other individuals should be subject to the same kinds of fines and penalties that are available in some of the antitrust litigation.

I felt that there was an undervaluation of the effects and the damage done by discrimination, and I felt that this kind of a case was very susceptible and appropriately susceptible to criminal contempt citations.

Senator SPECTER. I have been handed a note that my time is up, and we will return to it with my first question being why did EEOC, in your tenure, join with petitioners in trying to upset the contempt citation and taking the position that the discriminators ought not to be held for contempt and ought not to be punished.

Thank you, Judge Thomas.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Judge Heflin. Senator Heflin. Just so everybody does not think it was a slip, you were a judge. Senator Heflin.

Senator HEFLIN. Judge Thomas, I try to approach these hearings on the basis of fairness, fairness to you, fairness to the President, fairness to your opponents, and try to consider all of the evidence before I make up my mind. I tried to follow that procedure in the other confirmation processes, not only of the Supreme Court Justices, but of all appointments to the judiciary.

So, I do not at this time have any firm opinion one way or the other. I have done a good deal of reading and tried to listen to testimony. Of course, it has entered into my mind from your testimony, as opposed to some of the spoken and written words that you have given in the past, an appearance of confirmation conversion.

Now, this term is a term that came from the mouth of my colleague Senator Leahy here in the Bork hearings, which would indicate that the confirmation processes cause one to change his mind or to give answers that will hurt him in regards to seeking the confirmation. But it also can raise issues that can affect the evaluation that members of the committee may give as to integrity and temperament.

Now, in reading some of the articles and reading speeches that you had given beforehand, most of them in about the last 5 years, or at least since you have been on the EEOC, not back when you were 20 years of age or 25 or 30, but fairly recently, there appears to be a conflict on natural law between what you have stated in the past and what you state here at these hearings.

You are stating in these hearings basically that you do not think that natural law ought to be used in constitutional adjudication. Some interpretation—and it depends on how you interpret your written and spoken words beforehand—would lead one to believe that you had previously advocated the use of natural law in constitutional adjudication.

Now, natural law, of course, is a term that is broad and there seem to be at least two schools of thought, and there may be many others, one a liberal school of thought, another a conservative school of thought on the use of natural law. Those who are of the conservative viewpoint indicate that it would be using the ninth amendment, where there is no deprivation of unenumerated rights that a judge could pick an unenumerated right, something that he said was and then defend it under the concept of natural law.

On the other hand, from a political theory viewpoint on possible constitutional adjudication, there are those that advocate that natural law be used as a defense for judicial restraint, as being a defense for limited government and being a defense for economic freedom and certain other freedoms.

As has been pointed out, those that would advocate the use of natural law, and there have been those in the past in the Supreme Court decisions, particularly in the *Lochner* era, who say that the economic right of the freedom to contract should be allowed, without any government restrictions, and, therefore, that minimum wage laws, health laws, job safety-type laws are restrictions against the right to contract and economic freedom, and, therefore, they follow the concept of judicial restraint or follow the concept of limited government.

Now, you have been asked some questions about this issue and you, of course, have very clearly stated that you do not believe that natural law ought to be used toward constitutional adjudication, and you have mentioned that you so testified in your court of appeals hearing, and that was quoted to you from the court of appeals hearing, statements that you made, and this appears—and I want you to have an opportunity later to read it, and you can give a fuller answer after you are thoroughly advised, because it is not my purpose to ambush you or to make any statement, without you having a thorough right to review what you said before.

But here you say:

> But recognizing the natural rights is a philosophical, historical context of the Constitution, is not to say that I have abandoned the methodology of constitutional interpretation as used by the Supreme Court. In applying the Constitution, I think I would have to resort to the approaches that the Supreme Court has used. I would have to look at the texture of the Constitution, the structure, I would have to look at the prior Supreme Court precedents on these matters.

That is what was quoted to you.

The next sentence says—and this was your answer then—"and as a lower court judge, I would be bound by the Supreme Court decisions." Now, reading that answer, it is subject to two or more interpretations. One is that you were speaking of natural law as it would apply to your functions as a court of appeals judge, and the other would be whether you would apply it as to the broad general theory of constitutional adjudication.

Now, if you want to read this and read the whole thing, I will do it, or if you want to answer as to where it may have an appearance of either an ambiguity or of being contradictory. Whatever you want to do, if you want to study it and read it and give me an answer later, or if you want to give me an answer now.

