priately reveal to us and the Nation your constitutional philosophy within the limitations you think you are bound by.

So to clear it up, to state it again, any member can ask anything. You don't have to answer if you think it is inconsistent with what your responsibilities are.

Judge SOUTER. I appreciate that. Thank you.

The CHAIRMAN. Now, Judge, let me begin. You said in your statement, you used the phrase "the promises of our Constitution." That is the phrase you used, and that is really what I want to discuss with you—the promises of our Constitution. What does it promise? Because there are very, very different views held by very bright women and men, all experts in the law, many incredibly well informed, who have very different visions of what the promises of our Constitution are.

Judge, it comes as no surprise to you, as I discussed with you a little bit yesterday, there is nothing intended that I am about to ask you that is designed as a surprise, so much to the extent that I think you were probably surprised yesterday when I told you what I was going to ask you.

Judge SOUTER. I was a little bit.

The CHAIRMAN. And it will not surprise any of the press I see out there because it is something I care deeply about, and they are probably tired of hearing me talk about it, but I am going to continue to talk about it. And as, Judge Souter, a close friend of yours, and I consider him, quite frankly, a close friend of mine, my colleague Warren Rudman, has said—he has said many things, but he has said that Supreme Court——

Judge SOUTER. You should have been staying with him for the last 10 days. [Laughter.]

The CHAIRMAN. No, we each have our own jobs. That is your job, not my job.

Judge SOUTER. I realize that.

Senator HATCH. We live with him every day, let me tell you. [Laughter.]

The CHAIRMAN. But he has indicated that one of the Supreme Court Justices you most admire was the second Justice Harlan, who served on the Supreme Court between 1955 and 1971, and who was widely regarded, is widely regarded as one of the great conservative Justices ever to serve on the Court.

Now, Justice Harlan concurred in the Court's landmark decision of *Griswold*. That is the Connecticut case that said that the State of Connecticut, the legislature and the Governor couldn't pass a law that—constitutionally—said that married couples could not use birth control devices to determine whether or not they wished to procreate.

Justice Harlan indicated that that Connecticut law violated the due process clause of the 14th amendment which says that no State can deprive any person of life, liberty, or property without process of law.

Now, my question is this, Judge: Do you agree with Justice Harlan's opinion in *Griswold* that the due process clause of the 14th amendment protects a right of a married couple to use birth control to decide whether or not to have a child?

Judge SOUTER. I believe that the due process clause of the 14th amendment does recognize and does protect an unenumerated right of privacy. The——

The CHAIRMAN. And that—please continue. I didn't mean to interrupt. I like what you are saying.

Judge SOUTER. The only reservation I have is a purely formal reservation in response to your question, and that simply is: No two judges, I am sure, will ever write an opinion the same way, even if they share the same principles. And I would not go so far as to say every word in Justice Harlan's opinion is something that I would adopt. And I think for reasons that we all appreciate, I would not think that it was appropriate to express a specific opinion on the exact result in *Griswold,* for the simple reason that as clearly as I will try to describe my views on the right of privacy, we know that the reasoning of the Court in *Griswold,* including opinions beyond those of Justice Harlan, are taken as obviously a predicate toward the one case which has been on everyone's mind and on everyone's lips since the moment of my nomination—*Roe* v. *Wade,* upon which the wisdom or the appropriate future of which it would be inappropriate for me to comment.

But I understand from your question, and I think it is unmistakable, that what you were concerned about is the principal basis for deriving a right of privacy, and specifically the kind of reasoning that I would go through to do so. And in response to that question, yes, I would group myself in Justice Harlan's category.

The CHAIRMAN. Well, Judge, let me make it clear, I am not asking you about how you would decide or what you even think about *Roe* v. *Wade.*

Judge SOUTER. I understand that.

The CHAIRMAN. Now, in the *Griswold* case, I am curious what proposition you think it stands for. Do you believe it is a case in a long line of cases, establishing an unenumerated right to privacy, a right the Constitution protects, even though it is not specifically mentioned in the document?

