Government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a haven for reform movements. The Constitution is an instrument of Government, fundamental to which is the premise that in the diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court does not serve its highest purpose when it exceeds its authority, even to satisfy the justified impatience with the slow workings of the political process.

Now, this to me is classic John Marshall Harlan. Whether or not you would have signed on to his dissent in 1964 is immaterial because, of course, there is no turning back the clock in this area. My point is simply that Harlan has articulated a principle that, it seems to me, leaves no room for vacuum-filling. So I commend that particular bit of Harlan for you to reread and consider as you move to those lonely marble halls just a few blocks from here.

Thank you, and I wish you good luck.

Judge SOUTER. Thank you, Senator.

Senator GRASSLEY. I yield back my time.

The CHAIRMAN. Judge, was one-person, one-vote, rightly decided, Baker?

Judge SOUTER. I think it was. But I will tell you, Mr. Chairman, I think the Harlan dissent was a very powerful dissent. And the truth is I don't have a simple answer to the Harlan dissent. I don't have a simple answer to it today.

As you know, Justice Harlan relied so heavily on the provisions of section 2 of the 14th amendment for saying that that was an indication that any problem of the maldistribution of votes or the apportionment of votes was intended to have a congressional solution period. And yet on the other side, you would be facing the fact that there was less protection for this most fundamental right than there would have been for one of the garden variety economic rights. And that argument of his was a tough argument.

The CHAIRMAN. But you think it was rightly decided.

Judge SOUTER. I think I would have to have gone along with it, yes.

The CHAIRMAN. Thank you.

The Senator from Arizona, Senator DeConcini.

Senator DECONCINI. Mr. Chairman, thank you.

Judge Souter, I want to go back to a couple of areas that we discussed last week. Excuse my voice. I have a bit of a cold today. We talked at some length about the equal protection clause as it relates to discrimination cases.

In your opening statement, Judge, you stated that part of your role as Supreme Court judge will be to "preserve the Constitution for the generations that will follow." I think that statement is very accurate, and it is the reason why I have spent so much time on this particular issue.

Judge Souter, I have two daughters. One is a lawyer, one is a doctor. I have a son who is a lawyer. I see no reason why my son should be treated any better under the law than my two daughters. I also see no reason why the Court should give the same scrutiny to law that distinguished trucks or automobiles as it does a law that treats men different than women. To do otherwise, in my judgment, I believe would not preserve the Constitution for generations to follow.

Along that line, Judge, let me just pursue this a little more. Last week, we discussed the middle tier scrutiny that the Court applies to gender discrimination statutes. You described it to Senator Kennedy as "too loose"—those were your words, I believe—and you criticized its flexible quality.

Could you refer to any cases that you have analyzed that lead you to believe that the test may be too loose?

Judge SOUTER. Well, Senator, I think I can recall some. That test has a peculiar history. To the best of my knowledge, the first case in which the middle-tier scrutiny test, substantial relationship to important government objective, the first case in which that was mentioned was a case early in the century, and it was an economic regulation case. It may have been an antitrust case. It was an economic regulation case, in any event, and one of the parties was a corporation known as the Royster Guano Co. I don't remember the other party, but I will never forget *Royster Guano.*

The issue in that case, as I said, was strictly one of economic regulation. It is the kind of issue which today would merit what we would call first-tier, rational basis analysis. And, in fact, that was exactly the kind of treatment that *Royster Guano* got. So this test which today is being used and has evolved into a middle-tier test began its life right down at the other end of the spectrum.

Some of the cases that have applied it as a middle-tier test even since then have seemed to me, as I have read the opinions, to seem to slide back and forth as to whether they were applying middle-tier or first-tier. I think someone the other day mentioned the case of *Reed* v. *Reed,* which involved an issue of probate administration and the eligibility of a woman to serve under the same conditions or subject to the same conditions of eligibility as a man. There are portions of the *Reed* opinion in which they seem to be doing nothing but applying first-tier analysis.

Senator DECONCINI. I agree.

Judge SOUTER. And at the other end of the spectrum, I had a case in which I wrote a separate opinion on the New Hampshire Supreme Court this past year in which I know my colleagues did not agree with me, but it seemed to me that they were using the middle-tier test for the highest level of scrutiny. And so it is examples like that that have made me wish that we could come up with a less flexible formulation. That is a lot easier said than done. I hope you are not going to say to me, "OK, Judge, here is your chance, give us the word," because I don't have an alternative formulation written.