Judge THOMAS. Let me comment on what you have said, Senator. My view is that I have been consistent. On natural law, my interest, as Chairman of EEOC, was as I have stated. It was as a part-time political theorist, someone who was looking for a positive way to advance the ball with respect to individual rights in our political debates, as well as on the issue of civil rights.

I have not advocated or suggested that it should be used in consitutional adjudication. Our Founders and our drafters did believe in natural law, in addition to whatever else, philosophies they had, and I think they acted to some extent on those beliefs in drafting

portions of our Constitution, for example, the concept of liberty in the 14th amendment.

I think that knowing what their views are is a context for understanding our Constitution, knowing what they believed in is a context for understanding the separation of powers or perhaps even understanding the notion of limited government and the rights of individuals.

But when the rights are in the Constitution, then one resorts to constitutional adjudication. Now, the beliefs of the Founders could be a part of the history or tradition to which we look, but you do not make an independent search of natural law, and I have not suggested that. I think my writings have made clear that natural law is the background of our Constitution, that it does not move to the front and that it is not positive law. They are two separate things.

Senator HEFLIN. You have indicated that your writings and speeches were directed toward natural law more as a political theory and you have used the illustration dealing with slavery. How is slavery related to a political theory?

Judge THOMAS. Well, the issue there was for Abraham Lincoln, how do you, when the stated ideals of our country are that all men are created equal, how do you end slavery, and what is the underpinning, what does that promote in our country, the notion that all men are created equal.

Once you have the adoption of the 13th and 14th amendments, you have a positive law, but I think it was important to understand what that meant. It is just a notion, for example, of why do we feel strongly that apartheid is wrong, why do we feel strongly that discrimination is wrong, outside of the law.

But my point is very simply that Abraham Lincoln was sitting here, I think at the time I had read "The Battle Cry of Freedom," I wondered how or what gave him the strength to survive the onslaught that he was faced with, and it was then that I began to refer back to his beliefs and the beliefs of the abolitionists as a backdrop to the Constitution, as a background to the Constitution.

Senator HEFLIN. I am going to ask that someone on the staff here hand you two documents. One is a speech to the Federalist Society, an address, University of Virginia, March 5, 1988, and the other being an article that appears in the 1988 Harvard Journal of Law and Public Policy, entitled "Higher Law Background of the Immunity Clause of the Fourth Amendment," if they will hand you that.

Again, if any question that I ask, if you want to have time to read or review those, I would certainly want to do it, because I will have another opportunity to ask you questions, where you can fully understand it.

These two appear to have much relationship. This speech appears to be a speech, and then it appears that it was put in more of a law review form and was published. Is that a correct——

Judge THOMAS. What you do normally with these is that you give a speech and the review edits it and converts it to a law review piece. That is essentially what happens.

Senator HEFLIN. I see. Now, on the speech, on the first page, if you will look, tell us, bearing in mind as to whether or not you at that time were expressing a view that higher law or natural law—

as I understand it, they are used interchangeably—could be used as a part of constitutional adjudication.

Now, on the speech, starting it, you say:

I appreciate this opportunity for a practitioner, the head of a law enforcement agency, to give his opinion on our subject. I do not pretend to be a legal scholar, but I have a strong practical interest in the crucial part of our conference topic, namely, the grounding of our Constitution in higher or natural law. The expression "unenumerated rights" makes conservatives nervous, as it gladdens liberals, for the reasons our previous discussions here have indicated.

I want to take a different approach to this theme, which provides necessary background for the very abstract issue of the privileges or immunity clause today. Briefly put, I argue that the best defense of limited government and the separation of powers and judicial restraints that flow from that commitment to limited government is the higher law political philosophy of the Founding Fathers.

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 willfulness of both run-amuck majorities and run-amuck judges.

Now, in regards to the question of higher law, how do you interpret that? It seems to me that you are advocating or at least it has the appearance—maybe I withdraw saying it appears to me, because I have not made up my mind, but it at least appears that that is an advocation of the use of natural law toward constitutional adjudication.

Judge THOMAS. It is not, Senator. The point there is that, in our regime, if you notice, I speak to the higher law political philosophy of the Founders. Their philosophy was that we were all created equal and that we could be governed only by our consent, and that we ceded to the Government only certain rights, and that, to that extent, the Government had to be and was a limited government.

