

which permit, like the *Patterson* case does, continued discrimination in employment, people are going to be affected, lives are going to be affected, families are going to be blighted, and that is taking place today. It is taking place today, and I was hoping that perhaps you would express some kind of concern about those that, as a result of some of these decisions or rulings, are going to have their lives affected in one of the cruelest aspects of life's experiences, and that is discrimination.

May I have the benefit of the Chair for just one final area that I would like to go into, as a member of the committee. You have been extraordinarily patient with all of the members here, Judge, and I for one certainly appreciate it.

In response to a question of Senator Leahy, just at the end of the morning, about what would happen if *Roe v. Wade* is overruled, you replied that the States would take up the issue in their legislature. Basically, your reply was an answer in terms of what the States would do.

I would like to ask another question: What would women do? What is your sense of what the impact of this would be on women in this country?

Judge SOUTER. I think, as I understand your question, you are asking can anything but a free choice system, in fact, be enforced, a right to choose is anything but a right to choose system, as a practical matter, enforceable in this country, and the fact is I do not know the extent of its enforceability, but I recognize the problem that you raise by your suggestion.

Senator KENNEDY. Well, the problem, I suppose, would be for women in this country that did not have the resources to go to another country or to go to another State, would be left with this heart-rending decision about whether to carry to term or, in this case, violate the law in their State and risk, in a very important and significant way, their own lives.

I was just interested in what kind of gut reaction you have to that kind of dilemma that would face women, if this decision was altered, or if it was so shaped or trimmed so effectively, that it was just sort of a shell left out there, without real kind of meaning.

Judge SOUTER. I do not suppose, Senator, that there is any more moving example of the application of what I did try to say the other day, that whatever the Court does, someone's lives, and indeed thousands of lives, will be affected, and that fact must be appreciated.

Senator KENNEDY. No further questions, Mr. Chairman.

Thank you very much, Judge.

Judge SOUTER. Thank you, Sir.

The CHAIRMAN. Senator Hatch?

Senator HATCH. I will only take a second. I just want to say to you that I think you have outlined pretty carefully your standards of statutory construction. You know, with regard to some of the points that Senator Kennedy was making, yes, the administration, myself and a whole raft of others, were for the overrule of the *Patterson v. McLean* case.

On the other hand, you know, back to *Grove City*, when *Grove City* was decided, it decided that title IX did not apply institution-wide, because they actually read the actual language of the statute

and the statute was clear as a bell on that issue. The Supreme Court decided it the way we wrote it up here, which is the way I think the Supreme Court has to decide issues.

It was not two hours after the Supreme Court decided that, that we had discussions with the White House, suggesting that we really ought to apply title IX institution-wide, and President Reagan agreed and said, you bet, it ought to apply institution-wide. So, it was necessary, because the Court ruled properly on the actual precise language of the statute that we passed up here, well-intentioned and well-meaning and some thought applied institution-wide, but the language was just as clear as a bell.

It became necessary for us to pass another statute. Now some of us up here would like the Supreme Court to just do those corrections for us. If you think it should apply institution-wide, regardless of what the statute says, you apply it. You just actively make a new ruling from the bench and just redo the statute right from the bench.

Now, unfortunately, that isn't the way the Supreme Court should act. If we're going to pass stupid statutes that aren't written properly, I think you have got to construe those statutes in accordance with what we've passed, and if you don't do that, where is the law? How can you have any definiteness in law?

So all the criticism of the Supreme Court, I think, was misplaced. It should have been criticism of the Congress. By the way even though Reagan and myself and a whole raft of others said, yes, we should apply title IX institution-wide, there should be no sex discrimination against women anywhere, we could have done that in 10 seconds on the floor. Both Houses would have passed it. It would have been through.

We wouldn't have had to have all this anguishing about the Supreme Court missing what the statute said. They came up with a big Civil Rights Restoration Act of 1984. It went way beyond anything that was contemplated in title IX. Consequently, that was fought and it was stopped.

When it was rebrought up in 1988, 4 years later, it was a considerably different statute because most of the principles that were thought to be changed in the statute in 1984 had been changed in 1988.

That is what the legislative process is all about. It is that you don't just buy whatever anybody comes up with, but you, as a Supreme Court Justice—I don't think you have the right to just rewrite the statute because some of our people up here of the more liberal persuasion love to see that done, especially when it is rewritten in a liberal way, which has been the case for most of the last 50 years.

I think we have got to understand here that the Supreme Court is limited. If it wants to have consistency in the law, the Supreme Court is going to have to apply the law as written by these wonderful elected people up here on Capitol Hill who sometimes foul it up so badly that I am sure that you, as a Supreme Court Justice, will want to rewrite it in an activist way. I am also equally sure, or at least feel equally sure that you are going to not do that. You are going to look at the statute and try to interpret it the way we in-

tended it when we wrote it, and frankly, in accordance with the actual language of the statute.