Senator DECONCINI. Well, maybe not, and maybe you could pursue it a little bit. If the intermediate test requires that a classification must serve—as we, I think, agree—"an important governmental objective" and be substantially related to that objective—you went into at great length last week. And yet the strict scrutiny test provides a classification of compelling government interest and the narrowest means must be used to achieve that objective or interest.

Now, what in your opinion is "too loose," or can you discuss the difference between these two? I have trouble with them, but I understand the strict scrutiny test much better than I do the intermediate and where it follows with your reference to the looseness. I

tend to agree. It is interesting to me how you see the difference between this. Where is the looseness? And where would you tighten it up, if you can say, obviously without any reference to potential pending cases?

Judge SOUTER. I think the reason why we tend not to be quite so concerned about the flexibility in the highest tier test, the compelling State interest test, is that traditionally we have been working with classifications which affected rights of such fundamental importance that it was very, very difficult for anybody to meet the test. Therefore, there has tended, I think, just as a historical matter, to be fewer cases calling for third tier, the highest level of scrutiny, which have seemed to be debatable cases at all. And you are entirely right to say, well, compelling interest, that calls for an evaluation. Narrowly tailored, that calls for it. And you are entirely right. If you look at some of the recent cases that have come down on examining race-conscious remedial order by courts. They are being subject to the highest level of scrutiny.

Senator DECONCINI. Exactly.

Judge SOUTER. And yet, for example, when you come down to narrow tailoring, there is undoubtedly room for maneuvering there in the kind of factor analysis that has gone into the narrowly tailoring analysis.

Senator DECONCINI. It doesn't trouble you that you would make that statement, that there is room for maneuvering?

Judge SOUTER. It is a fact. There is no human formulation that is going to give you any kind of mathematical precision. And as I think I said when I first brought up the subject the other day, I am by no means convinced that I can do better at it. But the examples that we have been through, of which I gave you some——

Senator DECONCINI. Yes, you did.

Judge SOUTER [continuing]. Are what disturbed me.

Senator DECONCINI. Judge, to go to another area, last week we talked a little bit about the effects opinion polls should have on judges' decisions, and you stated that they should have no effect. In some eighth amendment cases, dealing with the death penalty, the Court has looked to many diverse factors in determining "evolving standards of decency," including opinion polls. That is made reference to in the *Gregg* case. Do you think that the Court erred in making reference to public opinion polls, in deciding the *Gregg* case? There are several other cases that judges' majority opinions have made reference to opinion polls.

Judge SOUTER. I was referring to opinion polls about the rightness of their decisions or not.

Senator DECONCINI. Yes.

Judge SOUTER. And I will stand by my answer there.

I will say that I would be much more comfortable to look to what legislatures do, for example, in expressing the sense of the communities on matters of appropriate criminal penalties.

So I would look at them very warily because I think we have better evidence.

Senator DECONCINI. Well, I agree with that and it seems like it's maybe unfair to even suggest that a Supreme Court Justice can really be so pure in his or her legal thinking that they are not

going to be influenced by newspaper articles or television opinion polls that they see over the news.

Judge SOUTER. You know what Charles Evans Hughes said: "They read the papers."

Senator DECONCINI. They read the papers, yes. After your comment I asked my staff to give me the *Gregg* case, which I had not read for some time. I remember opinion polls being cited someplace. It was there and in a number of other cases.

The CHAIRMAN. The question is, Senator, do they watch color television, that's the real question.

Judge SOUTER. I can tell you one nominee who doesn't unless he is visiting somebody.

Senator DECONCINI. That may be one of the biggest pluses you have had, for your credit.

Judge SOUTER. Well, I'm not about to get rid of that set right now, if that's the case.

Senator DECONCINI. Judge, let me go into the judicial activism that was discussed last week. Senator Thurmond asked you last Friday to describe what you thought the term judicial activism meant? I did not have as much luck as my colleague did when I asked you that question. You told him that you would consider it judicial activism if a judge imposed his personal values rather than searching for the values embodied in a constitution.

Is that, in essence, correct?

Judge SOUTER. That is fair to say.

Senator DECONCINI. Do you think it is judicial activism to rule that capital punishment is always cruel and unusual punishment?

Judge SOUTER. I think that would be an insupportable decision under the Constitution and I say that, sir, with a recognition that there are members of the Supreme Court who disagree with me. But that is an opinion which I could not join.

