have additional questions, will continue to pursue those questions and we will make the judgment as we go, from that point on.

Now let me yield to my colleague from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Souter, I began with our point of departure last Friday on your view of judicial interpretation. The starting point, from my understanding of your judicial philosophy, comes in your extensive opinion in the *Estate of Dionne,* where it is encapsulated, as follows, as I interpret it: "The Court's interpretive task is, therefore, to determine the meaning of the article 14 language as it was understood when the Framers proposed it and the people ratified it as part of the original constitutional text that took effect in June of 1784," so that you refer to understanding as the Framers proposed it and the people ratified it at a specific time in 1784.

Now, there has been a modification in what you have said, when you move from meaning at that time to a broader interpretation of meaning as that meaning might be understood at a later time. You have given a very expansive interpretation of judicial authority, when you talk about filling a vacuum, and as you go through the points of analysis, a great deal of what you have had to say would apply to a legislative judgment as well as to a judicial judgment.

You talk about what liberty interest is involved for an individual, then you talk about what are the countervailing considerations, it sounds very much like what a Senator might do, then you add to that a test which we do not have, and that is the precedent stare decisis, but you articulate that in terms which are very flexible, how long it has been in effect, what the principles are, what reliance there has been, so that at every turn you come to something which is extremely flexible.

The cases involving civil rights and taxing power and contempt power in the *Yonkers* case are far-reaching applications, as I see it, as to what the Court has done, which really moves into the position of being a super legislature. Let us start with the point where Senator DeConcini ended, and that is with the decision in which the Supreme Court of the United States said that the court had the power to direct the local authorities to impose a tax, and your response there was, "Political priorities at the local level are simply not being addressed."

Now, the difficulty that I see, the threshold with your response is that you say political priorities are not being addressed at the local level, and that the court can order the local officials to address those political priorities.

It is hard to find an issue which is more contentious in the political arena than the tax issue. In the 10 years that I have been here, that is about all we have talked about, as we have wrestled with the issue of the deficit. The summiteers on the budget conference, meeting at Andrews Air Force Base, are devoting their time, virtually exclusively, to the tax question.

The political process in 1984, I think was decided largely, if not exclusively, on the tax question. That issue was paramount again in 1988, and it is the most essential political function that there is in our society, to figure out when to raise taxes and how to raise

taxes is subordinate and the Court did leave that to the local government here.

But I would start with this question on this subject, Judge Souter, and I would again refer to your language in *Dionne*, to look to the Constitution, to the meaning of the language as understood by the Framers and the people who ratified it, and ask where is the constitutional authority on the very basic level for the Court to introduce into what is the most essential legislative function on taxation.

Judge SOUTER. Senator, I think the approach to that question is a two-fold one. The first is, I know certainly from my familiarity with my own 1784 constitution in New Hampshire, and I can speak with equal certainty of the national Constitution, that the taxing power in the sense of the Framers understood that is a power subject to the separation of powers was legislative, it was not judicial.

The difficulty in the question that faces us and that was facing the Supreme Court and, I presume from what I have been told this morning, will definitely face the Supreme Court again, is in drawing a line, if indeed a line is to be drawn there, between the appropriate scope of the judicial power in enforcing its own decrees and the point at which those decrees cannot be enforced without a tax increase.

When I spoke earlier of what seemed to me the failure or uncertainty of the means by which political priorities had been addressed at the local level, what I was trying to get at was that we never take on a constitutional issue if there is a means of adjudicating on a nonconstitutional basis. And it seems to me that the question of how far the court's remedial authority goes, when it runs smack up against a lack of money in the local treasury, should be posed in this way. I do not think it should be posed by saying will this judicial remedy exhaust the treasury; it should be posed by saying can this judicial remedy be enforced within the money available to government, bearing in mind that government may have to put the judicial remedy first and decide that there are other priorities for which it would like to spend which it can no longer spend for, without raising taxes.

Senator SPECTER. What is the authority of the court to establish the priority?