It is nice to complain about the *Patterson* case, but nobody disagrees. It goes back to *Runyon v. McCrary* and that whole set of cases. Administration agreed to overrule *Patterson* right away. We are still in a tremendous lock-jaw battle over the so-called Civil Rights Act of 1990 because some believe that the *Ward's Cove* case overruled the sacrosanct *Griggs v. Duke Power* case. Even though they said we just want to go back to the *Griggs* ruling, when we offered the exact *Griggs* language to them, it was not good enough. They wanted to go beyond it. It was another chance to use a civil rights bill to go far beyond what they originally said they wanted to do, you see, and overrule not only *Ward's Cove* but *Griggs* too.

Frankly, I don't think that there was a Justice on that Court that thought they were doing anything but complementing *Griggs* and extending the rule of *Griggs*. Now, whether that is so or not, that's the way it looks to me.

So you are going to have lots of these problems when you become a member of the Supreme Court. I suggest to you that if your rule of statutory construction is to do what your gut tells you to do, rather than what that language says, to ignore what Congress really said, then I think you are going to be a lousy Supreme Court Justice. There will be no definiteness about the law, and there will be no real way of knowing where we are going with regard to American jurisprudence.

Frankly, that has been the problem over much of the last 35 years, maybe as long as 50 years. We have activist judges doing whatever they feel ought to be done rather than what the language says.

Now, one of the things that impresses me so much about you, Judge Souter, is that you have a heart. You are willing to listen. You'll find some innovative ways of seeing that things are done right, and maybe there are some legitimate innovative ways that *Patterson v. McLean* could have been overruled by the Supreme Court, not decided to begin with, but the fact of the matter is I believe you will apply the law as written. If Congress makes a mistake and Congress doesn't do what is right, Congress will have to take the responsibility for it and not bank on the Supreme Court rewriting the statute so that Congress is off the hook.

We are going to have to go through the battles that we did on the Civil Rights Restoration Act that took 4 years until we finally got the bill which was considerably different from what I considered to be a reprehensible bill filed back in 1984, and what many people today look back and say really was an overreach.

Now, we are going through that right now in the so-called Civil Rights Act of 1990, a tremendous overreach. Everybody knows it, but it has got the term "civil rights" on it and therefore a lot of people just roll over and say, I'm just not going to be against the civil rights bill even if it really isn't right.

Now, I have been impressed—and I don't want to take any more time because I think you have been here long enough and you have gone through enough pain here. You have answered the questions forthrightly. You have answered them intelligently, intellectually, in a very, very forthright and good way.

I think you have impressed everybody up here, regardless of what our different ideological viewpoints may be. I want to tell you that I believe you are going to make a great Justice of the U.S. Supreme Court. I believe the reason you are is because you are not going to substitute your own notions of what you think the law ought to be for what it really is and for what the elected representatives have put on the books. I think that is going to be a very, very good thing even though both sides up here make tremendous mistakes in legislative enactments.

I just want to wish you the very best and tell you that I very greatly respect the testimony that you have given over these last 3 days. You deserve the respect of everybody in America, and I wish you well on that Supreme Court and I believe that we shouldn't drag this out any longer. We ought to get you on there so that you can sit on the first Monday in October and start participating in a way that I think everybody will be pleased with.

Judge SOUTER. Thank you, sir.

The CHAIRMAN. Judge, as you have just learned, one man's innovative ways is strict construction and another man's application of innovative ways is judiciary running rampant. I think you have found that out by talking to us all up here. Judicial activism is in the eye of the beholder. That seems to me—as the Senator from Utah just pointed out, he knows you will be innovative and if you are innovatively conservative you will be a strict constructionist.

Senator HATCH. We will certainly be pleased. [Laughter.]

The CHAIRMAN. If you are innovatively liberal, you will be running rampant and the flip will be reversed. But anyway—

Senator HATCH. Mr. Chairman, can I just say one other thing?

The CHAIRMAN. Sure.

Senator HATCH. I would like to just personally express my appreciation to the chairman. I think—not for his recent comments, because that is really wrong. [Laughter.]

But I would like to express appreciation to him and his staff because I think they have, thus far, run very fair and open hearings here and I think the hearings have run very smoothly because of the chairman and the approach that he has taken. I want to personally be on record as expressing appreciation to him for the leadership he has provided here. I certainly have enjoyed being here.

The CHAIRMAN. That's very gracious.

Senator THURMOND. We are not through yet.

Senator HATCH. No, but that may be the last time I get to say it.

The CHAIRMAN. I appreciate it very much, and the Senator from South Carolina will agree with that or disagree with it based on whether I vote for you or against you. [Laughter.]

The Senator from Vermont, do you have any further questions?

Senator LEAHY. I do have a couple, Mr. Chairman, and I also will concur in the facts. You have run the hearings very fairly and evenly, and you might say when Senator Hatch announced earlier that he was only going to give you a 1-minute lecture, don't feel, Judge, you got the whole load. I suspect that Senator Hatch was directing that lecture as much to some of his 99 colleagues in the Senate as he was to current or potential members of the U.S. Supreme Court.