and legally different in so many ways as you serve on the Supreme Court.

So I have to hand it to you. I think you have done an excellent job, and I for one have a great deal of admiration for you.

Judge SOUTER. Thank you, Senator.

Senator HATCH. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Metzenbaum?

Senator METZENBAUM. Judge Souter, I join Senator Hatch in saying I have a great deal of admiration for you also. But I also have some reservations and some concerns, and my colleague has mentioned some earlier hearings where litmus test questions were asked. I would like to refresh his recollection that those on both sides have seen fit to use litmus test questions when they deem the occasion appropriate. I am going back to the days of Senator Fortas' confirmation hearing, others as well, and so I guess it is just a question of whose ox is being gored on any particular day on whether or not we do or do not believe in litmus test questions.

Let me proceed, however, to questions that still remain of concern to this Senator. You had a discussion with Senator Grassley that I would like to follow up on. In that discussion, you stated that all three branches of Government are sworn to uphold the Constitution; and when Congress fails to use its full authority to uphold the Constitution, the Court is forced to resolve difficult social problems. You referred to the vacuum that is created when the issues are not resolved elsewhere.

Of course, in the realm of fundamental rights, the Supreme Court has the unique obligation to interpret the Constitution and define those rights. The first amendment rights of political protesters, the fourth, fifth, and sixth amendment rights of criminal defendants, the due process and equal protection rights of minorities and women, frankly only the Supreme Court can protect those rights, no matter how unpopular their decisions may be at times.

Now, even though Congress has the responsibility to enact legislation to address difficult social problems, you believe that the Supreme Court has the unique obligation to interpret the Constitution and to declare rights to be fundamental and, therefore, entitled to scrutiny, as I understand your response to Senator Grassley. Am I correct in that?

Judge SOUTER. Well, Senator Metzenbaum, there is, of course, no question that the Court does have that jurisdiction and obligation. Its obligation is constantly to search, to identify those rights which are fundamental, and to implement them.

In my exchange with Senator Grassley last week when I made the remark about the constitutional vacuum, I was thinking, in fact, of a particular example, and I don't remember now whether I went on to that example or not. But I was thinking specifically with reference to the 14th amendment. I thought the case of *Brown* v. *Board of Education* was an example of what can happen, because the unusual situation in the case of the 14th amendment is that under section 1 there are provisions which are to be applied by the judiciary, following justiciable standards, and under section 5, Congress has its own specific enforcement power there. And as you know, for some time before the *Brown* decision came down,

there were requests and hopes that there would be legislation to deal with the continuing problem of segregation in the schools. But no political solution was forthcoming.

Therefore, that is what I had in mind when I spoke of there being a vacuum in which the responsibility to deal with a 14th amendment problem had to be faced, and the Court rightly faced it.

Senator METZENBAUM. Now, the Supreme Court—I think we both would agree—also has the unique obligation to enforce those rights sometimes against the will of the majority. Over the last 2 years, the Nation has been embroiled in a debate over whether to prohibit flag burning as a form of political protest. Without exception, Americans found the acts of Gregory Johnson to be detestable and contrary to everything that we hold dear. But the Supreme Court concluded—quite rightly, to my mind—that burning the flag is part of the fundamental right to free speech protected by the first amendment.

Do you believe that the Supreme Court has the obligation to enforce fundamental rights no matter how unpopular the cause, no matter how repulsive the acts may be to the majority?

Judge SOUTER. Senator, there is no question about it. If that were not the case, there would be no point in having a Bill of Rights. If that were not the case, there would be no point in having any substantive protection for civil liberties. We would leave the entire issue to whatever majoritarian impulse there might be at the time, and we would have a vastly different society from the one which the Framers of the Bill of Rights intended us to have.

Senator METZENBAUM. Following up on that, I would like to return to our discussion of last week as to how you would go about deciding whether a right is fundamental. Last week, you and I discussed what is at stake for a woman in the debate over reproductive rights. You indicated that through personal experiences you could empathize with a woman who was faced with a very difficult—very difficult—decision as to whether to terminate a pregnancy. And I appreciate your candor in response to my question.