Judge SOUTER. Well, I do not think the court has the authority to establish the priority as such, but I think that the constitutional issue does not really arise, unless the priorities or it does not arise in a way which requires adjudication, unless those priorities have been addressed at the political level, the local level. In other words——

Senator SPECTER. Judge Souter, I do not think that advances us very far, when you take up the relative responsibility of the court versus the legislature on something as fundamental as taxes.

Let us go to another example, on the *Spillone* case, where you have a contempt citation which was reversed against councilmen of the city of Yonkers. The Court said that it was reversed only because they first should have proceeded with sanctions against the city alone, but then added "only if that approach fails to produce compliance within a reasonable time, should they then move to the issue of a contempt citation against the council."

Now, where does a legislative responsibility begin and end, if the court can order the council what to do? My question to you, is there any difference between a city council in Yonkers and the U.S. Senate? Does the court have as much authority to order the Senate on what it should do in discharging its legislative role, as the court has to order the city council of Yonkers, NY?

Judge SOUTER. I would suppose that the answer to that is clearly no, because the Senate of the United States is not going to be the party to the kind of litigation which the Yonkers litigation produced. In other words, the Senate of the United States, I presume, is not going to be a defendant in a civil rights action.

Senator SPECTER. Well, let me give you a case. The Court holds that it is unconstitutional to have prisoners in quarters which are unacceptable. That has been a judicial interpretation, and the Congress of the United States, including the U.S. Senate, is the only agent which can impose taxes to build the prisons. The case comes to the Supreme Court of the United States, there is a constitutional right not to have cruel and unusual punishment under the eighth amendment. The Supreme Court of the United States says that there are too many prisoners in the Federal prisons, and then orders, as the Court ordered the Kansas City authorities, says to the Senate raise taxes to grant the constitutional rights of petitioners under the eighth amendment. There is a case.

Judge SOUTER. Of course, the——

Senator SPECTER. The Court can do that, and now what is the Senate going to do? Is that any different than the city council of Yonkers, NY?

Judge SOUTER. Of course, the difference is that the city council of Yonkers, NY, is bound by the supremacy clause of the Constitution, so that there is an entirely different structural relationship between the two.

The second difference, it seems to me, is that the suit, even if in fact there were a Federal action, the suit would not be against the Senate of the United States, it would be against a subordinate branch, a subordinate contingent of the executive branch.

The third difference would be that the Court in those circumstances, if the executive branch could not get the funding to do the construction and so on, would have an alternative, not merely the alternative of ordering relief as in the *Yonkers* housing case, but it would have the alternative of nonappropriation or nonfinancial relief under the habeas power over conditions of prisoners, so I do not think the Senate of the United States could ever possibly be in that position.

Senator SPECTER. Well, Judge Souter, the Senate could be named as a party-defendant. You say that it could not be, but it would take too ingenious a plaintiff's lawyer to name the Senate as a party. You say the Court could order habeas corpus relief, that is true. That translates, habeas corpus relief means that there would be an order for the Federal prisons to release perhaps thousands of prisoners, but the Court might not choose to do that. The Court might choose to exercise its own remedial jurisdiction to say build the prisons, we do not want the responsibility for releasing so many thousands of prisoners.

Then you say that Yonkers is bound by the supremacy clause. That is a question I want to get into at a later point, in terms of jurisdiction of *Marbury* v. *Madison* and the authority of the Congress to take away jurisdiction, but it seems to me that the Congress is bound by the supremacy clause, unless we are to say that the Congress can legislate and say that the Court does not have the jurisdiction to order the Congress what to do.

But in our system, *Marbury* v. *Madison* has already been respected, so conceptually, it seems to me that we could come to a situation logically where, if the city of Yonkers can be ordered what to do, the council people can, so can the Senate.

Let me turn to another subject which is illustrative along the same line, and that is the issue of a super legislature and the interpretation of the Civil Rights Act, this last year in *Ward's Cove*, overruling the decision of the Supreme Court of the United States in *Griggs* in 1971. That is a particularly troubling issue today because the Senate and the House have each passed bills which would reverse *Ward's Cove*, and the President has made plain his intention to veto that legislation. It is an extraordinarily contentious issue and one that I think would really be very injurious to the country, would really tear the country apart in a lot of ways if the Congress passes a civil rights bill that the President feels constrained to veto and it does not stand.

