Senator HATCH. Thank you. I just wanted to correct the record, and I want to thank the chairman and my two Republican colleagues who have deferred to me in this matter. I will go to the floor and get out of everybody's hair.

The CHAIRMAN. Thank you, Senator.

Senator HATCH. Thank you, Mr. Chairman.

The CHAIRMAN. Apparently the Senator from New Hampshire will be next. Senator Humphrey.

Senator HUMPHREY. Thank you, Mr. Chairman.

Good afternoon, Judge. One of the things that fascinates me about the law, Judge, is the consistency and the striving for consistency. That is admirable. However, when we uncover inconsistency, it can be very frustrating. I want to explore a couple of areas that I regard as inconsistencies and see what thoughts they provoke.

Judge Souter, is an unborn child capable of inheriting or owning an estate?

Judge SOUTER. Well, in the civil law, for example, the rule on future interest recognizes the possibility of inheritance by an unborn child who is born alive and able to take.

Senator HUMPHREY. But even during gestation, an unborn child may have an interest in an estate, may be left an estate, a legacy—is that not correct—even during gestation, and that interest can be protected under the law?

Judge SOUTER. With respect, that is an issue which is capable of varying from jurisdiction to jurisdiction, and I will be candid to say to you that I don't recall a specific decision on it in the law of New Hampshire, which is the jurisdiction I would be familiar with.

Senator HUMPHREY. But I think it is known—as you say, it is more than likely to be a substantial difference from State to State, but it is a fact that an unborn child may be left a legacy and that may be protected under the law. How do you reconcile the fact that an unborn child has the capacity which may be protected by law to inherit and own an estate or a legacy on the one hand, while under *Roe* v. *Wade* on the other hand the very same unborn child has no enforceable right to life?

Judge SOUTER. Senator, I really cannot take up the task of reconciling that. As I said a moment ago, I am not sufficiently familiar with the specific body of civil law that you refer to, and the only thing I can say, as you know, is that *Roe* v. *Wade* is discussing a constitutional issue. One of the elements in the equation to which it speaks is the right of the mother. And the kind of inconsistency that you pose is, in fact, in the terms in which you pose it, an apparent reflection of weighting different interests of differential potential parties. But, beyond that, there really isn't anything I can say about reconciling it.

Senator HUMPHREY. Well, again, these are in some measure rhetorical questions. I am hoping to advance the public dialog on this issue by means of these questions.

You talk about weighing the interests. What interests of the unborn child does *Roe* acknowledge?

Judge SOUTER. Well, Senator, I think with respect that it is necessary for me to take the same position in response to your question that I have in response to the questions from some of your col-

leagues; that a dissection of *Roe* v. *Wade* is simply a step, and a significant step, in the direction of an evaluation of that case which, in view of its likelihood in some form or another on the docket of the Supreme Court, if I were to be confirmed, is just a subject that I cannot discuss without giving misleading suggestions.

Senator HUMPHREY. We need to develop an abbreviated answer so that each time this situation arises you can just say whatever it is you choose to say in a few words, so we don't have to go through the long explanation. I understand where you are coming from, and I didn't expect an explicit answer on that. But, in fact, *Roe* v. *Wade* assigns no weight at all and no rights at all to the fetus.

Let me just read the core of *Roe*. The Court held that, "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." First 3 months, no State interference.

"For the stage subsequent to and approximately the end of the first trimester, the State, in promoting the interests and the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." Second trimester, no rights or interests assigned to the fetus.

Third trimester: "For the stage subsequent to viability"—after viability now. We are talking—if that is an important dividing point for some people. I don't think it is terribly important myself, but for some it is. "For the stage subsequent to viability, the State, in promoting its interests in the potentiality of human life"—whatever that is, a cute phrase—"may, if chooses"—"may, if it chooses, regulate and even proscribe abortion, except where necessary in appropriate medical judgment for the preservation of the life or health of the mother."

So in *Roe* the Court found that the fetus has no rights and no interests. It says the States may if they choose. May. But it leaves that matter entirely up to the States and finds nothing, apparently, under the 14th amendment or any other provision of the Constitution that needs to be brought to bear in the interest of the fetus. So that when we talk about weighing the interests of the mother and the fetus, there is no weighing in *Roe*. None. All of the rights and weight are assigned to the mother and nothing, zero, to the child. And here is why.

The majority in *Roe* recognized the importance of the personhood issue to the disposition of the *Roe* case. Quoting from the majority opinion, "If this position of personhood is established, the case for a right to abortion collapses, for the fetus' right to life is then guaranteed specifically by the amendment." Referring to the 14th, of course.

So the issue of personhood is all critical and all important in this controversy. The Court found—wrongly, in my opinion—that the fetus is not a person, even though the fetus may inherit and own property, a legacy, that it is not a person, has no right to have its life protected by the Constitution.

