So that I was not left simply to make a judgment on my own about what would be an appropriate case to defend, because that issue, in effect, had already been foreclosed to me by the New Hampshire Supreme Court ruling.

So we might disagree about the application of the principle in that case, but the soundness of the principle is beyond dispute and it was beyond dispute then.

Senator LEAHY. The reason I ask this, of course, is thinking back to wearing your judge's hat, for example, would you regard the interests of the State in putting its motto on license plates to be so compelling that it would justify prosecuting people who had religious objections to the motto?

Judge SOUTER. I am sorry?

Senator LEAHY. Whatever the motto might be. I don't mean to pick on New Hampshire. New Hampshire has a motto, Vermont has a motto, and most other States do as well. I am not singling out a particular motto, but the basic principle, is the interest of the State in putting a motto on a license plate so compelling that it should be allowed to prosecute people who have strong religious objections to the motto?

Judge SOUTER. Well, of course, as I think as you suggest the need to identify a motto on the plate, as opposed to identifying numbers and letters by which the car can be identified is, of course, not a particularly compelling interest, and it was not so regarded by the Court at the time.

Senator LEAHY. They were not trying to block the numbers on the plate?

Judge SOUTER. That is right, no, they just wanted that motto out.

Senator LEAHY. OK.

Judge, I am told that my time is virtually up, and I am going to want to go back to this later on. I am not, as none of us is, asking you to prejudge cases that might come up, but you know the establishment clause in the past few years has been reviewed again. I hold the very strong feeling that one of the greatest bedrocks of our democracy is in the first amendment and the right of free speech, the right to practice any religion we want or not to practice any religion because those two things almost guarantee diversity. And if you get diversity, untrammeled diversity, you have, by definition, a democracy that is going to work.

Judge SOUTER. I think you have.

Senator LEAHY. So I will go back into that, and I appreciate your answers.

Judge SOUTER. Thank you, sir.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, very much, Senator.

The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Souter, let me give you a very brief roadmap of where I would like to go in my alloted 30 minutes. I want to pursue the freedom of religion subject for about one-third of that time, pick up the War Powers Resolution, and then discuss some of your testimony for Senator Grassley on what I would like to analyze as the differences between the original meaning from your *Dionne* opinion versus the Court filling the vacuum.

The beginning of the Bill of Rights refers to freedom of religion. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

I have two questions, and in the interest of time, let me put them both to you at the start. The establishment clause, and this goes to general approach, was defined by Justice Black in *Everson,* "In the words of Jefferson, in the clause against establishment of religion by law, was intended to erect a wall of separation between church and state."

And the words, "a wall of separation between church and state" were Jefferson's words. There is a sharp distinction which Chief Justice Rehnquist makes in *Wallace* v. *Jaffre* where he says, referring to the separation between church and state, the wall of separation, Chief Justice Rehnquist says, "it should be frankly, and explicitly abandoned".

I believe in terms of a general approach on the establishment clause trying to get a general philosophy that is as good a starting place as any and that is the first question on the first amendment.

The second question goes to the free exercise clause and the opinion of the Court in *Employment Division of Oregon* v. *Smith* where Justice O'Connor is very direct in strong criticism, saying that the majority opinion dramatically departs from well-settled first amendment jurisprudence, unnecessarily resolves the question presented, and is "incompatible with our Nation's fundamental commitment to individual religious liberty". She says that because of the essence which she cites a few pages later, that there is the failure to require the Government to justify any substantial burden on religiously motivated conduct by a compelling State interest and by means narrowly tailored to achieve that interest.

My second question to you is, Do you agree with Justice O'Connor that when you impede on the exercise of religion that there ought to be those two factors, a compelling State interest and means narrowly tailored to achieve that interest?

Judge SOUTER. Let me start with your first question on the establishment clause and the appropriateness of preserving Justice Black's adoption and the Court's adoption of the Jeffersonian view of a wall of separation.

