NOMINATION OF CLARENCE THOMAS TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

OCTOBER 1 (legislative day, SEPTEMBER 19), 1991.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

[To accompany the nomination of Clarence Thomas to be an Associate Justice of the U.S. Supreme Court]

The Committee on the Judiciary, to which was referred the nomination of Judge Clarence Thomas to be an Associate Justice of the U.S. Supreme Court, having considered the same, reports the nomination, a quorum being present, without recommendation, by a vote of 13 yeas and 1 nay, having failed to report favorably thereon, by a vote of 7 yeas and 7 nays.

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I. INTRODUCTION

On June 27, 1991, Thurgood Marshall resigned from the U.S. Supreme Court after 24 years of service as an Associate Justice. Eleven days later, on July 8, the Senate Judiciary Committee received President Bush's nomination of Judge Clarence Thomas to fill the seat vacated by Justice Marshall.

The committee held 8 days of hearings on Judge Thomas's nomination—the third longest set of hearings on any Supreme Court nomination. The nominee testified for 24½ hours over the course of 5 days—the second longest appearance by any Supreme Court nominee.

On September 27, 1991, a quorum being present, a motion was made to report the nomination to the Senate with a favorable recommendation. That motion failed by an evenly divided vote of 7 ayes and 7 nays:

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The committee then voted, 13 to 1, to report the nomination to the Senate without recommendation.

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II. BACKGROUND

The committee received President Bush's nomination of Judge Clarence Thomas to be an Associate Justice of the U.S. Supreme Court on July 8, 1991. The hearings on Judge Thomas' nomination were held on September 10, 11, 12, 13, 16, 17, 19, and 20.

The committee heard testimony from a total of 96 witnesses, with 47 witnesses—including Judge Thomas—testifying in support
of the nomination, 46 witnesses testifying in opposition to the nomination, and 3 witnesses testifying on behalf of and presenting the report of the American Bar Association. The witnesses included: Ronald L. Olson, chairman, American Bar Association's standing committee on the Federal judiciary; Robert P. Watkins, representative for the Federal Circuit, American Bar Association's standing committee on the Federal judiciary; Judah Best, representative for the District of Columbia Circuit, American Bar Association's standing committee on the Federal judiciary; Thomas C. Grey, professor, Stanford Law School; Sylvia Law, professor, New York University Law School; Frank I. Michelman, professor, Harvard Law School; the Honorable Roy Allen; the Honorable Griffin Bell; the Honorable Jack Tanner; Margaret Bush Wilson; Drew S. Days, professor, Yale Law School; Christopher F. Edley, Jr., professor, Harvard Law School; Charles Lawrence, professor, Stanford Law School, on behalf of the Society of American Law Teachers; Sister Mary Virgilius Reidy, former principal, St. Benedict's, Savannah, GA; Father John Brooks, president, Holy Cross College; the Honorable John Gibbins, former chief judge of the U.S. Court of Appeals for the Third Circuit and former vice chairman of the board of trustees, Holy Cross College; Dr. Niara Sudakasa, president, Lincoln University; Erwin N. Griswold and William H. Brown, on behalf of the Lawyers Committee for Civil Rights Under Law; Guido Calabresi, dean, Yale Law School; Marcia Greenberger, National Women's Law Center; Judith Lichtman, Women's Legal Defense Fund; Patricia King, professor, Georgetown Law School; Emily Hart Holyfield, Compton, CA, Chapter of the NAACP; Evelyn Bryant, Liberty County, GA, Chapter of the NAACP; Deanie Frazier, commissioner, Chatham County, GA; Rev. Dr. Lawrence F. Haygood, Tuskegee, AL; Sarah Weddington, attorney, Austin, TX; Kate Michelman, National Abortion Rights Action League; Faye Wattleton, Planned Parenthood; the Honorable Madeleine Kunin, former Governor of the State of VT; Gale Norton, attorney general for the State of Colorado; Larry Thompson, attorney, Atlanta, GA; the Honorable John W. Kern III, Judiciary Leadership Development Council; Barbara K. Bracher, attorney, Washington, DC; Lane Kirkland, president, AFL-CIO; Congressman John Conyers, Congressman Louis Stokes, Congressman Major Owens, Congressman Craig Washington, and Congressman John Lewis on behalf of the Congressional Black Caucus; Alphonso Jackson, director of the Dallas Housing Authority; Rev. Buster Soires, pastor of the First Baptist Church, Somerset, NJ; Robert Woodsen, president, National Center for Neighborhood Enterprise; Pamela Talkin, Federal Labor Relations Authority; Willi King, Equal Employment Opportunity Commission; James Clyburn, commissioner, South Carolina Human Affairs Commission; Dr. Talbert Shaw, president of Shaw University; John Buchanan, People for the American Way; Julius Chambers, NAACP Legal Defense and Educational Fund, Inc.; Joseph, L. Rauh, Jr., Leadership Conference on Civil Rights; Antonia Hernandez, Mexican American Legal Defense and Education Fund and the Alliance for Justice; William Lucy, Coalition of Black Trade Unionists; Dr. Julius Becton, Jr., president of Prairie View A&M University; Dr. Jimmy Henkins, chancellor of Elizabeth City State University; Dr. Wesley McClure, president of Virginia State Universi-
ty; Yvonne Thomas, Zeta Phi Beta Sorority; Sharon McPhail, National Bar Association; Adjoa Aiyetoro, National Conference of Black Lawyers; William Hou, National Asian Pacific American Bar Association; Leslie Seymore, National Black Police Association; Daniel Schulder, National Council of Senior Citizens; Nadia Axford, National Employment Lawyers Association; Rev. Bernard Taylor, Black Expo Chicago; Ed Haynes, Council of 100; David Zwiebel, Agudath Israel of America; John Palmer, president, EPD Enterprises, Inc.; J.C. Alvarez, vice president, River North Distributing; Benjamin L. Hooks, executive director of the NAACP; Rev. Dr. Amos Brown, the National Baptist Convention, U.S.A., Inc.; Rev. Mr. Archie LeMone, the Progressive National Baptist Convention; Sheriff Carl Pied, Fairfax County, VA; Johnny Hughes, National Troopers Coalition; Bob Suthard, International Association of Chiefs of Police; James Doyle III, former assistant attorney general, State of Maryland; Donald Baldwin, National Law Enforcement Council; John Collins, Citizens for Law and Order; Harriet Woods, National Women’s Political Caucus; Molly Yard, National Organization for Women; Eleanor Smeal, Fund for the Feminist Majority; Helen Neuborne, NOW Legal Defense and Education Fund; Anne Bryant, American Association of University Women; Byllye Avery, National Black Women’s Health Project; Joe Broadus, professor, George Mason Law School; James Ellison, professor, Cumberland Law School; Rodney Smith, dean of Capital University Law School; Charles F. Rule, Washington Legal Foundation; Dr. James J. Bishop, Americans for Democratic Action; Patricia Williams, Center for Constitutional Rights; Haywood Burns, Supreme Court Watch; William B. Moffit, National Center for Criminal Defense Lawyers; Ellen Smith, Concerned Women for America; Dr. George Dumas, national chairman, Republican Black Caucus; George Jenkins, chairman, Montgomery County Black Republican Council; Celes King, Professional Bail Agents.

The committee carefully and thoroughly scrutinized the nominee’s qualifications and credentials, including his 17-month record as a judge for the U.S. Court of Appeals for the District of Columbia, his 8-year record as Chairman of the Equal Employment Opportunity Commission, his 10-month record as Assistant Secretary for Civil Rights, Department of Education, his academic writings, and his speeches.

III. THE NOMINEE

Judge Thomas was born on June 23, 1948, in Savannah, GA. He received his bachelor of arts degree from Holy Cross College in 1971. Judge Thomas pursued his legal education at Yale Law School, receiving his juris doctor in 1974.

From 1974 to 1977, the nominee served as an assistant attorney general for the State of Missouri.

From 1977 to 1979, Judge Thomas worked as an attorney for the Monsanto Co., located in St. Louis, MO.

From 1979 to 1981, the nominee was a legislative assistant for U.S. Senator John C. Danforth, of Missouri.

In 1981, the nominee served for 2 months as a consultant to the Office of Civil Rights, U.S. Department of Education. He then
served for 10 months as Assistant Secretary for Civil Rights, U.S. Department of Education.

From 1982 to 1990, the nominee was Chairman of the Equal Employment Opportunity Commission.

In 1990, President Bush appointed Judge Thomas to the United States Court of Appeals, a position he held for 17 months before his nomination to the Supreme Court.

IV. THE AMERICAN BAR ASSOCIATION'S EVALUATION

A. THE STANDING COMMITTEE'S ASSESSMENT

The American Bar Association uses three ratings for Supreme Court nominees: "Well qualified," "qualified," and "not qualified." Twelve of the fifteen members of the association's standing committee on the Federal judiciary, chaired by Ronald L. Olson, found Judge Thomas to be qualified for appointment to the Supreme Court. Two members of the standing committee found Judge Thomas to be not qualified, and one member abstained from voting. (Letter from Ronald L. Olson to Chairman Biden, September 14, 1991, at 8.)

The standing committee's evaluation was based on its investigation of Judge Thomas' "professional qualifications, that is, of his integrity, judicial temperament and professional competence." (Id. at 1.) First, the Standing Committee concluded that Judge Thomas "possesses integrity, character and general reputation of the highest order." (Id. at 4.) Second, the standing committee concluded that Judge Thomas "possesses a highly suitable temperament for judicial service." (Id. at 5.)

Finally, a substantial majority of the standing committee concluded that Judge Thomas "has demonstrated intellect, analytical ability and writing skills that are well within the zone of competence for those rated 'Qualified' for the Court." (Id. at 6.) The standing committee minority of two concluded that Judge Thomas "does not have the depth or breadth of professional experience sufficient to place him at the top of the legal profession, as is required by the [Standing] Committee's criteria for appointment to the Supreme Court of the United States." (Id. at 8.)

B. THE STANDING COMMITTEE'S INVESTIGATION

The standing committee's investigation began on July 3, 1991, and ended on August 19, 1991. Its members interviewed more than 1,000 persons throughout the United States, including more than 400 current and former State and Federal judges, approximately 300 practicing attorneys, and more than 150 law school deans or faculty members.

Judge Thomas' court of appeals opinions were reviewed by three reading committees, the first chaired by Rex E. Lee, former Solicitor General of the United States and currently president of Brigham Young University; the second chaired by Prof. Ronald Allen of the Northwestern School of Law; and the third comprised of professors from Duke University School of Law. The standing committee reported that:
The results of the reviews of the Reading Committees were independently analyzed and evaluated by each member of the [Standing] Committee. In addition, each member of the [Standing] Committee independently selected and read opinions of Judge Thomas. (Id. at 6.)

The standing committee concluded that the reading committees “support the majority of this Committee in their evaluation of Judge Thomas'[s] legal opinions.” (Id. at 6.) Although reading committee representatives found Judge Thomas’ academic writings to be “disappointing,” the substantial majority of the standing committee concluded that “these limitations are overcome and outweighed by Judge Thomas'[s] brief but highly satisfactory performance on the Court of Appeals.” (Id. at 8.)

Members of the standing committee personally interviewed Judge Thomas on two separate occasions. (Id. at 1.)

V. COMMITTEE RECOMMENDATION

A motion to report with a favorable recommendation the nomination of Judge Clarence Thomas to be an Associate Justice of the U.S. Supreme Court failed by an evenly divided vote of 7 to 7. A motion to report the nomination to the Senate without recommendation passed by a vote of 13 to 1.
ADDITIONAL VIEWS OF CHAIRMAN BIDEN

The decision to oppose the confirmation of a nominee to the U.S. Supreme Court is a solemn one. And with respect to this nominee, Judge Clarence Thomas, I have no doubt about his character, credentials, competence, or credibility. Instead, the basis for my opposition to the confirmation of Judge Thomas concerns his judicial philosophy—the approach he would use in deciding how to interpret the ennobling phrases of our Constitution.

INTRODUCTION

In terms of judicial philosophy, Judge Thomas came to the hearings with a record that was troubling in several respects. Over the course of his professional life, he had expressed views that aligned him with the ultraconservatives seeking to fundamentally alter our society. The constitutional philosophy set forth in Judge Thomas' articles and speeches would result in radical, and in my opinion undesirable, changes in the relationship between government and individuals.

First, Judge Thomas seemed to advocate a change in the degree to which society could protect the environment, the workplace, and the public health and safety. Judge Thomas had approved the notion of an activist Court that would greatly increase the constitutional protection given to economic and property rights, striking down laws that regulated businesses and corporations.

Second, Judge Thomas appeared to seek a change in the degree to which government could interfere in the personal lives of individuals. Judge Thomas had praised or associated himself with arguments for greater government control over matters of family and personal life. In particular, Judge Thomas seemed comfortable with permitting government intrusions into that most private realm of decisions concerning procreation and other intimate matters.

Third, Judge Thomas had endorsed an extreme view of separation of powers which, if taken to the conclusion endorsed by its advocates, would radically redefine the balance of power between the branches of the Federal Government. This view holds that much of the current structure of our government impermissibly infringes on the power of the Executive. Having also expressed a strong hostility to Congress, Judge Thomas seemed to advocate a major shift in power away from the legislative branch and toward the executive branch.

In short, Judge Thomas' writings and speeches sketch a judicial philosophy that, if realized, would reverse the balance this country has struck between the rights of individuals, the obligations of businesses and corporations, and the power of government. The question concerning me as the hearings began was whether this was an accurate picture of Judge Thomas' judicial philosophy.
During the hearings, Judge Thomas sought to explain his views. I accept the sincerity of his testimony, and some of his explanations satisfied my concerns. On balance, however, my concerns remain. First of all, I was troubled by Judge Thomas’ repeated resistance to discussing his own views when asked about decisions of the Supreme Court. Perhaps the best way to gain insight into a nominee’s judicial philosophy is to use the Supreme Court’s existing constitutional and statutory decisions to frame the dialog.

Judge Thomas’ reluctance even to comment on already decided cases, apparently for fear of revealing his own views, was pronounced. I discussed this with him in the final hours of his testimony, after hearing yet another of his refusals to discuss a legal principle:

The CHAIRMAN. *** Judge, you are going to be *** a judge who is not bound by stare decisis, [who] has nothing at all that would bind you other than your conscience, and so I am a little *** edgy when you give an answer and you say, “well, that’s the policy,” as if you are still going to be a Circuit Court of Appeals judge ***.

You are going to take a philosophy to that Court with you, *** and you are not limited *** from reaching a conclusion different than that which the Court has reached thus far ***.

Judge THOMAS. Well, I understand that, Mr. Chairman, but what I have attempted to do is not to agree or disagree with existing cases.

The CHAIRMAN. You are doing very well at that.

Judge THOMAS. The point that I am making or I have tried to make is that I do not approach these cases with any desire to change them, and I have tried to indicate that, to the extent that individuals feel, well, I am foreclosed from a——

The CHAIRMAN. If you had a desire to change it, would you tell us?

Judge THOMAS. I don’t think so ***. (Transcript, Sept. 16, at 172-73.)

Judge Thomas’ last comment appears to have been said in jest, but in the end, he had declined comment or provided only vague remarks on the many constitutional issues—great and small, contentious and settled—about which he was asked. Perhaps Judge Thomas was advised that this approach was a sound political strategy designed to ensure confirmation. If that is the case, it is not a strategy I am prepared to accept.

I had hoped to discuss with Judge Thomas what his views are, not because I wanted guarantees that he would vote the way I might like in particular cases—that I would not seek. What I had hoped to determine was that he believed generally in a framework of government and of individuals rights that would enable him to meet the challenges of the next century, whatever they may be.

Thus, the most troubling aspect of Judge Thomas’ testimony, for me, was the number of occasions on which he said he had not appreciated the implications of arguments he previously had made. This occurred, to some degree, on each of the three subjects I men-
tioned above: Economic and property rights; privacy; and separation of powers.

Caution in embracing an argument because of where it might lead when applied is a critical attribute for a Supreme Court Justice. After all, the Court's interpretation of the Constitution or a statute does not simply decide the particular case before it, it serves as well to set the course of all future interpretations both for itself and for all subordinate courts. Even as he testified at the hearing, Judge Thomas evidenced a lack of appreciation for the implications of the views he had previously endorsed.

With respect to his statements on economic and property rights, he said he was speaking only as a "part-time political theorist." He said his interest derived from concern that individuals, particularly African-Americans, must not encounter barriers in their efforts to earn a living. Yet those who urge the Court to grant stricter protection to economic and property rights—those whose views Judge Thomas finds "attractive"—do not focus their writings on removing barriers keeping minorities from jobs. The implications of the view of these writers could prohibit government from regulating factory owners who pollute the air or water. They could invalidate the workplace safety laws and regulation of facilities like child-care centers. Judge Thomas said he did not mean to advocate these applications of the argument that economic and property rights deserve "more protection." But the arguments he endorsed are likely to lead to these results.

I was also concerned about Judge Thomas' prior statements on the issue of family and personal privacy. None of these statements, in my view, proves that Judge Thomas definitively rejects the idea that the Constitution protects individual and family privacy and unenumerated rights. But every word he uttered prior to his nomination on these issues was hostile to these concepts. Certainly, at the hearing, he distanced himself from his prior statements, saying either his meaning was misunderstood or he had not participated in making the statements. But the implication of his comments was to suggest he would be comfortable with greater government control and less constitutional protection of the right of privacy.

Moreover, Judge Thomas failed during his testimony to explain what he does believe is the proper relationship between the individual and government when intimate personal matters are at issue. In particular, he was persistently evasive on the source, the scope, and the nature of an individual's right of privacy, despite my repeated efforts to elicit his views on the subject. Judge Thomas thus failed to convince me that he has a broad view of personal freedom that will adequately protect individuals as unanticipated conflicts come before the Court in the future.

And, on the issue of separation of powers, Judge Thomas had given high praise to the sole dissent in the case of *Morrison v. Olson*, 487 U.S. 654 (1988), in which Justice Scalia argued that the independent counsel statute violated the separation of powers. At the hearings, I asked Judge Thomas if he agreed with the implication of Justice Scalia's argument—that all independent Federal agencies were unconstitutional. Judge Thomas said he was unaware of this implication of the opinion, and I accept his statement that he has no agenda in this area. But, if confirmed, Judge
Thomas will decide cases that determine the structure of our Government and the power each branch of Government may exercise to address the needs of the future. What does Judge Thomas think the constitutional framework of separate powers means? His prior statements point in a direction that troubles me.

Judge Thomas may ultimately turn out to be a Justice who will strike a balance between the individual, government, and businesses and corporations in a way that is acceptable. But, based on the record before me, I am not certain he would. Given what is at stake with this nomination—and given where the Court stands now—I cannot take the chance.

**PART ONE: JUDGE THOMAS' APPROACH TO INTERPRETING THE CONSTITUTION**

While still in the executive branch, Judge Thomas gave a series of speeches and wrote several articles in which he employed the terminology of "natural law," "natural rights," and the "higher law background" of the Constitution, including especially the contents of the Declaration of Independence. These repeated and expansive references strongly suggested that Judge Thomas believed these concepts were crucial tools for understanding the Constitution, and for reaching correct constitutional decisions.

In itself, the use of natural law terminology should not be a source of concern. Basic natural law principles, by whatever name, should and do inform our Constitution. This was the main point of contention between my own understanding of the Constitution—and that of the majority of Americans—as compared to Robert Bork's understanding, which denied any role for the recognition of rights beyond those expressly and specifically stated in the document itself.

In contrast to that view, most Americans, including myself, believe that the "higher law" of the Constitution provides a basis for understanding the broad, liberty-enhancing phrases of the Constitution. It does so because it provides the foundation for a government of limited powers derived from the consent of the people. Within this natural law tradition, rights are viewed as residing initially in each person due to their humanity, not because government bestowed rights on its citizens. The people enjoy their rights independent of government, but they then choose to relinquish such powers as they agree upon to the government. In my view, we the people of the United States have chosen to relinquish to our Government only those powers consistent with the protection of our fundamental liberties.

Down through the years of American constitutional thought, others have viewed the concept of natural law quite differently. Some have used it in ways that today seem inimical, rather than consistent, with our view of liberty. For example, the language of natural law has been invoked as a justification for denying women full access to careers outside the home (See Bradwell v. Illinois, 83 U.S. 130 (1873), Bradley, J., concurring.) It has also been used in Supreme Court decisions in the late 1800's and into the 1900's, to limit the legitimate authority of society to regulate commercial behavior, in the name of the natural rights of "liberty of contract."
And, today, natural law is again being used, for instance, by advocates of radical restrictions on society’s authority to regulate for the public welfare, this time in the name of the fifth amendment’s prohibition on the taking of private property without just compensation, (see Epstein, R., “Takings” (1986) at 5), as well as by those who urge that the Court return to the earlier “liberty of contract” jurisprudence of the *Lochner* era. (See Macedo, S., “The New Right and the Constitution” (1987).)

These particular applications of natural law language are not suitable for a constitutional jurisprudence of the 21st century. Prior to the hearings, there was some reason to be concerned that Judge Thomas embraced one or more of these unsuitable views of the Constitution, which have from time to time been predicated on the terminology of natural law.

An appropriate constitutional jurisprudence must include a commitment to individual freedom; it must be capable of growth and evolution to adjust to new contests between the individual and the government; and it must recognize ample authority for society to regulate commercial and economic behavior in the interests of protecting society in the areas of health and safety, the environment, consumer protection, Social Security, and health care.

So the question with respect to Judge Thomas is not whether he endorses natural law principles, but which natural law principles does he embrace and what does he mean by his endorsement of them. Does he believe in a moral code handed down from on high, which is controlling in cases of constitutional ambiguity? How would he interpret the broad, ambiguous phrases of the Constitution? In other words, how would he apply natural law principles as a judge?

A. JUDGE THOMAS HAD WRITTEN EXTENSIVELY ABOUT NATURAL LAW AND THE CONSTITUTION

Prior to the hearings, Judge Thomas' speeches provided ample reason to suppose that his vision of natural law, whatever its details were, played a significant role in his interpretation of the Constitution. In a speech to the Federalist Society at the University of Virginia School of Law, he said:

> 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. (Speech at the University of Virginia, March 5, 1988, at 11.)

In a keynote address before the Pacific Research Institute's civil rights task force, Judge Thomas reiterated that natural law principles apply to decisionmaking in all branches of government, insisting that “the American conception of the rule of law presupposes appreciation for the political philosophy of natural rights in all the departments of government.” (Speech at the Pacific Research Institute, August 4, 1988 at 12.) I took that statement to encompass a role for the philosophy of natural rights in the judicial branch, as well as the other two.
Later in that same speech, Judge Thomas further indicated that natural law reasoning should play a role in constitutional adjudication, this time by praising the lone dissenting opinion of Justice Scalia in the case of *Morrison v. Olson*, 487 U.S. 654 (1988). "Justice Antonin Scalia's remarkable dissent in [Morrison]," he said, "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." (Speech at the Pacific Research Institute, August 4, 1988, at 7–8.) Referring to a passage from the Massachusetts Bill of Rights that was brought to mind by Justice Scalia’s dissent, Judge Thomas continued, saying:

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. (Id. at 10.)

In a set of "Notes on Original Intent," Judge Thomas repeated his understanding of the centrality of natural law and natural rights to judicial decisionmaking. First he quoted a letter from Andrew Hamilton, who had defended American rights against a Tory critic by saying that "the source of all your errors, sophisms, and false reasonings is a total ignorance of the natural rights of mankind." Then, Judge Thomas asserted that this advice "could apply to virtually any judge * * * of * * * today. * * * The natural rights, higher law understanding of our Constitution is the non-partisan basis for limited, decent, and free government." (Notes on Original Intent, undated).

These examples could be multiplied, all in support of the fundamental conclusion that for Judge Thomas, important parts of the Constitution are "inexplicable" or "unintelligible" without an understanding of their higher law origins. (See, e.g., "Affirmative Action: Cure or Contradiction?" Center Magazine, Nov/Dec. 1987 ("unintelligible"); Speech Before the Kiwanis Club, Washington, DC, Jan. 1987 ("unintelligible"); and Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law and Policy 63 (Winter 1989) at 68) ("inexplicable").

B. JUDGE THOMAS' TESTIMONY ON NATURAL LAW FAILED TO SATISFY CONCERNS ABOUT HIS APPROACH TO INTERPRETING THE CONSTITUTION

At the hearings, however, a different understanding of the role of natural law emerged from Judge Thomas' testimony. When first asked about his use of natural law principles, Judge Thomas said:

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. (Transcript, Sept. 10, at 137.)

Soon thereafter, Judge Thomas explained that his interest in natural law had started with, and been limited to, his interest in understanding the theory by which people like Abraham Lincoln and Frederick Douglass argued for the end of slavery:
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. (Transcript, Sept. 10, at 143.)

During the remainder of his testimony, this arguable retreat from earlier views became a point of controversy between Judge Thomas and several different Senators on the committee. In all these discussions, Judge Thomas maintained that he had, throughout his speeches and articles, as well as his committee testimony, been consistent on one basic point. As he expressed it:

I have attempted, in good faith and under oath twice [referring to his testimony as a nominee to both the Court of Appeals and the Supreme Court], to make clear that I don’t think that an appeal, a direct appeal to natural law is a part of adjudicating cases. (Transcript, Sept. 12, at 31.)

I have not in any speech said that we should adjudicate cases by directly appealing to natural law. (Transcript, Sept. 12, at 30.)

While rejecting any direct appeal to natural law in constitutional adjudication, however, Judge Thomas seemed to acknowledge an indirect role. That role arises because the Framers of the Constitution “subscribed to the notion of natural law,” (transcript, Sept. 11, at 6), and they sometimes placed natural law concepts in the Constitution. In Judge Thomas’ words:

Our founders and our drafters did believe in natural law, in addition to whatever [other] 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 Fourteenth Amendment. (Transcript, Sept. 11, at 135-36.)

Even so, Judge Thomas took pains to insist that the rights being enforced by courts are being enforced because they are constitutional rights, not because they are natural rights. As he put it:

[Sometimes, the Framers] reduced to positive law in the Constitution aspects of life principles they believed in; for example, liberty. But when it is in the Constitution, it is not a natural right; it is a constitutional right. And that is the important point. (Transcript, Sept. 11 at 6.)

This disclaimer still leaves an important question unanswered. If the Framers placed a natural right in the Constitution when they used words like “liberty” or “due process” or “privileges and immunities,” how are Justices 200 years later to understand what these constitutional guarantees mean? These phrases, among the most important in the Constitution, are not self-defining, as Judge Thomas acknowledged. (Transcript, Sept. 12, at 27.)
One answer to this question is that of the specific intent or intentionalist school of interpretation. This school holds that, whatever the motives or principles of the Framers may have been, what has been reduced to positive law is only the specific intentions or specific applications the Framers had in mind when they drafted the words of the Constitution. Under this approach, several landmark decisions of the last half-century might well prove incorrect.\footnote{The difficulties with the “specific intent” or “intentionalist” method of interpretation were extensively discussed in the confirmation hearings for Justice David Souter. See Report of the Senate Judiciary Committee, Nomination of David H. Souter to be an Associate Justice of the United States Supreme Court, Additional views of Chairman Biden at 10–16, Exec. Rep. 101–32, 101st Cong., 2nd Sess. (1990) (hereinafter cited as “Exec. Rep. 101–32”).}

Another answer to this question of interpretation is that subsequent justices should attempt to understand what principle the Framers meant to “reduce to positive law,” and to decide cases consistently with the Justices’ best understanding of that principle. And there are other possibilities. What answer a Justice gives is one of the most crucial aspects of that judicial philosophy. It has been a major point of discussion in the confirmation proceedings of recent nominees. And it was a significant point of discussion with Judge Thomas, as well. Regrettably, Judge Thomas never satisfactorily articulated an answer to this question.

At one point, Judge Thomas seemed to embrace some version of the second general answer described just above, when he said:

To understand what the Framers meant and what they were trying to do, it is important to go back and attempt to understand what they believed, just as we do when we attempt to interpret a statute that is drafted by this body, to get your understanding,” (Transcript, Sept. 11, at 6.)

In emphasizing what the Framers believed, Judge Thomas appeared to be indicating that part of a judge’s task is to understand their natural law beliefs, along with whatever other beliefs they might have had. Furthermore, this is consistent with the testimony quoted earlier, in which Judge Thomas stated his view that the Framers

* * * did believe in natural law, in addition to whatever [other] 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 Fourteenth Amendment. (Transcript, Sept. 11, at 135–36.)

Thus, at some points during the hearing, Judge Thomas’ position seemed to be first, that judges should not appeal directly to their understanding of natural law, independent of what has been enacted as positive law in the Constitution; and, second, that those enacting our Constitution believed in natural law and placed some natural law concepts in the Constitution, thereby reducing those concepts to positive law. These constitutional rights are enforceable by judges.

Finally, to ascertain the meaning of these phrases, Judge Thomas seemed to be saying, third, that judges must appeal, at least in part, to an understanding of natural law as understood by
the Framers, because it was natural law that formed part of the Framers' own understanding of what those words mean.

Yet, when I put this third proposition to Judge Thomas, he resisted it.

The CHAIRMAN. Now, you say that they put some of these natural law principles in the document in words like 'liberty,' you just mentioned. You indicate that once 'liberty' was in the Constitution, it becomes positive law. But now comes the hard question, as you and I both know. A judge has to define what 'liberty' means. Now, how does a judge know what the ambiguous term liberty means in the Constitution? * * * Even though you reject the direct application of natural in constitutional adjudication, you would use natural law to understand what the Framers had in mind when they interpreted these broad notions. Isn't that correct?

Judge THOMAS. Not quite, Senator. Let me make two points there. The Framers' view of the principle of liberty is the important point.

* * * * *

Whatever natural law is, is separate and apart. The important point is what did the Framers think they were doing. What were their views.

* * * * *

The second point is this: That is only a part of what we conceive of this notion in our society. The world didn't stop with the Framers. The concept of liberty wasn't self-defining at that point.

* * * * *

And that is why I think it is important, as I have indicated, that you then look at the rest of the history and tradition of our country.

The CHAIRMAN. I agree with you completely. * * * Now, as a matter of fact, you used that argument to take on the original intent people in some of your speeches. You basically say, hey, you folks who just go [to] original intent and are pure positivists, you have got to look at intent, real intent. And the real intent of these guys is not just static. It goes on. It is informed by changes in time, and also you have got to understand, as I understand you, that they used the word liberty because they believed it to be a natural right of man.

* * * [Quotation from one of Judge Thomas' speeches concerning the place of natural law in Constitutional interpretation] * * *

Now, I don't know any other way to read this passage than to conclude that you believe that natural law and natural rights should help judges decide constitutional decisions.
Judge THOMAS. No, Senator. I have said that over—I have repeated that continually here. (Transcript, Sept. 12, at 29.)

There were numerous other exchanges between Judge Thomas and different Senators, from both sides of the aisle, concerning Judge Thomas’ views on natural law. None of them gave us any clearer picture how Judge Thomas would, in general terms, give meaning to the broad, ambiguous phrases of the Constitution.

Throughout his testimony, Judge Thomas cycled through these three assertions several different times:

1. that understanding the “higher law” background of the Constitution is essential to understanding the Constitution itself;
2. that judges should make no “direct” appeal to natural law in interpreting the Constitution;
3. that the natural law principles relevant to aiding a judge’s interpretation of the Constitution are those of the Framers; and
4. that only those natural law principles that have been “reduced to positive law” can be judicially enforced.

These answers are consistent with an interpretive approach that sees the broad principles of the Constitution evolving to accommodate changed circumstances, as well as with other interpretive approaches which are well within the mainstream of American constitutional development. But they are also consistent with a “specific intent” interpretation of the Constitution, which in my view is unacceptable. In the end, Judge Thomas’ answers simply do not tell us very much about the interpretive approach he will employ on the Court.

Insofar as natural law is concerned, I believe that the most fair-minded reading of the totality of Judge Thomas’ testimony can decisively support just two conclusions: First, we did not learn precisely what those views are; and second, whatever they are, natural law functions for Judge Thomas as a substantially less significant tool in constitutional adjudication than was to be supposed before the hearings.

These conclusions make the committee’s inquiry into natural law subject to a second misunderstanding. There is first the potential, already noted, that the inquiry would be misconstrued as an attack on Judge Thomas’ views, instead of an attempt better to understand them. Second, having discovered a less fully developed theory of constitutional adjudication and its natural law component than perhaps was anticipated, there is the danger that much more significance would be attached to that discovery than it warrants.

The inquiry into natural law always had as its fundamental purpose the exploration of Judge Thomas’ substantive and methodological views on constitutional interpretation. It is these views that are ultimately significant in the work of a justice, not the label that one attaches to them. Justices can operate with a sound higher law understanding of the Constitution without ever employing the terminology of natural law and natural rights.

Judge Thomas has noted this himself. In commenting on the use of natural law principles by the first Justice Harlan, Judge Thomas
remarked that “Harlan’s reliance on political first principles was implicit rather than explicit, as is generally appropriate for Supreme Court opinions.” (Speech at University of Virginia, March 5, 1988, at 11.) So it is the underlying substantive and methodological views that are ultimately the objects of inquiry. Natural law occupied some of the committee’s time at the hearing simply because Judge Thomas himself had invoked the language of natural law so often that the committee believed that this would provide an avenue along which to explore the underlying issues.

Labels aside, however, we learned very little additional information about Judge Thomas’ general constitutional methodology. As has already been noted, Judge Thomas believes, as do I, that the Framers understanding of words like “liberty”—

* * * is only a part of what we conceive of this notion in our society. The world didn’t stop with the Framers. The concept of liberty wasn’t self-defining at that point. * * * That is why I think it is important, as I have indicated, that you then look at the rest of the history and tradition of our country.” (Transcript, Sept. 12, at 27.)

To say that history and tradition informs the Constitution is, unfortunately, as imprecise a statement as saying that the higher law background informs the Constitution. In both cases, one wants to know how those concepts inform the Constitution before the statement can be evaluated. As discussed more fully in part 2 below, the question of how history and tradition functions in our constitutional jurisprudence has become a source of current contention on the Court. An extremely narrow view of the application of history and tradition would freeze the Constitution in our past nearly as effectively as the specific intent school of thought would, whereas broader views of the role of history and tradition permit the Constitution to continue to evolve in meaning and application.

We learned very little about how Judge Thomas would apply history and tradition to give meaning to the Constitution. In a promising sign, he did embrace the application of history and tradition as used by the second Justice Harlan. Responding to an inquiry by Senator Leahy, Judge Thomas said:

Judge Thomas. I believe the approach that Justice Harlan took in Poe v. Ullman and again reaffirmed in Griswold in determining * * * the right of privacy was an appropriate way to go. (Transcript, Sept. 11, at 111.)

Unfortunately, the particular issue that currently divides the Court respecting the application of history and tradition was not germane to the opinions that Justice Harlan wrote, so we have almost no way of knowing how his approach speaks to these emerging questions. Furthermore, aside from his acceptance of Justice Harlan’s approach, Judge Thomas had very little to say on the subject. For him, the answers undoubtedly have still to be worked out. For now, what he had to say on the subject came down to this:

Judge Thomas. How do we look at history and tradition, how do we determine how our country has advanced and grown, it is a very difficult enterprise. It is an amorphous
process at times, but it is an important process. (Transcript, Sept. 12, at 34.)

In sum, Judge Thomas appeared before the committee with a judicial philosophy that was unclear and uneven. This fact was best illustrated, I believe, in the discussion I cited above, from Judge Thomas' final day of testimony. Once again, I said to Judge Thomas:

The CHAIRMAN. You are going to be the judge * * * [a judge] who has nothing at all that would bind you other than your conscience, and so I am a little * * * edgy when you * * say 'Well, that's the policy,' as if you are still going to be a Circuit Court of Appeals judge, [where] you have to follow that policy. You are going to take a philosophy to the Court with you [under which] you are not limited * * * from reaching a conclusion different than that which the Court has reached thus far.

And after a subsequent exchange, Judge Thomas finally responded:

Judge THOMAS. The point that I am trying to make * * * is that when I say I don't have an agenda, I mean I don't have an agenda. I operate that way as a Court of Appeals judge and that's the way I [would] function * * * as a member of the Supreme Court. (Transcript, Sept. 16, at 172-173.)

In my view, Judge Thomas' answer fails to grasp the essential difference between the role of a court of appeals and a Supreme Court Justice. A court of appeals judge applies the law, and cannot change it—but a Supreme Court is not so limited when it comes to applying our Constitution.

The lack of a relatively developed judicial philosophy, at least more developed than that revealed by Judge Thomas' testimony, is disturbing. This point should not be misunderstood: it is by no means necessary that a Justice take his or her seat on the Court with a well worked out judicial methodology; some of our most distinguished jurists have developed their constitutional methodology while on the Court.

What is disturbing here is that Judge Thomas came before the committee having made some highly controversial pronouncements on a variety of subjects that pertain to the Court's business—on privacy, on economic and property rights, on the equal protection clause and the civil rights acts, and on the separation of powers. The committee was interested in knowing what approach Judge Thomas would take to these subjects, as well as to the Constitution as a whole. What we discovered was a nominee who still had not worked through the issues. So the committee was left with a question mark, instead of answers.

In some of the more specific areas of our inquiry, we were able to learn about Judge Thomas' views—or, more precisely, about what were not his views. But the sum of these parts may be less than the whole. This was a major concern of mine regarding Judge Thomas.
PART TWO: JUDGE THOMAS' VIEWS ON PRIVACY, REPRODUCTIVE FREEDOM, AND UNENUMERATED RIGHTS

In supporting the nomination of Justice Souter to the Court last year, I emphasized that a nominee bears the burden of proving that he or she falls within the sphere of candidates acceptable to this committee, and I indicated that a nominee who rejected the notion that our Constitution protects unenumerated rights, including the right to privacy, would, in my view, be unacceptable. This is because the rejection of this notion would mean that such a nominee would put at risk not only those rights the Court has already acknowledged, but also that the nominee lacked an expansive view of our Constitution that would guide us safely into the future.

Judge Thomas is a nominee who has, in the past, criticized the notion of unenumerated rights and the right of privacy. Thus, as we began the hearings, determining what Judge Thomas believed in this respect was, for me, a critical goal.

Prior to the hearings, Judge Thomas' record on the right of privacy, reproductive freedom, and unenumerated rights generally—while not definitive—was troubling. To the extent he had expressed views, they were hostile to these concepts. While Judge Thomas had addressed the issue of abortion, it was not simply his opinion on a woman's right to choose that troubled me. My concern was his apparent much broader criticism of an unenumerated right of privacy—of the very idea that there is a realm of intimate matters into which the Government may not intrude.

During the hearings, Judge Thomas conceded that the Constitution, and in particular the 14th amendment, protects some sort of privacy right, at least for married couples. But Judge Thomas declined to provide full answers to most of the questions he was asked on this subject.

He declined to describe in detail his overall methodology for approaching privacy claims. He did not reveal a decisive view on whether individuals had a right of privacy protected by the liberty clause of the 14th amendment. Nor did he say whether, in his view, the scope of the right of privacy—for married or single people—extended in any circumstances to decisions about procreation. His reticence to answer these questions, in light of his prior record, is profoundly troubling. He has failed to convince me that he endorses a broad and expanding conception of the Constitution's protection of the right of privacy.

A. JUDGE THOMAS HAS CRITICIZED JUDICIAL RECOGNITION OF AN UNENUMERATED RIGHT OF PRIVACY

In a series of speeches and articles, Judge Thomas implied his disagreement with those who believe the Constitution grants broad protection to the right of each individual to make intimate decisions without government intrusion. He had criticized the constitutional sources identified by the Court as embodying such protection, namely the 14th and the 9th amendments. He had participated in a report that advocated greater government control over personal and family matters.
1. Judge Thomas was critical of the concept of unenumerated rights

In an article on the privileges or immunities clause of the 14th amendment, Thomas stated that "[t]he expression of unenumerated rights today makes conservatives nervous, while at the same time gladdening the hearts of liberals." ("The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harvard Journal of Law & Policy 63 (Winter 1989) at 63.) In a footnote to this statement, Thomas wrote:

The current case provoking the most protest from conservatives is *Roe v. Wade* [410 U.S. 113 (1973)], in which the Supreme Court found a woman's decision to end her pregnancy to be part of her unenumerated right to privacy established by *Griswold v. Connecticut* [381 US. 479 (1965)].

In *Griswold*, Justice Douglas found that "[s]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." (Id. (citations omitted).)

Thomas then concluded the footnote by referring readers to his comments on *Griswold* he had made in another article, where he "elaborate[d] on [his] misgivings about the judicial use of the Ninth Amendment." (Id. (citation omitted).)

In that other article, Thomas rejected judicial use of the ninth amendment to protect unenumerated rights, complaining that Justice Goldberg "invented" the ninth amendment in *Griswold v. Connecticut*.

A major question remains: Does the Ninth Amendment, as Justice Goldberg contended, give to the Supreme Court to be a blank check. The Court could designate something to be a right and then strike down any law it thought violated that right. * * * * Far from being a protection, the Ninth Amendment will likely become an additional weapon for the enemies of freedom. ("Civil Rights As A Principle Versus Civil Rights As An Interest," Assessing the Reagan Years (1988) at 398–99.)

I find this discussion of the right of privacy troubling for two reasons. First, Thomas criticizes judicial use of the ninth amendment to prohibit government interference with a core personal freedom—the decision to use contraceptives and to decide whether and when to bear a child free from governmental interference. Second, the line of Supreme Court privacy cases up through *Griswold* has been accepted even by most conservatives. In recent years, debate has focused not on whether a right to privacy as a component of liberty exists—but how strong, or fundamental, is that right in any particular instance and what type of competing interest can justify government regulation. Anyone who challenges the premise that individuals have a protected privacy right to make intimate decisions without government interference, in my view, advocates an extreme and unacceptable position.

Judge Thomas strongly suggested prior to the hearings that he and I do not share a common vision of unenumerated rights. As he put it, on one of the two occasions on which he spoke of my view:
The conservative failure to appreciate the importance of natural rights * * * culminated in their spectacle of Senator Biden [following Judge Bork's defeat] crowing about his belief that his rights were inalienable * * * We cannot expect our views of civil rights to triumph by conceding the moral high ground to those who confuse rights with willfulness. (Speech at the Pacific Research Institute, August 4, 1988, at 12.)

Again, the issue for me is not whether Judge Thomas accepts my own vision of privacy and unenumerated rights, but whether he believes generally that the Constitution protects individual freedom. His rejection of my views does not definitively tell us whether he has his own theory of privacy and unenumerated rights, but it is a sharp disapproval of at least one approach that embraces an expansive view of these concepts.

Now, at the hearing, Judge Thomas sought to minimize some of his earlier statements. For example, despite his previous characterization of the ninth amendment as a "weapon for the enemies of freedom," when asked at the hearing if he would keep an open mind on whether the ninth amendment might protect a particular right, Judge Thomas responded:

The Ninth Amendment, I think the only concern I have expressed with respect to the Ninth Amendment, Senator, * * * is that a judge who is adjudicating under those open-ended provisions tether his or her ruling to something other than his or her personal point of view.

Now the Ninth Amendment has, to my knowledge, not been used to decide a particular case by a majority of the Supreme Court, and there hasn't been as much written on that as some of the other amendments. That does not mean, however, that there * * * couldn't be a case that argues or uses the Ninth Amendment as a basis for an asserted right that could come before the Court that does not—that the Court or myself, if I am fortunate enough to be confirmed, would not be open to hearing and open to deciding. (Transcript, Sept. 11, at 110.)

And Thomas conceded that the Constitution protects some sort of privacy right: "My view is that there is a right to privacy in the Fourteenth Amendment." (Transcript, Sept. 10, at 149.)

But these statements affirming that Judge Thomas believes in an unenumerated right to privacy reveal not at all what he believes the scope or nature of a fundamental right to privacy to be, nor who in his view enjoys this right. Unfortunately, Judge Thomas refused all invitations to give needed content to his views. I believe that, in light of his prior record, Judge Thomas' admission that some undefined right to privacy exists does not meet his burden of proof on this issue.
2. Judge Thomas did not dispositively acknowledge that the liberty component of the 14th amendment's due process clause protects the right of individuals, married or single, to make decisions about procreation.

At the hearing, Judge Thomas seemed first to concede that every individual, whether single or married, had a right of privacy with respect to matters of procreation:

The CHAIRMAN. * * * Now, you said that the privacy right of married couples is fundamental, and as I understand it now, you told me—correct me if I am wrong—that the privacy right of an individual on procreation is fundamental. Is that right?

Judge THOMAS. I think that is consistent with what I said and I think consistent with what the Court held in Eisenstadt v. Baird [405 U.S. 438 (1972)]. (Transcript, Sept. 12, at 50.)

Shortly thereafter, however, he spoke only of a marital right to privacy in responding to a question asked by Senator Kennedy:

Judge THOMAS. Senator, * * * I think I have indicated here today and yesterday that there is a privacy interest in the Constitution, in the liberty component of the Due Process Clause, and that marital privacy is a fundamental right, and marital privacy then can only be impinged on or only be regulated if there is a compelling State interest. * * * (Transcript, Sept. 12, at 82.)

As a result, I asked Judge Thomas again about his belief in an individual's right to privacy:

The CHAIRMAN. Judge, very simply, if you can, yes or no: Do you believe that the Liberty Clause of the Fourteenth Amendment of the Constitution provides a fundamental right to privacy for individuals in the area of procreation, including contraception?

