Packing v. *Antonio* case; and then the *AT&T Technologies* case, the *Lawrence* case. I think you are familiar with those cases.

A bipartisan majority in the Congress joined together to pass the Civil Rights Act of 1991 to overrule those decisions and several others. So now those cases are dead letters because of the 1991 act, so they can't come before you.

My question is: What is your view of the approach to construing civil rights laws taken by the Supreme Court majorities in those cases?

TESTIMONY OF RUTH BADER GINSBURG, TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge GINSBURG. My view of the civil rights laws conforms to my views concerning statutory interpretation generally; that is, it is the obligation of judges to construe statutes in the way that Congress meant them to be construed. Some statutes, not simply statutes in the civil rights area but those in the antitrust area, are meant to be broad charters—the Sherman Act, for example. The Civil Rights Act states grand principles representing the highest aspirations of our Nation to be a nation that is open and free where all people will have opportunity. And that spirit imbues that law just as free competition is the spirit of the antitrust laws, and the courts construe statutes in accord with the essential meaning that Congress had for passing them.

Senator KENNEDY. Well, we have overturned those decisions now in the Civil Rights Act of 1991. I am asking you whether you are willing to express an opinion about those cases that were overturned since it won't come back up to you and since now we have legislated in those particular cases.

Judge GINSBURG. I don't want to attempt here a law review commentary on the Supreme Court's performance in different cases. I think the record of the decisions made in the lower courts can be helpful. In some of the cases, the Supreme Court's position was contrary to the position that had been taken in the lower Federal courts. I believe that was true in the *Ward's Cove* (1989) case and in the *Patterson* (1989) case. It is always helpful when Congress responds to a question of statutory interpretation, as it did in this instance, to set the record right about what the legislature meant to convey.

Now, sometimes—I spoke of the Pregnancy Discrimination Act and title VII—Congress is less clear than it could have been the first time around. Maybe the ambiguity wasn't apparent until the specific case came up. Congress reacted rather swiftly in that instance and said, "yes," discrimination on the ground of pregnancy is discrimination on the ground of sex, and title VII henceforth is to be interpreted that way.

It is a very healthy exchange. It is part of what I called the dialog. Particularly on questions of statutory interpretation if the Court is not in tune with the will of Congress, Congress should not let the matter sit but should make the necessary correction. That can occur even on a constitutional question. I referred to the *Simcha Goldman* (1986) case yesterday, a case in which Congress fulfilled the free exercise clause more generously than the Court had.

We live in a democracy that has, through the years, been opened progressively to more and more people. The most vital part of the civil rights legislation in the middle 1960's was the voting rights legislation. The history of our country has been marked by an ever widening participation in our democracy. I expressed on the very first day of these hearings my discomfort with the notion that judges should preempt that process to the extent that the spirit of liberty is lost in the hearts of the men and women of this country. That is why I think the voting rights legislation, more than anything else, is so vital in our democracy.

Senator KENNEDY. In another area, we have certainly made important progress, as you mentioned, in the areas of banning discrimination on the basis of race, we have on gender, we have on religious prejudice, and more recently on disability with the passage of the Americans With Disabilities Act, banning discrimination against persons with disabilities.

One form of discrimination still flourishes without any Federal protection, and that is discrimination against gay men and lesbians. I note that in a 1979 speech at a colloquium on legislation for women's rights, you stated that "rank discrimination based on sexual orientation should be deplored." By rank discrimination, I assume you meant intentional discrimination rather than discrimination on the basis of rank in the military. I share that view, and I think most Americans do.

I would like to ask you whether you still believe, as you did in 1979, that discrimination based on sexual orientation should be deplored.

Judge GINSBURG. I think rank discrimination against anyone is against the tradition of the United States and is to be deplored. Rank discrimination is not part of our Nation's culture. Tolerance is, and a generous respect for differences. This country is great because of its accommodation of diversity.

The first thing I noticed when I came back to the United States from a prolonged stay in Sweden—and after I was so accustomed to looking at people whose complexion was the same—was the diversity. I took my first ride in several months on a New York subway, and I thought, what a wonderful country we live in; people who are so different in so many ways and yet, for the most part, we get along with each other. The richness of the diversity of this country is a treasure, and it is a constant challenge, too, a challenge to remain tolerant and respectful of one another.

Senator KENNEDY. I think we will leave that one there. Thank you.

The CHAIRMAN. It is not going to get any better, Senator.

Senator KENNEDY. Thank you very much, Mr. Chairman. My time is up.

The CHAIRMAN. Thank you. Now I assume my colleague would like half an hour.

Senator HATCH. Yes, I think I would.

The CHAIRMAN. I yield half an hour to our distinguished friend from Utah.

Senator HATCH. Well, thank you, Mr. Chairman.

Judge, just a real quick response, if you can. Are you for or against TV coverage of the Court? I had a number of people in the

media who asked me to ask that question. And I don't want to spend a lot of time on it, and if you don't have an opinion, I would be happy to hear that as well.

Judge GINSBURG. Senator Hatch, I spoke earlier about the C–SPAN interview with me. I thought how unfortunate it was that the audience couldn't view, because we didn't allow it at the time, television of the proceeding itself.

Senator HATCH. Right.

Judge GINSBURG. I don't see any problem with having appellate proceedings fully televised. I think it would be good for the public.

Senator HATCH. I do, too.

