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:]

STATEMENT OF

PROFESSOR SYLVIA A. LAW

OPPOSING THE CONFIRMATION OF

JUDGE CLARENCE THOMAS AS

ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

September 16, 1991

I am Sylvia A. Law. For 18 years I have been Professor of Law at NYU and Co-Director of the Arthur Garfield Hays Civil Liberties Program. I am President Elect of 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's 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 protest," 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. We 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's prior statements on reproductive freedom distinguish him from Justices Souter and Kennedy. He has staked out a position on these issues that is extremist -- 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's 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, on many issues he expressed concrete substantive views. He offered a 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 standard is currently pending before the Court. He addressed the wisdom and constitutionality of mandatory sentencing guidelines. He endorsed a three-tiered approach to equal protection analysis. I could go on. Each of these positions is controversial. Each involves issues that are or will be before the Supreme Court. On each he was prepared to provide concrete, detailed views.

Judge Thomas sought to distance himself from his prior extremist 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 ten weeks of preparation for the confirmation hearings. He testified that he never read the 1986 Report of the Working Group on the Family, calling for the overruling of Roe, even though he had signed the Report. Perhaps most astonishingly, despite his frequent criticism of Roe, Judge Thomas insisted that he had no personal memory of ever having discussed the case, and 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 v. Wade, the outcome in Roe v. Wade, do I have this day an opinion, a personal opinion on the outcome in Roe v. Wade; 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. There can be no question that integrity is an appropriate litmus test for a Supreme Court Justice. But if we believe what Judge Thomas has said during these hearings, we must then 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 parties, or prior precedent, if he doesn't even

reexamine his own words when they generate enormous protest and concern? How can he criticize a landmark decision guaranteeing women their most basic rights without having formulated an approach to the issue?

"Judicial impartiality" did not prevent Judge Thomas from asserting views on many important and controversial issues. But 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. When 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 addressing that specific question." It was as though Roe v. Wade, which did address that issue, did not exist. Judge Thomas's selective responsiveness and memory has to be disturbing to women and 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 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 "marital 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 Constitution's protection of liberty or privacy gives any right to women seeking abortions. This is a position more radical than that of Chief Justice Rehnquist or Justices 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 a particular case. Last Thursday Senator Hatch asserted that once one recognized that women possess a fundamental right, "you are on the way to deciding most of the cases" involving reproductive choice. With respect, this is not true. The development of a standard requires evaluation of the interest asserted by the woman, the countervailing state interests, and definition of a constitutional criteria for balancing these conflicting claims. Even people who agree upon a standard, often disagree on its application to particular facts and cases. And thought about the standard evolves over time. Rather we ask whether he repudiates prior statements suggesting that he would give no weight to women's claims of reproductive liberty and privacy, or 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 that he had no difficulty 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. He failed to do so.

On a practical level let me address the argument that confirmation of Clarence Thomas would not matter to reproductive choice because there are already five Justices on the Court willing to overrule Roe v. Wade. This may be true. But many difficult issues remain. Can states ban abortions when the woman's life is in danger? Can they ban abortion advertising? Can they prohibit women from traveling to states where abortion remains legal? Will statutes enacted by Congress be interpreted in a way that is hostile to women's reproductive freedom? The lack of a majority opinion in the Webster case demonstrates tension -- give and take -- among the current Justices. Adding a Justice with an extreme anti-choice view will influence that balance and 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 among the three branches of government.

Over the years this Committee has developed a "common law" of confirmation. Last week some of you made comparisons among this nominee, Judge Bork, and Justices Kennedy and Souter. To allow practical politics to justify approval of a nominee who does not meet your developing 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 refuse to confirm a nominee who is not forthright in discussing this core issue.

The CHAIRMAN. Thank you very much. Let me point out that you did exactly what I asked; you limited your comments to 10 minutes. I made a mistake, as has been pointed out by my staff and by the distinguished Senator from South Carolina, in that we had allegedly told every witness that they would be limited to 5 minutes because we have somewhere near 90 witnesses. And my physical constitution—that is one of the reasons why I would never want to be a judge.

Now, having said that, because we gave the first two panels 10 minutes, we will let the next panel as well go 10 minutes. But everyone else should be on notice from this point on that they are limited to 5 minutes. That little light will go off in 5 minutes.

Now, we will not be offended, Professor Michelman, if you get closer to 5 minutes than 10. But I will not cut you off, and I will not cut the next panel off either if they are under 10 minutes. But I would appreciate it if you would make it as short as possible.

The Senator from South Carolina keeps telling me to tell you what I have already told you, but I will tell you again. Your full statements will be placed in the record.

STATEMENT OF FRANK I. MICHELMAN

Mr. MICHELMAN. Thank you very much, Mr. Chairman. I think I get your message, and I will aspire to comply.

My name is Frank Michelman. I have been a member of the Harvard Law School faculty since 1963. That is 28 years there, and I am proud to say that I have survived.

What I would like to talk about is the one-issue issue; that is, the question that has been raised so many times about whether it is right or sensible for you to give a central place in your deliberations to the nominee's record on the question of abortion rights and your colloquies with him about that question.

Let me say first that we have to distinguish between the ideal and the actual. As an ideal matter, I would agree that there are strong reasons for striving to keep the process of nominating and confirming Justices from being used for purposes of packing the Court with friendly ideologues or with people who you think are going to decide one or another issue as you would prefer.

The independence of the judiciary may be in some ways an unachievable ideal. It is, nevertheless, a central tenet of our constitutional system. It aims at noble ends. It is an idea well worth reinforcing. And it does seem clear that this ideal may be compromised and eroded by deliberate, sustained attempts at court-packing through the process of selecting judges. And if that is true, then that concern certainly applies to your part of the process—that is, advising and consenting.

That is the ideal. What about the actual? Well, we all know that responsibility begins at home, and in this case it seems to me that home means 1600 Pennsylvania Avenue. Presidents Reagan and Bush both ran and were elected on platforms openly avowing a purpose to pack the Supreme Court with a view to overturning *Roe* v. *Wade*. Many Americans think they have good reason to believe that Presidents Reagan and Bush have had that plank in mind when choosing judicial nominees; maybe not in each and every

case, but at least as a general policy. Moreover, Clarence Thomas' particular record of speeches and publications surely gives Americans reason to think the plank had a bearing in his selection at this time, and that impression, I have to say, is not dispelled by the President's assurance that he simply chose the best qualified person.

The trouble with that assurance is that it simply doesn't seem to be true that Judge Thomas is, by the traditional standards, a truly—outstandingly a truly exceptionally well-qualified nominee. By the traditional understandings of qualifications for the Supreme Court, that would be rich and broad and tested experience as a constitutional lawyer or judge, notable accomplishment, admired mastery of the materials and methods of constitutional law, Clarence Thomas does not stand out as exceptionally well qualified for the Supreme Court. And I note that not one member of the ABA panel has said that he does through the obvious means of awarding Judge Thomas the highest rating.

Now, I want to say here that I am one who believes that it is very proper and desirable to consider in this process the Supreme Court's representativeness of the American people, and that does not change my assessment that Judge Thomas cannot reasonably be called the best qualified person for this job.

So the question for Senators doesn't arise in the abstract, but in the actual situation I have described, and I asked myself this question: Suppose a Senator comes conscientiously to the conclusion that this particular nomination really is very hard to explain or justify by the traditional standards. And the selection, therefore, seems to have been influenced by the nominee's record of prior declarations regarding a particular issue or set of issues.

Suppose that a Senator believes that for a President to nominate on such a basis is no less wrong than for the Senate to grant or withhold consent on such a basis. How does that Senator in this situation act effectively and in accordance with that judgment and that conviction? The only way I can see would be to refuse to lend his vote for the support of the nomination.

I have some additional thoughts about the one-issue question—am I close to the 5 minutes?—that I would like to offer. The question often is asked in such a way as to imply that abortion rights are just one neatly isolable issue among countless similarly isolable issues that come before the Court, important in its own right certainly, but still just one bone of contention among many others.

But that way of thinking involves a serious misunderstanding of how constitutional law works. Issues of constitutional interpretation don't come in separate packages like items on a store shelf, among which we arbitrarily, as fancy moves us, pick and choose. It is one Constitution that the Justices expound, and interpretations regarding one topic inevitably, and often unpredictably, interconnect with interpretations regarding others.

Your colloquies here make clear your understanding of how the issue of a woman's procreational freedom is inseparable from issues about contraception, about the privacy of marital intimacies, about the intimacies of unmarried persons of whatever sex, about family privacy and self-determination. *Rust* v. *Sullivan* unfortunately illustrates how issues of procreational freedom spill over into ex-

tremely momentous questions of freedom of expression and unconstitutional conditions.

What a judge thinks about *Roe* and how a judge thinks about *Roe* is inseparable from how that judge thinks about the whole tissue of constitutional law. It is inseparable from how that judge thinks about constitutional liberty, how he thinks about freedom of conscience, how he thinks about the status and place of women in our society, and what the Constitution has to say about that, how he thinks about natural law.

In our times and circumstances, we cannot fully know how a judge thinks about those matters if he refuses to engage us in earnest on the subject of constitutional protection for a woman's procreational freedom.

Finally, let us understand that apart from everything else I have said, the practical question of abortion rights is very far from being just one practically important legal issue among many. For many, many Americans, it is the issue of their lives—and I mean that literally in the sense of life and death, for the many whose lives or health would be sacrificed to their pregnancies by some of the extremely restrictive abortion laws we are seeing, and for many others whose life circumstances would force them to the back alley or to self-mutilation as the alternative to Government dictation.

For many, many more, the procreational choice is the issue of their lives in the sense in which life means running your own life, choosing responsibly for yourself who you will be and what you will do in life, rather than having the Government assign you a role.

Mindful of the Chair's request, I think I will leave it at that point and let others proceed.

[Prepared statement follows:]

STATEMENT OF FRANK I. MICHELMAN CONCERNING THE NOMINATION OF CLARENCE THOMAS AS ASSOCIATE JUSTICE OF THE SUPREME COURT*

I am Frank Michelman. I am a Professor at the Harvard Law School.

