

Judge THOMAS. Senator, I have not during my adult life or during my academic career been a 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, 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.

Senator BROWN. Mr. Chairman, my time is up. I would merely note for the record that the judge was an honors graduate of Holy Cross undergraduate school.

The CHAIRMAN. We will suspend just for a moment.

[Pause.]

I was just conferring with staff about the timing. Just so you have a sense of how much longer you are going to sit there, I think we should go with one more Senator. Today we will hear from the Senator from Illinois, and then we will take up tomorrow morning at 10 o'clock with the Senator from Wisconsin, followed by a second round beginning with me.

The Senator from Illinois, Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Judge Thomas, I will try to avoid doing what Senator Danforth said we should not do and just read little snippets from what you have written and said. I have read now over 800 pages of Clarence Thomas' speeches and opinions. I have read more of Clarence Thomas than any author I have read this year. I regret to say I do not think you have a best seller in the works. [Laughter.]

But it is important, because when you say you have no agenda or when you say you are not a policymaker, the reality is you become a policymaker on the U.S. Supreme Court. If I may quote from Justice Frankfurter, "It is the Justices who make the meaning," talking about the law and the Constitution. "They read into the neutral language of the Constitution their own economic and social views. Let us face the fact that five Justices of the Supreme Court are molders of policy, rather than the impersonal vehicles of revealed truth."

If, for example, in this committee, my colleagues, Senator Heflin and Senator Hatch, have a disagreement and work out a compromise and the law is not completely clear, then ultimately you may have to decide and make policy. That may be a 5-to-4 decision of the Court.

I mention this, because, generally, while it is not always true, you can usually tell where a Justice of the Court is going to go by looking at his record. For example, Justice Marshall has been talked about here. Generally, we can say there were no great surprises in Thurgood Marshall's record on the Court, because we knew where he had been.

When I look at your writings, I find a somewhat different tone, frankly, than the response to questions here, or a somewhat different tone in the quotes Senator Danforth read—with great respect to my colleagues, Senator Danforth, who gave as strong and eloquent an endorsement as I have ever heard of any candidate. But what I read is somewhat different from the tone of the remarks, the quotes that he made there. And when I read attacks on mini-

mum wage, for example, I would defer to your sister and mother on whether or not we ought to have a minimum wage law rather than to Judge Thomas. Or when I read and when I hear you mention public housing that your mother was able to move to, and then I read your statement—and I have almost—well, I have 16 similar in tone here, but let me read the one that I read in the opening statement:

“I for one don’t see how the government can be compassionate. Only people can be compassionate, and then only with their own property, and their own effort, not that of others.”

Now, in the case of public housing, my feeling is we are talking about government being compassionate, taking a little of your money, taking a little of Jack Danforth’s money, taking a little of my money, but doing something that is very constructive and very needed.

I find an inconsistency there, and I—well, let me just ask you to comment on what I see as inconsistency and maybe you do not see as an inconsistency.

Judge THOMAS. Senator, with respect to—let me just address the minimum wage. The concerns that I raised in a policy debate were something that I felt should have been taken into account. I think we are all for a decent wage. The one factor that I thought should be taken into account is the impact it would have particularly on minority teenage employment, and if that was considered in the calculus, then that was fine. But that was an important consideration. That is a policy decision. It is not one that judges make.

With respect to public housing or comments about compassion, I don’t think in all of those that you found one word saying that we shouldn’t spend money to help people who are poor or downtrodden.

Senator SIMON. But isn’t that what you are—

Judge THOMAS. I think that we have an obligation, an obligation to help those who are down and out. That is what I tried to point to in my opening statement; that as a part of our community, I think it is important for us to be willing to pay taxes so that people have a place to live.

Senator SIMON. And so when you attack, for example, redistribution of wealth—and one statement I read could have been made by an early king of France, very negative on the redistribution of wealth. But, in fact, when we have public housing—

Judge THOMAS. I think that is very important.

Senator SIMON. And that does not offend you?

Judge THOMAS. No.

Senator SIMON. All right.

Judge THOMAS. Senator, let me make one point. I think that it is important that we recognize, whether we have public housing or any other policies, that we make sure that we are doing good for the people who are the beneficiaries or recipients of this. Years ago I think we remember that there were public housing in certain cities that ultimately had to be torn down because they turned out to be more harmful to the inhabitants than they were helpful.

Senator SIMON. One of them in St. Louis that all three of us know about here.

Judge THOMAS. The debates that I requested and would have hoped to have been a part of is, Look, let's reexamine the pros and cons. Let's have a constructive debate about it. The problem is still going to be there.

I called a debate over affirmative action a pointless debate because at the end of the day there are people who are still not a part of our economy. We can agree or disagree all day. It is as though we are fiddling while their chances burn.

So I do think that those efforts are important, Senator.