Judge GINSBURG. We have open hearings. If coverage is gavel-to-gavel, I see no problem at all televising proceedings in an appellate court. Some concern has been expressed about televising trials, but we have come a long way from the days of the *Sheppard* (1966) case when the camera was very intrusive and there was all kinds of equipment in the courtroom that could be distracting.

The concern currently is about distortion if editing is not controlled.

Senator HATCH. I understand. That is good enough for me. I would be concerned about the editing that goes on, too. You are saying gavel-to-gavel you are for.

Judge GINSBURG. Yes.

Senator HATCH. OK.

Judge GINSBURG. Yes. But I would be very respectful of the views of my colleagues.

Senator HATCH. Sure. No, no, I understand.

In 1975, while you were at the ACLU, that organization adopted a policy statement favoring homosexual rights. According to what has been represented to me as minutes of a meeting on this matter, the following is noted:

> In the second paragraph of the policy statement dealing with relations between adults and minors, Ruth Bader Ginsburg made a motion to eliminate the sentence reading, "The State has a legitimate interest in controlling sexual behavior between adults and minors by criminal sanctions." She argued that this implied approval of statutory rape statutes, which are of questionable constitutionality.

Now, I realize that these events took place over 18 years ago, so let me just ask you: Do you have any doubt that the States have the constitutional authority to enact statutory rape laws to impose criminal sanctions on sexual contact between an adult and a minor, even where the minor allegedly consents?

Judge GINSBURG. Not at all, Senator Hatch. What I did have a strong objection to was the sex classification.

Senator HATCH. Sure.

Judge GINSBURG. I think child abuse is a deplorable thing, whether it is same sex, opposite sex, male-female, and the State has to draw lines based on age.

What I do object to is the vision of the world that supposes a woman is always the victim. So my only objection to that policy was its sex specificity.

Senator HATCH. So as long as they treat males and females equally, that is your concern?

Judge GINSBURG. Yes, and I think that as much as we would not like these things to go on, children are abused, it is among the most deplorable things, and it doesn't——

Senator HATCH. And the State has power to correct it.

Judge GINSBURG. Yes, and has power to draw lines on the basis of age that are inevitably going to be arbitrary at the edge.

Senator HATCH. Well, I am relieved to hear that that was the basis for your objection. It was a shock to me to learn, you know, that the Constitution, some people argue that the Constitution denies the State the right or the ability to protect young people and teenagers by forbidding sexual contact between them and an adult, even where the sexual contact is supposedly voluntary, and I am concerned about that.

Let me just move on to the death penalty. Now, I have a question. One of the problems I had yesterday, you were very specific in talking about abortion, equal rights, and a number of other issues, but you were not very specific on the death penalty.

Now, there are people on this committee who are for and against the death penalty, as there are people throughout the Congress, and my question is about the constitutionality of the death penalty. I am not going to ask you your opinion about any specific statute or set of facts to which the death penalty might apply. Also, I recognize that your personal views regarding the morality or utility of capital punishment are not relevant, unless your personal views are so strong that you cannot be impartial or objective. Then that would be a relevant question and a relevant matter for us here today.

Rather, I would just like to ask you the following specific question: Do you believe, as Justices Brennan and Marshall did, that the death penalty under all circumstances, even for whatever you would consider to be the most heinous of crimes, is incompatible with the eighth amendment's prohibition against cruel and unusual punishment?

Judge GINSBURG. Senator Hatch, let me say first that I appreciate your sensitivity to my position and the line that I have tried to draw.

Senator HATCH. Sure.

Judge GINSBURG. Let me try to answer your question this way.

Senator HATCH. All right.

Judge GINSBURG. At least since 1972 and, if you date it from *Furman,* even earlier, the Supreme Court, by large majorities, has rejected the position that the death penalty under any and all circumstances is unconstitutional. I recognize that no judge on the Court currently takes the position that the death penalty is unconstitutional under any and all circumstances. All of the Justices on the Court have rejected that view.

Many questions left unresolved. They are coming constantly before the Court. At least two are before the Court next year.

I can tell you that I do not have a closed mind on this subject. I don't think it would be consistent with the line I have tried to hold to tell you that I will definitely accept or definitely reject any position. I can tell you that I am well aware of the precedent, and I have already expressed my views on the value of precedent.

Senator HATCH. But do you agree with all the current sitting members that it is constitutional, it is within the Constitution?

Judge GINSBURG. I can tell you I agree that what you have stated is the precedent and clearly has been the precedent since 1976. I must draw the line at that point and hope you will respect what I have tried to tell you—that I am aware of the precedent, and equally aware of the principle of stare decisis.

Senator HATCH. You see, my question goes a little bit farther than that. I take it that you are not prepared to endorse the Brennan/Marshall approach that it is cruel and unusual punishment under the eighth amendment. But in response to my previous question, you stated that statutory rape laws are constitutional. Yet, you are unwilling to really answer the question or comment on the constitutionality—I am not asking you to interpret the statute, just the Constitution—you are unwilling to comment on the constitutionality or unconstitutionality of the death penalty.

The thing I am worried about is that it appears that your willingness to discuss the established principles of constitutional law may depend somewhat on whether your answer might solicit a favorable response from the committee.

Now, this is a touchy thing. I don't think anybody is going to vote against you, one way or the other, on this issue, at least I hope not, because I don't think we should politicize the Court. But it is important. For instance, the death penalty is, in effect, mentioned in the 5th amendment and the 14th amendment to the Constitution. The fifth amendment makes reference to a capital crime, stating that no one could be held to answer for such a crime unless pursuant to a grand jury. And this presupposes the constitutionality of the death penalty.

