priately reveal to us and the Nation your constitutional philosophy within the limitations you think you are bound by.

So to clear it up, to state it again, any member can ask anything. You don't have to answer if you think it is inconsistent with what your responsibilities are.

Judge SOUTER. I appreciate that. Thank you.

The CHAIRMAN. Now, Judge, let me begin. You said in your statement, you used the phrase "the promises of our Constitution." That is the phrase you used, and that is really what I want to discuss with you—the promises of our Constitution. What does it promise? Because there are very, very different views held by very bright women and men, all experts in the law, many incredibly well informed, who have very different visions of what the promises of our Constitution are.

Judge, it comes as no surprise to you, as I discussed with you a little bit yesterday, there is nothing intended that I am about to ask you that is designed as a surprise, so much to the extent that I think you were probably surprised yesterday when I told you what I was going to ask you.

Judge SOUTER. I was a little bit.

The CHAIRMAN. And it will not surprise any of the press I see out there because it is something I care deeply about, and they are probably tired of hearing me talk about it, but I am going to continue to talk about it. And as, Judge Souter, a close friend of yours, and I consider him, quite frankly, a close friend of mine, my colleague Warren Rudman, has said—he has said many things, but he has said that Supreme Court——

Judge SOUTER. You should have been staying with him for the last 10 days. [Laughter.]

The CHAIRMAN. No, we each have our own jobs. That is your job, not my job.

Judge SOUTER. I realize that.

Senator HATCH. We live with him every day, let me tell you. [Laughter.]

The CHAIRMAN. But he has indicated that one of the Supreme Court Justices you most admire was the second Justice Harlan, who served on the Supreme Court between 1955 and 1971, and who was widely regarded, is widely regarded as one of the great conservative Justices ever to serve on the Court.

Now, Justice Harlan concurred in the Court's landmark decision of *Griswold*. That is the Connecticut case that said that the State of Connecticut, the legislature and the Governor couldn't pass a law that—constitutionally—said that married couples could not use birth control devices to determine whether or not they wished to procreate.

Justice Harlan indicated that that Connecticut law violated the due process clause of the 14th amendment which says that no State can deprive any person of life, liberty, or property without process of law.

Now, my question is this, Judge: Do you agree with Justice Harlan's opinion in *Griswold* that the due process clause of the 14th amendment protects a right of a married couple to use birth control to decide whether or not to have a child?

Judge SOUTER. I believe that the due process clause of the 14th amendment does recognize and does protect an unenumerated right of privacy. The——

The CHAIRMAN. And that—please continue. I didn't mean to interrupt. I like what you are saying.

Judge SOUTER. The only reservation I have is a purely formal reservation in response to your question, and that simply is: No two judges, I am sure, will ever write an opinion the same way, even if they share the same principles. And I would not go so far as to say every word in Justice Harlan's opinion is something that I would adopt. And I think for reasons that we all appreciate, I would not think that it was appropriate to express a specific opinion on the exact result in *Griswold,* for the simple reason that as clearly as I will try to describe my views on the right of privacy, we know that the reasoning of the Court in *Griswold,* including opinions beyond those of Justice Harlan, are taken as obviously a predicate toward the one case which has been on everyone's mind and on everyone's lips since the moment of my nomination—*Roe* v. *Wade,* upon which the wisdom or the appropriate future of which it would be inappropriate for me to comment.

But I understand from your question, and I think it is unmistakable, that what you were concerned about is the principal basis for deriving a right of privacy, and specifically the kind of reasoning that I would go through to do so. And in response to that question, yes, I would group myself in Justice Harlan's category.

The CHAIRMAN. Well, Judge, let me make it clear, I am not asking you about how you would decide or what you even think about *Roe* v. *Wade.*

Judge SOUTER. I understand that.

The CHAIRMAN. Now, in the *Griswold* case, I am curious what proposition you think it stands for. Do you believe it is a case in a long line of cases, establishing an unenumerated right to privacy, a right the Constitution protects, even though it is not specifically mentioned in the document?

Judge SOUTER. I think probably it would be fairest to say that it is a case in a confused line of cases and it is a case which, again referring to the approach that Justice Harlan took, it is a case which to me represents at least the beginnings of the modern effort to try to articulate an enforceable doctrine.

My own personal approach to that derivation begins with, I suppose, the most elementary propositions about constitutional government, but I do not know of any other way to begin. I am mindful not only of the national Constitution of 1787, but of the history of State constitution-making in that same decade.

If there is one generalization that we can clearly make, it is the generalization about the intended limitation on the scope of governmental power. When we think of the example of the national Constitution, I think truly we are at the point in our history when every schoolchild does know that the reason there was no Bill of Rights attached to the draft submitted to the States in the first instance after the convention recessed, was the view that the limitations on the power to be given to the National Government was so clearly circumscribed, that no one really needed to worry about the possible power of the National Government to invade what we

today group under the canon of civil liberties, and we know the history of that response.

We know that there were States like my own which were willing to ratify, but were willing to ratify only on the basis of requesting that the first order of business of the new Congress would be to propose a Bill of Rights in New Hampshire, like other States, who was not bashful about saying would not be in it.

The CHAIRMAN. Did you wish to continue?

Judge SOUTER. If I may. This attitude did not sort of spring up without some antecedent in 1787. I am not an expert on the constitutions of all of the original States, but I do know something about my own.

One of the remarkable things about the New Hampshire Constitution, which began its life at the beginning of that same decade, is the fact that it began with an extraordinarily jealous regard for civil rights, for human rights. The New Hampshire Constitution did not simply jump in and establish a form of government. They did not get to the form of government until they had gotten to the Bill of Rights first.

They couched that Bill of Rights with an extraordinary breadth and a breadth which, for people concerned with principles of interpretation, requires great care in the reading. But the New Hampshire constitutionalists of 1780 and 1784 were equally concerned to protect a concept of liberty, so-called, which they did not more precisely define.

So, it seems to me that the starting point for anyone who reads the Constitution seriously is that there is a concept of limited governmental power which is not simply to be identified with the enumeration of those specific rights or specifically defined rights that were later embodied in the bill.

If there were any further evidence needed for this, of course, we can start with the ninth amendment. I realize how the ninth amendment has bedeviled scholars, and I wish I had something novel to contribute to the jurisprudence on it this afternoon, which I do not.

The CHAIRMAN. It is novel that you acknowledge it, based on our past hearings in this committee. [Laughter.]

One of the last nominees said it was nothing but a waterblot on the Constitution, which I found fascinating. At any rate, go ahead.

Judge SOUTER. Well, I think it is two things—maybe it is more. I have no reason to question the scholarship which has interpreted one intent of the ninth amendment as simply being the protection or the preservation of the State bills of rights which preceded it.

Neither, quite frankly, do I find a basis for doubting that, with respect to the national bill of rights, it was something other than what it purported to be, and that was an acknowledgment that the enumeration was not intended to be in some sense exhaustive and in derogation of other rights retained.

The CHAIRMAN. Is that the school to which you would count yourself a graduate?

Judge SOUTER. I have to count myself a member of that school, because, in any interpretive enterprise, I have to start with the text and I do not have a basis for doubting that somewhat obvious and straightforward meaning of the text.

The CHAIRMAN. Let me ask you another question here, and I realize this is somewhat pedantic, but it is important for me to understand the foundation from which you build here.

You have made several references appropriately to the Bill of Rights and the Federal Government. Do you have any disagreement with the incorporation doctrine that was adopted some 70 years ago applying the Bill of Rights to the States? Do you have any argument with that proposition?

Judge SOUTER. No; my argument with the incorporation doctrine would be with the proposition that that was meant to exhaust the meaning of enforceable liberty. That, in point of fact, as you know, I mean that was Justice Harlan's concern.

The next really—I mean that brings to the fore sort of the next chapter in American constitutional history that bears on what we are talking about, because one cannot talk about the privacy doctrine today, without talking about the 14th amendment.

The CHAIRMAN. Judge, I am truly interested in us going back through in an orderly fashion the evolution of constitutional doctrine, but as my colleague sitting behind you will tell you, I only have a half hour to talk to you and I want to ask you a few more specific questions, if I may.

The 14th amendment, as you know, was designed explicitly to apply to the States. Speaking to the liberty clause of the 14th amendment, Justice Harlan said:

> The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution,

Which is totally consistent with what you have been saying thus far.

Judge SOUTER. Yes.

The CHAIRMAN. Now, do you agree with Justice Harlan that the reference to liberty in the 5th and 14th amendments provide a basis for certain—not all, but certain—unenumerated rights, rights that the Constitution protects, even though they are not specifically enumerated within the Constitution?

Judge SOUTER. I think the concept of liberty as enforceable under the due process clause is, in fact, the means by which we enforce those rights. It is sterile, I think, to go into this particular chapter of constitutional history now, but you will recall that Justice Black was a champion at one point of the view that the real point of the fourth amendment, which was intended to apply unenumerated substantive rights, was the privileges of immunities clause, and not due process. Well, as a practical matter, that was read out of the possibility of American constitutionalism, at least for its time, and it has remained so by the slaughterhouse cases.

What is left, for those who were concerned to enforce the unenumerated concepts of liberty was the liberty clause and due process, and by a parity of reasoning by the search for coherence in constitutional doctrine, we would look to the same place and the same analysis in the fifth amendment when we are talking about the National Government.

The CHAIRMAN. Now, let us follow on. We recognize, you recognize, you have stated that *Griswold* and the various means of rea-

soning to arrive at the conclusion that there was a constitutionally protected right of a married couple to determine whether or not to procreate, to use birth control or not, is a constitutionally sound decision.

Now, shortly thereafter there was a similar case in Massachusetts, although in this case it did not apply to married couples, there was a Massachusetts statute, in the *Eisenstadt* case, that said unmarried couples, and the rationale was that there is reason to not be out there allowing unmarried couples to buy birth control, because it would encourage sexual promiscuity, and the Supreme Court struck that down, as well, saying that it violated a right to privacy, having found once again, most Justices ruled that way, in the 14th amendment.

Now, do you agree that that decision was rightly decided?

Judge SOUTER. Well, my recollection—and I did not reread *Eisenstadt* before coming in here, so I hope my recollection is not faulty, but my recollection is that *Eisenstadt* represented a different approach, because the reliance on the Court there was on equal protection. I know that my recollection is——

The CHAIRMAN. Yes, the——

Judge SOUTER. I am sorry.

The CHAIRMAN. Go ahead. I am sorry.

Judge SOUTER. My recollection is that the criticism of *Eisenstadt* at the time was whether the Supreme Court was, in fact, reaching rather far to make the equal protection argument. But I think there is one point that is undeniable, without specifically affirming or denying the wisdom of *Eisenstadt,* and that is there is going to be an equal protection implication from whatever bedrock start privacy is derived under the concept of due process, and I think that then leads us back to the essentially difficult point of interpretation, and that is how do you go through the interpretive process to find that content which is legitimate as a concept of due process.

The CHAIRMAN. Also, to what extent you find it legitimate. Is it a fundamental right, or is it an ordinary right? In the case of *Griswold,* in the *Griswold* case, it was discerned and decided that there was a fundamental right to privacy relating to the right of married couples to use contraceptive devices. Do you believe they were correct in that judgment, that there is a fundamental right?

Judge SOUTER. I think the way, again, I would express it without getting myself into the position of endorsing the specifics of the cases, is that I believe on reliable interpretive principles there is certainly, to begin with, a core of privacy which is identified as marital privacy, and I believe it can and should be regarded as fundamental.

I think what we also have to recognize is that the notion of protected privacy, which may be enforceable under the 14th amendment, has a great potential breadth and not every aspect of it may rise to a fundamental level.

The CHAIRMAN. I agree. That is why I am asking you the question, because as you know as well as I do, if the Court concludes that there is a fundamental right, then for a State to take action that would extinguish that right, they must have, as we lawyers call, it is required they look at it through the prism of strict scrutiny. Another way of saying it, for laymen, is that they must have a

pretty darn good reason. If it is not a fundamental right and it is an ordinary right, they can use a much lower standard to determine whether the State had a good enough reason to preempt that right.

So, as we talk about this line of cases, in *Griswold* and in *Eisenstadt*—let me skip, in *Moore* v. *East Cleveland,* where the Court ruled, extending this principle of privacy from the question of procreation, contraception and procreation, to the definition of a family. As you know, East Cleveland had an ordinance defining a family that did not include a grandmother and grandson, and so East Cleveland, under that ordinance, said that a grandmother and her two grandchildren could be evicted from a particular area in which they lived, because they were not a family, as defined by the local municipality in zoning ordinance.

Now, the Court came along there and it made a very basic judgment. It said—if I can find my note, which I cannot find right now, and I think it is important to get the exact language, if I can find it—I just found it. [Laughter.]

Justice Powell said, "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the 14th amendment."

Now, my question, Judge, is do you believe that that assertion by Justice Powell is accurate?

Judge SOUTER. I think that assertion by Justice Powell represents a legitimate judgment in these kinds of problems with respect to *Moore* just as in the discussion with *Griswold.* I am going to ask you to excuse me from specifically endorsing the particular result, because I recognize the implications from any challenge that may come from the other privacy case that is on everyone's mind.

But the one thing that I want to make very clear is that my concept of an enforceable marital right of privacy would give it fundamental importance. What the courts are doing in all of these cases is saying—although we speak of tiers of scrutiny—what the courts are saying, it seems to me in a basically straightforward way—is that there is no way to escape a valuation of the significance of the particular manifestation to privacy that we are concerned with, and having given it a value we, indeed, have to hold the State to an equally appropriate or commensurate reason before it interferes with that value.

The CHAIRMAN. That is exactly what I am trying to find out in your answering. So the valuation applied to a definition of family, is fundamental. The valuation applied to whether a married couple can use contraception is fundamental. The valuation applied to whether or not an unmarried couple can use contraception is fundamental.

Now, I would like to ask you, as I move along here, as you look at this line of cases we have mentioned—and I will not bother to go through a couple of others that I have anticipated—is my time up? I saw the light go off and I thought my time was about up and the one thing these fellows are not likely to forgive me for—they will forgive me for a lot of things but not for going over my time.

That when it comes to personal freedom of choice, as Justice Powell put it, in family and in marriage, one basic aspect of that freedom is the right to procreate. Now, early in the 1940's, in the

Skinner case, the Supreme Court said that criminals could not be sterilized. The Court made it very clear and it said, "Marriage and procreation are fundamental" and that sterilization affected "one of the basic civil rights of man."

I assume that some of the civil rights that you are referring to that those who wrote the New Hampshire Constitution referred to.