I asked those questions not because I believe that we will once again allow women to die from botched illegal abortions, nor do I believe that the American people would stand by for 1 minute for putting women in jail for having abortions or for granting periodic testing of women to determine if they have had an abortion. Even President Bush has said he would not put women in jail.

My point is just this: It is inconceivable that we would take these steps in order to prevent a woman from making a decision to terminate an unintended pregnancy. That is precisely why it is a fundamental right. It is a personal and basic freedom for a woman to make her own reproductive choices. It is basic to her health and to her dignity.

In your view, are these considerations I have described an essential part of determining whether a particular right is fundamental?

Judge SOUTER. Senator, those considerations to me point exactly to the kind of inquiry which the Court must make. As I said, in dealing with the question of what unenumerated rights may be regarded as fundamental and what require a lesser standard of scrutiny, the courts from time to time have tried different tests. One of

those tests was the one that is identified with *Palco* v. *Connecticut* in which we asked whether the right in question is essential to or comprehended by the concept of ordered liberty.

I think I indicated that my own view of the best approach to these problems is the one which is probably best identified with the late Justice Harlan. Justice Harlan said that we cannot approach these questions of weighing the value of asserted rights without an inquiry into the history and the traditions of the American people, in order to try to find on a historically demonstrable basis their commitment to a set of values which either do or do not support the claim that a particular right in question is fundamental.

I think Justice Harlan, in taking that approach—I am convinced that Justice Harlan in taking that approach was, in effect, asking for a broader inquiry than we might be engaging in if we limited ourselves to the formulation in *Palco* v. *Connecticut*, the concept of ordered liberty, because, as was demonstrated in many other cases, there are many limitations upon what we regard as almost garden variety constitutional rights which still could be found in a society which we would not say was fundamentally unjust. Do we have a right to a jury of 6 or a jury of 12, for example?

I think Justice Harlan, although he himself quoted the *Palco* formulation from time to time, I think he was clearly pointing to a broader inquiry into the history and traditions of the American people as being the basis upon which a fundamental valuation or a finding of no fundamental valuation should rest. And I think he was right.

Senator METZENBAUM. Thank you.

You have discussed your view that there is a right of marital privacy recognized in *Griswold*, and you have agreed that marital privacy is an aspect of privacy that is fundamental. What is it that led you to conclude that marital privacy is fundamental?

Judge SOUTER. I came to that conclusion, Senator, because, in fact, it is a subject which has received a great deal of attention within the courts themselves. Much has been said over the years about the proper way to interpret cases like *Meyer* v. *Nebraska* and *Pierce* v. *Society of Sisters*. But leaving aside the interpretive categorical problems that constitutional lawyers may come up with, one thing that is undeniable is that going right back to the discussion of those cases in the early part of this century, the courts have recognized a kind of core of what might be called marital or family liberty. And it has become so familiar to us that we can at least start with that core in any inquiry about the scope of unenumerated rights or their fundamental character.

I don't want to rest this discussion on a purely ad hominem basis, but, of course, I have to come right back to the Justice that I was referring to before. Justice Harlan engaged in an examination like this, as you know, both in his own opinion in *Griswold* and in the opinion that preceded that case, *Poe* v. *Ullman*. So, in a way, it seems to me that the notion of a marital privacy and a privacy which takes into account certain basic familial values has got to be our starting point. I think we have plowed that ground well, and I think we do have a secure starting point there.

Senator METZENBAUM. I think the starting point is that marital privacy is fundamental, and the use of contraceptives is part of

that fundamental aspect of marital privacy. I would ask you, Judge Souter, could you give me an example of an aspect of marital privacy that would not be fundamental under your formulation?

Judge SOUTER. Well, of course, I think it is very clear—again, there is no real dispute about this, I think, among people on both sides of this issue—that even marital privacy is not free from regulation by the State. A spouse is not entitled to assault another spouse. We do not build a sort of shield against all State intrusion. There certainly is an example of a subject which I suppose somebody could argue ought to be within the shield of scrutiny from State concern, and yet I think we would all agree that that was a reasonable subject of regulation, without which we would have an extremely barbaric marital society.