I wish to direct some remarks to the litmus-test question. I mean the question of whether it is right or sensible for Senators to give a central place in their deliberations to the question of the nominee's stance regarding a particular issue such as abortion rights.

As an ideal matter, there is a strong argument against trying to use the process of nominating and confirming Justices for purposes of packing the Court with friendly ideologues or with people you think will decide particular matters in the way you prefer. The independence of the judiciary may be in some ways an unacheivable ideal. It is nevertheless a central tenet of our constitutional system. It aims at noble ends. It is an ideal well worth reinforcing. And it does seem likely that this ideal will be compromised and eroded by deliberate, sustained attempts at court-packing through the process of selecting judges. The argument certainly applies to your part of the process in the Senate. That is the ideal. But it is necessary sometimes to distinguish between the ideal and the actual.

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* On Monday, September 16, I testified to the Senate Judiciary Committee as part of a panel on privacy rights and natural law, composed of law professors described as "opposed to" or "leaning against" the nomination. I prepared this statement for that occasion. Through the first paragraph on p. 4, this text is a close approximation of my opening remarks to the Committee. Time constraints prevented my saying the rest, although I worked some of it into responses to Senators' questions. I have submitted the full text for inclusion in the printed Hearings.

Responsibility begins at home, and in this case it seems to me that home is 1600 Pennsylvania Avenue. Presidents Reagan and Bush both ran on platforms openly avowing a purpose to pack the Supreme Court with a view to overturning Roe v. Wade. Many Americans think they have good reason to believe that Presidents Reagan and Bush have had that plank in mind when choosing judicial nominees, maybe not in each and every case, but certainly as a general policy. Clarence Thomas's public record gives Americans particular reason to think that the plank has had a bearing on his selection at this time.

That impression is not dispelled by the President's assurances that he simply chose the best qualified person. The trouble with that assurance is that it does not seem to be true that Judge Thomas is, by the customary standards, an outstandingly well qualified nominee. By the customary understanding of qualifications for this office -- one thinks of rich and broad experience as lawyer or judge, and of tested, accomplished mastery of the materials and methods of constitutional law -- Clarence Thomas does not stand out as exceptionally well qualified for the Supreme Court. Let me say here that I am one who believes that it is very proper and desirable to consider in this process the Supreme Court's representativeness of the American people, and the diversity of the Justices' experiences and outlooks. That does not change the assessment: Clarence Thomas cannot reasonably be regarded as in the running for best qualified person for the job.

I ask myself, then, this question: Suppose a Senator comes conscientiously to the conclusion that this particular nomination is very hard to explain or justify in terms of qualifications, and that the selection seems to have been influenced by the nominee's record of prior declarations regarding a given issue or set of issues. Suppose our Senator believes that for a President to nominate on such a basis is no less wrong than for the Senate to grant or withhold consent on such a

basis. How does our Senator give effect to his conscientious judgments? The only way I can see is by voting against the nomination.

The "litmus-test" question is often asked in such a way as to imply that the issue of abortion rights is just one, neatly isolable issue among countless similarly isolable issues that come before the Court; important in its own right, certainly, but still just one bone of contention among many others. That way of thinking, however, involves a serious misunderstanding of how constitutional law works. Issues of constitutional interpretation do not come in separate packages, like items on a store shelf among which we pick and choose as the spirit moves. It is one Constitution that the Justices expound, and interpretations regarding one topic inevitably and often unpredictably interconnect with interpretations regarding others. Your colloquies here make clear your understanding of how the issue of a woman's procreational freedom is inseparable from issues about contraception, about the privacy of marital intimacies, about intimacies of unmarried persons of whatever sex, about family privacy and self-determination. *Rust v. Sullivan* unfortunately illustrates how issues of procreational freedom spill over into extremely momentous questions of freedom of expression and unconstitutional conditions.

What a judge thinks about *Roe*, how a judge thinks about *Roe*, is inseparable from how that judge thinks about the whole tissue of constitutional law. It is inseparable from how he thinks about constitutional liberty, how he thinks about freedom of conscience, how he thinks about the status and place of women in our society and what the Constitution has to say about that, how he thinks about natural law. In our times and circumstances, we cannot fully know how a judge thinks about those matters if he refuses to engage us in earnest on the subject of constitutional protection for a woman's procreational freedom.

Let us understand, too, that, practically speaking, the question of abortion rights is very far from being just one important legal issue among many. For many, many Americans, it is the issue of their lives. I mean that literally, in the sense of life and death, for those whose lives or health would be sacrificed to their pregnancies by some of the more restrictive abortion laws we are seeing, and those whose life circumstances would force them to the back alley or self-mutilation as the alternative to government dictation. Moreover, that the question of abortion rights is the question of their lives is true for countless women in the sense in which life means running your own life, choosing for yourself who you will be and what you will do in life rather than having the government assign you a role.

In light of all I have said, it is entirely legitimate for Americans concerned about freedoms they hold dear to demand close examination of this nominee's views about constitutional protection for abortion rights, including frank discussion by the nominee himself. To ask this much is not to demand a commitment. There really is such a thing as open-mindedness, and many if not all of those for whom abortion rights are a chief concern would settle for that. We do not, in fact, know that Judge Thomas' mind is not fully open on this matter. The question, however, is whether, on the record before us, it is reasonable to ask concerned Americans to take it on faith that he has. I do not see how the record to date can warrant such a conclusion.

That record starts with Judge Thomas's prior declarations about abortion and natural law. It indelibly includes his robust commendation, in a prepared address to a presumably anti-*Roe* audience, of an extraordinarily vehement and

dogmatic attack on that decision as morally and legally outrageous.[1] Judge Thomas insists now that he conveyed no endorsement of that view. Yet anyone can see that he plainly did. Had Judge Thomas frankly faced up to this simple fact, you might have examined with him just how his mind has come to change since then, and conceivably a fair basis might have been laid for confidence in his ability now to judge the issues open-mindedly. However, his testimony denied you that opportunity. Certainly a man is not bound forever by a view he once embraced, but that is not the question here. The question here is what inference, if any, to draw from a man's failure to face candidly the plain fact that he once embraced a certain view, when we are trying to get a sense of how much of that view clings to his heart and fibre and mind.

Examined in light of that question, the transcript of Judge Thomas's testimony to the Judiciary Committee contains disturbing signs. The transcript shows Judge Thomas refusing to engage with the Committee on the legal issues surrounding abortion rights anything like as freely as he did on several other live and controversial matters of constitutional law. The transcript shows Judge Thomas repeatedly exercising what looks like care to preserve for himself a doctrinal path to overruling *Roe*, should it come to be his determination to do so. The transcript even shows Judge Thomas refusing to grant to *Roe v. Wade* the ordinary respect of *stare decisis*. (For example, in colloquy with Senator Leahy, Judge Thomas treated as uncontrolled by any precedent the question of

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1. This was not, as been suggested, an isolated statement having no resonance with anything else Judge Thomas has ever said or suggested. What, after all, do we make of a published article that first cites *Roe* to exemplify what "makes conservatives nervous" about "the expression of unenumerated rights today," and directly goes on to offer these conservatives a "higher law" theory designed to counter "the worst type of judicial activism" and "the wilfulness of ... run-amok judges?" (Thomas, *The Higher Law Background*, 12 Harv. J. Law & Pub. Policy 63-64 (1989).)

a fetus' "constitutional status as a person." The fact is that *Roe* squarely decided that question, in the negative, in the specific context of abortion rights.) In a vacuum of other information, these signs might not carry great significance. We do, however, have other information. Considered in its light, these signs tend to augment rather than dispel the indications already conveyed by Judge Thomas's Heritage Foundation speech, and by his perfunctory dismissal of its significance, of a predisposition against *Roe*.

The CHAIRMAN. Thank you very much, professor. I do appreciate it. I realize this is very difficult. You all have so much to offer, and you made such a trip to get here, and then we say, "5 minutes." I apologize to you and all the witnesses to come for the limitation, but I don't know quite else how to do it.

Professor Grey, welcome.

STATEMENT OF THOMAS C. GREY

Mr. GREY. Thank you, Senator.

There is statement here which the three of us have signed, along with a number of other law professors, which really expresses our views in writing, and I hope the Senators will read it.

The CHAIRMAN. It will be placed in the record.

Mr. GREY. I will be short, even shorter.

Frank Michelman said something of what I wanted to say about the role of the Senate, and so I will shorten what I had to say about that.

I just want to point out the Washington Post editorial that Senator Thurmond entered in the record, in which they basically endorsed Judge Thomas' confirmation. There is something said there that I think is wrong. The editorial says,

> It is still pretty widely accepted that a President has a right to choose Justices who reflect his own philosophical predisposition, and that if the nominee is to be rejected, it should be on some other grounds, grounds of moral, mental, or professional disqualification.

Now, I think that is not the understanding of the Constitution that most scholars who have studied the nomination and confirmation process have. It is not the one verified by our history, it is not the one backed up by the original intent, as best that can be ascertained, and it has not consistently been the practice of the Senate.

The process is a political one. It does not mean that adjudication is a political process, it means that there is a screen, a political screen placed before the judges become judges and stop being politicians, in which two kinds of politicians, the President on the one hand and the Senate on the other exercise their political judgment as to whether this person should be a Federal judge and, most dramatically, of course, a Supreme Court Justice in the case of appointments to this Court.

As people have pointed out, these judges and this Justice, if confirmed, will serve for a whole generation, the law of the United States for a whole generation is at stake. It seems to me this body has a responsibility equal to that of the President in exercising its independent judgment on whether this person is appropriate for this job.

It does not mean that the Senators necessarily should vote not to confirm any judge they would not have appointed, for that would be an unworkable system. But it does mean, it seems to me, that judges should apply the same criteria as the President applies, and I ask you to consider for yourself what criteria this President has applied in this and other cases.