Senator DECONCINI. Because, as you know, Brennan and Marshall, at least in this lawyer's and Senator's opinion, certainly reach for judicial activism in their efforts to state that that's how they interpret the eighth amendment as it relates to capital punishment.

You went into the *Miranda* and exclusionary rule at some length with Senator Thurmond also. In your response you stated that *Miranda* created a pragmatic rule, as you did just recently with Senator Grassley, you described the exclusionary rule in the same way. Let me read back your response just to refresh your memory, because I am concerned about these decisions as to their activism and what appear to me to be activism, although I can't disagree with the decision in at least the *Miranda* case.

"I think it's important to note"—this is you, Judge—"I think it's important to note that when we look back on a decision which has been on the books as long as *Miranda* has now, we are faced with the similar, I think practical, obligation, if one wants to modify or expand or contradict, to ask very practical questions about how it actually works. That is a judicial obligation if the judiciary is going to be imposing pragmatic rules."

Your response leads me to this question. Should the Court be imposing rules such as *Miranda* and exclusionary and are they not

really experimenting? And isn't that what you have indicated that the Supreme Court was doing?

Judge SOUTER. With the hindsight of history there is an experimental cast to some of them. As you know, over the years, for example, on the exclusionary rule there have been calls within the Supreme Court to turn the *Mapp* decision around on the grounds that it has simply not worked out, and that that is a fact which the Court ought to face.

I don't know of any theoreticaliy satisfactory way of saying when a pragmatic experiment sort of crosses that line it is something that has to be condemned as activism. The courts have got an obligation to, in effect, enforce standards. In the *Miranda* area what the courts were concerned with was the amount of litigation which was going into the question whether given confessions or admissions had been obtained voluntarily or not, was simply placing such a severe burden on the courts themselves, that there had to be a better way to protect the ultimate interest which the 14th amendment was trying to protect without, in fact, tying the courts up in the kind of litigation which just seemed endless, fact-specific, and detailed.

The idea was if the police can get the *Miranda* warnings right, they're going to obviate a large percentage of the voluntariness cases. So that in the long run, law enforcement and judicial administration are going to be more efficient. Well, that was not a very easy argument to sell to law enforcement when *Miranda* came down, as you well know.

But the fact is the intent of the *Miranda* decision was an intent to provide better administration for the imposition of a standard which we all, on each side of the issue, recognize had to be enforced.

Senator DECONCINI. I think today I agree with that. I agree that that is how they came to that conclusion. When that case came down I was a prosecuting attorney and I certainly didn't agree to it. I was outraged.

In essence, isn't that really experimenting by the Supreme Court? Wasn't the Court really trying to find a solution to its own problems of being inundated on these types of questions?

Judge SOUTER. Well, it was its own problems and it was law enforcement's problems, too. Yes, it was experimentation.

I remember——

Senator DECONCINI. When——

Judge SOUTER. I am sorry.

Senator DECONCINI. No, go ahead.

Judge SOUTER. No, that is all right.

Senator DECONCINI. In your own standard, Judge, and maybe you can explain this, where do you draw the line? Does it have to be a crisis matter of the Court, or is it just totally discretionary when a majority of the Court thinks that experiments, "activism," or whatever the majority decides the opinion is going to be, is that where the line is, or where do you draw it?

Judge SOUTER. Well, as I said a minute ago, I wish that I had a neat formulation for it. At the very least, in searching for the line we have got to keep in mind what I said in my discussion with Senator Thurmond. It is one thing to try to come up with a pragmatic

approach to the enforcement of a constitutional value or standard which is, itself, accepted. It is another thing to derive standards based simply on personal judicial views of what would be desirable in the world.

I will grant you that when we get into the area of pragmatic experimentation, that can be a darn tough line to draw and I don't know of any theoretically easy way to tell you how we would do it.

Senator DECONCINI. Does it violate your interpretivist approach to the Constitution, which you have expressed and explained quite well, I think?

Judge SOUTER. Well, I don't think it should be seen as any peculiarly interpretivist issue. Regardless of what your view may be of the various schools of interpretivism, the fact is that the courts have got an obligation to come down with practical decrees that implement whatever rights and standards we do find in the Constitution.

When we are talking about decisions like *Miranda*, we are talking about the best way for a Court to exercise its—I guess you might call its prudential power, to get to the right result, to enforce the appropriate standard with the least amount of damage to the body politic—because there is a price to be paid when confessions are thrown out—and with the least damage to the judicial system, which is constantly overwhelmed with litigation. I guess I tend to look upon that as an issue more about the appropriate scope of the Court's power to fashion remedies than an issue of interpretivism about constitutional meaning as such.

