The CHAIRMAN. Judge, the press will immediately go out and assess whether you did poorly or well today. I think you did well, but they will also have to assess that the networks obviously did not do well today, based on the discussion here that has been raised, and so maybe they will have a better afternoon.

Judge, we will recess for lunch until 3 o'clock. Let us start promptly at 3 o'clock, and we will have three, I believe, possibly four questioners, but no more than that, and we will end for the weekend after that. Is that all right?

Judge SOUTER. Yes, sir.

The CHAIRMAN. Thank you. We will recess.

[Whereupon, at 1:55 p.m., the committee was in recess, to reconvene at 3 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order. Welcome back, Judge. As I said, I think the extent to which we are going to go this afternoon is the three persons you see here in front of you at this very moment. There are four, but three of us will ask our questions this afternoon, and then we will adjourn for the weekend and give you an opportunity to do something other than to sit there in that chair. Although as I said to someone who asked me earlier one of my staff people, they said, boy, he sure is good—I mean he can sit there. I said, look, that is what judges are supposed to do.

You have a lot of practice at doing it. But I really seriously admire your constitution, and we are not going to trespass on it, test it too much this afternoon.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. Judge, as it will come as no surprise to you, I would like, as I said yesterday, to pick up where you and I left off yesterday. Yesterday, you told me that almost anything can be a liberty interest recognized, at least to some extent, by the Constitution.

Now, you refer to "whole range of human interests and activities" within the ambit of the liberty clause. That comes from yesterday's transcript, on page 118.

In the broadest context, for example, chewing gum is a liberty interest, or firing a gun can be a liberty interest, or smoking cigarettes can be a liberty interest. But the key question is, in these instances and all others, is, can the State interpose itself between the individual and the liberty interest that individual is seeking to exercise?

The State can take away your liberty interest in smoking in public, for example, because it decides that smoke from cigarettes is harmful to the health of other people. The State can take away your liberty interest in firing a gun if, in doing so, you are firing that gun at somebody else.

Now, the Supreme Court has historically dealt with this issue, the question of when a State can interpose itself between the individual and the liberty interest the individual wants to exercise, first by asking whether that liberty interest is a fundamental interest or an ordinary interest.

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Now, yesterday you said the right of marital privacy "can and should be regarded as fundamental", to use your words. And you said, "the concept of an enforceable marital right to privacy would give it fundamental importance."

Now, that means, Judge, as I understand you, that a woman has a fundamental right to use contraceptives, to decide whether or not she wishes, in the first instance, to become pregnant. I think that nearly everyone agrees with that proposition, with notable exceptions.

Now, my question is this, Judge. If the liberty interest in choosing whether or not to become—for a married woman, so that we don't get off into a debate about *Eisenstadt*—if the liberty interest in choosing whether or not to become pregnant in the first instance is a fundamental liberty interest, fundamental right of privacy, is that liberty interest terminated when a woman becomes pregnant?

Judge SOUTER. Mr. Chairman, I think there are two questions in your question. First, is the interest that the woman would assert following pregnancy a liberty interest? Second, having asserted that, what weight should be given to it? Should it be given the same constitutional weight as the liberty interest which she asserts prior to pregnancy?

With respect to the first question, the answer is undoubtedly yes. I think that going back to an exchange you and I had yesterday, I think you alluded to that. There are the Supreme Court reports, including dissenting and concurring opinions, that are replete with references to the fact in just such contexts as this that liberty is not limited to locomotion. That is, that is exactly the sense that you have been explaining this afternoon. So, of course, it would be asserted as a liberty interest.

The second question, how should that liberty interest be valued, is one of the central questions in the *Roe* v. *Wade* debate. And with respect to that, for reasons that I mentioned yesterday, I think that is the point at which I must respectfully draw the line.

I wonder if I may ask you one thing, and if this is out of turn, you tell me.

The CHAIRMAN. Nothing is out of turn. As we said at the outset any question is appropriate.

Judge SOUTER. Well, in fact, that is one difference between my role here before this committee and my role as a judge. I can't ask questions here.

The CHAIRMAN. Yes, you can, Judge.

Judge SOUTER. Well, I just did. In any case, thank you.

I remember when this first came up when you and I were speaking yesterday afternoon, and I said you understand my position. I thought afterwards I am not sure that everyone does. Would it be out of turn for me to take a minute for me to explain why I feel that I have to take that position?

