

The CHAIRMAN. I will dig up the record, I may be mistaken, but my recollection is that he specifically said he accepts the Court's middle-tier scrutiny.

Ms. GREENBERGER. I just want to finish one point, because the gravamen of our objection, even if one assumes he did unequivocally accept it, which I think is ambiguous, is that the basis of his other testimony and his record called into question what he meant when he said he accepted the heightened scrutiny test.

Part of the heightened scrutiny test that he articulated was—

The CHAIRMAN. In other words, it called into question his credibility, whether he was telling you the truth that he accepts it?

Ms. GREENBERGER. Well, I do not know whether I would say his credibility on that particular point, but what his understanding was of the heightened scrutiny test, because an aspect of it is that, when the Government comes forward to try to justify some discrimination that they must show an important governmental interest, but that is not enough. It cannot be an important governmental interest that is based on stereotypes, that is based on fixed notions of what women and men—

The CHAIRMAN. I understand that. So you—

Ms. GREENBERGER [continuing]. And that is part of the heightened scrutiny test.

The CHAIRMAN. Well, it is part of the way this Court without saying they are changing the test, in effect, has changed the result by redefining what constitutes meeting the test.

Ms. GREENBERGER. Precisely, and we saw that—

The CHAIRMAN. I just want to be clear whether my recollection is correct about his accepting, the present test.

Let me yield to my friend from Wyoming.

Senator SIMPSON. Thank you, Mr. Chairman, I appreciate it.

Thank you for your testimony, which I read. I know that is shocking, but I did. I had a little time. We have so many witnesses and there is so much to do, I hope that we can have access to the testimony of the witnesses. I know you are trying very hard to do that, too, but that makes it easier for us to be able to ask questions and do our work, and I appreciate that.

If I might direct these remarks to Ms. Greenberger, because you were speaking of this issue of the intermediate scrutiny test, and you stated in your written testimony that you fear for women's protection and that there are only four members with this heightened awareness or heightened protection, and I think you specifically did say that Chief Justice Rehnquist does not apply that level of scrutiny to gender-based statutes.

But in the questioning by Senator DeConcini, Judge Thomas stated that he supported the intermediate scrutiny test for gender-based statutes. In fact, he said and the record shows that he said, "One could consider and be open to ratcheting up or applying a more exacting standard."

My question is this: Based on his answer there to Senator DeConcini, why do you persist in being critical of Judge Thomas' position on the protection of women under the equal protection clause?

Ms. GREENBERGER. Senator Simpson, I have two basic concerns: One, that this is a statement that is not as clearcut as some of the statements he has made in other areas, certainly, one could consid-

er, and I am very glad that he was open to the possibility, but I think there was some ambiguity about the clarity, but that is only one point.

The second is what his understanding is at the heart of the heightened scrutiny test, assuming that he did embrace it, and the heart of the heightened scrutiny test is the stereotyped notions about what women and men can do cannot serve as a justification for sex discrimination by the Government. And when he has endorsed stereotyped notions again and again, his idea of what that heightened scrutiny test really means is far different than what it has been applied to mean and the way it has been used to strike down discrimination against women in this country, and that really is at the heart of my concern.

Ms. LIGHTMAN. Senator, may I jump in for a second?

Senator SIMPSON. Yes.

Ms. LIGHTMAN. You know, constitutional protections for women against sex discrimination are really rather new. They are some 20 years old. Modern constitutional protections date back only to 1971. And therefore, the protections against providing, for instance, Social Security to Mr. Weisenfeld when his wife died in childbirth for their child, which the Social Security Administration had only provided for moms, but not dads, before the mid-1970s, is something that we, are extraordinarily sensitive.

Those rights are fragile. They are newly won, and they are ones that we can't take risks with. And so when someone says, "I have no quarrel with that," and then later says in response to a later question, late Friday afternoon, to Senator DeConcini, "I think that it's important that when I don't know where I stand on something or I haven't reviewed it in detail that it's best for me to take a step back and say I have no reason to disagree with it, rather than saying I adopt it as mine." And that is what gives rise, it is that kind of statement that gives rise to the uncertainty, the fear of taking a risk.

We can't afford to have unknowns about these important individual rights.

Senator SIMPSON. Well, I understand that, and I happen to—well, I could never address the issue as a woman could, ever. But I do believe that, certainly my position on choice is very clear. I have said that before and I won't get into it. But, because I do deeply believe in it. It is not based on Constitution and stuff like that at all, just real life. That is the only touchstone I put that on.

But he did make—he has made some remarkable responses to questions here about his compassion and his sensitivity, and when you are quoting these things, and we are doing this a lot—we do this here, I do it and the witnesses do it—but Judge Thomas said that discrimination is a cancer on our society, and I am quoting right from, you know, where we were talking about ratcheting up to or applying a more exacting standard.

I would be concerned if we were to see a movement down toward the rational basis test, but I think discrimination and classifications based on race or sex are so damaging to our society and to individuals in particular. And he goes on in that vein to speak of those things, and he has all the while he was here before us.