the *Webster* decision. When it upheld the Missouri law that granted State restrictions on abortion, that undermined the earlier rulings on Roe and its progeny.

So I think that, yes, it is unfortunate that we find ourselves in 1990 once again debating this issue politically, something that is settled in the minds of the American people but now is politically in a state of upheaval again.

Senator SPECTER. Well, my time is up, so I would like to conclude with this very brief comment. I understand your position, but the focus is very much on a single issue. I did not have an opportunity to ask you if you would vote against a Senator on a single issue. As a person who has to decide a lot of questions, I very strongly feel that a Senator ought to be judged on his entire record.

When I asked Ms. Michelman the question about should I vote against Judge Souter because he doesn't satisfy me on the separation, the wall, between church and state, I didn't get an answer to that. It comes right back to the abortion issue. When I asked Ms. Wattleton if I should vote against Judge Souter because he doesn't satisfy me on the vital issue of judicial review, I get a generalized answer that if he doesn't uphold constitutional rights I should vote against him and we come back to the abortion issue.

The abortion issue is a very, very vital one, but it is one issue of many which are before the Court and have to be considered by the Senate. I do not have a fixed opinion on Judge Souter at this point, and I am very interested in your testimony. But I do have to say to you that as sympathetic as I have been, there is a big constituency out there opposed flatly to your point of view, which has to be weighed politically, although I voted, as I have said, prochoice because I don't think Government can deal with this issue. But there is much more in America besides any one issue, however important any one issue may be.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Let me conclude with a comment and a question. I may or may not agree with your final recommendation. For me it rests upon my reading, literally rereading—I don't say that lightly. We sometimes hear Senators say I am going to go back and reread the record, and you look at them like—the press just smiled and everybody went, yes, they understand that one. But literally I will reread the record in about 15 to 18 places that I think are key in helping me determine whether or not Judge Souter's assertions recognize a right to privacy in this area.

Now, let me make sure. I am going to characterize your position as I have heard it here today, and I want you to correct me if I am wrong rather than take the time to go back and ask you a number of probative questions and try to get all the pieces of this. I don't expect you to agree with me if I in any way misrepresent what I understand to be your position.

It seems to me that what you are saying here today is that your opposition to Judge Souter is grounded on his unwillingness to acknowledge the existence of a fundamental right to privacy relating to a woman's decision whether or not to remain pregnant. His failure to recognize that as a fundamental right, you are arguing, puts him in a category and the issue in a category totally different than

as it was characterized by the Senator from Pennsylvania and others.

On the separation of church and State issues, it is a matter of degree. No one is arguing, no one has put forward the proposition, no one has suggested that the first amendment—either in the establishment clause or the free exercise clause—does not set up a dilemma on the one hand, and the exercise of the existence of a fundamental right State action on the other hand. It is a fundamental right. The first part of the equation is clearly set out in the Constitution. There is a fundamental right against establishment, if you will, and for the free exercise. The only issue is what degree of evidence, of rationale, of proof, does the State have to show in order to interfere with that fundamental right.

The right of procreation, the decision to procreate is a fundamental right. There is no debate about that. The only debate is whether or not and under what circumstances the State can interfere with that fundamental right. The right of assembly is a fundamental right. The only question is how much evidence the State has to bring forward to interfere with that fundamental right. The right of association is an unenumerated fundamental right. No one argues about it. The only debate is gradation. How much proof or evidence or rationale has to be put forward to interfere with that right of association?

A parent's right to determine the education of their child is a fundamental right, going back to *Pierce*, and the only question is how much evidence the State, how much proof the State, how much rationale the State, has to bring forward to interfere with that fundamental right.

The right of an African-American to go to school anywhere they want to go is a fundamental right. Arguably, theoretically, like all fundamental rights, it could be overruled by, it could be interfered with by, some State rationale that no one has ever thought of and no one is ever going to be able to think of. But theoretically there is no fundamental right that is absolute in the Constitution. Free speech is a fundamental right, but the State can say we are going to interfere with that fundamental right if you are yelling "Fire" in a crowded movie theater. We can interfere with that fundamental right.