Now, the eighth amendment's bar on cruel and unusual punishments was adopted at the same time as the fifth amendment, as you know. And it obviously was intended to be read in conjunction with the fifth amendment's express approval of the death penalty. As well, the Supreme Court has affirmed the death penalty's constitutionality, as you said, as early as 1976 in the case of *Gregg* v. *Georgia*.

Given the express constitutional provisions, presupposing the constitutionality of the death penalty and the body of case law reaffirming its constitutionality, I think you ought to tell us where you really come down on this thing. Because I am not asking you to decide a future case. I am just asking is it in the Constitution, is it constitutional, or is there room to take the position that Brennan and Marshall did, even though it is expressly mentioned in at least the 5th and the 14th amendment, and probably six or seven places in the Constitution, that they find it barred by the cruel and unusual punishment clause of the 8th amendment.

Judge GINSBURG. Senator Hatch, I have tried to be totally candid with this committee.

Senator HATCH. You have. You have.

Judge GINSBURG. You asked a question. I was asked a lot about abortion yesterday. I can't——

Senator HATCH. You were very forthright in talking about that.

Judge GINSBURG. I have written about it, I have spoken about it as a teacher since the middle seventies. You know that teaching

and appellate judging are more alike than any two ways of working at the law. I tried to be scholarly in my approach to the question then. I have written about it in law review articles. I authored a dissert in that area in the *DKT* case.

The question you raised about age lines, I had a stated objection to drawing lines between males and females based on age, whether it is for beer drinking, for statutory rape, for—the first time I encountered an age line I think was in your State, Senator Hatch. Utah required parents to support a boy until age 21, but a girl only until age 18. The case was *Stanton* v. *Stanton* (1975).

Senator HATCH. I remember the case, but I can't remember whether it is from Utah.

Judge GINSBURG. In any event, that's the way it was. It was support a boy until 21 and a girl until 18, and that age line was struck down. So that is another area. Is the *Stanton* case not from Utah?

Senator HATCH. Yes, it is.

Judge GINSBURG. The death penalty is an area that I have never written about.

Senator HATCH. But you have taught constitutional law in this country.

Judge GINSBURG. I have.

Senator HATCH. It isn't a tough question. I mean I am not asking——

Judge GINSBURG. You asked me what was in the fifth amendment.

Senator HATCH. Right.

Judge GINSBURG. The fifth amendment uses the word "capital." I responded when you asked me what is the state of current precedent. But if you want me to take a pledge that there is one position I am not going to take———

Senator HATCH. I don't want you to take a pledge.

Judge GINSBURG [continuing]. That is what you must not ask a judge to do.

Senator HATCH. But that is not what I asked you. I asked you is it in the Constitution, is it constitutional?

Judge GINSBURG. I can tell you that the fifth amendment reads "no person shall be held to answer for a capital or otherwise infamous crime, unless" and the rest. But I am not going to say to this committee that I will reject a position out of hand in a case as to which I have never expressed an opinion. I have never ruled on a death penalty case. I have never written about it, I have never spoken about it in the classroom.

I can tell you that I have only one passion and it is to be a good judge, to judge fairly. But I must avoid giving any forecast or hint about how I might decide a question I have not yet addressed.

Senator HATCH. I will accept that, but I have to say that——

Senator COHEN. Would the Senator yield?

Senator HATCH. Yes.

Senator COHEN. As I recall, with all due respect, I believe that Clarence Thomas was asked——

Senator HATCH. Both Souter and Thomas answered that question very——

Senator COHEN [continuing]. Was asked the question whether he had ever had a discussion about the case of *Roe* v. *Wade,* and he

was ridiculed by many members, and indeed the press at large for saying he had never had a conversation.

Senator HATCH. No, he didn't say that. What he said was—and the press, even as late as this morning, one of our eminent press people criticized obliquely Thomas for having never discussed abortion.

What Thomas said was—and I will be honest with you, he did it to get off the subject, Senator Leahy was asking the question—he said "yes," we did discuss it, but we were more interested in *Griswold* v. *Connecticut*. That is basically what he said. Then Senator Leahy came back, "Yes, but did you ever discuss *Roe* v. *Wade?*" And Thomas responded, I think very cleverly, and Senator Leahy did get off the subject, he said, "I never debated it." Now, that is a far cry from saying I never discussed it.

Now, the reason I am asking this question is there are very few—give me a break, the fact of the matter—give Justice Thomas a break, not you, Judge, but the media out there—they have been misquoting that for years, ever since the hearings. But he was vilified all over this country and slandered and libeled and criticized, because he never discussed *Roe* v. *Wade,* as though that is the paramount prime issue in our society. And it is one of them, no question about it, regardless of what side you are on or whether you are not on any side.

But I cannot imagine any particular subject that has been more on the minds of the American people in criminal law through the years than the death penalty. Let me just say this: I will take your answer the way it has been given. You know, there are some who believe that there has been an evolution of standards regarding what constitutes cruel and unusual punishment. But even this theory cannot escape the express references in the Constitution to capital punishment.

It seems to me that any evolution to societal standards with respect to the death penalty cannot be divorced from the fact that the Constitution mentions capital crimes. And such an evolution of standards by society which would deem the death penalty cruel and unusual punishment or cruel and unusual I think would have to be represented in the form of a constitutional amendment or by repeal of the existing death penalty statutes.

Having said that, I just feel it is an important issue and one that—I don't want a political answer.