There is, of course—and this was true of the 1960's and 1970's and it is always in the background of our thinking today that when that kind of pragmatic experimentation does go on, it has an effect on the Federal balance in the country, too. I think it is safe to say that that is a value which the Court has also got to bear in mind and that is not merely prudential.

Senator DECONCINI. Well, Judge, would you agree that the *Miranda* decision is not likely to come back before the Court? It seems to me pretty clear where we are on that. I want to ask you whether or not you think that decision was correct?

Judge SOUTER. Let me, if I may—let me approach it this way. I do not rule out the possibility of that coming back before the Court, but I think what I can probably say to it is that—and I have said similar things from the bench in New Hampshire—that if that issue does come back or one similar to it, I think there is an obligation on those who want to raise it to address the pragmatic issues. How is it working today? How do we assess, if you say the price is high, how do we assess that price? What do we really know about what is going on?

I think we are engaged in significant measure if such an issue comes up in a very pragmatic weighing, and it must be addressed that way.

Senator DECONCINI. Then I take it from that if you conclude, as a judge, that a decision is, indeed, pragmatic, experimental or judicial activism, whatever term or adjective we might use, that because of that nature it probably ought to be reviewed or revisited. Is that putting words in your mouth?

Judge SOUTER. Well, I think that is a way of expressing, Senator, a conclusion that you have to approach on what I call the threshold question of the matter of precedent, and that is, was the decision wrong or not?

Senator DECONCINI. Judge, what about the Court ordering an elected official to raise property taxes as they did in *Missouri* v. *Jenkins*? Could this ever be within the remedial powers of the judge or is it just clearly judicial activism?

Judge SOUTER. Well, as you know, Senator, that is an issue that no matter how things turn out the Court is going to be revisiting. The scope of the decision of last term is subject, as you know, to great debate, and I think I have got to be very careful about what I would say on that.

Senator DECONCINI. Let me phrase it in a different way, if I can. If the Court rules or continues to rule that it is within its jurisdiction and its interpretation, that elected officials must take some action as to their proprietary interest regarding financing anything. I am trying my best to stay away from that particular case.

My point is, in your opinion, does that disturb you that the Court would move into an area of legislative, clearly legislative prerogative and certainly one of long-standing precedence that the Court, itself, has recognized and failing in the past to rule certain things should happen because it is up to the "appropriators" or the legislative body to fund them if they want to have them.

Can you give me a feeling of how you would address that theoretical area?

Judge SOUTER. I think I would start by addressing it, by asking whether, in fact, that question really has to be raised? I do not say that lightly.

One of the peculiarities of last term's case was the fact that the case came to the Court in almost a friendly posture. A decree was being worked out in that case on a cooperative basis and, in fact, the school administrators were apparently very well satisfied to include a great many extremely expensive items in the decree which the Court was being asked to enforce, as you know, as a remedy to a school segregation issue.

The case seemed to come to the Court in the posture that we can't afford all of the other things that we have got to spend money on and fund all of the very expansive details of this consent decree consistently with the tax rate that we can impose, subject to certain State restrictions on the raising of school taxes.

The case was presented to the Court in that posture. It seems to me one of the issues that ought to be faced before the question of the Court's remedial power is finally decided is whether that is the posture in which such a case should come before the Court?

For example, shouldn't the issue be phrased in these terms, that once a decree is ordered by the Court, the question is not whether necessarily taxes have got to be raised and, if so, under what authority they may be raised to do it, but whether, in fact, the political branches of the Government responsible have made a decision that they are going to put the implementation of this court decree first. They are going to give that its highest priority in funding.

Because if that is the appropriate way to go about it, if there is, as it were, a primacy of obligation to obey a court order, then the

real question that is going to face the local taxing authorities is not whether they have to raise taxes to fund the court order on top of everything else, but whether they are going to continue to fund everything else in addition to the court order?

It seemed to me that one of the difficulties of trying to focus the issue in last term's case is that the political priorities at the local level simply don't seem to have been addressed. If they are addressed, there is a real question in my mind as to whether or when the Federal courts are going to get to the point of having to rule on the question that so many people take that case of last term as really standing for, and that is the right to impose or order the imposition of a property tax.

