

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.

And I think it was Professor King who was talking about your terrible anguish about the sexual issues, no understanding of the imperative to provide opportunities and choices, and then you make some, I think, hard comments about him with regard to his sister, who sat right here with him all the days of his testimony.

But I think that, you know, the record clearly contradicts that point of yours, if I may respectfully say. He played this key role at the EEOC in convincing the Government to intervene in favor of the plaintiffs in the *Meritor Savings Bank* case. That was ultimately decided that sex harassment on the job was covered by title VII of the Civil Rights Act, and many women in this country have greatly benefited by that decision.

Wouldn't you think that that would show his understanding of the plight of women in general and black women in particular?

Ms. KING. Senator, with due respect for Judge Thomas when he was testifying here, his words were wonderful to a large degree. For me he was testifying. I think his record and what he has done, his conduct, what life represents in actions, not words, suggests to me that he does not in fact understand the plight of women of color in this country.

Let me give you one example. When he was chair of the EEOC, the EEOC did not move to deal with forced sterilization policies in a proper speedy manner, and indeed when they responded they adopted a standard that was most favorable to employers.

Frankly, I am horrified. If there is one thing that means something to black women in America it is to talk about forced sterilization, because women, black women in this country have been forcibly sterilized.

I simply call attention to the fact that his statement about his sister, and you will notice I have the greatest respect for his sister—in fact, I think she demonstrates the capacities, the character of a woman who is deserving, and deserving of more respectful remarks from her brother than she got. I think she showed a great deal of love and compassion to come and support him in this hearing.

Nonetheless, his statements about his sister I think betray a lack of compassion, not only for black women, but for members of his family, and his words during his testimony did nothing to make me feel that he is concerned about anyone other than himself and individuals like him, and lacks understanding about the lives of other black people and what it will take to rise out of the circumstances that he himself found himself in when he was a young man.

Senator SIMPSON. Well, I—you know I think we, Ms. Lichtman, and I am combining you all because time is, obviously, limited to us too, and the chairman is fair about that, but, you know, you have made critical observations about his writings and his works. Have you read all his decisions on the circuit court? Have you read those?

Ms. LICHTMAN. Between the people in my office and myself, I have indeed reviewed many of the kinds of subject areas that his decisions addressed. And, as you probably know, Senator, most of them, if not almost all of them, concern regulatory decisions about the subject of which we have not talked about either in our report or in our comments.

So, to the extent that we reviewed them to see the extent to which he had spoken to any of the things we were concerned about, we did.

Ms. GREENBERGER. You know, Senator Simpson, it is a very good question. And there is a case that is pending now that Justice Thomas heard as a member of the panel that deals with equal protection and sex discrimination of the laws in the context of the FCC, and it tracks the very same kind of issue that was decided by the Supreme Court last term in the *Metro Broadcasting* case, whether or not it is constitutional to make affirmative efforts to ensure that radio stations have a diversity of ownership.

And the Supreme Court upheld the constitutionality of that policy with respect to minorities. The very same issue is pending in the D.C. Circuit now with respect to women-owned radio stations, and the media and press had, in fact, printed some excerpts of the oral argument and some of the questions that Judge Thomas asked.

It was a case that was argued in January 1991, the end of January. Unfortunately, we haven't seen an opinion. It is surprising because I did look and I know that there has been a lot of pride on the D.C. Court of Appeals for the short turnaround time between the time cases are argued and the time they are decided, and for the last 2 years they have been between 1 and 2, at most 3 months is an average time for a decision, and we have been waiting for this case for 8 months.

Justice Thomas asked some very disturbing questions during that oral argument. Perhaps he would have resolved those questions in a way that would allay our fears if that decision had come down. I am sorry in all this 8 months it hasn't come down.

And I might give you some flavor of the kind of question he asked that caused the concern. And very briefly, he wanted to know what are women's issues.

Senator KENNEDY. Can I just say I think the time of the Senator has expired. But I would hope that I would be the next questioner, and you can use the response on my time.

Ms. GREENBERGER. OK. Thank you.

Senator SIMPSON. I thank you, Mr. Chairman.

Senator KENNEDY. Do you want to—I would just at the outset want to join in welcoming this panel to the committee. I think Marcia Greenberger and Judith Lichtman have over a period of years been in the forefront of the fight for equal opportunity and equal rights from the really extremely important and critical time in the decision of the Supreme Court decision, and all of us, I certainly do, take your comments and your testimony very seriously and we thank you for the thoughtfulness—

Ms. GREENBERGER. Thank you.

Ms. LICHTMAN. Thank you, Senator.

Senator KENNEDY [continuing]. With which the presentation has been made.

Ms. King, we are delighted to have you, a distinguished scholar and thoughtful commentator on many of these same areas.

If you would just continue. As I understand, you are now quoting some of the questions raised by Judge Thomas when the circuit court was considering a particular case involving the FCC and the