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*.