Senator DECONCINI. Well, of course, that is the point. How can the Court justify stepping into that area? They can certainly hold constitutional rights as being denied, but to go so far as to say you must shift your appropriations—and I think that's what you are suggesting might happen if the Court isn't careful in reviewing the cases before they consider them—shift your appropriation, local school board, or State legislature, or the Congress of the United States from building a B–2 bomber, which is not perhaps as constitutionally protected, assuming you can argue that the defense is adequate and putting it into prisons, because you are not treating and granting prisoners a constitutional right that they have to safety and other equal protections that they have.

It just is very disturbing to me to see the Court moving in this direction, and I have great respect for you, Judge, and the way that you have answered these questions. It doesn't give me a lot of encouragement, other than you are going to think about it. And you have thought about it. It seems to me that what you are saying is, yes, we have got to consider it. The best I can tell you, Senator, is in my objective observation now is that we ought to consider it at the early stage before we accept a case for argument, and maybe we can decide there that we shouldn't take it. But, yes, it is something that we have got to get into. Is that understanding——

Judge SOUTER. Ultimately we will.

I say we, we on the judiciary will, where I will be on the judiciary, I will not say.

Senator DECONCINI. Judge, thank you. I just want to say to you, Judge Souter, that I am very impressed with your presentation over the last 4 days and also the openness that you have come forward with, different than other nominees that we have had, I must say. Though I think you have adequately and properly protected your need to withhold answers in some areas, because of decisions before the Court I believe you will be confirmed to sit on, you took advice from a number of us, I guess a number of us, that I hoped you were forthcoming. Indeed, you have been in this Senator's judgment, and you have expressed time and time again your great intellectual capacity of the law that is, indeed, very impressive to this Senator, one I am envious of, quite frankly, of your knowledge of the cases that you have read over a long period of time or you crammed in over the last month, however you did it, it is quite remarkable. [Laughter.]

Whatever tutoring Senator Rudman gave you, I guess he deserves some credit, too, but quite frankly, Judge, I think you have conducted yourself——

Judge SOUTER. I think you are going to have a fight on the committee here, Senator. [Laughter.]

Senator DECONCINI. I think you have conducted yourself exceptionally well. It is not that I agree with everything you have said, but you have certainly, in my opinion, not dodged some very tough questions, and that is appreciated by this Senator very much.

Judge SOUTER. Thank you very much, sir.

Senator DECONCINI. Thank you, Mr. Chairman.

Senator THURMOND. Would the Senator from Arizona yield?

Senator DECONCINI. Yes.

Senator THURMOND. I just want to make this observation: In the *Missouri* case you referred to, the Court held that a judge does not have the power to impose taxes, but he could order officials to do that. That is a very disturbing decision. We have introduced a bill to reverse that decision. That is a legislative function. Whether taxes are put on or how much taxes or how much or for what purpose is not a judicial function, and we hope to reverse that decision, and so I just thought I would mention that to you.

Judge SOUTER. I appreciate that, sir. [Laughter.]

Senator DECONCINI. I could not quite say it that tactfully, Mr. Chairman.

The CHAIRMAN. It is amazing, Judge, how the degree to which people think you respond depends upon whether you answer questions, how you view capital punishment and not other things that are before the Court.

Also, Senator DeConcini had great credibility in his comments until he suggested that possibly you were tutored on the law by Senator Rudman. That is when we all began to have our doubts. [Laughter.]

Judge SOUTER. I think I can claim privilege on that, Mr. Chairman. [Laughter.]

The CHAIRMAN. What I would like to suggest is let us recess for 3 minutes, come back with Senator Specter's questioning, and during that 3-minute recess, maybe you and I can confer as to how long you would like to go before lunch.

We will recess now for 3 minutes, to give you a chance to stretch your legs.

Judge SOUTER. Thank you, sir.

[Short recess.]

The CHAIRMAN. The hearing will come to order.

Let me briefly describe the very brief discussion we had. What we will do is continue with two more rounds of questioning from the Senator from Pennsylvania and the Senator from Vermont, who will each question for a half hour. That will bring us roughly around 1 o'clock. We will then break until roughly 2 o'clock. Actually, it is probably going to be quarter after 1 and quarter after 2, and then what we will do is we will come back, starting with Senator Humphrey, our first questioner this afternoon of our witness, and we will proceed on until we finish the second round, at which time we will probably take a brief recess and then Senators who still have questions, and I know that there are a handful who still