

Senator DECONCINI. Judge Thomas, I would like to pursue the equal protection clause, the 14th amendment and how it relates to discrimination. As you so well know, but for purposes of clarity, the 14th amendment prohibits a State from depriving a person of life, liberty, or property, without due process of law or equal protection of those laws.

The equal protection clause provides the primary constitutional protection against laws that discriminate on the basis of gender. And as we also know from previous hearings, there are three tests. There is the rational relationship test, which is the most lenient of those tests, there is the intermediate scrutiny test or a heightened test, which has been used in gender cases, and then there is the scrutiny test, which has been used in race and national origin.

Judge Thomas, there has been much discussion already regarding reliance on natural law. Unfortunately, or maybe fortunately, depending on how you define it, natural law has been invoked historically, and goes back a long time.

For example, in 1873, in the *Bradwell v. Illinois* case, the Supreme Court denied a woman a license to practice law, arguing the following:

Civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. The natural and proper delicacy which belong to the female sex evidently unfits it for many of the occupations of civil life. The paramount destiny and mission of women is to fulfill the noble and benign office of wife and mother. This is the law of the Creator.

Now, I know you went on with Senator Kennedy at some length about your position on natural law, which I did review this morning, and I welcome some clarification that you can give. But with the *Bradwell* case, we see that those Justices applied natural law.

I know that you stated that your duty would be to uphold the Constitution and not a natural law philosophy, but I would like to just clarify for the record, do you disagree with the Justices' decisions that were held back in 1873 in the *Bradwell* case?

Judge THOMAS. Senator, I do.

Senator DECONCINI. Thank you. That is really all I want to know. I want to be very clear, based on your statements to Senator Kennedy, that you do not have any lingering thoughts that stare decisis, when dating back to a clear case where natural law was used, poses any problems to you.

Judge THOMAS. No.

Senator DECONCINI. Thank you.

Judge Thomas, when you were nominated to the court of appeals, because of time constraints and other things that prohibited me from coming to those hearings at any length and waiting my turn to ask you questions, I submitted written questions requesting your comments on the court's approach to the equal protection clause. We also discussed this before these hearings when you were in to see me, where I told you I would address some questions to you and offer some thoughts on it.

In response to my written questions, your partial response was, "Though I do not have a fully developed constitutional philosophy, I have no personal reservations about applying the three standards as an appellate court judge in cases which might come before me."

Now that you have been on the court for 18 months and may soon be making decisions on important equal protection cases on the highest court of the land, let me ask you if you have developed a constitutional philosophy regarding the Court's three-tier approach to the equal protection cases.

Judge THOMAS. Senator, I have no reason and had no reason to question or to disagree with the three-tier approach. Of course, the rational basis test being the least structured or least strict of the tests, the heightened scrutiny test, which has been used in the area of gender and alienage and legitimacy, and the strict scrutiny test, which has been used in the area of fundamental rights and race, Senator, I think that those tests attempt in our society to demonstrate the concern that we have for classifications that could infringe on fundamental rights, and I believe that underlying, when we move away just from the legalese—and I do accept this structure of the three-tier test—when we move away from it, at bottom what we are talking about is are we going to allow people to be treated in arbitrary ways, either because of their gender or because of their race, are we going to defer to classifications based on gender or race, and what the Court is attempting to do in an important way is to say no, we are going to look at those classifications.

Senator DECONCINI. Thank you, Judge Thomas. That is helpful, and I guess it goes without saying, but I am going to say it anyway, you have no agenda or hidden belief or anything else regarding the present position that the Supreme Court has taken with these three tiers on equal protection as they relate to gender or any other minority or class that it may be applied to.

Judge THOMAS. Senator, I think it is important for judges not to have agendas or to have strong ideology or ideological views. That is baggage, I think, that you take to the Court or you take as a judge.

It is important for us, and I believe one of the Justices, whose name I cannot recall right now, 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.

Senator DECONCINI. Thank you, Judge Thomas.

Is it fair to say that your philosophical approach, not going to any specific case, is that you would agree with this statement: If the Court were to abandon the heightened scrutiny test as it is applied to sex discrimination, gender cases, et cetera, that it would be turning the clock back on equal protection rights of women?

Judge THOMAS. Senator, I think that would be an appropriate statement, if you said either abandon or ratchet down.