Judge THOMAS. Senator, I think I answered earlier yes, based upon the precedent of Eisenstadt v. Baird.

The CHAIRMAN. Well, you know, * * * Eisenstadt v. Baird was an equal protection case. * * * That is not the question I am asking you. Let me make sure and say it one more time. Do you believe the Liberty Clause of the Fourteenth Amendment of the Constitution provides a fundamental right of privacy for individuals in the area of procreation, including contraception?

Judge THOMAS. I think I have answered that, Senator.

The CHAIRMAN. Yes or no?

Judge THOMAS. Yes, and—

* * * * * * * *

I have expressed on what I base that, and I would leave it at that.” (Transcript, Sept. 12, at 119-20.)

In an attempt to more clearly understand his views, I submitted to Judge Thomas, after the hearings, a written question on the
right of privacy. My letter recited Judge Thomas' testimony on this issue, and asked the following question:

Do you believe that the due process component of the Fourteenth Amendment's liberty clause—indeed of the equal protection clause and the case of Eisenstadt v. Baird—provides a fundamental right of privacy with respect to procreation and contraception?

Judge Thomas' answer to this question, in its entirety, was as follows:

As I sought to make clear in my testimony, I believe that Eisenstadt was correct on both the privacy and equal protection grounds.

So, despite my explicit request that Judge Thomas express his views on the liberty clause independent of the decision in Eisenstadt, he answered only that he accepts that Eisenstadt is right both on privacy and equal protection. Thus, yet again, Judge Thomas failed to answer the question directly or completely.

The result of Judge Thomas' reticence to discuss his views is that, even after the hearings, even after my repeated attempts to engage him in a dialog on this issue, I am left without any clear idea of what Judge Thomas means when he says the 14th amendment protects a right of privacy. What is the scope and nature of that right? Where does it come from? Who enjoys this right? These questions remain unanswered.

3. JUDGE THOMAS DID NOT REJECT THE NOTION THAT GOVERNMENT SHOULD HAVE MORE POWER TO REGULATE PERSONAL AND FAMILY MATTERS THAN IT DOES NOW.

In 1986, Judge Thomas was a member of an administration working group on the family that put out a controversial report recommending greater Government control over family and personal matters. In fact, the report "urge[s] the federal courts to permit the state wide latitude in formulating family policy." It recommends "returning to communities the authority to set norms and affirm values." (Administration Working Group Report at 16-17.)

In addition, the report characterized a number of Supreme Court's privacy decisions of the last 20 years as "fatally flawed." Included in this category, just to name a few, were: Moore v. East Cleveland, 431 U.S. 494 (1977), protecting a grandmother's right to raise her two grandsons in her own home; Gomez v. Perez, 409 U.S. 113 (1973), protecting an illegitimate child's right to judicially enforce monetary support from his or her natural father; and a number of the Court's decisions recognizing a fundamental right of privacy with respect to procreation. The group did not think the right of family and personal privacy recognized by these decisions should stand in the way of its recommendations. It said simply:

[In final analysis, * * * A fatally flawed line of court decisions can be corrected, directly or indirectly, through mechanisms * * * [That] include the appointment of new judges and their confirmation by the senate * * *.]
The report received extensive press coverage when released, and its conclusions were widely criticized. When asked about the report at the hearing, Judge Thomas acknowledged that there had been controversy over the report when released, but maintained that he had never read it: "To this day, I have not read that report." ( Transcript, Sept. 10, at 155.)

I specifically asked Judge Thomas about the report’s discussion of the Supreme Court’s decision in Moore v. East Cleveland, where the Court struck down a zoning law that prevented a grandmother from raising her two grandsons in her home, because they were cousins, not brothers. The report objected to this decision because it “forbade any community in America to define ‘family’ in a traditional way.” Simply stated, the working group said that East Cleveland should be permitted to define family in a “traditional way”—even if the result was to force a grandmother to choose between her grandsons or move.

When asked if he agreed with the report’s conclusion that this decision was fatally flawed and in need of correction, Judge Thomas replied only that:

I have heard recently that that was the conclusion, * * * If I had known that that section was in the report before it became final, of course I would have expressed my concerns.

*   *   *   *   *

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. ( Transcript, Sept. 10, at 157.)

*   *   *   *   * I indicated that I would have raised concerns, and I believe that those concerns would have been of the same character and the same nature as the concerns that I would raise in this case. I thought that we had a grand opportunity there to focus governmental policy on existing low-income and at-risk families. ( Transcript, Sept. 11, at 21.)

I find the recommendations of this working group deeply disturbing. If these views were ever adopted as public policy in this country, it would radically change our current conception of what is private—of what is none of the Government’s business. In short, this report is a blueprint for shrinking our rights of marital and family privacy. I accept Judge Thomas’ testimony that he did not write nor even read the report. Nonetheless, I cannot accept his failure to repudiate the idea that Government should be given more authority to regulate family and personal matters.

B. JUDGE THOMAS REFUSED TO DISCUSS HIS VIEWS ON REPRODUCTIVE FREEDOM

Certain remarks made by Judge Thomas prior to the hearings raised a concern that he did not believe individuals had a right of privacy in matters of procreation that included the question of whether to terminate a pregnancy. In a speech delivered to the Heritage Foundation in 1988, Thomas argued that conservatives
should recognize the "connection between natural law standards and constitutional government." (Heritage Foundation Speech, June 18, 1987, at 20.) He said:

The need to re-examine the 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. Martin Luther King was the last prominent American political figure to appeal to it. But Heritage Trustee Lewis Lehrman's recent essay in "The American Spectator" on the Declaration of Independence and the meaning of the right to life is a splendid example of applying natural law. (Id. at 22.)

At the hearings, when asked whether he agreed with the sole conclusion Mr. Lehrman drew from his application of natural law—that all abortions are unconstitutional—Judge Thomas replied:

I felt that conservatives would be skeptical about the notion of natural law. I was using that as the underlying approach. * * * 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. (Transcript, Sept. 10, at 151.)

He also said "I have not, nor have I ever, endorsed [Mr. Lehrman's] conclusion or supported this conclusion." (Transcript, Sept. 13, at 22.) Moreover, Judge Thomas said he had an open mind with regard to whether Roe v. Wade was rightly decided. (Transcript, Sept. 11, at 105.)

I accept Judge Thomas' statement that he has an open mind with respect to a woman's right to choose. And, although I understand that some of his previous comments on this issue had raised a concern going into the hearing, I do not believe these remarks can be viewed as definitive evidence of Judge Thomas' views. I believe that no one can be certain of where Judge Thomas stands on this point.

Nonetheless, I was disappointed by Judge Thomas' reticence to discuss the issue of reproductive freedom even at the most general level. Again, I am not referring to the specific question of whether the result in Roe v. Wade was correct—a question I did not ask Judge Thomas. But Judge Thomas would not even discuss, for example, whether a woman has any protected liberty interest at stake in matters of procreation, or whether the Court should apply strict scrutiny in reviewing such an asserted interest. Answering these questions would not have revealed whether Judge Thomas agreed with Roe, because even if Judge Thomas had acknowledged that women have a fundamental right to choose whether to continue a pregnancy, he could still disagree with the result in Roe.

My concern is that in refusing to discuss the broader question of whether we, as individuals, have a right to make intimate decisions
free from Government intrusion, I can not begin to understand how Judge Thomas would approach any number of cases in which the Court that will determine the future relationship of individuals and Government in our society. Considering his testimony on the issues of family and personal privacy as a whole, I am not comfortable that Judge Thomas would strike an appropriate balance between the right of individuals and the Government as we move into the next century.

C. JUDGE THOMAS DID NOT EXPLAIN HOW HE WOULD USE HISTORY AND TRADITION TO DETERMINE WHETHER AN ASSERTED LIBERTY INTEREST IS CONSTITUTIONALLY PROTECTED

Judge Thomas was similarly reluctant to expound the general methodology he would use to determine whether an asserted liberty interest is protected by the Constitution. Judge Thomas told the committee that the meaning of the Constitution's broad phrases—like "liberty"—are not "self-defining" and must be interpreted based on the Framers' intent and our history and traditions. (Transcript, Sept. 12, at 27.) Again, this answer does not really say much about Judge Thomas' approach. All the Justices now on the Court look to history and tradition in evaluating asserted rights, but they do so in different ways, with radically different results. The key question is whether the Court will protect only those interests supported by a specific and longstanding tradition, or whether a less constricted view of liberty will govern.

This debate was most clearly framed in the case of Michael H. v. Gerald D., 491 U.S. 110 (1989), involving the asserted liberty interest of a biological father to see his child. There, Justice Scalia, in a footnote joined only by Chief Justice Rehnquist, argued that the Constitution protects an interest only if it has been recognized at "the most specific level at which a relevant tradition can be identified." (Id. at 127 n.6.) Thus, Justice Scalia looked at whether the asserted interest fit within a tradition of protecting what he called the "marital family"; he expressly rejected the idea that the interest be more broadly defined in terms of "parenthood" or "personal relationships." (Id.)

Justices O'Connor and Kennedy rejected this portion of Justice Scalia's opinion, expressly because they found this methodology overly constricting:

[Justice Scalia] sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area. [Citing Griswold v. Connecticut and Eisenstadt v. Baird]. On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be "the most specific level" available. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis. (Id. at 132, O'Connor, J., concurring, (citations omitted) (emphasis added).)
Referencing this case, I asked Judge Thomas how he would define the interest at stake or use history and traditions to help give meaning to the broad phrases of the Constitution:

The CHAIRMAN. * * * do you concur with the rationale offered by Justice Scalia [in *Michael H. v. Gerald D.*] as to how one is to determine whether or not an interest asserted by a person before the Court, * * * whether or not you must go back and look at the most specific level of that interest as asserted, like he suggests, or as has historically or traditionally viewed, a broader look back at the more general interest asserted, as Justice Kennedy and Justice O'Connor indicated * * *?

Judge THOMAS. Senator, again, that is a very recent case and I am in the position of not wanting to comment on that specifically, but I am very skeptical——

* * * * * * * * * * * * * * *

I am skeptical, when one looks at tradition and history, to narrow the focus to the most specific tradition. I think that the effort should be to determine the appropriate tradition or the tradition that is most relevant to our inquiry, and to not take a cramped approach or narrow approach that could actually limit fundamental rights. * * *

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The CHAIRMAN. . . . as I understand it, you are not taken with the Scalia approach.

Judge THOMAS. Skeptical.

The CHAIRMAN. I hope you are more than skeptical, Judge.

Judge THOMAS. Well—(Transcript, Sept. 16, at 149-52.)

In my view, Justice Scalia’s approach is unacceptably narrow and fundamentally at odds with the Constitution’s generous, expansive phrases. As Justice O’Connor noted in her concurring opinion, had a majority of the Supreme Court used Justice Scalia’s methodology over the last 25 years, a number of the Court’s decisions would have been resolved differently. Judge Thomas, as had Justice O’Connor, put among this group the Court’s decision in *Loving v. Virginia*, 388 U.S. 1 (1967), striking down a State’s anti-miscegenation law, as such laws were unfortunately a part of much of our history.

Judge Thomas' failure to expressly reject Justice Scalia’s methodology—stopping at expressing his “skepticism”—is unfortunate. I note that Justice Souter, when asked this same question last year, stated emphatically that he “would not accept” Justice Scalia’s approach, and he explained how he would instead seek out the most “reliable evidence” including evidence of “great generality.” His response on this point played an important role in my decision to support his nomination. (See S. Exec. Rep. 101-32, Additional Views of Chairman Biden at 18-19.)
PART THREE: JUDGE THOMAS'S VIEWS ON THE CONSTITUTIONAL PROTECTION OF ECONOMIC AND PROPERTY RIGHTS

The Framers thought that the protection of private property was an essential ingredient in the maintenance of a free society. The Constitution protects private property in several places perhaps most significantly in the so-called takings clause of the 5th amendment of the Constitution, which states, "nor shall private property be taken for public use, without just compensation," and in the due process clauses of the 5th and 14th amendments, which stipulate that no government shall deprive any person of "life, liberty or property, without due process of law."

While neither the takings clause jurisprudence of the Supreme Court, nor its due process jurisprudence as applied to economic regulation, can be reduced to simple formulae, in broad terms these areas of constitutional analysis have been relatively stable for almost 60 years. The due process protection for private property has come to be understood as the basic requirement that a statute or regulation regulating economic activity or the use of property must plausibly advance some legitimate governmental objective. This requirement, in turn, has two subparts: The objective that the statute purports to advance must be a legitimate governmental goal, and the restriction on economic behavior or property use must plausibly promote that goal.

In the modern era, the Court has applied "rational basis" review to economic or property regulation challenged on due process grounds, meaning that it has broadly construed the legitimate objectives of government and as largely deferred to the legislature the question of whether the regulation serves one of those objectives. So long as a rational legislature might have concluded that the regulation advances a legitimate objective, under rational basis review the regulation will stand. This contrasts with "strict scrutiny" and "middle tier scrutiny," more stringent standards of review that are reserved for issues of race discrimination, gender discrimination, interference with fundamental interests such as free speech, the free exercise of religion, and privacy.

With respect to the takings clause, the prohibition against the taking of private property has never been understood to prohibit the legitimate regulation of private property in the public interest. To be sure, it is not possible to locate the exact dividing line between the realm of valid regulation from the realm in which the government may act, if it can at all, only upon the payment of just compensation. As the Supreme Court has said, "the question of what constitutes a "taking" of property for purposes of the Fifth Amendment has proved to be a source of considerable difficulty."


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3 For a succinct summary of the conventional analysis of economic and property use regulation, including a discussion of several of the Supreme Court's recent significant decisions, see Frank Michelman, "Takings, 1987," 88 Columbia L. Rev. 1600 (1988).
This said, it is still possible to advance several generalizations about the current interpretation of this clause of the Constitution. First, the analysis of when property has been "taken," instead of legitimately regulated, focuses on the nature of the government's action and on the grievousness of the impact of that action on complaining owner. See e.g., *Penn Central Transp. Co.*, 438 U.S. at 124. Second, as our Nation has become an increasingly industrialized, urbanized, and populated society, the Court has recognized that society's capacity, through its elected officials, to regulate corporate and commercial behavior in the interests of such concerns as worker health and safety, environmental protection, economic stability, minimum wages, consumer protection, Social Security, and public health has had to grow apace. Id.; see also Schwartz, "The New Right and the Constitution" (1990) at 98–136.

Until recently, this general outline was so widely accepted that an examination of a nominee's views on the constitutional treatment of economic and property rights played virtually no role in Supreme Court confirmations. However, if we go back in our country's history, we can find a different approach to the due process jurisprudence that some energetic scholars on the far right are attempting to reinvigorate. If they succeed, the Court will begin to strike down economic regulatory statutes under that clause of the Constitution. In the takings clause area, similar efforts are being made to persuade the Court that many more laws and regulations should be struck down. In both cases, the agenda of this group of scholars and others is to create an activist court in the areas of economic and property rights.

With respect to due process, the earlier jurisprudence is frequently called "the Lochner era," after the case of *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* decided that a New York law setting maximum hours that bakers could work infringed on the "liberty of contract" protected by the due process clause of the 14th amendment, because the restriction was not significantly related to any legitimate health or welfare objective of government. *Lochner* typified a series of decisions, extending from the 1880's into the 1930's, in which the courts took it upon themselves to evaluate whether economic regulatory legislation conformed to the judges' understanding of the public welfare or, in other words, whether the legislation was within the legitimate "police power" of the government.

Although the Supreme Court decisively rejected the *Lochner* approach in 1937, lately a group of libertarian scholars has been seeking to revive the *Lochner* approach. One of these scholars is Stephen Macedo. In "The New Right versus the Constitution" (1987), Professor Macedo lays out a case against the "double standard" currently employed by the Court, whereby laws in the area of economic and property regulation are reviewed under the lower, rational basis test, whereas laws infringing on fundamental interests, such as freedom of speech and of privacy, are reviewed under the higher strict scrutiny and middle-tier tests.

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4 The landmark decision is *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).
A prominent spokesman for invigorating the takings clause is Richard Epstein. In "Takings" (1986), he describes an approach to the Constitution that would, in his own words:

render constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers’ compensation laws, transfer payments, progressive taxation. ("Takings," at X.)

In describing his thesis, Professor Epstein quite forthrightly says, "I shall advocate a level of judicial intervention far greater than we now have, indeed far greater than we ever have had." (Id., at 30.) That level of intervention would extend even beyond the remarkable list that Professor Epstein provides, for it would subject to strict judicial scrutiny a wide number of laws dealing with environmental protection from hazardous substances and other kinds of pollution as well as laws addressing global environmental problems, such as ozone depletion and global warming. While not all such laws would be struck down, a fair number of them would be, and all would be placed in serious doubt.

An activist Supreme Court of this dimension may strike many as well beyond the realm of imagination. Tragically, they are mistaken. Such a Court is already being actively imagined by followers of Macedo and Epstein, and it is on the agenda of energetic academics and scholars, as well as of individuals with significant influence in the executive branch. This reconnaissance is not being reported by left-wing interest groups, but even by some conservatives.

One such conservative observer is Charles Fried, the Solicitor General during the last years of the Reagan administration. In his book, "Order and Law" (1991), he describes the agenda of a powerful minority within the Republican party. One aspect of that agenda relates to the takings clause. General Fried reports that the Attorney General and "his young advisers,"

many drawn from the ranks of the then 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: to use the takings clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay compensation as for a taking of private property every time its regulations impinged too severely on a property right—limiting the possible uses for a parcel of land or restricting or tying up a business in regulatory red tape. If the government labored under so severe an obligation, there would be, to say the least, much less regulation. ("Order and Law" (1991) at 183.)

This agenda will not be accomplished primarily by persuading existing judges to change their views. Instead, as with other aspects of the agenda, such as increasing the state’s authority to regulate in areas currently protected by constitutional privacy doctrine, including matters of family values and norms, the most significant
strategy is to appoint judges and Justices sympathetic to the agenda.\(^5\)

Glimpses of the activist economic and property rights agenda are beginning to emerge in judicial decisions, although its inroads are less well advanced than are the privacy-related agenda items of the ultra-conservative right, largely because individual and family privacy was the first object of assault by this ultra-conservative group of scholars and intellectuals. Still, we can see some suggestions of changes underway. See, e.g., *Nollan v. California Coastal Com.*, 483 U.S. 825 (1987).\(^6\)

If the ultra-conservative agenda succeeds, the consequences would be enormous, as General Fried suggests. As I put the matter, in a discussion with Judge Thomas on the first day of his testimony:

> The **CHAIRMAN.** As I said earlier, * * * [there are] those who want to sort of raise up the economic protections * * * to make it harder for Government to regulate them without paying [businesses and corporations], which is a multibillion-dollar change in the law * * * were Mr. Epstein’s views [to] take place, [it would be] a multibillion-dollar expense for the taxpayers if they wanted to continue to regulate the way we now regulate and consider reasonable. (Transcript, Sept. 10, at 148.)

**A. JUDGE THOMAS’ SPEECHES ON ECONOMIC AND PROPERTY RIGHTS SUGGESTED HE HELD ULTRA-CONSERVATIVE VIEWS**

Judge Thomas' speeches gave the committee several reasons to believe he was sympathetic to the views just described. To begin with, several of the prominent scholars promoting an activist Court in the area of economic and property rights employ natural law terminology, similar to that which Judge Thomas has embraced. In urging a return to the "principled activism" of the *Lochner* era, Stephen Macedo invokes the natural law background of the Constitution:

> The main sources of the political ideas of the founding generation were the authorities Edward Coke and William Blackstone and the great classical liberal political theorist John Locke. All three accepted the political centrality of "natural law" morality. * * * Most importantly for the argument at hand, in the period of the revolution, the "higher law," or natural moral law, was held to embody judicially enforceable limits on legislatures and positive law. ("The New Right v. The Constitution" (1987) at 44-45.)

And Richard Epstein, in arguing for an invigorated Takings Clause jurisprudence, says that "the political tradition in which I operate, and to which the takings clause itself is bound, rests upon

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\(^5\) For a discussion of this strategy in the privacy context, see the Administration’s Working Group on the Family (1986) at 12.

\(^6\) This 5-4 opinion, authorized by Justice Scalia, hints that some Justices, led by Justice Scalia, are willing to apply middle-tier scrutiny to laws regulating property use. The case is analyzed in Michelman, "Takings, 1987," 88 Columbia L. Rev. 1600 (1988). Since *Nollan*, Justices Kennedy and Souter have replaced Justices Powell and Brennan.
a theory of 'natural rights.'” (“Takings” at 5.) Indeed, I have been unable to find any contemporary scholar who writes or speaks about both natural law and economic rights who is not convinced that the Supreme Court’s double-standard, whereby privacy and other rights receive heightened protection and economic rights receive lower scrutiny, is a profound mistake. Nor have I been able to find one who does not urge the Court to become more activist in the area of economic and property rights.

Because Judge Thomas is another individual who has written about both natural law and economic rights, I believed it necessary to inquire more specifically into his views to determine whether he did indeed advocate the arguments of Macedo, Epstein and others. The presumption that he did entertain such views was strong. Judge Thomas had expressly said he has admired these arguments. In a speech to the Pacific Research Institute, Judge Thomas had announced that:

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. (Speech to the Pacific Research Institute, August 10, 1987, at 16.)

He immediately followed this endorsement with a qualifying statement: “But the libertarian argument [of Macedo and others] 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.” (Id.) Before the hearings, however, it was difficult to know how significant a qualifying statement this was. After all, the “libertarian argument” for an activist Supreme Court is opposed to judges making “policy,” too. That argument asserts that economic and property rights are protected as a matter of natural and constitutional law—it seeks to remove its conception of economic and property rights from the realm of governmental policy-making, and to put them beyond the reach of policy-makers.7

The day after the Pacific Research Institute Speech, Judge Thomas gave another speech on this theme. In is, he criticized government’s lack of respect for economic rights:

My point is not to denigrate the Fourteenth Amendment. Rather, what we need to emphasize is that the entire Constitution is a bill of rights; and economic rights are protected as much as any other rights. (Speech to the ABA Business Law Section, August 11, 1987, at 9.)

This last statement is, of course, not the current law, as Judge Thomas quite explicitly acknowledged in an exchange during his

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7 A second place where Judge Thomas expressed misgivings about the “libertarian argument” was in a speech to the Cato Institute, where he said:

"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." (Speech to the Cato Institute, April 23, 1987, at 8-9.)

It is hard to tell, however, whether Judge Thomas' closing skeptical remark would be the same if he were on the Court, helping to shape and control its activism.
testimony involving myself, Senator Brown and Judge Thomas. (Transcript, Sept. 13, 63–70, 120–27.) It is, however, quite consistent with the rhetoric of the ultra-conservation activists, who want to jettison the “double standard” and produce a jurisprudence in which the same heightened judicial scrutiny applicable to free speech and privacy claims is also applicable to takings or economic due process claims.

B. JUDGE THOMAS DISAVOWED ANY AGENDA IN THE AREAS OF PROPERTY AND ECONOMIC RIGHTS

In my view, Judge Thomas’ testimony put to rest suspicions that he would begin his service on the Court with a conscious agenda to change the current law as it pertains to economic due process.

With respect to the due process jurisprudence and the *Lochner* era, questions on this subject represented one of the few times during the hearings when Judge Thomas declared his present view that a case or cases were “correctly decided,” as opposed to more equivocal replies, such as that he had no reason to challenge them, or that he did not quarrel with them.

In an exchange with Senator Metzenbaum, Judge Thomas said:

> No, Senator. * * * [L]et me address the constitutional point first. I have indicated that I believe that the Court’s post-*Lochner* decisions are the correct decisions; that those cases were appropriately decided; that the Court is not a super-legislature to second-guess the very complicated social and economic decisionmaking of the legislative and executive branches. (Transcript, Sept. 16, at 21.)

And in an earlier exchange with Senator Heflin, Judge Thomas had said much the same:

> * * * 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 super-legislature over this body or the political branches. (Transcript, Sept. 11, at 143.)

His testimony with respect to the takings clause is somewhat more ambiguous. In several exchanges, Judge Thomas acknowledged that here, unlike the due process area, there is an ultra-conservative movement underway in the judicial system, and not just in academic writings. What is more, in these exchanges, he reverted to more equivocal statements, such as “I have no quarrel with,” perhaps suggesting more willingness to change the law in these areas than in the due process area.

In an exchange with Senator Brown, Judge Thomas discussed the current law respecting economic and property rights.

> Senator Brown. I guess I would like an indication from you as to whether or not you think property rights deserve a lesser protection in the Constitution, greater protection under the Constitution than other rights, or whether it is a balancing between rights when these questions arise. Would you share with us your view on that?

> Judge Thomas. Senator, my point has been that property rights; of course, deserve some protection, and I think
they are, as are our other rights, important rights. The Court in looking at the economic regulations of our economy and our society has attempted to move away from certainly the *Lochner* era cases and not as a super-legislature. And I indicated that that is appropriate, particularly in the area as I have noted—the health and welfare, wage and hour cases.

I think that some of those cases, the area, I think there is some developing in the taking area, and perhaps if I am fortunate enough to be confirmed to the Court, perhaps I would be called upon to rule on those issues. But I would be concerned about the diminishment or the diminishing, diminution of any rights in our society. But that is not to say in any way that I disagree with the standards that the Court applies to protecting those rights today.” (Transcript, Sept. 11, at 154-155.)

Senator Brown returned to this line of questioning later in the hearings.

Senator *Brown*. Do you find laid out in our Constitution language that calls for a second-class level of protection for property rights?

Judge *Thomas*. Senator, I think that we have certain— as we have discussed in these hearings, I have said in my own writings that there should be a recognition of property rights—economic rights, and I was talking in that case more about my grandfather and his ability to, as you say, earn his living, not be denied that.

But I think what the courts have done in the regulation of the social and economic affairs of our country has been—and I think appropriately so. As I have noted, I have no quarrel with the equal protection analysis that the Court uses. The Court has tried to defer to the decision of the legislature. In other words, the balances should be struck by this body or by the political branches and not second-guessed by the courts. I have no reason to quarrel with that approach. It recognizes that the considerations are very complex and involve any number of factors that are best left to the legislative branch.

Senator *Brown*. In relation to the comments by Professor Tribe * * * and Justice Stewart, when they conclude that the dichotomy between personal rights and property rights is a false one, would you agree with that? Do you find yourself in agreement with that? Do you have any observations about that?

Judge *Thomas*. Senator, I think certainly I have not re-examined that or looked at that as a judge. * * * I think that those are complicated decisions. We value our ability to own property and to engage in work. But there is a balancing that must take place, and I think that the courts have appropriately chosen to defer to the Congress or to the legislature, the political branches, in making those balances. (Transcript, Sept. 13, at 66-68.)
This exchange led me to return once more to the takings clause issue, because it was unclear whether Judge Thomas meant to say that he had no quarrel with the Court’s current equal protection analysis, as it applies to economic regulation, or whether he meant to include the takings clause analysis, too.

The CHAIRMAN. Okay. Let’s switch to what I thought was a very, very interesting and informative exchange you had with Senator Brown earlier. In your exchange with Senator Brown, Senator Brown accurately stated the law and the stated decisions in the Court as to where the law now stands with regard to the standard of review that judges use in determining whether an action taken by the Government against an individual is constitutional, against their individual rights of privacy or against their individual right relating to their property.

And you said you have no quarrel with what the Court does, how the Court deals now with regard to regulations of property. You said that this is where the Court should defer to the legislative branch. And you went on to say, ‘I don’t quarrel with this approach.’ That was the quote I do remember writing precisely.

Now, there are always two questions in analyzing whether a regulation is valid, whether the regulation by the Government to regulate somebody’s property, take their property, is valid.

One of the tests they apply is whether the object that is being served by the law, taking the property, is an object that falls within the scope of police power. And the other, as you well know, is whether the means chosen to legislate accomplishes an objective that is reasonably related to the reason they say they are doing this thing.

Now, Judge, the Court’s current approach is to give the legislature a broad latitude in both these areas—the area of determining whether or not the means is an appropriate means and whether or not the objective being served is an objective that falls within the police power. That is the state of the law now, and they essentially [use] a rational basis test or a much lower standard.

So my question is this: Do you agree with the state of the law as it is now with regard to property, as I understood you to say it? Or do you agree with Senator Brown who said it is wrong the way we are doing it now; property and the test applied to the taking of property should be elevated to the same level as other constitutional rights—i.e., the case he cited, the right to privacy in Moore?

What is your position?

Judge Thomas. Senator, I think that I indicated to Senator Brown as well as, I believe, to the question from Senator DeConcini on equal protection analysis, that the cur-
rent manner of equal protection analysis I have no quarrel with. * * * With respect to the area of the current law, in the area of taking, I have no basis to quarrel with that either. (Transcript, Sept. 13, at 120-125.)

On the basis of this testimony, it amounts to mere guesswork to try to determine whether Judge Thomas rejects the ultra-conservative approach to the takings clause being promoted by Professor Epstein and others, or whether he is being abundantly cautious because he is aware that takings clause cases come to the Court with some regularity—a caution I believe is unnecessary, but which would be consistent with his other testimony.

Short of explicitly rejecting the ultra-conservative school of thought, Judge Thomas did expressly disclaim being a current participant in that school of thought. After I had outlined both the ultra-conservative due process jurisprudence and the ultra-conservative takings clause jurisprudence, Judge Thomas testified:

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. (Transcript, Sept. 10, at 146-47.)

My conclusion is that here, as in other areas, Judge Thomas simply has not worked through his views in any systematic way. As a result, he was unable to engage the committee in an extended discussion of those views. So what are we to make of this state of affairs?

In his speeches and writings, Judge Thomas has expressed an attraction to some extreme views. These views fit within and are consistent with a systematic program being pursuant by a fervent minority of scholars and others who seek nothing less than a profound restructuring of settled jurisprudence with respect to property and economic rights.

Judge Thomas says he has no current agenda here, and that he is not a member of this school of thought, and I believe him. In this, as in other areas, Judge Thomas will have to develop a judicial philosophy. The question is: will he grow in the direction of the systematic agenda and program of the ultra-conservative right? While no one can know for sure, we can know that Judge Thomas's exposure to and his publicly stated affinity for these ideas have laid an intellectual foundation upon which he might well build. That foundation is already a part of his own process of maturation. Once he is on the Court, he will be free to call on that foundation in building a full blown judicial philosophy.

I am not saying that Judge Thomas will in fact turn in this direction, or even that it is likely he will. But, the consequences of his going down this road would be severe, indeed. In the areas of environmental protection, health and safety, social security and health care, as well as other forms of economic regulation, the agenda of the ultra-conservative movement is to place strict limits on society's authority to regulate.

Were Judge Thomas's judicial philosophy more developed, I might have had less reason for concern in this area. As it is, the very lack of its firm development raises the prospect that turning
this way is a possibility. It is a turn that would be extremely haz-
ardous for the country.

PART FOUR: JUDGE THOMAS' VIEWS ON THE SEPARATION OF POWERS
AND THE ROLE OF CONGRESS

The doctrine of separation of powers refers to the concept that
each branch of our tripartite government has its own role, and that
no branch shall exercise the powers of the other two. The separa-
tion of powers, and the system of checks and balances of each
branch over the others, is a central feature—and a critical safe-
guard—of our constitutional Government.

Coming into the hearings, I was profoundly troubled by Judge
Thomas's apparent support of a radical view of separation of
powers, accompanied by a strong hostility to Congress. Just as
Judge Thomas had seemingly aligned himself with those who seek
to use the takings clause of the fifth amendment to limit the power
of society to regulate business, he appeared also to join those seek-
ing to limit the power of society to regulate by revitalizing the doc-
trine of separation of powers.

This group believes that our current governmental structure per-
mits agencies that are not under the President's control to exercise
"Executive" power. Because these independent agencies may act
counter to the President's desire, executive power is, in their view,
"diluted." According to this school of thought it is imperative not
only that executive power be kept from the other two branches of
government, but that it be exercised only by the President or those
directed by him.

Former Solicitor General Charles Fried has written about his
years inside the Reagan Justice Department, and—to use his
word—the "revolutionaries" who have a specific agenda with re-
spect to separation of powers:

To the revolutionaries in the Reagan administration, the
independence of the independent regulatory commissions
(for instance, the ICC, FTC, FCC, SEC, and, most imposing-
ly, Federal Reserve Board) was an offense against the prin-
ciples of the unitary executive and of the separation of
powers. (Fried, C., Order & Law (1991) at 154.)

Judge Thomas appeared to share this view that independent
agencies violated the doctrine of separation of powers. In a 1988
speech, he said:

Unfortunately, conservative heroes such as the Chief
Justice [Rehnquist] failed not only conservatives but all
Americans in the most important court case since Brown
v. Board of Education. I refer of course to the independent
counsel case, Morrison v. Olson. As we have seen in recent
months, we can no longer rely on conservative figures to
advance our cause. Our hearts and minds must support
conservative principles and ideas. * * * Justice Antonin
Scalia's remarkable dissent in the Supreme Court case
points the way toward those principles and ideas. He indi-
cates how again we might relate natural rights to demo-
cratic self-government and thus protect a regime of indi-
individual rights. (Speech to the Pacific Research Institute, August 4, 1988, at 6-8.) At the hearing, I asked Judge Thomas about his statement:

"The Chairman. *** do [you] consider Morrison v. Olson the most important case since Brown v. Board of Education?

Judge Thomas. I think it is one of the most important cases. *** I say that because I think the cases that deal with the structure of our government are important cases.

The Chairman. *** As you know, there is a group of people beyond yourself who consider the independent counsel case very important and maybe even the most important case since Brown, and I am thinking of the libertarians who are devotees of Mr. Epstein and others, those people who have two major items on their agenda and who state them very forthrightly. One is to use the takings clause of the 5th amendment to limit the power of society to regulate. You and I have talked about that. And the other is to limit the power of society to regulate by revitalizing the doctrine of separation of powers.

Now, when you gave that speech at the Pacific Research Institute, did you realize the significance of the independent counsel case for the people with what I will characterize as with these views?

Judge Thomas. This is the first time I have heard of that. I have heard of the takings argument, but I haven't heard of the separation of powers argument.

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The Chairman. *** If Justice Scalia's opinion, the lone dissent that you found so remarkable—and that is your word, remarkable—in the Morrison case, had been the majority opinion, all of these agencies would be unconstitutional, *** including the Federal Reserve Board, *** because the rationale of Scalia's opinion does not stop at the independent counsel statute, it would outlaw all independent agencies.

Now, Judge, do you believe that the separation of powers requires the abolition of independent agencies in the Federal Government?

Judge Thomas. Senator, I have not thought that. ***

*** I was not involved in that debate and was not aware that there was a relationship or there was a second agenda to Morrison v. Olson. This is news to me, as you explain it today." (Transcript, Sept. 16, at 153-58.)

Having offered the highest praise to Justice Scalia's argument on this most important of cases—important according to Judge Thomas for the very reason that it dealt with the structure of government—Judge Thomas did not appreciate the radical change this argument would have, if given effect, on our Government's current structure.
While I accept his statement that he was not aware of this aspect of the radical rights's agenda, I remain troubled by the consequences should Judge Thomas apply these views as a member of the Court. In sum, Judge Thomas left me without any sense of how he would approach cases determining the future structure of our Government.

In addition, Judge Thomas has repeatedly expressed the view that Congress has acted without constitutional authority, most notably in attempting to remedy discrimination. He has argued that Congress has exceeded its power under the commerce clause or section 5 of the 14th amendment in enacting some civil rights legislation (see part 5 below). These arguments, if given effect, would cause major pieces of legislation in the areas of voting rights, employment, and housing to be held unconstitutional. Should Judge Thomas hold this view, as his prior statements suggested, he would not be an acceptable nominee to the Supreme Court in my view.

At the hearing, Judge Thomas was asked his opinion of both the Court’s interpretation of both the interstate commerce clause and Katzenbach v. Morgan, the case in which the Court held Congress had the power under section 5 of the 14th amendment to invalidate state laws that did not violate the equal protection clause.

With respect to the commerce clause, Judge Thomas said:

I don’t have any objective or basis to object or at this point any quarrel with the way that the Court has interpreted the interstate commerce clause. (Transcript, Sept. 13, at 69.)

With respect to Katzenbach v. Morgan, Judge Thomas said:

Judge THOMAS. Senator, I did read that case. Again, I do not remember all the details of it and I cannot and did not have a basis or any quarrel with the case or the result in the case.

Senator DeCONCINI. So, you feel that is, in your philosophy, a proper interpretation of the constitution of this particular section 5?

Judge THOMAS. I just have no quarrel with it, Senator. I do not object to it.

Senator DeCONCINI. When you say you have no quarrel, you mean that you agree with it, is that fair to say? I mean I do not want—

Judge THOMAS. I mean I do not disagree with it. I do not have a basis to disagree with it and I have not raised any objections about it. (transcript, Sept. 13, at 148-49.)

I accept Judge Thomas’ testimony that he does not at this time quarrel with the Court’s decisions under the commerce clause or section 5 of the 14th amendment. But, given his prior condemnation of Congress’s attempts to remedy discrimination, I do not believe remarks acquiescing to the current state of the law—remarks that fall short of an affirmative statement of what he believes are adequate. Judge Thomas failed to say what he believes the scope of Congress’s powers are, of how he would go about determining the proper role of Congress in this or other areas.
Rigid separation of powers and a constricted notion of the commerce clause and section 5 of the 14th amendment all lead in the same direction—to a radically restructured Federal Government in which the power of Congress to regulate business, the economy, the environment, and the public safety and health would be vastly reduced—. Judge Thomas in his writings and speeches—appears to accept the premises of this approach. I accept Judge Thomas' statement that he has no current agenda to change the Court's direction in these areas. Yet I fear that he might end up in the same place as these writers when he faces cases that determine the structure of our Government and the power of each branch as a member of the Court.

PART FIVE: JUDGE THOMAS' VIEWS ON CIVIL RIGHTS

A. JUDGE THOMAS' VIEWS ON GENDER DISCRIMINATION

The central debate in the application of the equal protection clause of the 14th amendment to gender discrimination concerns the standard of review that should apply in such cases.

Prior to the 1970's, the Supreme Court used a "reasonableness" test to uphold a variety of onerous and stereotypical legislative classifications based on gender. In 1873, for example, the Supreme Court found it reasonable to exclude women from the practice of law, with one Justice relying on natural law to reach that result. *(Bradwell v Illinois, 83 U.S. 130 (1873).)* In 1924, the Court found no "unreasonable * * * classification" in a law that excluded women, "considering their more delicate organism," from late-evening restaurant employment. *(Radice v. New York, 264 U.S. 293, 294, 296 (1924)).* And in 1961, a unanimous Supreme Court found a state's exemption of women from jury service, unless they volunteered, to be based on a "reasonable classification" in light of how, "[d]espite [their] enlightened emancipation," women are "still * * * the center of home and family life." *(Hoyt v. Florida, 368 U.S. 57, 61-62 (1961).)*

But beginning in 1971, with the decision in *Reed v. Reed*, 404 U.S. 71 (1971), and continuing in 1976, with the decision in *Craig v. Boren*, 429 U.S. 190 (1976), the Court broke from this older view and began to utilize a middle-tier standard of review for discriminatory laws. This standard is more exacting than the "rational basis" test applied to economic regulations, yet less stringent than the "strict scrutiny" test applied in the review of cases of discrimination against racial minorities. Under this standard of review, the Court determines whether the classification is "substantially related" to an "important governmental objective." It is usually termed "middle-tier scrutiny." It recognizes that women have been subject-ed to discrimination on the basis of archaic stereotypes and other notions of limited social roles and abilities.

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8 For discussion of the rational basis test for economic regulation, see part 3 above.
1. Some of Judge Thomas' views, as expressed prior to the hearings, could appear hostile to issues of gender discrimination

In an article based on interviews with Thomas, published in 1987, Juan Williams wrote that Thomas said "blacks and women are generally unprepared to do certain kinds of work by their own choice. It could be that blacks choose not to study chemical engineering, and that women choose to have babies instead of going to medical school." ("A Question of Fairness," The Atlantic Monthly, February 1987 at 79.)

In a 1988 article in the Lincoln Review, Thomas implied that women should not be able to take advantage of anti-discrimination laws. In discussing a recent book by Thomas Sowell, who argues that the absence of women in certain jobs is due to their choice rather than to discrimination, then head of EEOC Thomas wrote:

[Sowell's book] has a useful, concise discussion of discrimination faced by women. We will not here attempt to summarize it except to note that by analyzing all the statistics and examining the role of marriage on wage earning for both men and women, Sowell presents a much-needed antidote to cliches about women's earnings and professional status. In any event, women cannot be understood as though they were a racial minority group, or any kind of minority at all. ("Thomas Sowell and the Heritage of Lincoln: Ethnicity and Individual Freedom," Lincoln Review (Winter 1988).)

These views could be taken to reflect the sort of outmoded stereotypes that were one of the main objects of concern in the Court's developing middle-tier scrutiny. As such, they could indicate a predisposition against the use of middle-tier scrutiny in cases of gender discrimination.

2. In his testimony, Judge Thomas expressed no hostility toward the middle-tier standard of review

At the hearings, Judge Thomas was asked specifically about the statement just quoted:

Senator DeCONCINI. Sowell also explained pay inequities between the genders by claiming that "Women are typically not educated as often in such highly paid fields of mathematics, science, and engineering, nor attracted to physically taxing and well-paid fields such as construction work, lumber-jacking, coal mining and the like."

What are your thoughts about that conclusion?

Judge THOMAS. Well, I can't say whether or not women are attracted or not attracted to those areas. I think that is a normative comment there. * * *

* * * * * * * * * * * *

* * * Again, my point in saying that his argument could be an anecdote to the debate is because he attempts to disaggregate and to not simply say all of the reasons. It is not to say that I adopted * * * all of his conclusions and
his assertions. I simply don't and did not at that time. (Transcript, Sept. 11, at 64-65.)

When asked specifically about the standard of review for claims of gender discrimination, Judge Thomas said "Senator, I have no reason and had no reason to question or to disagree with the three-tier approach." (Transcript, Sept. 11, at 59.)

These answers once again express Judge Thomas' recurring theme: He has no reason to question, or disagree with, or quarrel with current constitutional interpretation. Yet this is not particularly reassuring given his strongly expressed views before the hearings began. Unfortunately, here as elsewhere, we are left to speculate about the direction in which Judge Thomas will move once he begins to give life to his dispositions and inchoate judicial inclinations.

B. THE SUPREME COURT'S TRADITIONAL APPROACH TO ISSUES OF CIVIL RIGHTS AND EQUAL PROTECTION ARE UNDER ATTACK

The issues of race discrimination relevant to the confirmation of a Supreme Court nominee need to be carefully distinguished from the policy disputes relevant to the work of the Congress and the Executive as they debate the best and most equitable programs for addressing the problems of race discrimination in our society. Under our Constitution, the Supreme Court has four crucial functions in the area of race discrimination: To determine whether legislative and executive actions are discriminatory by reviewing those actions under the equal protection clause; to interpret the lawfully enacted civil rights legislation in a manner faithful to congressional intent; to evaluate administrative programs, when they are challenged, to ensure they are being administered consistent with congressional intent; and to provide guidance to the lower courts concerning appropriate remedies when violations of the statutes or the Constitution have been found.

In a series of important decisions, the Court has ratified the constitutional authority of the Congress to enact carefully constructed and limited affirmative action programs, or to diversify opportunities for participation in government-sponsored or supervised activities. (See, e.g., Katzenbach v. Morgan 384 U.S. 641 (1966); Regents of the University of Cal. v. Bakke, 438 U.S. 265 (1978); Fullilove v. Klutznick, 448 U.S. 448 (1980); Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 1467 (1990).) Over the past three decades, the Court also implemented civil rights statutes in a manner consistent with their remedial purposes, reading them to authorize the use of effective, yet carefully drawn and limited, remedies for discrimination on both a voluntary and, where past discrimination has been proven by litigation or settlement of litigation, on a mandatory basis. (See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Runyon v. McCrory, 427 U.S. 160 (1976); United Steelworkers of America, AFL-CIO-CC v. Weber, 443 U.S. 193 (1979); Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987).)

In recent years, however, the increasing weight of conservative jurists on the Supreme Court has been felt with respect to all of these judicial functions. With respect to the issues of statutory interpretation of existing civil rights legislation, the Court has al-
ready undermined its earlier rulings in a number of areas, significantly weakening the effectiveness of this legislation.\textsuperscript{9} In other areas, including the constitutional authority of Congress and the Executive to enact and implement new remedial legislation, the Court stands on the verge of wholly reversing its course.

C. JUDGE THOMAS' PRONOUNCEMENTS PRIOR TO THE HEARINGS SUGGESTED HE WAS HOSTILE TO THE COURT'S TRADITIONAL JURISPRUDENCE IN THE AREA OF RACE DISCRIMINATION

As Chairman of the EEOC, Judge Thomas was a strong supporter of stiff penalties for individuals who had been found guilty of discrimination, as well as for remedies that would make whole individuals who could prove that they themselves had been victims of discrimination. However, some of his statements raised the concern that he would limit Congress' power to formulate permissible responses to societal discrimination. For example, in a 1988 book, Thomas characterized congressional attempts to remedy discrimination as ignoring constitutional mandates:

Not that there is a great deal of principle in Congress itself. What can one expect of a Congress that would pass the ethnic set-aside law the Court upheld in \textit{Fullilove v. Klutznick}. What the two branches were saying is this: the Court can reinterpret civil rights laws to create schemes of racial preference where none was ever contemplated. And Congress can devise laws justifying racial and ethnic set-asides on the basis of its powers to regulate interstate commerce. Any 'equal protection component' of the Fifth Amendment due process clause is irrelevant.” (“Civil Rights as a Principle Versus Civil Rights as an Interest,” “Reassessing the Reagan Years” (1988) at 396.)