This issue has arisen because of the Supreme Court's decision in *Ward's Cove*, which has shifted the definition of business necessity and changed the burden of proof. Without getting into all the particulars of the case, I find it particularly troublesome because four of the five members of the Court appeared before the Judiciary Committee in the past decade and talked very strongly about judicial restraint, nonactivism, and then came to the Court and saw a decision of the Supreme Court in *Griggs*, which had stood from 1971 until 1989. And, of course, the considerations on a reversal are very different—which we all recognize—between a constitutional decision, interpreting the Constitution as opposed to a statutory decision because it is easy for Congress to alter an erroneous interpretation of a statute; whereas, a constitutional amendment is much more difficult. So the Courts have articulated the principle—and I think you may have alluded to it earlier—that there is a different standard on overruling a constitutional interpretation, which the Court ought to have greater latitude in overruling a prior decision interpreting the statute. I think it is a fair legal conclusion that given 18 years that the *Griggs* opinion had stood, a presumption of congressional acceptance of that interpretation of burden of proof and business necessity.

In articulating this question, I want to do so in a way which will not intrude on a case which is likely to come before the Court, so I will ask it first in general terms. Do you think it is appropriate for the Supreme Court to affect a longstanding Supreme Court decision which has stood interpreting a congressional enactment?

Judge SOUTER. I accept as a general rule, just as you said, Senator, that statutory interpretations are entitled to the highest claim to be followed for the very reason that as statutory interpretations, if there is anything wrong with them, legislatures—in this case, the Congress—can take action to change them.

One of the kinds of facts that I don't know about the controversy over *Griggs* and *Ward's Cove* goes to an issue of precedent that I got into to some degree last week. We sometimes raise it under the term of "acquiescence." I was speaking of it, to a large extent, under the rubric of reliance. That is the extent to which in the period between *Griggs* and *Ward's Cove* the Congress had specifically in one fashion or another addressed this problem and had expressly chosen to leave the law as it understood it to be following the *Griggs* case.

What we can say is that to the extent that the record shows that the Congress has not merely sat passively, as it were, in the aftermath of *Griggs* but has specifically addressed the question and has made choices to leave the law as it is, a record of that fact would, of course, present an even stronger argument for leaving the interpretation as it stood. And I don't know whether there are facts that could be adduced in this case or not.

Senator SPECTER. Well, Judge Souter, that might present a stronger argument, but you need a stronger argument to leave standing congressional acquiescence, even if the Congress has sat passively.

Judge SOUTER. You have a very strong argument for leaving the precedent as it is. I think the point that—and this has come up from time to time in cases when I was on the New Hampshire Supreme Court. I do not accept the position that never under any circumstances can a statutory interpretation be reexamined. I think "never" is a pretty strong word. But there is a very, very strong claim of precedent to be followed in those circumstances.

Senator SPECTER. Well, why is "never" a strong word? If the Congress has let it sit and the Congress has the authority to change it, it seems to me "never" is the right word.

Judge SOUTER. Well, except that I am not sure, as reviewing courts, we always have the luxury to consider that interpretation simply in a vacuum by itself. What I am trying to leave the door open for are situations in which, in fact, in the time, let's say, after the first decision the Congress itself has taken legislative action, which if not directly contradictory, is at least arguably inconsistent with the principle.

If we get to a point on the issue of statutory interpretation where the earlier statutory interpretation has become a kind of isolated fluke, and we know that the Congress has, in fact, contributed to this process by its own subsequent legislation, then I think we ought to leave the door open for the fact that some coherence in the law would justify a reexamination of it.

Senator SPECTER. Well, that is an interesting hypothetical that doesn't apply here, and I know you didn't suggest that it did.

Judge SOUTER. I don't know one way or the other. That is right.