Then, simply as an analogy, I would suggest that Senators might take essentially the same attitude toward the confirmation vote as they think the President might appropriately take for the question

of whether to veto or approve legislation. The President does not veto every law that he would rather not have passed. On the other hand, he considers, in deciding whether to veto, the same criteria that the Congress has consulted in deciding whether to pass the legislation in question. I believe that is historically attested and, in terms of the theory of our institutions, appropriate role for this body, the Senate, in exercising its checking function against the President in the appointment of a Supreme Court Justice.

Now, I am going to move along at that point to the question of natural law, which Senator Leahy said a lot of people were asking him in Vermont over the weekend about natural law, and a lot of people have been asking me, as a law professor, what is this natural law stuff that they are talking about in the Thomas hearings.

I do not think the concept is quite as arcane as some have tried to make it seem. In the simple sense, natural law is simply doing justice, and there is nothing wrong with the idea that judges are there to do justice while they apply law. If that is what it means, it is an idea I think most Senators would endorse, and I would certainly endorse it.

It means, in that broad sense, simply the application, the practical application of human reason to difficult questions of right and wrong, the application, I would add, in all humility, given what we know about the limitations of human reason.

But I think it has frightened some Americans, the idea that Judge Thomas will be a Justice who applies natural law in adjudicating constitutional cases, and I will come in a moment to his statement that he will not do so. But the fear that he might do so is the sense that there is another version of natural law which lurks there, not necessarily a bad thing, when applied to personal decisions of individuals about what they think is right and wrong in politics or law, but not the right attitude for a judge.

This is the attitude that we see in Judge Thomas' continued references to self-evident truths. Now, the Declaration of Independence does declare these truths to be self-evident, of course, and in some broad sense, indeed, the rights of life, liberty, and the pursuit of happiness are perhaps self-evident truths. But I think it is fair to say that no lawsuit that ever comes before the Supreme Court or perhaps any other court involves questions the answers to which are self-evident or which can be deduced simply and dogmatically from clear, simple, self-evident premises.

So, the attitude that natural law is something simple and self-evident is the attitude that I think shows up in some of Judge Thomas' prejudicial announcements, his speeches and writings. It is God's law, it is, as he puts it in a number of places, but I will quote from the Harvard Journal of Law and Public Policy, he says, at the very end of that article, "Can this Nation possibly go forward, without a science of the rights of man?"

A science of the rights of man—now, I do not know what that science is. I do not have access to that science. I believe most Americans think they do not have access to any science of the rights of man. They may believe there are rights of man, they may believe they know what they are, but I think they believe they are matters of commitment, personal belief, in that general area, not things to be proved like scientific truths.

The point about this is that belief in that kind of natural law gives great confidence to the person holding the views that he or she thinks comes under the natural law. Liberty, there is a natural right to liberty, the Declaration of Independence tells us so. Liberty means this, it is clear to me that liberty means this: Liberty means X, it is written in the sky, it is God's truth, it is the higher law, it is the brooding omnipresence in the sky.

It is this attitude brought to the judiciary that, it seems to me, is inappropriate and is frightening, when joined to the actual views on public issues, constitutional issues, no less, that Judge Thomas has already expressed in his writings before coming before this committee.

Now, Judge Thomas has said before this committee that, in fact, he will not apply natural law in constitutional adjudication, or so it is sometimes thought. But if you go back and look at what he said on the question, you will find that he does not say quite that. He does not say simply that natural law is a matter of mere philosophic musing or political theory. He has said several times that he will not directly apply natural law, that he will view natural law at the background for his decisions on questions of what is life, liberty and property.

As he put it in the same article, the Harvard article, in discussing Justice Harlan's dissent in *Plessy* v. *Ferguson,* Justice Harlan's reliance on political principles was implicit, rather than explicit, as is generally appropriate for Supreme Court opinions. This is what he said before, and I think this is a version of what he said here, when he said he does not believe in appealing directly to natural law. He means that he does not think natural law can overrule the clear meaning of the Constitution.

However, it seems clear that he does believe that his convictions about natural law will inform his views of what the broad majestic phrases of the Constitution guaranteeing liberty, equal protection, protecting the privileges and immunities of citizens and the like do mean, and among those views we know what they are, and my predecessors on this panel have spoken about them.

The Lehrman speech is the most striking example. Remember what Judge Thomas said about that speech, that the right to life, that the speech was as splendid example of applying natural law to constitutional question. The article in question said that, from a right to life sprang the fetus' right to life form the moment of conception. Translating this into constitutional adjudication, into constitutional doctrine means something more radical than any nominee for the Supreme Court has heretofore proposed, something more radical than Judge Bork proposed, and he was rejected by the Senate.

Basically, implicit, indirect or background use of natural law is all you need, if you hold the kinds of firm, simple, dogmatic convictions about the content and method of natural law reasoning that seem to be held by Judge Thomas. It is all you need, if you want to translate your most deeply-held personal convictions into the law of the land. Those personal convictions in his case include the agenda of the relatively far right portion of the American political spectrum, and I think it would be a great mistake, it would be a tragedy if the Senate confirmed someone with those views who has

implied his intention to implement those views on the Supreme Court as a Justice of the Supreme Court.

Thank you, Senator.

[The report referred to follows:]

JUDGE CLARENCE THOMAS' VIEWS ON THE FUNDAMENTAL RIGHT TO PRIVACY

A REPORT TO THE UNITED STATES SENATE JUDICIARY COMMITTEE, SENATOR JOSEPH BIDEN, CHAIRMAN,

September 5, 1991

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CHRISTOPHER F. EDLEY, JR., Professor, Harvard Law School
THOMAS C. GREY, Nelson Dowman Sweitzer and Marie B. Sweitzer Professor, Stanford Law School
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STEVEN H. SHIFFRIN, Professor, Cornell Law School

As teachers and scholars of constitutional law committed to the protection of constitutional liberty, we submit this report to convey our grave concerns regarding the nomination of Judge Clarence Thomas to be an Associate Justice of the United States Supreme Court. Careful examination of Judge Thomas' writings and speeches strongly suggests that his views of the Constitution, and in particular his use of natural law to constrict individual liberty, depart from the mainstream of American constitutional thought and endanger Americans' most fundamental constitutional rights, including the right to privacy.

Among the most alarming aspects of his record, and the primary focus of this report, are the numerous instances in which Judge Thomas has indicated that he would deny the fundamental right to privacy, including the right of all Americans, married or single, to use contraception and the right of a woman to choose to have an abortion. Judge Thomas has criticized the Supreme Court's decisions in the landmark privacy cases protecting the fundamental right to use contraception. He has endorsed an approach to overruling Roe v. Wade[1] that is so extreme it would create a constitutional requirement that abortion be outlawed in all states throughout the Nation, regardless of the will of the people and their elected representatives. Recent Supreme Court

[1] 410 U.S. 113 (1973).

decisions in Webster v. Reproductive Health Services[2] and Rust v. Sullivan[3] have seriously diminished protection for the right to choose. Replacing Justice Thurgood Marshall with Judge Clarence Thomas would likely result in far more devastating encroachments of women's rights, perhaps providing the fifth vote to uphold statutes criminalizing virtually all abortions. Such laws have recently been adopted in Louisiana, Guam and Utah and challenges to them are now pending in the federal courts.

We submit this report prior to Judge Thomas' testimony before the Judiciary Committee in the hope that it will assist the Committee, and the Nation, in formulating questions to discern Judge Thomas' views on fundamental rights to individual privacy and liberty. We urge the Committee to question Judge Thomas on these matters and to decline to confirm his nomination unless he clearly refutes the strong evidence that he is a nominee whose special concept of the Constitution "calls for the reversal of decisions dealing with human rights and individual liberties."[4]

I. THE SENATE'S ROLE IN THE CONFIRMATION PROCESS

A basic element of our constitutional system of checks and balances is the joint responsibility the Constitution confers upon the President and the Senate for the selection of Supreme Court Justices. In the words of Senator Patrick Leahy:

> When the Framers of the Constitution met in Philadelphia two centuries ago, they decided that the appointment of the leaders of the judicial branch of government was too important to leave to the unchecked discretion of either of the other two branches. They decided that the President and the Senate must be equal partners in this decision, playing roles of equal importance. The 100 members of the United States Senate, like the Chief Executive, are elected by all the people.[5]

The Senate's equal role in selecting Supreme Court Justices is

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[2] 492 U.S 490 (1989).

[3] 111 S.Ct. 1759 (1991).

[4] Senate Committee on the Judiciary, Nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court, S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess., Additional Views of Senator Heflin, 210 (1987).

[5] S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess., Additional Views of Senator Leahy, 193-94 (1987).

widely accepted by Senators of both parties. For example, Senator Arlen Specter has stated that the "Constitutional separation of powers is at its apex when the President nominates and the Senate consents or not for Supreme Court appointees who have the final word. The Constitution mandates that a senator's judgment be separate and independent."[6]

Although the precise wording has varied, a majority of the members of the Senate Judiciary Committee have indicated that to be confirmed a nominee must, at a minimum, demonstrate a commitment to protect individual rights that have been established as fundamental under the U.S. Constitution. For example, Senator Patrick Leahy described the standard as follows:

> The Senate should confirm [a nominee] only if we are persuaded that the nominee has both the commitment and the capacity to protect freedoms the American people have fought hard to win and to preserve over the last 200 years. . . . I cannot vote for [a nominee] unless I can tell the people of Vermont that I am confident that if he were to become [a Justice], he would be an effective guardian of their fundamental rights.[7]

Senators have often identified the right to privacy as among the fundamental rights that a nominee must recognize to meet the standard for confirmation. As Chairman Joseph Biden stated:

> A nominee who criticizes the notion of unenumerated rights, or the right to privacy, would be unacceptable in my view. A nominee whose view of the Fourteenth Amendment's Equal Protection Clause has led him or her to have a cramped vision of the court's role in creating a more just society would be unacceptable in my view. And a nominee whose vision of the First Amendment's guarantees of freedom of speech and religion would constrain those provisions' historic scope would be unacceptable in my view.[8]

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[6] S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess. Additional Views of Senator Specter, 213 (1987).