Judge SOUTER. I think probably it would be fairest to say that it is a case in a confused line of cases and it is a case which, again referring to the approach that Justice Harlan took, it is a case which to me represents at least the beginnings of the modern effort to try to articulate an enforceable doctrine.

My own personal approach to that derivation begins with, I suppose, the most elementary propositions about constitutional government, but I do not know of any other way to begin. I am mindful not only of the national Constitution of 1787, but of the history of State constitution-making in that same decade.

If there is one generalization that we can clearly make, it is the generalization about the intended limitation on the scope of governmental power. When we think of the example of the national Constitution, I think truly we are at the point in our history when every schoolchild does know that the reason there was no Bill of Rights attached to the draft submitted to the States in the first instance after the convention recessed, was the view that the limitations on the power to be given to the National Government was so clearly circumscribed, that no one really needed to worry about the possible power of the National Government to invade what we

today group under the canon of civil liberties, and we know the history of that response.

We know that there were States like my own which were willing to ratify, but were willing to ratify only on the basis of requesting that the first order of business of the new Congress would be to propose a Bill of Rights in New Hampshire, like other States, who was not bashful about saying would not be in it.

The CHAIRMAN. Did you wish to continue?

Judge SOUTER. If I may. This attitude did not sort of spring up without some antecedent in 1787. I am not an expert on the constitutions of all of the original States, but I do know something about my own.

One of the remarkable things about the New Hampshire Constitution, which began its life at the beginning of that same decade, is the fact that it began with an extraordinarily jealous regard for civil rights, for human rights. The New Hampshire Constitution did not simply jump in and establish a form of government. They did not get to the form of government until they had gotten to the Bill of Rights first.

They couched that Bill of Rights with an extraordinary breadth and a breadth which, for people concerned with principles of interpretation, requires great care in the reading. But the New Hampshire constitutionalists of 1780 and 1784 were equally concerned to protect a concept of liberty, so-called, which they did not more precisely define.

So, it seems to me that the starting point for anyone who reads the Constitution seriously is that there is a concept of limited governmental power which is not simply to be identified with the enumeration of those specific rights or specifically defined rights that were later embodied in the bill.

If there were any further evidence needed for this, of course, we can start with the ninth amendment. I realize how the ninth amendment has bedeviled scholars, and I wish I had something novel to contribute to the jurisprudence on it this afternoon, which I do not.

The CHAIRMAN. It is novel that you acknowledge it, based on our past hearings in this committee. [Laughter.]

One of the last nominees said it was nothing but a waterblot on the Constitution, which I found fascinating. At any rate, go ahead.

Judge SOUTER. Well, I think it is two things—maybe it is more. I have no reason to question the scholarship which has interpreted one intent of the ninth amendment as simply being the protection or the preservation of the State bills of rights which preceded it.

Neither, quite frankly, do I find a basis for doubting that, with respect to the national bill of rights, it was something other than what it purported to be, and that was an acknowledgment that the enumeration was not intended to be in some sense exhaustive and in derogation of other rights retained.

The CHAIRMAN. Is that the school to which you would count yourself a graduate?

Judge SOUTER. I have to count myself a member of that school, because, in any interpretive enterprise, I have to start with the text and I do not have a basis for doubting that somewhat obvious and straightforward meaning of the text.

The CHAIRMAN. Let me ask you another question here, and I realize this is somewhat pedantic, but it is important for me to understand the foundation from which you build here.

You have made several references appropriately to the Bill of Rights and the Federal Government. Do you have any disagreement with the incorporation doctrine that was adopted some 70 years ago applying the Bill of Rights to the States? Do you have any argument with that proposition?

Judge SOUTER. No; my argument with the incorporation doctrine would be with the proposition that that was meant to exhaust the meaning of enforceable liberty. That, in point of fact, as you know, I mean that was Justice Harlan's concern.