Senator SIMON. In that connection, affirmation action, Senator Brown just asked you about college programs. One of your successors in the Office of Civil Rights in the Department of Education has criticized setting aside scholarships for minorities. Washington University, headed by a distinguished chancellor, William Danforth, has graduate fellowships for minorities in the field of science and math. Does that offend you in any way?

Judge THOMAS. It is my understanding, Senator, that there may be litigation about that particular policy, but let me answer that in this way:

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 process, to grow. I wish that when I was a kid I had had this opportunity also.

So I think that there are steps that need to be taken, but I can't—on that specific policy, I think it would be best that I not comment explicitly on that.

Senator SIMON. That is a perfectly legitimate response.

Again, so that I can get a feel of where you are coming from to judge where you are going to be going, Newsday magazine describes James J. Parker as a mentor and the person who introduced you to the Reagan White House. Is that an accurate description?

Judge THOMAS. Jay Parker has been a friend since I worked here on Capitol Hill. He was not the person who introduced me to the White House.

Senator SIMON. He has been, for many years, a lobbyist for the Government of South Africa. Were you aware of that?

Judge THOMAS. I became aware of that, interestingly, even though he is a friend, I can tell you that I do not question—he is an honest individual, and I didn't question him about his personal activities and his businesses. I became aware that he—through the news media, as you did, about this particular activity.

Senator SIMON. Now, he is quoted at one point as saying he informed you in 1981 about that. You don't recall that.

Judge THOMAS. I don't recall it. I knew he represented some of the homelands in South Africa at some point. I think the Mandela family or some individuals in South Africa. I was not aware, again, of the representation of South Africa itself.

Senator SIMON. He and a fellow named William Keyes, who are both editors of Lincoln Review, which is frequently given a far-

right label—whether it is justified or not, it is frequently given that label. But the two of them over the course of the years received well over \$1 million from the Government of South Africa. They also, in editing this publication, have had a number of articles critical of sanctions, antichoice articles, other things. For 10 years you were an editorial adviser to that publication. Did you at any point question whether these articles that, while critical of apartheid, were in agreement with the policies of the Government of South Africa or also the antichoice articles? Did you at any point suggest that those were not proper?

Judge THOMAS. Senator, the role of a member of the advisory board was purely honorary. There were no meetings. There was no review of literature. There were no communications. There was no selection of the material that was included in the journal. Indeed, I don't think that I have read a copy of the Lincoln Review in 2 or 3 years. I haven't received one in the mail in the last 2 or 3 years.

On the issue of South Africa, however, let me make this point: That even as I was aware of Mr. Keyes' involvement with South Africa, I was not aware of Mr. Parker's. But even as they took that position, I took a strong position on the board of trustees of Holy Cross that we divest of stocks in South Africa. That was important to me then, and, of course, that is contrary to a position that they might take. But it is one that I felt strongly about.

Senator SIMON. I was not aware of that, and I think that is significant.

You joined Clarence Pendleton and Steven Rhodes in criticizing those who were protesting at the South Africa Embassy on South African policy. At least the Washington Post reports this. Did you do this on your own? Were you requested by someone to do this? Do you recall this?

Judge THOMAS. I have no recollection of that at all, Senator.

Senator SIMON. Somebody give that to Judge Thomas.

If you can just look at the article and see if you do recall this.
[Pause.]

Judge THOMAS. I think the quote that if these were protests about the quality of education black kids in the United States receive, about the high crime rate in black neighborhoods, I would be right out front in that kind of a march. It is probably the kind of statement I would have made.

Senator SIMON. But the three of you did this in a coordinated way. Obviously, you know, it didn't just happen that all three of you said that the same day.

Judge THOMAS. Well, the only way that I think that something like that could happen would be that we were called the same day by the reporter. I had no involvement on that issue within the administration. I would assume that the reporter simply picked up the phone and looked for individuals to get a comment.

Senator SIMON. If on further reflection you or anyone else has any further background on that, when we get around to the second round—

Judge THOMAS. I simply don't remember a coordination. If anything comes to mind or if I can reflect on that, I will certainly apprise you of it.

Senator SIMON. On the question of privacy, you have been critical of the use of the ninth amendment. And when you were asked by Senator Metzenbaum, I believe, about the question of privacy, you referred to the 14th amendment.

There are at least three members of the Supreme Court who have referred to the right of privacy as a fundamental right. The ninth amendment, as I am sure you are aware, grew out of correspondence between Madison and Hamilton, where Hamilton said, "If you have a Bill of Rights, some people will say these are the only rights people have." And so the ninth amendment was added which says, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

That amendment is not just in isolation. In the Constitution you also have a provision which states that the Government can't search your home without a search warrant. That is in a sense a right of privacy. The Constitution says you can't have militia quartered in your home. That is in a sense a right of privacy.

When you put that all together, together with the ninth amendment, it seems to me that there is fairly clearly a right of privacy implied.

Now, that becomes significant because if you use the 14th amendment as a basis for the right of privacy, that comes later in our history. It has not been a part of our whole tradition of our country to have a right of privacy.