Now, what you are saying, as I understand it, is that you would insist from your perspective that the nominee say this is a fundamental right—like the right to travel, unenumerated; like the right of parents to determine the education of their child, unenumerated; like the right of procreation, the decision to procreate—that what you wanted him to say was that is fundamental.

Ms. MICHELMAN. Right.

The CHAIRMAN. And notwithstanding what all my colleagues have said here, none of it makes much sense, with all due respect, because all the examples they have used have been examples about the second part of the equation, which is how much proof, how much evidence, how much rationale, the degree of the rationale required to interfere with these rights. That is what the debate is. It is over on this side on all the issues my colleagues have mentioned.

And what you are saying is, hey, look, gentlemen, we want you to prove to us, we think you have a minimum obligation to say we are positive this guy knows this is a fundamental right.

Ms. MICHELMAN. That is right.

The CHAIRMAN. We are not asking you to say, Chairman Biden, we are not asking you to say, Senator Specter, we are not asking you to say, Senator DeConcini, that you can then guarantee us how he is likely to rule on the requirement of parental consent, all the gradations. Am I correct?

Ms. WATTLETON. That is correct, and our deep concern was his reticence to respond to this with respect to the Court evaluating this on the basis of compelling State interest as opposed to undue burden.

The CHAIRMAN. Now, let me tell you, in conclusion, where I may disagree with you. It is not in the burden you think the nominee must carry, which in my view is a legitimate request. For none of us would be sitting here if he said, "I don't think the right of association is a fundamentally guaranteed right," and say, "OK, Judge, you are a wonderful guy, we like you, and we think you are brilliant, and it has been a tour de force, and, therefore, even though we disagree on that little one, we are going to go ahead and vote for you." None of us would sit here, I suspect, and say, "Judge, you don't think it is a fundamental right for people to travel. But notwithstanding that little problem, we are still going to go ahead and vote for you."

So I think you are right in asking about that fundamental right. My dilemma relative to this Justice is as follows—and I know both of you, and you are both very bright women obviously, very compelling, but also very practical. The politics of the situation are this man was between a rock and a hard spot. If he said there was a fundamental right, he would satisfy Biden, and Grassley would go in orbit. If he said there wasn't a fundamental right, he would satisfy Grassley, and Biden would go in orbit. And he would guarantee that a nomination that might not be in trouble would surely be in trouble, from one side or the other.

And there is some rationale, it seems to me, for him to avoid that political briar patch. But I am not sure I read his statements—many that were in response to questions from me in particular because, obviously, I was focusing on this issue—I want to know what he said to me—as well as to others, the way you read it. And that is that he does not recognize the fundamental right.

It seems to me there is almost equally compelling evidence to conclude that he believes there is a fundamental right, but that is a decision I am going to have to make based on the record. I just want to get it clear here; that had he said—this is important because we are going to be at this exercise, I am afraid, God willing, all of our collective health prevailing, we are going to be at this exercise probably several more times in the near term.

I do not believe—and this is my concluding question. I do not believe that the nominee should have to answer how he would rule on *Roe*. I do not believe he should have to do that because I think that sets a precedent that may very well come back and bite everything I believe in, even though I would like to know how he would rule on *Roe*. Quite frankly, I am not sure what it would tell us

even if he told us he would sustain *Roe*. He might sustain *Roe* and vote for *Webster*. He might sustain *Roe* and say, yes, you can have an abortion in any facility that doesn't have hallways 14 feet wide. He might sustain Roe and say—you know, and so on. So I don't think it would tell us much.

My question to you is: The next nominee, are you going to insist that that nominee say anything beyond whether or not they regard the right of a woman to make a judgment with regard to the termination of a pregnancy as fundamental, a fundamental right? Are you going to ask anything beyond that? Are you going to insist that that nominee tell you how they would rule on *Roe*, on *Webster*, and on God knows how many other cases may have come between the time of the last case and the case that may be in question for that nominee? Do you want a specific answer to a specific case ruling?

Ms. WATTLETON. I believe that we are as mindful of the codes and the law as you are here today. We have not in this proceeding nor would we in the future insist upon such an assurance, although parenthetically I might point out that a variety of cases have come up in this discussion and this process. And if we look back at Justice Rehnquist's proceedings, he discussed it and has not recused himself in subsequent cases.