Senator METZENBAUM. Could I respectfully point out to my colleague——

Senator HATCH. On your own time, you can.

Senator METZENBAUM. On my time. I don't wish to interrupt him, but this same issue was before us in 1987 when Judge Kennedy was up for confirmation, and at that time Judge Kennedy stated, "I have taken a position with your colleagues on the committee that the constitutionality of the death penalty has not come to my attention as an appellate judge and that I will not take a position on it. If it is found constitutional, I think it should be efficiently enforced."

Senator HATCH. Fine.

Senator METZENBAUM. So this is not the first time that we have had a nominee who has declined to respond on this.

Senator HATCH. No, but as we defined further, demanding of members of this committee during the Souter and Thomas hearings, they had to answer that question. That is all I am saying. Now, I am going to let it go, because I respect the Judge and I have a great deal of fondness and appreciation for her. But I don't think that is a tough question, is it in the Constitution, is it constitutional.

Judge GINSBURG. Senator, I have read that sentence and know there is another reference to "capital," as well. I am glad you respect my position. I have told you my view of judging.

There are other people on this committee who would like to pin me down to what am I going to do in the next case.

Senator HATCH. Well, I am not one of them.

Judge GINSBURG. Even Senator Metzenbaum wants me to say whether I would be with three or with two on some issues, and I wouldn't answer. I have tried to be consistent in saying I believe in this process, I have written about it, and I have said how important I think the Senate role is. I also said I hope that we come to this with mutual understanding.

One of the things Senator Metzenbaum said was that Congress should be more thoughtful and more deliberate about the role of a judge. So I have tried to be as forthcoming as I can, while still preserving my full and independent judgment.

Senator HATCH. I understand, Judge, and I accept that. I do think, though, that some of the cheap shots in the media about Thomas ought to cease and they ought to read the doggone transcript before they make any more of them. As late as today, one of our learned members of the journalism community misrepresented again.

Let me move on to something else. I would like to followup on some of the exchanges you had with Senators Simpson and Leahy regarding government funding. Now, you agree, as I understand it, that the first amendment does not impose on government an affirmative duty to fund speech, is that right?

Judge GINSBURG. Yes, I think it imposes on government a duty to be impartial, and so I said if it chooses to fund political speech, it can't choose between the Republicans and the Democrats.

Senator HATCH. Right. Rather, it prohibits government from censoring or interfering with individual expression, and I believe that is your position as you have said.

For example, freedom of speech doesn't mean that the Government has to finance a lecture series for anyone who wants to speak his or her mind, or that the Government must give people megaphones or loudspeakers or, likewise, freedom of the press does not mean that the Government has to buy publishing equipment for aspiring journalists.

But in a recent concurring opinion, you wrote, the Government taxing and spending decisions "are most troublesome and in greatest need of justification, when distinctions are drawn based on the point of view a speaker espouses, or when a benefit is provided contingent and an individual is relinquishing a civil right." Now, that was the case of *FEC* v. *International Funding Institute* in 1992.

I would like to probe just one aspect of that statement, specifically, your apparent view that government spending decisions are

"most troublesome and in greatest need of justification, when distinctions are drawn based on the point of view a speaker espouses."

Let's assume that the Government decides that not smoking is better than smoking and that it subsidizes an antismoking campaign through a grant program. May the Government give grants only to those who adhere to the antismoking campaign or viewpoint, or does the Constitution compel the Government to also subsidize prosmoking campaigns by cigarette manufacturers?

Judge GINSBURG. I may get myself into difficulty with the Senators from tobacco States, and I am a reformed sinner in that respect myself. But this is a question of safety and health. I think the Government can fund antismoking campaigns and is not required equally to fund people who want to put their health and the health of others at risk. So my answer to that question is "yes," the Government can fund stop smoking campaigns and it doesn't have to fund smoking is intoxicating and fun campaigns. Yes, the Government can fund programs for the safety and health of the community.

Senator HATCH. Congress, as you know, has established a National Endowment for Democracy, and, you know, some might say is engaging in unlawful viewpoint discrimination unless it also establishes a national endowment for the opposite side, say communism or fascism or something like that.

The point that I am making is that I respectfully submit that your statement in your concurring opinion in the *International Funding* case may be overbroad. Government-funded programs are designed to serve certain policy goals. Those speakers who choose not to promote these goals will naturally be excluded from the funding.

And to impose viewpoint neutrality on government funding programs simply because they happen to involve speech would be to revolutionize government as we know it. And just as the taxpayers need not subsidize the first amendment right of free speech, the issue then arises do they need to subsidize abortions. Just as government programs may fund antismoking speech without funding prosmoking speech, the Government Medicaid Program may cover the expenses of childbirth, without covering the expenses of abortion.

The Supreme Court, as you know, settled this question in its 1977 ruling in *Maher* v. *Roe,* and then in its 1980 ruling in *Harris* v. *McRae.* It ruled in those cases that the taxpayers do not have to federally subsidize abortion. In some of your academic and advocacy writings before you took the bench, you did criticize those Supreme Court cases and, as an advocate, that is easy to understand.

But in the *International Funding* case, you cited *Harris* v. *McRae* favorably in support of a distinction you drew between funding restrictions that are permissible and those that are not. Irrespective of your views on the policy of abortion funding, do you agree that *Maher* and *Harris,* those two cases, were decided correctly?