[7] S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess., Additional Views of Senator Leahy, 193-94 (1987).

[8] Statement of Senator Joseph Biden, Chairman, Senate Judiciary Committee on Nomination of David Souter to be Associate Justice U.S. Supreme Court (Sept. 27, 1990).

Senator Herbert Kohl similarly stated:

> [A] Supreme Court Justice must, at a minimum, be dedicated to equality for all Americans, determined to preserve the right to privacy, the right to be left alone by the Government, committed to civil rights and civil liberties, devoted to ensuring the separation of Church and State, willing to defend the Bill of Rights and its applications to the States against all efforts to weaken it, and able to read the Constitution as a living, breathing document.[9]

Although Senator Howell Heflin indicated that he "would favor a conservative appointment on the Court," for him the question was "whether this nominee would be a conservative justice who would safeguard the living Constitution and prevent judicial activism or whether, on the other hand, he would be an extremist who would use his position on the Court to advance a far-right, radical, judicial agenda."[10] As Senator Heflin noted, if a nominee's "concept of the Constitution calls for the reversal of decisions dealing with human rights and individual liberties, then people's rights will be threatened."[11]

Judge Thomas' writings, speeches and professional activities do not statisfy this standard. They strongly suggest that, if confirmed, he would interpret the Constitution in a manner that would dangerously restrict constitutional protection for civil rights and civil liberties.

The threat Judge Thomas poses to our basic constitutional freedoms is well exemplified by his views regarding the fundamental right to privacy and the protection it affords reproductive rights, including the right to use contraception and the right to choose to have an abortion. The remainder of this report focuses on these alarming aspects of Judge Thomas' record.

II. THOMAS ENDORSES A NATURAL LAW "RIGHT TO LIFE" FROM CONCEPTION

At the core of Thomas' claims to constitutional authority and a dominant theme throughout his writings and speeches is a belief

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[9] Hearings of the Senate Judiciary Committee on the Nomination of Judge David Souter (Sept. 13, 1990) (Statement of Senator Kohl).

[10] S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess., Additional Views of Senator Heflin, 211 (1987).

[11] Id. at 210.

that the Constitution should be interpreted in light of "natural law" or "higher law." "[N]atural rights and higher law arguments are the best defense of liberty and of limited government."[12] "Natural law" is a slippery concept. It has been invoked in noble causes, for example, in opposition to slavery, genocide and torture. But it has also been used in invidious ways, for example, to defend slavery and to deny women the right to vote or participate in public life. The key questions that must be posed to a proponent of natural law are: What principles are dictated by natural justice? How do we know that these answers are correct?

Despite the central role natural law plays in his professional writings, Judge Thomas has said surprisingly little about the specific content of his natural law philosophy. His discussions of natural law, though numerous, tend to be abstract and repetitive, often confusing, and sometimes contradictory. Thomas routinely cites the Declaration of Independence as the primary source of the natural law values that should be promoted through constitutional interpretation, and he frequently refers to a religious basis for those values.[13] Beyond these general references, he has been remarkably vague about the content of those values.

One striking exception to Judge Thomas' general failure to provide specific examples of how natural law should be applied is his frequent criticism of the right to privacy. One specific application of Thomas' view of natural law is his enthusiastic endorsement of the assertion that the fetus enjoys a constitutionally protected right to life from the moment of conception. In a 1987 speech to the Heritage Foundation, he stated:

> We must start by articulating principles of government and standards of goodness. I suggest that we begin the search for standards and principles with the self-evident truths of the Declaration of Independence. . . . Lewis Lehrman's recent essay in The American Spectator on the Declaration of Independence and the meaning of the right to life is a splendid example of

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[12] Thomas, The Higher Law Background of the Privileges and Immunities Clause, 12 Harv. J.L. Pub. Pol'y 63, 64 (1989).

[13] See, e.g., Thomas, Why Black Americans Should Look to Conservative Policies, 119 Heritage Lectures (June 18, 1987); Thomas, Toward a "Plain Reading" of the Constitution -- The Declaration of Independence in Constitutional Interpretation, 30 Howard L.J. 983 (1987); Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest in Assessing the Reagan Years (D. Boaz ed.), 391, 398 (1989); Thomas, Notes on Original Intent.

applying natural law.[14]

The Lehrman article that Judge Thomas invokes as exemplary of his approach to natural law argues but one point: interpreting the Constitution, in light of natural law, as derived from the Declaration of Independence, requires that the fetus be protected as a full human being from the moment of conception. Lehrman states that the privacy right protected by the Court in Roe was "a spurious right born exclusively of judicial supremacy with not a single trace of lawful authority," and that even if such a right existed, it would be overridden by the natural, inalienable right-to-life of the fetus from the moment of conception.[15]

This view is far more extreme than that of any current Supreme Court Justice. The Declaration of Independence says nothing about abortion or the fetus. Abortion was then legal. An overturning of Roe premised on the supposed natural right of the fetus not only would strip women of constitutional protection for their reproductive autonomy, it would prohibit individual states or the Congress from allowing legal abortion as an option even in extreme cases. It would require that abortion be defined as murder. It would prohibit states from allowing abortion even where pregnancy resulted from rape or incest or posed grave risk to a woman's health. It would deny to women as responsible individuals the ability to exercise their own religious and moral beliefs concerning abortion.

The Lehrman article does little more than assert that it is a "self-evident" truth that the fetus possesses an "inalienable right to life."[16] We fear that Judge Thomas' strong praise of this application of natural law endorses this radical view on the critical issue of abortion on the basis of an approach to natural law that relies on fixed and unquestionable moral "truth" rather than reasoned debate over the application of American constitutional principles to the circumstances of our times.

Natural law protection of the right to life from the moment of conception has been cited in recent years by opponents of legal abortion, such as members of the group "Operation Rescue," in defense of their actions in violation of laws against trespass, destruction of property and assault and battery while attempting to obstruct women's access to reproductive health care

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[14] Thomas, Why Black Americans Should Look to Conservative Policies, supra note 13, at 8.

[15] Lehrman, The Declaration of Independence and the Right to Life, The American Spectator 21, 23 (April 1987).

[16] Id. at 22.

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facilities.[17] Natural law has further provided a basis for opposition not only to abortion, but to contraception by any means viewed as an interference with "natural" human reproduction.

III. THOMAS REJECTS UNENUMERATED RIGHTS AS ARTICULATED IN GRISWOLD, EISENSTADT AND ROE

The specific content of Judge Thomas' view of natural law can be seen, not only in the applications he praises, such as the "God-given" and "inalienable right to life"[18] of a fetus, but also in the rights and values he rejects. Although Thomas advocates constitutional protection for natural rights not specifically enumerated in the Constitution, he repeatedly attacks the recognition of unenumerated rights under the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment by what he dismisses as "liberal activist"[19] and "run-amok"[20] judges. Most prominent among the judicial opinions that Thomas has thus criticized are those in which the Supreme Court has protected the fundamental right to privacy.

For example, in a law review article he published in 1989, Thomas again selected decisions protecting the right to privacy to illustrate "the willfulness of both run-amok majorities and run-amok judges."[21] Thomas writes that the judicial decisions that "make conservatives nervous" are Roe v. Wade and Griswold v. Connecticut.[22] After describing Roe as "the current case provoking the most protest from conservatives," Thomas affirms

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[17] See, e.g. Senftle, The Necessity Defense in Abortion Clinic Trespass Cases, 32 St. Louis U.L.J. 523, 546 (1987); City of Kettering v. Berry, 57 Ohio App. 3d 66, 70 (1990) ("The law does not recognize political, religious, moral convictions or some higher law as justification for the commission of a crime"); Brief for Operation Rescue at 7, Roe v. Operation Rescue, No. 88-5157 (E.D. Pa., filed June 29, 1988); Brief for the Catholic Lawyers Guild of the Archdiocese of Boston, Inc., as Amicus Curiae supporting Appellants, Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (arguing that Roe v. Wade should be overruled).

[18] Lehrman, supra note 15, at 23.

[19] Thomas, Notes on Original Intent, supra note 13.

[20] Thomas, Higher Law Background, supra note 12, at 64.

[21] Id.

[22] Id. at 63 n.2.

his "misgivings about activist judicial use of the Ninth Amendment."[23] But, he asserts, his proposed concept of "higher law" would restrain both legislative majorities and judges, and should hence appeal to those he calls "my conservative allies."

Thomas has described the protection afforded the right to privacy under the Ninth Amendment as an "invention" in an opinion in Griswold v. Connecticut, authored by Justice Arthur Goldberg and joined by Chief Justice Earl Warren and Justice William Brennan. Thomas further criticizes Justice Goldberg's opinion and rejects the Ninth Amendment as a source of constitutional protection for rights that are unenumerated in the Constitution, stating:

> A major question remains: Does the Ninth Amendment, as Justice Goldberg contended, give to the Supreme Court certain powers to strike down legislation? That would seem to be a blank check. . . . Unbounded by notions of obligation and justice, the desire to protect rights simply plays into the hands of those who advocate a total state. . . . Far from being a protection, the Ninth Amendment will likely become an additional weapon for the enemies of freedom.[24]

Judge Thomas offers no real explanation in these writings of how protecting the rights of individuals promotes a "total state" or how defining unenumerated rights by reference to "natural law" is either more determinate or less a "blank check" to judges than more traditional means of constitutional interpretation.

Elsewhere, Thomas described the views on the right to privacy of Judge Bork and other proponents of original intent as follows: "restricting birth control devices or information, and allowing, restricting, or (as Senator Kennedy put it) requiring abortions are all matters for a legislature to decide; judges should refrain from 'imposing their values' on public policy."[25] Thomas then criticized this view as leading to an "indifference toward or even contempt of 'values.' Far from being an alternative to leftist activism, it readily complements it, as long as a majority approves."[26]

Although Thomas' discussion of this point is confusing, there is reason to fear it may be another endorsement of the view set out

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[23] Id.

[24] Thomas, Civil Rights as a Principle, supra note 13, at 398-99.

