Also, Sylvia Law, a professor at New York University School of Law, who specializes in constitutional law in the area of personal and family privacy rights, and I understand she is going to testify in opposition to Judge Thomas.

And Prof. Frank Michelman, a professor at Harvard University, has written extensively on methods of constitutional interpretation and, in particular, the use of the fifth amendment's takings clause.

I welcome you all. I would appreciate it if you would be willing to limit your comments to 10 minutes, as unfair as that is, in the interest of time. We will be delighted and anxious to have placed in the record as if read in full your entire statements, if they are long.

Why don't I begin, unless you have all decided on an order—you have, well, why don't you tell me what order you have decided on.

Ms. LAW. I will begin.

The CHAIRMAN. Professor Law, why don't you begin.

STATEMENT OF A PANEL CONSISTING OF SYLVIA LAW, NEW YORK UNIVERSITY LAW SCHOOL; FRANK I. MICHELMAN, HARVARD LAW SCHOOL; AND THOMAS C. GREY, STANFORD LAW SCHOOL

Ms. LAW. I am Sylvia Law. For 18 years I have been professor at NYU Law School and codirector of the Arthur Garfield Hays Civil Liberties Program. I am also the president-elect of a national organization called the Society of American Law Teachers.

Prior to his nomination to the Supreme Court, Judge Thomas expressed strong views opposing the fundamental right to choose abortion. Most dramatic was his assertion four years ago that Lewis Lehrman's analysis of "the meaning of the right to life is a splendid example of applying natural law." That endorsement of the assertion that the fetus is a human being, entitled to full constitutional protection, and that *Roe* v. *Wade* led to a "holocaust," is a more extreme position on abortion than has ever been taken by any Supreme Court Justice in our history, or by any nominee, including Robert Bork.

Judge Thomas' praise of the view that natural law requires an interpretation of the Constitution that would criminalize abortion under virtually all circumstances is not an isolated example. Two years ago, in the Harvard Journal of Law and Public Policy, he characterized *Roe* v. *Wade* as "the current case provoking most people," from conservatives, like himself. Judge Thomas then advocated the use of natural law in interpreting the Constitution, as an alternative to judicial activism and the recognition of unenumerated rights.

These comments were not made in an off-the-cuff political speech. They were published in an academic/legal journal of Harvard University. Those of us who publish in these journals can attest that the editors scrutinize each idea, word, and comma, to assure that the author has expressed ideas with precision.

Judge Thomas' prior statements on reproductive freedom, hence, distinguish him from Justices Souter and Kennedy. He staked out a position on these issues that is extremist, that is far outside the mainstream of conservative American political and judicial thought. His prior statements demand explanation.

During these hearings, many of you questioned Judge Thomas on reproductive freedom. You gave him the opportunity to assure us that he is not, in the words Senator Heflin used in rejecting Robert Bork, "an extremist who would use his position on the Court to advance a far-right, radical, judicial agenda." After a week of hearings, we do not know anything new about how Judge Thomas approaches the core question of women's right to control their bodies, free from State interference. Indeed, Judge Thomas' answers were deeply disturbing and raised new problems, including concerns about his sense of judicial responsibility and his credibility.

Judge Thomas sought to justify his refusal to answer your questions about his views on reproductive freedom, saying that "to take a position would undermine my ability to be impartial."

By contrast, however, on many issues he expressed concrete substantive views. He offered detailed analysis of the constitutional law of exclusionary rules and warrants. He endorsed the Court's current standards of establishment clause jurisprudence, even though a case challenging that standards is now pending before the Court.

He addressed the wisdom and constitutionality of mandatory sentencing guidelines. I could go on and on. You know he addressed many subjects in lots of concrete detail. Each of these positions is controversial. Each involves issues that are or will be before the Court. On each, he was nonetheless able to offer concrete detailed views.

Judge Thomas sought to distance himself from his prior extreme statements about reproductive freedom by denying knowledge of them. He said he had only skimmed the Lehrman article before pronouncing it a splendid example of natural law protecting fetal life.

Since his nomination, his endorsement of the Lehrman article has been a centerpiece of public debate and concern. But Judge Thomas testified that he did not even reread it in his 10 weeks of preparation for the confirmation hearings. He testified that he never read the 1985 report of the Working Group on the Family, calling for the overruling of *Roe* v. *Wade,* even though he had signed that report.

Perhaps most astonishingly, despite frequent criticisms of *Roe* v. *Wade,* Judge Thomas insisted that he had no personal memory of ever having discussed the case, he had no personal opinion about the Court's ruling in *Roe.* He said, "Senator, your question to me was did I debate the contents of *Roe,* the outcome of *Roe,* do I have this day an opinion, a personal opinion on the outcome of *Roe,* and my answer to you is that I do not."