Judge GINSBURG. I agree that those cases are the Supreme Court's precedent. I have no agenda to displace them, and that is about all I can say. I did express my views on the policy at stake, but the people have not elected me to vote on that policy.

Senator HATCH. I understand, but yesterday you endorsed the so-called constitutional right to abortion, a right which many, including myself, think was created out of thin air by the Court.

Judge GINSBURG. But you asked me the question in relation to the Supreme Court's precedent, and you have just asked me another question about the Supreme Court's precedent. The Supreme Court's precedent is that access to abortion is part of the liberty guaranteed by the 14th amendment.

Senator HATCH. That was just reaffirmed by a 5-to-4 decision just a year ago, and this issue is going to be before the Court for a long time in the future. But today, having opened the door on specific issues such as abortion——

Judge GINSBURG. I think your microphone is off again, Senator.

Senator HATCH. I am sitting back and not——

The CHAIRMAN. Thank you, Madam Chairman. [Laughter.]

Senator HATCH. I have got to speak louder, I think, when I sit back in my chair.

The CHAIRMAN. Will the Senator yield? It is obvious, Professor, you have been a professor for a long time, I think it is an endearing quality.

Senator HATCH. I think what the question is that I am asking is do taxpayers, in your view, have a constitutional obligation or duty to fund abortions.

Judge GINSBURG. Taxpayers don't have an obligation or duty to do anything other than what Congress tells them they must do. I know there is a taxpayers' protest movement, but people have to pay their taxes, and you decide what their tax payments should fund, as you are engaged in doing at this very moment.

Senator HATCH. I understand.

Judge GINSBURG. The only point I tried to make is that, of all the distinctions in the speech area, the ones we are most nervous about are distinctions based on viewpoint. As I said, the Government decides how it wants to spend its money. I think we would all agree that if the Government pays for Republican speech but not Democratic speech, that is not democratic.

Senator HATCH. I would agree with that.

Let me move on to another issue. In your response to the committee questionnaire on judicial activism, you stated,

> It is a reality that individuals and groups reflecting virtually every position on the political spectrum have sometimes attacked the Federal judiciary, not because judges arrogated authority but because particular decisions came out, in the critics' judgment, the wrong way.

Judge Ginsburg, in the 1857 case of *Dred Scott* v. *Sanford,* the Supreme Court ruled that the fifth amendment's due process clause prevented Congress from outlawing slavery in the territories. In essence, in its first use of what we now call substantive due process, the Court invented out of thin air a right to own slaves in the territories. Abraham Lincoln, among others, was highly critical of this holding in the *Dred Scott* case.

Now, do you think that the Supreme Court arrogated authority in this holding in the *Dred Scott* case? And if so, why? And if not, why not?

Judge GINSBURG. I think it was an entirely wrong decision when it was rendered. The notion that one person could hold another person as his or her property is just beyond the pale of——

Senator HATCH. So they arrogated authority to themselves in that case.

Judge GINSBURG. I think they made a dreadfully wrong decision.

Senator HATCH. You and I agree.

The same thing in the *Lochner* era, with the *Lochner* v. *New York* case. The Court arrogated its own authority to decide that minimum wage laws were really on the basis of liberty of contract. They invalidated State laws on minimum and maximum hours that bakery workers could work in a week.

Judge GINSBURG. The Court in the 1930's rejected the so-called *Lochner* line. The Court, in that line of decisions consistently overturned economic and social legislation passed by the States and even by the Federal Government. That era, in which the Court attempted to curtail economic and social legislation, is over. Although there may be some voices for a return of that kind of judicial activism, I think it is generally recognized that the guardian of our economic and social rights must be the legislatures, State and Federal.

Senator HATCH. I agree with you on that, but how do you distinguish as a matter of principle between the substantive due process right of privacy that the Supreme Court has developed in recent decades from the rights the Supreme Court developed on its own accord in *Dred Scott* v. *Sanford* and the *Lochner* v. *New York* case?

Judge GINSBURG. I don't think, Senator Hatch, that it is a recent development. I think it started decades ago, as I tried to explain in one of the briefs you have, one of the briefs that I referred to yesterday, *Struck*.

Senator HATCH. Right.

Judge GINSBURG. It started in the 19th century. The Court then said no right is held more sacred or is more carefully guarded by the common law. It grew from our tradition, and the right of every individual to the control of his person. The line of decisions continued through *Skinner* v. *Oklahoma* (1942), which recognized the right to have offspring as a basic human right.

I have said to this committee that the finest expression of that idea of individual autonomy and personhood, and of the obligation of the State to leave people alone to make basic decisions about their personal life, Justice Harlan's dissenting opinion in *Poe* v. *Ullman* (1961).

Senator HATCH. Right.

Judge GINSBURG. After *Poe* v. *Ullman,* I think the most eloquent statement of it, recognizing that it has difficulties—and it certainly does—is by Justice Powell in *Moore* v. *City of East Cleveland* (1977), the case concerning the grandmother who wanted to live with her grandson.

Those two cases more than any others—*Poe* v. *Ullman,* which was the forerunner of the *Griswold* (1965) case, and *Moore* v. *City of East Cleveland*—explain the concept far better than I can.

Senator HATCH. Well, you are doing a good job, but in my view it is impossible, as a matter of principle, to distinguish *Dred Scott* v. *Sanford* and the *Lochner* cases from the Court's substantive due process/privacy cases like *Roe* v. *Wade*. The methodology is the

same; the difference is only in the results, which hinge on the personal subjective values of the judge deciding the case.