The next really—I mean that brings to the fore sort of the next chapter in American constitutional history that bears on what we are talking about, because one cannot talk about the privacy doctrine today, without talking about the 14th amendment.

The CHAIRMAN. Judge, I am truly interested in us going back through in an orderly fashion the evolution of constitutional doctrine, but as my colleague sitting behind you will tell you, I only have a half hour to talk to you and I want to ask you a few more specific questions, if I may.

The 14th amendment, as you know, was designed explicitly to apply to the States. Speaking to the liberty clause of the 14th amendment, Justice Harlan said:

> The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution,

Which is totally consistent with what you have been saying thus far.

Judge SOUTER. Yes.

The CHAIRMAN. Now, do you agree with Justice Harlan that the reference to liberty in the 5th and 14th amendments provide a basis for certain—not all, but certain—unenumerated rights, rights that the Constitution protects, even though they are not specifically enumerated within the Constitution?

Judge SOUTER. I think the concept of liberty as enforceable under the due process clause is, in fact, the means by which we enforce those rights. It is sterile, I think, to go into this particular chapter of constitutional history now, but you will recall that Justice Black was a champion at one point of the view that the real point of the fourth amendment, which was intended to apply unenumerated substantive rights, was the privileges of immunities clause, and not due process. Well, as a practical matter, that was read out of the possibility of American constitutionalism, at least for its time, and it has remained so by the slaughterhouse cases.

What is left, for those who were concerned to enforce the unenumerated concepts of liberty was the liberty clause and due process, and by a parity of reasoning by the search for coherence in constitutional doctrine, we would look to the same place and the same analysis in the fifth amendment when we are talking about the National Government.

The CHAIRMAN. Now, let us follow on. We recognize, you recognize, you have stated that *Griswold* and the various means of rea-

soning to arrive at the conclusion that there was a constitutionally protected right of a married couple to determine whether or not to procreate, to use birth control or not, is a constitutionally sound decision.

Now, shortly thereafter there was a similar case in Massachusetts, although in this case it did not apply to married couples, there was a Massachusetts statute, in the *Eisenstadt* case, that said unmarried couples, and the rationale was that there is reason to not be out there allowing unmarried couples to buy birth control, because it would encourage sexual promiscuity, and the Supreme Court struck that down, as well, saying that it violated a right to privacy, having found once again, most Justices ruled that way, in the 14th amendment.

Now, do you agree that that decision was rightly decided?

Judge SOUTER. Well, my recollection—and I did not reread *Eisenstadt* before coming in here, so I hope my recollection is not faulty, but my recollection is that *Eisenstadt* represented a different approach, because the reliance on the Court there was on equal protection. I know that my recollection is——

The CHAIRMAN. Yes, the——

Judge SOUTER. I am sorry.

The CHAIRMAN. Go ahead. I am sorry.

Judge SOUTER. My recollection is that the criticism of *Eisenstadt* at the time was whether the Supreme Court was, in fact, reaching rather far to make the equal protection argument. But I think there is one point that is undeniable, without specifically affirming or denying the wisdom of *Eisenstadt,* and that is there is going to be an equal protection implication from whatever bedrock start privacy is derived under the concept of due process, and I think that then leads us back to the essentially difficult point of interpretation, and that is how do you go through the interpretive process to find that content which is legitimate as a concept of due process.

The CHAIRMAN. Also, to what extent you find it legitimate. Is it a fundamental right, or is it an ordinary right? In the case of *Griswold,* in the *Griswold* case, it was discerned and decided that there was a fundamental right to privacy relating to the right of married couples to use contraceptive devices. Do you believe they were correct in that judgment, that there is a fundamental right?

Judge SOUTER. I think the way, again, I would express it without getting myself into the position of endorsing the specifics of the cases, is that I believe on reliable interpretive principles there is certainly, to begin with, a core of privacy which is identified as marital privacy, and I believe it can and should be regarded as fundamental.

I think what we also have to recognize is that the notion of protected privacy, which may be enforceable under the 14th amendment, has a great potential breadth and not every aspect of it may rise to a fundamental level.