Do you agree that procreation is a fundamental right?

Judge SOUTER. I would assume that if we are going to have any core concept of marital privacy, that would certainly have to rank at its fundamental heart.

The CHAIRMAN. Now, the reason I am pursuing this is not merely for the reason you think, I suspect. It is because you have been categorized as—I believe you have described yourself as an interpretivist.

Judge SOUTER. I did and I have, yes.

The CHAIRMAN. You have begun—and I thank you for it—you have begun to flesh out for me on which part of the spectrum of the interpretivists you find yourself.

Let me, in the interest of time, move on here. I am trying to skip by here.

Let me ask you this, Judge. The value that the Court places on certain alleged, by many, privacy rights will dictate, as we said earlier, the burden placed upon a State in the circumstance when they wish to extinguish that right, or impact on that right.

Judge SOUTER. Yes, sir.

The CHAIRMAN. Now, you have just told us that the right to use birth control, to decide whether or not to become pregnant is one of those fundamental rights—the value placed on it is fundamental.

Now, let us say that a woman and/or her mate uses such a birth control device and it fails. Does she still have a constitutional right to choose not to become pregnant?

Judge SOUTER. Senator, that is the point at which I will have to exercise the prerogative which you were good to speak of explicitly. I think for me to start answering that question, in effect, is for me to start discussing the concept of *Roe* v. *Wade*. I would be glad—I do not think I have to do so for you—but I would be glad to explain in some detail my reasons for believing that I cannot do so, but of course, they focus on the fact that ultimately the question which you are posing is a question which is implicated by any possibility of the examination of *Roe* v. *Wade*. That, as we all know, is not only a possibility, but a likelihood that the Court may be asked to do it.

The CHAIRMAN. Judge, let me respectfully suggest the following to you: That to ask you what principles you would employ does not, in any way, tell me how you would rule on a specific fact situation.

For example, all eight Justices, whom you will be joining, all eight of them have found there to be a liberty interest that a woman retains after being pregnant. That goes all the way from Justice Brennan—who is no longer on the Court—who reached one conclusion from having found that liberty interest, to Justice Scalia who finds a liberty interest and yet, nonetheless says, explicitly he would like to see *Roe* v. *Wade*, he thinks *Roe* v. *Wade* should be overruled.

So the mere fact that you answer the question whether or not a woman's liberty interest, a woman's right to terminate pregnancy exists or does not exist, in no way tells me or anyone else within our earshot how you would possibly rule on *Roe* v. *Wade*.

Judge SOUTER. I think to explain my position, I think it is important to bear in mind there are really two things that judges may or may not be meaning when they say there is a liberty interest to do thus and so, whatever it may be. They may mean simply that in the whole range of human interests and activities the particular action that you are referring to is one which falls within a broad concept of liberty. If liberty means what it is, we can do if we want to do it. Then obviously in that sense of your question, the answer is, yes.

The CHAIRMAN. It is more precise, Judge, than that. I mean liberty interest has a constitutional connotation that most lawyers and all justices have ascribed to it in varying degrees. For example, Justices Blackmun, Brennan, Marshall, and Stevens, they have said a woman has a strong liberty interest, although Justice Stevens has phrased it slightly differently. Justice O'Connor has made it clear that she believes a woman has some liberty interest. Even Justices Rehnquist, White, Kennedy, and Scalia, all of whom criticized the Court's rulings in this area have said that a woman has at least some liberty interest in choosing not to remain pregnant.

Now, each of these Court members has acknowledged what we lawyers call a liberty interest after conception. So my question to you is, is there a liberty interest retained by a woman after conception?

Judge SOUTER. I think, Senator, again, we have got to be careful about the sense of the liberty interest. There is the very broad sense of the term which I referred to before and then there is the sense of an enforceable liberty interest. That is to say, one which is enforceable against the State, based upon a valuation that it is fundamental. It seems to me that that is the question which is part of the analysis, of course, upon which *Roe* v. *Wade* rests.

The CHAIRMAN. Well, all liberty interests have following all liberty interest is a right. The question is, how deeply held and rooted that right is; and what action the State must take and how serious that action must be—the rationale for that action—to overcome that interest?

But once we acknowledge there is a liberty interest, there is a right.

Judge SOUTER. But what—I am sorry.

The CHAIRMAN. So I am not asking you to tell me—I am just told my time is up—I am not asking you to tell me what burden of proof the State must show in order to overcome that. I am asking you is there a liberty interest and your answer is what, yes, or no?

Judge SOUTER. My answer is that the most that I can legitimately say is that in the spectrum of possible protection that would rank as an interest to be asserted under liberty, but how that 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 is a question with respect, I cannot answer.

The CHAIRMAN. With all due respect, I have not asked it.

But I will come back to that. My time is up. I yield to my colleague from South Carolina.

I thank you, Judge.

Judge SOUTER. Thank you, sir.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Souter, the Constitution of the United States is now over 200 years old. Many Americans have expressed their views about the amazing endurance of this great document. Would you please share with the committee your opinion as to the success of our Constitution and its distinction as the oldest existing constitution in the world today.

Judge SOUTER. Well, Senator, it is difficult to make a pronouncement which is commensurate with the magnificence of the document. If I have to explain it in a few words I would do it by reference to a very limited number of concepts.

The first reason for the Constitution's success is its insistence and its recognition on the source of power. The source of governmental power is the people.

The second concept which has guaranteed its endurance is that that power is no more granted to government than the people grant to government. The very concept of the National Government is one of limited power, was one of its motivating, one of its very forces of life from the moment that it was presented to the people.

Third, I would look to the concept implicit in that document and as a basis of the bedrock of the structural sense of American constitutionalism that power is divided and that that division of power even granted, is a division of power which must be protected if the entire Government is to remain in the place that it was intended to have.

That structural sense of the division of power encompasses not only what we speak of as the separation of powers doctrine within the National Government, itself, but the concept of the distribution of power in a federal system.

I think the reasons then for the remarkable and blessed endurance of the American Constitution are extraordinarily pragmatic reasons. It rests upon a recognition of where its power comes from and it is structured with a recognition that power will be abused unless it is limited and divided and restrained.

Senator THURMOND. Judge Souter, the 10th amendment to the Constitution provides that powers not delegated to the Federal Government are reserved to the States or the people.

Would you describe your general view about the proper relationship between Federal and State Governments, as well as how would you characterize the States' power to legislate in areas not specifically enumerated to the Congress.

Judge SOUTER. Well, Senator, as we know—certainly you know better than I, having sat in this Congress as you have—there is a great overlap of subject matter in which we know the Congress under article I has authority, and which is equally covered by the States. We are familiar with the doctrines of preemption which have developed over the years and we are familiar, of course, with the provision of the Constitution that in cases of conflict in legislation within both the constitutional competence of the States and

the National Government, the National Government is, of course, going to prevail.

One of the things that I think we have to recognize in dealing with problems of federalism today is a basic political problem which in those areas of overlap the Constitution, itself, cannot solve for us. That is a political problem that arises from the willingness or the unwillingness of the States to exercise the constitutional powers that they have to address the problems that are really before them.

One of the things that I was reminded of in my preparation, my sort of autobiographical inquiry—which has preceded my coming here today and has been going on for the last 7 or 8 weeks—is a speech which I gave years ago in Newport, NH, in which I was talking about—which to most people and to me seemed—an erosion of power all in the direction of the National Government from the States.

But the explanation for that erosion began with the fact that there were problems to be solved which the States simply would not address and the people wanted them addressed and therefore, the people looked to Washington. They looked to Washington, of course, because Washington had the means or exerted the means of raising the money to solve them.

So one of the problems that has to be recognized, as underlying so much of the tension which sometimes gets expressed by focus on the 10th amendment, is, in fact, a political problem and ultimately a fiscal problem.

We know that the concept of the 10th amendment today is something that we cannot look at with the eyes of the people who wrote it. At the very least, two developments in our constitutional history have necessarily changed the significance of the 10th amendment for us.

The first, of course, is the concept of the commerce power which I think—whatever everyone's predilections may be—has grown to a, and has been recognized as having a plenary degree which would probably have astonished the Founders.

The second development which has got to be borne in mind in coming to any approach to the 10th amendment is simply, the 14th. There was, very expressly, authority given to the National Government through the 14th amendment, which again, was inconceivable to the Framers of the 10th.

It is those two developments that have led to the difficulty reflected in a number of cases in recent years, in trying to determine, whether in fact, there is a substantive basis, an objective basis, perhaps I should say, for identifying and protecting State power under the 10th amendment; or whether conversely, the 10th amendment, in effect, has been relegated to the expression of kind of a political truism.

When I was in public practice, the case known as *National League of Cities* v. *Usury* was the law, which recognized a basis for enforcing limitation on national power in name of the 10th amendment under the wage and hour law. Subsequently *National League* was overruled by *Garcia* v. *San Antonio,* which has left the law, at the present time far closer to, in effect, a reflection of the politics of the Congress of the United States.

I do not know what the next step in that chapter may be, but I do know that any approach to the 10th amendment today is an approach which has got to take into consideration constitutional developments outside of the 10th amendment which we cannot ignore, and, as I have said, would have astonished the Framers.

Senator THURMOND. Judge Souter, the famous decision of *Marbury* v. *Madison* is viewed as a basis of the Supreme Court's authority to interpret the Constitution and issue decisions which are binding on both the executive and legislative branches. Would you give the committee your views on this authority?

Judge SOUTER. Well, I suppose for anyone in the year 1990 to speak admiringly of *Marbury* v. *Madison* is a fairly conservative act, so I don't have any trouble in sort of going out on the limb in support of *Marbury* v. *Madison.*

I recognize that the difficulty which may be facing us in assessing the significance of *Marbury* v. *Madison* today is a difficulty in defining the appropriate role of Congress with respect to the appellate jurisdiction of the Supreme Court of the United States. We might all hope that that kind of a contest would not come before us, but we cannot rule it out.

The question, of course, is not whether *Marbury* can be overruled as such, but whether the force of *Marbury* can, in fact, be eroded by limitations upon the appellate jurisdiction of the Supreme Court of the United States. As I am sure you know as well as I, the existing precedent on that is not of very great help to us.

We know that in the one case expressly addressing the Supreme Court's appellate jurisdiction, a post-Civil War case, *McCardle,* the Court seemed to say that there could be such an erosion through the exercise of congressional power, although there are times when I find *McCardle* a somewhat more ambiguous case than some have found it.

On the other hand, we know in the *Klein* case that followed not long after that, which dealt with the jurisdiction of the lower Federal courts not the appellate jurisdiction of the Supreme Court, that the Supreme Court clearly put limits upon what the Congress could do in trying, in effect, to limit jurisdiction for the sake of bringing about particular results or avoiding particular results which were thought to be undesirable.

But those are all post-Civil War cases. They seem to speak with conflicting and certainly not with consistent voices. And they are going to be the preface to any question about the ultimate vitality of *Marbury* in our time. But it is at least comforting to be able to end my response to you as I began it; that subject to that issue which has yet definitively to come before the courts, I trust everyone like me will accept *Marbury* as constitutionally essential to government as we know it.

Senator THURMOND. Judge Souter, the opinion of *Miranda* v. *Arizona* defined the parameters of police conduct for interrogating suspects in custody. Since the decision, the Supreme Court has limited the scope of *Miranda* in certain cases. Do you feel that the efforts and comments of top law enforcement officers throughout the country have had any effect on the Court's views?

Judge SOUTER. Well, of course, Senator, I cannot speak expressly for the Court, but I think those comments must have had some

kind of effect. The legitimacy of that effect, the appropriateness of the Court's listening, I think has got to be assessed from two different standpoints. It is very important that courts not be swayed in any case merely by the politics of the moment. And there is, I think, a laudable tendency—I hope it will always be regarded as laudable—for the Court to keep itself above the momentary furor.

It would be a mistake, however, from that, for a court to be unwilling ever to reexamine the wisdom of something that it had done. This is certainly true when we are dealing with decisions like *Miranda*, which are very pragmatic decisions. Whether one initially agreed or did not agree with *Miranda*, the point of *Miranda* was to produce a practical means to avoid what seemed to be unduly time consuming and sometimes intractable problems encountered in the Federal courts in dealing with claims that confessions were inadmissible on grounds of their involuntariness.

But *Miranda* was a practical case on how to deal with it. The assumption of the Court was that if *Miranda*, in fact, was complied with, a lot of the very difficult voluntariness problems were just going to take care of themselves. When we are dealing with a rule like *Miranda*, which had a very practical objective which, as was said at the time, extended the fifth amendment to the police station for the sake of trying to avoid other more serious problems, of course it is appropriate to consider the practical effect that those decisions have. And I have no doubt that both in the briefs that have been filed before the courts and in the arguments of the specific parties, the satisfaction or the dissatisfaction of law enforcement with the practical effects of that decision have had an influence, and rightly so, on the courts.

By the same token, I think it is important to note that when we look back on a decision which has been on the books as long as *Miranda* has now, we are faced with a similarly, I think, practical obligation, if one wants it modified or expanded or contracted, to ask very practical questions about how it actually works. That is a judicial obligation. If the judiciary is going to be imposing pragmatic rules.

Senator THURMOND. Judge Souter, there are hundreds of inmates under death sentence across the country. Many have been on death row for several years as a result of the endless appeals process. Recently, the Senate passed legislation which would reduce the number of unnecessary appeals. Generally, would you give the committee your views on the validity of placing some reasonable limitations on the number of posttrial appeals that allow inmates under death sentences to avoid execution for years after the commission of their crimes?

Judge SOUTER. Well, Senator Thurmond, I am not familiar with the bill which the Senate has passed, but I am assuming that it was probably in response to the report of the committee headed by Justice Powell a couple of years ago, retired Justice Powell, who was—the committee, rather, was addressing the problem of what you describe rightly as the seemingly endless appellate process and frequently of the confusion in haste which tended to characterize it at the Federal level.

I think there was great wisdom in the recommendation of the Powell committee, because what the Powell committee centered on

was not in the first instance a strict rule of limitation, but on the problem which, in fact, was leading to the resort, frequently at the last moment, to the Federal courts in death penalty cases.

What the Powell committee identified as one of those reasons was the fact that, although counsel is guaranteed to a criminal defendant through the direct appellate process, in most States counsel was, in any event, in the process of collateral review by habeas corpus after the direct appeal process had been exhausted, there was not a mandate under the national Constitution to the States to provide counsel at that level, and most States were not doing so.