[25] Thomas, Notes on Original Intent, supra, note 13.

[26] Id.

in the article by Lewis Lehrman in support of a natural right to life for the fetus. Thomas' discussion of the right to privacy in the context of arguing that the Constitution must be interpreted consistent with a particular moral view, and his expression that this moral view must be employed to constrain majorities that might otherwise engage in "leftist activism," may be a further indication that under Thomas' theory of natural law, the Constitution would not permit states to allow citizens to have access to abortion or use contraception if these activities are deemed to violate the natural order of things.

In 1986, Thomas participated as a member of a White House Working Group on the Family that produced a report on the family that severely criticized landmark constitutional decisions protecting the right to privacy. The report went so far as to excoriate a decision protecting a grandmother's freedom to open her home to her orphaned grandchildren, without government restriction.[27] It particularly targeted cases in the area of reproductive freedom, and called for them to be overruled.[28]

In addition to Roe v. Wade, the working group singled out as wrongly decided the Supreme Court's decision in Planned Parenthood v. Danforth, in which the Court struck down a Missouri law that required a woman to obtain the consent of her husband before she could obtain an abortion and a minor to obtain the consent of a parent. The report also criticized the Court's reasoning in Eisenstadt v. Baird, which protects the right of unmarried individuals to use contraception, and in particular the Court's statement that "the marital couple is not an independent entity with a mind and heart of its own."[29] The working group described these, and other cases protecting the fundamental right to privacy, as a "fatally flawed line of court decisions" and indicated that they "can be corrected, directly or indirectly, through . . . the appointment of new judges and their confirmation by the Senate . . . and . . . amendment of the Constitution itself."[30]

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[27] Moore v. City of East Cleveland, 431 U.S. 494 (1971). The Family: Preserving America's Future, A Report to the President from the White House Working Group on the Family 11 (1986).

[28] Id. at 11.

[29] Id., at 12 quoting, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[30] Id. at 12. The Republican Party platforms for 1980, 1984, and 1988 contained strikingly similar language, pledging to work for "the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity

IV. THOMAS' NATURAL LAW THEORY

As we have noted above, Thomas' approach to constitutional interpretation is highly unusual in its invocation of a body of natural law.[31] Appeals to natural law in constitutional interpretation do not necessarily portend decisions that would restrict the rights of individuals and overturn core constitutional values. Depending on how its methodology and content are specifically understood, natural law might point in various directions. But Thomas' approach to natural law is disturbing, both as a matter of methodology and as a matter of content.

As a matter of constitutional method, natural law is disturbing when invoked to allow supposedly self-evident moral "truth" to substitute for the hard work of developing principles drawn from the American constitutional text and precedent. As we have noted, Judge Thomas has not sought to explain the social and historical reasons supporting the conclusions to which "natural law" leads him. The more traditional common law and constitutional method of open-ended, case-by-case development is a core strength of the American judicial approach to justice for a diverse and ever-evolving country. Natural law norms are not necessarily antithetical to a reasoned, case-by-case approach. But Judge Thomas seems to invoke "higher law" as a substitute for explanation. His concept of natural law appears to mean strict adherence to a perceived set of fixed and undoubtable normative truths. As such, it does not accommodate the principle and precedent exemplified in the work of conservative Justices such as John Harlan and Lewis Powell.

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of innocent human life." Thomas listed the Republican Party's position on abortion as the first in a list of conservative positions that he believed should attract African Americans to the Republican Party. Thomas, "How Republican can Win Blacks," Chicago Defender, February 21, 1987.

[31] For at least the last fifty years, constitutional interpretation on the basis of natural law has been conspicuously absent from American legal philosophy and judicial opinions. Professor Laurence Tribe commented that Clarence Thomas "is the first Supreme Court nominee in 50 years to maintain that natural law should be readily consulted in constitutional interpretation." Tribe, "Natural Law" and the Nominee, N.Y. Times, July 15, 1991. As Professor John Hart Ely noted, "[t]he concept of [natural law] has . . . all but disappeared in American discourse." J.H. Ely, Democracy and Distrust 52 (1980).

When natural law was last in vogue some eighty years ago, it was employed by the Supreme Court to strike down state laws providing basic health and safety protection to working people. The Court asserted a natural law right of employers to be free of minimum wage laws and health and safety regulations.[32] Natural law has been particularly disabling for women. In 1873, the Court upheld the exclusion of women from the practice of law.[33] Justice Bradley wrote that the "civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[34]

The impact that the application of natural law would have on core constitutional principles thus depends on the particular proponent's personal views of the content and source of the natural law principles to be applied. It is therefore imperative that the Senate Judiciary Committee determine with specificity which fixed principles Judge Thomas has in mind when he advocates the use of natural law in constitutional interpretation and how they will affect the Court's role as guardian of American's fundamental rights. As the preceding analysis indicates, Thomas' record contains compelling evidence that the substantive content of his natural law theory is incompatible with continued protection for the fundamental right of privacy, including the right to choose.[35]

V. CONCLUSION

Particularly given the critical moment in the history of the Supreme Court at which this nomination has occurred, the Senate should reject any nominee who is not committed to protecting fundamental individual liberties. We urge the Senate to shoulder its responsibility to determine whether the nominee "has both the

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[32] See, e.g., Lochner v. New York, 198 U.S. 45 (1905).

[33] Bradwell v. Illinois, 83 U.S. 130 (1872).

[34] Id. at 141-42 (Bradley, J., concurring).

[35] In addition to Thomas' writings and speeches discussed above, Thomas has disparaged those who have used natural law arguments in support of unenumerated rights, including the fundamental right to privacy. Thomas, "How to Talk About Civil Rights: Keep it Principled and Positive," keynote address celebrating the Formation of the Pacific Research Institute's Civil Rights Task Force, August 4, 1988; Speech of Clarence Thomas at Harvard University Federalist Society Meeting, April 7, 1988. (This speech was prepared but apparently not delivered.)

commitment and the capacity to protect freedoms the American people have fought hard to win and to preserve over the last 200 years."[36] Our analysis of Judge Thomas' writings and speeches raises serious questions about whether he meets this standard. We exhort the Committee to probe these questions and to approve the nomination only if satisfied that Judge Thomas has the commitment and ability to contribute to the wise elaboration of our Constitution.

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[36] Statement of Senator Patrick Leahy, supra n. 7.

The CHAIRMAN. Thank you very much.

Let me begin, Professor Grey, with you, if I may. If Judge Thomas had not spoken about the application of natural law with reference to the Lehrman article, his views on natural law as stated would not be particularly out of the mainstream. Would they at all be out of the mainstream, assuming he had not spoken, as you characterized, in a dogmatic way?

Mr. GREY. No, I think not, Senator. I think a lot of Americans would affirm their belief——

The CHAIRMAN. Well, not just Americans. There are an awful lot of Justices who believe that natural law does inform the Constitution. And there are a lot of people, a lot of Justices who served on the Court, who share the view that I share, that, at a minimum, natural law is a basis for a limited government, that our rights spring not from a document, but spring from other sources, and that the document represents a document of limited government.

Correct me if I misstate your concern, but what has you concerned is that you believe or at least have a strong concern that Judge Thomas thinks there are natural laws writ large in the sky that are bright lines that should be applied in the area where the Constitution is not clear on the meaning of some of the majestic phrases and words like liberty and property and due process, is that correct?

Mr. GREY. That is my view quite well, Senator. I think the application of natural law has been common in the Supreme Court.

The CHAIRMAN. Now, I think the record should show, since Judge Bork's name has been mentioned, Judge Bork is the absolute antithesis of your concern of what you think Judge Thomas might be. Judge Bork's entire judicial construct for a way to deal with those phrases was to go the other route, to suggest that there is only positive law and there were, consequently, no unenumerated rights in the Constitution, because they were not positively stated and the judge could not roam.

Ironically, in fairness to Judge Bork, he was worried about the same thing you all are worried about. He was worried about Justices roaming the landscape and applying their own subjective judgments to phrases like liberty. I see Professor Michelman is shaking his head no, and I would defer to him for a whole range of reasons. I would be curious as to why that is not correct.

Mr. MICHELMAN. What my head shaking was about—Senator, you notice that my friend, Tom Grey, a moment ago paid you a great compliment.

The CHAIRMAN. He called me a judge. I paid him a bigger compliment when I called him Senator earlier. So we just exchanged compliments. [Laughter.]

Mr. MICHELMAN. He didn't call you doctor, but he called you judge.

Here is what my head shake was about. I think that a part of what we are concerned about here—and Professor Grey referred to this—isn't not just a question of judges roaming about and picking and choosing among their own values as to what they will read into the Constitution. There is a difference in style and spirit of constitutional reasoning that I might try to characterize as the difference between a dogmatic style and a more pragmatic style.

The pragmatic style is the style that sees—tends to see most constitutional cases as difficult, as involving more than one of the great values that animate the Constitution, as, for example, the question of abortion rights involves values of life, of control over one's own life and destiny and one's own physical being, of freedom of conscience, of the status of women in American society and so forth. And the pragmatist sees the task of the constitutional adjudicator as figuring out, on the basis of reasoned deliberation and argument, how best to make all those values effective in the particular context, and in the example I chose the wrenching context of abortion. And the more pragmatically inclined constitutional reasoner doesn't think you can deduce your way to a conclusion, doesn't think that you can get the conclusion for certain, just thinks that after all the arguments are in you have to make a choice and a judgment and hope that you have done it right, and keep listening.

The CHAIRMAN. Now, that is what he said to do.

Mr. MICHELMAN. Well, that certainly is what Judge Thomas' testimony here sounds like. But let me point out—let me first just say a word about the dogmatic style by contrast.

The dogmatic style, by contrast, is the style that tends to see constitutional law cases as simple, that tends to look for and find kind of one master principle whose imminent truth and whose application to the case at hand are both self-evident and all you have to do is go ahead and do it.

Now, if one was looking for a splendid example of the dogmatic style of natural law reasoning, one might go to Lewis Lehrman's article.