The difficulty, I think, that is focused by the Court today comes to the fore because of the difficulty in applying the—as I mentioned a moment ago—the *Lemon* v. *Kurtzman* test. But for that difficulty, there is some question in my mind as to whether there would be the present ferment to rethink the very conceptual foundation of the establishment clause, which, as you indicated a moment ago, Chief Justice Rehnquist has been doing in some of his own opinions.

I think, like a lot of people approaching the establishment clause, I am loath to talk about scrapping *Lemon* v. *Kurtzman,* without knowing what comes next. With respect to Chief Justice Rehnquist's position, I have never done personal research on the issue of the original meaning on the establishment clause, as I said a moment ago to someone else.

I would receive evidence on the issue respectfully, if there were reason to present it before me, but it is not something upon which I can pass a judgment at this point.

What I think I can helpfully say is the difficulty which I think those who do, indeed, adopt the Jeffersonian view, must face on the *Lemon* v. *Kurtzman* test. In fact, it is a difficulty which has ultimately nothing to do with the final conceptual rethinking that may go on, on establishment, if, indeed, it does go on.

As you know, *Lemon* v. *Kurtzman* has sometimes seemingly been honored in the breech. In the first *Kresh* case, as I recall, the author of the *Lemon* v. *Kurtzman* opinion said, well, that is a general approach that we have to this issue, but it is not the exclusive approach that we have to it.

The discomfort—I suppose there are many reasons that have been expressed for the discomfort with *Lemon* v. *Kurtzman*—but I will tell you what my discomfort is. It is a discomfort which relates to the relationship between *Lemon* v. *Kurtzman* as an establishment clause test, and the so-called *Shurbert* test which has, in a series of cases, as you know, prior to the *Smith* case this year, been used as the test for free exercise.

The concern is this, that in the free exercise cases—and I think I would like to take the Amish school case as my favorite example—in the free exercise cases, individuals are claiming that a generally applicable State law unduly burdens their exercise of religion.

Once it is determined that, in fact, their position is a genuinely religious position and that there is, as a matter of fact, a burden placed upon it by a generally applicable State law, the Court has traditionally, since the time of the *Shurbert* case, applied a standard, as you say, of very strict scrutiny.

There must be a compelling State interest to justify that burden, and the law that does so must be narrowly tailored to have that effect alone. It was on that reasoning that, in the Amish school case, *Wise* v. *Yoder* the Amish parents were allowed an exemption, in effect, from the requirement that they send their children to school until they are 16 years old.

The great difficulty that arises is that, when we ask the question, what would have happened in the Amish school case, if, instead of coming to the Court as a free exercise case, it had come to the Court with a slightly different statute as an establishment clause case, what if there had been a statute in effect which provided that there would be an exception expressly for Amish parents, from the State law? The immediate problem that would have been encountered under *Lemon,* is that the purpose of that law, the first of the *Lemon* tests would have been a religious purpose.

The speculation is just inevitable that the Amish school case could have gone the other way.

Therefore, my concern is, since I have not personally had any reasons to raise questions about the appropriateness of the strict scrutiny test, and have no reasons to raise questions about the appropriateness of the strict scrutiny test for free exercise cases, have we not got to take *Lemon* to some degree of refinement which has not yet been articulated to avoid what has explicitly been recognized as the potential conflict between the two tests in which——

Senator LEAHY. Judge Souter, I don't want to interrupt you unduly, but I don't think that the broad analysis or treatise is required consistent with *Kurtzman,* to make an answer to a fundamental question about whether you agree with the Jeffersonian

principle articulated by Black and held by the Court for a long time about the "wall of separation".

Nor do I think that the interrelationship, and it is a very complex issue, is necessary to come down to the basic concern about whether you are going to have a compelling State interest and narrow tailoring.

I think those are two very threshold questions. I would press you for specific answers because I think those are within the range of general philosophy appropriate for this kind of an exchange.

Judge SOUTER. As I started to say and apparently got sidetracked on saying, I have had and have today no reason personally, in either research or philosophy, to want to reexamine the view which was expressed in *Everson*. But my concern is that that view has been identified with a *Lemon* v. *Kurtzman* test. And we have to face the fact that in the implementation of that view, there is a difficulty which sooner or later the Court has to resolve.