The CHAIRMAN. I agree. That is why I am asking you the question, because as you know as well as I do, if the Court concludes that there is a fundamental right, then for a State to take action that would extinguish that right, they must have, as we lawyers call, it is required they look at it through the prism of strict scrutiny. Another way of saying it, for laymen, is that they must have a

pretty darn good reason. If it is not a fundamental right and it is an ordinary right, they can use a much lower standard to determine whether the State had a good enough reason to preempt that right.

So, as we talk about this line of cases, in *Griswold* and in *Eisenstadt*—let me skip, in *Moore* v. *East Cleveland,* where the Court ruled, extending this principle of privacy from the question of procreation, contraception and procreation, to the definition of a family. As you know, East Cleveland had an ordinance defining a family that did not include a grandmother and grandson, and so East Cleveland, under that ordinance, said that a grandmother and her two grandchildren could be evicted from a particular area in which they lived, because they were not a family, as defined by the local municipality in zoning ordinance.

Now, the Court came along there and it made a very basic judgment. It said—if I can find my note, which I cannot find right now, and I think it is important to get the exact language, if I can find it—I just found it. [Laughter.]

Justice Powell said, "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the 14th amendment."

Now, my question, Judge, is do you believe that that assertion by Justice Powell is accurate?

Judge SOUTER. I think that assertion by Justice Powell represents a legitimate judgment in these kinds of problems with respect to *Moore* just as in the discussion with *Griswold.* I am going to ask you to excuse me from specifically endorsing the particular result, because I recognize the implications from any challenge that may come from the other privacy case that is on everyone's mind.

But the one thing that I want to make very clear is that my concept of an enforceable marital right of privacy would give it fundamental importance. What the courts are doing in all of these cases is saying—although we speak of tiers of scrutiny—what the courts are saying, it seems to me in a basically straightforward way—is that there is no way to escape a valuation of the significance of the particular manifestation to privacy that we are concerned with, and having given it a value we, indeed, have to hold the State to an equally appropriate or commensurate reason before it interferes with that value.

The CHAIRMAN. That is exactly what I am trying to find out in your answering. So the valuation applied to a definition of family, is fundamental. The valuation applied to whether a married couple can use contraception is fundamental. The valuation applied to whether or not an unmarried couple can use contraception is fundamental.

Now, I would like to ask you, as I move along here, as you look at this line of cases we have mentioned—and I will not bother to go through a couple of others that I have anticipated—is my time up? I saw the light go off and I thought my time was about up and the one thing these fellows are not likely to forgive me for—they will forgive me for a lot of things but not for going over my time.

That when it comes to personal freedom of choice, as Justice Powell put it, in family and in marriage, one basic aspect of that freedom is the right to procreate. Now, early in the 1940's, in the

Skinner case, the Supreme Court said that criminals could not be sterilized. The Court made it very clear and it said, "Marriage and procreation are fundamental" and that sterilization affected "one of the basic civil rights of man."

I assume that some of the civil rights that you are referring to that those who wrote the New Hampshire Constitution referred to.

Do you agree that procreation is a fundamental right?

Judge SOUTER. I would assume that if we are going to have any core concept of marital privacy, that would certainly have to rank at its fundamental heart.

The CHAIRMAN. Now, the reason I am pursuing this is not merely for the reason you think, I suspect. It is because you have been categorized as—I believe you have described yourself as an interpretivist.

Judge SOUTER. I did and I have, yes.

The CHAIRMAN. You have begun—and I thank you for it—you have begun to flesh out for me on which part of the spectrum of the interpretivists you find yourself.

Let me, in the interest of time, move on here. I am trying to skip by here.

Let me ask you this, Judge. The value that the Court places on certain alleged, by many, privacy rights will dictate, as we said earlier, the burden placed upon a State in the circumstance when they wish to extinguish that right, or impact on that right.

Judge SOUTER. Yes, sir.