The CHAIRMAN. I get the point.

Mr. MICHELMAN. If one were looking for another splendid example of a dogmatic style, one might go to Justice Scalia's dissenting opinion in *Morrison* v. *Olson.* And what we know on the record is that Judge Thomas very strongly praised and commended those two splendid examples of the dogmatic style of natural law reasoning——

The CHAIRMAN. And one might look to the writings of your colleague.

Mr. MICHELMAN. I am sorry?

The CHAIRMAN. Or one might look to the writings of your colleague at Harvard, not at the law school, but—I know you don't want to mention that.

Mr. MICHELMAN. But he—the thing that we can't help noticing is that in the writings and speeches we find Judge Thomas putting forward such examples, as in my judgment unambiguously putting them forward as good models for constitutional adjudication.

The CHAIRMAN. I understand your point. I think it is a point well taken and one that I know I have to wrestle with.

Ms. LAW. Can I just follow that——

The CHAIRMAN. Let me ask you a specific question, if I may, professor, before my time is up, and then you can answer, including what you wanted to mention.

I questioned the judge extensively on *Eisenstadt.* I will get the record and make sure you have a copy of it. I don't have it in front of me at the moment. Although he started off giving me the equal

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.

The CHAIRMAN. I appreciate your frankness because one of the things that has—well, my time is up. I do appreciate your candor on the part of all three of you.

Let me yield to my colleague from South Carolina.

Senator THURMOND. Mr. Chairman, I was late. I will forgo any questions.

The CHAIRMAN. OK. Senator Kennedy.

Senator KENNEDY. Let me just ask the panel generally, given what—I think you probably answered in these early exchanges, but given what Mr. Thomas, Judge Thomas has stated about his position on the right to privacy prior to the time of the confirmation hearing, and then also his response to the various different questions. Do you find that there is a consistency here? How do you react to those exchanges? Are there consistencies, inconsistencies, given the wide range of both articles, writings, and his response in various degrees to the different members here on the right to privacy?

Mr. GREY. Just briefly, Senator, I had trouble with his testimony here that he had not thought about *Roe* v. *Wade* or had not spoken to other people about *Roe* v. *Wade* or expressed his opinion on that. It seemed hard to believe.

Then as far as consistency goes, you know, I think he has equivocally moved toward accepting something that he hasn't accepted before, as far as we know, which is the right of single people to have privacy, constitutional privacy rights under *Eisenstadt.* That question has been discussed already.

Ms. LAW. On abortion, this was not a confirmation conversion. There was a substantial difference between his prenomination statements, which were very critical of *Roe* v. *Wade,* and his statements here where he runs away from the issues. There is a way in which we could feel more comfortable with a confirmation conversion because you might try to evaluate whether it was sincere or not. But he did not affirm a concern with the core issues of women's capacity to control reproductive choice in the abortion context period, no matter what the circumstances. So there is that consistency, but there is a real inconsistency in terms of his willingness to go to be aggressive in attacking *Roe* v. *Wade.*

Mr. MICHELMAN. A quite obvious inconsistency is that between Judge Thomas' testimony here that he has an open mind about the abortion rights question and his prior declarations about that topic, which we all know about and are in the record and include the Heritage speech.

I don't have any problem with a man's changing his mind. I don't have any problem with a man's saying, I once thought and said because I thought it was true that Lehrman's article is a splendid example of constitutional argument with which I agree, and I have come to understand that it is not and let me explain to you what was wrong with my prior judgment.

What to me is troubling—and I want to say this committee invited, offered to Judge Thomas every opportunity to engage with it in that kind of colloquy, in serious open discussion about the issues involved in the abortion rights controversy and about how his prior views on that topic relate to his present views. And what is baffling

to me and disappointing and worrisome is that he did not take you up on it.

And what is especially baffling and troublesome to me is that he didn't do what I would have hoped he would have done, which would have been to start it off by frankly facing up to the obvious meaning and the obvious significance of the Heritage speech and other things that he had said. That he did not do.

Instead, he said that that speech and those other writings simply do not mean what to my mind they plainly and incontrovertibly do mean. That to me is a distressing and worrisome factor about these hearings.

Senator KENNEDY. Do you think everyone at the Heritage Foundation understood what he was talking about?

Mr. MICHELMAN. I certainly do.

Senator KENNEDY. This is just speculation. Given both what he has written and what he has stated in response to questions here, what would be your prediction of what he would do in a similar kind of factual situation of the *Roe* v. *Wade?*

Mr. GREY. You can never be sure, Senator, but with this judge I would say I would be more confident than usual in predicting his vote, that he would vote to overrule it and would extend that overruling very far. It is important to see that it is not simply the issue of overruling *Roe* v. *Wade* as such. It is how far you press beyond that and how you resolve the many difficult issues that would still remain if *Roe* v. *Wade* were overruled.

Mr. MICHELMAN. In all candor, there is some real uncertainty here, but if the question is that I have to stake a bet one way or the other and my life depends on it, there is no doubt that I am going to bet that he will vote to overrule *Roe* v. *Wade.*

Senator KENNEDY. Professor Law.

Ms. LAW. I would certainly concur with that, and that would be one vote. I don't think that he is going to get other Justices to join the position that he staked out prior to his nomination. But as Professor Michelman indicated earlier, it all comes up in complex packages, and it comes up in terms of your right to speak about abortion or your right to travel for purposes of getting abortions. And I suspect that in all of those contexts, we would see him as a voice for a more extremely conservative position than we have yet seen on the Supreme Court.

Senator KENNEDY. OK. Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

I notice that this paper that you have submitted to us was written on September 5. I think there are some really inflammatory statements in here I would like to ask you about.

On page 4: If confirmed, he would interpret the Constitution in a manner that would dangerously restrict constitutional protections for civil rights and civil liberties. Then you say this report focuses upon these alarming aspects of Judge Thomas' record.

Well, I don't know whether you are talking about his record as a judge or whether you are talking about his record as a policymaker in Government. But either way, you know, what you say about Judge Thomas here doesn't appear to me to be the judge that I have looked at face to face for the last 5 days.

Did you have a chance—well, I shouldn't say did you have a chance. Did you review the legal opinions written by Judge Thomas and the 122 other opinions that he joined in? Did these play a part in your analysis?

Mr. GREY. No, not my analysis, Senator.

Senator GRASSLEY. How about you, Mr. Michelman.

Mr. MICHELMAN. No.

Ms. LAW. I looked at some of those, but it focused—the purpose of this document was primarily to raise questions for the committee. And I don't have the text in front of me, but when we say things were alarming, what we are saying is that his prior record contains a lot of alarming statements that—at that point we are not condemning him. We are just urging you to question him closely, which you have done. And on many issues, the answers have been explanatory, and on other issues they haven't been. On other issues, they have been more disturbing than the prior record.

Senator GRASSLEY. When a person has served 18 months on the second highest court in the land and he is going to highest Court in the land, and he has written 18 to 20 opinions and he has been involved in 120-some, I don't see how if you are going to judge his competence for being on the Supreme Court or what he might do there, if there is any fear in his being there, that you could ignore that.

Mr. GREY. First off, Senator, it wasn't about his competence. His competence in the basic sense hasn't really been called into question. I accepted the representations made from all sides, both Judge Thomas' supporters and his detractors, that the decisions he had been involved with on the court of appeals had not raised fundamental issues one way or the other, so that he did not provide a sound basis for making a judgment about how he would decide the kind of issues that come before the U.S. Supreme Court which we are particularly concerned with here.

Mr. MICHELMAN. It really is relatively rare—it is not that it never happens, but it is relatively rare for a judge serving on a court of appeal to face the kind of responsibility for constitutional interpretation that might be seriously revisory of prior interpretations or that might be operating in a field in which there really is no prior precedent, in a way such that a judge's underlying philosophies and values and outlooks could enter seriously into the decisionmaking. A judge on the court of appeals in constitutional cases in the overwhelming preponderance of cases will find what appear to be binding precedents from which a judgment can be reasoned.

That is not true of a Supreme Court Justice. The judicial offices we are talking about here are two quite different offices. And given what Professor Grey has said about the representations coming from all sides, that unsurprisingly in Judge Thomas' 18 months on the court he hasn't come across a case that really would have put him to the test in terms of the kind of concerns we raised. We felt it appropriate to say what we had to say.

Senator GRASSLEY. Well, we were concerned at his confirmation hearing for the court of appeals about his views on natural law, and he was asked an awful lot about them. We are concerned about it now. But you were concerned because that is part of—that is the basis for the paper here. And not once has he touched on or

used natural law as a part of the rationale for these decisions he has written. It seemed to me like that would be significant.

Mr. GREY. Senator, that is my point that I tried to make in my opening statement; that he has said that he thinks the appropriate role for natural law in constitutional adjudication is implicit and pointed to Justice Harlan's dissent in the *Plessy* case as his example. That I believe is what he is likely to do on the Supreme Court, not say the Constitution says this or the statute says this but natural law says this and that wins, but rather in interpreting the liberty clause or the equal protection clause or the privileges and immunities clause bring to bear his prior stated version of natural law in interpreting those clauses. And that is what alarms me, and that is what I fear we will see.

Senator GRASSLEY. Well, there hasn't been anything you have heard from him in the last 5 days that relieves some of that suspicion you have, that concern you had?

Mr. GREY. Well, in my case, no. He certainly sounds different—he sounded different here in tone. He sounded very measured, very different in tone from the speeches. His explanation for that was that he was speaking as a policymaker then and as a judge now.

The thing is that he was speaking as a policymaker then about constitutional questions, about questions of constitutional law, and to a certain degree a Supreme Court Justice, once confirmed, is more like a policymaker in terms of the lack of constraint than he is like a sitting judge who is before a Senate committee scrutinizing him. So in some ways, the statements as a policymaker or an independent political speaker are more revelatory of what someone is likely to do on the Supreme Court, where there is no recall and there is no recourse.