The CHAIRMAN. No. It wouldn't. As long as, Judge, you don't take all of the half hour to prevent me from getting to what I would like to go to next. If you take a few minutes, I would be delighted to hear it; otherwise, I would suggest that you wait until the end of my questioning to do it. You decide.

Judge SOUTER. I promise you this is not a New Hampshire ruse. I say that because there are a number of people watching what we

are doing today who have not heard an explanation from me, and I think they ought to have one.

I have alluded to the reason a number of times. Ultimately it goes to the fact, as we did say yesterday, that the continuing validity of *Roe* v. *Wade* is an issue which will come before the Court, and if I shall be confirmed it will come before me.

The reason it is inappropriate for someone in my position to express an opinion on an issue which would be comprehended by that request to overrule *Roe* v. *Wade* goes right to the heart of what the judicial process is.

And if the judicial process is nothing else, it is a process in which in every court and on every issue that may come before a judge the people who come before him can have a fair hearing. A fair hearing means something substantially more than simply judicial courtesy to sit back and let a person say whatever is in that person's mind. A fair hearing requires a willingness of the court not only to listen, but genuinely to examine the position which the court is inclined at that point to take.

Anything which substantially could inhibit the court's capacity to listen truly and to listen with as open a mind as it is humanly possible to have should be off-limits to a judge. Why this kind of discussion would take me down a road which I think it would be unethical for me to follow is something that perhaps I can suggest and I will close with this question.

Is there anyone who has not, at some point, made up his mind on some subject and then later found reason to change or modify it? No one has failed to have that experience.

No one has also failed to know that it is much easier to modify an opinion if one has not already stated it convincingly to someone else.

With that in mind, can you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people?

You understand the compromise that that would place upon the judicial capacity and that is my reason for having to draw the line. I thank you for the time to say it.

The CHAIRMAN. That is extremely well stated, if that is what I was asking you to do.

You used several phrases in your comments you just made. You said, "substantially limit." What I am asking you does not, in my view—and let me explain why—"substantially limit" your ability to sit before any group of litigants and have a totally open mind, or a mind that although already inclined to rule one way, is open enough to listen intently, honestly, and with great interest to why the position you have tentatively taken in your mind should not be retained by you.

There are two parts, if I may respectfully suggest, Judge, to the equation in determining whether or not you would rule one way or another on any case relating to reproductive freedom.

One part is the value placed upon the liberty interest that is retained and constitutionally protected by the Court, recognized by the Court. The second is what the Court would conclude to be sufficient evidence to meet the test required under the law, to provide

countervailing weight to interpose the State between the woman and that right.

There are two sides to the equation, Judge. You can never solve a problem without both sides of the equation being present. If I only ask you for one side of the equation, you may think it takes you down a road, but no reasonable person, in my opinion, can conclude and walk out of this room with any clear notion of how you would rule only knowing the one side.

Let me be more specific, because I, too, am asked—a lot of people probably don't understand why I am. There are those out there who don't understand, why you are unwilling to answer. There are probably as equally as many people who don't understand why is Biden persisting in asking, if it is not for the purpose of finding out what this Judge is going to rule when the next case relative to the issue of reproductive freedom comes up.

Let me explain my side of that for a moment if I may. As I said, the first part of this question is to determine how Judge Souter thinks. What methodology Judge Souter would employ or be inclined to employ, even though, even that he can change his mind. No one here—let me say it for the fifth time, or sixth or seventh—no one here is seeking a commitment on anything. And nothing that you say here, today, on any subject, precludes you from doing what my friend from Iowa said the other day, when he said, I had a totally different view today about what is appropriate to ask and what isn't appropriate to ask. He changed his mind. He has a right to change his mind.

So no one is asking you for a commitment. Now, Judge, it seems to me that if you are willing to discuss with us, with me, the first part of the equation, whether or not this fundamental right of privacy of a married woman regarding procreation, regarding whether or not she wishes to be a mother, ceases at the time she becomes pregnant, or continues for some period of time, you have not answered in any way how you would rule on *Roe* v. *Wade* because if there is a fundamental right that exists, the State must have an extraordinary reason to interpose itself between the mother's judgment and her state of pregnancy or nonpregnancy.

What you consider to be an overwhelming reason is something I am not asking you. For you, an overwhelming reason could be there are just too many people or not enough people in the work force, that America's population is declining and the State has an interest in seeing to it that the birthrate is up, not down.