Senator DECONCINI. Thank you very much. Because it concerns me a great deal, if the Court moves in that direction, without touching the issue of abortion or what have you. Having studied it and having posed these questions to a number of nominees here, I really feel the Court has, to the best it can, with the variance of

people that are on there, come to some relatively good conclusions. And though the intermediate scrutiny or heightened scrutiny may not be enough to satisfy the inequities in women's position in jobs and pay and what have you today, at least I am satisfied that it gives a court an opportunity, as the cases come before it, to continue to improve the inequities that I believe women still suffer in our society, and I am pleased with your responses.

They are similar to those responses that Judge Souter gave, and maybe you listened to his testimony, but I am very thankful for your candid approach, and also your comments about an agenda, because I agree with you, Judge Thomas, there is no place on the Court for someone who has an agenda. We all have ideas and we have to express them. We are all raised in a certain way and we all have certain convictions that we have to express and follow through, once we are in a position of making a decision. But indeed, I take that as a very serious statement on your part.

Justice Marshall had his own distinct approach to equal protection claims, as you may recall. Marshall believed that the Court does not apply a three-tier approach to equal protection claims, but, rather, a "spectrum of standing" review. Thus, the more important the constitutional and societal right given to an interest, the greater the scrutiny should be applied.

Do you have any feelings about this distinction that Justice Marshall makes regarding the three-tier system that you clearly said that you support and the spectrum of standing in total society?

Judge THOMAS. Senator, I have not examined Justice Marshall's approach in any detail and not had occasion to employ it in any of my analysis. But I think that what he is attempting to do is precisely what you are attempting to do with the three-tier analysis, and that is to adjust the scrutiny and to make it more exacting, the more significant and more important the right we are protecting. Maybe it would accomplish the same ends or be pretty close to the three-tier analysis, but it seems as though the objective is the same. But I have not had occasion to use—

Senator DECONCINI. Is it fair to say from your comments, then, that if you came across a case regarding sex discrimination—it could fall into the strict scrutiny, if it was such a blatant case that was not unisex toilets or something that is always used in the area of the intermediate scrutiny to show the difference in applying a strict scrutiny, in an effort to all sex cases? Is that a fair statement or can you comment on it?

Judge THOMAS. 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.

Senator DECONCINI. Thank you, Judge Thomas.

I know yesterday with Senator Kennedy you discussed the 1987 Atlantic Monthly article by Juan Williams—"A Question of Fairness" I believe it is called—which was based on the extensive inter-

view with you. In that article, Williams writes that you stated, among other things, "Blacks and women are generally unprepared to do certain kinds of work by their own choice. It could be that blacks chose not to study chemical engineering and that women chose to have babies instead of going to medical school."

You also discussed with Senator Kennedy your support of the writings of Thomas Sowell. In an article you wrote for the *Lincoln Review* in 1988 titled "Thomas Sowell and the Heritage of Lincoln," you praised Sowell's analysis of working women. And Sowell contended in a 1984 book that inequities in pay and career advancement stem from women's own behavior and preferences, claiming that women choose jobs and careers with lower pay and greater flexibility to accommodate their roles as wives and mothers. And I agree with you that Mr. Sowell certainly has a right to express his views.

But my question to you is: Do you agree with his conclusions on this particular statement and issues?

Judge THOMAS. Senator, I think as I alluded to yesterday, to say that women brought discrimination on themselves or lower pay on themselves is going too far. The point that I attempted to make yesterday with Senator Kennedy was that you have to begin to disaggregate the numbers. You have to look more at the particular categories. You can't just have the average and say this is the problem. If you are going to address the problems, you have to engage in a process of disaggregation.

There were questions on—I think the comment yesterday by Senator Kennedy, I believe, was something to the effect that women who were married weren't as good employees. And as an employer and someone who employed a significant number of women, I did not find that to be true and made that very clear.

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, lumberjacking, 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. But I do think his point that there are not women in some of the higher paying professions begs the question.

Senator DECONCINI. I do, too.

Judge THOMAS. There are reasons why, and some of those reasons could involve discrimination.

Again, my point in saying that his arguments could be an anecdote to the debate is because he attempts to disaggregate and to not simply say all of the reasons are simply discrimination. There could be other reasons. It is not to say that I adopted, as I said yesterday, I believe, to Senator Kennedy, all of his conclusions and his assertions. I simply don't and did not at that time.

