Senator SPECTER. By all means, it is your turn.

Ms. LICHTMAN. I want to lay out with you for 1 minute the analogy that Professor King began a few minutes ago around *Brown* v. *Board of Education,* because, indeed, I think your questions suggest, to me at least, that you think perhaps we are being overly rigid in what we are expecting.

While I do not think anybody is asking, certainly we are not, that someone come here and prejudge a particular fact situation before it is presented in a courtroom, we are saying that there are some fundamental principles about which a nominee must assure us in its application, or that person is not worthy of confirmation.

For instance, could a nominee in 1991 come before this committee and assert that they believed that States sanctioned separation or apartheid if you will, it is constitutionally based? I doubt it. I don't think that a nominee could be neutral on the application of those constitutional principles and get confirmed either.

I think there is wide agreement that there are some fundamental rights, and that is really the analogy here. What are the fundamental rights, the application of those constitutional principles that Judge Thomas was unwilling to come forward and assert. And I find that very troubling.

If I take the *Brown* analogy further, he was quite willing, by the way, to criticize *Brown* historically, but say he agreed in the holding. Now, he may have found that right in a clause of the 14th amendment that you and I might not agree with, but he was willing to say that there were constitutional principles——

Senator SPECTER. Ms. Lichtman, I am sorry to interrupt you, but I have just 5 minutes to get to vote, and that is a minimum time.

So, the committee will stand in recess for 10 minutes. Thank you.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Thank you for helping me accommodate the Senate schedule here.

Now, who is on first and who is on second? Who has not testified yet?

Ms. GREENBERGER. I would be happy to.

The CHAIRMAN. Ms. Greenberger, if you would, please, we would appreciate it.

STATEMENT OF MS. MARCIA GREENBERGER

Ms. GREENBERGER. Thank you, Chairman Biden.

The National Women's Law Center is opposed to the confirmation of Judge Clarence Thomas to the Supreme Court. We do not take this position lightly, and I know that is the case for many of the witnesses who have indicated their opposition.

We oppose Judge Thomas because of our grave concerns that, based on his record, Judge Thomas does not have a commitment to the core constitutional and statutory protections that form the basis for women's legal rights in this country. Instead, Judge Thomas has taken positions that conflict with women's rights under the equal protection clause of the Constitution; the constitutional right to privacy; and women's rights to education and employment secured by Federal law.

You did make reference to the report that the National Women's Law Center prepared, and I will ask that that be made a part of the record.

We looked at his record in that report, and I can now say, unfortunately, that Judge Thomas' testimony before this committee has intensified rather than allayed our concerns.

Judge Thomas has been nominated to fill a crucial seat on the Supreme Court. Last term, five Justices announced their intention to rethink cases decided by narrow margins over spirited dissents. With the changing composition of the Court, cases upon which women's legal rights really could now fit into the category of those ripe for rethinking.

In particular, we fear for women's protection under the equal protection clause of the Constitution. The equal protection clause has been interpreted to give special protection to women against Government-sponsored discrimination. Key cases have given women equal rights to parental support, to be executors of estates, to Social Security benefits for their dependents, for their children, for their spouses, to serve on juries, and to Government employment and education benefits. Until 20 years ago, when the standard changed for measuring sex discrimination under the equal protection clause, no challenge to Government-sponsored sex discrimination was ever successful.

With Justice Marshall's retirement, there are only four members of the Supreme Court who have accepted this heightened protection for women under the Constitution. Justice Rehnquist has consistently opposed providing that protection to women, and the positions of Justices Scalia, Kennedy and Souter are unknown. Therefore, Judge Thomas' views on this issue are of the utmost importance.

Unfortunately, Judge Thomas' record of supporting the application of natural law as reflected in the Declaration of Independence provides little, if any, protection for women. Judge Thomas' testimony at this hearing calling into question how his past statements of natural law apply to deciding cases under the Constitution provide little comfort to those looking for an understanding on his part of the nature of sex discrimination or the way the heightened scrutiny test has actually been used by the courts to eradicate sex discrimination in this country.