Let's look at another inconsistency. Judge Souter, is a corporation a person?

Judge SOUTER. Again, in the abstract, we really can't answer that question. We have to know exactly what the context is. We

know, for example, that in civil law corporations may be parties to litigation. We know that corporations can be defendants under the criminal law, and that probably is in your mind if you asked the question.

Senator HUMPHREY. Yes. Well, for over a hundred years, corporations have been considered formally persons in various Supreme Court decisions, the first of which was *Santa Clara County* v. *Southern Pacific Railroad Company* in 1886, which found that the corporation is a person for purposes of the equal protection clause. Then 3 years later, in *Minnesota and St. Louis Railway Company* v. *Beckwith,* the Supreme Court found that corporations are persons with respect to the due process clause.

So we have the incredible and the ironic and the tragic situation where corporations, which clearly are not human beings from the biological point of view, are found to be persons under the 14th amendment. But the offspring of human beings, which by any standard of science and biology are clearly human beings, are found by the Supreme Court in *Roe* not to be persons. Corporations are persons and may be protected under the 14th amendment, but human beings, even a day before birth, are not persons under the 14th amendment.

Now, if there was ever an inconsistency and a revolting inconsistency and a cruel inconsistency, and one that begs for correction, sir, that is it. You needn't respond to that.

Let's talk about the 14th amendment. Its origins are important, obviously, in the interpretation of the Constitution. Let me ask you this question, Judge Souter. I don't know that it has been clearly established yet. Do you consider yourself an interpretivist, or just what school do you claim?

Judge SOUTER. I regard myself as within the broad umbrella of interpretivism, and I have tried in response to a couple of questions to explain that the search that I am engaged on is a search for principle as opposed to specific intent when I approach a constitutional provision initially.

Senator HUMPHREY. Would you repeat that last part again, please?

Judge SOUTER. I said when I am approaching a constitutional provision, leaving aside entirely the question of precedent that may have accreted around it, what I am searching for is the meaning, which in most cases is a principle, intended to be established as opposed simply to the specific application that that particular provision was meant to have and that was in the minds of those who proposed and framed and adopted that provision in the first place.

Senator HUMPHREY. The principle that underlies the provision.

Judge SOUTER. Yes.

Senator HUMPHREY. That is your first resort.

The principal sponsor, the chief sponsor in the House of Representatives of the resolution to amend the Constitution which, upon ratification, became the 14th amendment, Congressman John Bingham, said with respect to the scope of the 14th amendment language that it was to include "any human being." Any human being. He didn't say anything about persons. He said "any human being."

And Senator Jacob Howard, the main Senate sponsor of the amendment, said the language should be applied to "even the humblest, poorest, and most despised of the human race."

These are things that no doubt you are going to be reviewing one day.

Friday, you and I had an exchange on the 14th amendment and whether it extends to every human being. And I asked what is the difference between a living human being and a person, and you said, "Without being more specific about the legal context, I don't know that there would be any point in drawing that kind of distinction."

Let me try to put it in a narrower context, then. With regard to the 14th amendment's protection of life, what is the difference between a living human being and a person?

Judge SOUTER. I think the only thing that can be said, Senator, is we know that one distinction is drawn in the language of the first section. Whereas privileges or immunities refers to citizens only, the other guarantees refer to persons. And the issue that must come up and I think the issue that is implicated by your concern is whether that concept of person extends, as you have put it, to an unborn child.

Senator HUMPHREY. Is an unborn child a human being?

Judge SOUTER. Well, Senator, again, I think that is the kind of definitional issue that can only be discussed in the specifics of the kind of litigation which I cannot get into this afternoon.

Senator HUMPHREY. It is hard to believe that the offspring of a human being can be anything other than a human being. I have never in my life seen such a strained effort to rule out of the human race by legalistic means a whole class of human beings. It is shocking. It is shocking. And it is shocking how far this dishonesty has been extended to the point where it has raised all kinds of inconsistencies in our law. It is undermining the respect for our law.

All of the rights and all of the weight have so far been assigned to the mother, and nothing whatever in the law protects the unborn child, even on the day prior to natural birth. It is pretty shocking.

Senator Grassley has raised with you what he and I and others regard as dangers raised by cases such as *Missouri* v. *Jenkins,* where the Court seemed to have declared that they have the power to order State and local governments to impose new taxes or to increase taxes. Do you see in that any violation of the separation of powers?

Judge SOUTER. The case involves, really, two separate concepts. It involves the concept of federalism, and as Justice Kennedy's opinion pointed out very explicitly, it involved the question of whether, given the separation of powers as we recognize it, the judicial power can be construed to include the order in question, the inevitable result of which was that State officials raise taxes, so there is no question there is such an issue in the case.