Senator SPECTER. I will take that as a qualified yes. How about the free exercise question?

Judge SOUTER. On the free exercise question, I have to be circumspect to a point because I believe that the *Smith* case is subject to a motion for rehearing presently before the Court. And without any question, I think the development of that issue is something that if I were confirmed would come before me. But I think there are some things that with a reasonable degree of specificity I can say.

The first is that I do not come here and prior to the decision of that case or after it I have not had personal reason to want to reexamine the strict scrutiny test which has been applied in a lot of cases since *Shurbert*. I recognize the reasoning of the majority opinion. I mean I can follow it; I understand what the Court was saying in the *Smith* case. But I also recognize I think the fact that that case could also have been examined under the *Shurbert* standard. And as you mentioned or indicated a moment ago, that, of course, is exactly what Justice O'Connor did in her concurring opinion in that case.

I do not know at this point whether we should take the *Smith* opinion, if it stands, as being a total rejection of *Shurbert*. The one thing I do know is that the way the opinion was written, *Shurbert* seems to have been reduced to a rule for unemployment compensation cases. And I can tell you that I did not so read it, and I did not so read its application to, let's say, the *Yoder* case, the Amish school case, as resting upon the kind of analysis which the Court indicated would be its only justification for applying it there.

Senator SPECTER. Well, I hope the *Smith* case doesn't go that far, and I hope that your predisposition to side with Justice O'Connor comes to fruition if you are confirmed, because the basic requirement requiring a compelling State interest and a narrowly tailored means to achieve that interest seems to me very fundamental in the exercise clause, just as I personally believe that the standards of Jefferson and Black on the wall, however you articulate it, keeping that as a basic philosophy, to be very important.

Judge SOUTER. May I just add one thing, Senator? That is, I would not want you or anyone else to take what I said this morning as a commitment if I were on the Court to join with Justice O'Connor if this matter were brought before me. What I do want

you to understand is that I approach the issue, or would approach the issue, if it came before me, with exactly the view of the value of the strict scrutiny test which I described to you.

Senator SPECTER. I accept that, Judge Souter. I do not believe that it is appropriate to ask you for commitments.

Judge SOUTER. I understand that.

Senator SPECTER. The extent is to get a general approach.

Let me shift at this point to the issue of the War Powers Act. The War Powers Act was enacted in 1973 because of concern about the involvement of the United States in the Korean war without a declaration of war and in the Vietnam war without a declaration of war. It was passed over the President's veto. It has been a bone of contention as to whether it is constitutional or not, whether the President has powers as Commander in Chief which make the War Powers Act unconstitutional, or whether, in fact, the President has exceeded his constitutional authority in what has happened in Korea and Vietnam, because Congress has the sole power to declare war. This is a matter of enormous current importance. Saddam Hussein even crowded David Souter off the front pages for a time.

Judge SOUTER. I had no objection to his doing that, I assure you.

Senator SPECTER. Glad to see you are back on the front page, Judge. However contentious this may be, this is a lot better arena for contentiousness than Saudi Arabia.

But there is a real issue now which is starting to percolate as to the President's authority to project U.S. forces into hostilities, and the President has taken the position that certain notification has been given to Congress, not a recognition of constitutionality, but it is a sort of a hedge.

On this subject, I start with the question whether you believe it was constitutional for the United States to engage in a war, the Korean war, without a declaration of war by Congress as called for in the Constitution.

Judge SOUTER. Well, Senator, I think the only answer that can be given to that is that that is an issue which was never focused by the action of the United States and the Korean war because the issue was one essentially of congressional versus executive power, and that issue was never raised. The Congress of the United States, in fact, did fund the Korean war. The fact is that there was never a declaration, as you know, with the international law consequences that would follow from it. But the issue of constitutionality, as I understand it, is essentially an issue of congressional versus executive power in this area, and that issue was never raised.

