

the right of even African-Americans, other African-Americans who have done their yeoman's work within the Republican Party.

Senator SPECTER. Well, I am going to take that as a qualified yes. A reasonable man could hold the views which he articulated, and I am not saying that there are not arguments on the other side.

It has been a regret of mine in these hearings that so much time has been spent on repeating the same questions and talking about natural law, which was a fraction, a tiny part of what he had to say, really only on the Declaration of Independence as an answer to slavery, and a little bit on economics. The area where he had so much to contribute was on affirmative action, and we touched on it almost not at all.

But I have cited his statements and I think that they are very reasonable, and I think it is very healthy to put these forward in our society. Speaking for myself, and I am not making a commitment here, I do not put them in the radical right.

Professor Edley, let me take up a question with you, and then I have one question for Professor Days. You say, Professor Edley, that he does not have a background and character with a sufficient constitutional vision, and you say that it is not the character of the man, but it is the character of the record.

I would respectfully—I will not say I disagree, let us just discuss it for a minute.

Mr. EDLEY. You don't have to ask me a question, Senator, if you do not—

Senator SPECTER. I know I don't have to. I have a right to remain silent, and so forth, but I have a very serious question to ask. I hope all of my questions are serious.

We have had a nominee who has come forward here who perhaps, as a hypothesis, has campaigned for the Supreme Court. Professor Kurland came forward in one of our confirmation hearings, I forget which one it was, and said that the nominee had gone from podium to podium campaigning for the Supreme Court, and I asked him if there was anything wrong with that. Some of the people on this side of the table do that all the time.

You have a man who put in his writings, Judge Thomas has, in order to be within the Republican Party, a litmus test was to be against affirmative action and against welfare, a lot of questions we did not have a chance to ask him. I would suggest to you that his character is shown more by his roots than by these writings, and even in these writings, in 1983 he favored flexible goals and timetables, and in 1988 he opposed them.

Why not rely upon the character, which I think came through very positively for Clarence Thomas here? I do not think his writings did, his writings were inconsistent with what he said, problem- some, but his character was undeniably strong and laudable. Why not rely on the character, which had been with Judge Thomas a lot longer than those writings?

Mr. EDLEY. At the risk of repeating myself, and I hope this will be responsive, character is not irrelevant, by any means. What I am urging, however, is that character, the determination that the nominee has good character, high integrity, is not a substitute for discerning the nominee's constitutional vision.

I am quite confident that your predecessors in the Senate, when they confirmed Justices in the past, believed them, by and large, to be men and woman of high character, and yet we have had some very serious constitutional missteps in this country, and character did not prevent *Plessy v. Ferguson*.

So, while not excluding the importance of character and, indeed, the importance of diversity, it seems to me your fundamental task, respectfully, is to discern that constitutional vision, and it seems to me we look and we look and it is simply not to be found.

I disagree somewhat with your assertion, Senator, that his views with respect to affirmative action in racial issues, preferences and so forth, are reasonable. This reminds me very much of Professor Michelman's distinction last night between dogmatic and pragmatic.

In most of his writings and speeches, Judge Thomas only talks about the costs, and I agree with Professor and Lawrence and with you, that the costs identified by Judge Thomas are serious ones, but a pragmatic approach would also look at the benefits and would undertake willingly the difficult task of balance in particular circumstances how the costs and benefits compare.

A dogmatist, which Judge Thomas has shown himself to be in this area, would only focus on one side of the equation and would use that dogmatism, it seems to me, to interpret statutes and, indeed, interpret the Constitution in a way that is outside the mainstream. Character, acknowledging that he has a great character, it seems to me does not undo that difficulty for me.

Senator SPECTER. Thank you, Professor.

Mr. Chairman, I have a question for Professor Days, but I will wait for when my turn comes around, because the red light is on.

Senator KENNEDY. Senator Heflin.

Senator HEFLIN. I do not have any questions.

Senator KENNEDY. I just have one, but we will come back to Senator Hatch.

Senator HATCH. Do you want to ask yours first?

Senator KENNEDY. I recognize Senator Hatch.

Senator HATCH. Well, I would like to welcome you all here again.

Mr. Days, it is nice to see you again.

Mr. DAYS. It is good to see you.

Senator HATCH. I appreciated it when you served here and I have great respect for you, as you know, and for each of you.

I would like to ask the witnesses about affirmative action and the differences on this issue between Judge Thomas and others who might be called the traditional civil rights leadership.

Now, my purpose, in this limited timeframe in which we have so many more witnesses to follow, is not to argue the merits of the difference, but to try to identify the difference clearly. Now, would you all agree with me that Judge Thomas has supported that form of affirmative action aimed at increasing the numbers of minorities and women recruited into an employer's applicant pool, steps like advertising in the media that primarily reach minorities and women, recruiting at schools and colleges with primarily minority and women enrollment, and other similar steps? Would any of you disagree that he has at least done that?