Senator DECONCINI. Thank you, Judge Thomas.

Judge Thomas, I want to go into some areas that deal with Hispanic concerns. As a former Chairman of the Equal Employment Opportunity Commission, you weren't responsible for, but I am sure or I hope you are familiar with the 1983 charge study—enti-

tled "Analysis of the EEOC Service by Hispanics in the United States," which was conducted by the EEOC-appointed task force. That task force concluded that the needs of Hispanics were not being adequately addressed by the EEOC.

At the time, the task force indicated a need to improve EEOC's record of investigations of Hispanic charges and to increase outreach and education efforts within the Hispanic community.

Now, as the Commissioner, what programs did you initiate to improve the accessibility of the EEOC within the Hispanic community?

Judge THOMAS. Senator, when I arrived at EEOC, one of the first concerns among many—believe me, there were many—with which I was met was that EEOC was underserving the Hispanic community; for example, in Los Angeles and certainly in your home State.

There were a number of hearings, some of which I participated in, across the country in various major cities discussing the problem and what the probable or possible responses could be. A number of the, I think, concerns were that the national origin charges were low. The problem there, of course, is that not all of the charges which we received from Hispanic employees or Hispanic-Americans are national origin charges. They go across the line. They can involve age; they can involve gender discrimination also.

A number of the things that we did included opening offices in predominantly Hispanic communities, satellite offices. That was a part of our expanded presence program. I made sure that we 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 of our documents, our brochures, and translated them into Spanish.

The effort was to make sure that we reached out, that we included, and also in areas where we had—there was a significant Hispanic population, we made every effort to see to it that the top managers and the investigators spoke Spanish. Again, the effort, the overall effort was to reach out, and that was consistent with the recommendations.

I might also add that during the major part of my tenure, two of our five commissioners were also Hispanic. So there was considerable interest on my part, on their part, and, indeed, the Commission's part, in being of greater service to Hispanic-Americans.

Senator DECONCINI. How many offices did you open in the Hispanic community?

Judge THOMAS. We opened—that is a good point. I can't remember the satellite offices, the exact number. I know we opened one in east L.A., and we upgraded the office in San Antonio, TX, from a smaller area office to a full-scale district office to better serve that area.

Senator DECONCINI. Did any of these programs include plans to recruit more Hispanics for the agency itself?

Judge THOMAS. We attempted to do that in coordination with various individuals, but that is a more difficult proposition, and also to promote internally and to make sure that we had Hispanics promoted to jobs.

But that can be frustrating. My efforts sometimes were met with individuals after you position them for the senior position, they

find other alternatives and leave the agency, or other difficult personnel actions.

Senator DECONCINI. Judge, an interim result of a study conducted by the National Council of La Raza indicates that since the 1983 task force study, the situation at EEOC with regard to Hispanics has not improved. While the Hispanic population in the United States has grown in the last decade from 6 percent of the total U.S. population in 1980 to over 9 percent of the total population today, the percentage of the EEOC total charge caseloads filed by Hispanics was only 4.15 percent.

Given your efforts to improve the EEOC record with regard to Hispanics since 1983, how do you account for the disproportionate small number of charges filed by Hispanics?

Judge THOMAS. Again, Senator, I have and had the very same concern that we were underserving—or that EEOC during my tenure and when I arrived there was underserving the Hispanic community. I don't know how the numbers were arrived at. To my knowledge, the agency does not keep data in areas that do not involve national origin charges by national origin. So I don't know, for example, whether we are looking at numbers reflecting only the national origin charges as opposed to other areas.

I can say this: That we made every effort during my tenure to change the Commission's accessibility to Hispanic-Americans, to individuals across this country. That was the purpose for our expanded presence program, for our satellite offices, for our educational programs, all of which were started during my tenure. Our outreach efforts were all designed so that we are not sitting in our offices waiting for people to come in, but we actually go to them.

Sometimes it is frustrating because they don't all work, but it certainly was not because of a lack of trying.

Senator DECONCINI. Well, I'm certain it must be frustrating. Judge, another area of concern is the disposition of charges filed by Hispanics. According to the National Council of La Raza report, the percentage of cases which were administratively closed without remedy to the charging party has increased from 45 percent in 1985 to 72 percent in 1990. I realize a little bit of that time you weren't there. But does this figure reflect a weakness in the EEOC effort to pursue complaints filed by Hispanics, or does it suggest that the incidence of discrimination against Hispanics is lower than other protected groups?