Senator METZENBAUM. I would agree.

You also commented on *Eisenstadt* v. *Baird* in which the Court recognized the right of unmarried people to use contraceptives. Justice Brennan writing for the Court in that case stated, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusions in a matter so fundamentally affecting a person."

Do you agree that unmarried people enjoy an equivalent fundamental right of privacy to use contraceptives as you have recognized for married people?

Judge SOUTER. Well, I agree that *Eisenstadt* v. *Baird* engaged in an appropriate analysis. I didn't go back and reread it this weekend. I probably should have. But my recollection from reading *Eisenstadt* is that the case rested primarily on an equal protection analysis; and that having found in the *Griswold* case as they did, the Court then felt it was appropriate to apply an equal protection criterion going beyond the express due process concepts that they had come up with in *Griswold*. And I think there is no question that the area of privacy is not immune to this kind of equal protection analysis any more than any other subject of the law is.

Senator METZENBAUM. May I conclude from that that your answer would be in the affirmative, that unmarried people do enjoy a fundamental right of privacy to use contraceptives in the similar manner that you have recognized their right to use them?

Judge SOUTER. I would just like to enter this caveat: that because I have not reread *Eisenstadt* v. *Baird*, there may be some things in there that I am just not adverting to. But on the basic proposition that I refer to, the equal protection analysis based on the point at which *Griswold* left off, I would see no basis to approach the problem differently.

The CHAIRMAN. Would the Senator yield on that for a second?

Senator METZENBAUM. Yes.

The CHAIRMAN. You very rightly and skillfully, Judge, always refer to the equal protection aspect of that case, which was not the basis upon which *Griswold* was decided. What would have happened had *Eisenstadt* come before the Court before *Griswold*, so that there was not an equal protection portion to it?

Do you believe that there is a constitutional right to privacy in the liberty clause of the 14th amendment, not the equal protection clause of the 14th amendment for unmarried couples?

Judge SOUTER. I don't know the extent an answer to that question can be given in the abstract without the kind of Harlan inquiry that I'm talking about. It was not made and I have not made it. The thing that I can say is that if that question had come up before *Griswold* as you posit, exactly the same kind of analysis that Harlan would have used and did use in his concurring opinion should be used to address the same issue of nonmarital privacy.

The CHAIRMAN. That is worrisome, because I know of no tradition in American society where an inquiry into the history and traditions of the American people have guaranteed a right of privacy to unmarried couples relating to procreation or sexual activity. So it seems to me that you would have come down and concluded that married couples do not have a right to privacy, based on that set of inquiry.

Am I wrong about that?

Judge SOUTER. I think, yes, I think it is wrong simply to draw that conclusion because as you, yourself, have pointed out in the analyses that go on, there is a two-part inquiry. The first inquiry is No. 1: Is there a liberty interest to be asserted and how may it be valued? The other inquiry that goes on is, when, in fact, is the weight to be given to the State interest which may be brought up as a countervailing interest when the liberty interest is, in some way, restricted?

One of the questions, of course, that would have to be asked if we were approaching *Eisenstadt* first and not *Griswold* first, is not merely the weight to be given to the privacy interest to be asserted, but the weight to be given to the State interest in asserting the right to preclude people under those circumstances from obtaining contraceptive information and devices. I do not think that is a simple question to answer.

The CHAIRMAN. I thank my colleague and I will be happy to yield time from my time, when the time comes.

Senator METZENBAUM. Judge Souter, to change the area of interest, historically the commerce clause of the Constitution has been the source of congressional power to enact nationwide economic and social welfare legislation. Labor laws, health and safety legislation, environmental laws, civil rights statutes are just a few of the many laws rooted in the commerce power.

In 1918, a national child labor law was struck down as an invalid exercise of the constitutional power under the commerce clause. In the early years of the Depression much of President Roosevelt's New Deal legislation was invalidated by the Court on commerce clause grounds. The tide turned in 1937 in the *Jones & Laughlin Steel* case. In that case, the Court upheld the validity of the National Labor Relations Act against a commerce clause challenge.