Judge GINSBURG. In one case the Court was affirming the right of one man to hold another man in bondage. In the other line of cases, the Court is affirming the right of the individual to be free. So I do see a sharp distinction between the two lines.

Senator HATCH. I think substantively there may be, but the fact of the matter is it is the same type of judicial reasoning without the constitutional underpinnings.

Now, one of the things I admired about your criticism of *Roe* v. *Wade* is at least you would put a constitutional underpinning under it by using the equal protection clause rather than just conjure something out of thin air to justify what was done. And at least that would be a constitutional approach toward it.

See, one criticism of judicially invented rights like some call privacy is the inability in any principled fashion to determine their boundaries. In other words, whether or not such a right will be recognized in a particular context depends upon the predilection of the judge deciding the case. And some of the most vocal supporters of the right to privacy in the context of abortion would be the first to object if the Supreme Court employed the same methodology looking outside the text of the Constitution to protect economic rights, say to cut back on the liberal welfare state. There would be just as much objection to that.

Now, one can favor various privacy interests as a matter of policy and support legislation to protect them—and that is being done here—and still recognize the illegitimacy of judges making up rights that aren't found in the Constitution. Don't you agree with that statement?

Judge GINSBURG. Senator Hatch, I agree with the *Moore* v. *City of East Cleveland* statement of Justice Powell. He repeats the history to which you have referred, the history of the *Lochner* era, and says that history "demonstrates there is reason for concern lest judicial intervention become the predilections of those who happen at the moment to be members of the Court." I know that is what your concern is.

Senator HATCH. That is what my concern is, as it should be.

Judge GINSBURG. He goes on to say that history "counsels caution and restraint," and I agree with that. He then says, "but it does not counsel abandonment," abandonment of the notion that people have a right to make certain fundamental decisions about their lives without interference from the State. And what he next says is, history "doesn't counsel abandonment, nor does it require what the city is urging here"—cutting off the family right at the first boundary, which is the nuclear family. He rejects that. In taking the position I have in all of my writings on this subject, I must associate myself with Justice Powell's satements; otherwise, I could not have written what I did. So I——

Senator HATCH. You mean with the position of Justice Powell?

Judge GINSBURG. The position I have stated here. You asked me how I justify saying that *Roe* (1973) has two underpinnings, the equal dignity of the woman idea, and the personhood idea of individual autonomy and decisionmaking. I point to those two decision opinions as supplying the essential underpinning.

Senator HATCH. I understand, but at least—see, I differ with you on using the 14th amendment to justify it. But at least you found some constitutional underpinning. You would have written the opinion so that at least there was a constitutional argument for the right as you believe in it. And that I respect, even if I do disagree with you on it.

But, you know, some people would argue that the constitutional right to contract is a fundamental right as well and that that right can be interfered with just as much through substantive due process as anything else. But in your view, does the generalized constitutional right to privacy encompass, say, the following activities—because judges could decide this on their own because of their own predilections. If they use a theory of substantive due process, whatever they want to decide, regardless of what the language says, regardless of the Constitution or the statutes or anything else enacted by those elected to enact them say.

Judge GINSBURG. Senator Hatch, I believe that it is healthy for an academic or a judge to be exposed to criticism. You know that my position, the position that I developed in this, I thought, sleeper of a lecture, has been criticized from all sides. I have been criticized for saying that legislators have any role in this. I have been criticized for saying that the Court should not have solved it all in one fell swoop. So I appreciate that I am never going to please all of the people all of the time on this issue. I can only try to say what my position is and be as open about it as I can.

Senator HATCH. You have been, and I agree with that. As you know, I admire you personally. But this is more important.

Senator MOSELEY-BRAUN. Mr. Chairman, Mr. Vice Chairman, I would like, on a point of personal privilege——

Senator HATCH. Sure.

Senator MOSELEY-BRAUN. This line of questioning I find to be personally offensive, and I am very sorry to break the train of thought and the demeanor of this committee. But I find it very difficult to sit here as the only descendent of a slave in this committee, in this body, and hear a defense, even an intellectual argument, that would suggest that there is a rationale, an intellectual rationale, a legal rationale, for slavery that can be discussed in this chamber at this time——

Senator HATCH. Well, Senator, Senator, that is——

Senator MOSELEY-BRAUN. Well, no, Senator, you just——

Senator HATCH [continuing]. Not what I said.

Senator MOSELEY-BRAUN. You just a moment ago said that some would say that there was a constitutional right to contract which could not be impaired by a judicial decision.

Senator HATCH. That has nothing to do with *Dred Scott* v. *Sanford.*

Senator MOSELEY-BRAUN. That was your statement, though, Senator, and I——

Senator HATCH. Well, if I can——

Senator MOSELEY-BRAUN. I just submit, Senator Hatch—and we have had a very fine relationship——

Senator HATCH. Oh, we do.

Senator MOSELEY-BRAUN [continuing]. Since I have been here, and I have every respect for your intellect. I have every respect for

your judgment. We may disagree on issues, but we have never had occasion to be disagreeable. And I think, as a point of personal privilege, it is very difficult for me to sit here and even to quietly listen to a debate that would analogize *Dred Scott* and *Roe* v. *Wade*. It is very, very difficult for me to listen to——

Senator HATCH. Well, that is not what I am doing, so——

Senator MOSELEY-BRAUN [continuing]. And so I want just to give you my own sensitivity on this issue. That is why I asked as a point of personal privilege that if there are questions going to the current state of the law that are not as offensive that would elicit the same kind of responses, or if there is some other way that you can probe the judge's opinions on this area, I would very much, on a personal level, appreciate that you take another approach.