For you that could be an overwhelming reason. For you the fact that it is arguable that it is a fetus, that is able to be sustained outside the womb might not be an overwhelming reason. We don't know. I don't know. No one knows.

I am not asking you that. I'm not going to ask you that. But it seems to me that it is not at all inappropriate for me to ask you, how do you think as a constitutional lawyer and soon-to-be Supreme Court Justice about weighing the values that you spoke of yesterday.

Judge SOUTER. The answer to that question is two-fold, I guess. We think about that process of weighing values in essentially the same way and essentially by the same principles that we go about weighing values in the liberty case with which you and I began,

the circumstances prior to conception. We go about it in exactly the same way we go about assessing the value of any liberty interest.

As I have explained, basically my approach to it is the approach of Mr. Justice Harlan. The point at which I think you and I respectfully have to part company is on this point. You are saying to me that I am not, if I were to answer your second question, I am not in any way saying how I would rule.

With respect, I think I am a third to a half of the way down the road to saying how I would rule. Because as you say, there are a number of components in that ruling.

The CHAIRMAN. Can I interrupt you there, just so that we keep this as a little bit of a conversation? If I get in my automobile and I start in the westerly direction but there are three forks in the road between where I start and where *Roe* lives, and I get one-third the way down the road, and I stay on the road. I don't take the fork that leads me away from Roe, does that in any way tell you that I am going to end up at Roe's house?

Judge SOUTER. No, sir, it doesn't. But the road between here and Roe's house does not have 3 forks, it has 3 miles. It has——

The CHAIRMAN. How many forks does it have, Judge——

Judge SOUTER. Pardon me?

The CHAIRMAN [continuing]. To keep this silly metaphor——

Judge SOUTER. I don't think it is a forked road. I think we have to cross certain territories, if you will, of subject matter. We have to cross the issue of how the interest is itself valued. We have to cross the territory in which we explore what the countervailing interest may be and how they are to be valued. And in a case of reexamining a prior precedent we have to cross the territory of valuing that precedent in accordance with the general rules that we have.

You are saying to me and I respect the position from which you say it, sir, that I want you to cover the first third of the journey because that still leaves two-thirds of the way and you may or may not travel those two-thirds if you are asked to do it.

And my response has to be when I travel the first third, I am giving a third of an indication of what would be done, and with respect, I think I cannot do it.

The CHAIRMAN. You and I took different logic courses, Judge, and with all due respect on this one, it is probably the only thing I might get a better mark than you on. Because to suggest that to go one-third of the way in any way tells you where you are going to end, it diminishes the probabilities that I may not end, but it does not tell you.

But let me get off of this for a minute, because there is probably no course that I could think of that I would have done better than you in law school.

Judge SOUTER. I will drop my analogy if you will.

The CHAIRMAN. Let me explain, or use another analogy.

There was a good deal of discussion yesterday between you and Senator Kennedy and between you and, I believe it was Senator DeConcini—let me check, yes—and between you and me, less with me, and more with those other two gentlemen, about the equal protection clause as it applies against women.

Now, you discussed at length the various levels of scrutiny that are used in evaluating claims of gender discrimination. You talked about three standards of review that the Court uses when it looks at laws that classified people on the basis of whether or not they are male or female.

You said that strict scrutiny is the toughest standard. You said there is a rational basis test. You explained that. Then you said that there is a third test. There is the in-between—I am not quoting you—there is the in-between level of scrutiny which the lawyers call intermediate level of scrutiny and/or the middle tier in which one of the Justices on the Court calls God knows what.

Now, you came along at the end of that, I was kind of interested that you were willing to go so far the down the road to Mary's house. [Laughter.]

The CHAIRMAN. You got down the road and you said, yesterday—I looked at you and I said to you, now, let me understand, Judge. I said, well, let me understand, Judge, "there is a standard between strict scrutiny and rational basis? Is that where you are?"

And you said, "Well, I suppose there has got to be." Then you certainly said the same thing in response to Senator DeConcini, when you said, "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."

Now, in the area of equal protection, you are willing to tell me what ball park you are in. You crossed a lot more fields than you are willing to cross with me on the issues of procreation. How can you intellectually justify telling me what test you will use relative to the equal protection clause, and not tell me what test or principles you will use relative to the issues relating to procreation?

Judge SOUTER. Because there is no serious possibility, I think, today that anyone would maintain before a court, in the history of equal protection development that we have had in this country, that the only two focuses of equal protection have got to be at the one end least scrutiny of all, at the other end greatest scrutiny of all, as in the scrutiny for fundamental rights.

