMPT FOR THE NOTION OF EQUAL RIGHTS. THAT'S BECAUSE HE KNEW THAT A FOCUS

ON RIGHTS WOULD LEAD INEVITABLY TO INEQUALITIES IN SOCIETY. TRUE EQUALITY OF OPPORTUNITY WOULD LEAD TO INEQUALITIES; BUT TO BE JUSTIFIED ALL INEQUALITIES WOULD HAVE TO BE BASED ON AN ORIGINAL EQUALITY OF OPPORTUNITY.

AS HAYEK HAS NOTED, THE ATTACK ON FREEDOM AND RIGHTS HAD TO BE ACCOMPANIED BY THEIR REDEFINITION. IN THE SOCIALIST VIEW, "THE NEW FREEDOM WAS THUS ONLY ANOTHER NAME FOR THE OLD DEMAND FOR AN EQUAL DISTRIBUTION OF WEALTH." THE NEW FREEDOM MEANT FREEDOM FROM NECESSITY. AND IT WAS A SHORT ROAD FROM RIGHTS TO WHAT WE CALL TODAY "ENTITLEMENTS." BEFORE, A RIGHT MEANT THE FREEDOM TO DO SOMETHING; NOW A RIGHT HAS COME TO MEAN, AT LEAST IN SOME, UNFORTUNATELY GROWING CIRCLES, THE LEGAL CLAIM TO RECEIVE AND DEMAND SOMETHING.

THE ATTACK ON WEALTH IS REALLY AN ATTACK ON THE MEANS TO ACQUIRE WEALTH: HARD WORK, INTELLIGENCE, AND PURPOSEFULNESS. AND THAT IN TURN IS AN ATTACK ON PEOPLE LIKE MY GRANDFATHER. THIS WAS A MAN WHO POSSESSED IN ESSENCE ALL THE MEANS OF ACQUIRING WEALTH A PERSON COULD NEED. HE COULD NOT BE ATTACKED; BUT THE "RICH" AND THEIR CARICATURES ARE EASY TARGETS. THESE CRITICS OF "THE RICH" REALLY DO MEAN TO DESTROY PEOPLE LIKE MY GRANDFATHER, AND DECLARE HIS MANLINESS TO BE FOOLISHNESS AND WASTED EFFORT.

BLACKS KNOW WHEN THEY ARE BEING SET UP. UNFORTUNATELY, THIS HAS TAKEN PLACE IN THIS ADMINISTRATION IN SOME OF THE RHETORIC AND STRATEGY ABOUT CIVIL RIGHTS. I HAVE OBJECTED TO THIS THEN, AS I OBJECT NOW TO THE LEFTIST EXPLOITATION OF POOR BLACK PEOPLE. THE ATTACK ON WEALTH IN THEIR NAME IS SIMPLY A MEANS TO ADVANCE

THE PRINCIPLE THAT THE RIGHTS AND FREEDOMS OF ALL SHOULD BE CAST ASIDE, TO ADVANCE UTOPIAN SCHEMES, WHICH IN FACT END IN DESPOTISM.

IN MORE RECENT TIMES MY GRANDFATHER WOULD BE PROPOSED BY SOME WELL-MEANING DEMAGOGUE AS A RECIPIENT OF "ECONOMIC JUSTICE" OR "SOCIAL JUSTICE." THAT WOULD ONLY MEAN THAT HE'D HAVE TO WORK HARD NOT ONLY FOR HIMSELF BUT FOR A BUNCH OF OTHERS AS WELL. AND ISN'T THIS THE VERY DEFINITION OF SLAVERY? SUCH RIGHTS AS WERE PERMITTED HIM UNDER SEGREGATION HE MADE FULL USE OF. AND HOW COULD ANYONE TODAY, WHO DOES NOT LABOR UNDER MY GRANDFATHER'S BURDENS, DO ANY LESS? WHY DON'T WE SEE MORE PEOPLE ACTIVELY PURSUING THE ECONOMIC RIGHTS WHICH HE EXERCISED? (SOME PEOPLE CALL THIS SELF-HELP, BUT IT DOES NOT REQUIRE A SPECIAL LABEL.) ISN'T IT IRONIC THAT CIVIL RIGHTS ESTABLISHMENT ORGANIZATIONS HAVE TO PROCLAIM THE NEED FOR SELF-HELP?

