Now, Ms. Holtzman, I am concerned somewhat about your criticism of Judge Souter's opinion in the case *State* v. *Colbath,* and that was a unanimous decision of the New Hampshire Supreme Court. As I read your statement, you claim that Souter and all the rest of the New Hampshire supreme court simply ignored the State's rape shield law. You claim that Judge Souter failed to analyze the issue, and you point out the injury suffered by the woman in the case.

Now, the clear implication of your statement, as I read it, is that the defendant caused the woman's injuries and you mentioned them in connection with Judge Souter's holding on the rape shield issue, is to support your view that Judge Souter was somehow insensitive about rape issues and women's rights in that area, but I think there is more to that case.

In that case, there was a third party, the defendant's live-in companion who, as I read the case, surprised the prosecutrix and the defendant in the act of sexual intercourse and then assaulted the woman and caused her injuries. Now, that certainly raised a jury question as to who assaulted whom, thus making relevant some of the evidence that would not be admissible in an ordinary rape case.

Now, that key fact distinguished the *Colbath* case from the standard rape shield case. In this particular case, the New Hampshire State supreme court felt that there was an important sixth amendment right or issue involved, meaning a defendant's right to confront the witnesses against him in this case.

Now, it seems to me that Judge Souter cannot win, by your reasoning. If he refuses the defendant's argument that he is entitled under the Sixth Amendment to have the evidence in *Colbath* admitted, then he is accused of ignoring the defendant's rights. If he admits the evidence, then he is accused of being insensitive to women's rights.

Now, these are kind of tough questions that require fine lines to be drawn. These cases are very difficult and no one, least of all myself, wants to see anybody harmed who may have a right cause in those kinds of cases, and that is why we need judges to take their task seriously and make every effort to get to the bottom of the problem, as Judge Souter did in that particular case.

I just wanted to point that out, because I think that that is a correct statement of the facts in the *Colbath* case, and I just——

Ms. HOLTZMAN. Senator, might I respond?

Senator HATCH. Surely.

Ms. HOLTZMAN. Obviously, the issue in all of these cases is the question of the defendant's right to introduce relevant evidence and the sixth amendment right to confront the evidence, confront the witnesses against him or her and to adduce evidence in his or her behalf.

But the question that the rape shield law tries to address is that the idea of relevance is one that was based in the past on some very antiquated notions. The point was to try to suggest to judges that what they might have thought was relevant was really not only irrelevant, but profoundly misleading to juries, injurious as to the ability of State to prosecute cases, and injurious and humiliating to the complaining witness.

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That's the concern here. The concern here is not even so much with the result, although I would have—just from my reading of the facts of the case, another result could have been justified—my concern is the language that he uses and the lack of reasoning.

I mean the very fact that he tossed aside as trivial the possibility of prejudice to the jury from the introduction of prior evidence about a woman's prior sexual act, the fact of the matter is, and I know this case-after-case, and study-after-study has shown that it is highly prejudicial to juries.

Now, he might have said, even though it is prejudicial to juries, I still think it's important, but he didn't show any sense of understanding the prejudice. The same with respect to the issue about the relevance of her prior conduct.

It might have been relevant—let's assume hypothetically—but he didn't explain how it was. Instead he accused her of being sexually provocative, as though somehow she provoked the rape, and that is exactly the point that I was trying to say that the rape shield laws were trying to address.

So I find the language of this very troublesome from that point of view.

Senator HATCH. I didn't read it that way. I read it that he was concerned that there wasn't justice done here. I think the case does show his concern for the strict enforcement of defendant's legitimate constitutional rights.

Ms. NEUBORNE. Senator——

Senator HATCH. I would like to just finish. Let me finish this one thought and then I would be happy to let you speak.

The challenged evidence, in my opinion, was necessary to the defendant's case because, No. 1, it related to public acts. And, No. 2, I might say public acts, not private matters that the rape shield law was designed to protect. And, No. 3, the evidence in the case appeared to be particularly strong since the acts occurred closely in time to the actual time of the alleged assault.

So, I mean who would know unless the case was really retried and this opportunity to hear this evidence was really heard or given? All I'm pointing out is I think you may be right, but I don't think the case shows that. I think the case shows to the contrary.

Ms. HOLTZMAN. Well, with all due respect, Senator, I think that the case, at least his reasoning, is absent with regard with regard to why her prior sexual flirtation has anything to do with whether she consented.

I mean the theory of relevance here is that if she flirted with some other men that she would consent to a rape. You explain to me the relevance of one or the logical connection between one and the other, he didn't.

Senator HATCH. Well, basically, Souter did not accuse her of being sexually provocative. He said he wanted the jury to determine whether the complainant was lying to cover her embarrassment to be discovered by the defendant's real lover or girlfriend, but let me go a little bit further.