There may be disagreement within this committee, there may be disagreement within the court among lawyers as to how to articulate the way that we travel that distance between the least and the most scrutiny. But I think it is fair to say that there is no question today of anyone seriously arguing that there are not interests which are important enough to transcend the least scrutiny and which may not be important enough to get to the greatest. And my concern in the discussion, as you know, has been that the real tough question is whether the test for that place in between, if we are going to have discrete spots on the spectrum, should be the one that we have or a different test, if we could devise one.

The CHAIRMAN. But you think it is in between. You told us you think it should be in between. Judge, I think you are making a distinction without a difference. And with all due respect, the fact is that there are a number of gender discrimination cases you are going to have to deal with before this century is over. There are a number of issues you are going to have to confront. And you appropriately, not inappropriately, have told this body and the Nation that you have arrived at a standard that you would apply. You

said, "I haven't written it out yet." The fact that you reject the bottom one, Judge, and say everybody else rejects it does not speak to the question that there are two left. And you have chosen one of the two.

Judge SOUTER. Sir, I have not chosen the articulation of the middle-tier standard. I am saying that that is the one we have got now, and we ought to see if we can do a better job in articulating it.

The CHAIRMAN. A middle-tier standard.

Judge SOUTER. The position that I have taken—and I would have thought, and I do think that it would be unreasonable to take any other position—is that——

The CHAIRMAN. Well, Judge, why is it unreasonable to take the strict scrutiny position? Why is that unreasonable?

Judge SOUTER. I have not taken a position that it is unreasonable. What I am saying is that it would be unreasonable to take the position that the interest in avoiding discrimination on grounds of sex is of such obvious unimportance that you could seriously argue at this point that it should be left to the minimum scrutiny.

As to whether or not a sexual classification should be judged on the basis of the very highest scrutiny or not is a subject upon which I have not taken a position. I think the two things that I have said is clearly we must recognize that it is more important than minimum scrutiny. And if we are trying to devise a test for a middle tier, I am concerned, as I have said before, about the flexible quality of the one that we have.

The CHAIRMAN. Well, Judge, this is not a—I'm trying to find out information and rationales. I am not trying to bait you.

Let me ask you, then, from my perspective sitting here, it seemed to me that gender was not the only area you were able—you were willing, at least, and you acknowledge you narrowed the field. And you say the reason you are able to narrow it on gender, basically to translate what you said, the way I understand it, is because there is no longer any real debate about the lowest standard so it is all right to basically say there has got to be something other than the lower standard.

Judge SOUTER. I don't think there is a reasonable debate.

The CHAIRMAN. Yes, right. OK.

Now, in the morning, you had an exchange with Senator Specter. You were talking about the free exercise clause of the first amendment, the clause that protects a citizen's right to exercise their personal religion free from undue Government interference and applying the free exercise clause in particular cases requires the same kind of reasoning as is involved in the unenumerated rights area, like the right of privacy and the right of a woman to remain pregnant or not to remain pregnant, according to her choosing.

Judge SOUTER. Well, it involves the same level of scrutiny if a classification——

The CHAIRMAN. Right, that is all I am talking about. That is all I am talking about.

Now, in all these cases, Judge, the judge has to decide "how the individual interest should be evaluated and the weight that should be given to it in determining whether there is in any or all circumstances a sufficiently countervailing governmental interest." Now,

those are your words from yesterday, Judge, in describing what you would not be willing to tell us concerning a woman's right, when you were speaking of the woman's right. Yet in the free exercise case, you told Senator Specter that you recognized the value of the "strict scrutiny standard." You said that a person's right to exercise his or her freedom of religion is fundamental, and that to overcome it the State must have a compelling interest and a statute must be narrowly tailored to that interest.

In other words, you told him about free exercise exactly what you are unwilling to tell me about procreation.

Judge SOUTER. I think what I told Senator Specter was, No. 1, that the test as you have just quoted me as saying was the Supreme Court's test for it. And I told Senator Specter that there was nothing in my experience which had led me to believe that I would wish to re-examine that.

The CHAIRMAN. Well, now, what does that mean? Isn't that the same thing as saying that in your experience you are satisfied with the strict scrutiny test? Isn't that what you just told us?

Judge SOUTER. I am saying that there is no basis that I would raise in the discussion with Senator Specter or anyone else on this committee to give them an indication that I think there should be a change in the test that the Court has had. I also said to Senator Specter, when we were describing, for example, the concept of establishment, that I had not done any research or taken any position on the question of re-examining the concept of establishment.