WHAT I WANT TO EMPHASIZE HERE IS THAT WORK IS AN ENORMOUS MORAL EDUCATOR. SO ARE SPORTS. BOTH HAVE GOALS-- MONEY IN THE CASE OF WORK, AND HONOR IN THE CASE OF SPORTS. BUT IN PURSUIT OF THESE GOALS WE GAIN QUALITIES OF THE SPIRIT HARD TO BRING ABOUT THROUGH OTHER MEANS. I MEAN QUALITIES SUCH AS SELF-DISCIPLINE, SELF-RESPECT, TRUE GENEROSITY, NOT TO MENTION HEALTH AND COMRADESHIP.

SOMETIMES WE GET MEANS CONFUSED WITH ENDS. PEOPLE LIVE FOR THE SAKE OF WORKING, INSTEAD OF MAKING WORK A PART OF THEIR LIVES. AND THE CONFUSION OCCURS OFTEN ENOUGH IN THE CASE OF

SPORTS. YET, THE QUALITIES ONE LEARNS INCIDENTAL TO THE ENDS (MONEY OR HONOR) OFTEN BECOME MORE IMPORTANT THAN THOSE ENDS. TOO OFTEN WE SEE BUSINESS AND COMMERCIAL LIFE DERIDED AS "MATERIALISTIC" AND "CRASS." THESE CRITICS IMPLY WE SHOULD HONOR IDEALISTIC PROFESSIONS: JOURNALISTS, LAWYERS, AND PROFESSORS.

BUT I SERIOUSLY DOUBT THAT A FREE NATION COULD EXIST, IF IT WERE TO BE COMPRISED SOLELY OUT OF PEOPLE WHO MAKE THEIR LIVING BY PRODUCING WORDS. AMERICAN FREEDOM REQUIRES JOURNALISTS, LAWYERS, AND PROFESSORS, BUT EVEN MORE IMPORTANT ARE THOSE WHO EXERCISE THEIR ECONOMIC RIGHTS IN COMMERCE. COMMERCE, ALONG WITH SPORTS, TEACHES US THE CONDITIONS OF FREEDOM. THE UNFAIRLY RIDICULED CALVIN COOLIDGE KNEW THIS QUITE WELL, WHEN HE CALLED COMMERCE "THE GREAT ARTISAN OF HUMAN CHARACTER." HE WAS A FAR CRY FROM A BABBITT BOOSTER OF PETTY AVARICE. "WE MUST FOREVER REALIZE," HE ONCE DECLARED, "THAT MATERIAL REWARDS ARE LIMITED AND IN A SENSE THEY ARE ONLY INCIDENTAL, BUT THE DEVELOPMENT OF CHARACTER IS UNLIMITED AND IS THE ONLY ESSENTIAL."

FREEDOM WAS ALWAYS REGARDED AS AN EDUCATOR. THIS IS WHY TOCQUEVILLE, IN HIS 1835 CLASSIC, DEMOCRACY IN AMERICA, ALWAYS EMPHASIZED THE IMPORTANCE OF FREEDOM AS A TEACHER OF A WAY OF LIFE. FREEDOM WASN'T SIMPLY A LACK OF CONSTRAINTS ON MEN'S BEHAVIOR. FREEDOM MEANT THAT MEN MUST ACCEPT RESPONSIBILITY, OR LESS THEY WOULD GRADUALLY LOSE THEIR FREEDOM TO A CENTRALIZED POWER OBLIVIOUS TO THEIR DESIRES.

CERTAINLY THIS VIEW OF COMMERCE AND BUSINESS WAS NOT LOST ON THE FOUNDING FATHERS. JAMES MADISON, THE MAN WHO MOST APPROPRIATELY MIGHT BE CALLED THE FATHER OF OUR CONSTITUTION, PUT IT SUCCINCTLY: "AS A MAN IS SAID TO HAVE A RIGHT TO HIS PROPERTY, HE MAY EQUALLY BE SAID TO HAVE A PROPERTY IN HIS RIGHTS." IT IS THIS BROAD NOTION OF PROPERTY-- MEANING ALL THE HUMAN FACULTIES SUCH AS REASON, PASSION, AND IMAGINATION-- THAT INFORMED THE WORLD OF THE FOUNDERS.