His statement, for example, made to Senator Kennedy, and I quote: "I don't think that Professor Sowell or others are in any way sexist or in any way people who would discriminate," demonstrates this lack of understanding. Thomas Sowell has denied the very existence of sex discrimination in employment based on stereotypes of women's abilities and interests. Yet, the heightened scrutiny test must be applied "free of fixed notions concerning the roles and abilities of males and females," and the purpose cannot reflect "archaic and stereotypical notions" about men and women. Whether or not Thomas Sowell thinks he is sexist or means to sanction discrimination, his rationales for women's lower pay and limited job opportunities are precisely the rationales which have no place in the true heightened scrutiny test.

So, too, women's constitutional right to privacy, which includes pregnancy and termination of pregnancy, is at risk. Four Justices

have already applied a standard which, in effect, overturns *Roe* v. *Wade,* and Justices Souter and O'Connor have each taken positions that are cause for alarm.

At stake is not only the continued vitality of *Roe* v. *Wade,* but the degree to which States could restrict rights related to abortion, contraception and other privacy rights. The actual contour and scope of the right to privacy could well be determined by the person who takes Justice Marshall's seat. Of great concern is that Judge Thomas has praised legal theories taking the most extreme position on the right to privacy and abortion—theories that could not only overturn *Roe* v. *Wade,* but require States to criminalize abortion.

His statements at the hearing that he only skimmed, or never even read extreme positions he praised or endorsed, are unavailing. His willingness to discuss other controversial legal doctrines, while refusing to discuss this most critical issue, only heighten the concern. If Judge Thomas is unwilling to speak, the members of this committee must recognize the ominous portent of his silence.

Finally, we have seen the twin pillars of statutory rights central to women—title VII prohibiting sex discrimination in employment and title IX prohibiting sex discrimination in education—endangered by increasingly restrictive Supreme Court interpretations.

From May 1981 to May 1982, Clarence Thomas was head of the Office for Civil Rights, the office that enforces title IX. For 8 years he then served as Chairman of the Equal Employment Opportunities Commission, which enforces title VII. During these years, Judge Thomas ignored court orders, refused to enforce Supreme Court decisions, and was criticized repeatedly by Congress because of his poor enforcement record.

The National Women's Law Center was counsel for the sex discrimination plaintiffs in the *WEAL* and *Adams* cases, the cases in which a Federal judge expressed his frustration and concern with Clarence Thomas, as head of the Office for Civil Rights, for not complying with the court order designed to get enforcement moving again.

We saw Judge Thomas limit the scope of title IX and the other antidiscrimination laws—even to the point of being criticized by Brad Reynolds, who was then Assistant Attorney General for Civil Rights at the Justice Department. And we saw Judge Thomas cut back seriously on the employment rights of women, minorities, and the elderly at the EEOC. Again, Judge Thomas' attempts at the hearing to minimize the significance of the court order against him and to dismiss the devastating impact on people across the country of the policies he adopted are unconvincing.

Judge Thomas said that he enforced the law vigorously when individual victims of intentional discrimination were harmed. But his record proves otherwise. For example, Judge Thomas tolerated employer policies intentionally barring women of child-bearing years from jobs, and reduced EEOC efforts to protect women suffering intentional pay discrimination.

As Chairman of EEOC, Judge Thomas went so far as to criticize one of EEOC's own major sex discrimination cases, the *Sears* case, which sought to open higher paying jobs to women—to the point where Sears, in defending the case, tried to call then Chairman

Thomas as a witness on its behalf. The ABA Model Code of Professional Responsibility bars even a junior EEOC lawyer on the case from making those kinds of public statements.

Judge Thomas assured this committee that he would not justify discrimination, nor he said, "would I shy away from it." But his is a record of shying away from discrimination, of closing his eyes, and turning his back on victims of discrimination who sought the help of the Government agencies he ran, and of embracing and praising individuals who would undo the major gains women have won under the law in the last 20 years.

Thank you.

[The report follows:]