The Senator from Arizona, Senator DeConcini.

Senator DeConcini. Judge Souter, I was not going to mention the previous nomination hearing, but my good friend—and, indeed, he is a distinguished scholar—from Wyoming brought the Bork hearing to mind. So far, I don't think anybody sees any comparison at all. For instance, with regard to the equal protection clause, Judge Bork made some very strong statements about the Supreme Court's decision banning literacy tests as a prerequisite to voting. He stated that this decision, and another which abolished poll taxes, were very bad, indeed pernicious, constitutional rulings. I haven't found any similar statements like those you have made. Judge Bork's statements were written, and he admitted that he said them. You don't have any such statements some place that we have missed over the past 5 or 6 weeks, do you?

Judge Souter. No, sir.

Senator DeConcini. I didn't think so. There is a great distinction here in these hearings as far as I see, and there was no racist approach toward Judge Bork at all—at least by this Senator, and I don't think there was by anybody on this committee. And I want that record at least explained from this Senator's point of view. There was a disagreement, a very strong disagreement, and that is what this process is all about.

Chairman Biden touched upon the interpretivist approach, you stated in a recent interview on its relation generally as to the Constitution, and you said in an interview that you are not looking for original application, but, instead, are looking for meaning.

Then, Senator Kennedy went on to the sex discrimination cases in that area, and I take it that it is fair to say, from your discussion with Senator Kennedy, that you have no qualms whatsoever about the existing three standards on discrimination cases vis-a-vis the equal protection clause that the Supreme Court has clearly laid out as the guidelines when they take up discrimination issues. Is that a fair assessment?

Judge Souter. That is a fair assessment. The only concern that I have expressed, and Senator Kennedy alluded to it in the course of his questioning, is whether any of us could do a better job in trying to articulate the middle-tier scrutiny.

As I said, what the courts are trying to get at, whether it be the Federal courts under the 14th amendment or the State courts under their own equal protection guarantees, is a way of approaching classifications which the law makes which is going to, in effect, weight the State's interests or channel the question of trying to weight the appropriate State interest to determine whether there is a real justification for the classification in question.

Trivial interests are not going to require tremendous overbalancing by the interests of the State. Fundamental interests do.

What the courts are doing by coming up with a three-tier test is in trying to give some structure to this enterprise, so that in each case the courts at least can begin, and particularly the trial courts, can begin by saying, all right, we know roughly what the State counterweight must be, once we know how the particular private interest is to be classified, and the concern, as I said a minute ago, with the middle-tier test—and, by the way, we use it in New Hampshire, so I have expressed this concern only in terms of the

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State Constitution in my own judicial writing—is whether we can come up with some kind of a standard which is less subjective, because the experience has been that the middle-tier standard tends to shade down into the first-tier standard, and if that happens, somebody with a classification claim is going to get shortchanged.

Senator DECONCINI. Sure, and there is no reason why it cannot shake up to the highest scrutiny standard, either, is there——

Judge SOUTER. No, the——

Senator DECONCINI. Excuse me—particularly if the sex discrimination case is, as you say, fundamental?

Judge SOUTER. Well, the Supreme Court's approach to that has been—and it was described very concisely in the Court's opinion in the *Kleburn* v. *Living Center* case—is to indicate that there were two factors foremost in their mind in putting the sex discrimination classifications in the middle-tier category.

One was the likelihood that a classification might really have a legitimate reason behind it, a legitimate basis, and the case law, the experience with the cases coming up in the Court's view has simply been that there is greater chance that there may be a legitimate basis for some sex classification, in other words that it may not amount to invidious discrimination than would be the case in the racial area.

The second thing that the Court has pointed to and, as I recall, did in the *Kleburn* case, is the likelihood that individuals against whom there really has been a discrimination have some effective political process by which to counter it, as well. And the Court, if I understood or recall correctly, the Court's opinion, the indication was that, in the area of sex discrimination, there was more likely to be some political responsiveness than our history has shown in racial discrimination, so that is why they put it in the middle.

Senator DECONCINI. Judge, I know it is difficult to go back over all your cases—and I have read a number of your cases, a couple dozen of them during the recess—in one case *State* v. *Dionne,* you dissented from the majority, because you believe that the State constitution is required to be interpreted and understood strictly "in the sense in which it was used at the time of its adoption." Do you remember that?