Since 1937, the Court has broadly construed congressional power under the commerce clause and has rarely, if ever, invalidated legislation under commerce clause grounds. On Thursday you stated in response to Senator Thurmond that, "The commerce power has grown to and has been recognized as having a plenary degree which would probably have astonished the Founders."

Are you troubled by the scope of the commerce power exercised by Congress and do you have any doubts or qualms about the

breadth of congressional authority under the commerce clause as it has been interpreted by the courts since 1937?

Judge SOUTER. No. I do not have a concern to raise about it at this point, Senator. What I was referring to, I think, in my remarks to Senator Thurmond, was probably an historical fact. It illustrates something in our constitutional history which is not just confined to the commerce clause. That is the sense of State autonomy which doubtless motivated the Framers, I think, probably got a jolt as early as the tenure of John Marshall when it came to commerce clause analysis.

I think many of the Framers probably had not thought through the generality of the grant of power which Marshall recognized so early in our history. I think this phenomenon is probably paralleled in another example that we have been talking about in the course of these hearings and that is the effect of the powers granted to the courts, and indeed, to the Congress under the 14th amendment.

I remember in our discussion the other day about the appropriateness of *Brown* as a decision. We all agreed, I think, that historically none of the Framers of the equal protection clause would have had the slightest inkling that that clause was ever going to be applied to school desegregation. They doubtless would not have had the slightest inkling that that clause was going to be applied to sex discrimination.

Yet, the fact is they wrote a clause of great generality which they did not confine to the specific objects which they had in mind or had contemplated when they passed it. Therefore, as I was saying last week, the legitimacy of the application of the equal protection clause to school desegregation, to gender discrimination, and so on seems to me beyond argument.

I think probably historically the same phenomenon has gone on with the commerce clause. They wrote more generally than they probably intended by way of application at the time that they wrote it, but they wrote what they wrote.

Senator METZENBAUM. So actually, you are saying that those who would look to strict constructionism and original intent would have to move forward 200-and-some odd years in order to understand the Supreme Court interpretations of the commerce clause in today's world?

Judge SOUTER. Well, that is true. I would repeat something that I have said before, but I don't want to leave any mistake on this.

My approach to interpretation is not a specific intent approach. The approach has got to take into consideration the text of the provisions in question and it is not to be confined, the meaning of that text is not to be confined by reference simply to the specific applications that may have been, as it were, in the mind either individually or institutionally of the people who proposed the amendment.

We are looking, when we look for the original meaning, we are looking for meaning and for principle. We are not confining ourselves simply to immediately intended application.

Senator METZENBAUM. Now, in the 1976 brief on EEOC regulations, which has been a subject of questioning by Senator Kennedy, your office took the position that regulations designed to help battle discrimination in the private sector were an unconstitutional

exercise of congressional authority to regulate interstate commerce.

Is it your view today?

Or I guess I would ask you, in view of your previous answers, do you think that that same kind of position would be the one you would be taking were you the attorney general of the State of New Hampshire in today's world, in view of more recent Supreme Court decisions?

Judge SOUTER. Absolutely not.

Senator METZENBAUM. In the mid-1960's, Congress passed national legislation designed to end segregation in public accommodations. The legislation was challenged on commerce clause grounds. In *Katzenbach* v. *McClung* the argument was made that Congress had no authority to combat segregation in local restaurants because the effect on interstate commerce was too remote.

Do you think there is any validity to that argument?

Judge SOUTER. I don't think in view of the understanding of the commerce powers you, yourself, have said since the late 1930's, since the NLRB, I don't think there is. I recall the analysis in *McClung* and it came down to a straight factual analysis. That is, would the segregation, if it were permitted in these accommodations have an effect on the flow of goods in interstate commerce; would it have an effect on the movement of people in interstate commerce?

The Court, as you know, had no difficulty in concluding that it would have such effects, and therefore, that it was within the power of the, within the scope of the commerce power for Congress to regulate.