EARLIER THIS YEAR, I ADDRESSED AN AUDIENCE AT THE UNIVERSITY OF VIRGINIA LAW SCHOOL. IT WAS INSPIRING TO VISIT, ONCE AGAIN, A UNIVERSITY FOUNDED TO EDUCATE STATESMEN IN NATURAL RIGHTS. NOW, I AM FAR FROM BEING A SCHOLAR ON THOMAS JEFFERSON. BUT TWO OF HIS STATEMENTS SUFFICE AS A BASIS FOR RESTORING OUR ORIGINAL FOUNDING BELIEF AND RELIANCE ON NATURAL LAW. AND NATURAL LAW, WHEN APPLIED TO AMERICA, MEANS NOT MEDIEVAL STULTIFICATION BUT THE LIBERATION OF COMMERCE.

CONSIDER FIRST, THE DECLARATION OF INDEPENDENCE'S RELIANCE ON THE "LAWS OF NATURE AND OF NATURE'S GOD." THESE UNDERLIE THE SELF-EVIDENT TRUTHS: "ALL MEN ARE CREATED EQUAL; THAT THEY ARE ENDOWED BY THEIR CREATOR WITH CERTAIN INALIENABLE RIGHTS; THAT AMONG THESE ARE LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS...." GO FROM THIS TO JEFFERSON'S LAST LETTER. THE DYING JEFFERSON, ALMOST FIFTY YEARS TO THE DAY AFTER THE DECLARATION WAS PUBLISHED, REFLECTED FOR THE LAST TIME ON THE MEANING OF THE FOURTH OF JULY:

"THAT FORM [OF GOVERNMENT] WHICH WE HAVE SUBSTITUTED, RESTORES THE FREE RIGHT TO THE UNBOUNDED EXERCISE OF REASON AND FREEDOM OF OPINION. ALL EYES ARE OPENED, OR OPENING, TO THE RIGHTS OF MAN. THE GENERAL SPREAD OF THE LIGHT OF SCIENCE HAS ALREADY LAID OPEN TO EVERY VIEW THE PALPABLE TRUTH, THAT THE MASS OF MANKIND HAS NOT BEEN BORN WITH SADDLES ON THEIR BACKS, NOR A FAVORED FEW BOOTED AND SPURRED, READY TO RIDE THEM LEGITIMATELY, BY THE GRACE OF GOD."

WHAT CONFIDENCE IN AMERICA! JEFFERSON DOES NOT SPEAK OF THOSE AMORPHOUS, SUBJECTIVE FEELINGS CALLED "VALUES." THE TRUTH OF THE RIGHTS OF MAN RESTS ON AN OBJECTIVE TEACHING, A SCIENCE. A BELIEF IN A HIGHER LAW ENABLES SUCH CONFIDENCE AND PROVIDES DIRECTION. IF IT DIDN'T FREE THE SLAVES IMMEDIATELY, IT WAS THE MOST POWERFUL ARGUMENT LINCOLN HAD. IF NATURAL LAW WAS INSUFFICIENT BY ITSELF TO END THAT LEGACY OF SLAVERY, SEGREGATION, MARTIN LUTHER KING'S APPEAL TO IT ONCE AGAIN MOVED AMERICANS. BUT WHERE IS NATURAL LAW TODAY? IS IT GONE, ALONG WITH THE SEGREGATED SCHOOLS, BUSES, AND DRINKING FOUNTAINS OF MY YOUTH?

WITH MY PERSONAL EXPERIENCE IN MIND, I WOULD LIKE TO USE THIS OCCASION TO PRESENT A SKETCH OF A THEORY OF NATURAL LAW, WHICH WOULD UNITE BOTH LIBERTARIAN AND CONSERVATIVE PRINCIPLES. I DOUBT THAT WHAT I WILL SAY WILL BE ANYTHING NEW, BUT I THINK IT IS IMPORTANT TO PRESENT A COHERENT, PRINCIPLED BASIS FOR

APPROACHING CURRENT POLITICAL AND ETHICAL QUESTIONS.