Judge SOUTER. I do remember that, yes, sir.

Senator DECONCINI. My concern there is with what I see as a very rigid use of original intent, at least in this dissenting opinion, and how you would apply this approach to the equal protection clause, in light of what I think is very encouraging—maybe because I agree with it—your explanation of the equal protection clause, particularly as it applies to race and sex and economics. How do you apply that particular dissenting opinion?

Judge SOUTER. Senator, I think the first thing that has to be understood about that dissenting opinion is that, whether it was written clearly or not, I referred to the test of—I believe I referred to the test of original meaning or original understanding of the terms.

I have tended to shy away from the use of the term "original intent" in describing any approach of mine. I have done so, because the phrase "original intent" has frequently been used to mean that the meaning or the application of a constitutional provision should be confined only to those specific examples that were intended to

be the objects of its application when it was, in fact, adopted. It is a kind of a——

Senator DECONCINI. Excuse me. Original intent, then, in what you are telling me is not applicable to your interpretation of the equal protection clause in the 14th amendment?

Judge SOUTER. That is exactly right. I do not believe that the appropriate criterion of constitutional meaning is this sense of specific intent, that you may never apply a provision to any subject except the subject specifically intended by the people who adopted it. I suppose the most spectacular example of the significance of this is the case of *Brown* v. *Board of Education.* That case, I am glad to say, we may safely say that that particular principle is never going to come before the Court in any foreseeable future in my lifetime and we can talk about it. The equal protection clause was appropriately applied in *Brown* v. *Board of Education.*

If you were to confine the equal protection clause only to those subjects which its Framers and its adopters intended it to apply to, it could not have been applied to school desegregation. I think it is historically accepted by people of all schools that it is a historical fact that those who proposed and those who adopted the 14th amendment never intended to require integrated schools. The *Brown* opinion itself alludes to that.

The reason *Brown* was correctly decided is not because they intended to apply the equal protection clause to school desegregation, but because they did not confine the equal protection clause to those specific or a specifically enumerated list of applications, the equal protection clause is, by its very terms, a clause of general application.

What we are looking for, then, when we look for its original meaning is the principle that was intended to be applied, and if that principle is broad enough to apply to school desegregation, as it clearly was, then that was an appropriate application for it and *Brown* was undoubtedly correctly decided.

Senator DECONCINI. I agree with you, Judge, and I think you highlight the difference between this hearing and the discussion that we have had with other nominees who have been here, some of whom have been approved and some that have not. You deal with the principle of the equal protection clause, and not its original background. As you pointed out, you cannot find a justification to apply the clause to segregated schools if you apply original intent.

Judge SOUTER. That is true.

Senator DECONCINI. Let me ask you this, Judge: Justice O'Connor in a case, *Mississippi University for Women* v. *Hogan,* stated that sex-based classification should be subject to the same standard of review, regardless of whether they harm women or men. Would you agree with that, in general, not with the *Mississippi* case, particularly, but——

Judge SOUTER. I can think of no reason to disagree with it.

Senator DECONCINI. Thank you. I read that case carefully and I was impressed with the logic and the writing of Justice O'Connor in analyzing that and coming to that conclusion, and I am pleased to hear your answer.

Justice Marshall, on the other hand, has his own distinctive approach to equal protection claims that you may be more familiar with than I am. Marshall believes that the Court does not apply a three-tier approach to equal protection claims, but, rather, "a spectrum of standing as to the review." Thus, the more important the constitutional and societal weight given to an interest, the greater the scrutiny that should be applied. How do you approach that Marshall thesis?

Judge SOUTER. Well, there is no question about the correctness of the proposition, that the more significant the interest, the greater societal counterweight would be required to justify an interference or an abridgement of that interest.

I think the question which this kind of a debate raises is whether it is useful to identify three places on the spectrum as a convenient basis for classification, and those who want to retain, as it were, the whole spectrum approach I think are saying to us in so many words, you are applying instruments that are too blunt when you try to identify just three points and say everything has to fit into one or the other of these three slots.