Senator HUMPHREY. You do not see a distinction, do you, between the courts somehow directly raising taxes, on the one hand, and on the other, causing them to be raised, ordering them to be raised?

Judge SOUTER. I think, again, that was a distinction which I know Justice Kennedy felt was a specious distinction.

Senator HUMPHREY. Yes.

Judge SOUTER. No doubt, of the case or its aftermath as the result of any congressional legislation is before the Court, that will be a distinct issue.

Senator HUMPHREY. I have not been present for the entirety of these hearings, but I do not recall so far hearing from you, Judge Souter, any substantial concern raised about judicial usurpation of the legislative powers. Have I missed anything in these several days?

Judge SOUTER. Well, we have had several discussions on the problems which focused on 14th amendment enforcement. I think that has probably been the subject of our discussion on the matter up to this point.

Senator HUMPHREY. On Friday, you had high praise for Justice Brennan. Do you have any problem with Justice Brennan's views on capital punishment? Do you see them as being consistent with the Constitution and precedent?

Judge SOUTER. I think as far as I can go on that subject is what I have indicated so far, that, of course, I recognize that, as a simple matter of the text, the Constitution of the United States recognizes capital punishment. Beyond that, given the fact that there will be capital punishment cases before the Court and I believe are on its docket now, I do not think I can go very far on a discussion, without getting into something that is going to be before the Court.

Senator HUMPHREY. But you do acknowledge that the Constitution comprehends, anticipated capital punishment?

Judge SOUTER. It does so by express preference.

Senator HUMPHREY. That is one point on which you and Justice Brennan very significantly disagree, it would seem.

Well, I would like to address this murky subject of privacy rights. Where do they begin and where do they end, and how do you know?

Judge SOUTER. Well, I think where they begin is in the several textural references in the Constitution to the assumption that there are some rights not expressly enumerated. As I said to you, my thinking on the subject goes back to the State constitutions which form a preface to the National Constitution of 1787, including our own, with its recognition of unenumerated liberty interests. It includes the express reservation in the ninth amendment.

As I said, I have found as a matter of our constitutional history that, given the other interpretations that have been placed or interpretations that have been placed on other sections of the provisions of section 1 of the 14th amendment, that the appropriate place to focus a question about the existence of a particular unenumerated right is with reference to the liberty clause of the 14th amendment or of the fifth amendment.

What we have to find, what we are looking for, when we raise a question as to whether a given right is protected as fundamental liberty, is the kind of question on which I said I preferred the approach of the late Mr. Justice Harlan above all others, and that is we are making a search on his approach into the principles that may be elucidated by the history and tradition of the United

States, and ultimately the kind of search that we are making is a search for the limits of governmental power, because it seems to me if there is one point that is clearly established by both State and National constitutional history, it is that the powers of the Government were not intended to be unlimited, that the grant of legislative power was intended to have limits, and those limits are reflected in the liberty concept.

Senator HUMPHREY. Regarding *Griswold*, and I am not arguing with the outcome, I just want to cite some of the language from the majority opinion: "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance." What do you think of that language?

Judge SOUTER. Well, as I said, I think the first time the subject came up, I would not adopt as a kind of personal view any of the particular opinions in the *Griswold* case. My preference was for Justice Harlan's approach, rather than the approach that Justice Douglas embodied in the opinion that most members of the Court joined in.

Senator HUMPHREY. I would just like to say that if you cannot ever find a better explanation than penumbras formed by emanations, maybe you ought to conclude that you ought to leave it to the legislative body to deal with it. I mean that is real rot gut. Penumbras formed by emanations, that is constitutional law? By gosh, that is an expression of some kind of philosopher king, it seems to me.

What objective external standards are there to guide Supreme Court Justices in the declaration of new privacy rights, Judge Souter?

Judge SOUTER. Well, Senator, let me say two things: In the search for a content to the concept of privacy, we are not really looking for something new, as opposed to something which the constitutions assumed. We are looking for the principle that was intended to be recognized.

The material on which we are going to base our conclusions is basically the corpus of material that we regard as reliable evidence about the understanding of the limits of State or, in appropriate cases, national power. Those limits in those materials include everything from things like Federalist Papers, debates, philosophical treatises of the times in question, which reflected a concept of limited power, and we certainly do not ignore the precedents of the Court that over the years have tried to treat with the subject.

Senator HUMPHREY. Is this an area that you would approach with caution? How would you characterize your approach to this area of constitutional interpretation?

Judge SOUTER. Well, I guess I would use the term "care." The sound is of profound importance, it is not something that we are going to approach by winging it. We have to recognize that what we are searching for is a meaning which is independent of our personal predilections, and we have to guard against reading our predilections in what we find. I do not know of any other way to say, except that we would use great care in that enterprise, as we would in any interpretive enterprise on anything as of profound

and ultimate political importance to us as the meaning of the Constitution.