But beyond that—and the judiciary, of course, was a part of that limited government—but in no sense, and I do not mention here or say higher law should be pointed to in adjudicating cases. It is nothing more than the background, the—I think I say here provides the necessary background, it provides us an understanding of our form and our structure in our Government. It is not a methodology in constitutional analysis. I think it would have been easy enough to have said that directly.

Senator HEFLIN. Well, you use the words "higher law is the only alternative to the willfulness of both run-amuck majorities and run-amuck judges." Now, how can higher law through a political theory serve as a protection against willfulness of run-amuck majorities or run-amuck judges?

Judge THOMAS. The theory would be, Senator, essentially this: That the individual is to be protected, that the individual can only be governed by consent, so that the majority cannot take rights away from the individual that have not been conceded or that have not been consented to be given to the Government by that individual. It is not a notion that in your adjudication you look to this higher law. It is simply an explication or an indication that this is the theme of our underlying background political philosophy and that the Constitution protects these rights.

Senator HEFLIN. All right. If you turn to page 7 and 8 of that speech, you make this statement starting at the beginning of the last sentence on page 7:

> Similarly, an administration inspired by higher law thinking would not have argued on behalf of Bob Jones University. The higher law background of the American Constitution, whether explicitly appealed to or not, provides the only firm basis for a just, wise, and constitutional decision.

I am taking that out of context. If you want to read——

Judge THOMAS. The point there was that I felt that as a policy matter, as a political branch of our Government, that the administration of which I was a part made an inappropriate decision about being involved in the Bob Jones University case; a decision that had it been informed with the notion that we were all created equal or the notion of how important it was not to have discrimination in our society, that it—not the courts but our administration—would not have made as a policy matter. I thought it was a wrong decision.

Senator HEFLIN. All right, sir. Now turn to your law review article. Again, you—by the way, that thing that Senator Leahy was talking about, that footnote, I believe, appears here if you wanted to later, when Senator Leahy returns—it is footnote 2 on the first page.

I think basically the first part of that you use the term "run-amuck majorities" and "run-amuck judges" in that regard. But in the context of economic freedom or the freedom to contract on the concept of higher law, if you were to read it in that context, "Moreover, without recourse to higher law, we abandon our best defense of judicial review, a judiciary active in defending the Constitution but judicious in its restraint and moderation. Rather than being a justification for the worst type of judicial activism, higher law is the only alternative to the willfulness of both run-amuck majorities and run-amuck judges."

Now, in the context of economic freedom, right to contract, and the fact that any governmental restrictions placed upon those freedoms would be, in effect, restrictions and could be looked upon as being run-amuck majorities, do you still maintain that that does not—well, I am just saying it is subject to an interpretation that you are referring to constitutional adjudication there.

Judge THOMAS. I am not in this sentence. Let me make a point about my interest in the economic aspect of this. I was asked on—I did not just simply sit around and spend time just trying to spin theories. I had certain experiences that prompted me to think about some of these issues. And with respect to the issue of having a right to run my grandfather's business, for example, I simply looked at what in theory was his right. After slavery, what was his right or the rights of people who were near me, who lived around me, to just simply use their land and grow their food and be able to eat it or to sell it?

Those were the kinds of examples that I would use. I, for example, remember vividly my grandfather, whom I thought was a strong man—and when you are small, it is a giant of a man, and certainly a man with great pride. He would literally have to get a drink before he went to the licensing bureau in Savannah to get

the license that he needed to drive his oil truck. Those were the kinds of questions I was looking at.

Now, I did not intend, first, to say that this was a basis for constitutional adjudication. I think I could have said that if I had intended that. The second point is that I have said and I believe that the *Lochner* era cases were properly overruled and that the health and safety—the Court does not serve as a superlegislature over this body or the political branches.

Senator HEFLIN. Well, you said you could have stated that. On the other hand, in all of these writings on natural law, you could have made the distinction, could you not, that you were speaking of a theory and not a constitutional adjudicatory process?

Judge THOMAS. I think, Senator, if I were a judge, if I gave some of these speeches after I went to the bench, I would have made that distinction. But at the time, I was not a judge and certainly did not think at that time that it was necessary to draw that distinction when it really at that point wasn't relevant.

