Judge SOUTER. Of course, it is.

The CHAIRMAN. Is that fair?

Judge SOUTER. I think that is a good way of putting it.

The CHAIRMAN. Well, I want to pursue this a little bit longer. They gave me a sign that 5 minutes is up. I think this is very, very helpful to me. I realize that it is boring to everybody else, and I hopefully think it is of some consequence to those scholars are wondering as much as I am as to how the application of your basic conceptual framework within which you view the Constitution is applied.

With that and without further giving justification for my questioning, why don't I stop and yield to my colleague from South Carolina, and I will come back just for a few minutes after this is over.

Senator THURMOND. Mr. Chairman, I do not think I have anything else at this time. I reserve my rights at a later time.

The CHAIRMAN. Senator Kennedy.

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

I would like, if I could, judge, come back to where we were a couple of days ago on the issues of civil rights and, really, the significance and the importance of article 5 of the 14th amendment.

I believe that very substantial progress has been made, in terms of striking down the barriers of discrimination in the case of race, gender, national origin, and disabilities in recent time. Over the period of the last 30, 35 years, the period since the mid-1950's, this change has been really a result, as you have pointed out repeatedly, of the *Brown* decision. After *Brown,* Congress began to move in these areas, and in the 1960's passed laws in a number of different areas, as you are very familiar with, the right to vote, to ban discrimination in public accommodation, to ban discrimination against the disabled, section 504, banning discrimination in women's education programs. That was title IX, 1972.

What I want to express is some personal frustration with what has been happening in the more recent times by the actions of the Supreme Court in taking a look at both what the intent of Congress was and what the statute stated. Different members have talked about this in related ways, but I would like to approach it in a somewhat different way.

We saw, for example, that in 1972, Congress banned sex discrimination in education programs that receive Federal money. I think there was a general assumption in the 1960's, on the part of Congress and the President, bipartisan in nature, that we were not going to use Federal taxpayers' funds to subsidize discrimination. There were some that, perhaps, had a differing view, but I believe that that was an underlying basis of the Civil Rights Acts that were passed during that period of time, and certainly that was true of the 1972 act. That concept was upheld by a number of the lower courts, until we had the decision in the *Grove City* case.

As you remember, in the *Grove City* case, the basic concept was, if there was not discrimination against women in the admissions office and the student financial assistance office, it did not really make much of a difference if discrimination existed in other parts of the university, particularly in this case with regard to women's athletic activities.

Now, that, I think was an extraordinary conclusion by the Supreme Court. Clearly, what Congress was driving at when it passed title IX was no Federal funds were to be used to subsidize discrimination, and that was underlying most of every one of those acts.

Now, the Congress took 4 years to override *Grove City*, but we overrode it and it was bipartisan and has effectively changed the Supreme Court ruling in that case.

During that 4 years, there were numbers of incidents of discrimination and gender discrimination that were described to us. We were unable initially to get the support, it was actually vetoed, we overrode it, but it took 4 years in Congress.

Then we find a situation that goes back to 1989, regarding the *Patterson* case, where for a number of years, probably some 13 or 14 years, we were talking about discrimination in contracting. The lower courts' general understanding was that if you are going to ban discrimination in contracting, under an old post-Civil War statute, but one that was interpreted for a period of 13 or 14 years, it was also not going to permit discrimination in hiring, you were not going to permit discrimination in firing, discrimination on job sites, and promotions—this was generally understood.

Then the Supreme Court, in 1989, takes that same basic statute that had been on the books since the post-Civil War period and had been interpreted for the 13- or 14-year period prior to the 1989 period, and interpreted that particular statute as only applied to hiring. You could not discriminate in hiring someone because of the color of the skin, but, by God, after you hired them, you could fire them because they were a minority, or you did not have to promote them, or you could subject them to racial harassment on the job.

It just, I think, defies common sense to understand why you would have a decision that said, look, you cannot discriminate on the basis of someone's race to hire them, but once they are in there, you can discriminate like anything against them. Effectively, this is what the *Patterson* case said.

But when I was listening over the course of the last few days, you talked about article 5 and the power of the Congress to guarantee equal protection rights under the 14th amendment. I think what many of us have seen in recent times, in these recent holdings—and I am not going to take the time to go through it, because it is basically repetitive of those two examples—that we have had a very crabbed and narrow interpretation by the Supreme Court, both in terms of their understanding of what we meant and, second, in terms of congressional power under article 5.

I am sure you are aware, I think our colleagues certainly are, of the amount of time and the effort required, which is our responsibility to our fellow citizens, if we take seriously our oath about the equal protections, to try and catch up again with the Supreme Court, rather than attempting to move this country to strike down the barriers of discrimination—I mean for most of us who have been involved, it is across the board, you have heard many speak about a related subject over the period of the last few days about this question—are just spending time catching up and holding on to where we have been in the past, rather than trying to work with our fellow citizens in the States and local communities, in the pri-

vate sector, to move this country further down the road to reduce all of the discrimination barriers in all different forms. Lord only knows, we understand full well that you are not going to be able to accomplish it by legislation, I think all of us assume, but you can do a good deal.