I will confess that I have not come to the point, even though I have worried sometimes about whether we were articulating the middle-tier test as well as could be done, and maybe we are, but even though I have worried about that sometimes, I have not gotten to the point of saying we ought to scrap the whole notion of three tiers and just take, in effect, every issue as an original balancing issue in the first instance.

Senator DECONCINI. But do you agree that the intermediate or middle test is not satisfactory for all of those cases that come before that seem to fall into that area, that you need to look at that middle tier more carefully and more on a case-by-case basis, to see whether or not that is really applying the equal protection clause in the manner of the history of that clause and its interpretation?

Judge SOUTER. Well, I am certainly satisfied that it would be too blunt a set of instruments, just to have one test at the bottom and one test, if you will, at the top.

Senator DECONCINI. I get a feeling from the little bit I have read of Justice Marshall that he has the same quandary you do about that intermediate or middle test, that he is concerned that it falls down, instead of falling up.

Let me turn to another subject, Judge. Over the last few terms of the Supreme Court, almost 50 percent of the Supreme Court cases have involved issues of statutory interpretation. Your judicial experience has been in a State court, so you have not had much exposure to cases of Federal statutory interpretation, and that is why I would like to ask a few questions.

I did notice in the committee's questionnaire, you stated,

> The foundation of judicial responsibility in statutory interpretation is respect for the enacted text and for the legislative purpose that may explain a text that is unclear.

Based on that response to what extent do you believe the legislative history should be taken into consideration, if you were sitting

on the Supreme Court interpreting a statute passed by the Congress?

Judge SOUTER. Senator, I am very much aware, in answering or in approaching an answer to that question, about the great spectrum of evidence that gets grouped under the umbrella of legislative history. It seems to me that the one general rule—and it is a truism to state it, but the one general rule that I can state is, when we look to legislative history in cases where the text is unclear, we at least have got to look to reliable legislative history.

When we are looking to legislative history on an issue of statutory construction, what we are doing is gathering evidence, and the object of gathering evidence for statutory interpretation is ultimately not in any way different from the object of gathering evidence of extraneous fact in a courtroom.

We are trying to establish some kind of standard of reliability, in this case to know exactly what was intended. And what we want to know is, to the extent we can find it out, is whether, aside from the terms of the statute itself, there really is a reliable guide to an institutional intent, not just a spectrum of subjective intent. I suppose a vague statute can get voted on by five different Senators for five different reasons, so that if we are going to look to pure subjectivity, we are going to be in trouble.

What we are looking for is an intent which can be attributed to the institution itself, and, therefore, what we are looking for is some index of intended meaning, perhaps signaled by adoption or by, at the very least, an informed acquiescence that we can genuinely point to and say this represents not merely the statement of one committee member or committee staffer or one person on the floor, but in fact to an institution or to a sufficiently large enough number of the members of that institution, so that we can say they probably really do stand as surrogates for all those who voted for it.

Senator DECONCINI. So, in looking at legislative history, I take it from that, the amount, the intensity of it, those that are associated with the subject matter are of importance in a judge's interpretation?

Judge SOUTER. Yes, indeed.

Senator DECONCINI. More so than if it can be distinguished that someone merely put something in the record, because it appeared that it was the right place to put it in, but had no history in that legislation themselves.

Judge SOUTER. Yes, sir.

Senator DECONCINI. What other sources should a judge rely on in a statutory construction case outside the statutes and legislative history?

Judge SOUTER. Well, there is a kind of, I suppose, broad principle of coherence that we look to. The fact is we so frequently speak of interpreting sections of statutes. What we are really obligated to is to interpret whole statutes. We should not be interpreting a statutory section, without looking at the entire statute that we are interpreting.

One of the things that I have found—and I do not know particularly why I learned it, but I found one thing on the New Hampshire Supreme Court which has stood me in pretty good stead, and

that is when I get a statutory interpretation issue in front of me, I read the brief, I listen to the argument. But if I am going to write that opinion, I sit down, I tell my law clerks to sit down, but I do it myself before I am done, and I just sit there and I read the whole statute. Fortunately, I do not have to construe the Internal Revenue Code, in which case I would be in serious trouble with that methodology. But within reason, I try to read the whole statute, and I am amazed at the number of times when I do that, I will find a clear clue in some other section that nobody has bothered to cite to me in a brief.