These statements, if credited, reflect serious irresponsibility and insensitivity. Integrity—consistent truth-telling even when it is uncomfortable—is an essential quality in a judge. Everyone recognizes that. There is no question that integrity is an appropriate litmus test for a Supreme Court Justice.

But if we believe what Judge Thomas has told us during these hearings, then we must question whether he is sufficiently responsible to serve on the High Court. Why should we assume that he will bother to read the briefs of the parties or prior precedent, if he does not even reexamine his own words when they generate enor-

mous protest and concern? How can he criticize a landmark decision guaranteeing women their most basic rights, without having formulated an approach to the issue that it raises?

Judicial impartiality did not prevent Judge Thomas from asserting views on many important controversial issues. It did prevent him from repudiating or even discussing his recent assertions that natural law gives the fetus rights superior to any woman's right to make decisions about her own body and life.

We asked how, as a judge, he would address the question whether the fetus was entitled to full constitutional protection, he asserted that he would look to precedent, but that he knew no cases that addressed the issue. It was as though *Roe* v. *Wade* did not exist. Judge Thomas' selective responsiveness and selective memory has to be disturbing to women and has to be, I submit, disturbing to this committee.

Judge Thomas did recognize that the Constitution protects some forms of unenumerated privacies and personal liberties, particularly marital privacy in relation to contraception. In response to persistent questioning, skilled questioning by Senator Biden, Judge Thomas reluctantly approved *Eisenstadt's* holding that unmarried people have a right to access to contraception. But he repeatedly returned to characterizing *Eisenstadt* as an equal protection decision, and to the right to martial privacy. Clearly, this provides no reassurance that he would recognize a fundamental right of a woman to choose abortion. Indeed, Judge Thomas steadfastly refused to acknowledge that the constitutional protection of liberty or privacy gives any right to a woman seeking abortion. This is a position that is more radical than that of Justice Rehnquist or Justice O'Connor, who have recognized some form of liberty or privacy interest for women seeking abortions.

No one is asking Judge Thomas to indicate how he would decide particular cases. Last Thursday Senator Hatch asserted that once one recognized that a woman possessed a fundamental right, "you are on the way to deciding most of the cases" involving reproductive freedom. With respect, I don't believe that is true. The development of a standard requires an evaluation of the interest asserted by the woman, the weight to be given to countervailing interests asserted by the State, and a definition of a constitutional criteria for balancing these conflicting claims. Even people who agree on the standard often disagree on its application to particular facts. And thought about the standard evolves over time. We don't ask him to pass on particular cases. Rather, we ask whether he repudiates his prior statements, suggesting he would give no weight to women's claims of reproductive liberty and privacy, or whether he would attach an absolute value to the protection of the fetus. We ask that he answer the same types of questions concerning the fundamental right to choose as he had no difficulty in answering concerning other constitutional issues.

On the constitutional issues that matter most to women, reproductive freedom, he stonewalled you and the American people. A week ago, his prior statements and writings created a presumption that he was an extremist, an ideologue. He had a burden to overcome on reproductive freedom, and he failed to do it.

On a practical level, let me just address the argument that confirmation of Clarence Thomas would not matter to reproductive choice because we already have five Justices on the Court willing to overrule *Roe* v. *Wade*. Assuming that is true—and it may well be—many difficult issues remain. Can States ban abortions when the woman will die as a consequence? Can they ban abortion advertising or abortion counseling? Can they prohibit women from traveling to States where abortion remains legal? Will statutes enacted by this Congress be interpreted in a way that is hostile to women's reproductive freedom?

The lack of a majority opinion in *Webster* suggests that a tension exists amongst the Justices of the Court, a give and take. Adding a Justice with an extreme antichoice view will influence that balance and will move the Court even further to the extreme ideological right.

The Constitution assigns you the solemn responsibility to advise and consent. That responsibility is at the core of the Constitution's separation of powers amongst the branches of Government.

Over the years, this committee has developed an ability to question nominees. Last week some of you made comparisons amongst the nominees—Bork, Kennedy, Souter. To allow practical politics to justify approval of a nominee who does not meet your standards of integrity, responsibility, and commitment to core values of liberty and equality would disregard your constitutional duty.

Reproductive choice is a basic, fundamental right that is of singular importance to women. It is entirely appropriate for the Senate to insist that a nominee offer a reasoned framework for addressing this fundamental right and to return to confirm nominees who are not forthright in discussing this core issue.

Thank you very much.

[The prepared statement of Ms. Law follows:]