Senator HATCH. Well, thank you, but just to make that clear—then I would like to conclude, and I would appreciate taking a little additional time. I have been attacking both of those cases and the line of cases, both the *Dred Scott* v. *Sanford* case—there is no way that anybody—I don't think anybody should misconstrue what I am saying. I thought the *Dred Scott* case is the all-time worst case in the history of the country. I think there are others that are bad, but nothing that even approaches the offensiveness of that case.

If the Senator has misconstrued what I am saying—and I think you have—I apologize. But that isn't what I was saying.

Also *Lochner,* I think that is a ridiculous case. My whole point here is these are ridiculous cases and that they were conjured out of thin air by this role of substantive due process.

Now, whether I agree or disagree with *Roe* v. *Wade,* I still think that approach toward judging is wrong. There is no question you could have found constitutional underpinnings to have righted both of those wrongs in those two cases. But nobody should misconstrue what I am saying here into thinking that I am trying to find some justification for slavery. My gosh, I wouldn't do that under any circumstances.

So I certainly apologize if I haven't made myself clear, but I am attacking this whole area of substantive due process which attacks *Dred Scott* v. *Sanford,* where judges just conjure things out of thin air to justify their own predilections or their own ideas of what the law ought to be. So in that sense, I would certainly never offend my dear friend—and we are good friends, and we work closely together, and I think we are going to do a lot of things around here together. But I want to make that clear.

Senator MOSELEY-BRAUN. Thank you. I——

Senator HATCH. Nor do I support *Lochner* because I raised the issue—and that was in the context of *Lochner*—that there is a right of contract mentioned in the law that is very, very important, that some people think is fundamental. *Lochner* went way beyond that by denying that the States had any rights to do what was in the general welfare of the people. And I disagree with *Lochner,* and I decry both of those cases.

Now, let me just finish. Judge——

Senator MOSELEY-BRAUN. Again—and I am delighted with your statement, but let me just say that as part of the debate, as part of the intellectual argument that you were engaging in with the judge, you come back—you, in fact, did come back and say to her,

well, there are some who would defend the right of contract in this situation. And I am just saying to you that even listening to this debate is very difficult to me, and on a point of personal privilege——

Senator HATCH. I understand.

Senator MOSELEY-BRAUN [continuing]. If there is another way that you can approach the criticism of judicial activism, I would appreciate your taking it.

Senator HATCH. Well, if you construed that to mean go back to *Sanford,* that is wrong because that certainly wasn't meant. And I apologize if I was inarticulate in what I was saying, but I don't think I was.

But let me just point out how important this is. When we have the right in judges to just throw substantive due process or just decide cases based upon their own ideas of what is right and wrong rather than what is in the Constitution or is in the statute, we run into these difficulties. You know, with regard to the generalized constitutional right to privacy, does it encompass the following activities or does it not?

Let me just give you one illustration. Some people believe in a right to privacy that would allow almost anything, say prostitution. Let me note that in 1974, in a report to the U.S. Civil Rights Commission, you wrote, Judge, "Prostitution as a consensual act between adults is arguably within the zone of privacy protected by recent constitutional decisions." That is in "The Legal Status of Women Under Federal Law" in 1972, I believe. You were citing *Griswold, Eisenstadt,* and *Roe* v. *Wade.*

You could push it farther. How about marijuana use in one's own home? Is that a right to privacy that we should——

Judge GINSBURG. I said "arguably." I said it has been argued——

Senator HATCH. I know. You were making an academic point. I understand. I am not trying to indicate that you were justifying prostitution. But the point is some people believe this right of privacy is so broad you can almost justify anything.

Does it justify marijuana use in one's own home? Does it justify physician-assisted suicide? Does it justify euthanasia? Does it justify homosexual marriage that some people think should happen and shouldn't happen? Does it justify infanticide of newborn children with birth defects?

I use these examples in this hearing not to offer my own views on any of these subjects, on whether or not they should be protected conduct, but it is my point that people who believe that such conduct should be protected must, under the functioning of our system, turn to the legislatures and not to the Federal courts to determine whether or not they should be protected.

The point is that under an amorphous constitutional right of privacy, whether or not conduct is protected does not depend on any neutral principle of adjudication, but on the subjective predilection of the judge deciding the case. And that is not the rule of law. That is government by judiciary.

Let me just end by saying that with regard to the chairman's discussion yesterday or the day before of *Dred Scott,* the chairman stated that he wishes that the *Dred Scott* Court had moved ahead of the times to engage in progressive judicial activism—at least

that is the way I interpreted it—rather than the reactionary judicial activism that it did engage in. And I would simply like to point out that judicial restraint would have led the Court to uphold the Missouri Compromise. There was no need for and no justification for judicial activism of any stripe. And rather than moving ahead of the country, the Court need only have recognized the validity of the law passed 37 years before its decision. And had it done so, we wouldn't have had a substantive due process case or the disastrous result that *Dred Scott* v. *Sanford* really was.

The broader lesson, of course, is that there is no principled basis for obtaining only the judicial activist results that one likes as a judge. And to approve of substantive due process, which is nothing more than a contradiction in terms to me, is to accept *Dred Scott* and the *Lochner* line of cases. And more generally, the Constitution is suited to a changing society, not because its provisions can be made to mean whatever activist judges want them to mean, but because it leaves to the State legislatures and the Congress primary authority to adapt laws to changing circumstances.

