

life. So it was interesting to me and I share Faye's response, that he immediately focused very technically on what it would mean rather than on the huge dimension of social and human problems that would result.

Ms. WATTLETON. And I think it reflected our worry about his general judicial temperament, if I may, with respect to seeing the impact of the law in people's lives, and seeing the law in a narrow intellectual context and not in a living context. If there is any inspiration that we can gain from constitutional protections it is that it has been enduring, and that in the context of contemporary life it has extended protections to greater numbers and segments of American society.

So to reduce those protections to the simple equation of whether there would be tension between Federal and State jurisdictions, or for that matter, whether illiterate voters would dilute literate voters as a mathematical problem was very distressing to us.

Senator KENNEDY. I have no further questions, Mr. Chairman.

Thank you, very much.

Ms. MICHELMAN. Thank you.

The CHAIRMAN. Thank you, very much, Senator.

Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

How do you do, ladies? Nice to see you today.

I want both of you to know and I think you are aware of my position on this terribly anguishing matter. I think you know that I am in favor of a woman's right to choose. I have held that view, formed within 2 years after *Roe v. Wade* through a legislative debate.

I am also very supportive of most of the objectives of Planned Parenthood. I have stated those things and have provided some of my own personal funds for dues over the years to some of those groups.

But I really believe you are making a big mistake on this one. That's too bad. You know, it's perfectly all right, but I think these things are going to come up again. There are going to be other Supreme Court choices when you are really going to need to be in the trenches. This is not one of those cases. This is my view.

I believe you are seriously in error in demanding that Judge Souter answer specific questions on this issue, because he is a sitting judge. And since we have heard a remarkable array of extremely technical discussions over the last few days, which are like going to law school again, let's not forget Canon 3(a)(6) of the ABA Code of Judicial Ethics. It prohibits a sitting judge, and that is Judge Souter, from comment on a "pending or impending matter" likely to come before the Court. He is prohibited from doing that, absolutely prohibited under the ethics of the ABA, who have given him a rating that is the highest they can give.

Nearly everyone has conceded that abortion will be before the Supreme Court again, and thus, that subject is covered by the ABA Code. You are really asking Judge Souter to violate the rule of judicial ethics in order that your organizations, both of them, can have advance knowledge of his position on the particular issue of abortion.

Why are you asking of Judge Souter that which he is forbidden to answer by the Code of Judicial Conduct?

Ms. WATTLETON. Well, Senator Simpson, I would seriously object to your characterization of our asking Judge Souter to comment on the constitutional protection of reproductive privacy for the basis of our organization's foreknowledge of how he might rule.

As I spoke earlier in my comments, our views represent the overwhelming majority of the American people and I sit here, not only as head of an organization but also as an American, the American people have a right to know.

Yes, there are judicial ethics. As a matter of fact, I think that there is a law that forbids the judge to answer questions about specific cases, but virtually every aspect of American life at some time comes into question and must be adjudicated. We believe that this is an important aspect of American constitutional law that deserves to be probed very thoroughly. Perhaps it should be seen as something that is integrally important to the integrity of women in this country. We do not consider it an issue that we want to take a chance on. We may have a difference of opinion, but such is the democratic process. It is our opinion without a clear understanding of his judicial philosophy in this area, not how he will rule on *Roe v. Wade*, that Mr. Souter should not sit on the Supreme Court.

Ms. MICHELMAN. I would like to share that. I don't think any member of this committee asked Judge Souter specific questions about specific cases, or specific facts that may come before a case, or may be involved in a case.

What the attempt was to get at how he would, what kind of legal reasoning, legal approach he would use to evaluating whether there is a fundamental constitutional right to privacy. He did, as I said earlier and as Faye has said, he was more forthcoming in other areas of law where, in fact, the Court will have to rule in the future. He singled this one out and we think it is not acceptable that he should be able to single this out and raises too great a risk.

Senator SIMPSON. I see. You know, we talked about the issue of gender discrimination, first amendment free exercise, and those issues, critical issues. Those are much broader in scope than the question, do you support a constitutional basis for abortion rights?