Senator HUMPHREY. Do you suppose there are any more profound privacy rights lurking out there in the penumbra formed by emanations?

Judge SOUTER. Well, I am not going to—as I said, I do not necessarily adopt the penumbral emanation terminology in my approach to things, but there is no question that, over the course of the next decade or decades, the scope of privacy will be explored in Court decisions, but we do not know until we have done the exploration. We cannot sit here with kind of an easy theoretical premise which is going to give us answers.

Senator HUMPHREY. I do hope you will approach this with great caution and conservatism and leave to the legislative branch, the elected branches the primary responsibility for amending the Constitution.

Judge SOUTER. I appreciate that, sir.

Senator HUMPHREY. I have a few minutes left, so I want to explore one further area. You mentioned a moment ago the necessity of consulting contemporary treatises, speeches and so on. In the broader context of——

The CHAIRMAN. Excuse me, Senator.

Senator HUMPHREY. Yes.

The CHAIRMAN. Point of clarification. You say "contemporaneous" or "contemporary?"

Judge SOUTER. Contemporary.

Senator HUMPHREY. Which did I say?

The CHAIRMAN. No, you said it correctly. I just want to make sure——

Judge SOUTER. I think that is what I said. That is what I recall saying.

The CHAIRMAN. Yes. I was just asking. I was not challenging, I was just not certain. Thank you.

Senator HUMPHREY. Well, going back to the—the Constitution, of course, is contemporaneous with the Declaration of Independence, and the Federal Constitution is contemporaneous with the early State constitutions, all of which explicitly posited the belief in inherent rights.

If we are endowed by our creator with certain inherent rights, among which is the right to life, is it possible that we are endowed at birth or endowed by ability or endowed in the second trimester or the first or in some other nice convenient spot, or is it more logical, in your opinion, that we are endowed by our creator when we are created with such rights?

Judge SOUTER. Senator, I am afraid that I see that as really a question that cannot be answered, without throwing a suggestion on the *Roe* issue, and I will ask to pass on that.

Senator HUMPHREY. OK. One last question, I think I have time for one last question. Is the Declaration of Independence reduced only to Fourth of July rhetoric, or does it have some operative status with respect to interpreting the Constitution?

Judge SOUTER. The Declaration is certainly one of the sources that we look for meaning on disputed issues. Some of the language, as you know, that is contained in the National Declaration of Inde-

pendence is mirrored in our own State constitution, in its reference to rights which are not only inherent, but some of which are indeed inalienable.

Senator HUMPHREY. And when do they inhere?

Judge SOUTER. There again, Senator, I think you have passed that point with me.

Senator HUMPHREY. Well, they are not inalienable, in the eyes of the Supreme Court, with respect to unborn human beings, that is clear.

Thank you, Mr. Chairman.

Judge SOUTER. Thank you, Senator.

The CHAIRMAN. Thank you.

Before I yield, another point of clarification, if I may. If I remember from law school about decedent estates—and there is very little I remember from law school, with good reason, I might add. [Laughter.]

There can be vested rights in a child that is not even a glimmer in the eyes of his mother or father. In other words, there can be a vested right in a decedent who has not even reached the status, by anyone's definition, of being a fetus. Is that not correct?

Judge SOUTER. Well, I was referring to the rule that an unborn child may take a contingent remainder, if the child is born alive. That is what I was referring to.

The CHAIRMAN. But by "unborn child," just so we——

Senator LEAHY. I am sorry, I missed part of that last answer. I wonder if the Judge would repeat it.

Judge SOUTER. That an unborn child, a child who was unborn at the time a prior interest terminates may nonetheless take a remainder interest, if the child is born alive.

The CHAIRMAN. The point I am making is that the child unborn does not necessarily refer to a child who is, arguably from the position of the Senator from New Hampshire, that is in the mother's womb. There may not even have been a—how can I say it—a child may not even have been anything other than a thought in the mind of a parent at the time the right vests, if born alive, is that not correct?

Judge SOUTER. Well, on the rule that I was referring to, the child must be born alive in order to ultimately take the remainder, and the question is the remainder will simply remain in abeyance until the law find whether a child comes along.

The CHAIRMAN. The child comes along somewhere, some day.

Judge SOUTER. That is right.

The CHAIRMAN. That is right, but it does not relate to whether or not, in the law, whether or not there is a fetus, it relates to whether or not there is ultimately a child, correct?

Judge SOUTER. Yes, sir.

The CHAIRMAN. Thank you. I just want to make sure I understood that.

The Senator from Alabama, Senator Heflin.

Senator HEFLIN. Judge, I am going to try to ask you some questions about issues that have not been raised. I think we duplicated enough of some of the issues and there have been a lot of efforts, directly and indirectly, flanking, collaterally and every other way, to get you to a point and you are pretty good on just not answering