Judge Thomas also specifically criticized the Supreme Court's decisions acknowledging the constitutionality of appropriately drawn affirmative action programs:

The Court has made rather creative interpretations of equal protection and legislative intent in a number of civil rights cases beginning with \textit{Regents of the University of California v. Bakke}. The egregious example was \textit{United Steel Workers v. Weber}, back in 1979, followed by recent decisions such as \textit{Local 28 of the Sheet Metal Workers' International Association v. EEOC}, and \textit{Johnson v. Transportation Agency, Santa Clara County}. (Id. at 395.)

Judge Thomas singled out the decision in \textit{Johnson v. Transportation Agency, Santa Clara County} for particularly strong criticism, and urged lower courts to follow the dissent rather than the majority decision in the case:

Let me commend to you Justice Scalia's dissent, which I hope will provide guidance for lower courts and a possible

majority in future decisions. (Speech to the Cato Institute Speech, April 23, 1987 at 21.)

During the hearings, Judge Thomas frequently responded to questions about his prior statements by drawing a distinction between his views as a policy advocate and the views he found appropriate to the functioning of a judge or Justice. In this area, however, Judge Thomas had made it plain that some of his critical views were based on his specific belief that the Court had misinterpreted congressional intent, clearly an indication that he was speaking from a judicial perspective, if not as a judge. In sum, there was substantial reason prior to the hearings to question Judge Thomas on his views concerning the constitutional and other judicial issues in civil rights and discrimination cases.

D. JUDGE THOMAS' TESTIMONY LEFT UNANSWERED QUESTIONS AS TO HIS JUDICIAL APPROACH TO RACE DISCRIMINATION CASES

In part, Judge Thomas responded to questions about his prior views by emphasizing that they were policy positions, not the products of judicial reasoning. Even so, it was evident that in this one area of jurisprudence, he does have some considered views, and that they diverge from those of important Supreme Court decisions. For example:

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

Judge Thomas. As I indicated earlier, Senator, throughout my adult file, I have advocated the inclusion of those who have been excluded. * * *

* * * * * * * * * *

The difficulty comes with how far do you go without being unfair to others who have not discriminated or unfair to the person who is excluded, and at that range I thought—and, again, this was the policy position that I advocated—that it was appropriate to draw the line at preferences and goals and timetables and quotas. (Transcript, Sept. 11, at 164-65.)

Asked further about the issue, Judge Thomas had the following exchange:

Senator Specter. * * * In a context where blacks have been egregiously discriminated against, it is clear that that is going to happen in the future under the same circumstances, and the way to prevent future victims is to set the goal, and my question to you is, isn’t that a reasonable course which the Federal courts followed and the Supreme Court upheld, and, of course, which you disagreed with?
Judge Thomas. It is certainly the course that the Supreme Court has upheld, and I disagree with that as certainly a policy-maker. (Transcript, Sept. 13, at 27.)

And, when Judge Thomas was questioned about his criticism of the Johnson decision, and his advocacy of the views of the dissent, he responded by saying:

Senator, when one is involved in the midst of a debate in the executive branch and advocating a point of view, as I alluded to earlier, one continues to advocate that point of view as an executive. When I moved to the judiciary, as I noted earlier, I ceased advocating those points of views. I think that you can have the comfort of your position, and I felt that in those cases that the constitutional intent was one of nondiscrimination that was explicit in the language of the statute and clear in the language of the legislative history. That was my reading of constitutional intent. Of course, the Court took a different point of view, those of us who may not have agreed with that point of view simply had to swallow hard and go along.” (Transcript, Sept. 11, at 119.)

As a Supreme Court Justice, of course, Judge Thomas would not have to “swallow hard and go along.” He would be in a position to give effect to his interpretation of congressional intent. Indeed, it would be his judicial responsibility to determine congressional intent. In terms of a distinction between policy-maker and judge, there is simply no reason to read congressional intent differently in one capacity or another. So his testimony provides fairly reliable evidence of where he stands, as a judge, with respect to existing civil rights legislation.

Congress is currently revisiting these statutes in large part because of recent Supreme Court decisions undermining their effectiveness. Should changes be enacted, the Supreme Court will eventually be faced with the task of interpreting these new provisions.

Then, the pertinent questions for a nominee become: Does he or she agree with the policies that have been enacted? Will he or she be faithful to and give effect to those policies? In the past, the Court has recognized that Congress’s legitimate authority to enact remedial legislation under the commerce clause, as well as under section 5 of the 14th amendment, extends beyond both the power of a court of law and beyond whatever the Justices themselves might consider wise policy.

At the hearing, Judge Thomas was asked his opinion of the Court’s interpretation of both the commerce clause and Katzenbach v. Morgan, in which the Court held Congress had broad powers under section 5 of the 14th amendment, extending even to a power to invalidate state laws that did not violate the equal protection clause as a matter of judicial enforcement. And with respect to both clauses, Judge Thomas said he had no “quarrel” or “objection” to the Court’s current interpretation. (Transcript, Sept. 13, at 69, 148-49; and see part 4 above.)

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10 I believe that in this sentence and the next sentence of the transcript, the word “constitutional” was meant to be “Congressional.”
This testimony amounts to a softening of Judge Thomas' earlier quoted views, which purported to criticize on constitutional grounds some of the Supreme Court decisions upholding affirmative action, such as Bakke, Fullilove, and Weber. It should, however, be read cautiously, for all Judge Thomas said in his testimony is that he has "no quarrel" with current interpretations of Congress' authority, interpretations which may well become crucial in the future, because it is pursuant to that authority that revisions to the civil rights statutes must be made.

In sum, the testimony provided by Judge Thomas continues to evidence some cause for concern as to how he as a justice would address issues of race discrimination.

**PART SIX: JUDGE THOMAS' VIEWS ON RELIGIOUS FREEDOM**

The Supreme Court has been divided in recent terms over the proper interpretation and analysis accorded to the first amendment's two guarantees of religious freedom—the free exercise clause and the establishment clause. The Court recently adopted, by a 5-4 vote, a much less stringent test for reviewing free exercise claims. *(Employment Div., Dept. of Human Services v. Smith 485 U.S. 660 (1988).)* Similarly, several Justices have expressed disagreement with the test currently used in reviewing establishment clause claims, although a majority has not yet voted to depart from this approach. Because this area of constitutional law is in such turmoil, and because of the nature of the freedoms at stake, I believe it is essential to understand how a nominee to the Court would approach such cases.

On entering the hearings, I had no sense of how Judge Thomas would interpret these two essential clauses by which our Constitution ensures all Americans religious freedom. This was not an area Judge Thomas had written or spoken about prior to the hearings. Unfortunately, when the hearings concluded, I still had serious concerns about Judge Thomas' approach to these issues.

**A. THE FREE EXERCISE CLAUSE**

Judge Thomas was specifically asked about the majority opinion in the *(Employment Div., Dept. of Human Services v. Smith 485 U.S. 660 (1988)* decision, where Justice Scalia announced that the Court would no longer apply strict scrutiny to free exercise claims. Under the strict scrutiny test, a law that adversely affects a religious practice, is invalid unless a "compelling state interest" justifies its application—even if the law was neutral on its face and in intent. After *Smith* however, government no longer needs a compelling reason to pass a law that restricts an individual's ability to engage in his or her religion, a merely rational reason will do. For example, prior to *Smith*, a New Mexican law forbidding the consumption of wine by minors was invalidated as it applied to minors taking communion. After *Smith*, such an application might be upheld.

In my view, the rational basis test does not afford enough protection to religious freedom. Under the rational basis test, few if any laws restricting religious freedom with be struck down. While the rights of all of us are devalued, religious minorities in particular
will suffer. I believe the *Smith* decision is an unwarranted and unwise departure from the Court's long-accepted approach in the free exercise area.

Judge Thomas admitted the *Smith* decision represents a departure from the Court's prior approach to the free exercise of religion clause, but he did not answer whether he would apply it himself:

* * * 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. (Transcript, Sept. 10, at 171).

The acknowledgment that the Court had undertaken a major doctrinal shift that one should "be watchful for" reveals nothing about Judge Thomas' own vision of the constitutional guarantee of religious freedom. Does Judge Thomas think strict scrutiny or the rational basis test is the better standard of review in these cases? Does he believe the Constitution protects religious freedom from indirect as well as direct discrimination? These questions remain unanswered. It may be that Judge Thomas would, if confirmed, act to protect the religious rights of all members of our pluralistic society, but his testimony did not so demonstrate.

B. THE ESTABLISHMENT OF RELIGION CLAUSE

Judge Thomas' testimony on the establishment of religion clause was somewhat more reassuring. Currently, the Court uses the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to review establishment clause cases. Under this test, a law does not contravene the establishment clause if it has a secular purpose, its principal or primary effect neither advances nor inhibits religion, and it does not foster an excessive government entanglement with religion. Some members of the Court have recently criticized the *Lemon* test and have suggested that the Court simply determine whether a law gives a direct benefit to a religion so as to actually or tend to establish a state religion.

At the hearing, Judge Thomas was asked whether he would apply the *Lemon* test in establishment of religion clause cases. In response, he said:

* * * I have no personal disagreement with the test[], but I say that recognizing how difficult it has been for the Court to address just the kind of problem * * * when there is this closeness of activity of the government and the activity of the church.

I think the wall of separation is an appropriate metaphor. I think we all believe that we would like to keep the government out of our beliefs, and we would want to keep a separation between our religious lives and the government.
But the Court has had a great deal of difficulty, and there is some debate on the Court as to how far you should go; whether or not there should be this complete separation; whether or not there should be some accommodation in certain circumstances; or whether or not even there should be a movement as far as just simply to the position where the government isn’t establishing a religion or coercing individuals to be involved in a certain kind of activity.

But I think it is a vibrant debate. I have an open mind with respect to the debate over the application of the Lemon v. Kurtzman test, and I recognize that the Court has applied it with some degree of difficulty. But at the same time, I am sensitive to our desires in this country to keep government and religion separated, flawed as it may be by that Jeffersonian wall of separation.” (Transcript, Sept. 11, at 179-180.)

Judge Thomas' approval of the “wall of separation” between government and religion was reassuring. His testimony on the continued use of the Lemon test, however, was more equivocal. He neither endorsed nor repudiated the test, but he noted the practical difficulty the Court has had in applying it.

**PART SEVEN: JUDGE THOMAS' VIEWS ON FREEDOM OF SPEECH**

The Supreme Court's decision this past term in Rust v. Sullivan, 111 S.Ct. 1759 (1991), raised a significant question about the Court's direction in the area of the First Amendment's guarantee of free speech. Rust involved a challenge to regulations adopted by the Secretary of Health and Human Services that prohibited women's health clinics receiving Federal funds from counseling patients about abortion, or from referring a patient elsewhere for such information, even if the patient asked for such information. If asked, doctors in such clinics were instructed to inform patients that the clinic did not think abortion was an appropriate method of family planning. The regulations provided no explicit exception where a pregnancy could endanger the health of the mother.

Chief Justice Rehnquist, in upholding the regulations, concluded that:

> the government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In doing so, the government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another. (Rust, 111 S.Ct. at 1772.)

The regulations at issue in Rust singled out one particular subject—based on its content—and prohibited doctors from discussing it with their patients, from publishing any material on it, and from referring their patients to other doctors for complete information and medical services. They even manipulated what speech may occur if a patient asked for information on this subject. If the
Court allows government to restrict—and even to script—speech engaged in as part of activities it funds, a potentially vast array of activities will be subject to restriction—from libraries to schools to public television, and so on.

Judge Thomas, when asked about the Supreme Court's recent decision in *Rust*, seemed to understand the significance of this decision:

[The concern[] would always be whether or not the Government is conditioning the exercise of constitutional rights or * * * * the engaging in conduct that we think we are free to engage in this society under receipt of Federal financial assistance.

* * * * * with the significant involvement today of Government in virtually every aspect of our lives, the potential conflict between the Government policies or between the Government and rights that we consider fundamental to us or rights that we have considered those that we have been free to exercise, where that conflict—there is more of a potential for the conflict today. And I think that we all have to be on guard when the occasions arise when the conflicts are such that fundamental rights in ways are either denigrated or conflicted or undermined or interfered with in some way. (Transcript, Sept. 13, at 10-11.)

I would have deep concerns myself if someone said that in order to receive financial assistance you are going to have to conduct your life in a particular way. (Transcript, Sept. 13, at 12.)

I accept that Judge Thomas is concerned about this issue, but I did not hear, in his testimony, a repudiation of the analysis of freedom of speech in *Rust*. Because I find the implications of *Rust* so disquieting, I asked Judge Thomas to answer in writing whether he believed the first amendment protects the conduct—doctors communicating with their patients—at issue there. Judge Thomas responded, in full, as follows:

The First Amendment clearly protects communications between doctor and patient. The Constitution limits the extent to which the federal government may directly regulate such communications. (Letter from Judge Thomas, dated September 24, 1991, at 2.)

Judge Thomas' answer states the obvious—the first amendment limits the extent to which government may directly regulate such communication. This response does not indicate at all whether Judge Thomas found the "extent" to which the *Rust* case permits regulation of communication to be acceptable as a matter of constitutional law. Judge Thomas' failure to repudiate this approach is, to me, disquieting. To me, the *Rust* decision represents an unacceptable view of the level of protection the first amendment accords our fundamental right of free speech. The Court did not change the standard used to evaluate speech or expressive conduct cases, but it achieved the same effect simply by narrowing the range of expression protected
by the first amendment in the first place. I do not believe that reducing the level protection given to our personal freedoms—however it be accomplished—is in the best interests of Americans. The Supreme Court will guide our country into the 21st century. I would like to know that the Court will move in the direction of enhancing the protection of freedom of speech. I do not know whether Judge Thomas shares this vision.

CONCLUSION

A year ago, during the Senate’s consideration of Justice Souter’s nomination, I made it clear that, with respect to judicial philosophy, the “burden of proof” was on the nominee to demonstrate his or her suitability for the Court and clearly lay out for us his or her methodology for interpreting the Constitution.

Just as the nominee must persuade the President that he or she is the “right person for the job” before winning the nomination, the nominee must persuade the Senate that he or she is the right person for the Court before receiving our votes for confirmation.

In my view, Judge Thomas has not met this burden. It is not that I know for certain that he will take the Court in troubling new directions; rather, it is that I have too many doubts about his judicial philosophy to be confident that he will not. Given what is at stake, and where the Court currently stands, it is a risk we cannot afford to take, in my view.

How did we arrive at this particular juncture? There is no question that the aggressive agenda of ultra-conservatives in the Reagan and Bush administrations—an agenda of remaking the Court’s protection for individual and property rights, and for fundamentally altering the balance of power between the branches of government—lies at the core of the dilemma. The result is that Judge Thomas is the seventh consecutive conservative Republican nominated to the Court over the past decade.

Most of our other Presidents have taken a far different approach to filling vacancies on the Court. While they have all tried to shift the Court by virtue of their power to nominate, they have also been guided by historical responsibilities to moderate their selections, and protect a diversity of views on the Court.

In this century, this tradition extends back as far as the Presidency of Herbert Hoover, a conservative Republican, who, after consulting with Senators of all views, nominated the liberal Benjamin Cardozo to the Court.

The tradition continued with Presidents Franklin Roosevelt and Harry Truman. As noted by Guido Calabresi, the Dean of the Yale Law School, who testified in favor of Judge Thomas’ nomination:

Mr. CALABRESI. I just want to say that this is an extraordinary time in the history of the Court. * * * [It] is as long a time, perhaps as there has ever been in the history of this country, certainly since the Civil War, from 1860 to 1884 was a period of equivalent time.

At other times when there has been such an extended period of time [when one party controlled the White House], the President has attempted to name people to the Court whose views are very different from his own. Presi-
dents Roosevelt and Truman, for what seemed an eternity but was only 20 years, named all the Justices and made a point of naming some Justices who were very conservative and some from the other party. Justice Reid and Justice Burn were Democrats and very conservative; Justice Burton was a Republican.

The CHAIRMAN. I doubt whether we are ever going to see that enlightenment in this administration.

Mr. CALABRESI. This administration and the past administration have not done so. Under these circumstances, they have continued to name people whom they thought would share their views, and that is their right in the first instance. (Transcript, Sept. 17, at 163-64.)

This pattern of moderation and balance continued into the Presidencies of Eisenhower, whose appointments included the moderate conservatives, John Harlan and Potter Stewart, as well as Democrat William Brennan and moderate Republican Earl Warren; Kennedy, whose appointments included the conservative Byron White, as well as the liberal Arthur Goldberg; Nixon, whose appointments included the moderate conservatives, Lewis Powell and Warren Burger, the more conservative William Rehnquist, and also the liberal Harry Blackmun; and Ford, whose sole appointment was the moderate John Paul Stevens.

The pattern stopped with the Reagan administration, and it has yet to be restored, as Dean Calabresi noted.

Dean Calabresi also noted that it is the right of a President to nominate whomever he chooses to the Court. It is not, however, an obligation of the Senate to confirm anyone whom he nominates. Under the “Advice and Consent” clause of the Constitution, the Senate is an equal partner in the job of filling Supreme Court vacancies.

When the President has selected nominees without regard to ideology, the Senate has generally deferred to the President’s selections, so long as they met professional qualifications. On the basis of the evidence provided by those Justices who have been confirmed in the past decade, this and the previous administration have decided to repudiate this pattern.

Over the past decade, the Court overall has moved decidedly to a very conservative position, more conservative than the country as a whole. It is therefore the responsibility of nominees to make plain to the Senate how they will shape the current trend. This is why it is so important that nominees be prepared to discuss with the Judiciary Committee, candidly and forthrightly, what their fundamental judicial philosophy is.

In this regard, Judge Thomas’ responses to the questions of the committee were inadequate. Many have expressed frustration at Judge Thomas’ lack of responsiveness to the committee’s questions. Others have said that vagueness and imprecision in responding is inevitable, because such an approach has become the most likely path for the nominee to win confirmation.

As I have made it very clear on many occasions, only the nominee can decide what questions he or she will or will not answer. But if this choice is the nominee’s to make, the decision about what
we do in response to the nominee’s action is for us, for the Senate, to make. I cannot force a nominee to be complete and engaging in his answers; but I am not obligated to vote for the confirmation of a nominee who fails to do so, either.

Throughout his testimony, Judge Thomas gave us many responses—but too few real answers. And let me be clear: I am not talking about his refusal to say how he would vote on Roe v. Wade. Again, I never asked Judge Thomas this question, nor am I opposing him because of his failure to answer this question when it was put to him.

Instead I am talking of the many constitutional issues on which Judge Thomas declined comment and provided unclear and uncertain distinctions. What little we did learn about Judge Thomas’ approach to crucial issues of constitutional and judicial concern has left substantial questions in my mind. Quite apart from the label of “natural law,” it was essential to our deliberations that the committee be convinced that the nominee’s present dispositions toward such issues were moderate and balanced. I was not convinced.

Judge Thomas has praised some extreme ideas about “economic rights,” ideas which, if applied as their authors intended, would invalidate virtually every single modern legislative scheme to regulate the economy, the environment and the workplace. And he has endorsed a rigid view of separation of powers, an idea which, if fully implemented, would radically restructure our Government and its laws to effect a radical transfer of power from one branch of our Government to another.

The ideas that Judge Thomas appeared to embrace are part of an ultra-conservative agenda to use the courts to fundamentally alter the legal framework within which the Government operates. That is why I devoted so much time to questioning Judge Thomas on these matters. And this is what one of the spokesmen for the ultra-conservative agenda, a Wall Street Journal columnist had to say about my exchanges with the nominee on this point:

Mr. Biden most likely brought up the previously arcane subjects of property rights and separation of powers in the hopes of tripping up the Thomas nomination. Whatever the reason, at least Mr. Biden elevated these issues. Mr. Biden is also probably right to be worried. Don’t be too surprised if, when these cases reach the Supreme Court, Justice Thomas indeed becomes the second Justice Scalia.

No one could state my conclusions about this nominee’s judicial philosophy any more succinctly than this Wall Street Journal columnist.

But, of course, Judge Thomas went out of his way at the hearings to assure these fears. He told us that he had no agenda for the Supreme Court; that he had no disagreement with the Court’s current approach to economic rights cases; that he had no idea of the full agenda behind the separation of powers views he had endorsed in his speeches.

I accept each of these statements. I believe Judge Thomas when he says he has no checklist of cases to be overruled, and when he says that he never meant to advocate the full range of implications one could draw, and would have to draw, from his remarks.
The question about Judge Thomas—to use one of the favorite phrases of his supporters—is what views will he grow into at the Court? I believe that Judge Thomas does not now have an agenda; but with these predispositions, I wonder what sort of an approach he will have as a Justice once he acquires a point of view. And this is a point that I found to be of constant concern during the hearings.

Would Judge Thomas take the views hinted at in his speeches and writings, and apply them to their full extent and conclusion as a Justice of the Supreme Court? Is the Wall Street Journal columnist on the mark when he says that I am "right to be worried" about this possibility?

This, for me, is the single most difficult question to resolve with respect to the nomination of Judge Thomas. The major object of Judge Thomas' testimony was to reassure us that we need not worry; unfortunately, the major effect of his writings on these matters is to give great cause for concern.

Where such doubts exist, I cannot vote to confirm the nominee. There is too much at stake for me to take a chance—too much at stake for us, as one newspaper has urged, to "take a leap of faith."

Judge Thomas' writings sketch for us a judicial philosophy which, if fleshed out and applied with force, would be a disaster for the balance this country has struck between the rights of individuals and the rights of businesses and corporations. I believe him when he tells us that he has no current plans to take his views to this extreme—that he comes to the Court with no agenda. But I can not gamble on what will happen once he arrives at the Court with the views he now acknowledges, and the lack of broader views of the role of the Court which he has demonstrated. This is a risk I am not prepared to take.

Finally, there is the specific issue of greatest concern to me—the protection of privacy and unenumerated rights—and what we know of Judge Thomas' views in this area. Here, we must acknowledge that every word uttered by Judge Thomas in the years prior to his nomination was hostile to the concept of unenumerated rights. That is not to say that he had come to any final or firm conclusions about them in his writings; I do not agree with those who have sought to draw such stark conclusions from several paragraphs in his speeches.

Some, for example, told the committee that they are absolutely convinced they can tell how Judge Thomas views the constitutional protection for a woman's right to choose—on the basis of a half dozen or so statements he made in speeches and articles. As I said at the hearings, I disagree with this viewpoint held by some opponents of the nomination. I have studied his writings very carefully and I have listened closely to the testimony at the hearings, and I have concluded it is simply impossible to tell with certainty what his views are on this matter—or on a number of other questions of constitutional interpretation.

Nevertheless, it remains true that, to the extent that Judge Thomas had commented on issues related to unenumerated rights and the privacy cases, these comments have been almost entirely negative.
I asked about the right to privacy at such length, not in a result-oriented effort to determine how Judge Thomas might rule on *Roe v. Wade*, nor because I think that there is any real chance that any state might ban the use of contraceptives illegal in 1991. Rather, I made these inquiries because it is important that we place on the Court an individual who has an expansive view of personal freedom with respect to issues that will arise at the Court in the future, some we can not now even contemplate.

So it is not good enough that a nominee begrudgingly pledges not to reverse the battles already fought and won; rather, I am looking for a nominee's disposition with respect to questions of personal freedom not yet even framed.

I want to make it clear that this is not a liberal-versus-conservative question, and it does not require a liberal or conservative answer. There is no political or substantive reason why President Bush cannot nominate a jurist who would be good on these issues. Abortion aside, we all know many conservatives who think that Government should stay out of people's private lives, and that the courts, if necessary, should be vigorous in their defense of this ideal. Thus, there is ample reason to think President Bush could have nominated such a candidate for the Court; yet nothing that we know about Judge Thomas suggests that he is such a man.

These are the reasons why I will not vote to confirm Judge Thomas. It is not a decision I come to lightly, nor is it one I enjoy making. Everyone is impressed by Judge Thomas' personal life story, and as I said at the outset, I have no questions at all about his credentials, credibility, character, and competence. Indeed, that is why I voted to place Clarence Thomas on the second highest court in the land, and why I will wish him a distinguished and successful career in that post.

But as difficult as this decision has been for me, it is one that I make with firm conviction. It is a vote I cast with my head, and not with my heart, for I very much wish that I could have come to the Senate floor to announce my support for this nomination.

During the hearings, I found myself impressed by the testimony of Dean Calabresi, who said of Judge Thomas:

> I would expect that at least some of his views may change again. I would be less than candid, if I did not tell you that I sincerely hope so, for I disagree with many, perhaps most of the public positions which Judge Thomas has taken in the past few years. But his history of struggle and his past openness to argument, together with his capacity to make up his own mind, make him a much more likely candidate for growth than others who have recently been appointed to the Supreme Court. * * *" (Transcript, Sept. 17, at 160.)

Like the Dean of the Yale Law School, I believe that Judge Thomas has displayed the capacity for change and growth. But no one can know the direction that growth will take—not Dean Calabresi, not me—not even Judge Thomas himself.

I can best summarize my views on Judge Thomas' writings and speeches as follows: It seems to me that the major focus of these works was the construction of an intellectual framework for an ap-
proach to the question of civil rights and equality that would be a marked departure from the prevailing view—an approach that is one I generally do not accept, but does have a growing number of adherents.

In the process of developing this philosophy with respect to civil rights, Judge Thomas referenced theories being developed by other writers, for other purposes. These theories, as I have pointed out in detail above, would have devastating consequences if taken to the conclusion that their authors intend for them.

Perhaps Judge Thomas did not intend to embrace the conclusions of these theories, and instead, meant only to endorse them so far as they supported his views on civil rights. But the litany of speeches and writings Judge Thomas has made in the past, the consistency with which they have appeared to embrace ultraconservative views, the state of the current Supreme Court—and the danger to the fabric of our laws if these views were implemented—make this a risk that I cannot accept.

And where Dean Calabresi and I part company is in the extent to which I am prepared to take a chance on Judge Thomas' growth being in the right direction, as opposed to the wrong direction. For me, because of where the Court currently stands, the costs of adding yet another ultra-conservative member could be extremely high indeed—rulings deemed unthinkable just a decade ago may be on the verge of becoming reality. In the era of the Warren Court, such views would have been intellectually interesting; in the era of the Rehnquist Court, these views a daunting possibility.

I wish Judge Thomas had put to rest my misgivings on this score, but, as I have already indicated, he has not. And we are at a place in the country's history where the risks are simply too high.

So we have come to this difficult juncture, and all of us have come to it—the Senate, the President's nominee, and the President. This confrontation was not inevitable; it could have been avoided. I say respectfully to the President of the United States that he must shoulder a major share of the responsibility for bringing us to this place, because he has created a real dilemma for the Senate, one in which we are forced to demand a very high degree of certainty about the President's nominee before we can give our consent.

The dilemma has been created by two facts: a fervent minority within the President's party is engaging in an open campaign to shift the Court dramatically to the right; and the President has not been willing to engage in the kind of consultation with the Senate that would give this body more assurance that his nominees are not participants in that campaign.

In the future, we need to pursue a course of moderation in judicial selections—not a course in which the Senate insists on someone of its own choosing, but a course of genuine moderation and genuine consultation and cooperation among the branches. Such a process could result in the selection and confirmation of the kind of Justices I spoke of earlier—justices who, regardless of their stand on the contemporary, politicized issues facing the Court, are the kind of individuals who share a sound vision of the Constitution.

I hope the President will join in breaking this cycle of political skepticism, because without him it will be impossible to make that break. I hope that this is the last Supreme Court nomination I am
forced to oppose during my tenure in the Senate, for it is with a truly heavy heart that I oppose the confirmation of this nominee—and it is with real regret that I contemplate the possibility of more such conflicts in the years ahead.

But neither sorrow, nor regret, nor a desire to be able to support Clarence Thomas, can permit me to vote for his confirmation when so much is in doubt, and so much is at stake. If Judge Thomas is confirmed, then I hope for the day when I could come to the Senate floor and announce, that my decision to vote against his confirmation was the wrong one.

That is my hope; but I can not vote my hopes. Therefore, I will not vote to confirm Clarence Thomas as an Associate Justice of the U.S. Supreme Court.
ADDITIONAL VIEWS OF SENATORS KENNEDY AND SIMON

The nine Justices of the Supreme Court have the last word on the meaning of the Constitution and the scope of our most basic liberties. For this reason, no Senator should vote to confirm a nominee to the Supreme Court unless that nominee possesses a clear commitment to the fundamental constitutional rights and freedoms at the heart of our democracy.

If a nominee lacking such a commitment is confirmed, our rights as individuals and our future as a nation are jeopardized. Nominees must shoulder the burden of proof that they possess this fundamental commitment, and that they are not outside the mainstream of constitutional interpretation. Judge Thomas has not met that burden, and for that reason, we oppose his nomination.

Throughout his career, Judge Thomas has taken extreme positions on many issues. But during his hearings before the Judiciary Committee, he asked the committee to overlook the inflammatory positions he advocated for years, and to judge him instead on the soothing testimony of one short week when his confirmation was at stake.

Judge Thomas' record and testimony fall far short of demonstrating a commitment to fundamental constitutional values in numerous key respects.

A. NATURAL LAW

Judge Thomas' most obvious retreat during his testimony was his repudiation of natural law. Over and over in his career, he has repeatedly and forcefully advocated the use of natural law in constitutional decisionmaking.¹ He strongly commended Justices who have used natural law to guide their constitutional decisionmaking.² But he now says that he does not—and never did—see a role for the use of natural law in constitutional adjudication.³

B. PRIVACY AND ABORTION

Judge Thomas' past writings and speeches raise significant concerns about his views on the right to privacy and, in particular, about whether he believes that the right includes the right of a woman to choose abortion.

During his testimony before the committee, Judge Thomas attempted to cloak himself with more moderate views than his

² "The Higher Law Background" at 68 (commending Justice Harlan for his use of natural law in Plessy v. Ferguson); Speech to the Federalist Society, University of Virginia, March 5, 1988 (same); Speech to the Pacific Research Institute, August 4, 1988 (commending Justice Scalia's natural law dissent in Morrison v. Olson).
³ See e.g., hearing transcript, Sept. 10, 1991, at 137, 140, 143, 147, 197, 202-03, 207-09.

(57)
record supports. For the first time, he acknowledged the existence of a right to privacy under the 14th amendment. But he refused to answer questions about specific applications of that right.

Judge Thomas' unwillingness to demonstrate how he would determine fundamental privacy rights is particularly troubling with respect to the abortion issue. Judge Thomas' prior record indicates that he may well be prepared to overturn *Roe v. Wade*. In a speech to the Heritage Foundation in 1987, Judge Thomas stated:

> Heritage Foundation Trustee Lewis Lehrman's recent essay in "The American Spectator" on the Declaration of Independence and the meaning of the right to life is a splendid example of applying natural law.  

The Lehrman article is an extreme anti-abortion polemic. Lehrman argues that a fetus has a constitutionally protected right to life, beginning at the moment of conception. Lehrman describes the right to abortion as a right "born exclusively of judicial supremacy with not a single trace of lawful authority, implicit or explicit, in the actual text or history of the Constitution itself." Lehrman's entire article is devoted to the issue of abortion.

When questioned about his praise for the Lehrman article, Judge Thomas contended that his endorsement was merely rhetorical. In particular, Judge Thomas claimed that he had meant only to encourage conservatives to become more aggressive about enforcement of civil rights, by citing the views of a fellow conservative. Judge Thomas told the committee that his endorsement of the article had been merely a throw-away line. "It was considered, I think by many, as a throw-away line. I saw it as that."

During questioning about the Lehrman article, Judge Thomas claimed that he had not read the article closely at the time of his speech. Similarly, despite extensive prehearing discussions in the media about the reference to the Lehrman article, Judge Thomas told the committee that he had not re-read the article before the hearing.

> [M]y response to [a] question concerning that article was that I cited or praised it for a very limited purpose or made comments about it for a very limited purpose, and I stated what that purpose was. And that purpose didn't suggest from my standpoint the need to go back and learn everything about that particular article.

Despite claiming to be unfamiliar with the article's conclusions, Judge Thomas repeatedly disassociated himself from those conclusions. Asking the committee to disregard the common-sense interpretation of his language, Judge Thomas explained that his phrase

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8 Hearing, Sept. 11, 1991, at 97 (Q: "Had you read the article before you praised it?"
A: "I think I skimmed it, Senator.")
9 Hearing, Sept. 11, 1991, at 98. See also hearing transcript, Sept. 11, 1991 at 98.
“splendid example” did not indicate that he agreed with the substance of Lehrman’s conclusions.

[I]t was a splendid example in the sense that it was a compliment to him and it is a compliment to someone [conservatives] believed in, and I would reaffirm what I said yesterday and I have said consistently, and that is that at no time did I adopt or endorse the substance of the article itself.\(^{11}\)

Finally, after being questioned further by members of the committee on the article, Judge Thomas concluded that he believed Lehrman’s application of natural law was inappropriate to resolve the abortion issue—he thought instead that the matter should be resolved using the traditional tools of constitutional adjudication.\(^{12}\)

Other evidence in his record indicates that Judge Thomas may indeed be hostile to the Court’s holding in *Roe v. Wade*. In a 1984 article in the Harvard Journal of Law and Public Policy, Judge Thomas wrote that “[t]he expression of unenumerated rights today makes conservatives nervous, while at the same time gladdening the hearts of liberals.”\(^{13}\) In the footnote attached to that statement, Judge Thomas, a self-proclaimed conservative, wrote:

> The current case provoking the most protest from conservatives is *Roe v. Wade*, in which the Supreme Court found a woman’s decision to end her pregnancy to be part of her unenumerated right to privacy established by *Griswold v. Connecticut*.\(^{14}\)

But when questioned about the citation, Judge Thomas did not remember having made the citation.

> I would like to have the cite to it. Again, notwithstanding the citation, if there is one, I did not and do not have a position on the outcome.\(^{15}\)

Similarly, in 1987, Judge Thomas argued that blacks and conservatives agree on the abortion issue.\(^{16}\)

Judge Thomas also claimed to be unfamiliar with a report issued by a White House Working Group on the Family, despite having been a member of the Working Group. The 1986 report sharply criticized the Supreme Court’s decision in *Roe*, as well as other abortion and privacy cases.\(^{17}\) The report stated that this “fatally flawed line of court decisions can be corrected, directly or indirectly, through the appointment of new judges and their confirmation by the Senate.”\(^{18}\)

During his testimony, Judge Thomas said that he had not read any part of the report other than the sections on low-income families, even after the report had generated considerable controver-

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\(^{11}\) Hearing transcript, Sept. 11, 1991, at 95.


\(^{13}\) "The Higher Law Background" at 68.

\(^{14}\) "The Higher Law Background" at 68.

\(^{15}\) Id. at n.2.


\(^{17}\) Thomas, "How Republicans Can Win Blacks," Chicago Defender, Feb. 21, 1987 (Perspective Section), at 22.

He could not recall whether the report itself had been made available for final comment, but remarked that his sole interest in the report had been in the sections on low-income families. Later in the proceedings, Judge Thomas was asked whether he would have objected to the part of the report criticizing the abortion cases had he been aware of it. Ignoring the main thrust of the question, Judge Thomas answered only that he would have expressed concern that the report should be more narrowly focused to concentrate primarily on government policy with respect to low-income and at-risk families.

Judge Thomas repeatedly refused to state his views, either legal or personal, on whether a woman’s right to choose abortion is a fundamental right protected under the 14th amendment. Judge Thomas testified that he had neither discussed nor ever formed an opinion on abortion and had never discussed Roe v. Wade with anyone. In addition, Judge Thomas stated that even if he were to have formed an opinion, it would be inappropriate for him to enunciate his views on a matter that would be coming before the Court next term.

Moreover, other nominees have discussed personal views during their confirmation hearings without compromising their impartiality on the issue. For example, Justice Sandra Day O’Connor during her nomination hearing, felt no compunction about expressing her personal views on abortion.

Moreover, Judge Thomas did announce his views on a number of issues which have been recently before the Court and are likely to arise again, including habeas corpus appeals in death penalty cases, victim participation in the criminal process, the uniform sentencing guidelines, and the Lemon test for church/state issues.

The Senate should not give its approval to a nominee who refuses to answer fair questions on issues of bedrock importance to the vast majority of Americans. No one is suggesting that nominees should jeopardize his impartiality by commenting on specific cases. But Judge Thomas readily agreed to answer many questions about various issues before the Court. When we contrast that willingness with his reluctance to discuss issues like abortion, it is transparently clear that he was not demonstrating his impartiality, but defending his prospects for confirmation.

21 Id. at 22.
22 Id. at 103–105. Judge Thomas also repeatedly refused to state whether an unmarried individual has a right to privacy protected under the 14th amendment. Hearing transcript, Sept. 12 at 45–50.
24 Moreover, Judge Thomas discussed a case decided by the Supreme Court less than one year ago, notwithstanding the fact that he currently has pending before him a closely related case. See p. 15, infra. Judge Thomas told the committee that he is in favor of some restrictions on the habeas corpus appeals process for death penalty cases, that he is in favor of some form of victim participation in the criminal process, that he believes sentencing guidelines have been effective in reducing disparity and increasing the fairness of the sentencing process, Hearing Transcript, Sept. 10, 1991, at 162–165, and that he has no quarrel with the test used by the Supreme Court in Lemon v. Kurtzman. Hearing transcript, Sept. 11, 1991, 179–181.
C. EXECUTIVE POWER AND THE ROLE OF CONGRESS

Judge Thomas' past statements and actions as a member of the executive branch raise troubling concerns about his views on the separation of powers and the role of Congress in our constitutional structure. His record indicates that he may have a narrow view of the circumstances under which Congress may investigate or restrain actions by executive branch officials, either through direct congressional oversight or through the use of special independent prosecutors. In addition, he has condemned Congress generally and has criticized it for exercising powers vested in the Executive under the Constitution. These views indicate that Judge Thomas may lack respect for Congress' role as a lawmaking body or, more fundamentally, that he may view much of what Congress does as unconstitutional.25

During his testimony before the Judiciary Committee, Judge Thomas modified or abandoned many of his prior positions and stated that as a judge he would set aside his personal views. However, his record raises serious concerns about his views of the Executive, Congress, and the separation of powers.

1. CONGRESSIONAL OVERSIGHT

During Judge Thomas' tenure at the EEOC, his relations with Congress were often strained.26 These conflicts left Judge Thomas hostile to Congress and caused him to criticize congressional oversight efforts in very strong terms. In speeches given during 1987 and 1988, he argued repeatedly that Congress "has thrust the tough choices on the bureaucracy, which it dominates through its oversight function,"27 and that congressional subcommittees "micro-manage the running of agencies."28 Without naming names, he referred to Members of Congress as "pretty despots,"29 and stated that Congress has been "an enormous obstacle to the positive enforcement of civil rights laws that protect individual freedom."30 He also alleged that "[i]n obscure meetings, [members of Congress] browbeat, threaten, and harass agency heads to follow their lead."31 In Judge Thomas' view, "[t]o put it simply, there is

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25 In addition to the issues described in this paper, Judge Thomas' record raises other areas of concern with respect to his view of the separation of powers. His failure while an Assistant Secretary in the Department of Education to comply with a court order may indicate that he has a limited view of an Executive official's obligation to obey the direct commands of the judicial branch. His insistence on taking a very narrow view of section 504 of the Rehabilitation Act—over the objection of Assistant Attorney General William Bradford Reynolds—his statement expressing hope that lower courts would be guided by the dissenting opinion in a landmark title VII case, and some of his opinions as a judge on the D.C. Circuit indicate that he may have a hostile view of congressional enactments and a tendency not to give effect to congressional intent when that intent conflicts with either the administration's interpretation of a statute or with his own policy beliefs.


27 Prepared text, speech at Harvard University Federalist Society, Apr. 7, 1988, at 13 (prepared text not delivered).


30 Speech to the Tocqueville Forum, Apr. 18, 1988, at 20.

31 Id., at 21.
little deliberation and even less wisdom in the manner in which the legislative branch conducts its business."\(^{32}\)

During the hearings, Judge Thomas attempted to distance himself from his harsh statements criticizing Congress. He stated that "the oversight function of Congress [is] very appropriate,"\(^{33}\) and that "sometimes those of us who have been nominated and needed to be confirmed have deep regret[s] about negative comments about this body [Congress]."\(^{34}\)

However, he did admit that he still believes that some oversight efforts go "too far in micro-managing" federal agencies.\(^{35}\) He did testify that "[e]ven in the speeches where I talk about oversight, I may talk about the flaws, but I also point out the importance of the legislative and oversight process."\(^{36}\) However, his prior statements do not support this claim.

2. CRITICISM OF THE SUPREME COURT'S DECISION IN MORRISON V. OLSON AND THE ROLE OF THE INDEPENDENT PROSECUTOR

In *Morrison v. Olson*, the Supreme Court upheld in a 7–1 opinion the constitutionality of the provision in the Ethics in Government Act authorizing the appointment of independent counsels to investigate suspected criminal activity by high-ranking Federal officials. In an opinion written by Chief Justice Rehnquist, the Court held that Congress has the authority to create special prosecutors. Justice Scalia, the long dissenter, argued that Congress has no such authority, no matter how serious the allegations of criminal activity by executive branch officials.

In a 1988 speech, Judge Thomas stated that *Morrison* was the most important Supreme Court decision since *Brown v. Board of Education*. He criticized Rehnquist's decision, and commended Scalia's dissent. He stated:

Unfortunately, conservative heroes such as the Chief Justice failed not only conservatives but all Americans in the most important Court case since *Brown v. Board of Education*. I refer of course to the independent counsel case, *Morrison v. Olson*. As we have seen in recent months, we can no longer rely on conservative figures to advance our cause. Our hearts and minds must support conservative principles and ideas. As Judge Lawrence Silberman concluded in his opinion in his D.C. Circuit Court of Appeals opinion: This is no abstract dispute concerning the doctrine of separation of powers. The rights of individuals are at stake. Justice Antonin Scalia's remarkable dissent in the Supreme Court case points the way toward those principles and ideas. He indicates again how we might

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\(^{34}\) Hearing transcript, Sept. 11, 1991, at 162.


relate natural rights to democratic self-government and thus protect a regime of individual rights.\(^{37}\)

During the hearings, Judge Thomas seemed to say that he does not now believe that the independent prosecutor law is unconstitutional.\(^{38}\) He argued that he was merely expressing his concern that a law enforcement officer, unrestrained by either of the political branches, might trample on individual rights.\(^{39}\) However, he did not adequately explain why, if this was his only concern, he used such strong language condemning the decision and praising Justice Scalia’s dissent—which argued that any law enforcement by persons outside the executive branch is unconstitutional. Moreover, he did not explain why the provision allowing the Attorney General to dismiss an independent prosecutor for cause would not be sufficient to prevent the abuses of individual rights he said he feared.\(^{40}\)

3. CRITICISM OF CONGRESS’ LAWMAKING ACTIVITIES

In a number of speeches and articles, Judge Thomas has argued that during the last few decades Congress has abandoned its role as a deliberative, law-making body and has transformed itself into a quasi-executive body. For example, in 1988 he stated that "Congress no longer stands for a deliberative body which legislates for the common good or public interest. It has become a coalition of elites, reflecting various interest groups."\(^{41}\)

In Judge Thomas’ view, members of Congress enact vague legislation which delegates difficult policy decisions to executive agencies and to the courts. According to Judge Thomas, the members then micro-manage the administrative process in order to promote the goals of the interest groups to which they are indebted, while avoiding paying the political price for their decisions.\(^{42}\)

Judge Thomas apparently believes that such activities are not just improperly intrusive—they are unconstitutional. He has argued that Congress’ transformation from a lawmaking body to a quasi-executive body has altered the constitutional role of the executive and judicial branches and threatens the separation of powers.\(^{43}\) Although his position is not entirely clear, he appears to


\(^{38}\) Hearing transcript, Sept. 12, 1991, at 68, 73. His statements, however, are not entirely clear. On September 12 he stated: "I don’t think that my point of departure was that it was unconstitutional, although I disagreed and argued that the Scalia opinion was the better approach." Id. at 69. Later in the exchange he agreed that Morrison "is a decided case," id. at 73, but again did not state that he agreed with the result. See also hearing transcript, Sept. 13, 1991, at 17.


\(^{40}\) See Hearing Transcript, Sept. 12, 1991, at 72.

\(^{41}\) Speech to the Tocqueville Forum, Apr. 18, 1988, at 22. At the hearings, Judge Thomas testified that "I think I said [this] in the context of saying that Congress was at its best when it was legislating on great moral issues." Hearing transcript, Sept. 12, 1991, at 14. However, the speech does not place the comment in that context.