The CHAIRMAN. Excuse me, let me interrupt you there for a moment. I think Senator Simpson, God bless him, notwithstanding reading the Canons of Ethics, if he applied the Canons of Ethics to what was said here, clearly the judge had breached them because he went out of his way and he answered very specifically in a whole number of areas. I am not asking you on technical grounds because of the Canon.

Ms. WATTLETON. Yes, that is parenthetical.

The CHAIRMAN. So please try not to be a lawyer's lawyer with me, even though you are not a lawyer.

Ms. WATTLETON. No, I am not.

The CHAIRMAN. But you know a lot more than most lawyers that I know.

Ms. WATTLETON. I have studied very faithfully at the feet of many wonderful lawyers.

The CHAIRMAN. But, tell me, are you going to ask——

Ms. WATTLETON. But the point that I made, before I added the parentheses, was that we did not ask you to ask such a question in this proceeding, and we would not at future proceedings. I believe that the question that you asked and did not get an answer is an appropriate question to ask, and that is whether the Constitution protects the right not to be pregnant.

Ms. MICHELMAN. And you did not get an answer, and I think that is the question. And I agree, we should not expect the nominee to talk about specific cases. And I do hope, Senator, as you are reading the testimony, that we remember it isn't just about legal theory. This is about real women's and real Americans' lives. This is a fundamental right that is about to be overturned.

The CHAIRMAN. Well, you have never asked me—as a matter of fact, I didn't speak with you prior to this hearing—about any of this, nor do I know that you have asked any other member of the committee to ask. This is one of our opportunities to find out why you—not why you feel the way you do. It is clear why. But to find

out what burden of proof must be met in order for you to be willing to take a chance. And no matter what is said, ultimately all of America is doing nothing more than taking a chance because we are putting on the bench, at some point in this process, someone who could be there for decades, deciding the fate of Americans in a whole range of areas. And as one of my colleagues said earlier, why one man? Well, the reason one man or one woman will make a difference now is that one vote will decide almost a half a dozen critical issues. One vote. That is why it is so important.

I appreciate your testimony, and I hope I didn't in any way misstate it. But I think this issue is so complicated—the issue of the fundamental distinction between an ordinary and a fundamental right and the burden of proof that raises for the State. That is all a lot of legal gobbledygook.

Ms. MICHELMAN. Right.

The CHAIRMAN. I thank you both very, very much for your testimony and for being so clear in stating how you felt about this issue.

Ms. WATTLETON. Thank you for having us.

Ms. MICHELMAN. Thank you.

The CHAIRMAN. Our next panel is a panel of very distinguished Americans who are here to testify on behalf of the nominee: Hon. Griffin Bell, former Attorney General of the United States; Hon. Slade Gorton, the distinguished Senator from the State of Washington, who has served more than a decade as attorney general of the State of Washington; Hon. Gerald Baliles, former Governor and former attorney general of the State of Virginia; and Hon. Jerome Diamond, former attorney general for Judge Souter's neighboring State of Vermont.

The committee welcomes you. Senator Gorton is over on the floor. He is on is way. Mr. Diamond is not just on his way, he is here.

Welcome, gentlemen. Let me say for the record, I was asked to point out that Senator Simon wanted very much to ask questions of the last panel and this panel, but he, too, is involved with the legislation that is on the floor of the Senate at this moment. That is why he was unable to be here to ask the questions.

Gentlemen, it is good to see you. Good to see you, General Bell. It seems the only time I see you these days is when there is a nominee. But it is good to see you here, and I must tell you I long for the days when you were appointing nominees to the bench. Maybe some day in the next century we may have the chance to do that again.

I shouldn't say it that way because last time I used a phrase "Justice Souter," and all the papers said "Biden declares the matter over." I am only kidding. I believe it may well be before the year 2000 that we have a Democratic President. I shouldn't say that. I am only joking. I should stop joking. I am getting myself further in trouble, and that old adage, "When in a hole, stop digging." So I will stop.

Mr. BELL. You can't lose your sense of humor, though.

The CHAIRMAN. It is a necessary requirement.

Unless you gentlemen have another way in which to proceed, I would like to suggest that we begin in the order in which the wit-