Senator SPECTER. Well, I will testify for just a moment. It doesn't apply here.

Judge SOUTER. OK.

Senator SPECTER. But even if it did and the legislative body has legislated around it, they can legislate on that, too.

But let me pick up on this business of vacuum. When you say if the Congress has sat passively, that is less persuasive than if the Congress has considered it and rejected it. But I would differ with

you very sharply on that, Judge Souter, because when the Congress sits passively, the Congress is deciding not to act. When you talk about a vacuum, which you talked about on Friday—and you have narrowed the vacuum substantially today, and I hope to have time to come back to that—it is not a matter of a congressional decision which should be taken lightly. Perhaps our strongest ability is to do nothing. But frequently——

Judge SOUTER. I won't touch that one, Senator. [Laughter.]

Senator SPECTER. Thank you. But frequently we do nothing with deliberation. But I think it is highly dangerous for the Court to say that you start to move into a vacuum because the Congress has done nothing. We do nothing because we don't want anything done. And there is a real concern if you take your interpretation—I hope to come to interpretivism. There are a lot of subjects to be covered.

When you talk about due process being more extensive than incorporation of the Bill of Rights, and then you talk about the liberty interest being expansive, and then you say today that even defining liberty as it was defined by Cardozo in *Palco* in terms of the ordered concept of liberty, the interpretivists think that the definition of central to the concept of ordered liberty is an anathema, as I read interpretivism. And you were saying that even if you have the concept of ordered liberty, that is only a beginning point, because *Palco* and the concept of ordered liberty goes beyond.

The concern that I raise here, Judge Souter, goes to a lot of very important constitutional and governmental issues. And when you have the Court functioning as a superlegislature, as I think the Court did in *Ward's Cove*, and when you have the Court functioning as a superlegislature in the *Garcia* line, which just takes too long to get into now, but you have Chief Justice Rehnquist and Justice O'Connor explicitly saying in *Garcia* we are just waiting for another judge to come on our side, because the decision in *Garcia* v. *San Antonio Transit Authority* won't stand, then you come to the matter that when a judge is up for confirmation, we may not respect the judge's right not to answer the ultimate questions if he is really joining a superlegislature and should have to give answers, just like Senators do when we run for office.

I started with the proposition, as you know, that you ought not to answer ultimate questions; you ought not to say how you are going to decide the next case that comes before you, because the tradition of the Court is briefs, argument, deliberation, case in controversy, specific facts, and then you decide the case. But if the Court is going to move into political priorities in taxes, and if the Court is going to move into contempt citations against councilmen and Senators, and if the Court is going to take an 18-year-old precedent in a civil rights case and reverse it, then in that context, as a superlegislature, Judge Souter, I would ask you the question: Why shouldn't the nominee be compelled to answer the ultimate question as to how he is going to decide the next case?

Judge SOUTER. I think the answer to that, Senator, is that to the extent to which the Court is perceived, reasonably perceived as acting as a superlegislature, to exactly the same extent the rules against getting into ultimate questions are going to weaken.

You know, as you well know, the judgment about what is an appropriate question to ask, the judgment about what is an appropri-

ate answer to that question, has ultimately got to be your judgment. The American people have their views. I have mine. But the responsibility for making that judgment rests on this committee. And I understand what you are saying.

Senator SPECTER. Well, we have come a long way. There are those who are saying now that we ought to compel or ought to do our best—we can't compel, obviously, anything. That is your call—but that we ought to push that issue and compel that answer because—they don't really articulate it in terms of the superlegislature, and they don't take it down these lines. They really want a judge predisposed in their favor. And I don't think anybody is entitled to that, no litigant is and no group which articulates any interest.

Judge Souter, that brings us to another really important issue, and that is the relative authority of the President versus the Senate to select Supreme Court Justices. I was surprised to find years ago that in an original draft of the Constitution, the Senate was given the authority to pick Supreme Court Justices. That surprised me. Then you have a question as to is the Senate subordinate or equal to the President, and I made the comment in my opening statement that I think the Senate owes great deference to the President's selection. But that always hasn't been the case.