\(^{43}\) Speech to the Palm Beach Chamber of Commerce, May 18, 1988, at 10–27; speech to Brandeis University, Apr. 8, 1988, at 3–14; speech to the American Political Science Association, Sept. 3, 1987, at 3–21. See also “Civil Rights as a Principle” at 397–98.
argue that Congress may enact only open ended statutes which control "the general conditions under which departments and agencies ought to operate" and that it must leave to the executive branch decisions about "how to adapt the general law to particular circumstances."  

D. GENDER DISCRIMINATION

Judge Thomas' record reveals a number of reasons to question his understanding of and commitment to eradicating gender discrimination. He has condemned a landmark Supreme Court decision recognizing an employer's right to engage in affirmative efforts to open its historically segregated workforce to women. He has argued that women's choices, rather than discrimination, may have caused women's second-class status in the workplace. In all of his writings, many of which deal with the problem of discrimination, he mentions women infrequently and only in passing.

During the hearings, Judge Thomas stated that he opposes all discrimination, including gender discrimination. In addition, he testified that he has no reason to disagree with the Supreme Court's "heightened scrutiny" test for gender discrimination. But he subsequently indicated that he would not necessarily adopt that heightened scrutiny approach; rather, his comment was intended to mean only that he does not know where he stands or has not reviewed the issue in detail. His statements therefore provide no real basis for comfort.

1. JOHNSON V. SANTA CLARA

In Johnson v. Santa Clara Transportation Agency, the Supreme Court held that an employer may engage in affirmative efforts to open historically segregated workforces to women.

The defendant in the case, a county agency which did not employ any women in its 238 skilled craft positions, had voluntarily undertaken an effort to hire women for these positions. As part of that effort, the county hired Ms. Diane Joyce as its first woman road dispatcher.

Ms. Joyce had experience comparable to that of the other candidates and had been rated qualified by the county. Although she scored two points lower on a subjective interview, the employer decided that the difference was not significant and offered Ms. Joyce the job.

One of the individuals who was not selected challenged the agency's decision. The district court rejected the challenge, and the Supreme Court affirmed, ruling that an employer may lawfully attempt to integrate its previously segregated workforce without first admitting to a past history of discrimination, as long as it does not resort to inflexible quotas.

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46 The trial court found that the county had not engaged in past discrimination. However, there was evidence that bias had infected the selection process. Of the three supervisors who had interviewed Ms. Joyce, one had previously refused to issue her necessary work materials and a second had referred to her as a "rabble-rousing, skirt-wearing person."
In 1987, Judge Thomas criticized this decision and praised Justice Scalia's dissent. During the hearings, Judge Thomas stated that he condemned Johnson because he believes that title VII prohibits employers from ever considering gender in an effort to diversify its workforce. Although Judge Thomas admitted that the Supreme Court took the opposite view, he apparently continues to believe that title VII requires gender-blindness in all hiring decisions.

Judge Thomas did not merely condemn the majority's opinion. He stated that he hoped that Justice Scalia's dissenting opinion would provide guidance for lower courts and that it would form the basis for a future majority opinion. Judge Thomas defended this statement during the hearings, arguing that he was not urging lower courts to ignore controlling Supreme Court precedent but was merely expressing hope that the dissent would enable lower courts to see the other side of the affirmative action argument. This statement makes clear, however, that Judge Thomas had hoped that, at the very least, lower courts would interpret Johnson as narrowly as possible.

These statements, when combined with Judge Thomas' continued belief that Johnson was wrongly decided, raise concerns about whether Judge Thomas, if confirmed to the Supreme Court, will seek to overrule the Johnson decision.

2. STEREOTYPES OF WOMEN AND WORK

On a number of occasions, Judge Thomas has made or endorsed stereotyped views of women and work.

In a 1987 interview, he said that hiring disparities "could be due to cultural differences" between men and women and that "[i]t could be that blacks and women are generally unprepared to do certain kinds of work by their own choice. It could be that blacks choose not to study chemical engineering and that women choose to have babies instead of going to medical school."

In a 1988 review of Thomas Sowell's book, "Civil Rights: Rhetoric or Reality?", Judge Thomas commended Sowell's work as brilliant. In particular, he praised Sowell's discussion in chapter 5 of the

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47 Speech to the Cato Institute, Apr. 23, 1987, at 20–23.
49 Judge Thomas does believe that employers can use outreach efforts to attract women and minorities, hearing transcript, Sept. 12, 1991, at 99–102, but draws a sharp line when it comes to hiring decisions, id. at 102. He apparently recognizes that discrimination does exist and that no employer will ever seek to integrate its workforce if it is first required to admit past discrimination. Id. at 77. However, he does not agree that voluntary affirmative action programs are an appropriate tool for overcoming past segregation. Id. Indeed, he apparently believes that affirmative action is improper even where there is a finding of past discrimination. See discussion of "Sheet Metal Workers," infra at 23.
50 Judge Thomas testified that he would defer to Congress' intent when interpreting title VII. E.g., hearing transcript, Sept. 11, 1991, at 120, 122–22. However, if he believes that Congress intended title VII to be color- and gender-blind, this would not prevent him from reversing Johnson.
51 Judge Thomas also stated that to overrule a case a judge must not only show that it was wrongly decided, but must also show that stare decisis should not apply. Hearing Transcript, Sept. 16, 1991, at 7–8. Given the strength of Judge Thomas's objection to race- and gender-conscious remedies, as well as his unwillingness to state categorically that he would not overrule Johnson, this statement does not necessarily indicate that Judge Thomas would not overrule Johnson.
book, "A Special Case of Women," as "a much needed antidote to cliches about women's earnings and professional status." 53

Sowell's discussion of women and work incorporates the very stereotypes which have historically been used to exclude women from full participation in the workplace. Sowell argued that the wage gap exists because "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, coal mining and the like," 54 Sowell also wrote that most women's "very choice of occupation and of education for an occupation is dominated by the likelihood of a career interruption for a woman due to marriage and motherhood." 55 He argued 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 that may make her less valuable as an employee, or less promotable to jobs with heavier responsibilities." 56 Finally, Sowell stated that "the physical consequences of pregnancy and childbirth alone are enough to limit a woman's economic options." 57

During the hearings, Judge Thomas argued that he recognizes, and has repeatedly discussed, the destructive effect of gender discrimination. He characterizes his statements, and those of Thomas Sowell as mere attempts to disaggregate the statistics concerning women and work. 58

Judge Thomas' stereotyped statements did not appear in the context he now argues he intended them to have. In addition, Judge Thomas stressed the reasonableness of Sowell's perspective and his lack of knowledge about the causes of women's second-class status in America's workplaces, rather than stating categorically that discrimination is at the root of many of the problems faced by women. 59

Judge Thomas' statements about women and work are also troubling when considered in connection with his hostility to the pending Family and Medical Leave Act, which recognizes the responsibilities that all family members—both men and women—share, and which is designed to enable workers to respond to those commitments without risking or losing their jobs. In a 1987 speech, however, Judge Thomas condemned the FMLA as a "mandated benefits package" which would hurt small businesses. 60

During the hearings Judge Thomas stated that when interpreting social legislation, such as the FMLA, "[m]y job is to interpret

55 Id. at 93-94.
56 Id. at 97-98.
57 Id. at 97-98.
59 E.g. hearing transcript, Sept. 10, 1991, at 193, 194 ("I think it is important that there be individuals who look at statistics in [Sowell's] way"; I don't think Professor Sowell is "in any way sexist."); hearing transcript, Sept. 11, 1991, at 66 (some of the reasons why there are not women in some of the higher-paying professions could involve discrimination); hearing transcript, Sept. 11, 1991, at 65 (it is going too far to say that women brought lower pay on themselves); hearing transcript, Sept. 10, 1991, at 189 ("I don't think any of us can say that we have all the answers as to why there are statistical disparities.").
your intent, not to second-guess your intent." However, his negative view of the legislation and his protectiveness toward affected businesses could influence whether he would seek to give full effect to Congress' purpose or whether he would give the statute a narrow and unintended reading.

3. LAMPRECHT V. FCC

Judge Thomas heard oral argument in January 1991 in Lamprecht v. FCC, his only D.C. Circuit case to raise a significant gender issue. According to a published account, Judge Thomas circulated a draft opinion to the court in July, before his nomination to the Supreme Court, striking down a congressionally directed preference for women in the award of broadcast licenses. This opinion, as well as Judge Thomas' failure to mention the Lamprecht case during his testimony, raise a number of concerns.

First, when asked to comment on the Supreme Court's decision in Metro Broadcasting, Inc. v. Federal Communications Commission, Judge Thomas did not mention that he currently had pending before him a case raising issues almost identical to those raised in Metro Broadcasting. Given his repeated refusal to answer questions concerning issues which the Supreme Court may confront in future cases, his willingness to discuss Metro Broadcasting—and his failure to note his pending case—is both noteworthy and troubling.

Second, when asked about the Court's decision in Metro Broadcasting, Judge Thomas stated that he had "no reason to disagree with" the state of the law under that decision. Earlier in his testimony, Judge Thomas had explained that when he said that he had no reason to disagree with an approach rather than saying that he adopted it as his own, he meant that he did not know where he stood on an issue or had not reviewed the issue in detail. In light of the report that he had just circulated an opinion distinguishing Metro Broadcasting, his statement that he did not disagree with Metro is difficult to credit. It appears that he may have had a more concrete, and apparently hostile, view of Metro Broadcasting which he did not wish to share with the Committee.

Third Judge Thomas testified that "[t]he Court has made a distinction in Richmond v. Croson, as well as in Metro, that when the race or gender based policy, I think race based policy in these cases, were as a result of Congress' effort, the level of scrutiny is lower than it is if it is on a policy that is developed by a State or local government." He then engaged in the following exchange:

Senator Specter: So, you would accord greater strength or latitude to a congressional enactment, as opposed to a city council enactment?

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61 Hearing transcript, Sept. 10, 1991, at 188.
64 Hearing transcript, Sept. 16, 1991, at 171. In Metro, the Supreme Court upheld the identical set-aside program for racial minorities.
65 Id.
Judge Thomas: That's right, that is under existing case law, that's the approach.\(^6\)

Yet in his draft opinion, Judge Thomas reportedly refused to defer to Congress' factual finding that program diversity is enhanced when women own broadcast stations because, in his view, Congress failed to support that finding with sufficient evidence.

Thus, Judge Thomas' only opinion in a case raising a significant question of deference to Congress reportedly sharply contrasts with his soothing testimony to the committee.

Clearly, until a court actually issues an opinion, judges remain free to change their minds. However, regardless of the substance of Judge Thomas' draft opinion in Lamprecht, his failure to mention this pending case or to state a more well-formed opinion of Metro Broadcasting raises disturbing questions about the candor of his testimony.

4. THE SUPREME COURT'S "HEIGHTENED SCRUTINY" TEST

During the hearings, Judge Thomas appeared to accept the Supreme Court's use of a "heightened scrutiny" test for gender discrimination. In an exchange with Senator DeConcini, he stated:

Senator, I have no reason and had no reason to question or to disagree with the three-tier approach.\(^6\)

Later in the exchange, he added:

Senator, I think that discrimination is, as I have said, a cancer on our society. There could be instances where one would want to apply a more exacting standard even than the current heightened scrutiny test. I would be concerned if we were to see a movement down toward the rational basis test. But I think that discrimination and classifications based on race or sex are so damaging to our society, and to individuals in particular, that one could consider and be open to ratcheting up or applying a more exacting standard.\(^7\)

However, his comments during a later exchange with Senator DeConcini undermine these statements.

Senator DeConcini: When you say you have no quarrel, you mean that you agree with it, is that fair to say? I mean I do not want——

Judge Thomas: I mean I do not disagree with it. I do not have a basis to disagree with it and I have not raised any objections about it.

* * * * *

Judge Thomas: Certainly, as a judge, I think that it is important that when I do not know where I stand on something or I have not reviewed it in detail, that it is best for me to take a step back and say I have no reason to disagree with it, rather than saying I adopt it as mine.\(^7\)

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\(^6\) Id. at 170-171.


\(^7\) Hearing transcript, Sept. 11, 1991, at 63-64.

\(^7\) Hearing transcript, Sept. 13, 1991, at 149, 150.
Judge Thomas' constitutional approach to gender issues thus remains unclear.

E. CIVIL RIGHTS

Judge Thomas' statements about civil rights reflect a fundamental ideological disagreement with much of contemporary civil rights policymaking and jurisprudence. He has sharply criticized recent Supreme Court decisions which uphold the use of certain evidentiary methods to prove systemic discrimination, both in the voting rights and employment contexts. He has also passionately argued against the use of race-conscious remedies for employer discrimination, despite the Supreme Court's sanction of such remedies for certain types of discrimination. His record at the EEOC demonstrates an insensitivity to the needs of minority groups, in particular, Hispanics and the elderly. Both Judge Thomas' record and testimony before the committee reveal an individual whose views on civil rights issues depart significantly from the well-established body of law in the area of civil rights.

1. PROVING CIVIL RIGHTS VIOLATIONS

a. Voting rights

In 1982, Congress amended the Voting Rights Act of 1965 to prohibit election practices which result in the denial or abridgement of the right of minority citizens to vote. Under section 2 of the amended statute, plaintiffs are permitted to prove a violation of the Voting Rights Act by showing that, under the totality of the circumstances, a challenged election practice resulted in the denial of an equal chance to participate in the electoral process. Congress incorporated this standard, the so-called results test, to outlaw discriminatory election practices such as any at-large, multi-member election district which consistently excludes minority-preferred candidates.

In *Thornburg v. Gingles*, the Supreme Court held that in order to prove a violation of section 2, plaintiffs must prove that voting in the jurisdiction is racially polarized. In particular, plaintiffs must factually demonstrate that (1) minority group members in the jurisdiction vote as a cohesive unit, and (2) white voters in the jurisdiction vote sufficiently as a bloc to usually defeat the minority's preferred candidate.

In a speech at the Tocqueville Forum in 1988, 2 years after the Court's decision in *Gingles*, Judge Thomas harshly criticized the Supreme Court's interpretations of the Voting Rights Act without specifying the cases to which he was referring.

Unfortunately, many of the Court's decisions in the area of voting rights have presupposed that blacks, whites, Hispanics, and other ethnic groups will inevitably vote in blocs. Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected.

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73 Id. at 50–51.
When the individuals' racial or ethnic group has sufficient clout. 74

When first asked about his criticism, Judge Thomas could not identify which cases he had criticized, despite having been given prior notice that the voting rights cases would be discussed at the hearing. 75 When pressed further, Judge Thomas replied that his criticisms of the Voting Rights Act cases had been twofold. First, he told the committee that he had feared that white districts left behind after a minority district had been created would become more conservative and offset the newly created minority district. 76

Second, with regard to the "results test," Judge Thomas had questioned whether "we could really judge from the number of individuals who held office, for example, how effective a person's voting rights were being implemented or how effective the statute was implemented or how effective the minorities were in participating in the political process." 77 Judge Thomas did not at that time attempt to explain his comment in the Tocqueville Forum speech that the Supreme Court cases had presupposed the existence of racially polarized voting.

After refreshing his recollection over the weekend, Judge Thomas then told the committee that he had been referring to the academic debate about whether the 1982 amendments would lead to proportional representation.

"[T]here was a school of thought. There was thinking * * * in the early 1980's about the Voting Rights Act that felt that the early cases presupposed or would lead to proportional representation * * * I think there was even some debate up to and immediately prior to the amendments to the Voting Rights Act in 1982 concerning proportional representation * * * I think there was some concern even then with the legislation that came from the House of Representatives that it might lead to—the results test might lead to proportional representation. The language, of course, in the Voting Right Act, in the amendments precludes that. And, of course, the Thornburg case makes it clear that you don't presuppose now that there is bloc voting, but rather it has to be proven." 78

Judge Thomas' original comments in the Wake Forest speech and his subsequent explanations before the committee reflect his lack of knowledge about the Supreme Court's decisions on voting rights. In fact, no Supreme Court case, either prior to or since the 1982 amendments, presupposes racially polarized voting. Indeed, in Thornburg v. Gingles, the Court emphasized that plaintiffs were required under section 2 to prove the existence of racially polarized voting in the jurisdiction under examination. Judge Thomas' statement to the committee that he had been referring to debate about the 1982 amendments defies the plain meaning of his speech; apparently he was attempting to disguise his unfamiliarity with case

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74 Speech at the Tocqueville Forum, April 18, 1988 at 17.
75 Hearing transcript, Sept. 13, 1991, at 139.
76 Id. at 140.
77 Id. at 143.
78 Id at 65-66.
law, an unfamiliarity, which he displayed during his initial questioning on the subject of voting rights.


In Griggs v. Duke Power, the Supreme Court held that title VII prohibits not only intentional discrimination, but also prohibits hiring practices which disproportionately exclude minorities and women and which are not justified by "business necessity." In 1978, the EEOC promulgated Uniform Guidelines on Employment Selection Procedures ["UGESP"], which incorporated the principles of the Griggs decision.

In a 1985 report to the Office of Management and Budget, Judge Thomas sharply criticized the Court's ruling in Griggs, and the corresponding provisions in the Uniform Guidelines:

The premise underlying UGESP is that but for unlawful discrimination by an employer, there would not be variations in the rates of hire or promotion of people of different races, sexes, or national origins who are hired or promoted by that employer. UGESP also seems to assume some inherent inferiority of blacks, Hispanics, other minorities and women by suggesting that they should not be held to the same standards as other people, even if those standards are race- and sex-neutral. Operating from these premises, UGESP makes determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term "discrimination."

In 1985, Judge Thomas gave five speeches in which he passionately denounced the concept of disparate impact.

We have unfortunately permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories and procedures such as adverse impact. We have locked amorphous, complex, and sometimes unexplainable social phenomena into legal theories that sound good to the public, please lawyers, and fit legal precedents but make no sense.

However, during testimony before the committee, Judge Thomas spoke only in moderate tones about Griggs indicating that he thought that Griggs had not been explicitly overruled by subsequent decisions, and raising some concern with regard to stare decisis about the propriety of overruling a case like Griggs, which has been on the books for a substantial amount of time. Indeed,
he named Griggs as one of the Supreme Court's most important decisions of its time.\textsuperscript{84}

Regardless of Judge Thomas' beliefs about subsequent case law and stare decisis, his prior record provides ample evidence that he disagrees with the concept of adverse impact, a concept which provides the only avenue of relief from the many facially neutral practices which continue to exclude women and minorities from full equality of opportunity in the workplace.

2. REMEDIES FOR DISCRIMINATION

a. Judge Thomas' legal views

Judge Thomas believes that any consideration of race or gender by employers or courts—even to remedy prior discrimination—violates the anti-discrimination provisions of title VII. He argues that title VII does not distinguish between differentiation based on race motivated by the desire to remedy past discrimination from differentiation undertaken for invidious motives.\textsuperscript{85}

However, Judge Thomas' interpretation differs significantly from the Supreme Court's interpretation, set forth in \textit{United Steel Workers v. Weber}.\textsuperscript{86} In Weber, the Court held that neither title VII nor the Constitution prohibits employers from voluntarily adopting affirmative action plans to open up traditionally segregated opportunities to minorities.\textsuperscript{87}

In a 1988 article, Judge Thomas harshly criticized the Court's decision in Weber, as well as subsequent Court decisions affirming Weber. Not satisfied with limiting his criticism to the Court, he also berated Congress for not acting to overturn the Supreme Court's decisions.

"The Court has made rather creative interpretations of equal protection and legislative intent in a number of civil rights cases beginning with \textit{Regents of the University of California v. Bakke}. The egregious example was \textit{United Steel Workers v. Weber}, back in 1979, followed by recent decisions such as \textit{Local 28 of the Sheet Metal Workers v. EEOC}, and \textit{Johnson v. Transportation Agency, Santa Clara County}. In each case, Congress could have reinterpreted its legislative intent to rebut the interpretation of Justice Brennan in Weber. But of course, it demurred. . . ." \textsuperscript{88}

His speeches and articles indicate that Judge Thomas has elevated his ideological views above the considered judgments of both the judicial and legislative branches.

During his testimony, Judge Thomas repeated his objections to the Supreme Court's decision in \textit{Sheetmetal Workers v. EEOC},\textsuperscript{89} a case in which the district court had found continued discrimination by the local union for over a 20-year period. The lower court had issued a contempt citation, in effect notifying employers that they

\textsuperscript{84} Hearing transcript, Sept. 13, 1991, at 7.
\textsuperscript{85} Hearing transcript, Sept. 12, 1991, at 77-78.
\textsuperscript{86} 443 U.S. 193 (1979).
\textsuperscript{87} Id. at 201, 204.
\textsuperscript{89} 478 U.S. 421 (1986).
had to increase the number of minorities hired. Judge Thomas argued, both while at the EEOC and before the Judiciary Committee, that under the Supreme Court’s decision in *Firefighters v. Stotts* providing relief to nonvictims of discrimination was impermissible.

Once again, Judge Thomas’ analysis runs directly contrary to the Supreme Court’s decision on the matter, in which the Court upheld the contempt citation on a finding of egregious discrimination by the employer. In particular, the Court found that the prior Supreme Court case did not preclude granting relief to nonvictims of discrimination.

We decline * * * to read Stotts to prohibit a court from ordering any kind of race-conscious affirmative relief that might benefit nonvictims. This reading would distort the language of [title VII] and would deprive the courts of an important means of enforcing title VII’s guarantee of equal employment opportunity.

Judge Thomas’ condemnation of another Supreme Court affirmative action decision, *Johnson v. Santa Clara Transportation Agency*, was particularly vituperative.

The difference between this and previous affirmative action rulings should not go unnoticed. Last year’s case of *Local 28 of the Sheet Metal Workers v. EEOC* stressed that the discrimination must be ‘particularly longstanding or egregious’ for a race-conscious remedy to be applied. In the instant case there was a finding of no discrimination. Now, it seems that employers are free to develop plans to classify, hire and promote on the basis of race or gender, just to satisfy some desirable scheme of race and gender distribution.

So opposed was Judge Thomas to the Court’s reasoning in Johnson that he took the extreme step of urging lower courts to disregard the majority’s opinion and instead follow Justice Scalia’s dissent:

Let me commend to you Justice Scalia’s dissent, which I hope will provide guidance for lower courts and a possible majority in future decisions.

It is important to note that quite apart from philosophical and pragmatic disagreement with race-conscious remedies, Judge Thomas raises what he believes are valid legal arguments against the Weber line of cases, and concludes that both the Court and Congress have gotten it wrong. Certainly, Judge Thomas’ views indicate that if affirmative action plans like those in Weber, Sheetmetal Workers, or Johnson were to come before him on the Court, he would strike them down on the basis of these legal objections.
b. Education versus Employment: Yale versus Johnson

Many commentators have noted that Judge Thomas opposes the very sort of minority preferences from which he benefitted, for example, in his admission to Yale Law School. When asked about the apparent contradiction, Judge Thomas disputed that he had ever benefitted from race-based preferences.

I have not during my adult life or during my academic career been part of any quota. The effort on the part of Yale during my years there was to reach out and open its doors to minorities whom it felt were qualified * * *.96

When asked to distinguish between the Yale affirmative action program and the hiring plan in Johnson v. Santa Clara Transportation Agency, which was designed to open a previously segregated workforce to women, Judge Thomas drew three distinctions. First, he argued that education differs from employment in that it prepares individuals for their future.

I have looked at education as a chance to become prepared. I have in my thinking personally—and I am talking totally from a policy standpoint—that education was that chance to be prepared to go on in life. It was an opportunity to gain opportunities.97

This purported distinction ignores the fact that each rung of the employment ladder similarly prepares an individual to move to the next-higher rung. It also ignores the needs of persons who choose or must rely on on-the-job training because they lack formal education.

Judge Thomas also attempted to distinguish education and employment by pointing out that his participation in the Yale affirmative action program did not involve two people competing for the same position, as was true in Johnson.98 Again, Judge Thomas ignored the facts: admission to law school is indeed competitive, and positions given to affirmative action beneficiaries are unavailable to any other applicant.

Finally, Judge Thomas argued that the program under which he was admitted to Yale was not based on race, but on his disadvantaged background.

I think that during that era, those of us who were then the beneficiaries of what were called preferential treatment programs, I think that was the exact terminology then, it was an effort to determine whether kids had been disadvantaged, had socioeconomic disadvantages, had done very, very well in other endeavors against those odds, and I think that the law schools, that the colleges involved attempted to determine are these kids, with all those disadvantages, qualified to compete with these kids who have had all the advantages.99

However, according to an article in the New York Times, Judge Thomas was admitted to Yale Law School under an explicit affirmative action plan designed to ensure that blacks and other minorities would make up about 10 percent of each entering class.100

Under the program, which was adopted in 1971, the year Judge Thomas applied, blacks and some Hispanic applicants were evaluated differently from whites. Nonetheless, they were not admitted unless they met standards to predict they could succeed at the highly competitive school * * *. The result was that white applicants and minority applicants were treated differently. Having two applicant pools meant that a high percentage of minority applicants deemed qualified were admitted while a far smaller percentage of qualified white candidates were admitted, said Judge [Ralph K.] Winter, [former chairman of the admissions committee during the time Judge Thomas was admitted,] who now sits on a Federal Appeals Court in New Haven.101

3. JUDGE THOMAS' NEGATIVE STATEMENTS ABOUT CIVIL RIGHTS LEADERS

On many occasions, Judge Thomas has denounced civil rights leaders in unusually harsh terms. In an interview with Reason magazine in 1987, Judge Thomas was asked whether there were any areas where he thought that the civil rights establishment was doing good work. He answered "No * * *. None that I can think of."102

In five 1985 speeches, he denounced the civil rights community for "wallowing in self-delusion and pulling the public in with it."103

In an article in the Atlantic Monthly in 1987, Judge Thomas "publicly castigated civil rights leaders who 'bitch, bitch, bitch, moan and moan and whine' " about the Reagan Administration.104

When questioned about his criticisms, Judge Thomas answered showed a bitterness toward the civil rights community, apparently because he thought the community had excluded him and had not acknowledged his positions on civil rights issues as legitimate.

I think in the [Reason] interview, my point was that I was the wrong person to ask with respect to comments about the existing civil rights community, because of the manner in which the civil rights community had treated me and that I am no more or less human than anyone else, that there was serious disagreement, and I do not think that the disagreements were at the level that they should have been and I suggested that * * *. I did not feel

101 Id.
103 Speech to the Cascade Employers Association, March 13, 1985, at 16. See also EEO Law Seminar, May 2, 1985, at 15; Speech before the National Urban League, June 18, 1985, at 22; Speech to EEO Coordinators, July 10, 1985; Speech before the American Bankers Association, Sept. 11, 1985, at 19.
that that opportunity ever occurred or that we had the chance or I had the chance personally to engage in that debate, and I thought it was a lost opportunity, and I said it on both sides of the aisle with respect to the civil rights community, and with respect to the Reagan Administration.106

Judge Thomas' hostility toward the civil rights community, in conjunction with his passionate denunciation of the positions to which the community subscribes, cast grave doubt that he could ever be completely impartial in deciding civil rights cases. His personal and ideological differences with the civil rights movement create a bias which would be difficult for any judge to overcome, and Judge Thomas admits that, after all, he is "no more or less human than anyone else."

F. JUDGE THOMAS' EXTREME STATEMENTS

In addition to Judge Thomas many troubling statements on fundamental questions of individual rights and separation of powers questions, he has made other extreme statements which raise questions about his nomination.

He described one of America's greatest jurists, Justice Oliver Wendell Holmes, in the following harsh terms:

If anything unites the jurisprudence of the left and the right today, it is the nihilism of Holmes. As Walter Berns put it in his essay on Holmes, most recently reprinted in William F. Buckley and Charles Lessler's Keeping the Tablets: "* * * No man who ever sat on the Supreme Court was less inclined and so poorly equipped to be a statesman or to teach * * * what a people needs in order to govern itself well.' Or, as constitutional scholar Robert Faulkner put it: 'What [John] Marshall had raised, Holmes sought to destroy.' And what Holmes sought to destroy was the notion that justice, natural rights, and natural law were objective—that they exist at all apart from willfulness, whether of individuals or officials.108

He criticized another great jurist, Justice Thurgood Marshall, for noting that the Constitution, as originally enacted, failed to provide equality to Black Americans:

I find exasperating and incomprehensible the assault on the Bicentennial, the Founding, and the Constitution itself by Justice Thurgood Marshall * * *. His indictment of the framers alienates all Americans, not just black Americans, from their high and noble intention.107

He condemned much of the Supreme Court's recent work to enforce constitutional rights, alleging that:

The Supreme Court has used the due process and equal protection clauses in a variety of extremely creative ways. The Court has used them to make itself the national

108 Speech to the Pacific Research Institute, August 4, 1988, at 13-14 (ellipses in original).
school board, parole board, health commission, and elections commission, among other titles. But these activities overlook (when they do not trivialize) the fundamental purpose of the 13th and 14th Amendments.* * * 108

He commended radical conservative blacks like Jay Parker for "refusing to give in to the cult mentality and childish obedience which hypnotizes black Americans into a mindless, political trance."109

And finally, while an administration official, he commended the following extreme descriptions of modern America:

[W]e are careening with frightening speed toward collectivism and away from free individual sovereignty, toward coercive centralized planning and away from individual choices, toward a statist-dictatorial system and away from a nation in which individual liberty is sacred.110

As the noted constitutional historian Forrest McDonald recently said of the size of our government, "It's only saving virtue is its incompetence." Otherwise it would really be dangerous.111

G. THE CURRENT SUPREME COURT

Just as we cannot ignore Judge Thomas' record, so we must not ignore the current trend of the Supreme Court. That trend raises serious concerns about the Court's approach to conflicts between Congress and the Executive Branch.

By persistently taking a narrow view of congressional statutes, by tilting toward the President and his exercise of executive branch authority, the Supreme Court can dramatically shift the balance of power in government and seriously diminish the constitutional role of Congress.

The Supreme Court is supposed to be the impartial umpire of our federal system, resolving disputes fairly between the legislative and executive branches of the Federal Government. If a shift by the Supreme Court turns the judicial branch into an ally of the President against Congress, the Constitution will not work, and the entire Nation will suffer.

When ideology is the paramount consideration of the President in nominating a Justice to the Supreme Court, the Senate is entitled to take that ideology into account in the confirmation process, and to reject any nominees whose views are so extreme that they are outside the mainstream. Judge Thomas' past statements place him squarely in that category, and his testimony at the hearings was unconvincing.

President Reagan and President Bush have clearly attempted to pack the Supreme Court with Justices who share a single one-dimensional view of the Constitution. The Senate has a constitutional right—and a constitutional duty to the country—to reject any

108 Speech to the Tocqueville Forum, April 18, 1988, at 8.
109 Speech to the Heritage Foundation, June 18, 1987; Speech to Suffolk University, Mar. 30, 1988; Speech to California State University, Apr. 25, 1988.
110 Speech to the Cato Institute, Apr. 23, 1987, at 24.
111 Id. at 9-10.
nominee with whom we have profound differences on basic issues arising under the Constitution and the Bill of Rights. We therefore oppose the confirmation of Judge Thomas as an Associate Justice of the Supreme Court.
ADDITIONAL VIEWS OF SENATOR METZENBAUM

I. BACKGROUND

Justice Thurgood Marshall's resignation from the Supreme Court marks the fifth Supreme Court vacancy of the Reagan-Bush era. Once Justice Marshall's seat is filled, Presidents Reagan and Bush will have filled a majority of seats on the Supreme Court.

A judicial nominee cannot become a member of the High Court simply because the President and his advisers are comfortable with that nominee's views and judicial philosophy. The Supreme Court is not an extension of the Presidency. The Constitution makes it clear that the Supreme Court is a separate and independent branch of government.

That same Constitution assigned the Senate a role in the confirmation process to help preserve the independence of the judiciary. The importance of the Senate's role has grown in recent years because, quite frankly, Presidents Reagan and Bush have made no bones about using the Court to advance their political and social agenda.

A core element of the Reagan-Bush political program has been a reversal of Supreme Court decisions in the areas of abortion, civil rights, individual liberties, and the first amendment. Their effort has been successful. Landmark decisions protecting civil rights, constitutional liberties, and a woman's right to choose have been overturned or jeopardized because the Reagan and Bush administrations have made good on their campaign pledge to appoint judges who are hostile to those decisions.

For example, the Court's astonishing decision last term in Rust v. Sullivan—the abortion gag rule case—demonstrates the current Supreme Court's ongoing commitment to dismantling a woman's right to abortion. In that case, the views of Ronald Reagan's anti-abortion bureaucrats were given greater weight by the Supreme Court than either the intent of Congress of the first amendment.

An omen of things to come from the current Supreme Court was contained in a paragraph in Payne v. Tennessee, a recent case in which the Court reversed itself on a question of constitutional liberties. The majority in that case stated that adherence to precedent is most important in cases involving property and contract rights. But with respect to constitutional rights and liberties, a majority of the current Court stated that adherence to precedent "is not an inexorable command, particularly in constitutional cases."

In other words, the Reagan-Bush Supreme Court takes the position that justices should be more respectful of precedent when a businessman's contractual rights are at stake, than when a woman's constitutional right to choose or an African-American's right to equal treatment is at stake. As Justice Marshall wrote in his dissent in Payne—one of his final opinions for the Court—this
statement sends "a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting * * * open defiance of our precedents."

This is the context in which Clarence Thomas' nomination comes before the Senate. The President has made reversal of current Supreme Court decisions a campaign issue and a political issue. The Supreme Court has, consistent with the President's objectives, overturned or jeopardized a number of landmark decisions protecting civil rights and individual liberties. Clarence Thomas' nomination must be viewed against the backdrop of the effort by the Reagan and Bush administrations to remake the Supreme Court in their own image.

II. BASIS FOR OPPOSITION

Our opposition to Judge Clarence Thomas is based upon his record at EEOC, his legal credentials, his philosophy, his record on a woman's right to choose, and his testimony before the Judiciary Committee. Judge Thomas' record and testimony strongly suggest that he will be an active and eager participant in the current Supreme Court's assault on established Court decisions protecting civil rights and individual liberties.

A. RECORD AT THE EEOC

Clarence Thomas was chairman of the Equal Employment Opportunity Commission from 1982 to 1990. He was the chief law enforcement official responsible for protecting women, minorities, and the elderly from discrimination. But as Chairman of the EEOC, Judge Thomas pursued policies which undermined legal protections for minorities, women, and the elderly—the very people who are most in need of protection by the Supreme Court.

Judge Thomas' record with respect to age discrimination is particularly troubling. During his tenure as EEOC Chairman, thousands of older workers who believed that they were victims of age discrimination lost their right to bring age bias suits in Federal court because of the negligence of his agency.1 Despite assurance from Clarence Thomas that he would correct the problem, Congress found it necessary on two separate occasions—in 1988 and again in 1990—to pass legislation to restore the rights of these older workers to file age discrimination suits in Federal court.

Judge Thomas' record with respect to sex discrimination in employment is also particularly troubling. During the past 15 years, a number of American companies adopted policies which barred women from certain jobs unless the women could prove they were not capable of bearing children. These so-called fetal protection

1 The Age Discrimination in Employment Act (ADEA) requires older workers to file their age bias claims with the EEOC. The Commission is authorized to investigate the claim, and if it has merit, attempt to work out a settlement or file a lawsuit on behalf of the older worker. The ADEA has a 2-year statute of limitations, meaning that either the EEOC or the older worker who brings the age discrimination charge to the EEOC's attention, must file a lawsuit within 2 years of the alleged act of discrimination. Otherwise, the older worker loses his or her right to seek redress under the law.

Unfortunately, during Judge Thomas' tenure as head of the EEOC, thousands of age bias claims sat languishing in the EEOC for over 2 years. As a result, thousands of older workers lost their right to bring lawsuits under the ADEA.
policies left working women in the unconscionable position of having to undergo irreversible sterilization if they wanted to keep their jobs. Tragically, that's just what happened to a number of women, at companies such as American Cyanamid and Johnson Controls.

Six months ago, the Supreme Court completely banned these policies as illegal sex discrimination.

Judge Thomas, as head of the EEOC from 1982 to 1990, had the responsibility for protecting the millions of working women in this country against sex discrimination. Shortly before he became the Chairman, the EEOC decided not to resolve allegations of sex discrimination involving these fetal protection policies until it developed a formal position on the issue. In the interim, the sex discrimination charges were investigated in the field, and then simply sent to the Commission's headquarters in Washington, where they were held pending the development of an EEOC position.

Under Judge Thomas' command, the EEOC failed to address this intolerable situation for over 6 years. During this entire period, dozens of charges involving fetal protection policies sat at headquarters without resolution. The women who filed those charges had rights, but their rights became meaningless in the absence of enforcement. But, these women didn't just lose their rights; they lost their jobs, their careers, their dignity, and in some cases even their ability to bear children.

Under increasing pressure from a House Education and Labor Committee investigation, the EEOC finally took a position in 1988, and began to resolve these charges in 1989. By that point, over 100 charges had piled up. The EEOC couldn't even find many of the women who had filed the charges, so their cases were thrown out. For these women, justice delayed was justice denied.

EEOC documents indicate that Judge Thomas was personally involved in the EEOC's default on this issue (Tr., September 16, 1991 at 40-41).

Judge Thomas' unrelenting hostility toward effective civil rights enforcement tools such as class action suits and affirmative action remedies hurt women and minorities. These proven enforcement mechanisms—which have been continually upheld by the Supreme Court—are capable and cost-effective means of obtaining and ensuring compliance with antidiscrimination laws. But largely for political reasons, reliance on these effective law enforcement tools dropped significantly during Judge Thomas' tenure at EEOC.

Judge Thomas' supporters suggest that his childhood experiences of surmounting poverty and segregation demonstrate that, if confirmed, he would show sensitivity and concern regarding civil rights cases that come before the Court. But Judge Thomas does not appear to have brought that experience to bear during his 8 years as the Nation's top civil rights law enforcement official. While Judge Thomas' background and life-story are both impressive and inspiring, his track record at the EEOC is the single best indicator of his approach to civil rights issues should he be confirmed for the Court.

I believe Judge Thomas' failure to effectively enforce the Nation's civil rights laws while at EEOC is, by itself, sufficient grounds for opposing his nomination. The continued strength and
effectiveness of this country's antidiscrimination laws has been jeopardized by the current Supreme Court. Now is not the time to put a man on the Supreme Court with such a flawed and disturbing track record in the area of civil rights.

B. JUDGE THOMAS' LEGAL CREDENTIALS

Judge Clarence Thomas simply does not have the exceptional and distinguished legal credentials which one expects to find in a Supreme Court nominee. He practiced law for only 5 years, stopping at age 31. In his questionnaire, he did not identify a single case which he had argued in Federal court. By his own admission, he did not play a significant role in drafting any briefs filed by the EEOC during his tenure there. In addition, he does not have an extensive record of scholarship or expertise in an area of law, and he has served as a judge for a mere 17 months.

Julius Chambers, the director of the NAACP Legal Defense and Educational Fund, testified that Judge Thomas "does not meet the standards for elevation to the United States Supreme Court." The Legal Defense Fund reviewed the legal and related law and Government experience of Judge Thomas and compared his credentials with those of the other 48 Justices who were appointed to the Court in this century. The NAACP Legal Defense Fund found that virtually every Supreme Court Justice appointed in the 20th century possessed at least two of seven basic qualifications for the Court. The Legal Defense Fund found that, at this stage of the career, Judge Thomas has not yet shown any of these fundamental qualifications. The review noted that all but 8 of the 48 Justices in this century had at least 10 years experience practicing law. Of the 26 Justices appointed to the Supreme Court with prior judicial experience, only 5 had less than 4 years experience as a judge; but each of those 5 had spent at least 26 years practicing law.

Judge Thomas' supporters recognize that his legal and judicial record are not strong reasons to vote in his favor. Accordingly, they stress his capacity for growth. I do not believe that Justices who need to grow into the job should be put on the Supreme Court. If, as his supporters claim, Judge Thomas has the potential to be an outstanding judge, we should give him a few more years on the D.C. Circuit Court of Appeals to see if he lives up to that potential.

This country deserves Supreme Court Justices who have distinguished legal qualifications and proven track records. We should not take a chance with a nominee whose most compelling legal credential is his capacity for growth.

2 In prepared testimony submitted to the Judiciary Committee, the Legal Defense Fund identified the following seven basic qualifications: "(1) a substantial law practice either in the private or public sector, generally covering more than 10 years, (2) extensive legal scholarship or teaching, (3) significant experience as a judge, generally for five or more years, (4) the highest level of expertise in a particular area of the law, (5) superior intellect, (6) ability to persuade and lead, and (7) generally outstanding achievement over the course of their career." Prepared statement of Julius Chambers on behalf of the NAACP Legal Defense Fund, at 12.

3 The eight exceptions are: William Howard Taft, Felix Frankfurter, William O. Douglas, Francis William Murphy (who practiced law for 9 years, served as attorney general for 1 year, and a judge for 7 years), James Francis Byrnes (who served as a Congressman for 24 years and a Senator for 10 years), Wiley Blount Rutledge (law school professor for 13 years, 9 years judicial experience), Sandra Day O'Connor (practiced law for 8 years, State court judge for 7 years, State senator for 6 years), Antonin Scalia (9 years of legal practice, 9 years as a law professor, 4 years judicial experience). Id. at 13.
While Chairman of the EEOC, Judge Thomas wrote a number of speeches and articles on a wide range of legal and policy issues. Judge Thomas' speeches and writings raised serious and troubling questions about whether, as a Supreme Court Justice, he would (1) use natural law in constitutional adjudication, (2) favor revival of the discredited doctrine of economic rights to invalidate worker protection laws, (3) work to narrow congressional power under the Constitution's separation of powers clause, and (4) approach issues that come before the Court with an ideologically conservative mindset.

Natural law

Between 1987 and 1989—the years just prior to President Bush's decision to nominate him for the Court of Appeals—Judge Thomas wrote a number of speeches and articles in which he advocated the use of natural law. As a general statement, natural law is a set of universal principles which exist outside of the Constitution and Federal statutes. As applied, natural law is a broad, vague concept which means different things to different people. It has been used in support of and in opposition to both slavery and segregation. Over 50 years ago, conservative judges used natural law arguments to uphold anti-union practices by employers and strike down health and safety legislation. Similarly, a 19th century Supreme Court decision relied upon natural law arguments about “the paramount destiny and mission of woman” to justify an Illinois law which banned women from practicing law. Today, anti-abortion advocates have cited natural law as the basis for their argument that a fetus has a constitutionally protected right to life which overrides a woman's right to choose. In 1987, Judge Thomas called one article which made that argument “a splendid example of applying natural law.”

In 1988 Judge Thomas wrote that natural law, or higher law, “is the only alternative to the willfulness of both run-amok majorities and run-amok judges.” Judge Thomas also wrote that, “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.” (emphasis supplied). Judge Thomas called Justice Harlan's dissent in *Plessy v. Ferguson* “one of our best examples of natural rights or higher law jurisprudence” and stated that Harlan's approach “gives us a foundation for interpreting not only cases involving race, but the entire Constitution and its scheme of protecting rights.”

These statements were quite troubling because if Judge Thomas were to use natural law in constitutional adjudication, he would be outside the mainstream of current constitutional analysis. When Judge Thomas was questioned about this issue at his confirmation hearing, he denied that he had ever endorsed using natural law in the context of adjudicating cases. He stated that he was interested in natural law “purely in the context of political theory” (Tr., September 10, 1991 at 139) and that “I have not advocated or suggested that [natural law] should be used in constitutional adjudication.” (Tr., September 11, 1991 at 135) Indeed, Judge Thomas re-
peatedly denied that he had ever suggested using natural law in the context of constitutional adjudication. As will be discussed below, Judge Thomas' testimony with respect to natural law simply cannot be squared with his previous statements and writings on the subject.

**Economic rights**

In 1987 and 1988, Judge Thomas gave a number of speeches in which he appeared to advocate the revival of the discredited doctrine of "economic rights." In a 1987 address to the business law section of the American Bar Association, Judge Thomas stated that "the entire Constitution is a bill of rights and economic rights are protected as much as any other rights." In that same speech, Judge Thomas characterized "legislative initiatives such as the minimum wage and Davis-Bacon" as "outright denials of economic liberties." Judge Thomas also stated in 1987 that he finds "attractive the arguments of scholars such as Stephen Macedo who defend an activist Supreme Court, which would strike down laws restricting property rights." 4

Judge Thomas' statements in support of the doctrine of economic rights are distasteful. Between 1899 and 1937, the Court invalidated scores of laws designed to protect employee health and safety, establish a minimum wage, discourage the use of child labor, and protect workers' rights to join unions on the grounds that statutory interference with the operation of the free market violated the constitutionally protected economic rights of both employers and workers.

It has been over 50 years since the Supreme Court has struck down legislation on the basis that it violates constitutionally enforceable economic rights. Economic rights currently are not entitled to the same degree of protection as other rights, such as due process, equal protection and free speech. If they did receive that degree of protection, it would be much harder for Congress to pass laws protecting the environment, worker's rights and workplace safety.

In response to questions on this subject at his confirmation hearing, Judge Thomas testified that he did not believe that economic rights should receive the same degree of protection as other constitutional rights, such as due process and equal protection. Once again, his testimony before the Committee on a critical issue is greatly at variance with statements on that same issue made which he made prior to his nomination.

