May I have your views on this very important principle? I am sure you are familiar with the Justice's observation on stare decisis.

Judge O'CONNOR. Yes, I am, Senator Laxalt.

Senator LAXALT. May I have your views.

Judge O'CONNOR. Stare decisis of course is a crucial question with respect to any discussion of the Supreme Court and its work. I think most people would agree that stability of the law and predictability of the law are vitally important concepts.

Justice Cordozo pointed out the chaos that would result if we decided every case on a case-by-case basis without regard to precedent. It would make administration of justice virtually impossible. Therefore, it plays a very significant role in our legal system.

We are guided, indeed, at the Supreme Court level and in other courts by the concept that we will follow previously decided cases which are in point. Now at the level of the Supreme Court where we are dealing with a matter of constitutional law as opposed to a matter of interpretation of a congressional statute, there has been some suggestion made that the role of stare decisis is a little bit different in the sense that if the Court is deciding a case concerning the interpretation, for example, of a congressional act and the Court renders a decision, and if Congress feels that decision was wrong, then Congress itself can enact further amendments to make adjustments. Therefore, we are not without remedies in that situation.

Whereas, if what the Court decided is a matter of constitutional interpretation and that is the last word, then the only remedy, as you have already indicated, is either for an amendment to the Constitution to be offered or for the Court itself to either distinguish its holdings or somehow change them.

We have seen this process occur throughout the Court's history. There are instances in which the Justices of the Supreme Court have decided after examining a problem or a given situation that their previous decision or the previous decisions of the Court in that particular matter were based on faulty reasoning or faulty analysis or otherwise a flawed interpretation of the law. In that instance they have the power, and indeed the obligation if they so believe, to overturn that previous decision and issue a decision that they feel correctly reflects the appropriate constitutional interpretation.

What I am saying in effect is, it is not cast in stone but it is very important.

Senator LAXALT. It is still a highly persuasive consideration as a matter of principle.

Judge O'CONNOR. Very.

Senator LAXALT. That is all I have for now, Judge. Thank you very much.

Mr. Chairman, I waive the balance of my time, whatever it is.

The CHAIRMAN. Thank you very much.

Senator Byrd is next. I do not believe he is here.

Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman.

Judge O'Connor, I have appreciated the answers you have given here today. I think you have acquitted yourself very well up until

now. I fully expect that you will do so not only the remainder of these hearings, but also as a Justice of the U.S. Supreme Court.

Let me just ask one question following up on Senator Laxalt's questioning. I think he asked some very intelligent questions pertaining to judicial philosophy and some of your beliefs.

To pursue his question briefly, how should judges resolve conflicts between precedent or stare decisis and what they perceive to be the intent of the framers of the Constitution?

Judge O'CONNOR. These are very difficult issues for the Court. Obviously the Constitution is the basic document to which the Justices must refer in rendering decisions on constitutional law. In analyzing a question the intent of the framers of that document is vitally important.

Now what does one do as a Justice on that Court faced with a situation in which the Supreme Court itself previously has determined that the Constitution in a given area means a certain thing and that was the intent of the framers and that is the holding of the Court; yet a subsequent Justice believes that interpretation was erroneous and, indeed, that was not the intent of the framers at all but something else was intended? What does that Justice do?

I think we have an example of that kind of situation in the *Brown* v. *Board of Education* case where the then-sitting Justices in 1954 became persuaded that their brethren years previously when *Plushy* v. *Fergusen* and its progeny were decided had incorrectly interpreted the 14th amendment and the intent of the framers of the 14th amendment. They cast their vote and decision to alter that interpretation.

Therefore, it can occur and that is the process that unfolds, although I am sure that in each instance it is a very significant thing for a Justice to overturn precedent, particularly that of long standing.

Senator HATCH. In his famous dissent in *Plushy* v. *Fergusen,* which you mentioned, in 1893 Justice Harlan referred to our Constitution as a colorblind constitution. Would you agree with this characterization?

Judge O'CONNOR. I am aware that Justice Harlan has taken that view, and several other Justices have likewise so characterized it.

On the other hand, we have decisions outstanding of course in the affirmative action area which would indicate that it is not in the view of at least some of the decisions a purely colorblind decision, but that indeed some form of affirmative action is possible in certain areas. Therefore, it is difficult for me to characterize what the Court has done in that respect. I think in some areas it has not applied Justice Harlan's view at this point anyway.

Senator HATCH. Where would you stand on that issue?

