

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