**Congress/separation of powers**

As a Supreme Court Justice, one of Judge Thomas' fundamental duties would be to discern and defer to congressional intent in interpreting legislative statutes. In addition, one of the most important tasks which the Supreme Court must undertake is to decide

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4 Professor Macedo has written that if Judge Thomas "means it when he says that economic liberties are a vital part of rights protected by government, then he can press for meaningful review of laws infringing on economic liberties." He also has applauded what he calls "the seed of judicial activism in [Judge Thomas'] writings—morally principled activism on behalf of economic and other personal rights." Stephen Macedo, "Hurrah for Judge Thomas's Conservative Activism," Wall St. Journal, July 11, 1991 at A11.
disputes between the executive branch and the legislative branch. These “separation of powers” disputes are core constitutional matters which require careful and objective consideration. However, Judge Thomas’ speeches and writings raise serious questions about his willingness to defer to congressional intent, his position regarding the scope of congressional power under the separation-of-powers clause and his views on the validity of legislative oversight.

Judge Thomas has stated that Congress “is out of control,” that “there is not a great deal of principle in Congress,” and that “there is little deliberation and even less wisdom in the manner in which the Legislative branch conducts its business.” 5 Judge Thomas has stated that through the exercise of its oversight authority, Congress has overstepped its constitutional bounds and improperly intruded upon the province of the Executive. 6

In a 1988 speech, Judge Thomas severely criticized the Supreme Court’s 7-1 decision in Morrison v. Olson, a case which upheld the constitutionality of special prosecutor provisions contained in the 1978 Ethics in Government Act. Judge Thomas castigated Justice Rehnquist, who authored the opinion which held that the independent counsel law did not violate the Constitution’s separation of powers clause. Judge Thomas stated that Justice Rehnquist had “failed not only conservatives, but all Americans” and called the Morrison case “the most important court case since Brown v. Board of Education.” Judge Thomas went on to laud as “remarkable,” Justice Scalia’s dissent in the Morrison case, which took a

5 One example cited by Judge Thomas of how Congress “is out of control” is the subpoena issued against the EEOC in 1988 by the Senate Aging Committee. At that time, the Aging Committee was just beginning to learn that thousands of older workers had lost their right to bring age discrimination suits because of inaction by the EEOC. According to current Senate Aging Committee Chairman David Pryor, “after months of fruitless attempts to obtain additional and accurate information on this matter, the Aging Committee issued a February 1988 subpoena to Chairman Thomas to provide data on the lapsed charges.

Congress was trying to find out whether thousands of older workers had lost their legal rights due to the EEOC’s negligence. As a result of this investigation, Congress passed an emergency bill reviving the legal rights of older workers which had been lost because of EEOC’s negligence. Yet Judge Thomas, in an April 7, 1988 speech, characterized the subpoena in this fashion:

My agency will be virtually shut down by a willful committee staffer, who has succeeded in getting a Senate committee to subpoena volumes of EEOC records. It will take weeks of time, and cost hundreds of thousands of dollars, if not millions. Under the guise of exercising oversight functions, the staffer seeks to implement the program of the American Association of Retired Persons. Thus, a single unelected individual can disrupt civil rights enforcement—all in the name of protecting rights.

Judge Thomas made these remarks on the same day the President signed the first of two laws passed by Congress restoring the legal rights of older workers to sue in federal court for age discrimination.

6 In a 1988 speech, Judge Thomas stated that “the most striking change in American politics in recent years * * * is the change that has occurred in what can only be called the characteristic activity of the two political branches of government.” He asserted that “the characteristic activity of the legislative body [has] * * * ceased to be legislation, or even representation of local constituencies.” Instead, Judge Thomas declared that “selective intervention and control of the various functions of the Executive branch [has] become the legislator’s most characteristic and important activities.” He went on to say that “the detailed control of the ongoing activity of the administrative bureaucracy has been the means by which Congress has transformed itself into something rivaling an Executive.” Judge Thomas suggested that this supposed shift in power has occurred because “the average Member of Congress would prefer to remain in the shadows on controversial issues, while at the same time exercising control through the oversight process. This kind of shadowing of the bureaucracy has become the chief business of Members of Congress.” He concluded this speech by saying: “it is difficult to retain a Constitution with a genuine separation of powers, when the principal branches no longer perform their constitutional function.” Finally, Judge Thomas warned that “unless the Houses of Congress reorder their priorities, it is unlikely that the Constitutional order will function, once again, as it was intended.”
very narrow view of Congressional power under the Separation of Powers clause.

The disdain for legislative authority which is reflected in these statements raise concerns that Judge Thomas may join other members of the Court who narrowly interpret congressional statutes or eagerly revisit long-settled interpretations of civil rights laws. In addition, Judge Thomas' statements bespeak a cramped and narrow view of congressional authority under the separation-of-powers clause.

**Ideology**

A number of statements in Judge Thomas' speeches and writings raise questions about whether he will approach issues that come before the Court with an ideologically conservative mindset rather than with the even-tempered, even-handed judicial openness required of him.

In an April 1987 speech to the CATO Institute, Judge Thomas stated that he "agreed wholeheartedly" with former Treasury Secretary William Simon's statement that "we are careening with frightening speed toward collectivism and away from free individual sovereignty, toward coercive centralized planning and away from free individual choices, toward a statist dictatorial system and away from a nation in which individual liberty is sacred." It is difficult to understand how Judge Thomas could assert that, in the seventh year of the Reagan administration, this country was "careening with frightening speed toward a statist dictatorial system."

In an April 1988 speech at Cal State University, Judge Thomas declared that "those who have been excluded from the American dream [increasingly are] being used by demagogues who hope to harness the anger of the so-called underclass for the purposes of [advancing] a political agenda that resembles the crude totalitarianism of contemporary socialist states much more than it does the democratic constitutionalism of the founding fathers."

In a piece which appeared in a 1988 book entitled "Assessing the Reagan Years," Judge Thomas expressed concern that the ninth amendment, which has been used by members of the Court to uphold the right to privacy and the right to choose, "will likely become an additional weapon for the enemies of freedom."

In an October 1987 speech to the CATO Institute, Judge Thomas stated that "maximization of rights is perfectly compatible with total government and regulation. Unbound by notions of obligation and justice, the desire to protect rights simply plays into the hands of those who advocate a total state." Judge Thomas, whose task on the Supreme Court will be to protect vigilantly the rights of all Americans, also declared in a 1988 speech that "too great an emphasis on rights can be harmful for democracy."

A Supreme Court Justice must be balanced, even-handed and open-minded. But these statements by Judge Thomas raise con-

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7 The remarks noted here are not the only examples of strong ideological statements by Judge Thomas. He has stated that the Democrats have "a collectivist program for the economy," (Speech at the Tocqueville Forum, April 18, 1988, p. 18), and that Franklin Delano Roosevelt's "latter-day political heirs sneer at the wealthy [and] really want to attack the sources of wealth ** **". (Clarence Thomas, "Rewards Belong to Those Who Labor," "Washington Times," January

Continued
cerns that he approaches contemporary social and political issues in a rash, unscholarly, and judgmental manner. Since today's social and political issues often become tomorrow's legal issues for the Court, I believe that the strongly ideological mindset reflected in these statements is a matter of serious concern in connection with this nomination.

D. TESTIMONY BEFORE THE COMMITTEE

Judge Thomas came before the Judiciary Committee with an extensive and controversial record on a wide range of important legal and policy issues. His speeches and writings contain criticisms of key Supreme Court decisions in such areas as privacy, civil rights and separation of powers. In addition, he has commented at length on a number of policy issues that are likely to come before the Court in the future. Accordingly, members of the committee questioned Judge Thomas closely about his record and his speeches and writings.

Judge Thomas' discussion of his record before the committee was evasive, unresponsive, implausible and, at times, simply unbelievable. Stated simply, Judge Thomas ran from his record. His refusal to discuss his record with the committee in a candid, thorough and straightforward manner was the single biggest factor which led to his inability to obtain a favorable endorsement from a majority of the committee.

Judge Thomas' answers to the committee regarding relevant and controversial statements made in his speeches and writings could be grouped into four categories: (1) He sought to defuse the troubling aspects of some of his remarks by refusing to acknowledge the validity of the most plausible interpretation of those remarks. Thus, Judge Thomas either did not understand the legal and judicial significance of some of his statements at the time that he made them, or he simply did not wish to discuss the legal and judicial implications of those statements with the committee; (2) He sought to discount some of his extremist and intemperate statements by asserting that he was actually trying to make an uncontroversial point; (3) He sought to explain away some statements by asserting that he did not really believe what he was saying; and (4) He articulated a catch-all explanation by suggesting that we should give little or no weight to any statements which he made prior to becoming a judge. The nominee asserted his pre-judicial statements should be discounted because there is no relationship between his view of issues as an executive branch official and his approach to issues as a judge.

Judge Thomas' responses to committee questions regarding his views on natural law epitomized his refusal to engage in a forthright dialogue with the committee about his record. Judge Thomas' only real example of legal scholarship, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," advocated the use of natural law. The article stated

18, 1988). Judge Thomas also has asserted that it was "insane" for African-Americans to expect the Federal Government to help relieve the harmful effects of decades of discrimination (Washington Post, December 5, 1983), described the history of governmental efforts to aid minorities and the poor as a "sorry tale," and repeatedly denounced this nation's civil rights leaders.
that "higher law is the only alternative to the willfulness of * * * run-amok judges." It also stated that "the higher-law background of the American Constitution * * * provides the only firm basis for a just, wise and constitutional decision." The article lauded Justice Harlan’s dissent in Plessy v. Ferguson as "one of our best examples of natural rights or higher law jurisprudence" and stated that Harlan’s approach provides "a foundation for interpreting * * * the entire Constitution."

Judge Thomas also gave over a dozen speeches, many of which were to groups of lawyers, in which he advocated the use of natural law. In one speech, he criticized Justice Oliver Wendell Holmes because of Holmes’ condemnation of natural law. In another speech, Thomas praised Justice Scalia’s "remarkable" dissent in Morrison v. Olson because his opinion "indicates how again we might relate natural rights to democratic self-government."

In short, Judge Thomas’ record was replete with statements which indicated that he supported the use of natural law in the context of adjudicating cases. But in his testimony before the committee Judge Thomas disavowed most of his previous statements on natural law. He stated that he was interested in natural law only as "a political theory" and denied that he had ever supported the use of natural law in constitutional adjudication. Judge Thomas did not seek to explain his previous statements regarding the use of natural law, he simply denied the validity of the most plausible interpretation of those statements. Either Judge Thomas did not understand the implications of his previous statements about natural law, or he simply refused to acknowledge the importance of these statements and to discuss them with the committee in a forthright manner. In either case, there is a disturbing and irreconcilable contradiction between his testimony before the committee on natural law and his statements on the subject in his speeches and writings.

Judge Thomas engaged in a similar disavowal with respect to his statements on economic rights. Committee members were disturbed by Judge Thomas’ assertion that "the entire Constitution is a Bill of Rights and economic rights are protected as much as any other rights" and by his statement that he finds "attractive the arguments of scholars such as Stephen Macedo who defend an activist Supreme Court, which would strike down laws restricting property rights." Laws passed by Congress and the states which regulate the economy and protect workers’ rights currently are subjected to a very deferential level of scrutiny by the Court—they are almost never invalidated on the grounds that they violate economic rights. Committee members were concerned that Judge Thomas views on economic rights could make it harder for Congress to pass laws protecting workers and the environment.

In testimony before the committee, Judge Thomas simply repudiated his previous statements on economic rights without an adequate explanation. In response to a direct question about his statements regarding the appropriate level of protection for economic rights, Judge Thomas stated that it is not necessarily the case "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 would happen." (Tr., Sept. 10,
When questioned about the obvious discrepancy between his statements in his speeches regarding economic rights and his testimony before the committee on the subject, Judge Thomas refused to acknowledge that there was any inconsistency: "I have not changed my views. ** The level of scrutiny for economic rights is rational basis. I have not quibbled with that, and I have made that clear." Once again, Judge Thomas either did not understand the legal and constitutional implications of his statements at the time he made them, or he simply refused to acknowledge and discuss those statements with the committee.

Judge Thomas dismissed his repeated criticisms of Congress as simply remarks which sometimes surface during the everyday tension between the executive branch and Congress. (Tr., Sept. 11, 1991 at 161-62). As experienced legislators who are familiar with the normal give-and-take between the executive branch and Congress, I cannot accept Judge Thomas' breezy dismissal of his previous statements condemning both Congress in general and legislative oversight in particular. Serious doubts still linger about whether Judge Thomas would defer to congressional intent in statutes which he believes are wrong, or support the aggressive exercise of Congress' oversight power.

Judge Thomas' explanation of his attack on the special prosecutor law was particularly disingenuous. Committee members questioned the nominee about his condemnation of the Court's 7-1 decision in *Morrison v. Olson*, a 1988 case which upheld the constitutionality of the special prosecutor law. Judge Thomas had stated that Justice Rehnquist's majority opinion for the Court had "failed not only conservatives, but all Americans." He went on to call the *Morrison* decision "the most important court case since *Brown v. Board of Education*." Judge Thomas' statements regarding this case were disturbing, because they suggested that Judge Thomas felt very strongly that the separation of powers clause of the Constitution narrowly restricted and compartmentalized congressional power.

At the hearing, Judge Thomas simply ran from his previous statements regarding the *Morrison* case. When he was asked to give his views about the most important court cases in the last 20 years, he did not include *Morrison* on the list. Moreover, he testified that he called *Morrison* the most important case since *Brown* because he was trying "to take a case that most considered obscure and elevate it and attempt to show some of the significance of that." (Tr., Sept. 13, 1991 at 15-16). In other words, Judge Thomas did not really believe that *Morrison* was the most important case since *Brown*, in order to persuade his audience that it was significant. Once again, Judge Thomas simply avoided discussing the legal and judicial implications of a controversial statement in his record which directly implicated a critical Constitutional issue. Once again, Judge Thomas gave the committee an implausible ex-

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8 This was not the only instance in which Judge Thomas explained away significant and controversial statements by testifying that he had purposely misstated his views in order to try to win over the audience. As will be discussed below, Judge Thomas gave the same explanation with respect to his endorsement of Lewis Lehrman's article, "The Declaration of Independence and The Meaning of the Right to Life."
planation which provided little guidance about his true views on an important issue.

Finally, Judge Thomas' explanation of some of his most ideological statements provided little reassurance. Judge Thomas did not adequately explain his endorsement of the view that the country was "careening toward a statist dictatorial system" or his statement that the disadvantaged of this country were being manipulated by "demagogues" with "a political agenda that resembles the crude totalitarianism of contemporary socialist states." Judge Thomas stated that when he made these remarks, he was only trying to say that "we should be careful about the relationship between the government and the individual and should be careful that the Government itself does not at some point displace or infringe on the rights of the individual." (Tr. Sept. 16, 1991 at 33–35).

With respect to his statements that the ninth amendment could be a "weapon for the enemies of freedom" and his assertion that "the desire to protect rights simply plays into the hands of those who advocate a total state," Judge Thomas explained that he was simply concerned about "efforts to enlarge the Government at the expense of the individual." (Tr. Sept. 16, 1991 at 37).

Once again, Judge Thomas refused to acknowledge and discuss the troubling aspects of statements in his record. At no time did Judge Thomas explain why he felt compelled to employ such extremist and ideological rhetoric in order to make an elementary point about the growth of Government or the relationship between the individual and the state. Indeed, Judge Thomas' assertion that this extremist rhetoric was used only to make uncontroversial points was repeated too often to have any credibility.

Judge Thomas' suggestion that we should give little weight to the speeches and articles which he wrote prior to becoming a judge was a sweeping—and remarkable—attempt to persuade the Committee not to judge him based on his record. President Bush selected Judge Thomas because of his record at the EEOC and because of the conservative ideology espoused in his numerous speeches and writings. Yet Judge Thomas came before this Committee and asserted that we should discount the very same speeches and writings which prompted President Bush to select him. In fact, Judge Thomas told us that we should give little or no weight to the record which he established prior to going on the bench.

Judge Thomas asks us to believe that views which he expressed as an executive branch official will have no relationship to how he would approach issues as a judge. (Tr., Sept. 12, 1991 at 20, Tr. Sept. 13, 1991 at 101–05). I do not believe that a nominee's views and beliefs magically disappear the moment he or she dons a judge's robe. History tells us that, in most cases, a nominee's speeches and writings provide a good indication of the kind of judge that person will become.

In my view, the speeches and writings of Clarence Thomas strongly suggest that he is a nominee who would fit in all too well

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9 Judge Thomas told committee members that they "have to weigh or discount to the best of your abilities or in your judgments speeches that are made outside of the judiciary." (Tr., Sept. 13, 1991 at 106). Later he testified that "The only point that I am making is that, to the extent that those are political statements or policymaking statements, I don't think that they are relevant in my role as a judge." (Tr., Sept. 16, 1991 at 148).
with the conservative activists on the Supreme Court. Judge Thomas' refusal to acknowledge or discuss those speeches and writings in a candid, thorough and straightforward manner, suggests that he either does not understand the significant legal and judicial implications of those statements, or that he did not want to engage in a meaningful dialogue with the committee about these matters. In either event, Judge Thomas testimony before the committee regarding his speeches and writings reinforced our view that he should not be elevated to the Supreme Court.

E. JUDGE THOMAS' VIEWS AND TESTIMONY ON ABORTION

Nowhere was Judge Thomas' effort to run from his record more transparent than in the area of abortion. Unlike David Souter, Judge Thomas came before the committee with an extensive record on the subject of abortion. Every aspect of his record relating to abortion strongly suggests that he is opposed to a woman's right to choose. He was repeatedly asked to explain or elaborate upon those elements of his record which touch on abortion. But Judge Thomas' explanation of his record on the abortion issue only exacerbated concerns about his views on this subject, and about his willingness to be candid with the Committee.

In 1987, Judge Thomas gave a speech at the Heritage Foundation, entitled "Why Black Americans Should Look to Conservative Policies," in which he specifically praised as "a splendid example of applying natural law," an antichoice polemic by Lewis Lehrman. The Lehrman article argued that Roe must be overruled, that fetuses have constitutional enforceable rights, and that Congress and the states are barred from enacting laws that protect the right to choose. Lehrman's article stated explicitly that the right to abortion upheld in Roe is "a spurious right born exclusively of judicial supremacy with not a single trace of lawful authority. It also stated that Roe "eviscerated * * * the right to life of the child about to be born" and that the decision is responsible for a so-called abortion "holocaust."

However, when Judge Thomas was questioned about the Lehrman article, he stated that he did not believe that it was a "splendid" application of natural law. In fact, Judge Thomas testified that he regarded it as inappropriate application of natural law. He stated that he praised the Lehrman article in order to persuade his conservative audience that they should not be fearful about using natural law. In essence, Judge Thomas told us to discount this statement because he didn't mean what he was saying. Such an explanation only heightens concern about his nomination. If, in 1987, Judge Thomas was willing to misstate his views about the Lehrman article in order to win over his audience, how can we be certain that Judge Thomas was not disavowing the article in order to please the Committee?

Judge Thomas also signed onto a 1986 White House Working Group Report that criticized as "fatally flawed" a whole line of cases concerned with the right to privacy. The report characterized these privacy decisions as anti-family, and it specifically criticized Eisenstadt v. Baird—which upheld the right of unmarried couples to use contraceptives—and Roe—which protects a woman's right to
choose. That report suggested that these decisions could ultimately be corrected through "the appointment of new judges and their confirmation by the Senate."

The Report further declared that "state attempts to protect the life of children in utero, [and] to protect the interest in the life of the child before birth" are all matters to be decided by state legislatures. In short, the report concluded that state-imposed restrictions on a woman's right to an abortion should not be challenged by the Court on which Judge Thomas hopes to sit.

However, when Judge Thomas was questioned about the Working Group Report he tried to disavow this aspect of his record by explaining that he had never read the section of the report which discussed the abortion decisions. (Tr., Sept. 10, 1991, at 155). Once again, Judge Thomas' explanation of an important and controversial element of his record only raises more questions than it answers.

In a 1988 Cato Institute publication Judge Thomas criticized another of the Supreme Court's decisions on privacy, Griswold v. Connecticut, thereby deriding a key constitutional argument supporting the right to abortion. Specifically, in reference to Griswold, Judge Thomas dismissed as "an invention" the idea that the ninth amendment supports the right to privacy and protects a woman's right to choose abortion.

Judge Thomas testified to the Committee that he views the Constitution as protecting a marital right to privacy. (Tr., Sept. 10, 1991 at 149.) His testimony is troubling for two reasons. First, his testimony to the Judiciary Committee during his Supreme Court confirmation hearing was the first time in which Judge Thomas had ever given any inkling that he believes that the Constitution protects a right to privacy. Nowhere in any of his previous speeches and writings had Judge Thomas ever suggested that he takes such a view. Second, Judge Thomas refused to say whether the right to privacy which he recognizes encompasses a woman's right to terminate her pregnancy. Indeed, Judge Thomas' remarks regarding privacy sound eerily similar to statements made by other nominees who have paid lip service to the right to privacy and then have gone onto the Court and undermined the abortion right.

Judge Thomas has repeatedly characterized himself as a conservative. In his 1989 article entitled, "The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment," Judge Thomas argued to those he called "my conservative allies" that the case "provoking the most protest from conservatives" is Roe. This statement certainly raised concerns that Judge Thomas shared the conservative concerns about the Roe decision. But when Judge Thomas was asked whether he had any views about the Roe decision, he made the remarkable statement that he had no opinion on the case and that he had never even had a discussion about Roe. (Tr., Sept. 11, 1991 at 104-06.)

This statement is simply not credible. It is hard to believe that any thoughtful attorney or judge has never had a discussion or formulated an opinion about the Roe case. Moreover, Judge Thomas had cited to the decision in the article he wrote. In addition, Judge Thomas testified to the Committee that he believed that the Constitution protects a right to privacy. It is difficult to believe that
Judge Thomas could reach the conclusion that the Constitution protects a right to privacy without ever formulating an opinion regarding *Roe v. Wade*, the most significant of the privacy cases.

From 1981 through 1990, Judge Thomas was a member of the editorial board of the Lincoln Review, a conservative public policy journal that is published four times a year. During the time in which he served on the editorial advisory board, the Review published three articles that took strong positions in opposition to *Roe* and to a woman’s right to choose. The Review has never published a piece in support of that right. In his testimony before the committee, Judge Thomas disparaged his membership on the Review’s editorial board, stating his role “was purely honorary.” He went on to say that he had not “read a copy of the Lincoln Review in 2 or 3 years.” (Tr., Sept. 11, 1991 at 175.)

Finally, Judge Thomas has been nominated to the bench by a President whose party platform pledges to appoint judges who will reverse *Roe* and who has used his appointments to the high Court to make good on that pledge.

Because of his extensive record on the abortion issue, Committee members questioned him directly about his views regarding a woman’s right to choose. Despite the fact that Judge Thomas answered questions on a slew of constitutional issues that will most certainly come before the Court, he would not even given us an inkling about how he would approach the legal issues raised by the abortion question.

Judge Thomas’ supporters defended his silence on the abortion question. They pointed to his statements in support of the right to privacy, even though these statements are quite similar to the statements of other nominees who have gone on to the Court and weakened the abortion right. They also noted that the issue of whether the Constitution protects a woman’s right to abortion is unsettled, and is therefore not appropriate for discussion. But they failed to acknowledge that the major reason that a woman’s right to abortion is unsettled is that the Reagan and Bush administrations have consistently made good on their campaign promise to appoint Justices who would weaken that right.

The issue of abortion is of central importance to the Committee because of the simple fact that millions of women are on the verge of losing one of their most important rights: the right to decide for themselves—free of Government interference—whether or not to terminate a pregnancy. And, Judge Thomas could be the decisive vote on whether that right survives, or whether it disappears.

Rather than being forthright with the Committee about his views on the subject of abortion, Judge Thomas either claimed silence or ran from his record at every opportunity. But, in the face of his extensive record on this subject of abortion, it is all but impossible

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10 One of the articles published by the Review argued that abortion is “government sanctioned killing of the black community.” Another piece asserted that abortion is “contemporary American infanticide.” Other articles compared Planned Parenthood to the Ku Klux Klan; equated Justice Harry Blackmun—The author of the *Roe* decision—with Jim Jones, the cult leader who ordered hundreds of his followers to drink poison in Guyana; and likened Justices Marshall and Brennan to the “kapos recruited among the Jewish prisoners in the death camps to carry out exterminations.” (P. Monaghan, “Substantively Due Processing” The Black Population, *Lincoln Review*, summer 1989 at 58) There is no evidence that Judge Thomas ever objected to any of these articles.
to believe that Judge Thomas didn't really mean it when he called Lewis Lehrman's antichoice polemic "splendid," or that he didn't really mean it when he signed onto a report criticizing *Roe* and other prochoice decisions.

Although everything he has said or written suggests otherwise, Judge Thomas would ask us not to worry that he criticized a key constitutional argument supporting a woman's right to choose or that for six years he sat on the editorial board of a journal that has only published articles on the abortion issue vehemently attacking a woman's right to choose. Judge Thomas would ask us to ignore the fact that his nomination is championed by anti-abortion groups and that he was selected by a President who has pledged to appoint Justices who will overturn *Roe*. And, Judge Thomas would have us believe that it is of no consequence that he—like other nominees who have gone onto the Court and weakened the right to choose—has singled out the subject of abortion for silence. In fact, Judge Thomas would ask the women of this country to entrust their fundamental right to choose into the hands of a man who, by his own admission, does not even regard the issue as important enough to merit discussion.

In light of the record he has compiled, Judge Thomas' statements regarding the abortion issue are simply not credible.

**III. Conclusion**

In my view, Judge Thomas' nomination must be evaluated based upon his record, and based upon the manner in which he discussed that record with the Committee. Judge Thomas' background and life story are impressive and inspiring. But in the end, the question of where Judge Thomas comes from is far less important than the question of where he would take the Court.

Everything in Judge Thomas' record suggests that he will be an active and eager participant in the Rehnquist Court's ongoing assault on established Court decisions protecting civil rights, individual liberties, and the right to choose. Judge Thomas' refusal to discuss that record in a candid, thorough and straightforward manner only confirms our concern that he would move the court in the wrong direction.

I must vote against the nomination of Clarence Thomas.
ADDITIONAL VIEWS OF SENATOR DECONCINI

I am writing separately to express my reasons for supporting the nomination of Clarence Thomas to be an Associate Justice to the U.S. Supreme Court. My decision to support the nomination of Judge Thomas is based on the totality of the record. Judge Thomas is indeed a controversial nominee and I expect the full Senate's vote on his confirmation to reflect that controversy. Nonetheless, as I will briefly outline, I believe that Judge Thomas merits confirmation by the United States Senate.

In announcing that he was nominating Clarence Thomas for the Supreme Court, President Bush stated that Judge Thomas was the most qualified person for the position. There is a plethora of judges, lawyers and scholars who would be universally considered more qualified for the highest Court in the country than Judge Thomas.

But Judge Thomas need not be the most qualified person for the position. However, he must possess the qualities to shoulder the great responsibilities of a Supreme Court Justice. He must exhibit the intellectual capacity, experience, integrity, and temperament to serve on this country's highest Court. Not only must the nominee possess those qualities, but the nominee must have the ability to exercise those qualities with restraint as a Justice. In other words, the nominee must demonstrate to the American public that he or she understands the role of the Court in our governmental system and its duty to protect individual liberties.

In exercising my constitutional duty of "advice and consent" on judicial nominees, I have always accorded the President's nominee a benefit of the doubt. But whether a Senator applies a burden of proof standard or a presumption of fitness criterion for confirming a Supreme Court nominee, a Senator still must arrive at the same conclusion in his or her analysis—can this individual be entrusted with the tremendous responsibility of protecting the rights embodied in our Constitution?

Thus, voting upon a nominee to the Supreme Court entails a difficult, conscious decision. For this particular nomination, I must candidly admit, I struggled in making my decision.

Prior to his nomination hearings, I read extensively from Judge Thomas' writings, speeches and judicial decisions. I reviewed his record at the Equal Employment Opportunity Commission [EEOC] and at the Department of Education. I read analyses of his record prepared by opponents and proponents. I talked to my constituents in Arizona.

And after this preparation, I was left with a number of concerns about Judge Thomas. I knew these concerns could only be resolved through the hearings. After 5 days of testimony by Judge Thomas and hearing from over 90 witnesses, I came to the conclusion that I could support this nominee.
During the hearings we heard detractors of the process harken back for the days when nominees were not questioned by the Senate. I disagree with that notion. Five days of insight into a nominee is a small price to pay for someone who will spend the next 40 years interpreting the Constitution. The Senate and the American public have a right to know a nominee's judicial philosophy. And quite frankly, many of my concerns regarding Judge Thomas were only alleviated through his hearing testimony and his answers to our questions.

For example, in prior writings and speeches, Judge Thomas was critical of several landmark Supreme Court cases. With regards to the unenumerated right to privacy, he had been critical of *Griswold v. Connecticut*, 381 U.S. 479 (1965). But throughout the hearing, Judge Thomas stated that he believes that a right to privacy does exist in the Constitution and that it extends to both married and single individuals. Some of my colleagues would have liked to have heard a more direct application of this right. But I have no objection to where this nominee chooses to draw a line of propriety.

During the hearings, I questioned Judge Thomas on his understanding of the fundamental principle under the equal protection clause and the Court's approach to gender discrimination claims. More so than even Justice Souter, Judge Thomas supported heightened scrutiny for discrimination against women. I was very encouraged to hear him say that he believed that the Court should be willing to apply even greater scrutiny to gender discrimination.

I have not discounted the controversy of Judge Thomas' tenure at the EEOC. He and I have had our differences regarding the EEOC's treatment of the claims of Hispanics and the elderly during his tenure. I made this clear to him both at his Court of Appeals hearing and these hearings. I do not mean to question what Judge Thomas believes to be a sincere commitment to these two groups. However, it is this Senator's belief that during his tenure at the EEOC, these groups were not accorded the vigorous enforcement of the Civil Rights laws that they deserved.

I was heartened by Judge Thomas' acknowledgment that he was frustrated by the difficulty of his mission at the EEOC. In view of my belief that Judge Thomas acted within his official capacity and was earnest in his efforts at the EEOC, I did not consider his tenure at that agency as a disqualifying factor for the Supreme Court.

Undoubtedly, we have had nominees who have made a more concerted effort to convey their judicial philosophy to the committee and in turn to the American public. Nonetheless, I do believe that Judge Thomas' testimony before this committee was revealing of his judicial philosophy and addressed several of my prior concerns of him. Furthermore, I believe that this committee has made considerable advances from prior nominees who refused to respond to legitimate inquiries.

Throughout the hearings, we heard from several witnesses, many of whom know Clarence Thomas personally, speak with passion of his integrity. It is for this reason that I believe that Judge Thomas will not act contrary to his sworn testimony before this committee. I also believe that he was sincere in his pledge to this committee
that he would "carry with [him] the values of [his] heritage: fairness, integrity, open-mindedness, honesty, and hard work."

Over the past few weeks, we have heard from various reputable groups and individuals who oppose the nomination of Judge Thomas, including national groups representing the interests of women, African-Americans, Hispanics, and the elderly. I do believe that the opponents of Judge Thomas had a right to be concerned about his nomination. But in making my decision to support Judge Thomas, I balanced several important factors against Judge Thomas' prior record, statements and writings.

For example, I believe that Judge Thomas has shown a potential for growth, an ability to recognize the role of the judiciary, and a skill in separating his prior duties with that role. I also believe that his prior controversial positions must be weighed against his commendable work on the Court of Appeals. Furthermore, Judge Thomas has assured us that he will be a jurist who will not impose his agenda on the Court and that he will divorce his political views from his judicial duties.

Drawing from a remarkable life story Judge Thomas will bring a perspective to the Court that it is surely lacking. His story is one of courage—a story of an individual who has risen from the indignity and pain of segregation and poverty to be considered for the highest Court in the land. If confirmed, I hope that Judge Thomas will continue to recall his humble background and draw upon it.

But Judge Thomas' personal success story does not alone qualify him for the Supreme Court. Instead, he has the diversity of experience, intellectual ability, integrity and judicial temperament to succeed on the Court. I believe that he is an independent thinker beholdng to no particular cause. Judge Thomas will be a fair and openminded justice, who will review every case as it is presented to him.

I have little doubt that Judge Thomas will be a conservative jurist. But he will be conservative by respecting precedent and exercising restraint. I do not believe that he will use his position on the Court to advance a conservative activist agenda. As he stated to me at the hearing, "It is important for judges not to have agendas or to have strong ideology or ideological views * * * " (Tr., 9/11/91, at 60).

If confirmed, Judge Thomas will be making some of the most important decisions for this country decades into the future. I imagine that I will not agree with some of his conclusions. I expect that of any nominee. By voting in favor of a nominee to the Supreme Court, we express our trust that the nominee will exercise the immense powers of that position, judiciously. I believe that this nominee will not compromise that trust. Judge Thomas has shown the qualities to be a distinguishing Justice on the Supreme Court. It is my sincere belief that Judge Thomas will thoughtfully utilize these qualities and serve with distinction on the Supreme Court.

DENNIS DECONCINI.
The Senate’s responsibility to advise and consent on Supreme Court nominations is a most solemn duty, and each Senator must approach it with the utmost reflection and conscientiousness. Nominations to the Supreme Court bring together our three branches of government in a unique manner and demonstrate the genius of our system of separated powers, in which each branch of government checks the power of the others.

Throughout this nation’s history, Americans have turned to the Supreme Court when the other branches of government failed to protect their rights. The primary purpose of the Court is to act as a check on the excesses of the legislative and executive branches. To protect this crucial role of the Court, the Framers realized that neither the executive nor the legislature should have the power to cast the Court in its own image. Thus, the Framers required the President to obtain the advice and consent of the Senate in making appointments to the Supreme Court. See U.S. Const. art. II, § 2, cl. 2. As Alexander Hamilton wrote in The Federalist:

In the act of nomination, [the President’s] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment. * * * To what purpose then require the co-operation of the Senate? I answer, that * * * [i]t would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters.


Indeed, until the very last days of the Constitutional Convention, drafts of the Constitution called for the Senate to have the sole role in appointing Supreme Court Justices. After certain delegates objected that the Senate was too large to efficaciously fulfill this duty, a compromise was reached whereby the President and the Senate would share responsibility for the appointment of Supreme Court Justices. See 2 the records of the Federal Convention of 1787, 498–99 (M. Farrand rev. ed. 1966). See also, Monaghan, “The Confirmation Process: Law or Politics?,” 101 Harv. L. Rev. 1202 (1988).

If the Senate fails to take its advice and consent role seriously, and instead engages in only perfunctory, polite review of Supreme Court nominations, it abdicates its duty to guarantee the independence of our courts and the rights of our citizens. It is up to the
President and the Senate, working as coequal powers, to appoint our Supreme Court Justices. This is the manner in which the Framers intended advice and consent to function, and to serve as a check on presidential power. See e.g. Monaghan, "The Confirmation Process: Law or Politics?," 101 Harv. L. Rev. 1202 (1988); Black, "A Note on Senatorial Consideration of Supreme Court Nominees," 79 Yale L.J. 657 (1970).

THE SENATE SHOULD NOT CONSENT TO JUDGE THOMAS' NOMINATION

After considering Judge Thomas' record and his testimony before this committee, I cannot consent to his nomination to be an Associate Justice of the Supreme Court.

A Supreme Court Justice must possess, above all, a deep and profound vision of the Constitution and the role that document plays in the complex intertwining of American society. See 137 Cong. Rec. S13479 (daily ed. Sept. 24, 1991) (statement of Sen. Leahy). A nominee must be ready to apply his understanding of the Constitution to the difficult and important cases that he or she will begin considering as soon as he or she joins the Court. Id.

To perform my constitutionally required responsibility of consent, I must be sure in my own mind that the nominee possesses such a deep constitutional vision and that this philosophy does not threaten or undermine the Constitution. Id. Although Judge Thomas' brief tenure on the Court of Appeals has been thoughtful and moderate, his decisions have not dealt with the pivotal constitutional issues that are the routine fare of the Supreme Court. Judge Thomas' opinions thus far are not indicative one way or the other of his fitness for the Supreme Court. Id.

During September, the Judiciary Committee held thorough and fair hearings during which Judge Thomas testified for five days. After reviewing his past record and listening to his testimony, I am left with too many doubts to vote in favor of Judge Thomas' confirmation. I have doubts about his legal ability, which, at this early stage in his career, is largely untested. I have doubts raised by his refusal to answer questions and his repeated disavowals of his earlier speeches and writings.

Furthermore, I have doubts about how Judge Thomas views the fundamental constitutional right to privacy, including a woman's right to choose. The most astonishing statement in these hearings was Judge Thomas' claim that he has never discussed the merits of Roe v. Wade, 410 U.S. 113 (1973), the most controversial Supreme Court case of the last quarter-century. Transcript of the Confirmation Hearings of Judge Clarence Thomas To Be an Associate Justice of the Supreme Court of the United States, hereinafter "Transcript," Sept. 11, 1991 at 102-05.1

In the face of these doubts, the fact that Clarence Thomas is a fine person who has overcome what for many have been insurmountable obstacles is not a sufficient justification for a lifetime appointment to the Supreme Court.

1 This portion of the transcript is set out in full in the section on Privacy below.
JUDGE THOMAS HAS NOT DEMONSTRATED ADEQUATE QUALIFICATIONS
AND CONSTITUTIONAL VISION

First, nothing in Judge Thomas’ record or testimony suggests the level of professional distinction or constitutional grounding that a Supreme Court nominee ought to have. His legal experience is not extensive. After completing his law degree at Yale, Judge Thomas worked for two and a half years in the Missouri Attorney General’s office, concentrating in appellate tax litigation. Response of Judge Thomas to Senate Judiciary Committee initial questionnaire (Supreme Court), at 14–15, 28. This service was followed by 2 years working as an attorney in Monsanto Co.’s legal department on miscellaneous corporate matters. Id. at 15–16. Judge Thomas also served as Assistant Secretary of Education for Civil Rights for approximately a year, and as Chairman of the Equal Employment Opportunity Commission for approximately 8 years. Id. at 3.

In March 1990, Judge Thomas was confirmed to a seat on the U.S. Court of Appeals for the D.C. Circuit where he has authored some 20 opinions. Id. at 10–11. In addition to Judge Thomas’ limited legal and judicial experience, I was concerned about the quality of his speeches and writings before he became a Federal judge.

I do not quarrel with the soundness of the judicial opinions Judge Thomas has authored while on the D.C. Circuit. However, I found Judge Thomas’ prejudicial speeches and articles to lack intellectual quality and depth. In the words of the Reading Committee of the ABA, Judge Thomas’ articles prior to his confirmation to the D.C. Circuit were “disappointing in presentation, content and scholarship.” Statement of the ABA Standing Committee on the Federal Judiciary, Sept. 14, 1991 at 8.

Nor did Judge Thomas’ testimony in the hearings convince me that Judge Thomas has any developed constitutional vision or framework for approaching constitutional issues. For example, I was unimpressed by the depth and quality of Judge Thomas' responses to questions I asked him about issues raised by the recent case of Rust v. Sullivan, 500 U.S., 114 L. Ed., 2d 233 (1991). This case upheld regulations prohibiting federally funded family planning clinics from counseling patients on the availability of abortion:

Senator Leahy. Suppose the government wanted to further a policy of participation in the political process. Could they give out subsidies but limit them just to people who say that they will vote Republican or just to people who say they will vote Democrat? Could they do something like that?

Judge Thomas. Senator, I certainly couldn’t absolutely answer that. I would be concerned that if the government could do that, it certainly would seem to me to be an interference with * * * the freedoms that we would expect in our political processes, as well as the way that we think we can function as citizens in this country.

Senator Leahy. Well, let’s go to another example. Suppose * * * that we are going to have a Government policy that we want to protect the public from sexually explicit material. So we say that you are a library and you receive
public funds, but you can't have certain listed books. You can't have Alice Walker's "The Color Purple." You can't have J.D. Salinger's "Catcher In the Rye" available. Could we do something like that?

Judge THOMAS. Again, Senator, I would have the same concern. I think the underlying problem that the Court has wrestled with and certainly in using the receipt of federal financial assistance to in some way determine what the policies would be, that this body would have to wrestle with also. * * *

Senator LEAHY. But what happens when you go to the next step and say, okay, we are going to send money for a significant purpose, and, by gosh, we are going to tell you how to think to use that money? For example, say the Government says we are in favor of nuclear families. A fine, good statement of policy. But then [what if] we also say * * * to any college receiving federal funds * * * you can't include information in a sociology course on divorce or illegitimacy or homosexuality or heterosexuality—whatever—because we feel it would interfere with this policy? Can we do that?

Judge THOMAS. Senator, I think that as you move more into freedoms that we consider fundamental, I think, as I have noted earlier, that the conflict becomes more accentuated and I think the conflict becomes more evident. And to my knowledge, in those kinds of instances, the Supreme Court has to wrestle with whether or not the Government has—if it is a fundamental right involved, for example, whether or not the Government has a compelling interest in doing that. I understand the concern, but I can't in each specific instance say that I can resolve the problem or the specific problem. But I would have deep concerns myself if someone said that in order to receive financial assistance you are going to have to conduct your life in a particular way.

Transcript, September 13, 1991 at 9-12.

I was disappointed by these responses because the only substance in them was Judge Thomas' mere restatement of the Supreme Court's compelling interest test. He did not include in his answer an analysis of how this standard would apply to the fact settings about which I inquired or why it should apply. More importantly, Judge Thomas gave me no insight into his views on the first amendment or how he believes a court should assess the significant issues of when a right is fundamental, when a government interest is compelling or when Government action places an undue burden on a right. While these are difficult issues, I expected stronger analysis of them by Judge Thomas.

I was also disappointed by Judge Thomas's responses to Senator Specter about the War Powers Act. Senator Specter asked Judge Thomas how he would analyze whether the Constitution required a congressional declaration of war in circumstances like the Korean conflict or the Persian Gulf War—a question Senator Specter told Judge Thomas he would ask him 6 weeks prior to the hearings.
Judge Thomas appeared unable even to discuss the relevant constitutional considerations:

Senator SPECTER. Let me start with the question that I told you I was going to ask you, and that is whether the Korean conflict was, in fact, a war.

Judge THOMAS. Senator, I, in response to our informal discussions, did attempt to resolve an issue that scholars and political scientists, lawyers, seem to have been debating for the last 40 years. * * * Of course, I don't think that there was a suggestion that the President could not respond, but your question at the time went to whether or not there should have been a declaration of war.

Senator SPECTER. Correct.

Judge THOMAS. And the short answer to that is, from my standpoint, I don't know. I have attempted to look at that question, but, again, it is one that scholars haven't resolved and that legal minds haven't been able to resolve. And I think I would be imprudent to attempt to resolve it in this environment.

Senator SPECTER. Well, Judge Thomas, when I asked you the question at our informal session as to whether the Korean conflict was a war, you said, "You asked that question of Judge Souter." And I said, "That is right." And he ducked, and then I said [to Judge Souter], "Well let me give you the weekend." He came back and he said, "I don't know." Now, I thought that was okay under those circumstances [of Judge Souter's confirmation hearing] where it was from Friday to Monday, but you and I talked about this on August 1st and now it is September 16th. And I don't think that the Korean incident is going to be repeated. It is not asking you to comment on a pending case, and it is well established historically as to what happened. And this is a crucial issue as to whether American troops are going to be committed to combat on the President's word alone as commander-in-chief or whether it is going to require a congressional declaration of war. So, to the extent that I can push it just a little bit, let me repeat the question. Was it a war?

Judge THOMAS. Senator, this isn't one of the instances in which I am saying that the issue of whether or not * * * the hostilities in Korea was a war would be coming before the Court. This is an instance when, as I have indicated to you, I simply don't know.

Senator SPECTER. In early January of this year, there was a lot of debate as to whether the President had the authority to commit troops in the Gulf War without a [war powers] resolution. * * * What would the considerations be that you would work through in approaching that kind of a legal issue?

Judge THOMAS. It is a very difficult issue, Senator. I have addressed whether or not—in the War Powers Act, resolution, of course, is very complex and has a variety of reporting provisions, as well as the more difficult provision
involving the withdrawal of troops. I think that, as I may have alluded to in our conversation earlier in private, the whole issue of what the President's authority is, as opposed to the authority of Congress, seems to be one that is more amenable to the kind of process that this body and the Executive went through or engaged in the Persian Gulf conflict; that is, one in which the conflict is resolved in the political context. I don't think there is * * * very much in the way of judicial precedent or judicial consideration of this particular issue. And as I have noted before, there is an ongoing debate among scholars on both sides of the issue. I for one, just as I have viewed the issue, as I have looked at it, it seems to be one of those instances in which the differences, particularly when there is an existing conflict, are better worked out in cooperation between the executive and the legislative branches.

Senator SPECTER. Well, Judge Thomas, I agree with you totally that is is better to work them out, but that issue could come before the Court.


These and other responses indicate a lack of the deep legal understanding that I have seen in other nominees to the Supreme Court. In this regard, I found especially compelling Dean Griswold's assessment of the risk of appointing a nominee with such limited legal experience and attainment. Dean Griswold described Judge Thomas as a "nominee who has not yet demonstrated any clear intellectual or professional distinction." Dean Griswold went on to comment that Judge Thomas' appointment, "worries me profoundly * * * [t]he nominee, if confirmed, may well serve for 40 years. That would be until the year 2030. There does not seem to me to be any justification for taking such an awesome risk."