Senator SPECTER. Well, Judge Souter, if you are suggesting that to have a case in controversy or standing there has to be action taken by the Congress not to fund a military action, I would say that that might carry the matter too far; that Congress is not really in a position to stop funding when the U.S. military forces are on a front line or the planes are in flight; that there has to be some resolution beyond. And in a minute, I want to come to the question of standing and some of the litigation; 110 Members of the House of Representatives in one case took the matter to court in *Lowry* v. *Reagan*. But I think that the Korean war is sufficiently in the historical past that that issue is not likely to come before the

Court, and ask a flat question whether you think it was constitutional to fight that war without a declaration of war.

Judge SOUTER. I think that question, Senator, basically is a question about the constitutionality of the War Powers Act, is it not?

Senator SPECTER. No, I don't think so.

Judge SOUTER. My concern is that I don't think——

Senator SPECTER. No, I don't think so at all. There wasn't a War Powers Act. There wasn't an issue of withdrawing troops in 60 days. This is history. We all know the history. And I don't think there are any War Powers Act implications in it at all. Here you have a war which was fought and wasn't declared by Congress, and the issue is did the President have the powers as Commander in Chief, not an issue which is so impinging on any matter to come before the Court that I think a statement on that is well within the permissible ambit.

Judge SOUTER. Well, Senator, the reason that I was concerned to suggest that I think that raises the issue of the War Powers Act is not because there was any such resolution on the books at the time of the Korean war, but because the War Powers Resolution which is on the books today basically articulates a congressional position. And the congressional position would today be the focus for asking that question.

I think two things are necessary for me to say. The first is, of course—and I know you recognize this—that because of the reasonable likelihood that the constitutionality of the War Powers Resolution could come before the Court in some guise, I cannot give an opinion on the constitutionality of that.

Senator SPECTER. I agree with that and do not ask that question.

Judge SOUTER. And I think the most that I can say with respect to looking beyond that specific issue is that it is recognized, though it is not a matter of litigation at this point, that the President as Commander in Chief is not limited in the commitment of the U.S. troops to a formal declaration of war. In fact, the War Powers Resolution itself recognizes that the President is obligated to take action and must have the power to take action.

Therefore, it seems to me that the commitment of the United States troops in Korea in the first instance certainly could not be regarded, leaving aside the aegis of the United Nations, could not be regarded as itself an unconstitutional act. The only issue which it seems to me can be focused upon is: Is there an articulable way of limiting the President's authority as Commander in Chief which would focus this issue? And the only articulated attempt to do so that I am aware of has been the War Powers Resolution. I think, therefore, the only thing that I can properly say to you is we know—and it would, indeed, be my opinion—that the President is not certainly forbidden to commit United States troops without a prior declaration of war. How far he may go, in fact, I think can only be regarded today as a War Powers Resolution question.

I will, in any event, be candid to say that I could not sit here today, even if we had no War Powers Resolution, and articulate to you a limitation on how far the President could go with or without the express approval of Congress.

Senator SPECTER. Well, I would ask you, Judge Souter, to rethink your refusal to answer the question as to the Korean war. I would

ask you to rethink it in terms of the proposition that it is a part of history, that the War Powers Resolution was not in effect at that time, that the President took certain action, and there was follow-up action. The circumstances are so far in the history that it may have some relevance—but it certainly wouldn't be conclusive—on what would happen if the War Powers Resolution came before the Court at the present time.

Judge SOUTER. May I just add one thing, Senator?

Senator SPECTER. Sure.

Judge SOUTER. It seems to me that in approaching that kind of question, we really have to approach it in much the same way that we would approach a foreign relations question. One of the things that I think is standard analysis in the approach to questions of that sort is that when the President, in fact, is acting under the auspices of the foreign relations power and when he is, in fact, acting also with some expressed authorization by Congress, the issue of authority is probably an issue which does not arise or which is not focused.

And I do think that in approaching the Korean war question, we have to face the fact that it was undoubtedly within the power to commit troops to some degree and some instance without congressional approval; that, in fact, congressional support was expressed throughout that period by congressional appropriation and by the authorization which Congress thereby expressed. And it is difficult for me to see—although I will rethink this when I have some time to be quiet, it is difficult for me to see how the combination of the President's power with that degree of approval and support from Congress could raise a genuine issue of unconstitutionality that would be subject to adjudication.