The CHAIRMAN. Now, you have just told us that the right to use birth control, to decide whether or not to become pregnant is one of those fundamental rights—the value placed on it is fundamental.

Now, let us say that a woman and/or her mate uses such a birth control device and it fails. Does she still have a constitutional right to choose not to become pregnant?

Judge SOUTER. Senator, that is the point at which I will have to exercise the prerogative which you were good to speak of explicitly. I think for me to start answering that question, in effect, is for me to start discussing the concept of *Roe* v. *Wade*. I would be glad—I do not think I have to do so for you—but I would be glad to explain in some detail my reasons for believing that I cannot do so, but of course, they focus on the fact that ultimately the question which you are posing is a question which is implicated by any possibility of the examination of *Roe* v. *Wade*. That, as we all know, is not only a possibility, but a likelihood that the Court may be asked to do it.

The CHAIRMAN. Judge, let me respectfully suggest the following to you: That to ask you what principles you would employ does not, in any way, tell me how you would rule on a specific fact situation.

For example, all eight Justices, whom you will be joining, all eight of them have found there to be a liberty interest that a woman retains after being pregnant. That goes all the way from Justice Brennan—who is no longer on the Court—who reached one conclusion from having found that liberty interest, to Justice Scalia who finds a liberty interest and yet, nonetheless says, explicitly he would like to see *Roe* v. *Wade*, he thinks *Roe* v. *Wade* should be overruled.

So the mere fact that you answer the question whether or not a woman's liberty interest, a woman's right to terminate pregnancy exists or does not exist, in no way tells me or anyone else within our earshot how you would possibly rule on *Roe* v. *Wade*.

Judge SOUTER. I think to explain my position, I think it is important to bear in mind there are really two things that judges may or may not be meaning when they say there is a liberty interest to do thus and so, whatever it may be. They may mean simply that in the whole range of human interests and activities the particular action that you are referring to is one which falls within a broad concept of liberty. If liberty means what it is, we can do if we want to do it. Then obviously in that sense of your question, the answer is, yes.

The CHAIRMAN. It is more precise, Judge, than that. I mean liberty interest has a constitutional connotation that most lawyers and all justices have ascribed to it in varying degrees. For example, Justices Blackmun, Brennan, Marshall, and Stevens, they have said a woman has a strong liberty interest, although Justice Stevens has phrased it slightly differently. Justice O'Connor has made it clear that she believes a woman has some liberty interest. Even Justices Rehnquist, White, Kennedy, and Scalia, all of whom criticized the Court's rulings in this area have said that a woman has at least some liberty interest in choosing not to remain pregnant.

Now, each of these Court members has acknowledged what we lawyers call a liberty interest after conception. So my question to you is, is there a liberty interest retained by a woman after conception?

Judge SOUTER. I think, Senator, again, we have got to be careful about the sense of the liberty interest. There is the very broad sense of the term which I referred to before and then there is the sense of an enforceable liberty interest. That is to say, one which is enforceable against the State, based upon a valuation that it is fundamental. It seems to me that that is the question which is part of the analysis, of course, upon which *Roe* v. *Wade* rests.

The CHAIRMAN. Well, all liberty interests have following all liberty interest is a right. The question is, how deeply held and rooted that right is; and what action the State must take and how serious that action must be—the rationale for that action—to overcome that interest?

But once we acknowledge there is a liberty interest, there is a right.

Judge SOUTER. But what—I am sorry.

The CHAIRMAN. So I am not asking you to tell me—I am just told my time is up—I am not asking you to tell me what burden of proof the State must show in order to overcome that. I am asking you is there a liberty interest and your answer is what, yes, or no?

Judge SOUTER. My answer is that the most that I can legitimately say is that in the spectrum of possible protection that would rank as an interest to be asserted under liberty, but how that interest should be evaluated, and the weight that should be given to it in determining whether there is in any or all circumstances a sufficiently countervailing governmental interest is a question with respect, I cannot answer.

The CHAIRMAN. With all due respect, I have not asked it.