At the hearing held to consider Judge Thomas' nomination to the D.C. Circuit last year, Judge Thomas said that he was "* * * someone who has had the opportunity or the time to formulate an individual, well thought-out constitutional philosophy." Transcript of Hearings on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the D.C. Circuit, February 6, 1990 at 48. It seems to me that this candid assessment is all too true today, just a year and a half later. Judge Thomas' judicial philosophy remains obscure or unformed, and this is a serious drawback for someone who would, in short order, assume the duties of a Supreme Court Justice.

JUDGE THOMAS DISAVOWED PREVIOUS CONTROVERSIAL STATEMENTS

The second set of considerations that influenced me to vote against Judge Thomas was his disturbing flight from his record. In distancing himself from past statements, Judge Thomas took various tacks: either (1) he meant to say something far more temperate than his pugnacious rhetoric suggested; (2) he had not really read what he was commenting on; (3) he was just trying to score a point with his audience and did not mean what the words seemed to say, or (4) when he became a judge, he "stripped down like a
runner' and shed the harsh views expressed as an executive branch advocate.

For example, although prior to the hearings, Judge Thomas spoke repeatedly on the central importance of natural law and said that "the higher law background of the American Constitution * * * provides the only firm basis for a just, wise and constitutional decision," [Speech to the Federalist Society, Univ. of Virginia Law School, March 5, 1988] Judge Thomas maintained at the hearings that natural law should play no role in constitutional adjudication. In response to Chairman Biden's inquiry into Judge Thomas' views on natural law, Judge Thomas said:

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 the political theory standpoint. I was not interested in constitutional adjudication.


Another example of Judge Thomas' abandonment of previous positions is his praise for Lewis Lehrman's article, "The Declaration of Independence and the Right to Life." Lehrman, "The Declaration of Independence and the Right to Life," The American Spectator, April 1987. Judge Thomas warmly praised Lehrman's essay, which argues that any abortion is prohibited by the Constitution, calling it a "splendid example of applying natural law." Speech to the Heritage Foundation, June 18, 1987. Judge Thomas maintained at the hearings that this was just a "throwaway" line, that he only "skimmed" the article before praising it, and that he mentioned it only to make his conservative audience more receptive to discussing civil rights. Transcript, September 10, 1991 at 196–97; September 11, 1991 at 95–97.

I was also disturbed that in all the weeks of well-orchestrated preparation for the confirmation hearings, Judge Thomas inexplicably had not even taken the few minutes necessary to read this short article that was obviously going to be one of the focal points of the confirmation process. Transcript, September 11, 1991 at 98.

The record is replete with other instances of revisionism. For instance, in a speech to the American Bar Association Judge Thomas said that "economic rights are protected as much as any other rights," a statement that contradicts the Supreme Court's jurisprudence once it abandoned the line of cases represented by Lochner v. New York, 198 U.S. 45 (1905). ABA Address, August 11, 1987. At the hearings, Judge Thomas maintained that he only meant that economic rights were important and should not be forgotten. Transcript, September 16, 1991 at 21–24.

Further, although he appeared to moderate his views on affirmative action at the hearings, Judge Thomas' writings attack virtually every Supreme Court case since (and including) Univ. of Cal. Bd. of Regents v. Bakke, 438 U.S. 265 (1978), that upholds racial or gender preferences, even as a last resort to uproot proven discrimination. Compare Transcript, September 13, 1991 at 24–29, 31–36.

Judge Thomas also repeatedly described the harsh rhetoric that punctuates his speeches and articles in watered-down tones. For example, although he said in speeches that the United States was "careening with frightening speed towards . . . a statistdictatorial system * * *" [Speech to Cato Institute, April 23, 1987] and that "demagogues" are using the underclass to advance a political agenda that resembles "the crude totalitarianism of contemporary socialist states * * *" [Speech at Cal. State Univ., April 25, 1988], Judge Thomas said at the hearings that he only meant to underscore the importance of the individual as against the state. Transcript, September 16, 1991 at 31-33.

Another instance of Judge Thomas' disavowal of extreme prior statements involved his comments at the hearings regarding Morrison v. Olson, 487 U.S. 654 (1988), the case in which Justice Rehnquist's 7-1 majority opinion upheld the statute authorizing the use of independent prosecutors. Prior to the hearings, Judge Thomas lauded Justice Scalia's dissent as "remarkable," and criticized Justice Rehnquist's opinion as "fail[ing] not only conservatives, but all Americans." Barnes, "Weirdo Alert," The New Republic, Aug. 5, 1991 at 5. At the hearings, Judge Thomas' criticism of this opinion was muted. His earlier comments, he claimed, should be accounted only to the fact that "when we are in the political branch, I think that we advocate for the political branch." Transcript, September 13, 1991 at 17.

Even if I were to accept Judge Thomas' current disclaimers of previous statements, that would mean only that he gave too little thought to the words he was using or else was willing to say things he did not believe to curry favor with conservative audiences. Neither explanation is consistent with a proper judicial temperament. The latter explanation is especially disturbing because it raises questions about how much Judge Thomas was willing to tailor other portions of his testimony.

JUDGE THOMAS'S REFUSED TO ANSWER APPROPRIATE QUESTIONS

As I have said in this and earlier statements, the Senate must engage in thorough inquiry in order to fulfill its constitutional obligation of advice and consent. At the outset of these confirmation hearings, I said that I expected forthright answers to fair questions. Transcript, September 10, 1991 at 39.

Judge Thomas' stated rationale for refusing to respond to questions was that such responses would compromise his impartiality if he were confirmed to the Supreme Court. But Judge Thomas was highly erratic in his application of this standard. He commented on the propriety of capital punishment, the use of victims' impact statements and the validity of the exclusionary rule, issues which are all likely to come back before the Court. Transcript, Sept. 10, 1991 at 163, 168, 171. Indeed, he commented on the test for deciding Establishment Clause cases articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971), although that test is likely to be challenged in a case pending before the Court right now. See Lee v. Weisman, 59

Yet on privacy issues, he refused to do more than recite what the Court has held.

I asked Judge Thomas why other sitting Justices could comment on the reasoning of *Roe v. Wade* and how Judge Thomas distinguished his ability to comment on other controversial areas of the law—such as the scope of the ninth amendment—from his inability to comment on *Roe v. Wade*:

Senator LEAHY. Judge, other sitting Justices have expressed views on key issues such as—well, take *Roe v. Wade*. You know, Justice Scalia has expressed opposition to *Roe*. Does that disqualify him if it comes up? Justice Blackmun * * * not only wrote the decision but has spoken in various forums about why it was a good decision. Are either one of them disqualified from hearing abortion cases as a result of that?

Judge THOMAS. Senator, I think that each one of them has to determine in his mind at what point do they compromise their impartiality or it is perceived that they have compromised their objectivity or their ability to sit fairly on those cases.

* * *

Senator LEAHY. Would you keep an open mind on cases which concern the question of whether the Ninth Amendment protected a given right? I would assume you would answer yes.

* * *

Judge THOMAS. That is right.

Senator LEAHY. I ask because you have expressed some very strong views . . . on the Ninth Amendment. You had an article that was reprinted in a Cato Institute book. * * * [In that article] you refer to Justice Goldberg’s “invention,” [of] using the Ninth Amendment in his concurring opinion in *Griswold*. And you said—and let me quote from you. You said, “Far from being a protection, the Ninth Amendment will likely become an additional weapon for the enemies of freedom.” A pretty strong statement. But you would say, would you not, Judge, notwithstanding that strong statement, that if a Ninth Amendment case came before you, you would have an open mind?

* * *

Judge THOMAS. The answer to that is, Senator, yes.

Senator LEAHY. But if you were to express similar views regarding the principles and reasoning of *Roe v. Wade*, you feel that somehow it would preclude you from having that same kind of objectivity * * *?

Judge THOMAS. I do not believe, Senator, that I have expressed any view on the Ninth Amendment, beyond what I have said in this hearing, after becoming a member of the judiciary. As I have pointed out, I think it is important
that when one becomes a member of the judiciary that one ceases to accumulate strong viewpoints, and rather begin to, as I noted earlier, to strip down as a runner and to maintain and secure that level of impartiality and objectivity necessary for judging cases.


Judge Thomas' responses to these questions did not offer any principled distinction between questions he could appropriately answer and questions he could not. The degree to which Judge Thomas would speak to legal issues appeared to correlate more to the degree to which Judge Thomas would win or lose votes on the Committee than to the risk that his public statements would compromise his impartiality.

PRIVACY

Most of the troubling issues about this nomination—ambiguous testimony, repudiations of prior statements and nonresponses to fair questions—coalesce in the area of privacy.

Judge Thomas' refusal to answer questions on privacy was especially difficult to understand because Judge Thomas opened the door to them. Unlike now-Justice Souter, Judge Thomas came before the Committee having made statements that raised questions about his views on the right of privacy. He praised the Lehrman article [See Speech to the Heritage Foundation, June 18, 1987; Lehrman, "The Declaration of Independence and the Right to Life," the American Spectator, April 1987]; he participated in the White House Working Group on the Family which called for overturning Roe and other privacy cases [White House Working Group on the Family, "The Family: Preserving America's Future (1986)]; he favored a narrow reading of the ninth amendment and cited Roe in a footnote in an article on the privileges or immunities clause [Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," 12 Harv. J.L. & Pub. Pol. 63 (1989)]; and he specifically referred to abortion in a column in the Chicago Defender. Thomas, "How Republicans Can Win Blacks," Chicago Defender, Feb. 21, 1987. Given these statements, Judge Thomas did not enter the hearings with the appearance that he truly had no position on abortion and privacy rights.

The fundamental right to privacy is much more than the constitutional right of women to make very personal decisions about reproduction. It is the right of all of us to be free from government intrusion into the most basic, private aspects of our lives. See 137 Cong. Rec. S13479 (daily ed. Sept. 24, 1991) (statement of Sen. Leahy). It is, as Justice Brandeis said, "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

As I said at the outset of this process, Judge Thomas' embrace of Lewis Lehrman's article—"The Declaration of Independence and the Right to Life"—was of particular concern to me. The consequence of Lehrman's thesis that a fetus has an inalienable right to life beginning at conception is that any termination of a pregnancy would constitute murder. That radical position goes far beyond the
views of most conservatives that abortion is a political issue best left to the determination of legislative bodies.

Despite repeated questions from me and other members of the Committee, Judge Thomas did not categorically state that he disagreed with the Lehrman article. Instead, he explained that he invoked the article in his speech to a conservative audience to find “unifying principles in the area of civil rights” [Transcript, Sept. 11, 1991 at 96] and that he does “not endorse” Lehrman’s conclusion. Transcript, September 13, 1991 at 21. These responses left me with more questions than answers.

The Lehrman article makes only one argument concisely and powerfully, and that argument is antithetical to a woman’s fundamental right of choice. At the time Judge Thomas embraced the Lehrman article, did he understand its implications? Was he not sufficiently concerned about its conclusion to think twice about calling it a “splendid example” regardless of the audience he was trying to sway? If Judge Thomas did not agree with the radical position advocated in the Lehrman article, why could he not state his position unequivocally when asked about it repeatedly at the hearings?

Finally, nothing disturbed me more than Judge Thomas’ statement that he has never discussed the merits of Roe v. Wade with anyone:

Senator Leahy. Judge, you were in law school at the time Roe v. Wade was decided. * * * You would accept, would you not, that in the last generation Roe v. Wade is certainly one of the more important cases to be decided by the U.S. Supreme Court.

Judge Thomas. I would accept that it has certainly been one of the more important, as well as one that has been one of the more highly publicized and debated cases.

Senator Leahy. So, * * * it would be safe to assume that when that came down, you were in law school [where] recent case law is oft[en] discussed, [and] that Roe v. Wade would have been discussed in the law school while you were there?

Judge Thomas. The case that I remember being discussed most during my early part of law school was I believe * * * Griswold * * * and we may have touched on Roe v. Wade at some point and debated that, but let me add one point to that. Because I was a married student and I worked, I did not spend a lot of time around the law school doing what the other students enjoyed so much, and that is debating all the current cases and all of the slip opinions. My schedule was such that I went to classes and generally went to work and went home.

Senator Leahy. Judge Thomas, I was a married law student who also worked, but I also found at least between classes that we did discuss some of the law, and I am sure you are not suggesting that there wasn’t any discussion at any time of Roe v. Wade?

Judge Thomas. Senator, I cannot remember personally engaging in those discussions.
Senator LEAHY. Have you ever had discussion of Roe v. Wade, other than in this room, in the 17 or 18 years it has been there?

Judge THOMAS. Only, I guess, Senator * * * in the most general sense that other individuals express concerns one way or the other, and you listen and you try to be thoughtful. If you are asking me whether or not I have ever debated the contents of it, [the] answer to that is no, Senator.

Senator LEAHY. Have you ever, [in] private gatherings or otherwise, stated whether you felt that it was properly decided or not?

Judge THOMAS. Senator, in trying to recall and reflect on that, I don't recollect commenting one way or the other. There were, again, debates about it in various places, but I generally did not participate. I don't remember or recall participating, Senator.

Senator LEAHY. So you don't ever recall stating whether you thought it was properly decided or not?

Judge THOMAS. I can't recall saying one way or the other, Senator.

Transcript, September 11, 1991 at 102-05.

I have given a lot of thought to this exchange. It is deeply troubling. It is hard to believe that there is a thoughtful lawyer in this country—much less a federal judge or a nominee to the Supreme Court—who has not discussed or expressed his view on Roe v. Wade. Judge Thomas' assertion was even more baffling given his record of specific references to abortion and Roe.

CONCLUSION

As my views set forth above indicate, I am left with too many doubts to vote in favor of Judge Thomas' confirmation. I am concerned that he lacks the legal wisdom and judicial experience necessary to take the lead in grappling with the momentous constitutional issues he would face as a Supreme Court Justice. I am concerned that Judge Thomas has left us with no clear view of his constitutional philosophy. I am concerned about the differences between his hearing testimony and his prior speeches and writings. I am concerned by his refusal to answer significant and legitimate questions. Finally, based on the record as it was presented to the Committee, I am concerned that Judge Thomas will be a less-than vigilant guardian of the fundamental right to privacy.

It may be that at some time in the future Judge Thomas will show himself prepared for a seat on the Supreme Court. But based on my review of Judge Thomas's record and his testimony before the Judiciary Committee during this hearing, I am not confident that he is ready now, and therefore, I cannot vote to confirm him.
ADDITIONAL VIEWS OF SENATOR HOWELL HEFLIN

The Senate Judiciary Committee has exercised its responsibility to conduct a fair and thorough hearing into the nomination by the President of U.S. Court of Appeals Judge Clarence Thomas to be an Associate Justice of the Supreme Court of the United States. I congratulate Committee Chairman Joseph Biden of Delaware, for presiding over what I believe was a comprehensive and objective analysis of the nominee's background and qualifications in order for the full Senate to exercise its "advise and consent" function as required by the Constitution.

I think it is clear that Judge Thomas will be confirmed by the full Senate. In my discussions with senators, I do not think there are many doubts that he has the votes to be confirmed when the full Senate acts on his nomination.

However, I have an individual responsibility to make up my mind and vote the dictates of my conscience guided by a profound respect for our Constitution and Bill of Rights which have governed our nation for over two hundred years.

First let me say, I support a conservative court; my votes for Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Souter support my basic philosophy in this regard. However, I am not for an extremist right wing court that would turn back progress made against racial discrimination as well as the progress that has been made for human rights and freedoms in recent years.

I entered the hearing with an open mind, as I have in all of the judicial confirmation hearings in which I have participated; not as an advocate, but as a judge. I try to be fair to the nominee, to the President, to the nominee's opposition, and to the American people.

Judge Thomas' history revealed that he has an admirable record of coming from a disadvantaged background to success through a history of perseverance and hard work. He has suffered the ravages of segregation and racial discrimination. With the guidance of a strong grandfather and the discipline instilled in him by the nuns who taught him at an all-black parochial school in Savannah, Clarence Thomas was determined to succeed. He ultimately graduated from Yale Law School of whose preferential admissions policies he was a beneficiary.

Judge Thomas has over the last decade written and spoken extensively on a wide variety of legal issues. My review of his writings and speeches raised questions in my mind that he might be part of the right wing extremist movement.

During the course of the hearing, Judge Thomas' answers and explanations about previous speeches, articles and positions raised thoughts of inconsistencies, ambiguities, contradictions, lack of scholarship, lack of conviction and instability. During the hearing I expressed that such created an appearance of confirmation conversion (a term used by Senator Leahy in the Bork hearing) and that
he was an enigma because of his puzzling answers and explanations.

One of the most troubling areas of the law was his frequent reference to an adoption of the theory of natural law, which is a "higher law" of "right and wrong" existing essentially outside the Constitution.

In speech after speech, Judge Thomas has referred to the theory of natural law as follows. . . . And I quote. . .

The higher law background of the American government, whether or not explicitly appealed to or not, provides the only firm basis for a just and wise Constitutional decision.

Then in testimony before the Committee he disavowed those statements made repeatedly over the past decade as having been made "in the context of political theory" by a person who he self-describes as a "part-time political theorist," and he articulated the position that natural law should never be used as a basis for constitutional adjudication.

In a speech to the Pacific Research Institute in 1987, Judge Thomas stated:

I find attractive the arguments of scholars such as Stephen Macedo who defend an activist Supreme Court that would strike down laws restricting property rights.

Modern constitutional jurisprudence has reversed holdings of the Lochner era which relied on natural law, and the law is well settled that economic rights are not held to the same high standards as personal or individual rights. Now, for many decades the Supreme Court has recognized that Congress has broad powers to regulate commerce in order to protect public safety, health, welfare and the like; otherwise, there would be no minimum wage laws, no occupational safety and health laws, no environmental protection laws, nor laws providing for federal inspection of aircraft or food and meat products.

Judge Thomas' explanation of his position on natural law gave me concern on whether he had changed his position for expediency's sake. My position on natural law should not be misunderstood: I believe there is a danger that the loose application of natural law can be employed as support for any desirable conclusion, thus making it possible to invalidate established holdings or laws on the authority of a "higher law." However, I believe that concepts of natural law do have a role in construing the language of the Constitution, but not in superseding it.

Judge Thomas' explanation of his criticisms of the opinion in Brown v. Board of Education raised concerns in my mind.

I have reservations about his commitment to judicial restraint as evidenced in his words of support of Justice Scalia's dissent in the case of Johnson v. Transportation Agency of Santa Clara County (an employer discrimination case upholding a lower court interpretation that Title VII of the Civil Rights Act of 1964 allowed an employer to adopt a voluntary affirmative action plan to bring equally qualified women into the work force that had been exclusively male in the past). In a 1987 speech to the CATO Institute, Judge
Thomas said he hoped Justice Scalia’s dissenting opinion would help “provide guidance for lower courts and a possible majority in future decisions.”

Judge Thomas’ words of support of Justice Scalia’s lone dissent in the case of *Morrison v. Olson* (upholding the appointment of a special prosecutor to investigate alleged wrongdoing in the executive branch of government) also troubles me. Justice Scalia’s dissent used natural law to argue against the constitutionality of the statute authorizing the appointment of a special prosecutor. In a 1988 speech, Judge Thomas cited the dissent as “how we might relate natural rights to democratic self-government and thus protect a regime of individual rights.”

Judge Thomas’ answer that he failed to read the report of the White House Working Group on the Family when he had signed off on such report as a member of the group raises basic questions of his lack of thoroughness and circumspection.

Judge Thomas’ answer that he had never discussed the case of *Roe v. Wade* with anyone is simply hard to comprehend. How could any lawyer not have, at some point in his or her career, at least discussed this well-known and controversial Supreme Court decision?

In his 1987 speech to the Pacific Research Institute, Judge Thomas states that he finds attractive arguments of the libertarian philosopher Stephen Macedo that an activist Supreme Court should strike down laws restricting property rights. The content of this speech, in general, evidences to me a tendency of Judge Thomas to harbor a libertarian philosophy.

Judge Thomas’ responses to the questions about Oliver Wendell Holmes, a great justice, continue to linger in my thoughts. In a speech to the Pacific Research Institute in 1988, Judge Thomas said this about Holmes:

> The homage to natural right inscribed on the Justice Department building should be treated with more reverence than the many busts and paintings of Justice Oliver Wendell Holmes in the Department of Justice. You will recall Holmes as one who scoffed at natural law, that “brooding omnipresence in the sky.” If anything unites the jurisprudence of the left and right today, it is the nihilism of Holmes. As Walter Berns put it in his essay on Holmes, most recently reprinted in William F. Buckley and Charles Kesler’s *Keeping the Tablets*: “* * * No man who ever sat on the Supreme Court was less inclined and so poorly equipped to be a statesman or to teach * * * what a people needs in order to govern itself well.” Or, as constitutional scholar Robert Faulkner put it: “What (John) Marshall had raised, Holmes sought to destroy.” And what Holmes sought to destroy was the notion that justice, natural rights, and natural law were objective—that they exist at all apart from willfulness, whether of individuals or officials.

However, at the hearing Judge Thomas stated this about Holmes: “He was a great judge * * * Obviously now he is a giant in our judicial system.”
During the hearing, Judge Thomas stated that later, after reading a biography of Holmes and other writings about Holmes, he developed a praiseworthy view of the judicial career of Holmes. However, his remarks about Holmes in his speech indicate a lack of scholarship and objectivity when he used dogmatic words in harshly attacking Holmes before a receptive audience.

It is interesting to note that his criticisms of Justice Holmes were because Holmes took the same position that he, Clarence Thomas, now takes; that is, that natural law should not be used as a basis of constitutional adjudication. Adding to his previous inconsistencies on the doctrine of natural law, Judge Thomas' responses suggest to me deceptiveness, at worst, or muddleheadedness, at best.

I came away from the hearings with a feeling that no one knows what the real Clarence Thomas is like or what role he would play on the Supreme Court, if confirmed. I want to give him the benefit of the doubt because of the well-deserved success he has achieved in overcoming the bonds of racial discrimination and poverty to become one of our Nation's top Federal officials in both the executive and judicial branches of Government and because his presence would continue a well-needed diversity on the court.

The Senate Judiciary Committee hearings have revealed to me many inconsistencies and contradictions between his previous speeches and published writings and the testimony he gave before the Committee. His testimony before the Committee in several instances contained outright disavowals of previous statements and positions, further obscuring his constitutional philosophy.

I stated at the onset of the hearing that Judge Thomas' own testimony could remove, clarify, decrease or increase any doubts which we in the Senate might have about his nomination. Most of these doubts still remain, along with newly created doubts.

Should I therefore follow the old adage "When in doubt—don't" or on the other hand, because of his accomplishments under adverse circumstances, give him the benefit of the doubt?

Our Nation deserves the best on the highest court in the land and an error in judgment could have long lasting consequences to the American people. The doubts are many. The court is too important. I must follow my conscience and the admonition "When in doubt—don't."

I will respectfully vote against the confirmation of Clarence Thomas to become an Associate Justice on the Supreme Court of the United States.
SUPPLEMENTAL VIEWS OF SENATOR PAUL SIMON

I concur with the views of my colleague, Senator Kennedy, and would like to submit a few additional thoughts.

In approving a Supreme Court nominee, Senators must examine their conscience rather than public opinion. And the questions we ask ourselves must go beyond the fundamentals of character and ability. All of us on the committee have found Judge Thomas a warm and engaging personality, but our decisionmaking must rest on a more solid base.

I asked myself six key questions:

1. Why did the President select him?

Only the President can answer this question fully, but two factors are obvious. First, he wanted an African-American, and I applaud the President for that. Diversity on the Court has always been desirable. Second, his criteria were more than simply seeking a fine legal mind, or even a fine legal mind of a Republican African-American. Had that been the measure, someone like William Coleman, the distinguished former Secretary of Transportation under President Ford, might have been selected, whose legal credentials are stronger, who would have merited the highest rating from the American Bar Association and who would have breezed through this committee. Or if the President had wished to join the majority of Republican Presidents in this century and chosen a highly qualified person, regardless of politics, many extremely capable African-American lawyers and scholars and jurists who are African-Americans could have been considered.

But the President's criteria, obviously, included one other factor that excluded more obvious choices: Someone whose views would satisfy the most rigidly conservative of the President's followers. The Senate must weigh whether this requirement of the President serves the best interests of the nation.

2. Has the nominee been candid with the committee?

It is interesting that the words "candid" and "candidate" have the same Latin root, though in American political discourse the two words often have little to do with each other. That is true with this nomination.

This nomination process has been this committee's search for the "real" Clarence Thomas.

When Judge Thomas tells us that he does not recall ever having discussed the *Roe v. Wade* decision, handed down when he was in law school, and that he has no thoughts on it, that simply defies belief. Would we elect a President or senator who told us that he or she had never discussed *Roe v. Wade* and had no thoughts on it? Should we approve a Supreme Court nominee who gives us that answer?

His frequent attempts in testimony to escape past writings and statements would have been more understandable if he had simply
said, "I changed my mind." He strained to please an audience of 14 on this committee and may have succeeded with some, but his lack of candor troubles me.

While I differ with Judge Robert Bork in philosophy, and for that reason voted against him, his frankness with the committee I respect and appreciate.

If evasiveness before the committee is rewarded, we have warped the process. And Judge Thomas' evasiveness adds to my doubts.

3. Isn't it important to have an African-American justice on the Supreme Court?

It is desirable, but as Justice Thurgood Marshall said, "I think the important factor is to pick the person for the job, not on the basis of race one way or the other."

A majority of the national African-American organizations either oppose Clarence Thomas or are silent. Their concern is understandable; from the perspective of those of us who have labored in the civil rights field, too often, he has been on the wrong side of issues.

But two other factors are important to the minority community. One is the political reality that so long as Clarence Thomas is on the Supreme Court it is not probable that another black will be named. That means that for three or four decades the lone person of African heritage will, if judged by his record, be taking stands that the large majority of blacks do not hold. Their voice and yearning for justice will be muted.

In his writings and speeches and in his life, Judge Thomas has stressed self-help, which we all laud, but Judge Thomas also often harshly criticized another foundation of opportunity in our society—the laws that offer the helping hand sometimes needed by others who are less fortunate and less able. When a nominee comes before us to be elevated to the highest court in the land, I want to know that the nominee is a vigorous champion for the less fortunate and for the powerless. Even the casual comments of a Judge Thomas would be seized by some as an excuse for preserving the status quo. It would be good to have an African-American in this position of great influence, but not if the price is to compromise the future of others less fortunate.

4. Will he, like Justice Marshall, champion the cause of those who are not America's elite? Will he fight for basic civil liberties, for the freedoms that are the heart of this nation?

The record is not encouraging. Even without Clarence Thomas on the Supreme Court, it will take decades to undo the damage the current court is doing to the basic rights of Americans. We face a bleak period in the history of the Court. We should not make it bleaker.

Judge Thomas's struggle in early life is important, but so far has not been a great influence on his public record. And as Cook County Commissioner Danny Davis has commented, "Where you stand is more important than where you are from."

Because the Thomas testimony too often lacked credibility, we are forced to judge by the record. And that record suggests that the privileged of the Nation will have a champion, rather than those who yearn for opportunity. The record suggests that working men and women too rarely will find him in their corner.
In part, he is here because he became a hero to the far right. They have every reason to applaud his nomination, but those same reasons give me pause.

5. But if we turn him down, won’t President Bush nominate someone with similar views?

The majority of Republican presidents in this century have nominated at least one Supreme Court justice with significantly different views than the President. Those who suggest George Bush’s inflexibility place less faith in the President than I do. He has the ability to rise to statesmanship, as so many of his predecessors have. And if he does not, the Senate has no commitment to approve the next nominee. During President Tyler’s term, the Senate refused to confirm five nominees. That course of action is unlikely, because the President will understand, if this nominee is rejected, that the Constitution calls on the Senate to “advise and consent,” not simply consent. The White House should keep in mind the full phrase.

6. Could I be wrong?
I hope I am.

Judge Thomas may well be confirmed, and the probability is that his record will predict his future, as it has for most justices. Nothing would please me more than to discover I erred in my judgment. He does have, as one witness testified, “a capacity for growth.”

I do not cast my vote with absolute certainty that his Court record will reflect his public service.

One of my colleagues on the committee suggested to me that his public record reflects the fact that he worked for the Reagan administration; he did what he could to please them, but now he will be free to be himself, and that may be a very different Clarence Thomas. I hope he is right, but I have my doubts. And that doubt will have to be resolved in favor of protecting our freedom and our people.
ADDITIONAL VIEWS OF SENATOR KOHL

Although I share many of the concerns of Chairman Biden, and Senators Kennedy, Metzenbaum, Leahy, Heflin and Simon in opposing the nomination of Clarence Thomas to the U.S. Supreme Court, I write separately to explain my own uneasiness with Judge Thomas' confirmation.

When a vacancy develops on the Supreme Court, discussion quickly focuses on what standards the Senate ought to use as it discharges its "advice and consent" responsibilities. My standard is simple: judicial excellence. In my judgment, any nominee to the Supreme Court of the United States—the Court which interprets our Constitution and protects our liberty—must be exceptional.

The Supreme Court represents a coequal and independent branch of government. It is not an extension of the executive or the legislative branch. It serves neither; it applies the Constitution to both. Therefore, a President's nominee has no presumption operating in his or her favor; instead, the nominee accepts a burden of proof—a burden to demonstrate to the Senate that he or she ought to sit on the Supreme Court, that he or she deserves a lifetime appointment.

Over the past 43 years Clarence Thomas has demonstrated many admirable qualities. He has demonstrated that he is a man of great character and courage. He has demonstrated that he has the strength to triumph over adversity. He has demonstrated that he has retained his sense of humor and that he deserves the respect and admiration of his many friends.

In my judgment, however, he has not demonstrated that he ought to sit on the Supreme Court. Let me explain my reasoning.

First, Judge Thomas lacks a clear judicial philosophy. Less than 2 years ago, when Judge Thomas was nominated to serve on the appeals court, he told me that he "[d]id not have a fully developed Constitutional philosophy." Confirmation Hearings on Appointments to the Federal Judiciary, Before the Senate Judiciary Committee, 101st Cong., 2nd Sess. at 56 (Feb. 6, 1990). That did not disqualify him for a position on an appellate court, which is required to follow precedent. But the Supreme Court creates precedent—it interprets the Constitution in which we, as a people, place our faith and on which our freedoms, as a nation, rest.

It was my hope that during the hearings, Judge Thomas would articulate a clear vision of the Constitution—ideally, one that included full safeguards for individuals and minorities, and which also squared with his past positions. Unfortunately, after spending 5 days listening to Judge Thomas testify, I was unable to determine what views and values he would bring to the bench. This, I believe, was not primarily a function of the confirmation process itself, but rather a result of Judge Thomas' failure to adequately respond to the questions put to him by the Committee.

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Second, Judge Thomas exhibited selective recall. Judge Thomas asked us to heavily consider his experiences as a young man while, at the same time, to discount many of the views he expressed as an adult. When, for example, I asked Judge Thomas about his extensive criticism of Congress—an important issue, given that the Court is supposed to be guided by congressional intent—he dismissed those statements, saying, "I was in the political branch *** I fought the policymaking battles." Thomas Supreme Court confirmation hearings, September 13, 1991 Tr. at 13. Judge Thomas disavowed his past musings about natural law, his endorsement of theories which elevate economic rights to a position of parity with individual rights, and his past dismissal of almost all forms of affirmative action as a remedy for discrimination in similar fashion. These policy positions, he asserted, would have no impact on his decisions on the Court. In fact, he suggested that a judge should shed his views just as a runner sheds excess clothing before a race.

This approach troubles me. In my opinion, it is totally unrealistic to expect that a Justice will not bring his values to the Court. Presidents nominate candidates based on their values, and the Senate must consider them as well. As Chief Justice Rehnquist wrote:

Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of Constitutional adjudication would be evidence of lack of qualification, not lack of bias." Laird v. Tatum 409 U.S. 824, 835 (1972) (Chambers opinion of Rehnquist, J.)

I agree with the Chief Justice: either we judge Clarence Thomas on his complete record—his years as a lawyer and his tenure as a policymaker, as well as his experiences as a youth—or we do not consider any part of his record at all.

Third, Judge Thomas engaged in oratorical opportunism. Judge Thomas crafted policy statements apparently tailored to win the support of specific audiences—and then later repudiated these very same positions. For example, when speaking to the Federalist Society, he said that the natural law background of the American Constitution "provides the only firm basis for a just, wise and constitutional decision." Address by Clarence Thomas to The Federalist Society for Law and Public Policy Studies, University of Virginia School of Law at 11 (Mar. 5, 1988) (emphasis added). Yet during the hearings he steadfastly maintained that natural law played no role in constitutional adjudication.

He told another audience that Lew Lehrman's article opposing abortion was a "splendid example of applying natural law." Speech by Clarence Thomas to the Heritage Foundation at 22 (June 18, 1987). But at the hearings he indicated that he had made these comments only to win the support of his conservative audience. In fact, Judge Thomas said he had only skimmed the Lehrman article before tacitly endorsing it at the Heritage Foundation speech, and that he never actually approved of Mr. Lehrman’s conclusions. Moreover, Judge Thomas told me that he did not read the article during his extensive preparation for his confirmation hearing. Thomas Supreme Court confirmation hearings (Sept. 13, 1991, Tr. at 107).
This presents two disturbing possibilities. On the one hand, Judge Thomas may have been merely telling his listeners what they wanted to hear. On the other hand, he may have genuinely supported the positions he espoused, but sought to distance himself from them when they were perceived as controversial. Either interpretation is disquieting, especially for someone who hopes to sit on our nation's highest court.

Fourth, Judge Thomas' answers to questions on *Roe v. Wade* suggest a disturbing lack of legal curiosity. Judge Thomas told the committee that *Roe v. Wade* was one of the two most significant decisions handed down by the Supreme Court in the last 20 years. Yet he also told the committee that he had never discussed that decision either as a lawyer or as an individual, and had no views about it.

As with his explanations of his controversial speeches and articles, Judge Thomas' responses in this area raise more questions than they answer. If we are to believe that Judge Thomas never discussed the legal reasoning of *Roe v. Wade* during his 18-year legal career—even while he acknowledges it to be perhaps the most important Supreme Court decision of the last 20 years—what does this say about his intellectual focus as a lawyer? By comparison, Justice Souter told me that "everybody was arguing about" *Roe v. Wade* when it came out, and that he "[could] remember not only I but others who I knew, really switching back and forth, playing devil's advocate on *Roe v. Wade.*" Hearings on Nomination of David H. Souter to be Associate Justice of the Supreme Court, before the Senate Judiciary Committee (101st Cong., 2d Sess. at 189, Sept. 14 1990).

Even more disturbing is Judge Thomas' claim, to Senator Leahy, that he has never had a conversation about abortion, even in a personal, nonlegal context. I find this statement nothing short of astonishing. Not surprisingly, other Committee members have also called into question Judge Thomas' responses in this area.

Fifth, Judge Thomas demonstrated limited legal knowledge. When asked questions of law, many of his replies did not meet my expectations. For example, in response to my questions about antitrust law, Judge Thomas did not demonstrate the sophistication I hope for in a Supreme Court justice. His discussion of other substantive areas—the War Powers Act, freedom of speech, the right to privacy and habeas corpus—were also disappointing. In contrast, at his confirmation hearings Justice Souter displayed a wealth of constitutional understanding in virtually all of these areas. But that is not surprising. Judge Thomas' professional experience prepared him to be a leading policymaker, not a leading interpreter of the Constitution.

Frankly, I had hoped that Judge Thomas would resolve my concerns at the hearings. But for whatever reason, he was extremely guarded in his appearance before the committee. Judge Thomas did not—and should not—tell us how he would rule on *Roe* or any other case. But he could and should have told us how he would approach those cases. Judge Thomas had a full and fair opportunity to explain why his professional qualifications—as opposed to his personal accomplishments—justified his elevation to the Supreme Court. He failed to do that. He failed to discharge his burden of
proof. He failed to demonstrate the level of judicial excellence which ought to be required on the Supreme Court. And, as a result, he has failed to win my consent to his confirmation.

It has not been easy to reach that conclusion. Initially, I welcome Judge Thomas' nomination because I believe that diversity on the court is desirable. But diversity alone is not a sufficient qualification. Some level of legal distinction is also required. In my judgment, though, this nominee did not meet that requirement.

However, I still expect that Judge Thomas will win the approval of a majority of my colleagues in the full Senate. Their support for his nomination will, I suspect, be based on the hope that Judge Thomas will continue to grow as a jurist and develop as a person. I may not share their vote but I do share their hope. Clarence Thomas is a man with the ability to inspire—even in those who will not vote for him—the hope that he will, if confirmed, become what we all want him to become: an outstanding Justice.
ADDITIONAL VIEWS OF MESSRS. THURMOND, HATCH, SIMPSON, GRASSLEY AND BROWN REGARDING THE NOMINATION OF JUDGE CLARENCE THOMAS TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

We strongly support Judge Clarence Thomas' nomination. On July 8, 1991, President Bush nominated Judge Clarence Thomas, who currently serves on the United States Court of Appeals for the District of Columbia Circuit, to be an Associate Justice of the U.S. Supreme Court. Following the nomination, the Senate Judiciary Committee conducted a thorough investigation of Judge Thomas' background and qualifications. We believe that the results of that investigation conclusively demonstrate that Judge Thomas is highly qualified for a position on the Nation's highest court. Accordingly, he should be confirmed.

Judge Thomas' life story is one of great success and achievement in the face of adversity. He has faced bitter racial discrimination in his life. Judge Thomas has risen from poverty to positions of great trust. We believe he will bring a distinct perspective to the deliberation of the Supreme Court.

Judge Thomas has held a number of important positions during the course of a distinguished legal career. He has worked in private practice, state government, and all three branches of the federal government. He has been confirmed by the full Senate four times to positions of immense responsibility. Recently, the Judiciary Committee extensively reviewed his record and background recommending to the full Senate, his confirmation to serve as a member of the District of Columbia circuit court.

Throughout his confirmation hearing to the Supreme Court, Judge Thomas demonstrated that he has the intellect, temperament and judgment that all Americans look for in those who serve on the Nation's highest court. We believe he will be a fair, open-minded justice who will view every case as it is presented to him, without preconceptions. His testimony reveals that he believes firmly in equal opportunity for all Americans, and in the rights of individuals guaranteed by the Constitution. We are convinced that Judge Thomas will serve with distinction on the Supreme Court.

JUDGE THOMAS' BACKGROUND AND QUALIFICATIONS

Judge Clarence Thomas was born June 23, 1948, in Pin Point, GA, a rural community near Savannah. His father left the family when Judge Thomas was still a small child. For the first years of his life Judge Thomas lived in a house with no indoor plumbing, moving at one point to a cramped tenement in Savannah. At the age of 7, he went to live with his maternal grandparents, Myers and Christine Anderson.
His grandfather, though barely literate, owned and managed an ice and fuel oil delivery business for which Judge Thomas worked after school. Mr. Anderson was also active in the local chapter of the NAACP. Judge Thomas learned many important lessons such as, hard work and discipline, from his grandparents and he has applied these lessons throughout his life.

The Andersons sent Judge Thomas to schools in Savannah, where he was taught by Franciscan nuns. The nuns underscored his grandparents' teaching about the importance of education.

In 1964, Judge Thomas transferred to St. John Vianney Minor Seminary near Savannah, where for most of the succeeding three years he was the only black student in his class. At this point in his life, Judge Thomas intended to become a priest. However, after spending several months at Immaculate Conception Seminary in Missouri, he changed his mind and transferred to Holy Cross College in Massachusetts. He supported his education through a combination of scholarships, loans, and jobs. He worked in the free breakfast program and tutored in the local community. He graduated with honors in 1971.

Judge Thomas then went to Yale Law School. While a law student, he worked summers for New Haven legal assistance and for a small civil rights law firm in Savannah. He graduated from law school in 1974.

Throughout his life, Judge Thomas has seized the opportunities that the American system offers to all. As Judge Thomas said on being nominated by President Bush, "only in America could this have been possible," for someone born in poverty and segregation to be nominated to the Supreme Court. In the President's words, Judge Thomas exemplifies "the endless possibilities of the American dream."

Judge Thomas' legal career is a long record of accomplishment. Most of his life he has been dedicated to public service. In 1974, John C. Danforth, then the attorney general of Missouri, hired him as an assistant attorney general. Judge Thomas practiced in both the trial and appellate courts, and argued several cases before the Missouri Supreme Court. In 1977, he joined the legal staff of the Monsanto Co. where he was involved in matters relating to contracts, antitrust law, environmental regulation and products liability. In 1979, he became a legislative assistant to Senator Danforth.

In 1981, Judge Thomas was appointed by President Reagan to be the Assistant Secretary for Civil Rights at the United States Department of Education. One year later, he was again nominated by President Reagan to be the Chairman of the Equal Employment Opportunity Commission; he was reappointed to that position in 1986. The EEOC, an agency that employs more than 3100 persons and has an annual budget of $180 million, enforces title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, sex, or national origin. The EEOC also enforces laws against discrimination based on age or disability. During Judge Thomas' tenure at the EEOC, he performed a management miracle, transforming an inefficient and dispirited agency into an effective and dynamic enforcer of the civil rights laws. Judge Thomas emphasized the need to provide specific relief for individual victims of discrimination. Judge Thomas' tenure as Chair-
man was the longest in the history of the Commission. A strong indication of the success of his tenure and the respect that he engendered among his coworkers is that the employees of the EEOC have named the Commission's new headquarters building after him.

On March 12, 1990, Judge Thomas assumed his present position on the United States Court of Appeals for the District of Columbia Circuit, to which he was appointed by President Bush. During his time on the bench, he has written opinions in such areas as criminal law, antitrust law and trade regulation, constitutional law, and administrative law. He has participated in more than 140 decisions of the court. His opinions have been lucid and scholarly. None of his decisions has been reversed, either by the District of Columbia Circuit en banc or by the Supreme Court.

Throughout his confirmation hearing, we believe that Judge Thomas demonstrated the qualifications of character necessary for an Associate Justice of the Supreme Court of the United States. As well, he is highly qualified professionally. Simply said, he is intelligent, decent, honest, openminded, and fair. He brings to his judicial office a willingness to listen, to consider, and to analyze carefully.

In addition to Judge Thomas being highly qualified, we believe that he will bring a unique perspective of life that has required him, as he stated, to "touch on virtually every aspect, every level of our country, from people who couldn't read and write to people who were extremely literate, from people who had no money to people who were very wealthy." (Tr., 9/12/91, at 59.) Members of this committee, from both sides of the aisle, have called the story of Judge Thomas' life "impressive and truly inspiring" (Tr. 9/10/91, at 44, remarks of Sen. Simpson); "admirable" (id., at 18, remarks of Sen. Thurmond); and "an uplifting tale of a youth determined to surmount the barriers of poverty, segregation and discrimination" (id. at 53-54, remarks of Sen. Metzenbaum).

When Judge Thomas was before the Judiciary Committee regarding his nomination to be a judge of the U.S. Court of Appeals, he explained why he pursued the law as a profession:

[The reason I became a lawyer was to make sure that minorities, individuals who did not have access to this society gained access. Now, I may differ with others as to how best to do that, but the objective has always been to include those who have been excluded.

(Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary, Prt. 4, 101st Cong., 2d Sess. 36, 1990). As Senator Kennedy said at the time, no one "could ask for any better assurances." Id.

No sitting Senator or other member of the Supreme Court has a background that is even remotely similar. Judge Thomas, as he has promised, would "bring to th[e] Court * * * an understanding and the ability to stand in the shoes of other people across a broad spectrum of this country." (Tr., 9/12/91, at 59-60.) The Court—and the country—will benefit from that understanding.
PRESUMPTION IN FAVOR OF THE NOMINEE

We believe that the President's nominee to the Supreme Court comes before the Judiciary Committee and the Senate with a presumption in his or her favor.

We believe this presumption is firmly rooted in the advice and consent process established by our Constitution for the appointment of Supreme Court Justices. The Constitution gives to the President the discretion to choose men and women to serve on the Nation's highest court. Presidential primacy in making judicial appointments is reflected in the structure of the Constitution itself: the appointment power is assigned in Article II's enumeration of executive powers, not in the legislative powers of article I. The advice and consent function was never intended to permit substitution of the Senate's judgment for the President's in determining who should be selected from among the qualified and fit. Performance of the Senate's duty in accordance with the Constitution requires that the Senate as a whole to respect the President's preeminent role in this process by according the President's nominee a presumption of qualification, and fitness.

Of course, this presumption of fitness may be overcome in individual cases if a nominee's character is found to be seriously flawed, that a nominee lacks integrity or judicial temperament, or that a nominee is deficient in professional qualifications. In historical context, the Senate's role is properly viewed as a vigorous check against any "spirit of favoritism" and the appointment of "unfit characters." "The Federalist" No. 76 (J. Cooke ed. 1961), at 513. Short of such potentially disabling infirmities, the burden rests on those who would challenge the President's nominee to expose disqualifications to that nominee's confirmation.

As well, a nominee should not be rejected for any alleged failure to assure this committee about his or her positions on specific, controversial issues. Those who would have Judge Thomas demonstrate his fitness by meeting certain specific, substantive litmus tests misunderstand the role of the Senate in the advise and consent process. The failure to meet substantive standards would disqualify countless otherwise intelligent, fair, and capable individuals from serving on the Supreme Court.