I am not saying I don't believe what he was saying. I am sure he believed what he was saying. But I think you all must understand how tempting it is to say what—to come to believe what one wants—what one knows is expected in a situation like this. It is a high pressure situation, and I would place more credence on the long-term record.

Senator GRASSLEY. Professor Law, you almost suggested a litmus test on the abortion issue. If he had been right on the abortion issue, would he otherwise be qualified to be on the Supreme Court, in your judgment?

Ms. LAW. That is a hard hypothetical. It is not, I don't think, a litmus test on any particular issue, certainly not that a person to be confirmed has to take a particular view in a particular factual context. But I think it is the case that there are some basic principles—like, for example, the principles articulated in *Brown* v. *Board of Education* or the principles articulated in *Griswold* v. *Connecticut*—that at this point in our history it is fair to ask Supreme Court Justice nominees if they agree with those basic principles.

I believe that *Roe* v. *Wade* should be added to that list. It is a precedent that we have had for 17 years. And I am not saying that a Justice has to take this view or that view or that view. But I do think it is essential at this point that a nominee be willing to talk about in the way Professor Grey suggested is the mainstream of our constitutional adjudication and history, talk about the values

and the principles that they would bring to that process of decision-making.

I don't, with respect, think that Judge Thomas was willing to do that on that issue in particular.

Senator GRASSLEY. Well, I am done questioning, but from a practical standpoint, if every Senator with a pet project or pet political issue or pet constitutional issue we have would expect a litmus test-type approach from everybody who came before us, we would never confirm anybody to the Supreme Court.

Ms. LAW. Senator Grassley, with respect, I don't think basic commitment to racial equality, to gender equality, to core notions of privacy and autonomy are pet projects. You know, they are—the Constitution has——

Senator GRASSLEY. Well, I think——

Ms. LAW [continuing]. Free speech would be another. The Constitution has a substantive value because it has been given content by Justices over the last 200 years. And it is legitimate to be concerned about that content.

Senator GRASSLEY. Well, with the exception of one or two of the issues you just mentioned, he has already spoken to those before this hearing, in support of his view, and would agree in the same general approach you did of those being very basic and I would too. But I am still saying—whether it is a 200-year history or something as recent as 10 years—if every Senator took that view, we would never confirm anybody.

I am done.

The CHAIRMAN. Thank you very much.

Senator Simon.

Senator SIMON. Just very briefly, and I want to thank all three witnesses. I will just comment on a point that Professor Grey made that I think is extremely important.

In connection with the Washington Post editorial, and the idea that we should not consider ideology or philosophy, whoever wrote that editorial was a major in journalism and not history. It is interesting. It is used by both sides. When you have a liberal President, the liberals say, oh, you can't look at ideology. When you have a conservative President, it goes the other way.

But historically, from George Washington's first term on his nominee for Chief Justice, from that point forward it has always been a consideration. It was assumed by the Constitutional Convention that it would be a consideration. Up until the next to the last day of the Constitutional Convention, the Senate was naming the Supreme Court, not the President of the United States. We go through this phrase "advice and consent." We have forgotten totally about the "advice" part of it. And some people want us simply to rubber stamp the nominee. That should not be what we do. I think your point is well taken, and I appreciate the testimony of all three witnesses.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Professor Grey, you refer to the documents which have been submitted on September 5 signed by a number of professors, including

you, and I note there is a comment on page 4, the heading of section No. 2, "Judge Thomas endorses a natural law right to life from conception." My question is: Where does the reference come from that he views that from conception?

Mr. GREY. That is what is implicit in his endorsement of the Lehrman article, his picking up the Lehrman article and saying it was a splendid application of natural law.

Senator SPECTER. So it comes from what Lewis Lehrman said——

Mr. GREY. That is right.

Senator SPECTER. Is there anything more that you know about to your contention about Judge Thomas endorsing the Lehrman article besides that one line in his speech?

Mr. GREY. No, but I think that is a very significant line, Senator. I think he said—he did not say Lewis Lehrman is a great benefactor of the conservative cause. He said—Lewis Lehrman is a nice man. We all respect him. He said, "This is a splendid example of applying natural law theory," and he referred to it in his article about the right to life, his argument about the right to life. So he wasn't referring to the abstract fact that he endorsed natural law, but to the fact that he had applied natural law to the right to life.

Senator SPECTER. Well, that sentence says, "But Heritage trustee Lewis Lehrman's recent essay in The American Spectator on 'The Declaration of Independence and the Meaning of the Right to Life' is a splendid example of applying natural law."

Mr. GREY. Right.

Senator SPECTER. That is the sole basis for the contention that Judge Thomas endorses life beginning at conception?

Mr. GREY. Yes, it is. It is the only clear statement that he has made on that. He has had some other hints, but that was the only clear statement, I thought.

Senator SPECTER. You say there are other hints?

Mr. GREY. Yes. His——

Senator SPECTER. What hints?

Mr. GREY. Well, the reference in the Harvard article on the privileges and immunities clause to *Roe* v. *Wade* as the decision that conservatives are most concerned with. Now, that doesn't go nearly this far. That simply suggests——

Senator SPECTER. That doesn't say anything about——

Mr. GREY. From the moment of conception——

Senator SPECTER [continuing]. Conception or about natural law.

Mr. GREY. Oh, yes, it does, because the whole thrust of the article thereafter is to say that if we apply natural law in constitutional reasoning we can get past these problems.

Senator SPECTER. He has written quite a lot on natural law, but it has been largely in the context of the Declaration of Independence as a source for eliminating slavery or as a source for the decision in *Brown* v. *Board of Education.* There is a reference to natural law as it relates to economics. But is there any reference anywhere—Professor Law, you also in your statement refer extensively, in criticism of Judge Thomas, to the right—to the abortion issue. Is there anything else in any of his other writings which supports your conclusion that he would rely on natural law to deal with the abortion question?

Ms. LAW. I think it is basically a matter of putting together the fact that he has, in the Harvard article and in other places, criticized *Roe* v. *Wade* with the fact that he—and you are quite correct that normally when he talks about natural law, he uses the example of slavery, which is a relatively less controversial example today. But it is basically, apart from Lehrman, putting together the fact that he is critical of *Roe* v. *Wade* with the fact that he is very enthusiastic and recommends to conservative audiences that we adopt a natural law approach to judicial decisionmaking in order to develop a way of approaching problems that conservatives will find attractive.

Now, I don't know what that means. Abolishing slavery is not an issue that is going to bring conservatives—or black people into the conservative fold or that is going to be attractive to conservatives particularly. So in terms of a concrete agenda, the place where natural law has been used in recent years has been primarily in relationship to the abortion debate, a debate about which he is very conservative.

Senator SPECTER. But what you have is the reference that *Roe* v. *Wade* is the subject of criticism by conservatives, and you have that single line referring to the Lehrman article, and that is all.

Ms. LAW. Senator Specter, that is why that letter a couple weeks ago didn't conclude by urging you to reject the nominee. The whole purpose of that letter was to say ask good questions because here are things that we find alarming. And you did ask good questions, but I don't think you got answers to suit your questions.

Senator SPECTER. Well, let me ask the question of you again, Professor Law. That is all there is. The one statement about being critical of *Roe* v. *Wade*, conservatives being critical, and the single line about a reference to Lehrman's article. That is the sole basis for your contention as to Judge Thomas' stand on abortion and natural law relating to abortion.

Ms. LAW. Actually, I think the major evidence now is the response he gave to you in these hearings. The fact that he was so forthcoming on so many subjects and so concrete and so detailed and so utterly unwilling to discuss abortion in response to good questioning on this committee.

Senator SPECTER. Well, I am familiar with what he said here. I am just trying to find the basis which is a long statement by you, Professor Law, and a fairly long statement by a number of people which is focusing virtually exclusively on the privacy issue, and I am just wondering if you have anything more to base it on other than those two statements. And I think I understand your position.

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

The CHAIRMAN. Before I yield to Senator Leahy, I am going to explain what is about to happen in terms of a vote. Momentarily, there will be a vote. As a matter of fact, I can hear it coming now with the beepers, so there will be a vote and it is on an amendment that as the chairman of the European Affairs Subcommittee, I have jurisdiction over, and I am going to be required to spend a little time on the floor after the vote.

Senator Simon has been gracious enough to agree to chair the hearing, or Senator Leahy if he is going to stay, whomever, and we will go to the next panel after this panel is completed, so we will

have one more panel tonight. I will try to come back before that panel is completed. This will be the only time I will have absented myself from these hearings, but I must be over on the floor for a moment.

Now, with that, let me suggest that we go to Senator Leahy.

Senator LEAHY. I will take just 1 minute.

The CHAIRMAN. Please go right ahead. Senator Leahy.

Senator LEAHY. Mr. Law, I was not going to really ask any questions here at all, but I heard reference saying almost in a flippant way we would just be concerned about why you are concerned about remarks regarding the Lehrman article on the part of Judge Thomas, but that was a pretty substantial remark you made, saying wholeheartedly applauded it.

I read the Lehrman article. If one were to follow specifically the arguments made in the Lehrman article, it would make all abortion unconstitutional, am I correct in that?

Ms. LAW. Absolutely correct, it would constitutionally require that abortion be treated as murder, whatever the circumstances of the woman or the desires of the individual State.

Senator LEAHY. Whether there be rape, incest, whatever it might be?

Ms. LAW. That is absolutely correct. I think if you think about a nominee who cited an article advocating slavery and describing it as a superb example of the application of natural law to protect historic rights of property ownership, we would have no trouble in seeing that as a serious problem.

My complaint is that I feel that women's reproductive rights, however they are defined, are being treated as something less than fully serious.

Senator LEAHY. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. I might point out, Professor Law, there is probably no issue since slavery that has divided a nation as much as this issue has.

Let me yield now to my colleague from Colorado.

Senator BROWN. Thank you, Mr. Chairman.

Professor Law, I want to go back to the judge's record on the circuit court of appeals. My understanding is that he is now joined in approximately 120 opinions. Can you help us in looking at those opinions, of those 120 how many would you disagree with the conclusion he has reached?