The practical result was that in the attempt at collateral review at the State level, death row inmates were, in fact, trying to raise constitutional issues without counsel competent to do so—they were issues of sufficient subtlety that a pro se litigant simply could not handle them—and that time was being consumed in what was really unproductive, almost helpless, litigation in State court collateral review. And it was only when that was exhausted and only when, in fact, an execution date was set that the prisoners would then find it appropriate to try to go into the Federal courts for collateral review.

What the Powell Commission recommended was that if we are going to place reasonable limits on Federal collateral review, we have got to accept the reality that there has got to be some kind of genuinely significant representation by counsel at the very point collateral review can begin, so that it can be worth something both at the State level and at the moment the petitioners enter the Federal scheme. And if that can be provided, if counsel can properly be provided at the initial stages, then it is fair and appropriate to place limitations upon the time in which collateral review can be sought.

I can only say that I think that is an eminently fair approach to the problem.

Senator THURMOND. Judge Souter, you are currently serving as a member of the U.S. Court of Appeals for the First Judicial Circuit. Previously, you served on the New Hampshire Supreme Court for 7 years and the New Hampshire Superior Court for 5 years. How beneficial, in your opinion, will this prior judicial experience be to you if confirmed to sit on the Supreme Court?

Judge SOUTER. Well, Senator Thurmond, for someone who has never sat on the Supreme Court, there is great difficulty in answering that question, because the one thing that I think we all hear about the Supreme Court and its workload is that the combination of the task, the volume of the task, and the responsibility of the task is something for which no one really feels prepared at the beginning of service on that Court. And probably it would be impossible that anyone could be.

There are at least some bits of background which I hope would fit me to work into the responsibilities of the Court as fast as possible if I am confirmed. Although the supreme court on which I sat, without question, did not have the demands on me that the Supreme Court of the United States would have, it shares the problem of all appellate courts in the United States today of having a series of requests for review which, as a practical matter, tend to

exceed the capacity of the court to deal with the depth that the court would like.

In New Hampshire, before I ever went on the New Hampshire Supreme Court, we had gone necessarily to a system of discretionary review because it was impossible to review every request for an appeal on the merits. So I am familiar, in fact, with the business of the Court and the need to set some kind of limits to make any worthwhile adjudication possible.

More than that, though, I think the important thing is what I alluded to in the remarks that I made before the questioning began today. There is one overriding responsibility that any judge on an appellate court has. It will not guarantee that he will get the right result, but it will guarantee that he will try as best he can to get the right results. And that is a recognition that however far removed from the bench of that court, the decision that the court renders, the ruling that the court makes is going to affect a life.

I have learned that lesson, and it is a lesson which, if I am confirmed, I hope will stand me in good stead.

Senator THURMOND. Judge Souter, I believe that judges should impose tough sentences in criminal cases, especially when the crime committed is one of violence. Society demands tough punishment for violent offenders. In the past, victims of those who committed violent crimes have often played a diminished role in the criminal justice system. However, recently, the number of victims who participate in the prosecution of criminal cases has increased.

In your opinion, should victims play a major role in the criminal justice system? If so, to what extent should a victim participate?

Judge SOUTER. Well, Senator, there are certainly two respects in which victims should be recognized in the system, and there is a further interest of victims which the government as a whole should recognize. The most obvious role of the victim, of course, is the role which any victim must play in establishing the fact of the crime. Your central witness, theoretically, in a criminal case is the victim. The victim also, it seems to me, has a claim to the attention of the court in a criminal case if there is, in fact, a conviction.

We try to avoid disparity in sentencing, but one of the subjects which is appropriate to bear in mind is exactly the one that you raised a moment ago, and that was: What was, in fact, the conduct of the defendant? What degree of either mild or outrageous behavior can we assign to the conduct of the defendant in relation to the victim in causing harm? The heinousness of a crime is an appropriate subject in any sentencing decision.

I think going beyond that, one of the happy developments of the law in the last few years is the recognition by the government that after the criminal case is tried, whatever may be the result, the victim is still left, in many cases, in a mess not of the victim's own choosing; and that, in fact, there is a need to provide some help. The victim assistance acts which the States have been passing, it seems to me, is a step in the right direction.

Senator THURMOND. Judge Souter, the doctrine of stare decisis is a concept well entrenched in our legal system and the concept that virtually all judges have in mind when making decisions, especially in difficult cases. I am sure that the issue of prior authority has

been a factor which you have considered many times in your years on the bench.

Could you please briefly state your general view of stare decisis and under what circumstances you would consider it appropriate to overrule prior precedent?

Judge SOUTER. Well, Senator, as you know, the doctrine of stare decisis which we speak of in that shorthanded kind of way is a series of considerations which courts bear in mind in deciding whether a prior precedent should be followed or should not be. Some such doctrine or some such rule is a bedrock necessity if we are going to have in our judicial systems anything that can be called the rule of law as opposed simply to random decisions on a case-to-case basis.

The problem that the doctrine of stare decisis addresses is the problem of trying to give a proper value to a given precedent when someone asks a court to overrule it and to go another way. And I suppose the complexity of the doctrine is such that, contrary to the terms of your question, I suppose I could talk about it for a very long time. And there may be other members of the committee——

Senator THURMOND. You need not do that.

Judge SOUTER. I was going to say, I think you have made it very clear that that is not what you had in mind, and I don't know whether any other members of the committee may be greater bears for punishment to go into it further than you have or not. Let me, though, in compliance with your terms, just state in a very kind of outline way what I think we should look to, without meaning to be exhaustive.

The first thing, kind of the threshold question that, of course, you start with on any issue or precedent, is the question of whether the prior case was wrong. We don't raise precedential issues unless we are starting with the assumption that there is something inappropriate about the prior decision. Now, that decision may have been right at the time and there now be a claim that, in fact, it is wrong to be applied now. But the first question that we have to ask is: If we were deciding the case today, if we were living in a kind of Garden of Eden and we didn't have the precedent and this was the first case, would we decide it the same way?

If the answer is no, we would not do so, then we look to a series of factors to try to decide how much value we ought to put on that precedent even though it is not one that we particularly like or would think appropriate in the first instance.

One of the factors which is very important I will throw together under the term of reliance. Who has relied upon that precedent, and what does that reliance count for today? Have people——

The CHAIRMAN. Excuse me, Judge. Did you say if the answer is no or if the answer is yes? You said when we look back——

Judge SOUTER. My problem, Mr. Chairman, is I forget what the question was.

The CHAIRMAN. I am sorry. You indicated that one of the things you looked at is whether the prior case was wrongly decided, isn't that correct?

Judge SOUTER. Then the answer should have been yes. I said no?

The CHAIRMAN. Yes. OK. I got it.

Judge SOUTER. Thank you for amending that.

The CHAIRMAN. I was getting confused.

Judge SOUTER. If you are going to ask me for a statutory interpretation, I would be as liberal as that, then you may have me in a corner. But assuming we start with a precedent which is wrong for this time, considered by itself, one of the things we are going to start by looking at is the degree and the kind of reliance that has been placed upon it.

We ask in some context whether private citizens in their lives have relied upon it in their own planning to such a degree that, in fact, it would be a great hardship in overruling it now.

We look to whether legislatures have relied upon it, in legislation which assumes the correctness of that precedent. We look to whether the court in question or other courts have relied upon it, in developing a body of doctrine. If a precedent, in fact, is consistent with a line of development which extends from its date to the present time, then the cost of overruling that precedent is, of course, going to be enormously greater and enormously different from what will be the case in instances in which the prior case either has not been followed or the prior case has simply been eroded, chipped away at, as we say, by later determinations.

Beyond that, we look to such factors as the possibility of other means of overruling the precedent. There is some difference, although we may have trouble in weighting it, there is some difference between constitutional and statutory interpretation precedent, which Congress or a legislature can overrule, so we look to other possibilities.

In all of these instances, we are trying to give a fair weight to the claim of that precedent to be followed today, even though in some respect we find it deficient on the merits.

Senator THURMOND. Judge Souter, former Associate Justice Lewis F. Powell once stated:

> Those of us who work quietly in our marble palace find it difficult to understand the apparent fascination with how we go about our business. However, as our decisions concern the liberty, property and even the lives of litigants, there can be no thought of tomorrow's headlines.

Judge Souter, would you share with the committee your thoughts regarding Justice Powell's statement, especially his comment that "there can be no thought of tomorrow's headlines"?

Judge SOUTER. Senator, I hope there is no judge in the Republic who would not agree with that statement of Justice Powell. If there is one thing that——

Senator THURMOND. That is sufficient. [Laughter.]

Judge SOUTER. You are going to turn me into a laconic Yankee, if you keep doing that, Senator. [Laughter.]

Senator THURMOND. I have just been told that my time is up, Judge Souter. Thank you. I was trying to get in another question, but it is too late.

Judge SOUTER. Thank you, sir.

Senator THURMOND. Thank you.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I would like to direct the judge's attention to the issue of civil rights. I am sure you understand, as all Americans understand, that the issue of slavery, when it was discussed at the Constitution-

al Convention almost ruptured that whole process and compromises were made during the consideration of the Constitutional Convention.

As a consequence of accepting slavery, we saw a vicious Civil War that took place in the 1860's on that issue. We saw this country go through enormous convulsion in the late 1950's and early 1960's, with loss of life, as we were trying to move toward a fairer, more equitable society, to breath real life into the Constitution when it talks about equal protection of the laws.

I am interested in your own views about the majesty of the Constitution and about providing guarantees for the citizens of this Nation, whether black or white, man or woman, of whatever religious, in assuring that the words "equal protection of the laws" really mean equal protection of the laws. I am most interested at this point in having your view about the authority and the legitimacy of the Congress in implementing the 14th amendment, through the 5th section.

So, I would like to direct your attention to a couple of these areas, firstly that you took positions on as attorney general and assistant attorney general of New Hampshire. Both of these areas relate to the questions of pursuing equal rights and liberties. First of all, I want to talk about eliminating discrimination in the workplace and guaranteeing equal opportunity in employment.

I am sure you are aware of the case which I am directing your attention to, decided in 1973, when the Equal Employment Opportunity Commission regulations required State and local communities and private firms with over 100 employees to file annual reports, listing racial composition of the employers' work force, to assist the Commission in its mission.

In many circumstances, we see Evan Kemp, President Bush's head of EEOC, talking about how necessary such statistics are today and recognize the importance of the accumulation of that type of material.

Now, unlike every other State, New Hampshire rejected the regulation and it refused to supply the data for 1973, 1974, and 1975. When the U.S. Government sued to enforce the requirement, you defended the refusal, as New Hampshire Attorney General, and when New Hampshire lost in the Federal district court, you appealed to the circuit court of appeals, which unanimously rejected your position, and then you tried to take the issue to the Supreme Court, which refused even to hear your case, let alone accept your argument.

Your office took the position in all three courts that it was unconstitutional to require employers to compile reports of those statistics. A reading of the brief would indicate that you did not believe that Congress had the power to implement and develop that legislation of their work force.

As far as I can determine, no other employer, public or private, pressed such an excessive claim, so hostile to civil rights. Your brief even went so far as to make the extraordinary argument that it violated a worker's constitutional right to privacy, for employers to report the overall racial composition of their work force.

My question is this: Did you agree with the position of the State of New Hampshire that it is unconstitutional for Congress to re-

quire employers to provide statistics about racial composition of the work force?

Judge SOUTER. At the time that case was litigated, Senator, I did not know whether it was consitutional or not. That case, as I think you realize, was——

Senator KENNEDY. What I am directing your attention to is your view about the power of the Congress, under section 5 of the 14th amendment, that when it finds that there is discrimination, that we have the power to try and take steps to eliminate the discrimination as best we can. We are not going to argue that laws are going to resolve all of these problems. Clearly, they are not. But the issue and the question, the basic issue and question is whether you recognize the authority and the power of the Congress to develop legislation, in this case the EEO Act, which required the kind of information that I have mentioned, in order for the American people to be able to gain these rights.

Judge SOUTER. There is no question that, under the law as it is understood today and under the law as I understand it, that Congress has a preferred and unique role of power in enforcing the 14th amendment under section 5.

There is probably no question that there will be further years of litigation before the exact limits of that power are defined, but there are some things that are clear now. It is clear now under the law that the Congress certainly does not stand on the same footing as the State and county and local governments may do in devising remedies for a broader societal discrimination than may come to light in specific cases. We know that the Congress has a preferred position in that respect.

Senator KENNEDY. Well, you certainly had the opportunity to develop your own personal view at the time that you were developing the position, as the Governor's lawyer. Did you form any position on your own, as to whether that was the correct position? Did you do it reluctantly? What can you tell us? We know that the lawyer who assisted you in the case, Mr. Edward Haffer, was quoted in the press as saying that you were supportive of and involved in the effort to challenge the regulation. Governor Thompson has said that you did not discourage him from pursuing the case to the Supreme Court.

So, did you at the time formulate any personal view about the legitimacy of the Congress in attempting to root out discrimination in the workplace?

Judge SOUTER. I came to no comprehensive personal view of section 5 at that time. The views that I came to grips with at that time were these: The first, of course, is that I was representing a client. The issue before me, as a lawyer in that case, was whether the client, whose policy was being set by the executive branch, speaking through the Governor, had a legitimate position which could in good faith be pressed before the courts. It was my judgment at that time that the State did, in fact, have a case which could be pressed in defense of the Governor's position.

The most remarkable thing about it and the reason for coming to this conclusion which I drew as a lawyer, is indicated in an unusual way in our constitutional history. In a footnote in a later opinion by Justice Powell that came about years later—and I cannot cite it

from memory, but I can produce it, if you would like—Justice Powell referred to a survey of discrimination by State and local governments on racial grounds, and I do not recall now whether it was strictly State employment discrimination or discrimination in voting, but it illustrated the truth that lay behind the decision that New Hampshire could take that position and press it before the courts, for whatever disposition, and that determination was that there was no indication that there had ever been racial discrimination, what we would today broadly call title VII discrimination, by the State or local governments.

The issue that the Governor wished and the State wished to press forward was whether the power of section 5 of the 14th amendment, whether the congressional power could in fact be used to require the assembly of racial data by a governmental entity with respect to whom there was absolutely no historical indication of any discrimination.

As I think you know from the briefs which I know have been brought to your attention, one of the concerns raised is that if you have not been thinking in racial terms and you are suddenly forced to start classifying nor at least to classify statistically in racial terms, you are running the risk that race is, in fact, going to play a role and a wrong role, which it has never done.