These "burdens of proof," whether general or specific, represent an "unwarranted, and in our view inappropriate, attempt to redefine the roles of the President and the Senate as they are now defined in the Constitution." S. Exec. Rep. No. 32 at 75. We believe the imposition of such burdens threatens the integrity of the confirmation process, denigrates the dignity of the Supreme Court as an institution, and impugns the integrity of nominees to that Court as individuals.

The key considerations governing the confirmation process were properly stated by Senator Thurmond in his opening remarks to Judge Thomas:

Clearly, if a philosophical litmus test can be applied to defeat a nominee, then the independence of the Federal judiciary would be undermined. Judges are not politicians put in place to decide cases based on the views of a political constituency, but are sworn to apply constitutional and
legal principles to arrive at decisions that do justice to the parties before them.

The prerogative to choose a nominee to the Supreme Court belongs to the President, an individual elected by the people of this country. The full Senate has the opportunity to review that nominee who comes to this body with a presumption—and I repeat, with a presumption—in his favor. To reject a nominee based solely on ideology is inappropriate. Requiring a nominee to pass an ideological litmus test would seriously jeopardize the efficacy and independence of the Federal judiciary. (Tr., 9/10/91, at 17-18.)

While each Senator is free to apply his own standards for confirming a Supreme Court nominee, the Senate as a body has traditionally extended considerable deference to the President's nominees. With rare exceptions, the Senate has refrained from subjecting judicial nominees to political or ideological litmus tests.

We consider it appropriate for the Committee to inquire carefully and thoughtfully into the qualifications, judicial temperament, intelligence, and integrity of each nominee. However, in performing this constitutional function, we believe that the President, who is elected by the People, has the duty to select nominees for a position on the Supreme Court with a presumption of qualification in order to shoulder the grave responsibilities of that position. It is this presumption, grounded in the Constitution, that will preserve the independence of the Judiciary, the integrity of this confirmation process, and the Senate's essential role in that process as contemplated by the Constitution.

JUDGE THOMAS WAS APPROPRIATELY RESPONSIVE TO THE COMMITTEE'S QUESTIONS

We believe that Judge Thomas responded openly, thoughtfully, and responsibly to the wide range of questions propounded to him during the hearings. Judge Thomas properly declined to express an opinion or position on particular issues that he could be required to resolve as a member of the Court or in his present role as a circuit judge. In this regard, he adhered to a long-standing tradition that is absolutely essential to the maintenance of an independent judiciary.

Judge Thomas was questioned extensively by some Committee members regarding his views on the various abortion-related issues raised by Roe v. Wade and its progeny. In all, Judge Thomas was asked more than ninety questions on the abortion issue. In response, Judge Thomas repeatedly explained the well-established principles that make such testimony improper. For example, in response to a question from Senator Leahy, Judge Thomas explained:

[F]or me to respond to what my views are on those particular issues would really undermine my ability to be impartial in those cases. I have attempted to respond as candidly and openly as I possibly can, without in any way undermining or compromising my ability to rule on these cases. (Tr., 9/11/91, at 99.)
While Judge Thomas indicated his acceptance of certain well-recognized general principles germane to this area, he properly drew the line at answering questions raising issues he might well be addressing in future cases. This distinction is reflected in the following colloquy with Chairman Biden:

Chairman BIDEN. Well, Judge, does that right to privacy in the Liberty Clause of the Fourteenth 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. (Tr., 9/10, at 149.)

Throughout his testimony, Judge Thomas maintained a proper balance between forthcoming discussion of general legal principles and approaches, and respectful reticence on specific unsettled issues likely to come before the Court. Judge Thomas consistently struck the same balance in response to questioning in other areas of the law, separate from Roe, where it is likely that he could be called upon to sit in judgment, either as a Supreme Court Justice or in this present role as a circuit court judge.

If Supreme Court nominees could be forced to stake out their positions on the crucial legal issues of the day under the pressure of the confirmation process, the principle of judicial independence would be irreparably compromised. As former Chief Justice Burger explained the problem in a 1990 article:

To expect a nominee to make commitments, or even to engage in substantive discussion of a case yet unseen, borders on the preposterous. * * * To call on a nominee for advance views as to questions that may come before the Court is really not unlike asking a potential juror how he or she will decide a particular case that the jury has not yet heard. A trial judge would reprimand a lawyer for such conduct. (Burger, "How Far Should the Questions Go?," Parade Magazine, Sept. 16, 1990, at 10, 14.)

Senator Hatch stressed Judge Thomas' current status as a sitting Federal judge when he raised his deep concerns on the subject of case-specific questioning:

So, you are a sitting judge on one of the Nation's highest courts, and whatever the outcome of these hearings may be, you are still going to be a judge for the rest of your life, for the rest of your professional life, if you so choose to be. You simply do not have the freedom to answer every question as a sitting judge, every question that every Senator might have on this panel or might wish to be answered, and that goes for questions from both sides of the
aisle, not just the other side of the aisle. (Tr. 9/12/91, at 87.)

These principles are fully consistent with the standard of responsiveness traditionally adopted by previous Supreme Court nominees. For example, Justice Thurgood Marshall was reticent in questioning during his confirmation hearing. Whereas today some believe the most controversial constitutional issues are the abortion issues raised by *Roe v. Wade*, at the time of Justice Marshall's confirmation hearings in 1967 the burning issue concerned the Supreme Court's decision in *Miranda v. Arizona* and related rulings expanding the rights of criminal suspects and defendants. Some Judiciary Committee members were just as anxious to extract Thurgood Marshall's views on *Miranda* in 1967 as some current committee Members are to learn Clarence Thomas' views on *Roe* today.

The exchanges on the *Miranda* decision between Thurgood Marshall and various Senators bear a remarkable resemblance to the questioning of Clarence Thomas with respect to *Roe v. Wade* and the abortion issue. In both instances, Senators pressed the nominee to disclose his views and opinions on a prominent holding that was certain to be revisited in future cases; in both instances the nominee steadfastly refused to compromise his capacity to participate impartially in such future cases by signalling his approach to such cases as a condition of confirmation; and in both cases the nominee was legally and ethically correct in resisting the pressure to telegraph his views.

Supreme Court nominees such as, Abe Fortas, Sandra Day O'Connor, Antonin Scalia, and David Souter consistently refused to answer questions on specific issues likely to come before the Court in future cases. In particular, nominees appearing before the Judiciary Committee in the "post-Roe" era have properly declined to respond to relentless efforts to elicit their views on the evolving and unsettled legal questions raised by the abortion controversy. Judge Thomas' refusal to compromise his impartiality in future abortion cases by signalling his position is consistent with the history of the confirmation process.

Judge Thomas' decision not to answer certain specific questions that intruded upon his independence as a judge, or that could be construed as seeking a commitment regarding future cases, reflects a conscientious respect for the judicial process rather than any disrespect for the Senate's prerogatives. We believe, for a nominee to give his or her extrajudicial opinion on complex legal issues in the absence of any record or argument developed through our traditional adversarial process, could gravely compromise his capacity to adjudicate those issues in the future.

Although some members of the Judiciary Committee freely questioned Judge Thomas as to his views on a host of contemporary legal issues, President Bush refrained from making such inquiries in connection with the selection and nomination of Judge Thomas. (Response of Judge Thomas to Senate Judiciary Committee Initial Questionnaire (Supreme Court), Item III.4.) In response to questions from Senator Brown, Judge Thomas described his conversation with the President prior to being nominated:
[The President] had two issues he wanted to discuss. The first was: If you are nominated, will your family be able to sustain or to survive this process, because it will be a difficult process? * * *

The second question that he asked me was—and I think this is almost verbatim: Can you call them as you see them? And then he went on to indicate that if he did not agree with me, were I to be confirmed and sit on the Supreme Court, that I would never see him criticizing me in public, even if I disagreed with him or he disagreed with me. * * *

Senator Brown. Since that meeting, have you had any discussions with the President where you have committed how you would vote on a particular case or a particular legal doctrine?

Judge Thomas. No, Senator.

Senator Brown. In other words, you have given the President the same ethical treatment you have given us?

Judge Thomas. Well, I have tried to be consistent across the board, Senator. (Tr., 9/13/91, at 62–63.)

We believe there are numerous compelling reasons why Supreme Court nominees should not be called upon to answer questions on issues likely to come before the Court in the near future. The practice not only raises problems of judicial ethics and possible disqualification from future cases, but more fundamentally undercuts the great constitutional principle of judicial independence. Judge Thomas acted properly—and in keeping with the historical precedents established by a long line of distinguished justices—in refusing to answer questions regarding unsettled issues that are likely to arise in pending and future cases.

THE ROLE OF AN EXECUTIVE BRANCH POLICYMAKER IS FUNDAMENTALLY DIFFERENT FROM THAT OF A JUDGE

In the Department of Education and as Chairman of the Equal Employment Opportunity Commission [EEOC], Judge Thomas was a powerful advocate for policy positions advanced by the executive branch. Some members of the committee felt that certain positions Judge Thomas had proposed in his prior speeches were controversial. These included, for example, certain statements in speeches that were critical of affirmative action programs that involve preferences for one racial group over another. We believe the positions Judge Thomas advocated were always within the mainstream of public debate and were perfectly appropriate for an executive official holding an important and high-profile office. Furthermore, we believe that Judge Thomas' record on the District of Columbia Court of Appeals is illustration that he has not advocated political policy as a member of the court. We have reviewed his record on the court and find no evidence that he injected any hint of political ideology into the judicial opinions he has authored or joined. In his testimony before the committee, Judge Thomas stated clearly that his views on policy are wholly distinct from his responsibilities and actions as a judge.
As his testimony makes abundantly clear, Judge Thomas is keenly aware that when he donned the robes of a Federal judge, he entered upon a new role, one that is and must remain independent from any policymaking agenda the judge may have advanced in an earlier career. In response to a question from Senator DeConcini, Judge Thomas testified:

I think it is important for judges not to have agendas or to have strong ideology or ideological views. * * *

I believe one of the Justices * * * spoke about having to strip down, like a runner, to eliminate agendas, to eliminate ideologies, and when one becomes a judge, it is an amazing process, because that is precisely what you start doing. You start putting the speeches away, you start putting the policy statements away. You begin to decline forming opinions in important areas that could come before your court, because you want to be stripped down like a runner. So, I have no agenda, Senator. (Tr., 9/11/91, at 60-61)

In a colloquy with Senator Kohl concerning the relevance of his prior speeches, Judge Thomas once again made it known that he completely divorces his current role as a judge from his earlier role as a policymaker:

When one becomes a judge, the role changes, the roles change. That is why it is different. You are no longer involved in those battles. You are no longer running an agency. You are no longer making policy. You are a judge. It is hard to explain, perhaps, but you strive—rather than looking for policy positions, you strive for impartiality. You begin to strip down from those policy positions. You begin to walk away from that constant development of new policies. You have to rule on cases as an impartial judge. And I think that is the important message that I am trying to send to you; that, yes, my whole record is relevant, but remember that that was as a policymaker not as a judge. (Tr., 9/12/91, at 20-21.)

If policy positions taken in speeches are to be overscrutinized and held against the nominee as evidence of prospective judicial opinions, many well-qualified candidates, who have served in the executive branch or in the Congress and have taken part in vital debate on the policy issues that face the country, will no longer be eligible for the Court.

Judge Thomas has not undergone a confirmation conversion. We were most impressed with the testimony of Ms. Margaret Bush Wilson, who was the chairperson of the National Board of Directors of the NAACP from 1975 until 1984, and has known Judge Thomas since 1974. She noted in her written statement that:

One of the most disagreeable charges leveled at Judge Thomas is that he has changed his stated views to gain confirmation. Those who make this unfair charge do not know the man. Judge Thomas would not violate his principles for any purpose—and certainly not to gain a seat on the Supreme Court.
We believe Judge Thomas demonstrated the principal tenet of judicial restraint: That a judge must faithfully apply the law and, in so doing, may uphold policies with which he personally disagrees and may strike down policies with which he personally agrees. As Senator Hatch cogently explained:

If there was a central theme to Judge Thomas’ testimony, it was this: the roles of the judge and the policy maker are wholly and completely distinct. * * *

This distinction—between the judge as interpreter of the written law and the legislator as the author of the written law—appears to be wholly lost on some of Judge Thomas’ critics. They are incredulous that Judge Thomas could, as a policymaker, have taken strong positions, and then, as a judge, forswear any policy agenda. For them, apparently, adjudication in the courts is nothing more than a continuation of politics by other means. Put more bluntly, some of the critics of Judge Thomas would collapse the distinctly different functions of adjudication and policymaking into an approach that simply reaches a preferred policy result, whatever the violence done to the written law. (Statement of Sen. Orrin Hatch, 9/27/91, at 2.)

We believe that Judge Thomas’ record on the District of Columbia Circuit Court demonstrates that he has successfully shifted from the role of a policymaker to that of an impartial jurist. His comments during the hearing are further reassurance of his integrity, neutrality, and judicial temperament, for it exemplifies his understanding that adjudication is not a means to a desired policy end but is, instead, a limited and ultimately self-effacing search for the intent of those who have written the applicable law.

THE AMERICAN BAR ASSOCIATION

The American Bar Association found Judge Thomas to be qualified to sit on the Supreme Court. In the bar association’s terms, “To meet the [bar association] committee’s ‘Qualified’ rating for the Supreme Court * * * [t]he nominee must have outstanding legal ability and wide experience and meet the highest standards of integrity, judicial temperament and professional competence.” We agree with the bar association: Judge Thomas does have outstanding legal ability and wide experience, and he does meet the very highest standards of integrity, judicial temperament, and professional competence. Judge Thomas’ record demonstrates that he is dedicated to the rule of law, that he understands the role of judges in our democratic society, and that he will not impose his own personal values in the guise of judging.

JUDGE THOMAS POSSESSES APPROPRIATE JUDICIAL TEMPERAMENT

During Judge Thomas’ appearance before the committee, he exhibited an exceptional temperament. Throughout his testimony, Judge Thomas consistently demonstrated the characteristics we consider crucial in any nominee: Openmindedness, impartiality, integrity, independence, and fairness.
Judge Thomas repeatedly demonstrated before the committee the receptivity and openness which he himself characterized as the "essence of temperament," stating: "[I]t is important, actually critical, for a judge to be able to listen, to be open to the arguments, to be open to the different points of view, to look for all arguments on all sides, to explore them in depth, not to reject any." (Tr., 9/12/91, at 57.)

Judge Thomas' willingness to listen to those who come before him shows us the most critical of qualities needed in a member of the Nation's highest court. It confirms that Judge Thomas will not pursue an agenda on the Court, but will simply go about the job of being a good and fair judge for the parties involved. In his opening statement, Judge Thomas explained:

I have learned to listen carefully, carefully to other points of view 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 decisions that I make and decisions made by others.

*   *   *   *   *

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. (Tr., 9/10/91, at 132-33.)

Judge Thomas has shown himself to be a fair man who will come to each case not only with an open mind, but also, in his words, "with an open heart." (Tr., 9/12/91, at 142.) Throughout his life, Judge Thomas has shown sensitivity for those less fortunate than himself. During his testimony, Judge Thomas explained the importance of the pro bono legal work he did during law school:

I think there are individuals in our society who, for whatever reasons and a variety of reasons, primarily socio-economic reasons, cannot afford the kind of representation that they deserve or that they need.

I think it is important for all of us in the society to feel and to know that our judicial system is open to everyone, and the representation of poor or indigent individuals I think is critical to that, and it says a lot about our system.*   *   *

What I was attempting to do while I was in law school, as well as any number of friends of mine, is to take the opportunities, the abilities, the analytical skills, the energy that we had as law students and to translate that into concrete help for people who needed things, such as how to get their welfare check, how to get a pair of shoes, how to keep from being evicted, how to get their driver's license. (Tr., 9/12/91, at 57-58)
Judge Thomas has not forgotten those values. Indeed, both his record and his testimony show an acknowledgement that judges and courts must be open to all. As he told Senator Grassley:

"I don't think that we as judges should be stingy or crabbed in our review of individuals' access to our judicial system. I think it is important that the courts and our judicial system be available to all, that they have a place where their case can be adjudicated in a fair way."

(Tr., 9/11/91, at 85.)

We are also impressed that Judge Thomas makes a conscious effort not to lose touch with the people who will be affected by his decisions. Judge Thomas told the committee:

"In my job, my current position on the Court of Appeals, one of the things that I always attempt to do is to make sure that in that isolation that I don't lose contact with the real world and the real people—the people who work in the building, the people who are around the building, the people who have to be involved with that building, the people who are the neighborhood, the real people outside. Because our world as an appellate judge is a cloistered world, and that has been an important part of my life, to not lose contact."

(Tr., 9/13/91, at 84.)

We have no doubt that when confirmed Judge Thomas will fulfill the promise he made to the members of the committee and to the American people: "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, open-mindedness, honesty, and hard work." (Tr., 9/10/91, at 132-33.)

**JUDGE THOMAS FAITHFULLY ENFORCED THE LAW AS CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

As Chairman of the EEOC, Judge Thomas faithfully enforced the employment discrimination laws. As Senator Hatch observed in his opening statement:

"The Washington Post, no shill for the Reagan administration civil rights record, praised "the quiet but persistent leadership of Chairman Clarence Thomas" in an editorial on May 17, 1987, entitled "The EEOC is Thriving." The July 15, 1991, U.S. News and World Report wrote, "Overall, it seems clear that he left the [EEOC] in better condition than he found it." (Tr., 9/10/91, at 29.)

In particular, Judge Thomas formulated a full investigation policy to replace the "rapid charge processing" system that had been used by his EEOC predecessors to force settlements upon both charging parties and employers. As Judge Thomas explained:

"I felt that the [rapid charge processing] system, which in essence brought the charging party who filed the claim of discrimination and the employer together and required them to reach a settlement, without investigating and de-"
termining whether or not there was actual discrimination, I felt that that system shortchanged both parties.

The Commission voted in [a] policy that * * * indicated that cases should be investigated as fully as possible before there is any determination.

* * * * *

One of the results of this approach is the increased number of cases that were litigated. I think also an important result was that we were more consistent, and I think more faithful to the statute that required us to investigate these charges. (Tr., 9/11/91, at 158–59.)

Many of the concerns regarding the EEOC were aired during Judge Thomas' hearing for appointment to the court of appeals. However, four topics involving the EEOC were examined: Handling of age discrimination charges, the EEOC's programs for Hispanics, the Government's litigation position on sexual harassment, and fetal protection.

A. JUDGE THOMAS' RECORD ON AGE DISCRIMINATION REFLECTS HIS CANDOR, INTEGRITY, AND RESPECT FOR THE LAW

Although the issue had been fully aired upon Judge Thomas' appointment to the court of appeals, allegations involving the lapse of age discrimination charges beyond the statute of limitations provided by the Age Discrimination in Employment Act [ADEA] were again raised in these hearings.

As he did in his court of appeals confirmation hearing, Judge Thomas accepted responsibility for the lapse, calling it "the low point of my tenure." (Tr., 9/12/91, at 120). Judge Thomas noted that, during his chairmanship of the EEOC, he promptly disclosed to Congress the existence of the lapse, and he took steps to prevent recurrence of the problem:

[W]hat we attempted to do was, as soon as I found out [about the lapsed charges], * * * to not only inform Congress, but to make it public. I found out in December of 1987 and reported to Congress the day Congress returned for the next term in January. * * * If I could have investigated every one of those cases, I would have. There were approximately 2,000 * * * charges within EEOC which had missed the statute [of limitations] over a four-year period out of the approximately 50,000 or 60,000 that we receive a year. * * * But even one * * * is too many.

We took steps to solve the problem. We * * * completed * * * the automation of the agency, so that the cases could be more accurately tracked, that is both at headquarters and in the field offices. We sent notices to the individuals, so that they would know when the statute was approaching. We held managers more accountable. We had done that before, but we redoubled our efforts. (Tr., 9/12/91, at 126–27.)
B. UNDER JUDGE THOMAS, THE EEOC ADDRESSED THE CONCERNS OF THE HISPANIC COMMUNITY

Judge Thomas, as Chairman of the EEOC, directed the agency to be of better service to the needs of Hispanics. Judge Thomas noted that he responded constructively to recommendations from a 1983 task force appointed by the EEOC to study discrimination charges by Hispanics. Judge Thomas stated:

[The EEOC] open[ed] offices in predominantly Hispanic communities, satellite offices. That was a part of our expanded presence program. * * * [W]e developed public service announcements that were bilingual. I installed a 1-800 number at EEOC so that the agency could be accessible. We developed posters that were bilingual. We took all our documents, our brochures, and translated them into Spanish. * * * [W]e made every effort to see to it that [in areas with a significant Hispanic population] the top managers and the investigators spoke Spanish. * * * [T]he overall effort was to reach out, and that was consistent with the [task force's] recommendations. (Tr., 9/11/91, at 67-68.)

Judge Thomas also pointed to the EEOC's efforts to combat English-only language requirements in the workplace. (Tr., 9/12/91, at 151, 155).

Moreover, Judge Thomas personally reached out to representatives of the Hispanic community. As Senator DeConcini noted:

[W]ithin the first year, [Judge Thomas] as Chairman conducted one-on-one personal meetings with MALDEF [Mexican American Legal Defense and Education Fund] and with LULAC [League of United Latin-American Citizens] and with the National Hispanic Bar and the Cuban-American Men & Women and the Personnel Management Association of [Atzlan] and Los Angeles County Affirmative Action. (Tr., 9/12/91, at 149.)

J.C. Alvarez, who served on Judge Thomas' staff at the EEOC, vividly described the success of the Judge's efforts to forge a bridge between the EEOC and the Hispanic community:

I can recall * * * how bitter many Hispanic leaders were because they had been ignored or shut out by the EEOC under the previous administration. * * *

But in every instance I can recall, the Hispanic leadership was shocked and amazed at the reaction and the response of the Chairman. He was genuinely sincere in his concern for their cause. He solicited their views and their experiences, shared his perspective, and ultimately responded to the recommendations to address the issues. In every instance, they walked into his office as his enemy and left as his ally. (Tr., 9/20/91, at 9-10.)

C. AS EEOC CHAIRMAN, JUDGE THOMAS WAS AT THE FOREFRONT OF THE GOVERNMENT'S EFFORT TO COMBAT SEXUAL HARASSMENT

Judge Thomas' commitment to combat sexual harassment in the workplace is clear from his active involvement in Meritor Savings
Bank v. Vincent, the landmark case in which the Government successfully urged the Supreme Court to recognize a right of action for sexual harassment based upon the existence of a hostile working environment. As Judge Thomas noted:

My direct role was not only at EEOC in developing the arguments that were transmitted to the Justice Department, but to personally meet with the Solicitor [General], his staff, individuals who disagreed throughout the Justice Department, and to argue for the Government's involvement in that case in the Supreme Court. And ultimately EEOC itself played a very extensive role in the development of the legal arguments in that case in the Supreme Court. (Tr., 9/16/91, at 57.)

D. JUDGE THOMAS ENFORCED THE LAW IN THE AREA OF FETAL PROTECTION POLICIES

We find no evidence that Judge Thomas was remiss in failing to resolve charges challenging workplace fetal protection policies during his tenure as Chairman of the EEOC. In response to a question regarding the development of a policy for resolving charges in connection with fetal protection, Judge Thomas explained:

* * * that it was a very complex area and an area that involved a tremendous amount of work safety-related problems, as well as health and medical problems and concerns, and we attempted to work them out or to wrestle with them, but EEOC does not have the scientific and medical capability on its own to make or did not have the capability to make all of those determinations. We attempted to coordinate * * * with the other agencies and that took some time. However, even during that process, we gave significant detailed guidance * * * in 1983 or 1984, to the field on how to handle and how to investigate these charges, and then ultimately to forward those to our headquarters. (Tr., 9/16/91, at 54.)

There was no intentional delay in formulating a comprehensive policy. Agencies such as, OSHA, and EPA had to coordinate with other agencies to determine what standards to apply in analyzing various fetal and reproductive hazards. (Tr., 9/16/91, at 41.) We concur with Senator Hatch's comments:

[T]here was a legitimate difference of opinion among lawyers and others over whether Title VII forbids employers from excluding women from jobs that might endanger any unborn children that they might be carrying or that they might carry in the future. * * * [T]hat is a very, very complicated area of employment law and Title VII law. It involves scientific and medical considerations, as well as legal considerations. And because of the complexity of the issue and because other government agencies such as OSHA, the Occupational Safety and Health Administration, and the EPA, the Environmental Protection Agency, had to * * * weigh in with their views on this issue, it naturally took some time for the EEOC to formulate a posi-
tion on this issue, and as it did, fetal protection discrimination charges that were filed with the EEOC were naturally held in abeyance, because a judgment had to be reached, a fair judgment, taking into consideration all of the matters, including medical and legal and other matters. (Tr., 9/16/91, at 52-53.)

Judge Thomas also emphasized that EEOC had been actively grappling with the issue during his tenure:

The agency, the commissioners, including myself, attempted to review this particular policy in a professional way and a way that would protect the rights of women. We recognized * * * this was a difficult issue that involved scientific, as well as health problems or health concerns, and we attempted to resolve it in a way that took these factors into consideration. (Tr., 9/16/91, at 94.)

Judge Thomas agreed with Senator Hatch that the EEOC’s regulations approved in 1988 and 1990, reflected Federal case law as it had developed up to that time. The 1988 regulations “permitted fetal protection restrictions on female employees only when the employer demonstrated that there was a substantial risk of harm to the fetus and that there were no other reasonably available less discriminatory alternatives that would effectively protect female employees’ offspring.” (Tr., 9/16/91, at 54-55.) The Supreme Court in *International Union, UAW v. Johnson Controls, Inc.*, agreed with the EEOC’s conclusion that the business necessity defense does not apply to fetal protection policies and that the burden of proof in fetal protection cases is on the defendant.

We concur with Senator Hatch’s conclusion that, “no one was prejudiced by the EEOC’s consideration of this extremely complex set of cases or issues * * * the position taken by the EEOC was reasonable, in light of the fact that it was based on the developing case law in the Courts of Appeals.” (Tr., 9/16/91, at 56.)

**JUDGE THOMAS HAS DEMONSTRATED HIS AWARENESS OF THE IMPORTANCE OF BALANCING LAW ENFORCEMENT WITH THE RIGHTS OF CRIMINAL DEFENDANTS AND RECOGNIZES THE CONSTITUTIONALITY OF THE DEATH PENALTY**

Judge Thomas’ opinions and testimony demonstrate that he is tough but fair in ruling on criminal cases. He properly balances society’s interest in apprehending and punishing those who engage in criminal activity against the need to protect the rights of criminal defendants. He has declined to overturn criminal convictions on technicalities not required by the Constitution, while guarding against infringements of the fundamental rights of criminal defendants. He has also recognized the practical problems that law enforcement officers face in combatting crime and has resisted efforts to impose unreasonably burdensome requirements on the police or prosecutors. For example, Judge Thomas testified in connection to questions by Senator Thurmond regarding the good faith exception to the exclusionary rule:

the warrant * * * requirement is to make sure that the law enforcement officials are deterred from * * * obtain-
ing evidence in an unlawful way. * * * 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. * * * [T]he Court is looking for ways to make sure that the purposes of the Exclusionary Rule are advanced, as opposed to simply being used in a way that is rote. (Tr., 9/10/91, at 168–169.)

Additionally, he testified that the uniform sentencing procedures are a way to eliminate disparities and promote fairness in sentencing of criminal defendants who commit similar crimes. (Tr., 9/10/91, at 164–65.)

Several individuals and groups with experience and expertise in criminal law matters testified in support of Judge Thomas. For example, Gale Norton, the attorney general of Colorado, pointed out that Judge Thomas has first-hand law enforcement experience as a result of litigating criminal cases during his tenure in the Missouri attorney general's office. She further testified:

[A]s a prosecutor, I do not desire a pro-prosecution judge. I would like to see a fair one. * * * That is, I value justice—not simply securing convictions. * * * The promise of Judge Thomas is that he brings a realistic and balanced perspective on law enforcement. (Tr., 9/19/91, at 94–95.)

She concluded that Judge Thomas "would be fair to both prosecutor and defendant alike." (Tr., 9/19/91, at 96.) Similarly, James Doyle III, a former assistant attorney general of Maryland, stated that "Judge Thomas has shown through his criminal decisions that he is supportive of law enforcement, yet he has struck the appropriate balance and has also shown that he intends to be fair to the accused." (Tr., 9/20/91, at 92.)

In answering questions concerning the death penalty, Judge Thomas recognized that the Supreme Court has repeatedly held the death penalty to be constitutional (Tr., 9/16/91, at 15–16) and demonstrated an appreciation for due process concerns, while recognizing the practical constraints of the criminal justice system. Responding to a question posed by Senator Thurmond about limiting post-trial appeals in death penalty cases, Judge Thomas testified:

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. * * * So I would be in favor of reasonable restrictions on procedures * * * but not to the point that an individual is deprived of his constitutional protections. (Tr., 9/10/91, at 162.)
JUDGE THOMAS KNOWS THAT DISCRIMINATION EXISTS IN THE UNITED STATES AND HE IS COMMITTED TO ELIMINATING IT IN ALL OF ITS PERNICIOUS FORMS

Judge Thomas has been concerned throughout his career with improving the lives of those who have been disadvantaged, dispossessed, and victims of discrimination. Upon entering the executive branch of the Federal Government, Judge Thomas tried to identify and use “all avenues of inclusion.” (Tr., 9/13/91, at 37.) At the EEOC, he stressed the importance of strong remedies for victims of discrimination, rather than reliance on quotas. But while recognizing the absolute necessity for government action to correct discrimination, he also advocated self-help and self-reliance. Judge Thomas’ record illustrates that his aim was to end discrimination and to give all Americans an equal chance to succeed in the workplace.

Judge Thomas has supported constructive forms of affirmative action for the disadvantaged in our society. As he explained to Senator Brown, “throughout my adult life, I have advocated the inclusion of those who have been excluded.” (Tr., 9/11/91, at 164.) And in response to a question from Chairman Biden, Judge Thomas stated clearly that “from a policy standpoint, I agree[ ] with affirmative action policies that focus[ ] on disadvantaged minorities and disadvantaged individuals in our society.” (Tr., 9/13/91, at 44.) Judge Thomas’ record and testimony reflect the efforts that he has made during his career to open the doors to advancement for those who have previously been left out.

In a discussion with Senator Brown, Judge Thomas explained his advocacy of affirmative action at the EEOC:

I felt, for example, that there were many opportunities to include minorities and women and individuals with disabilities in our workforce, and I took every occasion to do that in the Senior Executive Service program * * * our record is superb on the efforts that I was able to achieve in agreements, scholarships for minorities and women across the country, colleges and universities programs, internship programs, mentor programs, stay-in-school programs, et cetera.

I think that many of us of good-will * * * though we do not necessarily share the same approach, agree with that goal that we have to include individuals who have been left out for so long. (Tr., 9/11/91, at 164-65.)

In response to a question from Senator Simon on educational scholarships, Judge Thomas noted that:

When I had the opportunity to establish a program at EEOC that provided scholarships for minorities and women, I did. And it is a program that I think now has about $10 million in endowments. When I had an opportunity to establish a program or to participate in the establishment of a program here in Washington for minority interns, I did. I think that it is important for them to be here, to participate in this process, to learn from this proc-
I wish that when I was a kid I had had this opportunity also. (Tr., 9/11/91, at 173.)

As a policymaker, Judge Thomas did not endorse the use of quotas and preferences based on race or gender. As his testimony made clear, Judge Thomas developed his views only after careful consideration of the tension between the desire to remedy past discrimination against women and minorities and the desire to avoid unfair discrimination against innocent third parties:

I wrestled with that tension and I think others wrestled with that tension. The line that I drew was a line that said that we shouldn’t have preferences or goals or timetables or quotas. I drew that line personally, as a policy matter, argued that, advocated that for reasons that I thought were important.

One, I thought it was true to the underlying value in [Title VII of the Civil Rights Act of 1964] that would be fair to everyone, and I also drew it because I felt and I have argued over the past 20 years and I felt it important that, whatever we do, we do not undermine the dignity, self-esteem and self-respect of anybody or any group that we are helping. That has been important to me and it has been central to me.

I think that all of us who are well-intentioned, on either side of the debate at any given time, wanted to achieve the exact same goal. I would have hoped, if I could revisit the 1980s, that we could have sat down and constructively tried to hammer out a consensus way to solve what I consider a horrible problem. (Tr., 9/11/91, at 128–29.)

Judge Thomas’ objections to race or group based preferences is well founded. As he stated to Senator Specter:

* * * I think we all know that all disadvantaged people aren’t black and all black people aren’t disadvantaged. The question is whether or not you are going to pinpoint your policy on people with disadvantages, or are you simply going to do it by race. (Tr. 9/13, a.m., p. 36.)

To the extent preferential treatment is given, Judge Thomas believes it should be to those from socio-economically depressed backgrounds, not to those who are members of a particular group. Again, he told Senator Specter that such a determination—of someone’s disadvantaged background—is a difficult, subjective, but important one:

The kid could be a white kid from Appalachia, could be a Cajun from Louisiana or a black or Hispanic kid from the inner cities or from the barriers, but I defended that sort of program then and I would defend it today. (Tr. 9/13, a.m., p. 32–33.)

Indeed, as Senator Danforth noted, “If support for race-based preferences becomes a litmus test for the Supreme Court, that test would rule out a majority of the American people and a majority of the Members of the Senate, as well.” (Tr. 9/10/91, at 124.)
In his judicial role, Judge Thomas will approach the constitutional issues presented by affirmative action with an open mind. In his testimony, Judge Thomas reiterated that "in the appropriate circumstances, we all are concerned with the underlying value of fairness that is expressed in our Constitution." (Tr., 9/11/91, at 166.) Yet Judge Thomas recognizes that there is no simple answer to the issues raised by affirmative action programs: "[W]e have to remember that, even though the Constitution is colorblind, our society is not, and * * * we will continue to have that tension." (Id.)

Some have argued that Judge Thomas' opposition as a policy maker to race-based preferences and quotas is inconsistent with his own experience at Yale Law School, where he was admitted as part of an affirmative action program for disadvantaged minorities. Judge Thomas addressed this matter during questioning by Senator Brown:

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

Judge Thomas. * * * The effort on the part of Yale during my years there was to reach out and open its doors to minorities whom it felt were qualified, and I took them at their word on that, and I have advocated that very kind of affirmative action and I have done the exact same thing during my tenure at EEOC, and I would continue to advocate that throughout my life. (Tr., 9/11/91, at 167.)

And, as Judge Thomas later testified, "[F]rom a policy standpoint I agree with affirmative action policies that focused on disadvantaged minorities and disadvantaged individuals in our society." (Tr., 9/13/91, at 44.)

Some have intimated that Judge Thomas does not appreciate the reality of job discrimination against women. We believe any such suggestion is completely unfounded and contradicts Judge Thomas' clear record in this area.

In one colloquy, Senator Kennedy referred to a 1987 article in the Atlantic Monthly in which Judge Thomas is described as stating that some statistical hiring disparities could be due to cultural differences between men and women, including personal choices made by some women to take time away from their education to raise families. When asked if he believes these cultural differences fully explain the underrepresentation of women in the workplace, Judge Thomas stated:

* * * 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.
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. (Tr., 9/10/91, at 189-90.)

In our view, Judge Thomas's position that statistics alone cannot tell us everything about the invidious nature of employment discrimination facing women or any other group is certainly acceptable. Senator Kennedy himself agreed, responding that there was "[v]ery little I could differ with you on th[at] comment." (Id. at 190.)

Judge Thomas was also questioned about an article he wrote for the Lincoln Review that referred to a chapter in a book by economist Thomas Sowell concerning these same statistical disparities. In his article, Judge Thomas described Dr. Sowell's analysis of wage-earning statistics as "a much-needed antidote to cliches about women's earnings and professional status." (Id. at 190-91.) Senator Kennedy wondered whether this reference represented Judge Thomas's endorsement of all of Dr. Sowell's views about discrimination against women. Judge Thomas fully dispelled this misconception, explaining:

[T]he 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, * * * who has dropped out of high school, there is a difference between the problems of that child or that student [and the problems of] someone who has a Ph.D. or someone who has a college degree.

And I thought that it would be more appropriate * * * 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. (Id. at 191-92.)

Again, we believe this skepticism about the blind use of aggregate statistics is well-founded and is entirely reasonable. Judge Thomas went on to explain that he was not indicating his agreement with all of Dr. Sowell's beliefs, but only the opinion that statistical stereotypes should not replace healthy debate about the true causes of discrimination and the best policies for eradicating it. He further testified:

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. (Id. at 192-94.)

We wholeheartedly agree with these statements by Judge Thomas. Judge Thomas has a long and distinguished record at the EEOC of fighting for women's rights and against gender-based job discrimination. That record is well-known, and was bolstered by his testimony before the committee.
Thus, as a policymaker, Judge Thomas took a thoughtful and constructive approach to affirmative action. He is sensitive to the competing goals of fostering opportunities for the disadvantaged in our society and ensuring fair treatment for all Americans. We believe that Judge Thomas will be a strong voice on the Supreme Court for equal opportunity and equal justice for all Americans.

JUDGE THOMAS BELIEVES STRONGLY IN THE VOTING RIGHTS ACT

Judge Thomas stated forcefully to the committee that he supports the Voting Rights Act and, more generally, the right to vote. In answer to Senator DeConcini's questioning, Judge Thomas remarked that "[i]t makes eminent sense to me to find unlawful literacy tests that are used to deprive people of the right to vote." (Tr., 9/13/91, at 450.) In a dialog with Senator Kennedy, Judge Thomas emphasized that he "absolutely support[s] the aggressive enforcement of voting rights laws." (Tr., 9/16/91, at 67.)

JUDGE THOMAS ACTED RESPONSIBLY AND DILIGENTLY TO PROCESS CIVIL RIGHTS CASES DURING HIS TENURE AS ASSISTANT SECRETARY OF EDUCATION

From May 1981 to May 1982, Judge Thomas served as the Assistant Secretary for Civil Rights at the Department of Education. Some have criticized Judge Thomas' record there by referring to testimony given by Judge Thomas during a 1981 hearing in the case of Adams v. Bell. In that hearing, Judge Thomas candidly admitted that the Department of Education had been unable to comply with timeframes for the processing of civil rights cases that had been set by a consent decree during the 1970's. Some have erroneously suggested, based on this testimony, that Judge Thomas willfully disregarded the Adams court order during his tenure as Assistant Secretary.

During questioning by Senator DeConcini, Judge Thomas explained the Adams litigation to the Committee:

The court order in the Adams case involved a consent decree in which there were fairly rigid timeframes in which to investigate the cases that came to OCR. The action I believe that you are mentioning started before I became Assistant Secretary, and even the proceedings that I became involved in and the reopening of that started before I became an Assistant Secretary, I believe early in 1981.

OCR had never been able to meet those timeframes, and indeed we devoted, as I remember in reviewing some of the documents, we devoted about 95 percent of our staff at that time to attempting to comply with the court order and were still—to the timeframes, not the court order, the timeframes, and were unable to do that.

* * * * *

Subsequent, of course, to all of this, the order itself, the case itself was dismissed by the court. But I can say uncat-
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ically there that I was responding truthfully to the question asked and was not defying the court order, and I
did everything within my power and the agency expended 95 percent of its resources to attempt to comply with that order. (Tr., 9/12/91, at 157-58.)

We have noted that the problem of the Adams timeframes pre-dated Judge Thomas' tenure at the Office of Civil Rights, and that he devoted a great amount of time and energy to resolving the situation.

As Senator Hatch commented, the Carter administration had trouble complying with the timeframes. According to a June 4, 1981 memo from Acting Attorney General Counsel, Ted Sky, to Secretary Bell in the last quarter of the Carter administration, the Office of Civil Rights met the deadlines for compliance reviews in only about 5 percent of the reviews, and for only 33 percent of the complaint investigations. Moreover, the motion seeking contempt was filed on April 22, 1981, before Judge Thomas even arrived at OCR. The motion was based just about exclusively on the Carter administration's failure to meet the timeframes.

The plaintiffs excoriated the Carter OCR operations, noting that the report for the last quarter of 1980, under Carter, "demonstrated wholesale violation by OCR of timeframes for compliance reviews." The plaintiffs further noted that about 80 percent of all compliance reviews were behind schedule during the last half of 1980. The plaintiffs were also critical of the Carter OCR's complaint processing: "data for the last half of 1980 illuminates a serious deterioration in OCR's enforcement efforts. * * * The seriousness of defendants' violations of the decreed timeframe requirements is underscored by OCR's large number of very old unresolved compliants * * * pending at [the end of] 1980."

We found no evidence to suggest that his handling of the matter was anything other than diligent and responsible.

**JUDGE THOMAS HAS ACKNOWLEDGED THE VALUABLE CONTRIBUTIONS OF THOSE IN CIVIL RIGHTS MOVEMENT**

After outlining his childhood, education, and career in his opening statement, Judge Thomas reflected on how he made it from Pin Point, GA, to the U.S. Senate Caucus Room: "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." (Tr., 9/10/91, at 130.) Judge Thomas expressly acknowledged the efforts of civil rights groups and their leaders:

The civil rights movement, Reverend Martin Luther King and the SCLC [Southern Christian Leadership Conference], Roy Wilkins and the NAACP, Whitney Young and the [National] 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. (Tr., 9/10/91, at 131.)

These acknowledgements are heartfelt. As recounted by Senator Hatch on the Senate floor and Senator Grassley at the hearing,
Judge Thomas has repeatedly praised the civil rights community for many years. On October 23, 1982, for example, Judge Thomas said of the NAACP:

"Promises have been made and broken, but one group, the NAACP, has remained steadfast in the fight against this awful social cancer called racial discrimination. * * * From its inception in 1909 until today, the work this organization has done in the area of civil rights is unmatched by any other such group. At each turn in the development of blacks in this country, the NAACP has been there to meet the challenges. (Tr., 9/16/91, at 85.)"

Judge Thomas has consistently recognized his personal debt to the civil rights community. "I also experienced the progress brought about as a result of the civil rights movement," he said at the Wharton School of Business on January 18, 1983. "Without that movement and the laws it inspired, I am certain that I would not be here tonight." (Tr., 9/16/91, at 86.) On October 21, 1982, he described himself as "a beneficiary of the civil rights movement." (Id.) Similarly, Judge Thomas wrote in 1983: "Many of us have walked through doors opened by civil rights leaders, and now you must see that others do the same." (Id.) In these speeches, Judge Thomas praised the heroes and giants of the civil rights movement including Thurgood Marshall.

This recognition and gratitude was reflected in the Judge's testimony. For example, when invited by Senator Thurmond to elaborate on his opening statement, Judge Thomas replied:

"Unless someone removed the impediments [of segregation and discrimination], unless there was a civil rights movement, not all the talent in the world would get me here or get me actually even out of my neighborhood in Savannah. That is the point: that the civil rights leaders opened the doors * * * that permitted individuals like myself to then move on.

* * * * *

And I think it is important to repay individuals * * * with those kinds of efforts. And I have tried to do that, and I would encourage others to try to do that and remember those leaders and remember what they gave for us to have these opportunities. (Tr., 9/12/91, at 55-56.)"

Some of Judge Thomas' critics have selectively quoted his comments regarding some civil rights leaders or groups, and have neglected to note his praise for them. Moreover, these same critics fail to mention that some civil rights leaders vigorously assailed Judge Thomas for his views. Reasonable people would agree with his testimony that "I do not think that allegiance [to the civil rights community] and that support should undermine the ability to disagree." (Tr., 9/16/91, at 78.) With respect to the contentious issue of affirmative action, Judge Thomas testified:
I think that there is a need for debate. These issues are so difficult, and the problems are so bad, that we need all of the talent, that we needed all of the ideas possible, not just one point of view.

I did not feel that I had the chance personally to engage in that debate, and I thought it was a lost opportunity, and I said so to the civil rights community. (Tr., 9/16/91, at 78-79.)

As Senator Grassley stated, "it may seem more newsworthy to report the Judge's remarks only when they have been critical of traditional civil rights leadership but it is a false portrait of character being drawn." (Tr., 9/16/91, at 87-88.) That is because "some of Judge Thomas' critics who object to his expressed views against reverse discrimination and preference wish to make him look ungrateful." (Tr., 9/16/91, at 87-88.)

We agree with Senator Grassley's statement that both in word and in deed, Judge Thomas has supported the efforts of those in the civil rights community who are engaged in the hard work of freedom, and that Judge Thomas has "adequately recognized their contribution." (Tr., 9/16/91, at 88.)

**JUDGE THOMAS RECOGNIZES A CONSTITUTIONAL RIGHT OF PRIVACY**

Certain members of the committee were keenly interested in Judge Thomas' views on unenumerated rights, most particularly privacy. Although we believe the committee's recommendation should not depend exclusively upon the nominee's opinions concerning any particular issue of substantive law, Judge Thomas' approach to this area clearly fell within the jurisprudential mainstream.

Judge Thomas testified that he believes "there is a right to privacy in the Fourteenth Amendment." (Tr., 9/10/91, at 149.) Following the position staked out by Justice Harlan, Judge Thomas would be inclined to locate the right of privacy specifically in the liberty component of the due process clause. He recognizes that "the marital right to privacy is at the core" of the protections provided by the Due Process Clause and is "a fundamental right" (Tr., 9/11/91, at 178) upon which "the State cannot infringe without a compelling interest" (Tr., 9/10/91, at 149.) More generally, he acknowledged that under the Supreme Court's privacy cases, "the notion of family is one of the most personal and most private relationships that we have in our country." (Id. at 156.)