Do you have any reactions to that, and do you consider the right of privacy a fundamental right?

Judge THOMAS. Senator, to my knowledge, the Supreme Court, no majority has used the ninth amendment to establish as the basis for a right. Of course, it was used by Justice Goldberg and by Justice Douglas in *Griswold*.

With respect to the approach that I indicated that I thought was the better approach, it was Justice Harlan's approach. But with that said, my bottom line was that I felt that there was a right to privacy in the Constitution, and that the marital right to privacy, of course, is at the core of that, and that the marital right to privacy in my view and certainly the view of the Court is that it is a fundamental right.

Senator SIMON. Let me shift to another area, and that is the church-state area where you have not written very much. In fact, the only thing I have is in response to a question about religion in the schools in Policy Review magazine. You say:

My mother says that when they took God out of the schools, the schools went to hell. She may be right. Religion is certainly a source of positive values, and we need all the positive values in the schools that we can get.

It is the only thing I have found in this whole church-state area.

This is an area where, again and again, during your years on the Court you will be asked to make decisions. Since 1971, the Court has followed a three-part *Lemon* criteria that you may be familiar with. It is Jefferson's wall of separation. It is not quite that clear. When the Methodist church is on fire, you call the fire department. You don't say separation of church and state. We can't put out the fire because of a number of factors.

But the *Lemon* criteria are: No. 1, does it have a secular purpose? No. 2, is its effect to advance or inhibit religion? And, No. 3, does it excessively entangle government and religion?

That is what the Supreme Court has been using since 1971.

I guess I have a twofold question: No. 1, are you familiar with the *Lemon* criteria? And, No. 2, 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.

Senator SIMON. Let me give you a very specific instance that you are not going to be confronted with, though the issue may be one that you will be confronted with. We have a House colleague by the name of Dan Glickman, a Congressman from Kansas. He told me the story, and I repeat it with his permission.

When he was in—I think it was the fourth grade, they had prayer in the schools in Wichita. He happens to be Jewish. A large majority of this population in Wichita is not. Every morning when he was in the fourth grade, he was excused while they had school prayer, and then he was brought back in. Every morning little Danny Glickman was being told, you are different, and all the other fourth graders were being told he was different.

Does this strike you as something that is offensive in terms of where we have been, and where we ought to go?

Judge THOMAS. Senator, I think that when we engage in conduct such as that, when someone feels that he or she is excluded because of certain practices, such as those religious practices, I think we need to question whether or not government is involved. I think it is wrong.

You know, as you were talking, something came to mind. I remember being excluded from conversations about the war of North-

ern aggression, which for those who don't know about the war of Northern aggression, it is the Civil War. And it is refought, for those who think it ended at some point. But it is a sense of exclusion. And for those of us who have felt that sense of exclusion, I think that we have a strong sense that any policy that endorses that exclusion—and I think Justice O'Connor points that out—should be considered inappropriate.

My concern would be with someone like Danny Glickman that when we consider cases in a constitutional context that we understand the effects of government's perceived endorsement of one religion over another, and that we take that into consideration when we analyze those cases.

Senator SIMON. I don't think since you have been on the appellate court you have had any chance to rule on any of these church-state issues. Have you?

Judge THOMAS. In my way of recollection or in my knowledge, I have not, Senator.

Senator SIMON. If you or anyone—Ken or Fred or anyone, if you have written anything in this field, I would be interested in seeing it.

Judge THOMAS. I think my writings in this area are mercifully minor, if any.

Senator SIMON. My time is just about up, and rather than start the next subject—when you are the last in line, you have to skip from subject to subject, whatever hasn't been covered. I will hold off until the second round.

Thank you very much, Judge. Thank you, Mr. Chairman.

Judge THOMAS. Thank you so much, Senator.

The CHAIRMAN. Senator, all the writings are in the area of natural law. There aren't any on religion.

Senator I understand that you don't mind if we start tomorrow, do you?

Senator KOHL. No.

The CHAIRMAN. Tomorrow we will start at 10 o'clock, Judge. I am going to give you a copy, which you already have, of some of your speeches that occurred post-1984. I believe, almost all of these speeches have been discussed, but I want to make sure you have copies of them, because tomorrow I am going to ask you to help me understand some of them.

If there is no further business, I have been asked to accommodate the President's request to continue to allow district court and circuit court judges to be reported out during this process. In order to honor that request we will have a very brief—which will make no sense to anyone except White House staff that is here and the committee—exec tomorrow to vote on reporting out 13 Federal judges and 4 U.S. attorneys. So as a practical matter, I say to the press that we will begin questioning closer to 10:30 than 10. But the purpose of that is to report out these Federal judges. We might as well just do it right here so we don't have to move around.

But we are going to try to start as close to 10 as we can with you, judge. This exec won't take very long.

With that, if there is no further business coming before the committee this evening, we will adjourn until 10 tomorrow.