

protection answer, I was dogged in my pursuit of whether or not he agreed with Brennan's reference to a liberty—a fundamental right found in the liberty clause, the fundamental right of privacy for an individual. And he said on the record under oath that he did agree with Justice Brennan's assertion as being what the Constitution would dictate and require, and that is that an individual had a fundamental right to privacy which resided in the liberty clause of the 14th amendment, in addition to giving me the equal protection answer.

How did that sit with you? Did you just not believe him or—

Ms. LAW. It was not tremendously reassuring. I mean, his testimony was exactly the same testimony that Justice Souter gave before this committee. But—

The CHAIRMAN. No, that is not true. Justice Souter did not—

Ms. LAW. Well, to begin with.

The CHAIRMAN. To begin with.

Ms. LAW. To begin with. But you, having learned your lesson with Justice Souter, pressed on and pressed on and pressed on. I think it was either on the second or third round of questioning that you finally got him to concede that there was a liberty protection for single people's rights to use contraception.

But it was a brief moment there, and then in subsequent discussions he returns again and again to the right of marital privacy as that is the characterization of the right to privacy. And even in that brief moment when he is conceding a liberty protection for *Eisenstadt*, it tells us nothing—it tells us absolutely nothing about whether women have any right in relationship to—

The CHAIRMAN. I wasn't suggesting. I was just responding specifically to your concern. There is no question about that, that it doesn't tell us when, for example, one concluded there was a competing life and being and so on. I understand that.

Ms. LAW. It tells us absolutely nothing, and—

The CHAIRMAN. I was just speaking of the specific issue of—

Ms. LAW [continuing]. Thomas is not Souter in the sense that Thomas has staked out a position on abortion and has indicated that he has thought about abortion and needs to address that issue.

The CHAIRMAN. Well, I think—well, I understand your position.

Now, let me ask one last question. The yellow light is on here, the amber light is on, and I want to go to this question of qualification, Professor Michelman. Your assertion that it is clear on its face that he is not the most qualified person out there in terms of the traditional methods by which the legal profession, legal scholars, and observers would conclude who would be the most qualified, the *creme de la creme*.

Now, were any of the previous Justices in that position? Would you put Justice Kennedy in that position?

Mr. MICHELMAN. No.

The CHAIRMAN. Would you have put Justice O'Connor in that position?

Mr. MICHELMAN. I can't really answer about Justice O'Connor. I am not familiar enough with—

The CHAIRMAN. Would you have put Justice Souter in that position?

Mr. MICHELMAN. Probably not.