IN AMERICA, THE NATURAL LAW STRENGTHENS THE POSITIVE, OR MAN-MADE LAW. JUSTICE HOLMES ONCE RIDICULED IT AS A "BROODING OMNIPRESENCE IN THE SKY." I WOULD LIKEN IT MORE TO A CONSCIENCE OR, AS LINCOLN PUT IT, A "STANDARD MAXIM" WHICH KEEPS US HONEST. IT IS, AS BLOOM SUGGESTS, THE ANTIDOTE TO THE RELATIVISM WHICH CURRENTLY AFFLICTS US. OF COURSE, THERE ARE SEVERAL DIFFERENT VERSIONS OF NATURAL LAW AND NATURAL RIGHTS, INCLUDING SOME IN SHARP CONFLICT WITH ONE ANOTHER. YET, I THINK ALL OF THEM WOULD HAVE TO AGREE ON CERTAIN ELEMENTS CONCERNING ECONOMICS. THESE ARE: FIRST, THE COMMON SENSE OF THE FREE MARKET; SECOND, AS LINCOLN PUT IT, "THE NATURAL RIGHT TO EAT THE BREAD [ONE] EARNS WITH [ONE'S] OWN HANDS;" AND THIRD, THE DIGNITY OF LABOR.

THE FREE MARKET LOGIC OF BUYING LOW AND SELLING HIGH AFFIRMS COMMON SENSE AND PUNISHES THOSE WHO LACK IT. ITS PRINCIPLES ARE VIRTUALLY SCIENTIFIC, THOUGH IN PRACTICE PEOPLE MAKE DECISIONS BASED ON SUPERSTITION AND BRIBERY, FOR EXAMPLE. THE FREE MARKET LOGIC EXISTS WHETHER THE ECONOMIC SYSTEM IS CAPITALISM, SOCIALISM, OR ANY KIND OF TRADITIONAL ECONOMY. IN FACT, TO HALT COMPLETELY THE FREE MARKET'S OPERATION REQUIRES TYRANNY. TO QUOTE THE OLD ROMAN POET, YOU CAN EXPEL NATURE WITH A PITCHFORK, BUT IT IS SURE TO RETURN. THOUGH THE FREE MARKET DOES NOT BY ITSELF GUARANTEE DEMOCRACY, IT DOES REQUIRE SIGNIFICANT PERSONAL FREEDOM. MOREOVER, THE QUALITIES OF INDEPENDENT JUDGMENT AND COMPETITIVENESS WHICH IT FOSTERS CERTAINLY POINT TOWARD REGIMES HONORING FREE ELECTIONS.

THE SECOND NATURAL LAW PRINCIPLE SUPPORTING THE FREE MARKET IS THE NATURAL RIGHT TO EARN FROM ONE'S LABOR. JOHN LOCKE, WHOSE POLITICAL PHILOSOPHY INFORMS OUR DECLARATION OF INDEPENDENCE, MADE THIS A CRUCIAL PRINCIPLE. SLAVERY WAS THUS AN EVIL THAT THREATENED THE FREEDOM OF ALL IN A SOCIETY THAT TOLERATED IT. IN OTHER WORDS, THIS PRINCIPLE ELABORATES ON OUR FIRST PRINCIPLE OF RESPECTING THE IMPULSES OF THE FREE MARKET. THE FREE MARKET ITSELF RESTS ON CERTAIN ETHICAL ASSUMPTIONS OR AT LEAST ONE MAJOR ASSUMPTION: ONE CANNOT TRADE IN SLAVES.

I AM REMINDED HERE OF THE GREAT COURT SCENE IN SHAKESPEARE'S MERCHANT OF VENICE, IN WHICH SHYLOCK JUSTIFIES HIS TAKING A POUND OF FLESH FROM ANTONIO.

"WHAT JUDGMENT SHALL I DREAD, DOING NO WRONG?
YOU HAVE AMONG YOU MANY A PURCHAS'D SLAVE,
WHICH, LIKE YOUR ASSES AND YOUR DOGS AND MULES,
YOU USE IN ABJECT AND IN SLAVISH PARTS,
BECAUSE YOU BOUGHT THEM. SHALL I SAY TO YOU,
"LET THEM BE FREE ....." YOU WILL ANSWER,
"THE SLAVES ARE OURS." SO DO I ANSWER YOU.
THE POUND OF FLESH WHICH I DEMAND OF HIM
IS DEARLY BOUGHT, 'TIS MINE, AND I WILL HAVE IT.
IF YOU DENY ME, FIE UPON YOUR LAW!
THERE IS NO FORCE IN THE DECREES OF VENICE."