The issue before me, as attorney general of New Hampshire, in carrying on with that litigation which had in fact begun before I became attorney general, was whether in fact there was an argument that could be made to that effect. I believed that there was an argument that could be made to that effect. The courts rejected it and it is, of course, not an argument that would be made today.

Senator KENNEDY. Of course, first of all, as attorney general, you take the oath of office in upholding the Constitution. Second, the New Hampshire statute says the attorney general will represent the public interest in the administration of the department of justice, be responsible to the Governor, the general court, and the public for such administration.

So, what we have to gather here, and when you give a response that you are just acting as the lawyer for the Governor, we have to give some weight to the fact that you are sworn to an oath of office, both in terms of the Constitution and the New Hampshire statute. Very clearly you are not only the lawyer for the Governor, but you also represent the public interest.

You have stated that you support that concept as a matter of personal belief now and, as I gather, you were uncertain at the time when you filed the brief, is that correct?

Judge SOUTER. The question that I thought could be legitimately raised at the time was whether, in fact, as against a governmental entity which had not practiced any discrimination, either specific or reflective of societal discrimination, that was an appropriate exercise of section 5 power. I think we now know very clearly that it is.

Senator KENNEDY. Well, the point that we are talking about is a national determination by the Congress that this kind of information is necessary in order to try to gather discrimination information that is necessary before any action can be taken, and also to try to measure some progress in this area.

Tell me, why did you file information with regard to gender in employment, and not with regard to race? I found that somewhat puzzling. You submitted the information to EEOC with regard to gender, but not with regard to race, and the 14th amendment clearly is about race and about gender—in terms of that—why did you file that?

Judge SOUTER. As you indicate, I think the 14th amendment is about both.

Senator KENNEDY. Right.

Judge SOUTER. I think, in fact, the answer to that is one which, with respect, I would almost have to direct to my client. If you were to ask me cold whether the State was filing gender information at that time, I could not have told you.

Senator KENNEDY. Let me go to a second area of civil rights, and this is with regard to the literacy tests. You are familiar that in 1965 the Congress took action to abolish literacy tests in the limited number of States that were included in the 1965 act, and then in the 1970 act we abolished literacy tests generally across the country?

Judge SOUTER. I think they were suspended, were they not, for 5 years by the 1970 amendments?

Senator KENNEDY. Exactly. The State of New Hampshire vigorously defended the State law, arguing that Congress did not have, again, the constitutional authority to ban literacy tests. Your name appears on the brief. Do you remember whether you drafted it or not?

Judge SOUTER. I was assistant attorney general at that time, and my recollection is that I filed a posttrial memorandum with the U.S. district court after that case was argued. I remember I was the assistant attorney general assigned to argue——

Senator KENNEDY. Well, your name is on the brief, the third one down.

Judge SOUTER. Pardon me?

Senator KENNEDY. Your name is on the brief.

Judge SOUTER. I was not trying to get you to read the names off, Senator.

Senator KENNEDY. We have got two of them.

Now, when this was brought up in the district court, the position was rejected 3 to 0, and then when it was brought up eventually in the Supreme Court, the position was rejected 9 to 0. Again, the question I think is how you view the Congress' power to try and provide remedies against discrimination against minorities and women.

Very little was given me when I heard you talk about the questions of limited power. You talk about the overlap of power that exists and the power of preemption by the National Government. You say that the National Government will prevail when there is conflict, and speak of the movement toward greater power to the National Government, primarily political and fiscal in recent times, but did not mention what has been the most, I consider the most important reason in the past several years, and that is to try and guarantee civil rights and liberties to minorities. This is something that we have to make a judgment on.

Another part of that brief that concerned me that I want you to speak to, is in the brief you said that if people who could not read were permitted to cast ballots, it would dilute the votes of literate citizens. You went on to say:

> To this harm, must be added the impossibility of providing any means whereby illiterate voters could intelligently vote upon the constitutional proposals which are presented on the ballot in narrative form. The result of allowing illiterates to make a choice in such matters is tantamount to authorizing them to vote at random, utterly without comprehension.

Yet, in a letter to the President on the issue, when Congress was considering the Voting Rights Act of 1970, Father Hesburgh, who was Chairman of the Civil Rights Commission, said this:

> The lives and fortunes of illiterates are no less affected by the actions of local, State and Federal governments than those of their more fortunate brethren. Today, with television so widely available, it is possible for one with little formal education to be well-informed, an intelligent member of the electorate.

What troubles me is that you said that the Congress did not have the power to collect data on race discrimination. Now, you say that Congress does not have the power to ban literacy tests for voting. Congress is attempting to deal with the profound historical, national problem that this country has ached at over its history and continues to do so today.

Yet, we have seen these fundamental areas—you seem to interpret the powers of Congress so narrowly that we cannot achieve our purpose—even fundamental areas such as race discrimination and the right to vote.

Judge SOUTER. Well, with respect, Senator, let me address a couple of points that you raise. Maybe the best place to start is with the fundamental one. That is about me today, as opposed to me as an advocate in a voting rights case 20 years ago.

I hope one thing will be clear and this is maybe the time to make it clear, and that is that with respect to the societal problems of the United States today there is none which, in my judgment, is more tragic or more demanding of the efforts of every American in the Congress and out of the Congress than the removal of societal discrimination in matters of race and in the matters of invidious discrimination which we are unfortunately too familiar with.

That, I hope, when these hearings are over, will be taken as a given with respect to my set of values.

The second thing that I think must be said, with respect to that case of 20 years ago, is that I was not giving an interpretation 20 years ago. I was acting as an advocate, as a lawyer, in asserting a position on behalf of a client. Maybe it is unnecessary to add, but I know that you recognize that the identity of the Governor has nothing to do with the responsibility of the attorney general to bring a case.

This voting rights case, by the way, did not arise during the administration of the Governor that you have just been referring to. It arose during the Peterson administration which preceded his. The issue that was presented to the State was, in one respect, similar to one we have already discussed.

New Hampshire had a literacy test. The literacy test had never been used or, indeed, ever have been claimed to have been used for any discriminatory purposes whatsoever. There is some question as

to what its practical effect was in those days. But it had never been used for discrimination.

There was one thing that we did know very clearly about the law in those days, and that was that the use of a literacy test for a nondiscriminatory purpose was constitutional under the 14th amendment. That had been litigated.

So that New Hampshire's practice was, in fact, a wholly constitutional practice. The issue which the Governor requested the attorney general to raise was: Is it within the power of Congress, under section 5, to suspend a literacy test in a State in which there is absolutely no history or evidence of any sort, at any time, of its discriminatory use, in such a way as to be unconstitutional under the 14th amendment?

That issue was not ultimately decided until about 4 or 5 months after our case began. That issue was decided in *Oregon* v. *Mitchell,* and as you indicated a moment ago, the Court under varying rationales—some under 14th and some under 15th amendment analyses—decided that it was, in fact, within the power of the Congress to deal with literacy and the discrimination frequently associated with it, as a national problem, and to suspend the test without regard to any particular history of discrimination in the States.

But that case had not been decided at the time that ours was brought. Therefore, the attorney general at the time was in the position, No. 1, of being requested by the Governor to defend a constitutional action under existing State law. I think that was within the appropriate role of an advocate, and it did not represent a personal opinion, either by the attorney general or anyone else involved in the litigation about the ultimate scope of Congress' power under section 5.

Senator KENNEDY. Well, Judge, I must say that you keep coming back to the role of the Governor's lawyer. It is very clear to me that the oath of office that you take, as attorney general in the statute requires, and a part of your responsibility as attorney general is, your responsibility to the public trust and to the people.

Judge SOUTER. That is correct.

Senator KENNEDY. So now we know where you are today. I think the question is, where were you then?

Judge SOUTER. Well, Senator, I think you have answered that question. Where we were then, where the attorney general was and where I was as an assistant attorney general in that case was in defending a State practice which the Supreme Court of the United States had ruled to be constitutional under the 14th amendment.

I think that cannot be reasonably regarded as a derogation of the duty of the State to its people. It may have turned out to be a legal position which the Supreme Court of the United States ultimately rejected, but I think it is a defensible one.

Senator KENNEDY. Well, you can see what the impact would have been if they had not rejected it, because then we would have had 50 different types of solutions which the Federal Government would have been attempting to deal with in a problem of major national concern.

Let me go to the issue of the equal protection clause of the 14th amendment. The Supreme Court struck down virtually all laws that discriminate on the basis of race. On the other hand, they

used a weak standard, on other classifications, and upheld many laws under the rational justification test.

Obviously they have drawn a distinction between trucks and automobiles and different laws for businesses of different sizes. Before the 1970's, the Supreme Court applied the weakest test to cases involving claims of sex discrimination. The Court accepted any rational basis for laws that discriminated against women. Under this approach women were routinely excluded from many occupations, including being lawyers, and many areas even serving as jurors.

Beginning in the 1970's, the Court began to apply a higher standard of review to laws that discriminated against women. But evidently you did not agree with that standard. In 1978, you urged the Court to reexamine and perhaps eliminate the new standard.

The issue here does not turn on the facts of the case. It involved the New Hampshire statutory rape law, and a man convicted under the statute claimed the law was unconstitutional because it did not apply to women, too. The Supreme Court refused to hear the New Hampshire case, but a few years later the Court, in another case, made clear that under even the higher standard of review, statutory rape laws were valid, even though they do not apply to women.

What I find very disturbing is that in your brief you urged the Supreme Court to eliminate the higher standard of review. It seems to me that if you are genuinely concerned about the rights of women the obvious argument to make is that even under a higher standard review the statutory rape laws are valid. But you did not take that course. You suggested the Court should go back to the old law, which had permitted sex discrimination to flourish.

In your brief, you call on the higher standard as amoebic, and you said it was in the "Twilight Zone" which are generally considered to be, I think, disparaging, perhaps even derogatory, ways of referring to a constitutional requirement that made an enormous difference in any discrimination against women in our society.

So do you think the Court should go back to uphold statutes that discriminate by sex if there is any plausible reason for the distinction?

Judge SOUTER. No. That is not my position. My position which was described in that, which was raised as an advocate in that brief, went to a problem which is a problem that is still with us. It is a problem which anyone who is concerned about sex discrimination and the appropriate standard of review, I think has got to face.

What we are dealing with when we are asking what is the appropriate standard of review in an equal protection case is what kind of pragmatic approach should we adopt in order to find whether there is or is not a defensible classification?

As you have pointed out, we have come up with, or the courts have come up with basically three tiers of review, so that the courts do not have to reinvent the wheel in every case.

Economic matters get the lowest scrutiny, and racial matters get the highest. The difficulty which has bedeviled the middle scrutiny test, under which classifications of sex and illegitimacy have been examined, is the looseness of the test.

The rational basis test is fairly easy to understand. The strict scrutiny test is fairly easy to understand but the middle scrutiny test requires the court to determine whether there is a substantial relationship to an important governmental objective in deciding whether or not a discrimination, a classification on the basis of sex is appropriate.

What is unfortunate about that standard of review is that it leaves an enormous amount of leeway to the discretion of the court that is doing the reviewing. The history of the middle-tier test illustrates this because we know there are examples, both State and Federal, in which the middle-tier test, in fact, has been treated as nothing more than the first-tier rational basis test—the lowest basis for scrutiny.

I think the question that has got to be faced is whether there can be devised a middle-tier test providing a higher level of scrutiny for these classifications on the basis of sex and illegitimacy that does not suffer from the capacity of a court, as a practical matter, to read it back down to the lowest level of scrutiny, if it is inclined to do so.

The trouble with the middle-tier test is that it is not a good, sound protection. It is too loose.

Senator KENNEDY. I—excuse me.

Judge SOUTER. No, I was just going to add, that has nothing to do with the question of whether sex discrimination should receive heightened scrutiny. I think that is to compare sex discriminations with common economic determinations seems to me totally inappropriate.

The question is, what is a workable and dependable middle-tier standard for scrutiny.

Senator KENNEDY. In your brief, you talk about even eliminating that test.

Judge SOUTER. Well, I also talked about making the test more clear and eliminating this kind of protean quantity to it.

Senator KENNEDY. And we will include the brief in the record.

Judge SOUTER. Surely.

[The brief of Judge Souter follows:]

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1978

NO. _____

RAYMOND A. HELGEMOE, WARDEN,
NEW HAMPSHIRE STATE PRISON, ET AL.,
Petitioners

V.

THOMAS E. MELOON,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

David H. Souter
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Concord, New Hampshire

Counsel for Petitioners

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Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The Petitioners, Raymond A. Helgemoe, Warden, New Hampshire State Prison, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding

on October 31, 1977.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit is reported at 564 F.2d 602 (1st Cir. 1977) and a copy of that Opinion is appended hereto as Appendix A. The Opinion of the District Court, which granted Respondent's Petition for Writ of Habeas Corpus and was affirmed by the First Circuit, is not reported; a copy of that Opinion is appended hereto as Appendix B. The Opinion of the New Hampshire Supreme Court which upheld Respondent's conviction is reported as State v. Meloon, 116 N.H. 669, 366 A.2d 1176 (1976). A copy of the Opinion is appended hereto as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on October 31, 1977, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

I. WHETHER NEW HAMPSHIRE REVISED STATUTES ANNOTATED 632:1, I-c, WHICH MAKES IT UNLAWFUL FOR A MALE TO HAVE SEXUAL INTERCOURSE WITH A FEMALE NOT HIS WIFE WHO IS LESS THAN FIFTEEN YEARS OLD, OFFENDS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATUTORY PROVISION INVOLVED

New Hampshire RSA 632:1 states in pertinent part:

> "632:1 Rape.
> I. A male who has sexual intercourse with a female not his wife is guilty of a class A felony if . . .
> (c) the female is unconscious or less than fifteen years old . . . ."

STATEMENT OF THE CASE

This petition for a writ of certiorari arises from the First Circuit's affirmance of an Opinion by the United States District Court for the District of New Hampshire granting Respondent's petition for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254. The Opinions of both the Circuit Court and the District Court held that New Hampshire's statutory rape law (RSA 632:1, I-c), under which Respondent was convicted, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Respondent, Thomas E. Meloon, and the proseeutrix, Susan D. Sourlolle, first met in Portsmouth, New Hampshire during late August or early September of 1973. At the time of this meeting, the prosecutrix

was thirteen years of age; the Respondent was twenty-four. On three separate occasions thereafter, the Respondent and the prosecutrix engaged in consensual sexual intercourse. Respondent was then arrested, charged, indicted, and on May 21, 1974, convicted of statutory rape pursuant to New Hampshire RSA 632:1, I-c. (This statute was repealed and replaced on August 6, 1975, with RSA 632-A, a gender neutral law.)