The CHAIRMAN. I understand that.

Judge SOUTER. And I said to him then and I would now that if a case of that sort were brought and the argument were made, I would listen. But I do not approach those issues with any preconception that I——

The CHAIRMAN. In the establishment area, that is true, Judge, if I may interrupt you. But on the free exercise question—well, I won't beat it to death, but you said what you said. You said, "What I do want to understand is that I approach the issue, or would approach the issue if it comes before me, with exactly the view of the value of the strict scrutiny test which I described to you."

Now, I don't know how, Judge, in any plainer English—we can debate this, but I don't know how that says anything other than what it says: "I would approach the issue with the view of the value of the strict scrutiny test." Now, if that is not telling us what principle you would apply, I don't understand. But, again, I don't want to belabor it. I don't understand why in the free exercise area you are—on page 49 of today's transcript—explicitly prepared to tell us what standard you would apply, although I acknowledge, no matter what you told us, you are prepared to listen to arguments. No one doubts that. No one doubts that you are prepared to listen to an argument if Senator Specter were before you. And he would be arguing strict scrutiny. But if he were before you and said, no, it shouldn't be strict scrutiny, it should be rational basis, you would listen. No one doubts that. But you were willing to tell us what standard you would apply, but you would sit down—as they say, O ye, O ye, bang, you sit down, and you sit down strict scrutiny is where you start. That is all I am asking you about the other area.

But let me leave it for a second and go to one—I will take one last run at this. You have mentioned Justice Harlan several times. If I can't get you to do in the procreation area what you are willing to do, in my view, in the gender and free exercise area, let me ask you to try this with me so I can have a better insight into how you think, how you approach a problem.

I have thought about how can I possibly do this because I had no doubt where you were going to go. You are not about to tell me what principles you are going to employ. And so I tried to think last night about how could I get at your reasoning process. Forget the statement of what principles you would apply. We are beyond that. Let's just leave that aside. As I said, one more effort, so listen to me. Maybe you can give me some insight here, OK?

In response to a question—and what I came up with last night, and I drove my staff crazy. I said, look, how do you ask a guy how does he think? Not what standards, that is real easy. One of the ways to figure out how you think is you say, well, here are the standards that I apply, the principles from which I start. Another way to say it, if you don't use that—which met with the rejoinder, well, that is getting me too close to case-specific, so I won't—how do you get to the guy and say, okay, just tell me, how do you think? And I went back to old Harlan, God bless him. He was a great Justice.

This morning, Senator Grassley in a different context got you talking about that a little bit in a way that sort of clicked in my mind that maybe this is the way to go about it, and let me try it.

This is harder than talking to Warren Rudman, you know? [Laughter.]

As a matter of fact, it is similar. No wonder you guys are such close friends.

Judge SOUTER. I was going to say, at least you have gotten the chance to do that. You know, what I said yesterday, I just listen.

The CHAIRMAN. It is only because there are certain Senate rules on the floor. When one Senator has the floor, the other cannot speak.

In response to a question from Senator Grassley this morning, you said something that I would like to pick up on. You said that the one thing that judges need to "work on"—he was going into what is the proper role of a judge—is the "criteria they use" to determine which enumerated rights will be deemed protected by our Constitution. And I would like to ask you about the criteria that you would use, just like the criteria that Harlan used and enunciated.

In response to another question from Senator Grassley, you suggested that your criteria would be similar to those employed by Justice Harlan, and you identified two criteria in particular. And I want to be specific; that is why I am reading from this. I don't want to misrepresent your position.

You identified two criteria in particular that you used which you seem to find helpful. One was whether the deprivation of such a right, an asserted right, an asserted liberty, would be contrary to the concept of ordered liberty. So I am real clear for me because you are—and I am not being solicitous. This is stating the obvious. You are the scholar. I do this among other things.

What we are talking about here is an assertion of a liberty interest not enumerated in the Constitution by an individual, and a State coming along and saying, wrong, you can't do that, you don't have that constitutionally protected right. It is not constitutionally protected any longer. It may have been constitutionally protected to some degree, but the State trumps you. The State comes along and has a better right to take it away than you have to retain and exercise it.

You said when that debate is taking place, one of the issues is whether or not the right would be contrary to the concept of ordered liberty; and, second, you said, "A search of the American tradition" to see if the rights fall within that tradition.