You know that and I know that. Judge Souter was granted latitude on those broader issues, but he simply is not granted this kind of latitude on this specific issue of abortion.

Ms. WATTLETON. I might point out that Mr. Souter chose not to answer the question do you believe that the Constitution protects the right not to procreate. He declined to answer that after having established that he believed that it protected marital privacy.

Senator SIMPSON. I know that. I guess I can only judge that you wish Judge Souter to advise all political litigants that he is not impartial and not using the tools of a judge if he were to hear an abortion case. I think that is what you are asking him to do.

Ms. WATTLETON. I believe what we are asking him to do is to demonstrate his commitment and that he will champion our constitutionally protected rights. Just as I would not want to see him openminded about whether I have the right to a symbol in this room today or whether there will be an enshrinement of a particu-

lar religious doctrine in the Constitution of the United States, these constitutional rights must be protected as well.

Senator SIMPSON. I'm on your side, but I think you're hurting your cause. If Judge Souter's personal qualifications are not the single most important issue here, then we're wasting our time and that was your testimony—

Ms. MICHELMAN. Wait—

Senator SIMPSON [continuing]. Please, I only have 10 minutes. That is the issue. Are you really saying the only issue in this process is whether or not the nominee will do what you want him to do on one issue? Now, you know, you can talk about single issue all you want, but that's where we are. I remember the cries and the shrieks of "unfair, improper crude," and such when the Reagan administration was supposedly making the abortion issue a litmus test in selecting judges during Ronald Reagan's time. I remember that.

Family values, you know, was an issue of sinister import at one time with regard to that. The moral majority and all that stuff were being hacked to shreds, the litmus test deluxe. Now, you are asking the committee, this committee, the Senate, to apply that very test. And you specifically request this, to overlook the personal qualifications of this splendid man that you have all seen. The country knows exactly who he is now, and you ask us to overlook that, plus his intellect and his knowledge and decide this on a single issue.

He did not single this issue out. He did not single this issue out.

Ms. MICHELMAN. We didn't, by the way, also create the litmus test. We have lived through 10 years of an administration that has, indeed, used the judicial appointment process to further a goal of taking away a fundamental right to choose. In fact, for the first time in our Nation's history we are on the brink of the Court reversing, taking away a fundamental right and I think it is appropriate for Judge Souter to talk about that issue. It is not, as we said, just about legal theory. These are millions of women's lives.

Senator SIMPSON. I know.

Ms. WATTLETON. I would like to also say that we have not asked you to overlook this candidate's qualifications. If a candidate came before you and said that he or she believed that the Constitution protected reproductive rights and was otherwise unqualified, that would not result in our support for that nominee. So I think it is important not to trivialize the significance of the position that we are taking here today.

Just as I doubt that you would confirm this individual if he said that public education should be separate but equal in this country, American women do not believe that this individual should be confirmed declining to say that he believes that the Constitution protects our reproductive choices.

Senator SIMPSON. As I say, I only know what I read in your statement and I know what it says. We have been impressed by Judge Souter's intellect and knowledge but Judge Souter's personal qualifications are not the issue. That is your quote not mine.

Ms. MICHELMAN. That's my quote.

Ms. WATTLETON. That's precisely what I've just said.

Ms. MICHELMAN. That is not the issue, his personal qualifications.

Senator SIMPSON. Fine, but I can say to you that Judge Souter will be confirmed. It is my thoughtful hope that will happen. He will be one of nine on the Supreme Court. He will not be the Supreme Court. How in the world have we gotten into this situation where on each case suddenly this is supposedly the key person? Even if he should be, I don't know where he is on the issue, but I know he has done the absolutely right thing in answering with regard to it that even if he should be antiabortion—I hope he is not, as you seem to be so sure he is. I don't understand how you got to that point. But even the overruling of *Roe v. Wade* will never prohibit abortion. It will come up again and again and again and it will come up in the States. It will never be put away ever, ever be put away.