Respondent's conviction was upheld on direct appeal to the New Hampshire Supreme Court, which considered and explicitly rejected Respondent's equal protection claims. See Appendix C. However, the United States District Court for the District of New Hampshire subsequently granted Respondent a writ of habeas corpus on the ground that New Hampshire's statutory rape

law, RSA 632:1, I-c, violated the Equal Protection Clause of the Fourteenth Amendment. See Appendix B.

The judgment of the District Court was affirmed by the United States Court of Appeals for the First Circuit on October 31, 1977. See Appendix A.

REASONS FOR GRANTING THE WRIT

I. IN HOLDING THAT NEW HAMPSHIRE'S STATUTORY RAPE LAW, RSA 632:1, I-c, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT HAS DECIDED A SUBSTANTIAL QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The law under which the Respondent was convicted, RSA 632:1, I-c, made it unlawful for any male to have sexual intercourse with a female not his wife who was less than fifteen years old. The District Court, in striking down this statute, became the first court in the nation to hold any statutory rape law unconstitutional on equal protection grounds. The Court of Appeals then affirmed. Petitioners respectfully submit that the decisions of the District Court and the Court of Appeals are erroneous.

These decisions present this Court with the unique opportunity not only to address the first impression issue of the constitutionality of a gender based statutory rape law vis-a-vis the Equal Protection Clause, but also to reanalyze and clarify the unsettled question of what is the correct equal protection test to apply to statutory classifications based on sex.

Few areas of the law have troubled this Court as much in recent years as has the problem of testing statutory classifications based on sex against the Equal Protection Clause of the Fourteenth Amendment. There are, of course, two traditional tests to which constitutionally challenged statutes under the Equal Protection Clause have been subjected -- rational basis and strict scrutiny. Under the rational basis

standard a state is entitled to make reasonable classifications among persons upon whom benefits are conferred or burdens imposed, and the equal protection safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. See, e.g., Dandridge v. Williams, 397 U.S. 471, 484-485 (1970); McGowan v. Maryland, 366 U.S. 420, 425-426 (1961); and Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1955).

The strict scrutiny test is imposed if the statutory distinction is based upon a "suspect classification" such as race, alienage, or nationality, (Loving v. Virginia, 388 U.S. 1 (1967); Graham v. Richardson, 403 U.S. 365 (1971); and Oyama v. California, 332 U.S. 633 (1948)) or if the distinction infringes a "fundamental

interest." Dunn v. Blumstein, 405 U.S. 330 (1972); and Skinner v. Oklahoma, 316 U.S. 535 (1942). To successfully withstand the strict scrutiny test, a state must demonstrate a "compelling state interest" in creating the challenged classifications. Skinner v. Oklahoma, supra.

Where the statutory classification under consideration has been based on sex, however, this Court has been unwilling to apply either of the traditional tests. Instead, the Court has resorted to an amorphous "substantial relation" test which requires more heightened scrutiny than would be applied under the rational basis standard, but less stringent scrutiny than is applied to suspect legislation.

The middle-tier approach began to evolve in Reed v. Reed, 404 U.S. 71

(1971). The Court, in striking down a probate statute which gave males a preferred position as executors, stated:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" Reed v. Reed, supra, at 76. (citation omitted)

The rationale of the Reed decision provided the underpinning for subsequent holdings which invalidated statutes employing gender as an inaccurate proxy for more germane bases of classification and which rejected administrative ease and convenience as sufficiently important objectives to justify gender-based distinctions. See, Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wisenfeld, 420 U.S.

636 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975); and Stanley v. Illinois, 405 U.S. 645 (1972). In other cases the Court, applying in some instances the traditional rational basis test and in others the substantial relation test of Reed, found that certain classifications challenged as sexually discriminatory were in fact based on functional or circumstantial differences between the sexes; therefore no violation of the Equal Protection Clause existed. See, General Electric Co. v. Gilbert, ____ U.S. ____, 97 S. Ct. 401 (1976); Schlesinger v. Ballard, 419 U.S. 498 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); and Kahn v. Shevin, 416 U.S. 351 (1974).

In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices went so far as to conclude that sex should be regarded as

a suspect classification. Since Frontiero, however, the Court has not only declined to hold that sex is a suspect class, but it has significantly retreated from that position. See, Califano v. Goldfarb, ____ U.S. ____, 97 S. Ct. 1021 (1977); General Electric Co. v. Gilbert, supra; Craig v. Boren, 429 U.S. 190 (1976); and Mathews v. Lucas, 427 U.S. 495 (1976).

The most relevant precedent for the instant case is Craig v. Boren, supra, the only Supreme Court gender-based discrimination case concerning a criminal statute. In Craig, the Court examined and struck down an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18. The majority applied the substantial relation test from Reed, but three Justices

expressed outward concern with this standard. Justice Powell, in a concurring opinion, indicated that the rational basis test should take on a "sharper focus" when addressing a gender-based classification, but he balked at characterizing the new test as an independent "middle-tier" approach. Craig v. Boren, 429 U.S. 190, S. Ct. 451, 464 (1976). In separate dissenting opinions, both Chief Justice Burger and Justice Rehnquist expressed their position that gender based cases, like all cases where no suspect classification or fundamental interest is involved, should be tested by the traditional rational basis standard. Craig v. Boren, supra, at 466, 467, 469. Justice Rehnquist went on to express his concern that the substantial relation test is "so diaphanous and elastic

as to invite subjective judicial preferences or prejudices relating to particular types of legislation . . . ." Craig v. Boren, supra, at 467, 468.

In the instant case the Court of Appeals was troubled by the amoebic quality of the substantial relation test. Chief Judge Coffin comments that it is "hardly a precise standard," and he worries that "we must decide the constitutionality of the New Hampshire statute under a test that to some indeterminate extent requires more of a connection between classification and governmental objective than that of the minimal rationality standard." Meloon v. Helgemoe, supra, at 604.

Despite the First Circuit's misgivings over the imprecision of the Reed substantial relation test, the Court found that the New

Hampshire statute could not pass muster under that test. This decision is made even more suspect by the First Circuit's suggestion that the Court would not have struck down the statute under the "minimal rationality test." Meloon v. Helgemoe, supra, at 606.

In sum, this Court has created a new equal protection test which resides somewhere in the "twilight zone" between the rationale basis and strict scrutiny tests. This new standard lacks definition, shape, or precise limits. The instant case is a perfect example of what Justice Rehnquist feared most - the abuse of a standard so "diaphanous and elastic" as to permit subjective judicial preferences and prejudices concerning particular

legislation. The instant case represents an opportunity for the Court to define, shape, limit, or even eliminate the new standard. In all events, it presents the opportunity for the Court to correct a situation which invites subjective judicial judgments and possible abuses.

Finally, as noted above, the instant case is one of first impression. Never has this Court weighed a gender-based statutory rape law against an equal protection argument. The implications of the First Circuit's Decision for all gender-based criminal statutes and for equal protection analysis in general are devastating. The decision should not be left to the Court of Appeals. The issue is substantial and worthy of this Court's

consideration.

II. THE HOLDING OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH A DECISION OF THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE AND WITH THE DECISIONS OF ALL OTHER STATE COURTS WHICH HAVE CONSIDERED THE QUESTION.

During the course of Respondent's direct appeal to the New Hampshire Supreme Court, he first raised the issue of whether RSA 632:1,I-c was violative of the Equal Protection Clause. The Court considered Respondent's argument and in a unanimous decision explicitly rejected it. State v. Meloon, supra, at 670, 671.

The New Hampshire Supreme Court does not stand alone. On the contrary, equal protection attacks against statutory rape laws have been universally rejected by every state court considering the question.

See, e.g., People v. Mackey, 46 Cal. App. 765, 120 Cal. Rptr. 157 (1975); People v. Green, 183 Colo. 25, 514 P.2d 769 (1973); In re W.E.P., 318 A.2d 286 (D.C. App. 1974); State v. Drake, 219 N.W. 2d 492 (Iowa 1974); In re Interest of J.D.G., 498 S.W.2d 786 (Mo. 1973); State v. Elmore, 24 Or. App. 651, 546 P.2d 1117 (1976); and Flores v. State, 69 Wis. 2d 509, 230 N.W.2d 637 (1975).

The holding of the Court of Appeals runs directly counter to that of the New Hampshire Supreme Court. It is also in conflict with the decisions of all state courts which have considered the question. It is a significant issue, and a significant conflict. It is a question of law which has not been, but should be, settled by this Court.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Counsel for Petitioners

January 25, 1978

Senator KENNEDY. But you talk about clarification but you also talk about eliminating it. My question is, do you not think that statutes that discriminate on the basis of sex should receive very close examination.

Judge SOUTER. I do not think there is any question about it.

Senator KENNEDY. I know my time is just rapidly going by. I mention these, Judge, because these are questions of fundamental equality and discrimination in all forms and shapes that have been, as I mentioned earlier, a matter of enormous concern and this country has experienced a lot of pain, a lot of tears, a lot of blood. I do not think the American people want to go back.

We have seen—and this is subject to many members understanding—we have seen recent judgments and decisions that have been made by the Supreme Court which many of us feel have been a significant retreat from protections for both women and minorities.

So it is important, at least for this Senator, to understand your recognition of the authority and the responsibility that we, in the Congress, have in terms of fulfilling our responsibility under the 14th amendment, clause 5, to make sure that when laws are necessary that we are going to pass them. And that we are going to have someone who is going to be sitting on the Court who is going to recognize the importance of interpreting them to deal with the problems of discrimination, and also who is going to give the adequate remedies for the enforcement of those laws.

That is why I am most interested in understanding your views about it, but I appreciate your response to these questions.

Thank you.

Judge SOUTER. I appreciate your concerns.

The CHAIRMAN. Before I yield to my colleague from Utah, I am a little confused, Judge.

Judge SOUTER. Yes, sir?

The CHAIRMAN. You say there should be a standard between strict scrutiny and rational basis.

Judge SOUTER. Well, I suppose there has got to be. It seems to me impossible to say that unless you are within those basically four categories that get the very strict scrutiny—race, alienage, national origin, fundamental rights—that there is no appropriate level of review except that bottom level of review which is reserved for basically the most garden-variety economic distinctions.

That kind of a position seems to me not to take into account the variety of the importance of the interests that fall between them.

The CHAIRMAN. So there should be a middle level to define it more clearly?

Judge SOUTER. There has got to be something other than just threshold level scrutiny.

The CHAIRMAN. Right.

Judge SOUTER. The tough thing is in writing—I have been saying and I will say it again—the tough thing is in finding—is in writing a test that does not have the undue flexibility in the middle.

The CHAIRMAN. I thank you.

I will yield to my colleague.

Senator HATCH. Thank you, Mr. Chairman.

I think you have more than adequately answered the concerns that Senator Kennedy has raised with regard to these issues, but I would like to just clarify them just a little bit, if we can.

Judge SOUTER. Yes, sir.

Senator HATCH. I would like to just make sure I correctly have the procedural history, say, of the EEOC case, the case regarding the racial data collection and the briefs you filed in that case.

As I understand it, Governor Thomson refused to supply the EEOC with the racial, ethnic data information on State employees about 1973.

Judge SOUTER. I believe that was the first year, 1972 or 1973, yes.

Senator HATCH. Who was the attorney general at that time?

Judge SOUTER. My esteemed former colleague, Senator Rudman. I would not want to suggest that Senator Rudman counseled any executive decision on that.

Senator HATCH. No. I am not trying to embarrass Senator Rudman here. But the point is that as I understand it Senator Rudman was then the attorney general when the Department of Justice sued the State of New Hampshire for this information in 1975?

Judge SOUTER. That is correct.

Senator HATCH. And as I understand, his name and Assistant Attorney General Edward A. Haffer, were on the answer to the Federal Government's lawsuit and they signed that particular answer, if you can recall.

Judge SOUTER. I believe that was correct.

Senator HATCH. Was your name on that answer?

Judge SOUTER. I do not remember. I do not specifically remember.

Senator HATCH. The answer is, no, I do not think you were.

Judge SOUTER. You are a better student of my history than I am.

Senator HATCH. The names of the same two persons, Senator Rudman and Assistant Attorney General Haffer appear on the State's memorandum in support of the cross motion for summary judgment which was filed, as I recall, December 9, 1975. I think you would agree with that.

Judge SOUTER. I recall that.

Senator HATCH. The Federal district court, later in December 1975, then granted summary judgment for the Federal Government. Now, who filed the State's notice of appeal to the Court of Appeals for the First Circuit?

Judge SOUTER. My best recollection is that the notice of appeal probably had been filed before I became attorney general, but I would have to check the dates.

Senator HATCH. Again, it was Senator Rudman and Mr. Haffer, I believe it was.

Now, I believe that the notice was filed on December 31, 1975, and your name was not on it?

Judge SOUTER. That is right. I was still deputy at that time.

Senator HATCH. On what date did you become attorney general of New Hampshire?

Judge SOUTER. I think it was January 20 of the next year, 1976.

Senator HATCH. So by the time that you became head of the office of attorney general of New Hampshire, the Governor had re-

fused to comply with Federal data requests and the Federal Government had sued the State to obtain the data and the State's answer and legal arguments had already been fully set forth in the Federal district court and the State had lost in that court.

And the State's attorney general, our current colleague, Senator Rudman, had already noticed an appeal and all of this occurred before you became attorney general.

Judge SOUTER. That is correct.

Senator HATCH. OK. Now, is it accurate to say that the State's appellate brief filed in the first circuit and the State's petition for certiorari, after the first circuit upheld the lower court, generally tracked the arguments made in the district court filing, while Senator Rudman was attorney general?

Judge SOUTER. That is my understanding.

Senator HATCH. That is true.

Now, I am pointing out who was attorney general at what stage of the proceedings. I am not trying to suggest that you should seek to disassociate yourself from the briefs. You clearly have not done that.

But I just want this episode and its perspective because I think that has to be said.

Then I would like to also add that you and then attorney general, my good friend Senator Rudman, you were both advocates and you have made that point here.

Judge SOUTER. That is correct.

Senator HATCH. It was your duty to do the best you could for your client who was, in this case, the Governor and the State of New Hampshire. And as such, it is not only appropriate but it is a part of your responsibility to advance the plausible arguments to try and win the case, is that a fair statement?

Judge SOUTER. Yes, sir.

Senator HATCH. I notice that these briefs asserted—I thought that this was fairly ingenious—that these briefs asserted the right to privacy for State employees not to reveal their racial identity and the briefs based it on *Griswold* v. *Connecticut.*

Judge SOUTER. That is correct.