Senator METZENBAUM. Let me switch the area of inquiry for a bit. I think over the weekend a number of your responses have been of concern to me and I have been thinking about them. I think the exchange you had with Senator Heflin concerning the Seabrook demonstration is probably as troubling to me as are some of the other issues.

That involves this $74,000 contribution from the owner of the plant, Public Service Company of New Hampshire, to help defray some of the law enforcement expenses.

What bothers me is how far down the road can you go with that kind of a concept? When a labor union is on one side, and management is on the other, can a State start to think well which one is going to be willing to help us defray the expenses and don't you get to that conclusion when there is an environmental issue?

Don't you have that kind of contrast? When you have an abortion issue, whether or not it is closing down or picketing or whatever the case may be, unlawful conduct in front of an abortion center? I am so disturbed about the fact that when the State or public body accepts money from a private litigant.

Now, you actually testified that the $74,000 contribution was made in order to offset the extra law enforcement expenses for the weekend of the demonstration. You also suggested that because the contribution arrived in late June, over a month after both the demonstration and your appearance in court, it did not raise any problems of propriety.

I might say I would take strong exception to that but let's pass on because the facts are a little different. You also stated that if there was any particular appeal to the Public Service Company it was something that had nothing to do with me or my office.

Now, talking about the purpose of the $74,000 contribution and the date that it arrived, you suggested that you knew nothing about it until June. But on Friday, May 13, 1977, the last 500 of the 1,400 demonstrators who were arrested were released from the National Guard Armory pending appeal after having been found guilty of criminal trespass.

Two days later, on May 15, the Manchester Union Leader reported that, "Public Service Company of New Hampshire, the prime backer of the Seabrook plant has contributed more than $74,000 to the State to help pay the costs of prosecuting and detaining the protesters, and officials of the firm have said another contribution will be given."

Now this account suggests that the contribution was given at a much earlier time than you indicated. It also states the contribution went toward the "costs of prosecuting the protesters" and you testified that on Tuesday—well, let me just get to that point. Is that Manchester Union account accurate and it does change the picture somewhat as to learning about it in June, but even learning about it in June does give me some concern. I wonder if you would respond to that, Judge?

Judge SOUTER. Yes. In fact, I would like, if I may, Senator, respond to a couple of the specific points you made.

Let me start, of course with that one. When I went back to check on this when the subject first came up, the only record that I could find—to begin with, I didn't recall the contribution at all—but the only record that I could find was the record of the action by the Governor and Council which I think was on June 30, when they had accepted or had on their agenda to accept the contribution of around 70-or-74-whatever it was, thousand dollars from the Public Service Company.

I had not been aware of the Manchester Union Leader report on May 15, and you have seen a copy of the paper and I am sure that's accurate.

The report was something I was not aware about, until you just told me now. But I think going to the issues of substance that you raise, I think there are two particular points that I do want to emphasize.

The first is that at no time did I engage in a solicitation of the Public Service Company or, indeed, of anyone else, except the New Hampshire Legislature for funds to defray the costs of the law enforcement work and the prosecution.

The request for those funds that were made came, as I recall and I think as has been reported here, from the Governor. The only consultation that I had with him that I have any recollection of is my preparation to go to the legislature, as I said, to ask for funds.

I can state categorically that the Public Service Company had no consultation with me about what would be an appropriate response by me as a prosecutor or by what would be appropriate policy for me as a prosecutor in appearing before the courts. There was no

consultation, there was no message going back and forth, and I would not have tolerated one.

I made the decisions that I made based on what I thought were evenhanded law enforcement criteria, considering, among other things, other cases of civil disobedience which had been prosecuted, particularly in the State of New Hampshire in recent years.

So, there was no opportunity and there was, in fact, no influence by the Public Service Company or by any other contributor of funds to the State of New Hampshire, in my position as attorney general.

The second thing that I think it is important to say is something which you rightly raise, and that is when the State, regardless of who solicits the money, when the State receives funds in a case like this from what might be regarded as a party in interest, two dangers arise and they simply cannot be divorced from those situations.

The first danger is that we are starting down the road, not as a particular attorney general's office which may not have been involved in it, but simply as a State, we are starting down the road of dependence upon people with particular interests in the specific subjects of law enforcement, which would tend to give them an opportunity for an influence which they should not have.