BY PERMITTING THE SLAVE-TRADE, VENICE RELINQUISHED ITS RIGHT TO CONDEMN OTHER FORMS OF BARBARISM, SUCH AS THE TAKING OF THE POUND OF FLESH. THE VENETIANS FALL SILENT, AND IT TAKES THE CLEVER

PORTIA TO SAVE THE DAY. SHAKESPEARE HAD SPOTTED A FATAL CONTRADICTION IN A SEEMINGLY VERY FREE SOCIETY. AND VENICE WOULD EXACT ITS EQUALLY IRRATIONAL REVENGE ON SHYLOCK.

THUS, I WOULD JUSTIFY GOVERNMENT INTERVENTION IN CASES TO INSURE THAT THE FREE MARKET IS TRULY FREE. IN MY YEARS AT THE EEOC I HAVE TRIED TO MOVE TOWARD THIS IDEAL.

FINALLY, TO THE FREE MARKET PRINCIPLE AND THE PRINCIPLE FORBIDDING ARTIFICIAL BARRIERS, I ADD THE PRINCIPLE OF THE DIGNITY OF LABOR. FROM ALLAN BLOOM'S BOOK ONE CAN GET THE IMPRESSION THAT LIFE IS LED SOLELY IN THE MIND. BUT WITHOUT LABOR, THE WORK OF ONE'S BODY, ONE CAN FEEL SELF-CONTEMPT. THIS ATTITUDE CAN IN TURN HAVE OTHER CONSEQUENCES DELETERIOUS TO FREEDOM AND DECENCY.

I HAVE RECENTLY BEEN PERUSING ONE OF THOSE GREAT BOOKS BLOOM CITES FREQUENTLY, TOCQUEVILLE'S DEMOCRACY IN AMERICA. ONE OF THE MOST STRIKING OBSERVATIONS HE MAKES CONCERNS THE RADICALLY DIFFERING EFFECTS OF SLAVERY AND FREE LABOR. HE CONTRASTS THE ETHOS IN THE FREE STATE OF OHIO WITH THAT IN THE NEIGHBORING SLAVE STATE OF KENTUCKY. LET ME READ A BRIEF PASSAGE, JUST TO GIVE YOU A FLAVOR OF THAT DISCUSSION. IN THE SLAVE STATE

> "WORK IS CONNECTED WITH THE IDEA OF SLAVERY, BUT [IN THE FREE STATE] WITH WELL-BEING AND PROGRESS; ON THE ONE SIDE IT IS DEGRADING, BUT ON THE OTHER HONORABLE; ON THE LEFT BANK NO WHITE LABORERS ARE TO BE FOUND, FOR THEY WOULD BE AFRAID OF BEING LIKE THE SLAVES; FOR WORK PEOPLE MUST RELY ON THE NEGROES.... THE AMERICAN [IN THE SLAVE STATE] SCORNS NOT ONLY WORK ITSELF BUT ALSO ENTERPRISES IN WHICH WORK IS

NECESSARY TO SUCCESS; LIVING IN IDLE EASE, HE HAS THE TASTES OF IDLE MEN; MONEY HAS LOST SOME OF ITS VALUE IN HIS EYES; HE IS LESS INTERESTED IN WEALTH THAN IN EXCITEMENT AND PLEASURE AND EXPENDS IN THAT DIRECTION THE ENERGY WHICH HIS [FREE STATE] NEIGHBOR PUTS TO OTHER USE...."

WORK HAS A DIGNITY WHICH IN TURN GIVES MEANING TO OTHER SPHERES OF LIFE. THIS IS A PART OF THE HUMAN CONDITION, AN ELEMENT OF HUMAN NATURE, WHICH ANY DECENT GOVERNMENT OR SOCIETY MUST RESPECT.

NOW I REALIZE THIS IS JUST A BEGINNING OF A PROJECT, BUT I HOPE IT IS OF SOME USE.

