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