Judge O'CONNOR. I am sure that these questions, Senator Hatch, are going to come back before the Court in a variety of forms. I do believe that litigation in the area of affirmative action is far from resolved, as I see it, and that we will continue to have cases in this area. I think it would be inappropriate for me to indicate my specific holding should that matter come before the Court, which I think it will.

FOURTEENTH AMENDMENT

Senator HATCH. I may come back to that issue.

Recent scholarly works with regard to the doctrine of incorporation, including Raoul Berger's famous work, "Government by Judiciary," soundly refute the notion that the authors of the 14th amendment intended to make the Bill of Rights applicable to the States.

Do the Constitution's words and phrases require the first eight amendments to be applied to the States themselves? Is there any justification for that in the legislative history of the 14th amendment?

Judge O'CONNOR. I have not made an indepth study at this point of that legislative history such as you would want to do before casting a deciding vote on a case. I am aware of Raoul Berger's article. In fact, I have read it, and I have read other scholarly works that address themselves to the intent of the drafters of the 14th amendment.

In fact, I think probably there is some difference of opinion which was expressed by the drafters of that 14th amendment at the time. I think Justice Black placed his reliance, for example, on the comments of one or two of those drafters. Mr. Raoul Berger would have felt that those comments were not particularly appropriate.

I am aware of the controversy about the question. We do know, of course, that at this point the Court has held that many of the first 10 amendments are indeed incorporated into the 14th amendment by virtue of its provisions.

TENTH AMENDMENT

Senator HATCH. In regard to the 10th amendment, it discusses "reserved powers." In your opinion what is still reserved to the States?

Judge O'CONNOR. I suppose the 10th amendment was thought by many for some time to be of virtually no further application. We heard very little about it for a long time.

Then I think it gained a lot of notoriety at the time that the Supreme Court handed down its decision in the *Ussury* case, in which basically the Court said that the 10th amendment prohibited the Congress from applying its powers and wage standards to that of State and local employees and held that in that instance it was a violation of the 10th amendment because it affected the States in their role as States.

The attention given the 10th amendment did not last too long I guess because in a succeeding case or two, the *Hodell* case for one, we had occasion to look at some additional enactments of Congress, specifically pertaining to surface mining I believe. The Court did not apply the 10th amendment to invalidate those as they applied to the States, but indeed determined that in those instances Congress really was addressing its attention to private business rather than the States as States.

Therefore, the 10th amendment has had perhaps not a great deal of attention, if you will, in the cases. While we have isolated

holdings that have relied on it, we cannot point to any great bulk of authority.

Certainly this has been a great concern to the States because States feel that it is out of the States that the Federal Government grew; that the Federal Government did not create the States but the States formed together to create the Federal Government, and indeed that they did maintain and retain very significant rights.

I could only conclude that perhaps we have not seen the last of the litigation concerning the 10th amendment.

Senator HATCH. You are correct that the Court in the *Usery* case cited the 10th amendment with the proposition that State government employees are beyond Federal Government control for some purposes. I think that was a landmark decision.

Do you think that this is a reinvigoration of the 10th amendment, and really should *Usery* be used as a precedent for future rulings by the Court in your opinion?

Judge O'CONNOR. I am sure that will be cited by many as precedent for future holdings and already has been cited. The extent to which the Court will continue along that path I would say is somewhat uncertain.

STATUTORY INTENT

Senator HATCH. I have been concerned, as you know, about the doctrine of preemption. Under that particular doctrine I think too often the Federal courts have been willing to imply that Congress intended to preempt the whole field of regulation when Congress has not conclusively spoken at all.

Where Congress is silent, when should courts imply a Federal preemption? What limits are there on the use of this doctrine, which I believe is an insidious doctrine?

Judge O'CONNOR. I suppose this involves basically questions of interpretation of statutory intent—the intent of Congress, if you will. There are a number of cases on the books, as you have correctly pointed out, where the courts have determined in essence that Congress has occupied the field fully and therefore the States may no longer exercise any jurisdiction in that particular area.

This, of course, is a matter that has to be addressed on a case-by-case basis. I think quite properly the Court would want to look in each instance at the particular enactment or enactments of Congress that are being said to have occupied the field.

USURPATION OF STATES POWER

Senator HATCH. As you know, I believe the Supreme Court has continually usurped the power of the States and, frankly, has continually invaded the power of the States. It seems to me this is a question you are going to have to be faced with many times in the future as a Supreme Court Justice.

Judge O'CONNOR. I would assume that is true. In approaching problems of statutory interpretation and intent, it has been at least my practice until now, to examine very carefully the legislative history and the language of the particular statute in determining what Congress does intend.