On the issue of whether the Constitution provides a fundamental right of privacy for nonmarried individuals, Judge Thomas was equally forthcoming. He repeatedly stated that he agreed with the Supreme Court's leading precedent in this area, Eisenstadt v. Baird, which found such a right based on application of the equal protection clause in light of the privacy decision in Griswold v. Connecticut. The Eisenstadt decision also noted, that "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (Emphasis in original.) Judge Thomas repeated his endorsement of both the equal protection and
privacy rationales of Eisenstadt in response to written questions from Senator Biden: “As I sought to make clear in my testimony, I believe that Eisenstadt was correct on both the privacy and equal protection rationales.”

Judge Thomas’ endorsement of the privacy rationale of Eisenstadt was not a simple reliance on the value of precedent without any independent endorsement of the reasoning in the case or of other rationales for the result. Rather, it was an explicit endorsement of the “privacy rationale” for the result.

We note that Judge Thomas emphasized that in defining the contours of unenumerated rights, like privacy, the Court must proceed with deliberate caution and restraint. Referring to the liberty component of the due process clause, Judge Thomas firmly stated that when judges are “interpreting the more open-ended provision[s] of the Constitution,” they “must restrain themselves from imposing their personal views”; rather, such interpretation should be rooted in the “history and tradition of this country.” (Tr., 9/13/91, at 117-18.) He pointed out that the importance of looking to history and tradition “is not so much to restrain or constrain * * * the development of important rights and freedoms in our society, but rather to restrain judges so that they do not impose their own will or their own views or their own predispositions in the adjudication process.” (Tr., 9/12/91, at 54.)

Some members of the committee pressed Judge Thomas to speculate on the furthest reaches of the right of privacy and to disclose his position on one of the most controversial issues likely to come before the Court—the issue raised in Roe v. Wade. Judge Thomas appropriately declined to answer these questions. He recognized, as do we, that any statement to the committee on this hotly contested issue could threaten his ability to remain impartial and could compromise the independence of the judiciary. As he put it, “[F]or me to begin to state positions, either personal or otherwise, on such an important and controversial area, where there are very, very strong views on both sides, would undermine my impartiality and * * * compromise my objectivity.” (Tr., 9/11/91, at 151.) At the same time, Judge Thomas assured the committee more than once that he would bring an open mind to any privacy case involving abortion: “I have no reason or agenda to prejudge the issue or * * * to rule one way or the other on the issue of abortion.” (Id. at 9.) “I think that it is most important for me to remain open. I have no agenda. I am open about that important case.” (Id. at 151.)

Judge Thomas testified that he would not invoke the use of natural law or his personal moral philosophy on the Court’s treatment of abortion. This topic arose out of a single remark in a speech Judge Thomas delivered before the Heritage Foundation in 1987. In that speech, Judge Thomas referred to an essay by Lewis Lehrman on the Declaration of Independence and the right to live as “a splendid example of applying natural law.” (Tr., 9/10/91, at 150.) Judge Thomas explained that this remark was simply meant as a compliment to Mr. Lehrman in a speech given in the Lewis Lehrman Auditorium concerning the need for conservatives to pursue a more aggressive civil rights program. As Judge Thomas stated:
I felt that conservatives would be skeptical about the notion of natural law. I was using that as the underlying approach. * * * 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. (Id. at 151-52.)

Judge Thomas made it absolutely clear to the committee that the statement was not an endorsement of Mr. Lehrman's article and that he disagrees with the application of natural law to the constitutional status of abortion. He testified: "I did not endorse the article." (Id. at 195.) "I did not and do not think that natural law can be applied to resolve this particular issue, I think it [is] a constitutional matter and it has to be resolved under constitutional law, as a matter of constitutional law." (Tr., 9/11/91, at 94.) "I do not believe that Mr. Lehrman's application of natural law is appropriate." (Id. at 97.) Furthermore, Judge Thomas reiterated that natural law does not provide an independent moral code that judges may invoke on issues of constitutional interpretation: [I]n constitutional analysis and methodology, * * * there isn't any direct reference to natural law. The reference is to the Constitution and to using the methods of constitutional adjudication that have been traditionally used. You don't refer to natural law or any other law beyond that document." (Id. at 6.)

Chairman Biden rightly gauged the insignificance of the Lehrman remark while questioning the testimony of representatives from abortion rights groups. Chairman Biden stated, "I did not find anywhere in the record, and I spent a hundred hours on this, researching every word [Judge Thomas] ever wrote that I could find before the hearing and listening to every word he said afterwards, where he did anything that remotely approached endorsing the Lehrman article." (Tr., 9/19/91, at 64.)

Judge Thomas also dispelled the misconception that his participation in a White House Working Group on the Family represented an endorsement of statements in the working group's report that were critical of certain Supreme Court opinions in the area of privacy. Judge Thomas explained that his contribution to the report was limited to the issue of low-income families at risk. He never reviewed—or signed—the entire report and was not asked to comment on it. He testified, "My involvement in that working group was to submit a memorandum, * * * on the issue of low-income families. * * * [W]ith respect to the other comments, I did not participate in those comments." (Id. at 107.) The final report was not a group effort: "[A]s it normally works in these working groups in domestic policy, the report is not finalized, nor is it a team effort in drafting. You * * * submit[ ] your document. That document * * * may be sent around or it may not be sent around. But there is no signature required on those." (Tr., 9/10/91, at 154.) Moreover, Judge Thomas testified, "To this day, I have not read that report. I read the sections on low-income families." (Id. at 155.) We think it plain that no inferences can be drawn from this report about Judge Thomas' potential views on privacy rights.
Similarly, no inference can be drawn from footnote 2 of Judge Thomas' article "The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment," 12 Harv. J. L. & Pub. Pol. 63 (1989). There, Judge Thomas merely referred to Roe v. Wade as a case "provoking the most protest from conservatives." Id. at 63 n.2. Judge Thomas may have stated a fact, but he did not state his opinion as to the merits of the decision. We believe that Judge Thomas' reference to the Lehrman essay, his participation in the Working Group on the Family, and his descriptive statement in a footnote do not contradict in his testimony to the committee that "I did not and do not have a position on the outcome" of Roe v. Wade. (Tr., 9/11/91, at 107.)

Members of the committee asked Judge Thomas more than 90 questions relating to his views on this one issue. In contrast, Justice Souter was asked questions on abortion only 36 times. At that time, Justice Souter also responded by declining to answer, and the committee nevertheless approved his nomination by a vote of 13 to 1. This dramatic increase in the number of questions directed to abortion indicates a troubling trend toward a single issue litmus test for judicial nominees. In our opinion, questions on a controversial issue about which the nominee cannot properly express an opinion without jeopardizing the impartiality of the Court is a disservice to the confirmation process and to the American people.

**Judge Thomas Has Made Clear That He Will Not Rely on "Natural Law" as a Source of Judicial Decision Independent of the Constitution and Law**

Judge Thomas has consistently maintained that natural law principles are not an independent ground of judicial decision and that they may be used only as part of the historical and philosophical background to the Constitution. Nothing in his decisions on the court of appeals casts any doubt on that position.

In his confirmation hearings for the court of appeals, Judge Thomas testified before this committee that, while natural law and natural rights were part of the philosophy of the founders of our country and thus are part of the historical background of the Constitution, natural law does not provide an alternative method of constitutional adjudication:

Chairman Biden. You have said and written that the Declaration of Independence and the idea of natural law underlie the Constitution. When you say that the Constitution reflects principles of natural law, are you endorsing the idea that the Constitution protects fundamental, though possibly unenumerated rights?

Judge Thomas. In writing on natural law, as I have, I was speaking more to the philosophy of the founders of our country and the drafters of our Constitution. I was also speaking to an issue that was of significant importance to me, and that is the philosophical basis for doing away with slavery, if you notice also in those speeches.

But recognizing that natural rights is a philosophical, historical context of the Constitution is not to say that I have abandoned the methodology of constitutional inter-
pretation used by the Supreme Court. In applying the Constitution, I would have to resort to the approaches that the Supreme Court has used. I would have to look to the texture of the Constitution, the structure. I would have to look at the prior Supreme Court precedents on those matters. (Confirmation Hearings on Federal Appointments: Hearings before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 30 (1990).)

None of Judge Thomas' decisions on the Court of Appeals relied on natural law principles. Thus, Judge Thomas' service on the Court of Appeals has been entirely consistent with his testimony.

In his recent testimony before this committee, Judge Thomas restated his position:

Yesterday as I spoke about the Framers and our Constitution and the higher law background—and it is background—is that our Framers had a view of the world. They subscribed to the notion of natural law, certainly the Framers of the Thirteenth and Fourteenth Amendments.

My point has been that the Framers then reduced to positive law in the Constitution aspects of life principles that they believed in; for example, liberty. But when it is in the Constitution, it is not a natural right; it is a constitutional right. And that is the important point.

But to understand what the Framers meant and what they were trying to do, it is important to go back and attempt to understand what they believed, just as we do when we attempt to interpret a statute that is drafted by this body, to get your understanding. But in constitutional analysis and methodology, as I indicated in my confirmation to the Court of Appeals, there isn't any direct reference to natural law. The reference is to the Constitution and to using the methods of constitutional adjudication that have been traditionally used. You don't refer to natural law or any other law beyond that document.

* * * * * * * * * * *

As a judge, * * * on the issue of natural law, I have not spoken nor applied that. What I have tried to do is to look at cases, to understand the argument, and to apply the traditional methods of constitutional adjudication as well as statutory construction. (Tr., 9/11/91, at 6, 8.)

It is uncontroversial that judges may, in interpreting the text of the Constitution, look to the Declaration of Independence and the philosophical beliefs of the founders as part of the historical background of the Constitution. Similarly, in the briefs filed on reargument in Brown v. Board of Education, Thurgood Marshall argued that the Court must understand the importance of the Declaration of Independence and the natural law philosophy of the Enlightenment to the framing of the 14th amendment:

The men who wrote the Fourteenth Amendment were themselves products of a gigantic antislavery crusade which, in turn, was an expression of the great humanitar
ian reform movement of the Age of Enlightenment. This philosophy upon which the Abolitionists had taken their stand had been adequately summed up in Jefferson's basic proposition "that all men are created equal" and "are endowed by their Creator with certain unalienable Rights." It was in this spirit that they wrote the Fourteenth Amendment and it is in the light of this revolutionary idealism that the questions propounded by this Court can best be answered. (Brief for Appellants on Reargument at 69, Brown v. Board of Education, 347 U.S. 483 (1954).)

We have noted that there is an irony in the questioning of Judge Thomas on the issue of natural law. Many of those who are now expressing concern over Judge Thomas' philosophical references to natural law also professed adherence to natural law principles just 4 short years ago. As Senator Hatch pointedly observed in his questioning of Judge Thomas:

Well, I find it to be interesting, because Judge Bork was criticized because he did not particularly endorse the principle of natural law, and now you are being criticized because you do. Frankly, it is a double standard, and, I might add, by the same committee. (Tr., 9/10/91, at 209.)

JUDGE THOMAS SUPPORTS SEPARATION OF POWERS AS PROTECTIVE OF INDIVIDUAL LIBERTY

Judge Thomas was questioned closely by several Senators on the subject of separation of powers. His testimony shows that he attributes a significant value to the doctrine of separation of powers as a bulwark of individual liberty against governmental encroachment. Thus, in connection with the proper roles of the legislature and the judiciary within the scheme of separation of powers, Judge Thomas made clear that he would resist unconstitutional attempts to deprive the Federal courts of the power to review the constitutionality of such asserted encroachments. At the same time, he saw as dangerous the assertion by the judiciary of the power to tax, which traditionally belongs exclusively to the legislative branch.

In connection with questioning about a speech he had made that referred approvingly to the dissent in the independent counsel case, Morrison v. Olson, Judge Thomas made plain that he had been concerned to emphasize the importance to individual liberty of well-defined powers and clear lines of accountability for the political branches of the Government. The focus of separation of powers analysis, he explained, should be on the effect that governmental structures had upon individual rights:

In speech after speech, I talked about the ideals and the first principles of this country, the notion that we have three branches, so that they can be in tension and not impede on the individual. That is what this case is about. At bottom, the case is about an individual who could be in some way, whose rights could be impeded by an individual
who is not accountable to one of the political branches. That was the sole point. (Tr., 9/12/91, at 29).

* * * * * * *

The point, though, that I was trying to indicate to them is that when we address cases involving the structure of our government, there is a subsequent impact or could have a direct impact on individuals, and I think that is the point that I made in the speech, and that was the central part of the speech. It was not an exegesis of the Supreme Court opinion itself, but how it affected the relationship of the government to individuals. (Tr., 9/12/91, at 35.)

In sum, Judge Thomas' statements make clear that he views the principle of separation of powers as vital to our scheme of ordered liberty. Moreover, he also finds the principle valuable because it permits a genuinely majoritarian government while also checking the threat of majoritarian tyranny.

JUDGE THOMAS UNDERSTANDS THE PROPER ROLE OF THE COURTS

Judge Thomas' testimony made plain that he views the role of the courts, correctly, as that of interpreting the law, not making it. Moreover, while he disfavors any approach that would unduly limit access to the courts, he will also scrutinize cases carefully to ensure that the article III requirement of a genuine "case or controversy" is met. His testimony—and his decisions on the bench—demonstrate that he understands the "case or controversy" requirement to make a limit to the judicial power—a limit that prevents the courts from deciding abstract policy issues outside the context of resolving discrete, individualized disputes about the application of the law. Finally, Judge Thomas believes strongly that the practice of judicial review is indispensable to the working of the constitutional scheme.

Judge Thomas' view of the essentially interpretative, nonpolicy-making function of the courts was made clear throughout his testimony. For instance, in response to Senator Thurmond's questioning about the proper role of the judiciary in the scheme of separation of powers, Judge Thomas replied:

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. (Tr., 9/10/91, at 167-68.)

Judge Thomas later defined the court's role as follows:

[W]hen [the Congress] make[s] a decision, when you write a statute, when this body deliberates and concludes, whether I agreed or not in the policy making 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. (Tr., 9/10/91, at 188.)

This view of the judicial function is, as Judge Thomas explained to Senator Grassley, critical to maintaining the appropriate judicial role in our democracy:

[W]e are the least democratic branch of the Government, and we have to restrain ourselves as judges. And I think that is important. Indeed, I think it is critical so that we do not begin to see ourselves as super-legislators. (Tr. 9/11/91, at 86.)

Chairman Biden expressed concerns that Judge Thomas may take an inappropriate, activist approach to economic regulation. We found that Judge Thomas has never indicated that he would be a judicial activist in striking down economic regulations. Such a course would be inconsistent with his approach to judging, discussed above; more specifically, in both his public speeches and his Senate testimony, Judge Thomas has made clear that he does not believe that the Supreme Court should take an activist course to invalidate economic regulations.

For example, in a 1987 speech before the Pacific Research Institute Judge Thomas criticized academics who have argued that the Supreme Court should be more activist in striking down laws that restrict property rights. In his testimony before this committee, Judge Thomas repeated that he did not agree with the activist approach. Responding to Senator Hatch's question as to whether he was going "to go on the bench to be a conservative judicial activist," Judge Thomas testified:

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. (Tr., 9/10/91, at 211.)

Judge Thomas repeatedly stated in his testimony that he believes that the Supreme Court properly overruled cases such as *Lochner v. State of New York*, in which the Court struck down State economic regulations:

I have said and I believe that the *Lochner* era cases were properly overruled and that * * * the Court does not serve as a super-legislature over this body or the political branches.

* * * * * * * * * *
The Court in looking at the economic regulations of our economy and our society has attempted to move away from certainly the *Lochner* era cases and not as a super-legislature. And I indicated that that is appropriate, particularly in the area as I have noted—the health and welfare, wage and hour cases. (Tr., 9/11/91, at 143, 155.)

Judge Thomas does not take a "stingy or crabbed" view of the Courts role. However, it is essential to satisfy the article III requirement that the courts have jurisdiction over the cases and litigants before them. In his discussion with Senator Grassley, he noted:

I don't think that we as judges should be stingy or crabbed in our review of individuals' access to our judicial system. I think it is important, as I said yesterday, that the courts and our judicial system be available to all, that they have a place where their case can be adjudicated in a fair way.

My concern, however, is that we are judges who are required to determine what our jurisdiction is before we can decide a case, and I see that more as a restraint on us than it is on the individual having access to the court system, although the two, of course, could ultimately be the same thing in some cases. But the jurisdictional determination to me is an important determination. (Tr., 9/11/91, at 85.)

In response to Senator Grassley's question concerning his concurring opinion in which he argued that jurisdictional issues had to be resolved before the court could address the merits of the dispute, Judge Thomas stated that:

The question was for me initially the question that I ask in all cases and in all areas: Do we have jurisdiction to consider this? And there is an argument sometimes that when the merits of the case are easy and the jurisdictional component of the case is hard, that it is easy enough to skip over determining jurisdiction and determine the easy-merits portion of the case.

My point in the concurrence was that it was inappropriate to skip over the jurisdiction determination to get to the merits, that Federal judges had an obligation to determine at each turn whether or not we as judges had any role in that particular case. And my view was that there was no standing to raise the issue on the part of the existing ferry company. (Tr., 9/11/91, at 84–85.)

Finally, in colloquy with Senator Specter, Judge Thomas affirmed that he would resist efforts to take away the jurisdiction of the Federal courts on constitutional issues:

Senator Specter. I just want to be sure that, if confirmed, you would not countenance that kind of a major change in our constitutional government.
Judge Thomas. I think we discussed that the last time, and I think that my position is the same, that I would not. (Tr., 9/16/91, at 179.)

We believe Judge Thomas properly understands the role of the courts in our democracy and views the courts as non-policy-making bodies, and at the same time insists that they afford a firm bulwark against unconstitutional decisions by the political branches.

**JUDGE THOMAS UNDERSTANDS AND RESPECTS THE VALUES PROTECTED BY THE FIRST AMENDMENT'S RELIGION CLAUSES**

The Supreme Court's doctrines in the area of the Constitution's religious guarantees—the free exercise clause and the establishment clause of the first amendment—are fundamentally important to all Americans. As the Court's understanding of the meaning of the religion clauses has evolved, individual Justices have expressed dissatisfaction with some of the doctrines of the past. Thus, this sector of the law is witnessing some change. Throughout his testimony, Judge Thomas displayed commendable sensitivity to the complexities of this difficult area. He also made clear that he would examine claims under the religion clauses in light of the precedents that have developed over the years.

One such precedent is *Lemon v. Kurtzman*. In *Lemon*, the Court formulated a three-part test to assess an establishment clause challenge to Government programs providing financial aid to sectarian institutions. In substance, the elements of the test are whether the governmental action at issue has a secular purpose; whether the effect of the governmental action is to advance or inhibit religion; and whether the action unduly entangles the Government with religion. A majority of the current Members of the Court have on separate occasions advocated significant changes in, or even the abandonment of, the *Lemon* test.

Judge Thomas demonstrated his familiarity with *Lemon*, together with a recognition of the merits—and possible shortcomings—of the *Lemon* test. He also stated unequivocally that he would approach such issues with an open mind. In an exchange with Senator Simon, he testified as follows:

**Senator Simon.** I guess I have a twofold question: Number one, are you familiar with the *Lemon* criteria? And, second, if you are, do you think they are reasonable criteria that should be used in the future?

**Judge Thomas.** Yes, Senator, I am aware of the tests enunciated in *Lemon v. Kurtzman*. The Court has applied the tests with some degree, I think, of difficulty over the years. I have no personal disagreement with the tests, but I say that recognizing how difficult it has been for the Court to address just the kind of problem that you have pointed out when the church is on fire or when there is this closeness between the activity of the government and the activity of the church.

I think the wall of separation is an appropriate metaphor. I think we all believe that we would like to keep the
government out of our beliefs, and we would want to keep a separation between our religious lives and the government.

But the Court has had a great deal of difficulty, and there is some debate on the Court as to how far you should go; whether or not there should be this complete separation; whether or not there should be some accommodation and certain circumstances; or whether or not even there should be a movement as far as just simply to the position where the government isn't establishing a religion or coercing individuals to be involved in a certain kind of activity.

But I think it is a vibrant debate. I have an open mind with respect to the debate over the application of the *Lemon v. Kurtzman* test, and I recognize that the Court has applied it with some degree of difficulty. But at the same time, I am sensitive to our desire in this country to keep government and religion separated, flawed as it may be by that Jeffersonian wall of separation. (Tr., 9/11/91, at 179–81.)

We believe Judge Thomas will be open minded with respect to the ongoing debate over the *Lemon* tests. His testimony reflects a sensitivity to the issues without predetermining his judicial views on that matter.

Under questioning by Senator Thurmond, Judge Thomas also noted the evolution of the Court's jurisprudence under the free exercise clause. A leading recent case in this area is *Employment Division of Oregon v. Smith*, in which the Court upheld a general governmental prohibition on the use of certain drugs, including a drug that was used sacramentally, despite the incidental adverse effect that the prohibition had upon a particular religion. Senator Thurmond sought Judge Thomas's understanding of the effect of the *Smith* decision on the Court's prior free exercise case law:

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 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 *Sherbert* test and reached the same result.
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. (Tr., 9/10/91, at 170-71.)

Later in the hearing, Chairman Biden asked Judge Thomas whether he inclined to the analysis followed by the Court in Justice Scalia's majority opinion, or to the analysis preferred by Justice O'Connor. Without improperly committing himself to adopting any particular mode of analysis as a Justice, Judge Thomas indicated his appreciation for the concerns Justice O'Connor had raised, and responded as follows:

Judge Thomas. I think we all value our religious freedoms, I think that there was an appropriate reason for concern, and I did note then that Justice O'Connor, in applying the traditional test, reached the same result.

Chairman Biden. Correct.

Judge Thomas. I cannot express a preference. I have not thought through those particular approaches, but I myself would be concerned that we did move away from an approach that has been used for the past I guess several decades.

Without being absolutist in my answer, my concern would be that the Scalia approach could lessen religious protections. (Tr., 9/13/91, at 130-31.)

We believe Judge Thomas appropriately acknowledges the complexity of issues that arise under the first amendment's religion clauses. His testimony shows a strong respect for the Court's precedents in the area. We are convinced that he will carefully and thoughtfully decide cases in this area.

JUDGE THOMAS DISPLAYED A COMMITMENT TO PROTECTING THE FIRST AMENDMENT RIGHTS OF FREE SPEECH AND A FREE PRESS

In his testimony, Judge Thomas demonstrated a strong commitment to the first amendment's protections of free speech and a free press. He showed a keen understanding of the Supreme Court's jurisprudence in this area.

We believe Judge Thomas will be inclined to a broad reading of the first amendment's freedom of speech clause, which did not limit its protections specifically to political speech but which extended them to other modes of expression, such as artistic expression. In an exchange with Senator Leahy, Judge Thomas testified as follows:

Senator Leahy. Do you think that there is a core of political speech that is entitled to greater constitutional protection than other forms of speech?

Judge Thomas. I think that, Senator, the value that we place on speech, whether it is freedom of the press or whether it is freedom to engage in discussions about politics or whether it is expressive conduct, we see those as
and the Court has treated those as fundamental rights and has protected those accordingly. (Tr., 9/16/91, at 106.)

Similarly, Judge Thomas reiterated his acceptance of the prevailing view of the scope of the freedom of speech clause by stating: "What I am trying to say is I don't limit and see no reason and haven't seen the Court limit our freedom of speech to whether or not we are talking about science or whether we are talking about politics. Certainly the Court has attempted to accord protection to speech such as, for example, the most recent case being Texas v. Johnson, the flag-burning case." (Id. at 108.)

Later in Senator Leahy's questioning, Judge Thomas indicated that he viewed the freedom of the press clause, and the Court's existing jurisprudence under that clause, in a similar light. Asked about the landmark case of New York Times v. Sullivan, Judge Thomas testified:

Judge THOMAS. I think what the Court was attempting to do there was, of course, to balance the First Amendment rights, the freedom of the press as we know it, and to not have that in a way impeded by one's abilities to sue the media or to intimidate the media, and applied a standard of actual malice and struck a balance by protecting the rights of the individual with the standard of actual malice.

That is something, of course, that one could debate, but I think it is demonstration, a clear demonstration on the Court's part that the freedom of the press is important in our society, is critical in our society, even though individuals may at times be hurt by the use of that right.

Senator LEAHY. Do you see any need to change that standard?

Judge THOMAS. I at this moment certainly have not thought about changing that standard and have no agenda to change that standard. * * * [M]y view * * * is that we should protect our First Amendment freedoms as much as possible. (Tr., 9/16/91, at 110-11.)

Judge Thomas properly declined to comment on how he would rule if the Court revisited questions recently addressed in Rust v. Sullivan, which held that the First Amendment did not invalidate a governmentally funded family planning program that forbade the use of Federal grants for the purpose of counselling abortion. (Tr., 9/16/91, at 5.) Under later questioning by Senator Simon, Judge Thomas, while again declining specifically to discuss Rust, expressed his concern about the possibility of the abuse of Congress' spending power to attach unconstitutional conditions to Federal funds, especially in light of the growth of Federal involvement in the daily life. (Tr., 9/16/91, at 136.)

We believe Judge Thomas' statements on the freedom of speech and press clauses demonstrate his strong commitment to the protection of those liberties.
THERE IS NO CREDIBLE EVIDENCE TO SUPPORT THE ALLEGATION THAT JUDGE THOMAS MANIPULATED THE RELEASE OF AN OPINION DURING THE CONFIRMATION PROCESS

We believe it is wholly inappropiaite, irresponsible and contemptible that unnamed sources have attempted to invade the deliberations of that court and to impugn Judge Thomas' character by suggesting to a trade paper, The Legal Times, that Judge Thomas delayed issuing an opinion in a case to avoid controversy while his nomination is pending before the Senate.

It is obvious that these sources have strayed far outside the bounds of ethical behavior. John J. Gibbons, former Chief Judge of the United States Court of Appeals for the Third Circuit, has explained his reaction to such leaks concerning the deliberative process:

My reaction to the story is that the judges of the Court of Appeals for the District of Columbia Circuit should immediately take steps to identify the sources of The Legal Times report, and terminate their employment. Those sources have violated the most important and sacred trust imposed on employees of the Judicial Branch. Until an opinion is filed announcing the judgment of a multi-judge court, it is subject to revision, and its author remains open to persuasion by other members of the Court. A multi-judge court cannot maintain the atmosphere of collegiality and personal confidence required for open-minded deliberation unless all who are privy to the deliberative process maintain the strictest confidence with respect to it until a judgment has been announced. (Statement of John J. Gibbons, 9/26/91.)

We believe those involved in such leaks are obviously motivated by personal and political motives, and are evidently unconcerned with the clearest requirements of ethical propriety. We agree, with the conclusions of Senator Specter, who during this Committee's hearings questioned Judge Thomas on a Supreme Court case closely related to the issue pending before the D.C. Circuit:

I have reviewed that matter and I do not believe that there is any basis for those charges of [for the] concern [that Judge Thomas has withheld an opinion] * * * I have reviewed the questioning of Judge Thomas on the [Supreme Court] case, and I am satisfied that he did not dissemble or mislead the Committee in any way. * * * I believe that this matter requires no further inquiry, and I concur with * * * the importance of proceeding to conclude this matter so that Judge Thomas may be seated by the first Monday in October.

CONCLUSION

The Judiciary Committee conducted through and extensive hearings which lasted 8 days. Judge Thomas testified before the Committee for almost 25 hours. We agree with Senator Thurmond's comments regarding Judge Thomas and have concluded that based
on his testimony, that "Judge Thomas possesses the attributes of a Supreme Court Justice: a keen understanding of the law, the intellectual capacity to deal with complex issues, fairness, patience, and a willingness to be open-minded." We also believe, as noted by Senator Thurmond that "Judge Thomas' background gives him the sensitivity to understand the impact of his decisions on parties before the Court. His life experience shows he is a man of courage who will bring an added dimension to the Supreme Court. As well, Judge Thomas' education and work experience will serve him well on our Nation's highest court." We have concluded that Judge Thomas is highly qualified to serve as an Associate Justice and we strongly support his confirmation to a position on the Supreme Court of the United States.
SUPPLEMENTAL VIEWS OF SENATOR HATCH

I enthusiastically support the nomination of Judge Clarence Thomas to be an Associate Justice of the Supreme Court.

When President Bush announced that he was nominating Judge Clarence Thomas to the Supreme Court, I said that it was a great day for America. I have known Judge Thomas for over 10 years, and I knew at the time of his nomination that he is eminently qualified to be a Supreme Court Justice. President Bush could not have sent us a finer nominee.

The American people are now familiar with Judge Thomas's rise from poverty to the doorstep of the Supreme Court. In that rise, Judge Thomas obtained an excellent education, and first served as an Assistant Attorney General of the State of Missouri, under our distinguished colleague, John Danforth. Judge Thomas then worked in the private sector as a lawyer in the Monsanto Corp's legal department. After that, he worked in all three branches of the Federal Government. In so serving, he won Senate confirmation four times in less than 9 years, perhaps more than any other person during the same period.

Judge Thomas warrants confirmation because his nomination is meritorious today and he has an outstanding and courageous record of public service, not for the patronizing reason that he might "grow in the position." All persons learn from their experience. But I take it to mean that those who have voiced this thought hope that, once on the Supreme Court, he will vote in a more liberal way than they now think he might. No one knows how the Judge will vote once on the Court, but I certainly do not support him out of any wishful thinking.

I share President Bush's view that a Justice of the Supreme Court should interpret the law according to its original meaning and not legislate his or her own policy preferences from the bench. Based on a careful review of his writings and judicial opinions, and my knowledge of the man, I am confident Judge Thomas will interpret the law according to its original meaning, rather than substitute his own policy preferences for the law.

I am also confident that Judge Thomas will zealously safeguard the principle of equal justice under law for all Americans—not just white Americans, not just black Americans or Hispanic Americans or Asian Americans, but for all Americans, without unfair preference.

I said at the beginning of the hearings that Judge Thomas is a man of fierce independence. He demonstrated that independence during the hearings when he took the position that the fourteenth amendment's due process clause contains a substantive content, a position that many conservatives take issue with. Judge Thomas demonstrated that independence again when he disassociated himself from Chief Justice Rehnquist's comment on stare decisis in
Payne v. Tennessee to the effect that erroneously decided procedure cases are automatically entitled to less weight than erroneously decided property cases.

We have heard from some quarters that Judge Thomas's previously-held views vanished when he was before this committee. This was not so. For example, his writings on natural law were overstated by various pundits and interest groups. In his writings and speeches Judge Thomas said that the framers' understanding of natural law requires limited government, and limited government requires that judges, no less than legislators and executive branch officials, not overstep their constitutional authority. His discussions with the committee were entirely consistent with this principle.

The Judge's discussions of affirmative action with the committee were similarly steadfast. Judge Thomas refused to budge from his stated opposition to racial preferences, articulated as a policy-maker in the executive branch. Much of the opposition to Judge Thomas, in my view, stems from his forthright stand on this issue. Judge Thomas was and is unequivocal in his support for outreach programs, for making efforts to broaden the scope of employee applicant pools, for making whole the actual victims of discrimination, and punishing the wrongdoer, rather than innocent third parties. At the same time, he defended his opposition to race-conscious preferences that do not provide relief to actual victims of discrimination, but rather provide benefits to members of particular groups solely because of their members in those groups. His support for educational preferences based on disadvantaged status, regardless of race, is fully consistent with his opposition to racial preferences. Frankly, the most astonishing vanishing act was by supporters of racial preferences on the other side of the aisle, who barely raised the issue with the Judge.

While on the subject of vanishing acts, what this confirmation struggle is really about is the vanishing liberal hope that the judiciary, under the pretext of interpreting the Constitution, will impose on the American people the same liberal policies that have been overwhelmingly rejected in five out of the last six presidential elections.

If there was a central theme to Judge Thomas's testimony, it was this: the roles of the judge and the policy-maker are wholly and completely distinct. As Judge Thomas correctly stated, on taking the bench a judge must shed his previously held policy views and interpret the written law. The people themselves—through their elected representatives in their state legislatures and Congress, determine what the policy shall be. The role of the judge, according to Judge Thomas, is to discern the intent of the lawgiver and carry out that will. For a court to second-guess policy determinations made by the political branches is to overstep its role.

This distinction—between the judge as interpreter of the written law and the legislator as the author of the written law—appears to be wholly lost on some of Judge Thomas's critics. They are incredulous that Judge Thomas could, as a policy maker, have taken strong positions, and then, as a judge, forswear any policy agenda. For them, apparently, adjudication in the courts is nothing more than a continuation of politics by other means. Put more bluntly, some of the critics of Judge Thomas would collapse the distinctly
different functions of adjudication and policy-making into an approach that simply reaches a preferred policy result, whatever the violence done to the written law.

Judge Thomas understands the limited role of the courts in our constitutional scheme. He is eminently qualified to serve on the Supreme Court, and he acquitted himself admirably before this committee, as he has for his entire professional career. I look forward to voting for his confirmation and his tenure as Associate Justice of the United States Supreme Court.

Orrin Hatch.
I write separately only to add my personal thoughts on the Thomas nomination.

First, I believe the Thomas nomination hearings—in addition to acquainting the committee and the American public with Judge Thomas—has helped educate us all about how race relations in the United States might evolve in the 21st century.

After hearing from the over 90 witnesses who appeared before the Committee, I believe it is now apparent that the African-American community can no longer be treated as if it holds certain "monolithic" views. We learned that some of the organizations which claim to represent particular minority groups in America do not speak for all of "their group" on every issue. We learned that there are a number of Americans of varying ethnic and religious backgrounds who strongly endorse Judge Thomas' approach to self-help, affirmative action, and the improvement of the lives of disadvantaged U.S. citizens.

I believe the committee's "learning process" will help improve the integration and assimilation of historically disadvantaged groups into the economic and social mainstream of American life.

Second, I want to stress an issue that is routinely disregarded in Supreme Court confirmation hearings. The ABA's Code of Judicial Conduct forbids any sitting judge from commenting on a case that is pending or impending in any court. Specifically, Canon 3A(6) says:

A judge should abstain from public comment about a pending or impending proceeding in any court.

I believe this ethical rule prevented Judge Thomas from commenting about the abortion issue, as it prevented comments from the previous sitting judges who were nominees to positions in the Supreme Court, including David Souter, Anthony Kennedy, Robert Bork, Antonin Scalia, William Rehnquist, and Sandra Day O'Connor.

Finally, I believe the committee has reached a crossroads in the confirmation process. In 1987, some special interest groups elevated the confirmation hearings of Judge Robert Bork into a high-profile, media-intensive campaign to defeat nominees to the Supreme Court who were not sufficiently "liberal." The Thomas hearings have proven that the executive branch has learned how to counter "anti-Bork" strategies. The committee is frustrated by both the understandable caution with which nominees answer questions and by the pressures placed on it by some special interest groups to turn the nomination hearings into an ideological inquisition.

Chairman Biden has expressed his hope that he will not have to chair another hearing to consider a nominee to the U.S. Supreme Court. I sympathize with his exasperation, and I strongly encour-
age the committee to consider alternative confirmation procedures which will minimize the "media spectacle" that Supreme Court confirmations have unfortunately become. I pledge to work with all interested committee members to reform this process.
SUPPLEMENTAL VIEWS OF MESSRS. GRASSLEY AND BROWN

Judge Thomas will take his seat on the Supreme Court at a time when its docket increasingly addresses the constitutional separation of powers. When one political party controls the Presidency and the other controls the Congress, the two branches will disagree on policy choices. To advance their respective policy goals at the expense of the other's, the two branches will each take expansive views of their own powers and a narrow view of the other's. When this situation arises, as it has several times in recent years, the Supreme Court has resolved the dispute. In so doing, its rulings have had enormous practical significance. The Court declared unconstitutional the legislative veto, invalidating more statutes in one day than in its prior history. The Court has also ruled that the original Gramm-Rudman Act violated the separation of powers, but that independent prosecutors do not.

At a time when these issues are coming to the fore, Judge Thomas is an ideal person to address them. Clarence Thomas served in the Attorney General's office in Missouri, as a legislative assistant in the United States Senate, as an assistant secretary in a Cabinet department, as the head of an independent agency within the Executive branch, and as a Federal appeals judge. Of the 48 people who have been appointed to the Supreme Court in the twentieth century, only two others, Justice Sutherland and Chief Justice Vinson, had prior experience in state government and in all three branches of the Federal Government. Perhaps unsurprisingly, these Justices are in part known for famous opinions in the separation of powers area: Justice Sutherland's opinion for the Court in Humphrey's Executor v. United States, 295 U.S. 610 (1935), upholding the constitutionality of independent agencies, and Chief Justice Vinson's dissent in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), regarding the constitutionality of President Truman's seizure of steel mills during the Korean War. There can be little doubt that these Justices' wide experiences among the different branches contributed to their understanding and analysis in these cases. Judge Thomas will similarly bring a broad experience to separation of powers cases, one which no other Justice has contributed in 45 years. Perhaps he, too, will similarly author landmark decisions in this area of law.

Judge Thomas has demonstrated an understanding of the role of each branch of Government and the relations between them. As a Senate aide, he learned the legislative process in the areas of environmental and energy policy. At the Education Department and EEOC, he demonstrated knowledge of executive branch policymaking and administration of a large and decentralized Federal agency. Additionally, he interacted with both the legislative and judicial branches. He testified before congressional committees.
dozens of times, learning firsthand about the oversight process. Further, he carried out policies as an executive that the courts had found to be legal, such as goals and timetables in hiring, even though he personally differed as to the wisdom of these devices as a matter of policy. As head of the EEOC and one of its five commissioners, Clarence Thomas also was involved with the litigation matters of his agency.

Since becoming a Federal judge, Clarence Thomas has now become adept at being an arbiter of competing legal arguments. His decisions show a measured impartiality that reflects the proper role of the judiciary in several ways. He has refused to substitute his own policy views for those of agencies that have interpreted statutes in their sphere of authority. He has adhered to important rules, such as jurisdictional requirements, that govern the proper scope of judicial action and preserve the authority of the other branches to act in their own areas. In this respect, Judge Thomas has recognized that judges in our system are not, in Justice Cardozo's memorable phrase, "knight errants" roaming across society in search of ills to correct.

At the hearings, Judge Thomas further demonstrated his cognizance of the proper role of judges under the Constitution vis a vis the other branches. Responding to a question from Senator Kennedy, Judge Thomas recognized that judges are not to impose their policy preferences:

[W]hen 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 * * * 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. (Tr. 9/10/91, at 188).

At the hearings, Judge Thomas demonstrated his knowledge of and respect for the doctrine of separation of powers as an important means of protecting the individual rights of all Americans. We are confident that Judge Thomas will fairly resolve disputes between Congress and the President. We also believe that in the far more numerous set of cases in which the Court interprets Federal statutes, Judge Thomas will fairly seek out congressional intent as evidenced by the text and the legislative history, showing due regard for the authority of Congress as an independent branch.

At the hearings, Judge Thomas also addressed another issue of importance to me, the doctrine of stare decisis: that the rule in established cases governs later cases. One of the important features of this rule is that judges apply the law rather than their personal preferences about what the law should be. Judge Thomas made it very clear that except in unusual circumstances, cases that he hears will be decided according to established precedent. As he answered a question of Senator Brown:
Senator, I think that the principle of stare decisis, the concept of stare decisis is an important link in our system of deciding cases in our system of judicial jurisprudence. The reason I think it is important is this: We have got to have continuity if there is going to be any reliance, if there is going to be any chain in our case law. I think that the first point in any revisiting of the case is that the case be wrongly decided, that one thing it is incorrect. But more than that is necessary before one can re-think it or attempt to reconsider it. And I think that the burden is on the individual or on the judge or the Justice who thinks that a precedent should be overruled to demonstrate more than its mere incorrectness. And at least one factor that would weigh against overruling a precedent would be the development of institutions as a result of a prior precedent having been in place. (Tr. 9/11, at 156-57).

Judge Thomas elaborated that these institutional reliances included subsequent judicial application of those precedents (Tr. 9/16, at 113). He further indicated that stare decisis applied to precedents involving individual rights as fully as other kinds of cases (Tr. 9/11, at 158), and that the Supreme Court “cannot simply, because you have the votes, begin to change rules, to change precedent.” (Tr. 9/16, at 117).

We agree with Judge Thomas on all these points. Stare decisis is necessary if citizens are to know what the law is. If there is minimal likelihood that courts will interpret litigants’ cases in accordance with established rules, people could not conform themselves to the law. Possibilities for settlement would also vanish, as litigants with weak cases would take their chances that courts would change the law in their favor. Most important, the doctrine plays a vital role in keeping judges from reaching whatever results are consistent with their policy preferences. In this respect, it helps ensure that ours is a government of laws rather than a government of men and women.

Nonetheless, stare decisis is not inflexible. Judging is not simply a process of applying past cases to decide current cases. Justice cannot be dispensed by computers. Judges are not to be unyielding defenders of the status quo of case law. Judges have a responsibility to examine the textual bases for prior decisions, their adherence to other established rules of jurisprudence, and how experience has shown the rule to operate in practice, among other factors. Moreover, in constitutional cases, the doctrine must have limits because the process of passing constitutional amendments is so cumbersome. It should be expected that precedents will be overruled from time to time. And, in fact, the Supreme Court has overruled itself on more than 260 occasions. We must remember that Justices are to enforce the Constitution, not cases interpreting the Constitution, if these should conflict.

Therefore, we are concerned with the views expressed by various people in this process that overturning precedent is somehow synonymous with judicial activism. There is simply no necessary connection between overturning a precedent and judicial activism. The key question is what kind of precedent is overturned. If the prior
precedent is inconsistent with the Constitution, overruling it is not judicial activism. This is particularly true if the overruled decision arrogated to the judiciary powers that properly belong to the elected branches. Restoring those powers to the Congress and the state legislatures—the people's branches—is not judicial activism, but rather shows restraint in limiting the judicial role to its proper place.

Finally, we must note the irony present in the way stare decisis has been treated in these hearings. From observing only these hearings, a visitor from another planet would conclude that the greatest adherent of stare decisis in history is Justice Thurgood Marshall. His dissent in *Payne v. Tennessee* argues that Justices should not overturn precedents simply because they have the votes to do so, and my liberal colleagues all piously nod agreement with this sentiment. Of course, the Warren Court overruled cases in the 1960's for no better reason than that they had the votes. Justice Marshall himself voted to overrule many cases. In 1985, he wrote the opinion overruling one 98-year-old precedent and provided the fifth vote to overrule another that was only 9 years old. It is particularly difficult to square his new-found reverence for stare decisis with the 750 times he found the death penalty to be per se unconstitutional after the Supreme Court's numerous clear precedents to the contrary.

It is obvious how the opponents of Judge Thomas treat stare decisis: it is all right to overrule or disregard conservative constitutional precedents. It was all right for the Warren Court to overrule them, it was all right for the Burger Court, and it was all right for Justice Marshall. After all, times change, we have a living Constitution, and anachronistic precedents must fall. But it is not all right for practitioners of judicial restraint to overrule precedents. Liberal precedents are sacrosanct. No matter how contrary to the constitutional text they may be, times never change in a way that would justify overruling them. To those who hold these views, Americans have a Constitution that lives only in a historically determined way. We simply cannot accept the notion that only conservatives are bound by stare decisis.

Judge Thomas is correct that stare decisis is the norm and that proponents of overruling precedents bear a heavy burden. But for our constitutional system to work, Justices must be free to overrule cases that cannot be squared with the Constitution, whatever the political implications of so doing, unless the result is a usurpation by the judiciary of power reserved to the other branches. Justices should be praised, rather than criticized, when they overrule extra-constitutional precedents. We believe Judge Thomas' answers indicate that he would vote to overrule decisions he believed to be of that type.

Judge Thomas' understanding of the constitutional doctrine of separation of powers and of the jurisprudential principle of stare decisis are well within the mainstream of legal thought. They provide two additional bases for supporting his nomination to the U.S. Supreme Court.
ADDITIONAL VIEWS OF SENATOR ARLEN SPECTER

I support the nomination of Judge Clarence Thomas to serve as an Associate Justice of the Supreme Court of the United States for the reasons given in my statement in the Congressional Record at S 13398-13401 on September 20, 1991.
SUPPLEMENTAL VIEWS OF SENATOR HANK BROWN

I concur with the views expressed in the report of Mssrs. Thurmond, Hatch, Simpson, and Grassley regarding the nomination of Judge Clarence Thomas to be an Associate Justice of the Supreme Court of the United States, except for the section involving presumption in favor of the nominee.

The Senate has a constitutional duty to make an independent judgment regarding judicial nominees. This committee has inquired independently into the qualifications, judicial temperament, intelligence and integrity of this nominee. The full Senate is constitutionally required to do no less. Absent independent evaluation of each nominee, we fail to preserve the independence of the judiciary and the integrity of the confirmation process.

Alexander Hamilton stated that while some measure of deference is due the President's nominee (The Federalist, No. 66 at 405), in his view the Senate was to be an "excellent check" on the President's power. The Federalist, No. 76 at 457.

Hank Brown.