In the famous case involving John Rutledge, he voted against the Jay treaty, so on purely critical grounds, the Senate rejected him by a vote of 14 to 10.

Now, there has been articulated a fascinating proposition that the American electorate is intuitively imposing limits of power in the United States by electing a Republican President and by electing a Democratic Congress, so that they want that kind of limitation. There have also been those who have said that the President may be seeking through the Supreme Court to put into effect an agenda which the President can't achieve without having the Court.

I do not believe that President Bush has sought that. I think that in his appointment of you the evidence is conclusive—I was about to say virtually conclusive. Never say never. It is conclusive, I think, that he is not seeking to find some way to carry on an agenda. To make an appointment within 72 hours shows a lot of courage. He had some good fact witnesses to attest to your good character because the FBI investigations are not infallible.

But that brings us to the question, if the Court is to be a superlegislature and to carry out an agenda which is different from the congressional agenda—and we face that in the civil rights area, and we can't get it passed, the Presidential veto—then the issue arises as to whether the Senate may come to the point of trying to exercise its authority. Congress may try to exercise its authority through the Senate to have an equal voice in the selection of Supreme Court nominees, to decide it very much as it was decided in John Rutledge. If we don't like where you stand on the issues, then we are going to come to a different conclusion and try to assert the balance that the electorate has tried to impose with a President from one party and a Congress from the other.

My time is up. I just got a note. But your time isn't up. I would be interested in your thoughts on that.

Judge SOUTER. My response to that, Senator, is that that does not raise, it seems to me—you raise a very serious issue, but you do not raise a justiciable issue. You are raising an issue of the self-definition of the Senate in relation to the President, and it is a matter which should not and cannot come before the Courts.

Senator SPECTER. No, I know I am not raising a justiciable issue, Judge Souter. I am raising questions about how far we can go in asking you questions and a discussion as to the process and where we are going to end up. Those are really very, very important questions. A lot of people have already decided that your nomination process is over. Not everybody, but a lot of people have.

Judge SOUTER. I don't necessarily have that feeling as I sit here in the well of this room, Senator.

Senator SPECTER. Well, I think that is a further testimonial to the high quality of your responses.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Judge, I noted you smiling when the Senator from Pennsylvania said sometimes the Congress deliberately does nothing. I suspect you understand that better than others because sometimes people deliberately say nothing in answer to the questions. [Laughter.]

Judge SOUTER. Sometimes they have to work at it, Senator.

The CHAIRMAN. And you have worked at it very, very well, I must say, with great aplomb. And I thought you defined very well the responsibility of the Senate and your responsibility relative to answering questions. That is why some of us still have not made up our minds about how we are going to vote, myself included.

Senator THURMOND. Mr. Chairman, will you just give me half a minute?

The CHAIRMAN. Surely.

Senator THURMOND. The distinguished Senator referred to John Rutledge not being confirmed. Well, over the years the Senate has made some mistakes, and that is one mistake they made. He was from South Carolina. [Laughter.]

Incidentally, his brother Edward signed the Declaration of Independence. They were both very prominent people. In their homes, standing today in Charleston, if any of you ever go to Charleston, SC, get on Broad Street, and the home of Edward Rutledge is on one side, and right across is the home of John Rutledge. One signed the Declaration, one signed the Constitution.

I just thought I would call that to your attention. [Laughter.]

The CHAIRMAN. I will now yield to the Senator from Vermont on the condition that we don't hear anything about Vermont. I am only kidding, Senator Leahy.

Senator LEAHY. I was waiting for the part where Senator Thurmond was going to give us a list of good hotels to stay in. [Laughter.]

Senator THURMOND. If you promise to go down there and learn about South Carolina we will give you a free hotel accommodation. [Laughter.]

Senator LEAHY. Are you going to go there with me, Strom?

Senator THURMOND. I won't promise you that. We will be glad to have you though. The yankees come down and make the best southerners you ever saw.