We are trying to come up with statutory coherence, not with just a bunch of pinpoints in individual sections. So, the first thing to do, in a very practical way, is to read the whole statute.

It is beyond the intent of your question, of course, to get into constitutional issues, but we do know it is accepted statutory interpretation that if we have a choice between two possible meanings, one of which raises a serious constitutional issue and one of which does not, it is responsible to take the latter, and, of course, we looked at that.

Senator DECONCINI. Judge, the term, textualism, has been used to describe a judge who attempts to limit the statutory interpretation to the text and ignores the legislative history. You explained what you do, and such an approach really fails to take into consideration, I think, the necessity—although I have never been a judge, I have certainly had a lot of association and argued enough cases where I have felt at least the judges have listened to legislative history propounded on both sides of it, maybe not always coming to the same conclusion.

The fact that the matter is passed by a legislative body—often, those of us in those bodies are not clear ourselves as to the absolute interpretation or how it is going to be applied by the regulators or the bureaucracy that must implement our statutes.

I think it is very important that you have laid out a record here. I am curious about your views as a judge who might disregard dispositive legislative history and create his own definitions. If that is a judge's final decision, would you consider that judicial activism, to ignore this discussion that we have just had?

Judge SOUTER. Well, I was going to say activism is a term that we all employ to describe the activities of any judge when we do not approve of the activities. And so given that definition of activism——

Senator DECONCINI. Let me interrupt you a minute. I do not quite agree with that definition because——

Judge SOUTER. You are probably a more principled man than I am.

Senator DECONCINI [continuing]. Sometimes a judge will come to a conclusion that might very well be activism, and I can think of a few cases that I have argued before that I was very glad that he was an activist judge, even though I profess against that, but go ahead.

Judge SOUTER. I think probably a fair bedrock of activism is at least—or example of bedrock activism is ignoring any clear and positive source, objective source of law. I think what you are de-

scribing in your example is a refusal to accept an objective source of meaning.

Senator DECONCINI. Thank you, Judge, because I think that helps me a great deal as to how I feel you will approach the constitutional questions, and certainly the statutory questions.

I want to say, Judge, you have said many impressive things today; many of them have left a very favorable impression with me. Most important to me is that you are very convincing, that you are a listener; nothing is more important in communication than to listen. That, to me, leaves me with a very good feeling about the nominee that is before us today.

Senator Thurmond touched a little bit on the principle of respect for precedents, and although I do not think he said stare decisis, but along that line, how does a judge treat a 5-to-4 decision differently from a 9-to-0 decision when he is asked to perhaps consider not following stare decisis? Have you thought about that, having sat on the State supreme court?

Judge SOUTER. Senator, I think that is one of those questions that you cannot answer in the abstract like that. If we are talking about a 5-to-4 decision that is 50 years old and has spawned a body of consistent, supporting precedent which is basically the foundation of the law that we have, the fact that it was 5 to 4 originally is a matter of small or no consequence at all.

If, on the other hand, we are talking about a 5-to-4 decision which was rendered the year before and in between there are arguably inconsistent precedents with it, then, of course, you are not going to be able to give it that much weight. I suppose the real significance of its being 5 to 4 under those circumstances is that if it were unanimous it is virtually unlikely that there would be the arguably inconsistent precedents following it.

So I just think the numbers analysis standing by itself is a misleading analysis.

Senator DECONCINI. So you would not put any more weight in a 5-to-4 decision to a 9-to-0 decision, as far as the application? Each case has to stand on its own in the history of that case?

Judge SOUTER. I would be wary of any abstract numerical principle like that.

Senator DECONCINI. What about public opinion in a judicial decision? Does that play any role in a judge's objective decision?

Judge SOUTER. Well, Senator, it better not play any role in the application of principle. We all know of decisions—there could not be a better one than *Brown*.

Senator DECONCINI. I agree with that. How does a judge—how do you, Judge, attempt to avoid that influence from the real world that you live in, as we all do—public opinion on a subject matter; that is, the abortion issue or some other issue where the polls demonstrate popular support another way? How do you attempt to mentally prevent yourself from being influenced?