Ms. LAW. I cannot really help you on that, because, as he indicated in his testimony here earlier this week or last week, many of the cases that he was involved in were regulatory technical opinions on which I could not form an opinion, because I am not sufficiently sophisticated in the areas in which—and as Professor Grey indicated, people studied those opinions with some care and did not seem to think they were a major source of concern, so I have not done that detailed analysis myself.

Senator BROWN. Well, are there any of them which you would cite as ones which you would be in disagreement with the conclusion?

Ms. LAW. I cannot think of one, no.

Senator BROWN. Professor Grey, my understanding is that you, along with Professor Tribe of Harvard, are two of the most preeminent scholars in America, at least in terms of the writing that you have done on natural law. For me, it is hard to imagine that Stanford would not have the claim on preeminence over Harvard, but perhaps there is disagreement in the academic community about that.

The CHAIRMAN. But not at Stanford, there is no disagreement at Stanford, is there?

Mr. GREY. I am speechless. [Laughter.]

Senator BROWN. You mentioned at least a reference to two kinds of natural law, or at least I suspect there may even be more, but at least two general approaches to natural law. You described one as a lurking kind, which I assume would be one that we might deal with alarm. Could you help us with how you would differentiate the one that is benign and the one that may be thought of as of concern?

Mr. GREY. My colleague Frank Michelman, I agree with what he said and I will paraphrase it. Basically, there is an approach which I think has been very widely followed by the great Justices of our Supreme Court, which is the attempt to develop through reasoned elaboration a structure of doctrine based on the text, based on the history and based on the fundamental values, trying to draw these together in a coherent way, and treating individual cases as tough problems to be wrestled with in the light of that set of materials, which includes fundamental values which might be called natural law.

Then there is another approach, which treats legal and political and moral problems like problems in Euclidean geometry, where there are certain axioms, fundamental truths which are self-evident, which dictate answers, and that is not—I definitely detect that tendency in Judge Thomas. It is not unique to him, though it is relatively rare among lawyers today. I think it was somewhat common in the 17th and 18th centuries for lawyers to believe or at least aspire to some kind of deductive geometric kind of legal science which could answer all tough questions.

Senator BROWN. You have a concern over someone who views it as a simplistic answer to legal problems?

Mr. GREY. That is right.

Senator BROWN. My few years of exposure to law professors taught me that nothing is simplistic. I assume, then, that you, in reviewing his statement that he would not use natural law as a means of interpretation of the Constitution, that that has not allayed your fears or concerns in this regard?

Mr. GREY. No. Actually, I found Judge Thomas more consistent than other people did on this, as I read very carefully what he said in his writings on the subject before the hearing, which did not—he said, for instance, the quote that I gave from the Harvard Journal article, Justice Harlan, who he took as a model, the first Justice Harlan, his reliance on political principles was implicit, rather than explicit, as is generally appropriate for Supreme Court opinions, and he went on to say that he would do that, too, that he would regard him as background or make indirect, rather than

direct reference or see natural law as incorporated, because the Framers believed in it in text of guarantees like the liberty clause.

My concern was just that once you get it in indirectly, if you have the kind of approach Judge Thomas displays in his prejudicial speeches, indirect is enough and implicit is enough to march very confidently to these very firm conclusions that he tends to reach about economic rights, about privacy rights, and so on, about color blindness as the proper approach to racial equality questions, march very confidently and swiftly to those conclusions, and that is what disturbs me.

Senator BROWN. In his 120 or so opinions on the circuit court of appeals, are there any of them in which you see signs of the use of this simplistic natural law?

Mr. GREY. As I said, Senator, I have not read a one of his opinions. I passed on them, relying on the fact that both his proponents and his detractors had said that there was no guidance there to be gained on his constitutional philosophy.

Senator BROWN. The Bar Association has found, I guess to quote their standard—and you appreciate that my guess is standards I suspect are not chiseled in stone, but perhaps may be more flexible than they appear from paper, but what they say is the nominee must have outstanding legal ability, wide experience, to meet the highest standards of integrity, judicial temperament, and professional competence.

They indicated, after talking with roughly 1,000 people in interviews, 150 deans and faculty members of law schools and 300 practitioners, I suspect that those are cumulative figures, that the 1,000 includes everyone and the others are breakout, in reviewing the judge's record, do you come to the same conclusion the Bar Association does? Do you conclude that he has outstanding legal ability, wide experience, and the highest standards of integrity, temperament, and professional competence?

Mr. GREY. Again, Senator, I have not read the opinions, which were a big source of their evaluation. I have read his speeches and I have read his published law review articles, and I thought the scholarship there was not particularly strong, but he does not put himself forward as a professional legal scholar, so as far as his competence goes, I have no strong views.

I certainly do not see him as a standout nominee, but as a number of Senators have pointed out, not everybody who goes on the Supreme Court is a standout nominee, and indeed some people who have had less than stellar backgrounds have turned out to be great Justices, so really that part is not something to which I can really speak.

Senator BROWN. Am I correct in assuming that the other members of the panel do not agree with the Bar Association evaluation, either?

Mr. MICHELMAN. I certainly would not try to judge Clarence Thomas' qualifications on the basis of his scholarship. He was not primarily a scholar. I think that it is fair to look in his scholarship and his speeches for indications of the bent of his mind, the tendency of his thinking, his habits of thought, but I would not look there to try to appraise that material on some standard of scholarship, to ask whether he is qualified for the Supreme Court.

I think that in order to gauge this man's abilities, you would have to look to the walks of life in which he primarily invested his energies. You have to look to the testimony of those who appraise his work at EEOC, and in the positions that he held professionally prior to EEOC.

If I were to judge on the basis of the testimony here, I would say that Judge Thomas is a man of considerable ability. I have never raised a question about that and I would not now. My testimony was that it is not reasonable to think of him as being in the class about which one might plausibly say he is the best qualified person.

Senator BROWN. Were any of you among the 150 professors that were consulted by the Bar Association?

Mr. MICHELMAN. I was not, sir.

Mr. GREY. Nor was I.

Senator BROWN. I see that we have got a vote on, and let me just conclude very quickly with one question. Professor Grey, you had referred to the standard to be used in selecting or approving or confirming a nominee for the Court. One of our distinguished members is quoted in the Thurgood Marshall confirmation of indicating that the basis should be on qualifications and not on philosophy. I take it your feeling is that philosophy should be a part of the confirmation process.

Mr. GREY. Yes, Senator.

Senator BROWN. I must say I agree. I think philosophy is an appropriate venue, but I wonder, would you think the standard for the philosophy used should be the standard of the President making the nomination?

Mr. GREY. No, Senator, I think the Senate should exercise——

Senator BROWN. I did not mean to imply that you did.

Mr. GREY. I am sorry, then I misunderstood the question.

Senator BROWN. I am saying what standards should we look to, in terms of philosophy.

Mr. GREY. It seems to me Senators have to make independent individual judgment about what they think will be good for the country, just as I believe the President does, using his political views, when he decides what nominee should go forward. So, Senator can be expected to disagree, because they have different views of what is the proper future direction for the Supreme Court.

Senator BROWN. Just a couple of quick observations, Mr. Chairman, and I will yield back the balance of my time.

It strikes me, if we have a President who has as different philosophy than the majority of the Senate, we find ourselves in an unusual circumstance that is not easily resolved, and perhaps there is some explanation here.

It also occurred to me, as I thought about the testimony we have received, that when Clarence Thomas had clearly indicated he believes in a constitutionally based right of privacy; two, that my recollection is that he indicated that he had not agreed with Mr. Lehrman's conclusions in response to questions brought by this panel; third, in his discussion of natural law, he specifically indicated that he would not use it to adjudicate the Constitution; and, fourth, we had as many questions as I can imagine on his attitude of *Roe* v. *Wade*.

I confess that the panel has made some interesting points, but I do not know how you would forecast this, except to say that the judge has said very clearly he had not made up his mind.

Thank you, Mr. Chairman.

Senator SIMON [presiding]. Senator Thurmond.

Senator THURMOND. Thank you very much.

I am going to ask a couple of questions. I think you can answer them in one word, unless you especially want to explain them. I have to go and vote in just about 3 minutes.

First, we will start with you on this end, Professor Grey. Isn't it true that the theory of natural law does not require that a judge reject the Constitution, statutory intent or relevant, law?

Mr. GREY. That is right, Senator.

Senator THURMOND. Professor Michelman?

Mr. MICHELMAN. The same question, yes, the same answer.

Senator THURMOND. Professor Law?

Ms. LAW. That sounds right.

Senator THURMOND. The second question: Isn't it true that a judge is bound by the Constitution and statutory law, even if he believes in natural law?

Mr. GREY. Right, though he may think natural law is part of that Constitution.

Mr. MICHELMAN. The same answer.

Ms. LAW. And it depends, I mean it will influence his interpretation.

Senator THURMOND. He is bound by those, regardless of what he believes in, isn't it?

Ms. LAW. Of course he is bound.

Senator THURMOND. The Constitution and statutory law?

Ms. LAW. Yes.

Senator THURMOND. You have all answered them favorably. Thank you very much, and good night.

Senator SIMON. We thank you very much for being here and for your testimony.

Senator SIMON. Our next panel has four distinguished witnesses. The first is the Honorable Roy Allen, State senator from Savannah, GA; the second is one of the most distinguished Americans, the Honorable Griffin Bell, former Attorney General of the United States, now practicing law in Atlanta; the third member of the panel is Judge Jack Tanner, senior Federal district court judge for the western district of Washington, in Seattle, Judge Tanner is one of the founders of the National Conference of Black Lawyers; and the final member of this panel is Margaret Bush Wilson, former chair of the board of the National Association for the Advancement of Colored People.

We are very happy to have all of you here. I am particularly pleased to welcome Judge Bell, who is an old friend, a long-time friend, and, as I indicated earlier, one of the most distinguished Americans. We are honored to have you here any time, Judge Bell.

Judge BELL. Thank you very much.

Senator SIMON. Senator Allen, we will be pleased to hear from you first.