I felt, as I stated in my hearings for the court of appeals, that this is political theory. This is not constitutional adjudication or methodology. And I stand by that. I think the distinction is an important one, and it is one that certainly I didn't draw a clear and exacting line sometimes, simply because I wasn't in the judiciary. I didn't say I am not saying this or I am not saying that, but it was not my intent at any point to provide a basis for adjudicating constitutional law cases.

Senator HEFLIN. In this article in the Harvard Journal of Law and Public Policy on page 66, this statement appears:

> To believe that natural rights thinking allows for arbitrary decisionmaking would be to misunderstand constitutional jurisprudence based on higher law.

That appears—it has the appearance of advocating natural law in the field of jurisprudence and decisionmaking on constitutional adjudication.

Judge THOMAS. Senator, no, I still—my point is that—and jurisprudence that I would use there would be in the broadest sense. I still take the position and took the position then that this would serve as a background to understanding what our Constitution was for. I was not speaking as a judge. I was not setting out rules of analysis or adjudication. I was trying to establish a sense among conservatives or among the audience that here is the background to our Constitution.

Now, our Founding Fathers took bits and pieces of what they believed may have been natural law, and they placed that in the Constitution. But once it is in the Constitution, it is no longer required that anyone refer to natural law. It is a part of our positive law. And I think that that is the appropriate distinction. It is the one that I certainly attempted to make there. At no point did I intend to say, look, this is an approach or methodology for constitutional adjudication. And that was the point I attempted to make again in my court of appeals confirmation. It has no role.

I think that if as a judge I had stated here is a new approach for constitutional adjudication, then I think you would be right, that there would be concern. But I was speaking solely as a chairman of

a commission who was interested in this debate and advancing this idea, but not in adjudicating cases.

Senator HEFLIN. The concept that natural law is a political theory, most political theories that are developed involve protections, adjudicatory concepts, or processes. You eliminate as a part of the comprehensiveness of the natural law theory or natural law philosophy the protection of rights or adjudicatory rights.

Now, in most political theories, you would have something, if it is adopted, that would provide for protection, which is judicial decisionmaking. Are you separating from the natural law theory adjudicatory processes?

Judge THOMAS. What I am saying, Senator, is this: That the individuals who drafted our Constitution, let's say our 14th amendment, the abolitionists, for example, believed in natural law. And to the extent that they reduced it to a positive document, it appears in the Constitution. But one need not appeal to whatever they believed beyond the understanding of what they intended to do, that the law—that our rights don't flow from what their beliefs were, but rather from the appearance of those rights in the Constitution.

Senator HEFLIN. Well, if it became positivism or the positive law of the Constitution, then why is natural law being advocated? The concept that if it is constitutional law, if natural law has progressed to the extent that it is positivism, it is a part of the Constitution, then why all the great discussion today on natural law?

Judge THOMAS. Well, for me it was just a matter of discussing and understanding the issue of slavery and the issue of the underlying values and the underlying ideals of our country. I thought it was important. I thought it was a way of discussing an issue that was important to me, rather than simply constantly arguing about goals and timetables and quotas. It was a way of attempting to find a way to—a theme to unify us on this debate and a way to convince individuals whom I felt should be supportive of civil rights. And I am not saying that it worked. I certainly never thought that I would be having this discussion about it. And I did not intend it certainly as a method of adjudication.

Senator HEFLIN. Well, let me ask you this last question. I understand my time is about up. How does natural law as a political theory provide protection for limited government or for judicial restraint if that political theory excludes constitutional adjudication?

Judge THOMAS. I think, Senator, it offers an understanding of why it was necessary or why our Founding Fathers felt that we should have a government that did not infringe on the rights of individuals or a government by consent rather than our rights emanating from that government.

It gives us an understanding of why government ought to be limited, why it ought not to intrude on the individual, why there is a line between the individual and the government. It gives us a sense of why the government shouldn't require that black people live over here or white people live over there. But it doesn't adjudicate it. It gives us an understanding of why slavery was wrong, but it doesn't provide for the manumission of slaves. That had to be done by the Constitution.

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

The CHAIRMAN. Thank you.

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

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

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

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

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

[Recess.]

The CHAIRMAN. The hearing will come to order.

Senator Brown?

Senator BROWN. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

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