Senator HATCH. Which, of course, was a 1965 decision and has been raised earlier by our distinguished chairman.

Judge SOUTER. That is correct.

Senator HATCH. Now, this argument, I might add for the benefit of my colleagues who are concerned that you might not be an advocate of the right of privacy, this argument extended far beyond *Roe* v. *Wade* with regard to the right of privacy, in those briefs cited, because the line of privacy cases cited grew out of the marriage relationship and the personal interest in procreation.

But as a critic of the *Roe* v. *Wade* decision, which I am—I am not the least bit troubled by its inclusion in your brief.

As an advocate, you have to make plausible arguments based on then current case law, and the principles you find there. I have to give my old friend, Senator Rudman, a lot of credit, and you as well, for having the ingenuity for making the arguments based upon *Griswold* v. *Connecticut.*

Judge SOUTER. We did the best we could, Senator.

Senator HATCH. You sure did.

Judge SOUTER. Thank you. [Laughter.]

Senator HATCH. You were wrong, but you made very, very good arguments. That is all I can say. I would be more concerned if as a judge you had accepted that inventive argument, you see.

Now, let me just ask one other question. When you did become attorney general, did your office comply and provide the racial and ethnic identification data in response to the EEOC surveys?

Judge SOUTER. Yes; I think by that time an order had been entered against the State.

Senator HATCH. So once you had taken a shot at it and tried to change the law and, as best you could, with innovative arguments in representing your client as an advocate and as one who inherited the case from prior ingenious advocates—and I say that with respect—you complied with the law once you lost.

Judge SOUTER. When the case was over, it was over.

Senator HATCH. It was over. Well, I think that makes the case pretty well that it is improper for us to try to use your position as an advocate to determine whether or not you have—or to determine your own beliefs as you exist here today as the nominee for the Supreme Court.

Judge SOUTER. Thank you, Senator.

Senator METZENBAUM. I think the Senator from Utah has convinced me we should not confirm Warren Rudman to the Supreme Court. [Laughter.]

Senator HATCH. Actually, I think——

Judge SOUTER. Senator, I would stipulate to that.

Senator HATCH. You will stipulate to that. [Laughter.]

Actually, I think he would make quite a great Supreme Court Justice. I would be worried every time a case came down, however.

Judge SOUTER. I was going to say I think he would be a great Justice, too. I thought it was a question of him against me, and under those circumstances. [Laughter.]

Senator HATCH. I wouldn't push that if I were you. I know Rudman too well.

With regard to the literacy case, the law of New Hampshire had basically, in your opinion, been upheld before you tried that case.

Judge SOUTER. Yes; it had. The use of a literacy test for a nondiscriminatory purpose had been affirmed by the Supreme Court.

Senator HATCH. As I understand it, the New Hampshire Constitution required all voters to be able to read and write and understand English.

Judge SOUTER. Yes. It was a requirement, and I don't think this was the point of any question so far. But needless to say, no one had authority to suspend the imposition of that literacy test except a court of competent jurisdiction.

Senator HATCH. Well, as I understand it also, that law required voters to be 21 years of age, and it restricted absentee voting to people who were actually outside of the State, at least as I understand it.

Judge SOUTER. I believe that is correct.

Senator HATCH. The Department of Justice took the position that the Voting Rights Act of 1965 outlawed all of these practices.

Judge SOUTER. That is correct.

Senator HATCH. So when you and Senator Rudman took that matter on, you had current law that seemed to support you.

Judge SOUTER. Yes, sir.

Senator HATCH. In addition, you were both, as advocates, as attorneys general, if you will, you were both required by your oath of office to uphold the New Hampshire Constitution and statutory law.

Judge SOUTER. Yes; we were.

Senator HATCH. In fact, it would have been unseemly if you had not tried to uphold the constitution that had been enacted by elected representatives in your State.

Judge SOUTER. The only case, Senator, in which our responsibility would have been different from the way we saw it would have been a case in which the national and State constitutions clearly conflicted. And in those circumstances, our oaths would have required us, if we so believed—and we believed that there was no reasonable argument that could have been made to defend the State position—our obligation would have been to state that to the court. We did not find ourselves to believe that we were in that position.

Senator HATCH. Is it fair to say constitutionally that at that time back in 1970, the constitutionality of the Voting Rights Act was being legitimately disputed at that particular time?

Judge SOUTER. Yes. That was being litigated, and it was a final determination on that, or at least on the issues that concerned us, came with *Oregon* v. *Mitchell,* which was decided, I think, about 4 months after our own State case.

Senator HATCH. It was disputed, basically, on the principles of federalism arguments.

Judge SOUTER. Yes; it was.

Senator HATCH. All right. Well, as I understand it, the district court itself expressed some doubt about the issue but said that the act was "probably" constitutional.

Judge SOUTER. Yes; they were at an injunction stage, and they made that judgment.

Senator HATCH. I also understand that you and Senator Rudman, then attorney general of the State of New Hampshire, complied with all aspects of the Justice Department suit as soon as the constitutionality of the act was settled by the Supreme Court.

Judge SOUTER. Yes. My recollection is that after *Oregon* v. *Mitchell* came down I believe there was a joint stipulation filed by the State and Federal counsel, which ended the case.

Senator HATCH. We can go through a lot of questions on the other point that Senator Kennedy raised with regard to the gender issue, but let me just say this: In its petition for writ of certiorari, your State in that particular case did refer to the Supreme Court's case laws evincing a "middle-tier" approach and asked the Supreme Court to make it clearer and more precise and, in addition, to uphold your statutory rape law.

Judge SOUTER. That is correct.

Senator HATCH. Now, there is simply nothing here giving rise to any legitimate concern, as far as I am concerned, about you because the brief made reasonable arguments back in 1977 seeking to

construe precedent in a manner which would uphold your own State's statutory rape law.

Judge SOUTER. That is correct.

Senator HATCH. A May 5, 1987, opinion of the New Hampshire Supreme Court, which you joined in, made reference to the so-called middle-tier level of heightened scrutiny with respect to gender. And so, even on the bench, you acknowledged this middle-tier gender characterization.

Judge SOUTER. That is correct.

Senator HATCH. I think I have to say that I don't see any reason to criticize you on the basis of any of those matters. As a matter of fact, I see every reason to say that in the fight for principle, you may be wrong but you fight for it. You may be right but you fight for it. And you are an effective advocate and an ingenious representative of the people and, I might say, a clever and good writer of the law.

Judge SOUTER. Thank you, Senator.

Senator HATCH. But that once the decision is made, you immediately followed those decisions.

Judge SOUTER. We did.

Senator HATCH. I don't know what more we could ask for in somebody who is here sitting as a nominee for the Supreme Court of the United States of America.

Judge SOUTER. Thank you, Senator.

Senator HATCH. I want to compliment you for it because, you know, let's just be honest. If we are going to start criticizing advocates because they advocated for people who may have been wrong, we would hardly ever have an opportunity of putting a criminal lawyer on the Supreme Court, or any other bench, for that matter. Nor would we have an opportunity of putting people who actually go to bat for some pretty reprehensible people in our society and try and uphold their rights, which is time honored, one of the most important obligations of any attorney worth his or her salt. So, you know, I don't see any problems at all with you as an advocate. As a matter of fact, I would be surprised if you had not advocated the way you did at the time. It would have been nice if you had known how the Supreme Court was going to rule in advance.

Judge SOUTER. I could have been a very successful lawyer.

Senator HATCH. Well, you are also going to be in a position where I think you are going to know how it is going to rule in advance in the future. That will be great.

Judge SOUTER. Thank you, Senator.

Senator HATCH. Now, you have sat on a State trial court, a State supreme court. You have had tremendously broad experience. You have heard domestic relations cases, right?

Judge SOUTER. Yes, sir.

Senator HATCH. Child custody cases?

Judge SOUTER. Yes.

Senator HATCH. Criminal law cases?

Judge SOUTER. Yes.

Senator HATCH. Divorce cases?

Judge SOUTER. Yes.

Senator HATCH. In fact, you have heard cases of employment law.

Judge SOUTER. Yes.

Senator HATCH. You have heard cases involving almost every aspect of human endeavor.

Judge SOUTER. Anything that can come before a trial court of general jurisdiction.

Senator HATCH. Yes, and you have heard them in a more refined sense with arguments on both sides in the appellate courts that you have been on.

Judge SOUTER. Yes, I have.

Senator HATCH. All right. Well, having had that experience and now sitting on an intermediate Federal court, the highest court under the Supreme Court of the United States, could you describe for the committee the process by which you have reached your decisions in cases as they come before you? It is a generalized question, but I would like you to give us the benefit of how you go through deciding these cases.

Judge SOUTER. Well, do you want me to refer to the trial court experience as well as appellate court?

Senator HATCH. No, just the appellate experience I think would be fine at this point, since it is closely parallel to the Supreme Court experience I hope you will have.

Judge SOUTER. Well, the process is one which helps to discipline the mind as we go through it. I will leave aside the question of determining whether there should be discretionary review in a given case and start with the point at which the case is docketed before the court.

In the normal course, sometime in the month before the case is going to be argued, we get a set of briefs. My practice would be usually in the week or the weekend before the argument to read those briefs through, to make notes on the covers of the briefs of questions that I want to ask. And also, as a matter of curiosity, to try to settle a lawyer's argument, I engaged in a practice for the last couple of years of trying to get some sense in a way that I could measure of the effect of the oral argument on me, which would come after the briefs had been read.

What I would do after I had read the briefs and noted the questions that I knew that I wanted to ask counsel, I would make a notation on my docket list, which I kept in my own file, of what I thought was the strongest position at the time, a kind of first, even prestraw-poll indication of where I thought I might come out on the case.

Following the oral argument in the case, I would then compare my determination after oral argument with that first indication that I had put on the docket list. One of the things that I wish I had done before I came down here and I didn't think to do was to try to go down to my chambers and pull out my old docket lists and tabulate those points at which I had had some change of decision from the preliminary to the postargument decision. But I did change my mind in enough cases so that I remember there are enough little x's in the margin to indicate that the second look after argument suggested something that the first look before argument had not, to indicate to me that oral argument was a matter of substantial importance to me in deciding cases.

I would then, following that oral argument, of course, go through a preliminary discussion of the case and a preliminary vote with the other justices. We would decide how the case probably would come out, and the case in the New Hampshire Supreme Court would be assigned randomly. And if I got the case, I would then start working on the opinion.

The way I happen to work on opinions was to ask a law clerk whom I would assign to that particular case to draft an opinion which followed a rough outline that I would give the clerk of the points that I wanted to cover and the basic reasoning that I wanted to go through. What I wanted the clerk to do was not to write me an opinion which I was necessarily going to use—because, in fact, on the New Hampshire Supreme Court I never did use a clerk's draft ultimately. What I wanted the clerk to do was, in effect, to make the run-through, help me with the research, reduce down the amount of reading that I personally had to do of the most important authorities, and to give a further preliminary look at whether there was some flaw in our reasoning that I was not catching or that the other judges in the majority with me were not catching.

After I would get the clerk's draft back—we may or may not have argued about it in the meantime. But after the clerk's draft came back, I would then work my way through the briefs again. I would read the portions of the record sent up to us that were germane to the decision. I would then go through my own research process of rereading cases, even though I might think I was familiar with them, that the parties had relied on.

At that point, I would make a final assessment myself as to whether there was any reason to change my view from what it had been when the court voted. If there was, I would either go back to the court or I would draft an opinion indicating the change and circulate that and explain why I was doing it. If there was no change, I would then write my own opinion. I would revise it an unfortunate number of times. And then I would let the clerk have a go at it again, and the clerk would try to tear it to pieces. Usually, another clerk would review it then, and ultimately it would circulate to the rest of the court, at which point I might or might not be in trouble. But that was at least the process that I went through up to there.

Senator HATCH. Well, that is good. I have other questions I would like to ask. I have about 10 minutes left, but I think I will just reserve that time and we will move on from here. But thank you, Judge. It has been great to be able to ask a few of these questions.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. I think it may be appropriate now for us to take a short break. But before we do, let me ask my colleagues to think about it while we are on break. We have 2½ hours' worth of questioning left. I indicated we would stop around 6 o'clock, which is my preference this evening. But I would like my colleagues to think about that, and we will come in in the morning, and those who haven't had their first round would start off when we started in the morning. But I would just like to ask my colleagues to think about that while we take a break.

We will have a recess until 4:30, at which time we still start promptly at 4:30.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Judge, would you like a soda or some coffee or anything?

Judge SOUTER. No, I am fine. Thank you, sir. I was offered anything I needed out back.

The CHAIRMAN. We have done a little bit of a check here and I think this is consistent with my colleagues and the White House, I think we are all in agreement, which we usually always are. [Laughter.]

That is that this is how we will proceed. I checked with the ranking member, Senator Thurmond, because we do not do anything he does not agree to, and this is what we will do: We will go next to Senator Metzenbaum, then to Senator Simpson, and then to Senator DeConcini, and we will stop after Senator DeConcini, and by that time we will have a consensus.

Is there a preference when you wish to convene tomorrow morning, somewhere between 9 and 10? Before we close out, I will have that, because a lot of the press are asking. I do not—and we have discussed this—I do not intend to go late tomorrow afternoon. We will go into the middle of the afternoon, to the 5 o'clock area, but it will not be a late night tomorrow, and I expect, based on that, as we indicated before, have a reasonable prospect of finishing up early Monday and then begin with our witnesses, but we will see from there.

Again, I thank you. You obviously have one advantage that most witnesses do not have, Judge. You are accustomed to sitting for a long time, and you——

Judge SOUTER. That is the third lesson I learned as a judge. [Laughter.]

The CHAIRMAN. You do it with great aplomb, your physical constitution as well as your understanding of the Constitution are matched.

Judge SOUTER. Thank you, Mr. Chairman.

The CHAIRMAN. Now, let me turn to my colleague from Ohio Senator Metzenbaum, for his questioning.

Senator Metzenbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

Judge Souter, I want to focus on your view of really what is at stake in the abortion debate. Now, we write the laws in Congress, the Court interprets the laws, but we all must be aware that the laws affect the personal lives and the hopes and the dreams of the people who must live with the laws we make.

I want to start to talk with you on a personal level, not as a constitutional scholar nor as a lawyer. This year, I held hearings on legislation that would codify the principles of *Roe* v. *Wade*. I heard stories from two women who had had illegal abortions prior to 1973. They were women about your age. They told horrifying stories.