LET ME SAY THIS IN PASSING ABOUT RECENT ISSUES INVOLVING THE SUPREME COURT. I FIND ATTRACTIVE THE ARGUMENTS OF SCHOLARS SUCH AS STEPHEN MACEDO WHO DEFEND AN ACTIVIST SUPREME COURT, WHICH WOULD STRIKE DOWN LAWS RESTRICTING PROPERTY RIGHTS. BUT THE LIBERTARIAN ARGUMENT OVERLOOKS THE PLACE OF THE SUPREME COURT IN A SCHEME OF SEPARATION OF POWERS. ONE DOES NOT STRENGTHEN SELF-GOVERNMENT AND THE RULE OF LAW BY HAVING THE NON-DEMOCRATIC BRANCH OF THE GOVERNMENT MAKE POLICY. HENCE, I STRONGLY SUPPORT THE NOMINATION OF BOB BORK TO THE SUPREME COURT. JUDGE BORK IS NO EXTREMIST OF ANY KIND. IF ANYTHING, HE IS AN EXTREME MODERATE, ONE WHO BELIEVES IN THE MODESTY OF THE COURT'S POWERS, WITH RESPECT TO THE DEMOCRATICALLY ELECTED BRANCHES OF GOVERNMENT. I AM APPALLED BY THE MUD-SLINGING CUM DEBATE OVER THE BORK NOMINATION. THE VERY IDEA OF THE SUPREME COURT IS TO DISPENSE IMPARTIAL JUSTICE, ONE ABOVE THE STRUGGLE OF SPECIAL

INTEREST GROUPS. OF COURSE WHAT HAS HAPPENED OVER THE LAST 50 OR SO YEARS IS A GROWTH OF POWER IN THE NON-ELECTED BRANCHES. AND MUCH OF WHAT IS DONE ADMINISTRATIVELY WINDS UP IN THE COURTS. SO THE COURTS AND THE BUREAUCRACY ARE LOBBIED. AND NOW A SUPREME COURT NOMINATION-- OF A DISTINGUISHED SCHOLAR-- IS TREATED AS THOUGH IT WERE AN ELECTION FOR THE LOCAL ZONING COMMISSION. IT IS A TRAGEDY FOR THE RULE OF LAW AND THE NOTION OF IMPARTIAL JUSTICE. AFTER ALL, IF IT TAKES A JUDGE TO SOLVE OUR COUNTRY'S PROBLEMS, THEN DEMOCRACY AND THE RULE OF LAW ARE DEAD. AND I FOR ONE, ALONG WITH BOB BORK, AM NOT YET READY TO GIVE UP ON SELF-GOVERNMENT. IRONICALLY, BY OBJECTING AS VOCIFEROUSLY AS THEY HAVE TO JUDGE BORK'S NOMINATION, THESE SPECIAL INTEREST GROUPS UNDERMINE THEIR OWN CLAIM TO BE PROTECTED BY THE COURT. AGAIN, THE COURT HAS ITS DIGNITY, AND ITS POWER, BY VIRTUE OF BEING ABOVE AND BEYOND SUCH CLAMORING.

LET ME CONCLUDE BY QUOTING AGAIN FROM ALLAN BLOOM'S BOOK. HERE HE LAMENTS THE PASSING OF A VIEW FORMERLY HELD BY AMERICANS ON NATURAL RIGHTS:

> "BY RECOGNIZING AND ACCEPTING MAN'S NATURAL RIGHTS, MEN FOUND A FUNDAMENTAL BASIS OF UNITY AND SAMENESS. CLASS, RACE, RELIGION, NATIONAL ORIGIN OR CULTURE ALL DISAPPEAR OR BECOME DIM WHEN BATHED IN THE LIGHT OF NATURAL RIGHTS, WHICH GIVE MEN COMMON INTERESTS AND MAKE THEM TRULY BROTHERS."

I WOULD ONLY ADD TO BLOOM'S WISE OBSERVATIONS HERE, THAT A RENEWED EMPHASIS ON ECONOMIC RIGHTS MUST PLAY A KEY ROLE IN THE REVIVAL OF THE NATURAL RIGHTS POLITICAL PHILOSOPHY THAT HAS BROUGHT THIS NATION TO ITS SECOND BICENTENNIAL YEAR.

THANK YOU!

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.]