Really, what I am driving at is how you are going to view the statutes that are passed. My concern is that, when the choice comes now to a closely divided Supreme Court, and you are going to be really a swing on this issue, as well as on many others, that the favor has been given not to the Congress and their sense of trying to fashion a remedy that clearly cannot anticipate every simple possibility in the future, but is basically rooted in its dealing with discrimination, whether you are going to interpret it generously or if, as I believe and speaking for myself, that there is a balance too often in these past Supreme Court decisions, the two I have mentioned and others, they have made to tip the scales against a generous interpretation and interpreting that statute to try and do something about the discrimination into a narrow interpretation, which results in additional discrimination.

During the *Grove City* case, when that was the law, we had constant examples of that, and we have found it to be the case since 1989 in the *Patterson* case, and I am just interested in what comment you might like to make.

Judge SOUTER. I think there is only on comment to make, Senator—maybe there are two. The first is a personal one. I have made it before, but I think I should make it to you, too, that I appreciate what you said a moment ago about the fact that we cannot, by legislation, erase all discrimination in our society, but we can try. We can go as far as we can.

In this process, there is no question that when a legitimate issue of the scope of protection or the scope of remedy arises, that it is indeed the intent of Congress, which is the touchstone for determining what the results should be, not a crabbed intent or, on the other hand, a speculative inquiry, but a fair reading of Congress' intent placed on the record, and if I am in the position to do it, I will engage in that process.

Senator KENNEDY. Well, that is certainly helpful. I was trying to get somewhat of a broader concept about this issue, because as we went over, the other day, your own briefs with regards to the power of Congress, article 5, in terms of literacy and job discrimination, you have expressed—that was a number of years ago—some real concerns about how much power and how much authority Congress has under article 5, and we have gone over that.

Now we are really at an absolutely, I think, crucial time. We have seen the holdings of the courts in a number of different areas which, as you mentioned earlier by reference, that the Congress is addressing, and I am not interested in the specifics on those questions, although they do not involve constitutional issues, but statutory intentions, which obviously has a different rule. But I was trying to get some sense and some feeling, you know, from you on this issue.

As you pointed out, I thought very eloquently 2 days ago, every time you make a judgement and decision, it is going to affect some people's lives, and every day that we fail to remedy the decisions

which permit, like the *Patterson* case does, continued discrimination in employment, people are going to be affected, lives are going to be affected, families are going to be blighted, and that is taking place today. It is taking place today, and I was hoping that perhaps you would express some kind of concern about those that, as a result of some of these decisions or rulings, are going to have their lives affected in one of the cruelest aspects of life's experiences, and that is discrimination.

May I have the benefit of the Chair for just one final area that I would like to go into, as a member of the committee. You have been extraordinarily patient with all of the members here, Judge, and I for one certainly appreciate it.

In response to a question of Senator Leahy, just at the end of the morning, about what would happen if *Roe* v. *Wade* is overruled, you replied that the States would take up the issue in their legislature. Basically, your reply was an answer in terms of what the States would do.

I would like to ask another question: What would women do? What is your sense of what the impact of this would be on women in this country?

Judge SOUTER. I think, as I understand your question, you are asking can anything but a free choice system, in fact, be enforced, a right to choose is anything but a right to choose system, as a practical matter, enforceable in this country, and the fact is I do not know the extent of its enforceability, but I recognize the problem that you raise by your suggestion.

Senator KENNEDY. Well, the problem, I suppose, would be for women in this country that did not have the resources to go to another country or to go to another State, would be left with this heart-rending decision about whether to carry to term or, in this case, violate the law in their State and risk, in a very important and significant way, their own lives.

I was just interested in what kind of gut reaction you have to that kind of dilemma that would face women, if this decision was altered, or if it was so shaped or trimmed so effectively, that it was just sort of a shell left out there, without real kind of meaning.

Judge SOUTER. I do not suppose, Senator, that there is any more moving example of the application of what I did try to say the other day, that whatever the Court does, someone's lives, and indeed thousands of lives, will be affected, and that fact must be appreciated.

Senator KENNEDY. No further questions, Mr. Chairman.

Thank you very much, Judge.

Judge SOUTER. Thank you, Sir.

The CHAIRMAN. Senator Hatch?

Senator HATCH. I will only take a second. I just want to say to you that I think you have outlined pretty carefully your standards of statutory construction. You know, with regard to some of the points that Senator Kennedy was making, yes, the administration, myself and a whole raft of others, were for the overrule of the *Patterson* v. *McLean* case.

On the other hand, you know, back to *Grove City,* when *Grove City* was decided, it decided that title IX did not apply institution-wide, because they actually read the actual language of the statute