The second concern is related to the first, and that is whether particular parties or groups in interest do exert that kind of influence. When funds are accepted in this manner, there is a risk of an appearance that they would have had this influence——

Senator METZENBAUM. The appearance of impropriety is what concerns me.

Judge SOUTER. And the appearance that justice can be deflected by this should be avoided. If I had been consulted as to whether or not these funds should be accepted or, indeed, solicited, if there was any specific solicitation, I trust that my answer would have been no, for exactly that reason.

Senator METZENBAUM. Do you not think you had a responsibility, when you learned about it, to say to Governor Thomson, I insist that the funds be returned, because it gives the appearance of impropriety, they were not a factor in the case, taking their money does not look right, and I insist, as the attorney general of the State, that that money be returned, otherwise it might appear to some that our integrity has been compromised?

Judge SOUTER. Yes; I think that would have been an appropriate position to take and I wish I had taken it.

Senator METZENBAUM. Let me just go one more point about this question of whether you knew or did not know, and I appreciate your agreeing that that would have been the appropriate conduct.

In a civil action brought by some of the Seabrook protesters, Assistant Attorney General James Cruz, who participated in the Seabrook prosecution effort, was deposed. We do not have Mr. Cruz's entire deposition, but one portion which we do have indicates that Mr. Cruz testified that, on Tuesday, April 26, 1977—now, that is several days, 4 days before the demonstration—there was a meeting in the Governor's office to discuss the upcoming protest at Seabrook. Do you recall if you attended that meeting?

Judge SOUTER. I am almost certain that I did not. I did not go through the preprotest meetings. The deputy attorney general did, Mr. Cruz did, so I am reasonably certain I was not at that meeting.

Senator METZENBAUM. According to the transcript, Mr. Cruz testified that, "During the meeting with the Governor, a couple of things came up. One was the possibility that the Public Service Company would be paying some of the bill for the law enforcement at the site."

Now, on Friday, you testified that, "If there was any particular appeal to the Public Service Company, it was something that had nothing to do with me or my office." But Mr. Cruz, a member of your office, testified that, 4 days before the protest and the arrests occurred, he was in a meeting in which a contribution from the Public Service Company apparently was being considered by the Governor. Did he inform you that such a plan was being considered?

Judge SOUTER. I can only say that I have no recollection of it whatever.

Senator METZENBAUM. Were you aware of his testimony about the April 26 meeting, the deposition?

Judge SOUTER. No; I had not seen his deposition, again, until you referred to it now.

Senator METZENBAUM. Judge, I will——

Judge SOUTER. Senator, may I—I am sorry.

Senator METZENBAUM. Go ahead.

Judge SOUTER. I am sorry. I was going to say, I think in one respect I just misspoke inadvertently. I said I did not see his deposition again. I am not sure that I have ever read his deposition.

Senator METZENBAUM. I think your recognition that there was not an appearance of impropriety and that probably if you had it to do over again, you would have told him to give the money back. I think I understood your answer to be to that effect.

Judge SOUTER. We learn as we go along.

Senator METZENBAUM. Pardon?

Judge SOUTER. I say we learn as we go along.

There is one other thing, if I may, that I would like to add, not because I think I said anything that gave a contrary impression, but I think it should be put on the record, and that is that, in this kind of maelstrom of events surrounding the Seabrook protest. At no time, did Governor Thomson ever tell me what he wanted to do, as a matter of law enforcement, with the protesters.

Despite his feistiness and his assertiveness, he was in this instance, and I think in our general relationship, he was respectful of my role as attorney general, and at no point did he tell me I think you ought to recommend this or recommend that. That issue was left to me, and the Governor was very careful to do that.

Senator METZENBAUM. I do not suggest that your judgment was compromised. I do suggest and maintain that the appearance of impropriety is self-evident, when one side in a matter of that kind is permitted to pay part of the legal costs in the State. It should never occur. I think now you agree.

Mr. Chairman, I yield back.

Senator KENNEDY. Thank you very much.