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:]