That is one side. I don't think you're right on it and I wanted to just point it out because we should both re-read the case. But let me point out another case in the case of *State* v. ——

Ms. HOLTZMAN. Excuse me, if I could just read to you from the case.

Senator HATCH. Sure.

Ms. HOLTZMAN. There was evidence, this is a quote on the very first page, in fact, it is the second paragraph, "there was evidence that she directed sexually provocative attention toward several men in the bar."

Senator HATCH. That's different from saying that she did that. He said there was evidence. That doesn't mean it is true, and it doesn't mean it is false. Any judge worth his salt would point that out.

Let me point out another case just to show the other side of it. In the case of *State* v. *Ducette,* Judge Souter reaffirmed the important right of a rape victim to have her case prosecuted free of judicial inquiry into irrelevant and immaterial aspects of the victim's private life.

This is what he did in this case. In that case the accused rapist sought court permission to conduct discovery into a prior sexual assault that the victim had undergone some, as I recall, seven years prior to this alleged crime.

Judge Souter held and held firmly that this request was properly denied. That he couldn't bring that evidence out of seven years ago, another rape of this victim. That was properly denied because the evidence that was sought was immaterial to any issue involved in this later prosecution.

In other words, I think if you re-read this first case, the mere fact that he said there was evidence, I mean that is what the evidence showed——

Ms. HOLTZMAN. No, it was how he characterized the evidence, not that there was. If you characterize it as provocative, that suggests that she was somehow provoking the action on the part of the defendant and that is the problem that the rape shield laws, I think, and a lot of the work that we have tried to do over the years to permit effective prosecution of rape cases is designed to counter the idea that the woman is provoking the rape.

Senator HATCH. I agree with you on the necessity for rape shield laws and the necessity of protecting the women under these circumstances. I think his case shows that he agrees with you, and, certainly, this latter case shows that he agrees with you. All I'm pointing out is that I'm not sure that the criticism is as well-placed as you feel.

Now, let me just say this. I happened to listen very carefully to all of your testimony and, I respect you for it. Ms. Yard, we have known each other for a long time. Your testimony was very moving. It was very sincere. It was eloquent. So was yours, Ms. Smeal, and others as well. I don't mean to slight anybody here.

I respect you for it. But there is another point of view that is equally as moving, equally as relevant, equally as felt about, and equally as emotionally appealing.

I think that's what we have in this country is we have a tremendously issue that has two sides to it. That if you ask the right questions, you are likely to find majorities on one side or the other, depending upon the questions. And everybody in this country seems to be concerned about it.

Now, what I'm concerned is if we do go to single-litmus test issues to determine whether a person sits on the Court—I read an article by Ben Wattenburg, a Democrat, who said that the real litmus test issue is not abortion, it's quotas.

Now, what if 15 Senators felt that if this man is for quotas, they couldn't vote for him, or against quotas, they couldn't vote for them? What if 15 Senators who felt that school prayer is very important to them and they wouldn't vote for anybody who was not for school prayer? Or 15 Senators who won't vote for anybody who is for the death penalty or against the death penalty?

In other words, if we bring this down to single-litmus test issues, no matter how important, or how emotionally compelling they are to various people, my goodness I'm not sure we would have very good people ever sit on the Supreme Court, or we would ever be able to resolve these very difficult issues.

So I just point that out because I respect you for your viewpoint. I disagree with it, but I respect you for it.

Ms. YARD. But you must remember that every poll in every State and nationally shows that the vast majority believes that it is a woman's right to determine whether or not she will have an abortion——

Senator HATCH. And every poll, in every State shows that the vast majority of people think it's abominable for us to have 2 million abortions in this country every year and——

Ms. YARD. That is not the——

Senator HATCH [continuing]. To become the most, except for Mainland China, the most permissive country with regard to abortion in the world. And most everybody is concerned of finding some way of resolving this issue. Now, we're never going to agree on these things. The point——

Ms. YARD. But the point is——

Senator HATCH. The point I'm making——

Ms. YARD. The point is not whether somebody thinks it's wrong or right. What the polls show is that people believe that you should make the decision yourself. We aren't insisting that people who oppose abortion have them at all. What we are insisting is that each one of us has the right to make the decision for herself.

I don't insist that they have an abortion, and, by the same token, they can't insist that I can't make the choice not to have one.

Senator HATCH. And there may be some way of——

Ms. YARD. That's the issue.

Senator HATCH. There may be some way of resolving this issue, if it is instead of deciding by nine unelected judges, all of whom were men at the time, if it is decided by elected representatives of the people and you may very well win on your contentions. You may very well win. But the point is that there are two sides.

There are two emotional sides, and there are two equally felt-out sides, and if you ask different polling questions, you will find there are different majorities on different aspects of that issue.

Now, we could argue about it for hours and for days and months and years, which has happened around here. But my main point is this, that if we come down to single-litmus test issues to determine whether a person ever sits on the Court and we divide the Senate on litmus-test issues, we will never have any Supreme Court.