One woman was the victim of a brutal rape and she could not bear raising a child from that rape along side her own two children. Another woman, who was poor and alone, self-aborted. It is a horrible story, just a horrible story, with knitting needles and a bucket.

I heard from a man whose mother died from an illegal abortion when he was 2 years old, after doctors told her that she was not physically strong enough to survive the pregnancy.

I will tell you, Judge Souter, that the emotion that those people still feel, after more than 20 years, is very real, sufficiently strong to have conveyed it to those of us who heard their testimony. Each woman risked her life to do what she felt she had to do. One of those women paid the price.

My real question to you is not how you would rule on *Roe* v. *Wade* or any other particular case coming before the Court. But what does a woman face, when she has an unwanted pregnancy, a pregnancy that may be the result of rape or incest or failed contraceptives or ignorance of basic health information, and I would just like to get your own view and your own thoughts of that woman's position under those circumstances.

Judge SOUTER. Senator, your question comes as a surprise to me. I was not expecting that kind of question, and you have made me think of something that I have not thought of for 24 years.

When I was in law school, I was on the board of freshmen advisers at Harvard College. I was a proctor in a dormitory at Harvard College. One afternoon, one of the freshmen who was assigned to me, I was his adviser, came to me and he was in pretty rough emotional shape and we shut the door and sat down, and he told me that his girlfriend was pregnant and he said she is about to try to have a self-abortion and she does not know how to do it. He said she is afraid to tell her parents what has happened and she is afraid to go to the health services, and he said will you talk to her, and I did.

I know you will respect the privacy of the people involved, and I will not try to say what I told her. But I spent 2 hours in a small dormitory bedroom that afternoon, in that room because that was the most private place we could get so that no one in the next suite of rooms could hear, listening to her and trying to counsel her to approach her problem in a way different from what she was doing, and your question has brought that back to me.

I think the only thing I can add to that is I know what you were trying to tell me, because I remember that afternoon.

Senator METZENBAUM. Well, I appreciate your response. I think it indicates that you have empathy for the problem. In your writings, as a matter of fact, you reveal real empathy for those who are morally opposed to abortion.

For instance, in 1986, as a State supreme court justice, you wrote a special concurrence in a wrongful birth case called *Smith* v. *Coat,* outlining, in your words, how a physician with conscientious scruples against abortion—this is a quote:

> How a physician with conscientious scruples against abortion and the testing and counseling that may inform an abortion decision can discharge his professional obligation, without engaging in procedures that his religious or moral principles condemn.

As a matter of fact, that was sort of dictum. That was dictum in the case, it was not necessary.

As attorney general, you filed a brief in *Coe* v. *Hooker,* which emphasized that,

> Thousands of New Hampshire citizens possess a very strongly held and deep-seeded moral belief that abortion is the killing of unborn children.

That brief went on to conclude,

> It is not accurate to say that the moral feelings of other individuals and groups, both public and private, may not constitutionally interfere with a woman's otherwise unrestricted right to decide to have an abortion.

I start off saying it is not accurate to say that. Now, you obviously indicated a concern for the doctor with conscientious scruples against abortion, you indicated your concern about feelings of individuals and groups, both public and privately. My concern is do you have the same degree of empathy for the woman who must make a difficult decision when faced with an unwanted pregnancy. That is really the thrust of my concern, and I think the thrust of the concern, frankly, Judge Souter, of millions of American women, not really wanting to know how you will vote on a particular case, but wanting to know whether you can empathize with their problem.

Judge SOUTER. If they were to ask me whether I could, I would ask them to imagine what it was like to be in that room that fall afternoon that I described to you. That is an experience which has not been on my mind, because it has not had to be, but I learned that afternoon what was at stake.

I hope I have learned since that afternoon what is at stake on both sides of this controversy. You mentioned my opinion in the *Smith* v. *Cody* case. I do not know whether that was dictum or not. I did not think it was at the time.

What I thought I was addressing at the time was as moral dilemma which had been created not unnecessarily, but which had necessarily been raised by the majority opinion of my court.

If I were to generalize from that concurrence in *Smith* v. *Cody,* it would be that I believe I, indeed, can empathize with the moral force of the people whom I addressed, and I can with equal empathy appreciate the moral force of people on the other side of that controversy.

Senator METZENBAUM. My staff just points out to me that each year almost 3.5 million women face that problem of an unwanted pregnancy, much like the woman that you mentioned.

Everybody talks about *Roe* v. *Wade* as a case. I do not think of it as a case. I think of it as those witnesses who came before my committee. I think of it as women generally. I think of it as my own daughters, who are married, and I can imagine a situation where they might need to have or want to have an abortion. Other women less fortunate than they would not be able to go to a different State, if there were no law.

I think about what would happen if there were no constitutional protection, and I ask you not how you vote on the case, but what are your thoughts as to what would happen to those women in this country who might be able to go, if they had the money, to State x, but not get an abortion, not be able to stay in State y, because that State prohibits abortions.

My concern is what does Judge Souter think about this moral, and it goes beyond being a moral question, it becomes a really heart-wrenching decision that actually goes beyond morality, it goes to the very heart of living, the kind of living that people experience.

Judge SOUTER. I think I have to go back to something that I said to all of the members of the committee when I was speaking at the very beginning, before my testimony this afternoon.

If I have learned one thing, I have learned that whatever we do on any appellate court is not, just as you said it was not, just a case. It affects someone and it changes someone's life, no matter what we do.

One of the consequences undeniably of the situation that you describe would be an inconsistency of legal opportunity throughout this country. Some States would go one way, others would go another. Some would fund abortions, some would not fund abortions. There is no question that that is a consequence that has to be faced.

I do not think that, any more than any other given fact, as tragic as that fact may be, is sufficient to decide a case. We can never decide a case totally that way, and I know you are not suggesting otherwise.

But you remember what I said is the second lesson that I learned as a trial judge, that knowing that any decision we make is going to affect a life and perhaps many lives, we had better use every resource of our minds and our hearts and every strength that we have to get it right. It is the imperative for conscientious judging.

Senator METZENBAUM. Judge, I think you are a very sincere man and I think you are a very moral man. What is bothering me, maybe some others as well, is that you have already expressed concern for the conscientious scruples of physicians in connection with abortion, you have expressed concern for the moral feelings of others in connection with abortions.

The real concern is, would the conscientious scruples of a physician or the moral feelings of others override a woman's decision when and whether or not to have her child.

Judge SOUTER. There is no question that the decision about the future of *Roe* v. *Wade* does not rest upon an assessment of a physician's moral scruples. The issue of *Roe* v. *Wade* is one which, as you know, on the merits I cannot comment on.

But there is one thing that I can say, and I do not know how else to say it, is that whatever its proper resolution may be, it is an issue. It is not simply a label for one view, whether that view be in favor of continuing *Roe* v. *Wade* or in favor of overruling it.

You are asking me at this point have I demonstrated, can I point to something on the record that demonstrates as kind of equality of empathy on either side, and I think the only thing that I can, without self-serving rhetoric, say to you is I have talked and I have counseled with someone on the other side.

I have been the trustee of a hospital which has opened its facilities to people on the other side, people who did not agree with these conscientious doctors, and to the extent that I have a record that goes behind the legal issue in the case, I think you may properly look to that. And you may properly ask, and I hope you will ask yourself, as you and the other members of this committee listen to me over the course of the next few days, you may properly ask whether, on other issues generally, I am open enough to listen.

What you want to avoid is a judge who will not listen, and I will ask you when these hearings are over to make a judgment on me as to whether I will listen or not. I think I have a record as a judge which indicates that I will, and after you and the other members of

this committee have finished examining it, I will ask you to judge me on that basis.

Senator METZENBAUM. We will.

In *Griswold* v. *Connecticut,* Justice Douglas articulated the very important privacy concerns that were at stake if Connecticut fully enforced its anticontraceptive statute. He asked, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives." This idea is obviously repugnant to everyone.

Surely, the Court has to concern itself with the problems of enforcing statutes regulating reproductive rights. The Court must be willing to reap what it sows, if it overturns *Roe* and permits States to once again criminalize abortion.

I do not have to tell you, until last November, what was occurring in Romania, the draconian regime, the manner in which they enforced their criminal abortion laws, each month police would enter factories to examine women to determine if they were pregnant. No question, that would not happen in this country.

Romanian women who had miscarried were interrogated to make sure they had not had an abortion. We know that will not happen. But if the Supreme Court were to overturn *Roe* and a State passed a statute criminalizing abortion, would it then be constitutional to put a woman in jail for obtaining an abortion?

Judge SOUTER. I think the only answer to that, Senator, is a reference back to the laws that preceded *Roe.* We know that in my own State there were misdemeanor statutes on the book for procuring an abortion. And it was exactly such statutes as that that *Roe* rendered unenforceable.

Senator METZENBAUM. Excuse me, I did not mean to be rude.

Judge SOUTER. I was going to say it was exactly such statutes as that that *Roe* rendered unenforceable.

Senator METZENBAUM. Now, according to news reports at the time you were attorney general, you opposed repealing New Hampshire's criminal abortion statutes which had been passed before *Roe* v. *Wade.*

The legislative archives of the bill that would have repealed the criminal statutes contain a memorandum from the attorney general's office outlining the effects of *Roe* v. *Wade.* Although it is unclear when the memo was written, it was likely written soon after *Roe* was decided in 1973, although I am not certain about that.

At that time, you were deputy attorney general. The memo concluded that "the effect of the Supreme Court decision is to invalidate RSA 585:12, 585:13, and to make RSA 585:14 a nullity."

Are you familiar with that memo?

Judge SOUTER. I do not recall the memo, no.

Senator METZENBAUM. Did you agree then, or do you believe now that the Supreme Court's decision in *Roe* rendered the New Hampshire criminal statutes unconstitutional?

Judge SOUTER. The fact is I cannot give you a categorical answer to that. To begin with, it is an issue that I have not even given thought to for, I guess, 17 years and I do not recall the extent to which I may have been aware of that memorandum at the time.

The further reason for the difficulty and a categorical answer is that you may recall that there are questions about the effect of *Roe*

or the *Roe*-type decisions depending on the form of the State statutes in question.

Now, I am going to say something from memory and it may be inaccurate, so I want you to take it with that disclaimer. But my recollection is that the Court's indication of the enforceability of the statute in *Roe* v. *Wade* was different from its indication of the enforceability that came out of *Doe* v. *Bolton*.

Quite frankly, Senator, without a reexamination of precisely what they were saying on whether the statute remained partially enforceable to the extent allowable under *Roe* v. *Wade* as opposed to becoming totally unenforceable, I would have to go back and reread those carefully and parse the New Hampshire statutes, which I have not done.

It is—in one sense I think we are inclined to say, well, that ought to be an easy question, and I do not think it is an easy question.

Senator METZENBAUM. I will change the subject.

The day after President Bush nominated you to the Supreme Court, White House Chief of Staff John Sununu called in an advocate for the right, conservative movement and said that you would—to assure him and the right, that those on the right would be very happy and that Bush selected you over better known conservatives. He called a man by the name of Pat McGuigan. Mr. McGuigan works for or is involved with something called the Coalitions for America; Paul Weirich, national chairman; Eric Licht is the president; library, court/social issues; Stanton, defense and foreign policy; Kingston, budget and economic policy; 721 Group, judicial and legal policy; Siena Group; Catholic Coalition; the Omega Alliance; Young Activist Coalition; Resistance Support Alliance; Freedom Fighter Policy; Jewish Conservative Alliance.

At that meeting, according to the memo that Mr. McGuigan then wrote to Paul Weirich and a number of others, it was stated that Sununu asked, how are you doing? I replied, well, John, you guys could have hit a home run if you had picked Edith Jones, a Texas judge. Instead, you hit a blooper single which has barely cleared the mitt of the first baseman who is backpedaling furiously and almost caught the ball.

Sununu smiled and replied, Pat, you are wrong. This is a home run and the ball is still ascending; in fact, it is just about to leave Earth orbit.

It was not too long after that the Coalition for America announced they were fully supporting your nomination. That original memo that I mentioned specifically provided that there were to be absolutely no leaks allowed.

Judge Souter, what does John Sununu know about you that we do not know? Can you tell us what conversations you have had with him or with others at the White House either before the nomination or since the nomination concerning any matter of issues, points of view, that make it possible for Mr. Sununu to say that it is a home run; the ball is still ascending?

Judge SOUTER. I have never discussed the issue in question with Governor Sununu. After Governor Sununu came to Washington, I did not see him until one day last December. I think it may have been around the 11th or the 12th. I was in Washington that day in

connection with the nomination or the possible nomination to the court of appeals.

The Governor invited me to lunch and I did have lunch with him. We did not discuss any substantive issue that his memorandum referred to. We largely, as I recall, talked politics in New Hampshire. I did not see the Governor again until the day before this nomination.

I did not have discussions with him on the issue that you referred to.

Senator METZENBAUM. How about on other issues? Did you discuss other issues with John Sununu, or others at the White House or connected with representing the White House?

Judge SOUTER. I was going to just try to establish how far back in time we want to go with Governor Sununu.

Senator METZENBAUM. I did not mean to interrupt you.

Judge SOUTER. No. I just wanted to know how far back you want to go in time? To the beginning?

Senator METZENBAUM. Well, anything that would give him sufficient knowledge to this kind of assurance and to call in the representatives of the far right and to assure them that you are going to be OK.

Judge SOUTER. I have not discussed that issue or given any assurance to Governor Sununu.

I presume that Governor Sununu was drawing a conclusion based on what he understood to be principles of judging. But I can assure you that I gave no assurance to him at any time on that matter. And I did not discuss that matter with him at any time.

Senator METZENBAUM. Did you have any discussions with him or any other persons at the White House concerning issues that may or may not come before the Supreme Court?

Judge SOUTER. The only discussion that I had with anyone at the White House in connection with this nomination or, for that matter the circuit nomination, was my conversation with the President which I think lasted about a half an hour on the afternoon that he announced his intent to nominate me. He asked for no assurance on any subject.

Senator METZENBAUM. And at the time you were appointed circuit court of appeals judge, did anybody in the White House inquire of you concerning any of your political views, or views concerning matters that might come before the Supreme Court?

Judge SOUTER. No, Senator. The only conversation I had or conversations, I should say, plural, with anyone at the White House at that time, was during the course of the lunch that I mentioned. Governor Sununu—the lunch was in Governor Sununu's office. He was there and his assistant was there; the Governor's legal counsel, Mr. Gray, and Lee Liverman, who is on his staff.