Senator SPECTER. Well, when you start talking about foreign relations, that injects another element of complexity into a subject which is already complex enough.

Judge SOUTER. Yes.

Senator SPECTER. When you talk about appropriations, it isn't realistic for the Congress to stop appropriations at a time when a war is being fought. And if you follow through the logic of your last answer, that there is some implicit sanction—I left out Vietnam particularly because of the Gulf of Tonkin issue. I wanted to focus exclusively on Korea as a more distant event at any rate. But if you take that kind of implicit approval, then we have read out of the Constitution the congressional authority to declare war. The President does have authority to make a commitment to some extent, and once he makes that commitment, if the Congress has the options of not funding, as a way of litigating, it is no option at all.

Judge SOUTER. Well, I think the only thing I could say to that is you make the assumption that Congress never has a funding option. Not being a Member of Congress, I can't second-guess you on that, but that is a position—it never has an option once the troops are committed and engaged. That is an assumption that I would be loath to make.

Senator SPECTER. Well, we won't speculate about you becoming a Member of Congress.

Judge SOUTER. There is no chance of it.

Senator SPECTER. But I don't think we have that option, if I can answer one question.

Let me turn in the 5 minutes remaining, 4¾ that I have, to the question of original meaning and expansiveness of constitutional interpretation, and your testimony both yesterday on equal protection, and your testimony given to Senator Grassley's excellent questioning this morning, where you testified in very broad and expansive terms about the Court's role in filling a congressional vacuum. If the Court is going to fill congressional vacuums, the Court is going to do a lot of filling because there is a lot of congressional vacuum around.

You interpret the liberty clause very, very broadly as a starting point with the incorporation doctrine, taking into the due process clause of the 14th amendment the Bill of Rights, and then both yesterday and today you have expressly stated that that is just a starting point, which is very, very broad, indeed.

I have some concern about the scope of those answers when I take a look at the cases which you have decided. There are some—one, in particular *Richardson*, concerning a liberty interest. But the bulk of the cases I think is more accurately characterized by *Dionne*. There is a case where you had in issue a fee schedule where the majority said that the payment for the judges "smacks of the purchase of justice"; that "the spectacle of the citizen returning giving cash in one hand and calling for a judicial hearing and decision in the other is one that can no longer be tolerated"; and saying that "it is inconsistent with the professional judiciary," and then referring specifically to the contemporary culture—rather, "a contemporary injustice."

Then in your dissent, you start off with the proposition that you agree with the Court's disapproval of the fee system, and then proceed to look for original meaning by going to an unreported case from 1663 and statutes from 1781 and 1768 and 1878. And as I look at that opinion in the context of your description of *Brown* v. *Board of Education*, there was a situation where, if you look for original meaning, the District of Columbia schools were segregated, even the Senate gallery was segregated. Raul Berger in his analysis of the contemporary thinking was that the equal protection clause did not even give the right to vote or the right to desegregation.

It seems to me that the thrust of what you have had to say in a solitary dissent—the other four justices of New Hampshire were on the other side in the stated *Dionne* case—is very much at variance with the broad expansive answers you have given to Senator Grassley today and that you gave yesterday on the equal protection clause.

Judge SOUTER. Senator, you can pack a lot into one question.

Senator SPECTER. I wish I had more time. I would ask it more simply.

Judge SOUTER. Let me start first with an issue of adjectives because I think it is an important issue. You have characterized my testimony about the recognizable liberty interest as taking a very broad position, and you have spoken of my reference to incorporation as just a starting point. I want to go back to them for a moment just by way of preface.

What I said in response to the question about incorporation was that I did not believe that the definition of the concept of liberty, which was subject to recognition and protection in the 14th and the 5th amendments, could be limited by the incorporation doctrine. Indeed, if it could be limited by the incorporation doctrine, there would be no question as to whether some core right of privacy was cognizable under those two amendments.

With respect to how much further the so-called liberty concepts in those amendments should be treated as recognizing rights enforceable against the Government, I have not given an opinion. I have given an opinion that there is certainly a core concept of privacy which is to be recognized and that certainly aspects of marital privacy, which we discussed yesterday, are among them.