We have got to sometimes make these decisions based on the quality of the people, the competence of the people, the ability of the people, the health of the people, and a number of other issues that are far broader than just one or any single-litmus test, as important as this may be to you, and it is important, and I admire you for feeling the way you do.

I can never get mad at somebody who really believes in what they do. I might disagree violently, but I never, never will find fault with your sincere belief. I will just have to tell you that.

But my time is up. I have taken so much time as it is.

Ms. NEUBORNE. I just want to make a comment on that.

Ms. YARD. I don't want your admiration. What I want is for you to understand that it is totally unacceptable to turn back the clock. This body, the Senate Judiciary Committee, has made it very clear that you can't be a racist and sit on the Supreme Court. Well, I say you can't be a sexist and sit on one, too.

If you don't understand what freedom for women means, you don't deserve to be on the Court.

Senator HATCH. Well, from your point of view, I will respect you for that point of view, but there is another point of view that is equally as forceful. I have to tell you that.

Ms. SMEAL. And we don't know what Souter's point of view is.

Senator HATCH. Neither do I.

Ms. SMEAL. Well, the point of the matter is that you know, for he must be worried about what the public would think of his point of view, because he is refusing to say it.

We know, from his past record, that his point of view has been not only on the issue of abortion and privacy opposed to women's rights, but also on every other case that he has taken with gender discrimination at issue he has been on the side against eliminating gender discrimination.

Senator HATCH. I just showed you one where he was on your side. I can show you others. So the fact is that is just simply not a true statement. My time's up.

Ms. ALLRED. Senator Hatch, may I just say it's not a shell game. It's not a shell game where he can't, he doesn't have to answer what is under this shell but he will answer what's under that shell as it pleases him. That's what is unfair.

Of course, it goes well beyond the issue of abortion. We're talking about precedent. We're talking about seventeen years of precedent, where *Roe* v. *Wade* has been challenged time after time after time for 17 years, and of course, will be challenged again in *Russ* v. *Sullivan* in the November term, so this is an issue that is well beyond abortion. He has a duty to answer these questions. The Senator should not allow him to avoid answering what we all know is the key question.

Senator HATCH. I have to tell you as a circuit court of appeals judge——

The CHAIRMAN. I have to tell you all this, your time's up. But please finish your thought.

Senator HATCH. I know it's up, but I'm going to finish this thought here. As a circuit court of appeals judge, I don't believe that's correct. I think he has an obligation not to talk about issues

that he knows are presently and currently on the Supreme Court's list.

It's an ethical obligation, and I think that he should not prejudice his right to be able to rule in those matters by telling us in advance how he is going to rule. I would be very upset if he did, in fact, I might not support him if he did do that.

So, that's the problem and he knows that the *Russ* case is on that list and so does everybody else. That is not the only one that is going to come up. There are going to be all kinds of cases until this matter is resolved by elected representatives rather than unelected judges.

It will never go away until it is, and it may not go away then, but at least people are going to say a majority has ruled one way or the other and you may very well win.

Ms. ALLRED. Senator, I have additional——

The CHAIRMAN. I'm sorry, I am not going to allow the answer. You can maybe figure out the answer in response to a non-question from the next person. [Laughter.]

The CHAIRMAN. I didn't mean that quite the way that sounded. You may answer the question, Senator Hatch, in avoiding an answer from Senator Simpson but we have to move on.

Senator Simpson.

Senator SIMPSON. Mr. Chairman, I appreciate it. I have seen these women here before as we dealt with issues. It is a particular pleasure to see Elizabeth Holtzman, who I always enjoyed working with on various issues. We worked together on illegal immigration reform legislation and I have great regard and respect for you. I do not know the other women that well.

But obviously, you know, we're in it deep right now. And I look at the testimony of Ms. Yard. A statement of Judge Souter's, you quote on page 8, that "I don't think unlimited abortion should be allowed." That was Souter's statement, "I don't think unlimited abortion should be allowed."

Then you go on to say that "Senators, this is the language of the right wing." And then you go on to right wing it some more.

As you know, I am pro-choice. I strongly support a woman's right to choose and however, I'm always concerned about sweeping statements. You show me a 100 percenter and I will show you a person I like to stay away from. I don't care what the issue is. That's my view of life, just mine, my personal opinion.

So I see sweeping statements, filled charged statements, emotional statements and all of you are very skilled at this. You do more talk shows than we will ever do on the U.S. Senate floor. You are very good at your work.

So is Faye Wattleton and so is Kate Michelman. So let's get that out. There is power and potency in what you say, but you know how to get it across and you know just exactly what you're doing here. There is no naiveness here, no naivete. You are it. So now, let's just go forward here.

So, I'm always concerned with that. If you support unlimited abortion rights I do think you do a disservice to the cause we share, to ensure that women do have this freedom to choose. Because even *Roe* v. *Wade*—don't shrug, I see that all the time. I get