Of course, Congress can be very helpful in that regard by making clear expressions of what it intends. Perhaps it could be therapeutic to consider an expression in the congressional enactment itself that Congress does not intend that this be regarded as occupying the entire field that otherwise States could occupy themselves, or something of that sort.

Senator HATCH. Of course, you know Congress has almost always been necessarily vague. We are not known for legislative draftsmanship in Congress although we should be.

Let me say this to you: During the legislative debate concerning the Civil Rights Act of 1964 many of the proponents said that act would never be used to establish quotas. Yet, in fact, there are many in our society today who feel that is exactly what we have done through the Office of Federal Contract Compliance and the Equal Employment Opportunity Commission. Maybe we will get into that in the next round of questions.

Let me ask you this: The Supreme Court recently upheld a Utah statute requiring parental consent for abortions performed on minors. How would you draw the line between the role of a parent, and a family, and the right to an abortion? If parents have the right to give consent, how about the father of the child? Do you see any inconsistency in giving parents the right to consent but denying the similar protection or privilege to the father of the child?

Judge O'CONNOR. Senator, my recollection of the Utah statute is that it was not one that provided for parental consent but rather for notification to the parents without a consent aspect. In fact, I think that the Supreme Court in an earlier decision had held that a statute from another State which required parental consent for a minor to obtain an abortion was invalid.

I think the more recent case from Utah involved notification to the parents and involved a minor who had not alleged that she was of sufficient maturity, or whatever it was, to make up her own mind or to decide. The Court upheld that particular Utah statute and has drawn a distinction between that and its earlier holdings. I think the Court also has invalidated a requirement in State law that the natural father consent as well.

EXEMPTING WOMEN FROM COMBAT DUTY

Senator HATCH. Let me ask one more question.

You served on DACOWITS, which was the Defense Advisory Committee on Women in the Services, a committee formed by former Secretary of Defense George Marshall in the 1950's to make recommendations on the role of women in the military. One of the recommendations was the right to go into combat ought to be granted to women or at least the law should be removed exempting women from combat duty.

As I understand it, the records in fact show that you exercised leadership in attempting to remove all barriers to the assignment of women to combat vessels. I do not know whether you would be influenced by that fact in reviewing congressional statutes on this subject and the principles the Supreme Court has laid down recently. Do you have any position on that particular matter at this time?

Judge O'CONNOR. Senator, if I could correct some of the statements on that——

Senator HATCH. Yes.

Judge O'CONNOR. I did, indeed, serve on the Defense Advisory Committee on Women in the Service for an interval of time by Presidential appointment. That commission did have occasion to consider a variety of the statutes and regulations governing women in the service.

As you know, the Defense Department had established as a policy that a certain number of women would be admitted in the military service and would serve in the various branches of that service. The DACOWITS commission really was asked then to look into the role of these women and make appropriate recommendation.

During my service on it I did offer suggestions which were adopted by the group and which subsequently were adopted by Congress asking that the statutory definitions, if you will, of combat be reexamined so that we could be more specific as to what jobs and tasks it is that women may appropriately perform and what they may not.

Let me give you an example. At the time that my motion was made women were totally prohibited from serving on ships other than hospital or transport ships. It made no difference whether it was a ship that was in a peacetime mission during peacetime or some other task that did not involve combat at all in the sense that we knew it. It simply was a total prohibition of service by these women on anything but a hospital and transport ship at the same time that the Navy was admitting women to the service and making promotions on the basis of any service that they could have on a ship at sea, so their opportunities were being restricted.

It was suggested that Congress reexamine this prohibition and look instead at the particular mission to be performed and the particular capability of the person to be assigned. That was done. The total prohibition was removed.

I also recommended that the Defense Department and Congress reexamine some of the definitions of combat to make sure that women were not being unnecessarily precluded from appropriate tasks. For example, if we live in an age where we have missile warfare and the task to be performed is one of being engaged in a missile silo in plugging in certain equipment, is that combat—far from the jungles of Vietnam, but rather in the safety of the missile silo? Some of the existing definitions had that effect. It was our suggestion that they be reexamined on a more specific basis. Indeed, that process occurred.

I did not serve on DEACWIS at the time when any recommendation was made to remove totally the prohibition against combat for women.

Senator HATCH. I notice my time is up. Thank you, Mr. Chairman.

ANTITRUST EXPERIENCE

The CHAIRMAN. Senator Metzenbaum?