I was not asked for any statement of position or assurance on any issue in that conversation.

Senator METZENBAUM. Thank you.

Senator Biden, how much time do I have left?

The CHAIRMAN. I do not know. You have 1 minute. That is just about enough time to call Governor Sununu, who is doing a fundraiser in Delaware for my opponent. Maybe we can get a hold of him.

Senator METZENBAUM. Do I understand that we will be in several rounds?

The CHAIRMAN. Yes. What we will do is this. We will have those Senators who have additional questions ask them tomorrow afternoon and/or Monday morning, or whatever the appropriate time is. Yes, there will be an opportunity.

Senator METZENBAUM. I do, Judge Souter, wish to inquire of you concerning church-state issues, but time obviously does not permit it at this moment. Thank you very much for responding to my questions.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. Thank you, Senator.

Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

We lawyers often are out doing our business, like correcting the record. So I did want to—you will notice Senator Biden and I this morning, as I pungently gave a comment about his quote and he pungently spliced it back together. So I thought we would just put the whole thing in because we both said exactly that, and it is in the same paragraph. And we have already had that answered, I think, now.

But it is clear that what I said and what Senator Biden said are the exact quote with regard to the specific attitude of questions. So I just wanted to get that on record, because my staff was not on vacation. They were here laboring diligently. They were not at Rehobeth or anywhere.

The CHAIRMAN. Well, mine were not in a hole clawing to get this information, or however you mischaracterized it.

Senator SIMPSON. I was talking about those poor law professors. I think that was the part I should have clarified. Diana and the staff were doing their work, but the poor law professors and the academics, they were clawing and scratching. We have to realize that they have had an arduous summer and an arduous August, without question.

Judge SOUTER. If they were reading my opinions, they were.

Senator SIMPSON. Well, we all did a little of that. In any event, your remarks when you spoke with hardly or nary a note at 2 p.m. today was very impressive. I think to me, as a person who practiced law for 18 years in really what I thought of as the real world—and it was; you know, I have represented some real weird people, and did some real weird cases with some weird results, too, I can tell you that. [Laughter.]

So the thing that impressed me is to hear you able to describe yourself and then hear you describe answers and form answers to pretty piercing questions from Senator Biden, Ted, Howard, Orrin, Strom. All of those—your answers come back with the lucidity of very impressive degree.

I have always had the peculiar view that legislating should be done in a way—as I said earlier, in a way that is understandable to the governed. And certainly I always had a view of the law practice that if your clients could not understand what you had drafted for them, what was the purpose of practicing law?

I know that is a screwy view, but it was mine. In other words, if the client did not know and looked at a contract that you had

drafted and did not know what it said, what is the purpose of the law practice?

And I think as a judge, writing opinions, what greater purpose of a judge is to write an opinion that the public can understand or to answer a question in a way that the public can understand, not just from some intellectual level, but from the gut level, from the commonsense level?

And that is what has been most impressive to me—to hear you respond to these questions in a way that is extraordinarily understandable——

Judge SOUTER. Thank you, sir.

Senator SIMPSON [continuing]. And showing, in a hackneyed word in these times, sensitivity and empathy. I know my friend, Howard Metzenbaum and I know my friend, Ted Kennedy, and we get to know each other pretty well in 12 years, and Joe Biden and Orrin Hatch and all the men at this table, and our fine ranking member. And we do know each other pretty well after 12 years and going through these kinds of exercises. We have been through some grinders here.

The Bork thing was extraordinary in its, you know, intensity, in what occurred, and I do not see any portent of that at all here. Yet, my friend, Ted Kennedy, speaks with power as he gets into those issues of—he and I are chairman and ranking—and it was more fun when I was chairman and he was ranking, but we have done tough work together on immigration, refugees, things filled with, I often say, emotion, fear, guilt, and racism.

None of us on this panel are racists. I do not know any racists in the U.S. Senate. So it is always something that when you bang around the edges of it, you almost want to ask the question, David Souter, Are you a racist?

Judge SOUTER. The answer is, no.

Senator SIMPSON. A crazy question to ask, is it not?

Judge SOUTER. Well, far be it for me to say that a question from you, Senator, is crazy. [Laughter.]

Senator SIMPSON. No, do not. Just stop right there.

Senator HATCH. But we all agree.

Senator SIMPSON. Do not listen to them, just go ahead.

Judge SOUTER. In a way, I think that answer might have been impressive to some people if I had grown up in a place with racial problems, and some people have pointed out that I did not. The State of New Hampshire does not have racial problems.

So you can ask, well, what indication is there, really, as to whether you mean it or not. And you did not provoke this thinking on my part by your question immediately because I thought of it before I came in here. I can think of two things to say.

The first is something very personal and very specific to my family. In a way, it surprises me when I look back on the years when I was growing up that never once, ever in my house that I can remember did I ever hear my mother or my father refer to any human being in terms of racial or ethnic identity. I have heard all the slang terms and I never heard them in my house.

Now, as much as I esteem my family, I do not want to try to make them a race of saints, but the fact is, in that respect, they

were perfect. They were perfect in some other ways, too, but they were in that respect.

And if there is a kind of homely vision for America, in my mind, it is simply the vision of my home. And I have lived long enough and I have lived outside of my home long enough to know what the difference is. I am glad that I am conditioned by my beginnings and I am glad that I do not have to overcome them. I am glad that I can have an aspiration for America which is as good as the circumstances that I came from.

Another thing that occurred to me, and it is equally personal—and I think that I will not offend the two people involved by saying this—two of my closest friends in this world are sitting in the row behind me. You have already heard from Warren Rudman. I heard Warren Rudman talk about what it was like to be discriminated against when he was a kid because he was Jewish. Somewhere out there, there is somebody who is discriminating against a friend of mine who is close enough to me to be a brother.

And there is another friend of mine in that category in the row behind me; you haven't heard from him today. His name is Thomas Rath. I can remember Tom Rath telling me once years ago—I don't know why, I don't know how it came up. I remember him telling me about his grandparents, and his grandparents remembered the days when there were help-wanted signs up around the city of Boston that said "No Irish need apply." And that meant them.

So if you want to know whether I have got the vision, if you will, behind the answer to my question, I will be content to have you look to my friends.

Senator SIMPSON. Well, I come from Wyoming, and people think that I don't have the sensitivity about race. I remember I was at a baseball game with Coretta Scott King. It was the World Series in Kansas City several years ago, and she said, "I don't know much about baseball." I said, "Coretta, you will when I finish with you."

So when we finished the game, she said, "Now, I want to ask you what you know about racism in Wyoming. And how many blacks are there in Wyoming?" I said, "Well, probably less than 1 percent. I have a large Hispanic population of 11 to 12 percent or something of that nature, and a native American population." Funny how you can be from a small area and somehow be known as not sensitive enough. I don't know what that is, but it is not real. And on the immigration reform business, was I sensitive enough to Hispanics? I don't know. Three million of them have come forward under that bill, and they are now no longer living in some illegal subculture, and that just pleases me immensely—Hispanics and Germans and everybody else, all the way up and down the line. So it isn't just one.

This is a line of questioning that destroyed Robert Bork because all he had done was be a judge on a Federal district court, just like you, for 5½ years, and he did 106 opinions, and 6 of his dissents became majority opinions of the U.S. Supreme Court, and he was never overturned. And he was turned into a racist right here—in a different room—also a sexist, also a violator of the bedroom, also a sterilizer of women. That is what happened right here. I was here. You don't have to like him or not. You don't have to get into anything else. That happened.

So, you know, that is something we must be very careful about. That is not a good trait for any of us to say that somehow if someone does not agree with our views they are somehow, you know, racist or poll taxers or whatever or whatever. And that was uncomfortable. I didn't mean to drag that out, but it was all false. There was nothing in the background of the man that proved up one bit of it, and that is pretty tough stuff. That could happen to any of us.

We saw John Tower, you know, with ballerinas dancing on pianos and things that were all fake. We had to go look at the FBI report on our colleague and found that witness T-4 said this. I said, "Who is T-4? Some disgruntled former somebody?" And that could happen to each one of us.

That is what this committee, I think, should pride itself on, and we do pride ourselves in trying to assure that we do it right. I think we are going to do it right.

The issue of abortion, that was a powerful, powerful response to my friend from Ohio. Those were not only eloquent answers; the questions were eloquent by Howard Metzenbaum. And he and I don't always agree, but I do enjoy that ornery rascal. And he is as spirited as I am in his causes, and I have enjoyed him in many ways. And the thing that—I guess I could almost ask that same question just the way he did. I really would, because it comes from real life.

What we are dealing with here are real live people. I went through the abortion debate in 1975 when I was a State legislator. It was one of the most grueling, powerful, impressive debates of the State legislature that I had ever been involved in. From that and from my practice, I came to the determination that a woman should have the choice, and that I as a man and especially as a male legislator—a spouse would be different. That would be a whole new scenario God knows one would never want to go through. But as a male legislator, what was I even doing in the decision process, especially with, you know, a woman I remember—since we are speaking in some rather powerful little personal reminiscences of the woman who sat there and said, "I have five marvelous children, and now I know that if I am going to have the next one and I am pregnant, I am going to lose my mind. And I am here because you are a lawyer, and I am asking you what I should do."

You know, I sat for over 2½ hours with that lady, and she eventually made the decision to do that. And she also said that she, as I said, would destroy herself. She did not destroy herself. I had yet another situation that did destroy herself in that situation. So, really, it is so unfortunate that we get into this issue of extremism on both sides of this issue.

In any event, there are two or three things that I would say, and then I do have a question. But I think you have said several times in just this short day that all activities and decisions and the things you have done as a judge or a lawyer, you have realized that the most paramount feature of it is that it has some impact on another life, somebody's life, some other person.

Judge SOUTER. Yes, sir.

Senator SIMPSON. And that is your deep feeling. You have said that.

I would like to ask you a question. What else have you done in that little community where you grew up and where you practiced and what you did to tie you closer to the human condition? You have talked about a hospital board. You talked about these other things. What is it you are most proud of in the things you have done that would disclose the man I think that the American people are seeing here today? You have given us some. Who are you?

Judge SOUTER. If I had to pick one thing—you have already mentioned it—it would be that hospital board. It was like a second occupation for me. I went on it the way lots of people went on it. Somebody asked me to go on it. You say, well, why do you do it? Why do you do any of those things? You do it because you are paying your dues. You are in the group that is lucky. And the people in the group that are lucky have got an obligation to pay it back. And so we go on boards like that.

Then the activities start taking sort of lives of their own. I went on in an unassuming way. I was a quiet trustee for a couple of years. Sooner or later, it became obvious that we were outgrowing a building, and in kind of an innocuous way, a lawyer who was a mentor of mine said, "Well, why don't you go on the planning committee and just make sure we don't do something foolish?" And I said, "Well, yes, I will do that."

By increments, by short steps, I finally found myself back in the years when I first went on the superior court as the chairman or, as we called it, the president of the board. And I saw all sorts of conditions of people in doing that. We dealt with a regulatory bureaucracy because we could no longer just go out and build what we thought we needed. We dealt with a health care bureaucracy because whatever we built was going to affect the cost of health care throughout the State of New Hampshire. We dealt with the fact that there were people out there who did not have health insurance and who might or might not be eligible for governmental health benefits.

Once a year, we all trotted around to the town meetings. I remember standing up in the town meeting of my town telling how much money the hospital had given away in free care in that town every year because there was a neighborhood tradition around there that the towns would chip in to offset the costs that the hospital would otherwise have to drain out of an endowment or recoup by raising rates to the people who did pay. So we all knew exactly what it was costing. We knew what it was costing our neighbors. We knew what health care was costing the people who couldn't pay for it. We knew what it was going to do to the cost of health care throughout the State when we had to build a building. And we finished, ultimately we finished the job.

I am glad I did that. There are many other things, I suppose, that I might have done that would have given equal satisfaction. The reason it gave satisfaction I think is simply that in ways I never dreamed it would it was paying the dues. And I had a lot of dues to pay, and I got a chance to pay them.

Senator SIMPSON. And you paid those dues not only through that service but through pro bono activities, some of which you have described earlier today.

Judge SOUTER. I did some back in the time when I was in private practice. Of course, I couldn't do that as a public lawyer.

Senator SIMPSON. Well, I have just a few minutes left, and I had a great temptation to ask about an issue. But since I have been railing about that most of the day, I can't really do much of that, but I will. That is the issue—here is the kind of tough stuff I would love to get into, but I think that you can see that 1 year with one nominee we will want to ask a lot of specific questions, and 1 year with another nominee we won't want to ask any. And we have all done that. I could bring out the quotes, seeing my friend from Massachusetts. But how about gun control? See there, there is one.

There is a sign in Massachusetts on the border that says if you have a gun in your possession it is a $100 fine. And in Wyoming you carry a gun in the gun rack of your pickup truck. Now, that is a pretty big difference in the United States, and that is the kind of thing that you are going to be dealing with. And we fiercely defend the right to keep and bear arms, and my friend from Massachusetts has an ever more intimate and personal reason why it is deeper than anything any of us have ever hit on that one. Talk about crazies with arms, versus the legitimate citizen with his arms. So there is one for you.

I guess I am not going to worry about you at all. I have read, and my President appointed you, and I think you are going to be a splendid, splendid judge. I can't wait to see you get on there with some of those others, get into some discussion. I wish we could record those. But the thing that is most critical and most important and the most exciting is that you are a listener. You are a listener, and that is the key. That is the very key.

I would have very great difficulty voting for a politician who was not a listener or a judge, if I had the opportunity——

The CHAIRMAN. I think you would have a great difficulty finding a politician who was a listener.

Senator SIMPSON. That is right. Finding one would be the tough part.

Judge SOUTER. That is why Senator Rudman and I have always gotten along so well. I listen. [Laughter.]

Senator SIMPSON. We do know the propensities of your former employer.

Senator HATCH. We do understand that, let me tell you.

Senator SIMPSON. Indeed we do. But that is so critical. And politicians need that and judges need that, and it is so important. That is impressive to me because there are people we deal with every day in this place, of either party, where you are talking to them and their eyes are just glazed over and you know they are not listening to one thing you are saying. You almost want to say, "Are you in there? Is anybody home back there? Are you just waiting to get out and get your suit boiled by the camera that is out in the hall? What are you doing?"

And so enough. But I thank you for sharing a bit of yourself and your philosophy and your sensitivity—that is certainly not an overworked word and certainly a most appropriate one—and yourself.

Thank you, Mr. Chairman.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Thank you, Senator.

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

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.]