Ms. MICHELMAN. Oh, Senator——

Senator SIMPSON. Just a moment, please. The issue is going to come up for ever and ever and ever. I hope it will be done in the Supreme Court and I hope it will be done correctly so that women will have that choice.

But you talk about the majority of Americans who support the woman's right to choose and I'm one of those. So why this great inordinate fear of a single nominee to the Supreme Court who you really don't know where he stands on the issue? What is the basis of that inordinate, obsessive fear?

Ms. MICHELMAN. Because the Court is on the brink, for the first time in history, of taking away an established, fundamental right. And that has been accomplished year after year by administrations committed to using the judicial appointment process to attain that goal. That's how we got Scalia, and we have O'Connor, Kennedy. That is why we are understandably a trifle nervous about Judge Souter.

He has said nothing in his testimony to convince us that he, in fact, recognizes a constitutional right to privacy. Senator, I must comment, I can't let go your comment, well, if *Roe* is overturned women will have the right to choose. You know what it was like before 1973, some women died because in one State abortion was illegal.

Women shouldn't have to win their rights or their rights shouldn't be dependent upon their place of residence any more than an African-American should have equal protection based on his or her place of residence.

I don't think we can trivialize this issue that way and that is why we have taken this strong statement. The last thing I want to say is this is politically not an easy thing to do. As I said also in my statement, that the politics are difficult but the principle is what counts here.

Ms. WATTLETON. Senator Simpson, I would also like to say that the reason that we are deeply concerned about this is because we believe in the concept of the Bill of Rights that separates and takes apart from certain political processes, certain basic rights that Americans enjoy and can expect to enjoy as Americans. While you may say that if *Roe v. Wade* is overturned it has very little effect——

Senator SIMPSON. I don't know whether that will happen.

Ms. WATTLETON. Or that, for that matter, it will turn back to the States as the representative of an organization that provides services to millions of women each year, we know the practical application of that, the poor and the young.

That most often means minority women will be the first to be injured and the first to die and that is not what we want to see.

Senator SIMPSON. I know, but you see you have effectively diverted it again and again and again. We are back to the issue of a man that you have watched and heard. A man who is bright, intelligent, studious, caring, chivalrous, patient, probative, civilized, and a great listener and if that ain't enough for you, I think you are making a real mistake.

Ms. WATTLETON. I think we have a difference of opinion and we believe in the process.

The CHAIRMAN. I think that is clear, you do have a difference of opinion. [Laughter.]

Ms. MICHELMAN. We do have a difference of opinion.

The CHAIRMAN. Let me ask you one question, because I did not understand one thing you said. Had Judge Souter said, "I believe that the right to determine whether or not to remain pregnant is a fundamental right of privacy," even though that would not have told you how he would rule on any case relating to abortion, because it would not tell you what burden of proof he would think is necessary to interpose the State's will between an individual's exercise of that right and the State's requirement that they put up, if he had merely said it is a fundamental right that continues after pregnancy, would you be here this morning?

Ms. WATTLETON. If he had said that it was a fundamental right that continued throughout procreation and throughout pregnancy, he would have said that the State must show—in essence, he would have been affirming *Roe*, which is to say that the State must show a compelling interest in order for it to be a fundamental right to intercede and to prevent the exercise of that right.

The CHAIRMAN. I am not asking you what it means. I am asking you whether or not you would be here.

Ms. WATTLETON. That is the way we interpret it.

Ms. MICHELMAN. Probably not.

Ms. WATTLETON. We probably would not be.

The CHAIRMAN. OK. I thank you.

Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman.

You equate the *Brown v. Board of Education* cases with the issue and the problem that your organizations and those you represent face and it seems to me there is no reconsidering of *Brown v. Board of Education* before us or the Court. There are no organizations that I know of, there is no split in society of any significant numbers, where there is a great split in our society regarding reproductive rights and the right to choose.

I think you would agree that there is as tremendous split in our society as it relates to your position versus the right to life?

Ms. WATTLETON. There is virtually little disagreement, and that is not to say there is no disagreement, on the question of whether the Government should be the one to decide or to intervene. There