Judge SOUTER. By being conscious, Senator, of the fact that you could be influenced. It is a problem like any other problem; you solve it by facing it. You face the fact that you are human and that you are subject to being pushed unless you guard against it, and you face that as a possibility. You keep it in your consciousness. And by doing that, I think you can come as close as a human being

can possibly do to eliminating that from a role in the decision which you otherwise might not even be aware it was playing.

Senator DECONCINI. Judge, let me ask you one last question for today. I am gravely concerned about the so-called litigation explosion and its effect on the working of our judicial system. In the past 25 years, the volume of court cases has increased dramatically at all levels, State and Federal courts. There were 15,000 filings in the district courts of the U.S. Federal courts in 1915; 45,000 in 1950; 120,000 filings in 1975; today there are over 275,000 filings a year.

There are 575 district judges to handle 275,000 filings; 168 circuit judges handling 33,000 filings, and 9 Supreme Court Justices handling over 5,000 filings.

The number of pending product liability cases alone has increased 257 percent in 8 years. Part of the reason perhaps is that this country has 750,000 lawyers. I am concerned, Judge Souter, and maybe you can just give us your ideas of it. I realize you do not control the Judicial Conference. That is the Chief Justice's statutory area, but nevertheless, you have had a long experience. You have seen this growth. You witnessed it. I am sure you have been under the pressure of it. What role do you see, or how do you see any changes? Do you have any, quite frankly, observations about it?

Judge SOUTER. Senator, I have not—as you know, I have not been a part of the Federal judiciary long enough to have any qualification to give a judgment about the problems of the federal system. I have virtually just arrived as a circuit judge when I suddenly find myself here.

But I know that I have gotten used to thinking about that problem in the State context from which I came. I never wrote a definitive analysis of it, but I think I have some appreciation of the complexity of it.

We tend, it is true, as lawyers and judges to be willing to stab ourselves to a degree, at least when we are really being candid, with some responsibility for the problem. We say, well, there are all of those lawyers out there bringing the cases, and the judges may say, well, there are all of those judges recognizing new causes of action that did not exist 10 and 20 and 50 years ago.

I am wary of putting very much weight to those explanations. There are, of course, instances in which liability has been expanded. Products liability has obviously grown as a preferred cause of action.

But what we overlook are two other things that have happened in the last 25 or 50 years. The first is, at least in my own State, we have got an enormously larger population. The litigation explosion in New Hampshire is, to a very significant degree, in civil matters, of course, a function of population.

One thing the State of New Hampshire, I know, has not done or tried to do seriously until recently is to try to keep up with that population explosion. The fact is the population has grown far more exponentially than rights of action have grown during that period.

Senator DECONCINI. You do not think that we should be attempting to find new avenues to address the problem, or we should just

keep up with more courts, more prisons if it is the criminal matter, and more courts to handle the civil cases?

Judge SOUTER. Well, Senator, I think what you allude to with respect to civil litigation is what might be called the good news of the litigation explosion, and that is that it is forcing not just the judiciary, it is forcing society to ask seriously in a way that it did not do 20 years ago, whether there is now a new significant class of cases which belong not just in regulatory agencies to get them out of the courts, but belong outside the adversary process entirely.

I mean, the good news is that alternate dispute resolution has become a respectable subject of concern. It is a subject of experimentation in my own State, and I would assume in every State in the Union.

Senator DECONCINI. Do you subscribe to it?

Judge SOUTER. I certainly do.

Senator DECONCINI. Thank you, Mr. Chairman.

Thank you, Judge Souter, very much.

The CHAIRMAN. Judge, the second to the last question the Senator asked about impact of public opinion—and you said you said you had to guard against it—I would respectfully suggest that you guard more closely against it when it comes from Rudman and less closely when it comes from Rath, McAulliffe, and Broderick.

Judge SOUTER. I will take that under advisement, Senator.

The CHAIRMAN. I appreciate your patience today, Judge.

We will reconvene tomorrow at 9:30 a.m.

[Whereupon, at 6:08 p.m., the committee adjourned, to reconvene at 9:30 a.m., Friday, September 14, 1990.]