Now, before I ask you about these criteria, Judge, that I want to get into, have I accurately stated the views you expressed to Senator Grassley: that ordered liberty and a search for the American tradition would be at least two of the criteria you would use for determining whether or not there is a constitutionally protected unenumerated right in the Constitution?

Judge SOUTER. Yes, with this one caveat, which I think is unnecessary: You and I, we are both abbreviating Justice Harlan's language when we were speaking of that second approach to reasoning. But with that, yes, of course.

The CHAIRMAN. Now, Judge, I am particularly interested in this notion of search of the American tradition that you spoke of. As you know, one heated debate in modern constitutional law—not about any specific case but about general principles—concerns just how judges should go about "searching for our traditions."

Now, Justice Scalia—in a case called *Michael H.* v. *Gerald D.*—and the facts of the case are not relevant so, please, in the time I have left, let's not get off into the facts of the case.

Judge SOUTER. I promise.

The CHAIRMAN. OK. Unless you think they are relevant or necessary in order for you to answer.

He explained his methodology this way in Footnote 6, which is becoming a famous footnote: "I would refer to the most specific level at which a relevant tradition protecting or denying protection to the asserted right can be identified." Now, this is understood to be a narrowing of the idea of unenumerated rights, because under it, unless the particular and specific right being asserted by the individual has long been recognized in our tradition, the Court, adopting this reasoning, would not recognize it.

Two other conservatives on the Court, I might add—Justices O'Connor and Kennedy—rejected this method as being too cramped. They said, "When identifying liberty interest protected by the due process clause, on occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be the most specific level available." Then they specifically cited *Loving,* and let me make sure we get into that.

Loving, as you know better than I do, was a Virginia case years ago, striking down the anti-miscegenation laws which said black folks can't marry white and white can't marry black.

Now, the way Justice Scalia would approach *Loving,* if his reasoning is consistent—and I think it is. He is a very bright fellow and totally consistent, to the best of my knowledge. He says don't

go back and look at whether or not marriage, the institution of marriage is granted and viewed in American tradition with a sense of sanctity and privacy. That is too general. Go back in our history and look at whether or not our American tradition recognized the rights of blacks and whites to marry.

That is the specific tradition we must investigate. Did it exist or did it not exist?

So, it depends from whence you start, it is like that old thing about computers, "garbage in, garbage out." Depending on where you start is going to determine in your little syllogism how it is built and what answer you give.

Now, Justice Scalia says you should look at the most specific right being asserted. In this case, Justice Kennedy and Justice O'Connor say no, you have got to go a little broader sometimes.

Now, Judge, without getting into how you would have decided *Michael H.* or *Loving* or any other specific case, could you tell me which of the two methodologies you would employ?

Judge SOUTER. I could not accept the view that, as a rule always to be applied, the most specific evidence is the only valid evidence, and I do not think that Justice Harlan would have done so, either.

It is a quest for a greater degree of certainty that we understand, and it seems to me that the quest for the kind of evidence that we are after should be a quest not for evidence which, as a matter of definition or a matter of absolute necessity has either got to be of narrow compass or of general compass, rather, it has got to be a quest for reliable evidence, and there may be reliable evidence of great generality.

The analogy that I thought of, as you were describing that, is far from a perfect analogy, but I think I will throw it out anyway. We do not say, when we are engaging in the normal evidentiary problems in the trial court, that we will accept only direct evidence and not circumstantial. We do not narrow down our kind of search for truth in ways like that, and I think——

The CHAIRMAN. But, Judge, does it not determine what evidence you are accepting to assert what proposition? If the evidence you are seeking is whether or not marriage is protected historically, that is one thing. If the evidence you are seeking out, the reliable evidence is to determine whether or not blacks and whites marrying has been a tradition in our tradition, that is a different thing, right?

Judge SOUTER. That is right.

The CHAIRMAN. OK. And that is what I am asking you, the fundamental issue, do you think we need to determine when the investigation begins, the narrowest application of the right asserted, or a broader application of the right asserted?

Judge SOUTER. The answer is we cannot, as a matter of definition at the beginning of our inquiry, narrow the acceptable evidence to the most narrow evidence possible——

The CHAIRMAN. OK. I now yield——

Judge SOUTER [continuing]. And I think Justice Harlan would have given the same answer to that.

The CHAIRMAN. Thank you very much. Maybe I can come back to it.

Judge SOUTER. Thank you.