How much further, how much broader the concept to privacy and, hence, ultimately how much broader the enforcement power under the liberty clause may be is something which is going to have to be developed by the courts over the course of probably a great many years.

Going next to what you question is the inconsistency between my position in *Dionne* and my espousal of the correctness of the *Brown* decision, let me start by saying that, as you recognize, the interpretive position that I start with when I am looking at a provision which has not been construed is one of original meaning, and in discussion yesterday I distinguished that from the theory that would confine that meaning to those applications which were originally and specifically intended by the framers or by the adopters of that provision to be its application.

I have read Raul Berger's book, and I think—although people will dispute about his constitutional interpretive views—I think his history is well accepted by most people today.

There certainly was no intent whatsoever in the enactment of the 14th amendment to bring about school desegregation. And if in fact the meaning or the guarantee of equal protection were confined to specific intent, then of course, *Brown*, instead of being a correct decision, would have been a wrong decision. But my interpretive position is not one that original intent is controlling, but that original meaning is controlling.

In construing the 14th amendment, the first fact that has to be faced is that the best index, the point at which you start the quest for meaning, is with the text. And as I said yesterday, the text of the 14th amendment is a very broad text. It is not in fact, as we well know by its terms, limited to race, although race was obviously the problem most on their minds. It was not limited as the 15th was by reference to prior condition of servitude. And therefore whatever troubles some people may have with the 14th amendment, I think the point at which we have to start in the process of construing the scope of the equal protection clause has got to take into account that it was not written in such a way as to be restricted either to race or to the specific racial applications intended or on the minds of the people when it was adopted.

And given that as a starting place, as I said, I think there is no question that *Brown* was correctly decided and the provision correctly construed.

Now, is that inconsistent with my view on *Dionne*? It is not. Just as I said a moment ago, the text is the starting place from which we have to construe the 14th amendment; the text was the starting place from which we had to construe the provision of the New Hampshire Constitution that justice should be available freely and that right or justice should not be purchased.

The question is how much freedom, if you will, from cost was that provision intended to embody. If we read that provision in a totally, literally, expansive sense, we could have said, well, certainly there can be no filing fee for someone who wants to come into court in a civil case. In a sense, there is nothing free if you have to pay $50 to file your case. And we could have gone on through a number of incidents of expense that are accepted in the system and have always been accepted in the system as being costs that could reasonably be levied.

The question before the court was, then, how free did they intend it to be; what kinds of costs were they trying to outlaw? And that, in the context of that particular issue, came down to basically a choice between two principles—the principle against paying anything beyond a filing fee to get into court, on the one hand, saying that anything beyond that would be a violation of the provision; and the other principle, which was the one that I thought was supported by evidence of the original meaning of the framers, that what was trying to be outlawed by that provision was essentially, in a word, bribery. I think the provision was traced back to the kind of fines which the medieval courts dealt with and which were still in people's minds at the time of the adoption, whereby money payments could be made to the courts either to delay a case or to bring about its resolution at the convenience and with the result intended by a given litigant.

And therefore the issue in the *Dionne* case was simply a narrower issue than the issue in *Brown* v. *Board*. The meaning came down to a closer choice between two possibilities. But the ultimate criterion of meaning for me in the *Dionne* case was exactly what I think the ultimate criterion should have been and was for the Supreme Court of the United States in *Brown*—not specific intent, but the principle intended. And of course, those distinctions will grow narrower and narrower the more narrow and exact the language it is that we are construing, but the ultimate criterion remains the same.

Senator SPECTER. Thank you very much, Judge Souter. We'll come back to that when I have some more time.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Our next questioner will be Judge Heflin, Senator Heflin, from Alabama.

Senator HEFLIN. Following up on Senator Specter's question on the *Dionne* case, was the equal protection clause of the Constitution invoked in that issue?

Judge SOUTER. In the *Dionne* case, sir?

Senator HEFLIN. Yes.

Judge SOUTER. No, it was not. The only issue that was raised there was the provision precluding the purchase—or, the requirement that justice be purchased.