Judge THOMAS. Senator, again, I don't have that data, and this is the first I have heard of those numbers. I would not think, particularly with the office heads and the employees who would certainly be interested in the communities in which they investigate those charges, that it is a weakening in EEOC's efforts.

Again, I don't have the data. It certainly does not reflect—not to my way of thinking—a reduction or decline in discrimination.

Senator DECONCINI. Is it your position that you were taking and following the recommendations of the 1983 task force?

Judge THOMAS. We did everything in our power during my tenure to reach out.

Senator DECONCINI. Well, did you, really, Judge? Did you go and meet with the Council of La Raza, the GI Forum, or any of the other national or local Hispanic groups, to see what they would

suggest you do, or to ask for their counsel and suggestions and advice?

Judge THOMAS. Senator, I can't name, again, sitting here, all of the groups that I have met with, but one of our Commissioners in particular was very, very active, and he and I spent a great deal of time together, because he would go, and he would report back on what the perceptions of the problems were and approaches that we could take. Again, he and I were there the entirety of my tenure, with the exception of a few months. And a second Commissioner who was also Hispanic, he and I worked very closely together to begin to address some of these problems. And I am sure both of them were very active and very involved, and I think they would both tell you that I always—

Senator DECONCINI. Judge, I appreciate that, but it doesn't answer my question. What did you do? Did you go out and seek to sit down with some of these national Hispanic groups regarding the problem, or was it kind of your attitude that, look, I've got two Hispanics here; I'll let them take care of that; I am going to take care of other areas that I think are of primary concern to me?

I get a feeling that you did not pay attention yourself to Hispanics—and that doesn't mean I am going to vote against you or for you because of that single issue, because I don't make any decisions that way, but I get a feeling that while you were there that that was not high on your priority list, that you left it to the two Hispanic Commissioners, and you did something else, but yet you were the Chairman.

Judge THOMAS. Senator, I can assure you that I traveled over this country to meet with various groups. I can't tell you precisely right now which groups I met with. I know I met with any number of Hispanic groups in my efforts to change the way that the agency was responding.

I believe that discrimination in this country—whether it is race, gender, national origin, religion, age—that all of it is wrong, and—

Senator DECONCINI. I don't question that, Judge, I don't question that.

Judge THOMAS [continuing]. And what I attempted to do was to equalize treatment at the agency of all the areas. I was outside of the agency to visit with these organizations. I can't tell you which ones. I certainly tried to work with a number of the organizations. Some, I had better relationships with during my tenure than others.

Senator DECONCINI. Well, maybe you could help us—and I don't know if you have time, or somebody could help you to go back over your calendar. I'd like to know whom you did meet with in the Hispanic area. The feeling I have is that you really were not paying attention to Hispanics—maybe not because you didn't like them—I'm sure that isn't the case—maybe it is because you were so busy dealing with women's issues and black discrimination, I don't know. But I get that feeling, and from the opposition that has come forward from the Hispanic community, you certainly didn't leave them with any great impression that you were interested in their problems, Judge.

Judge THOMAS. Well, Senator, I was, and I tried to resolve the problems. As all of us know, when you run an agency as spread out as EEOC, and with the difficult mission that we had, you have your frustrations, and I certainly had my share, but I can assure you that I tried to reach out to all the groups.

Senator DECONCINI. My time is up, Judge. I will come back to this and a couple of other areas later. Thank you, Judge Thomas.

The CHAIRMAN. Thank you very much.

Senator GRASSLEY.

Senator GRASSLEY. Mr. Chairman, I would like to make sure that a letter sent to you and Senator Thurmond from former Attorney General Benjamin Civiletti is introduced in the record, and I would like to note as a statement in that record besides the fact that Mr. Civiletti served the Carter administration, he has testified in support or has asked to testify in support of Judge Thomas, and these are some words he used, "finding his tenacity and strength of character to be positive attributes for the work of the Court." So, I would like to submit that for the record.

The CHAIRMAN. Without objection, and I can assure the Senator that General Civiletti has been invited to testify and we look forward to hearing his testimony.

[The letter referred to follows:]