Well, you could go on and on, but this is an important issue. And I know that you understand it, and I just want you to think about it because if we get to the point where judges just do whatever they want to do and they ignore the statutes or the Constitution and the laws as they are written and as they were originally meant to be interpreted, then we wind up with no rule of law at all. And that is the point that I am making.

And I admit there are some fine lines where it is very difficult to draw the line between when a judge is actively trying to resolve a problem and when the judge is just doing it on their own volition.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

The Senator did—and I will accommodate other Senators, as well—did go close to 50 minutes, but there was as continuous line of questioning, and hopefully it means the next round will be a lot shorter.

We are about to have a vote, Judge, but I will start my questions. We will probably end up with a break here anywhere from 3 to 5 minutes into the questioning, and then I will resume it.

We sometimes make statements over our long careers in the Senate that we either wish we didn't make or, although proud of having made them, we are reminded of them at times. I am about to engage in that.

Senator Hatch, when Judge Souter was before us, and some were pressing Justice Souter for a specific answer on an issue like the death penalty, said:

> Judge Souter, I hope you will stand your ground, when you sincerely believe you are being asked for answers which you clearly cannot provide and have the good faith to be able to act as a Supreme Court Justice later. The Senate will not probe into the particular views of a nominee on a particular issue or public policy, let alone impose direct or indirect litmus tests on specific issues or cases. If it does, the Senate impinges upon the independence of the judiciary. It politicizes the judging function. The confirmation process becomes a means of influencing outcome.

Now, I am sure having read that, I will have statements that I made during the process read back to me. But I do think it is appropriate to point out, Judge, that you not only have a right to choose what you will answer and not answer, but in my view you

should not answer a question of what your view will be on an issue that clearly is going to come before the Court in 50 different forms, probably, over your tenure on the Court.

So, I just want to inject what we never have in politics—consistency. Then again, if we were consistent, it would be very dull.

Let me move on. As a matter of fact, I have just been told the vote—and I want to make sure my colleague from Illinois knows it this time, I told her there is a vote—the vote has just begun, and so I think this is an appropriate time to break. I will come back with my round of questions. It will probably take us, as you have probably observed by now, Judge, somewhere between 10 and 15 minutes to get over and vote and come back.

So we will recess for whatever time it takes to get to the floor and back.

Judge GINSBURG. Thank you.

[A short recess was taken.]

The CHAIRMAN. The committee will come to order.

Welcome back, Judge. I started to say in another context, when you talk about the Madison lecture, welcome to the club of realizing that nothing you say will ever fully satisfy everyone. But now you are in a new arena, where nothing you say will satisfy the same person twice, even if you say the same thing twice.

I find the press fascinating and I love them, and this will get their attention.

When a former Justice was before us, I asked a number of tedious questions about natural law, because this particular Justice has written a great deal on natural law, all the press wrote articles about how tedious and boring it was.

After he got on the Court, one of the leading newspapers in America ran a long article about why didn't we ask more about natural law. Part of the problem is the press is like us, they sometimes don't understand the substance of issues.

So the good news is your nomination has not been controversial. The bad news is that if it is not controversial, then we will discuss other things. I just want to point out that I am flattered that the press noticed I comb my hair a different way, which is a major issue these days. I would be happy to have a press conference on that and give you all advice later on how to do that, if you would like.

But it is a fascinating undertaking, and so I can assure you that when you finish, as brilliant as you are, you will not be satisfying to anyone all the time, let alone all the people all the time. But I think you are doing a brilliant job.

Let me point out—and my colleague is, as we say in this business, necessarily absent as I speak. As a matter of fact, I can see him at this moment being interviewed. So I am not going to take the time to wait until he returns to make the statement I am about to make, although I say this not as a criticism to him.

I would indicate that, historically, I think you have laid out very clearly from the outset the basis upon which the right of privacy has been found to exist under our Constitution. Because the first question you answered, you talked about the liberty clause; you talked about the ninth amendment; you talked about the common law and the common-law traditions.

I would point out to my colleague that there has, in fact, with a notable aberration period in our history, always been a distinction in the common law, as well as constitutional interpretation, between the degree of protection and the wide berth that matters relating to personal privacy and property have been treated, especially the last 50 years. There have been distinctions historically made in terms of how the Court approaches the degree of protection warranted in those areas, and in terms of how and under what circumstances government can interfere with either of those rights, one's personal private rights and one's property rights.

I would like to pursue a little bit—I didn't intend on going in quite this direction, but in light of the line of questioning, which I think was appropriate, the line of questioning of my colleagues just had—I would like to discuss with you the issue of unenumerated rights, particularly the right to privacy.

The right to privacy recognized by the Court includes such things, as you have mentioned, as the right to marry free from government interference. And in response to one of the best columnists in the country who says we repeat things all the time, part of the reason we repeat things all the time is an attempt to educate people a little bit. Most Americans, I have found in surveys, if you ask them if I can marry whom I want, they will say "yes". If you say what right do you have for that, they say the Constitution guarantees it.

Nowhere in the Constitution is the word "marry" mentioned; nowhere in the Constitution is the right to marry mentioned. There is nowhere in the Constitution where the right of a married couple to use birth control is mentioned, but Americans think that it is.

Senator GRASSLEY. Are you arguing that a brother has a right to marry a sister?

The CHAIRMAN. No, I am arguing that the right to marriage is one that is a right of privacy that most Americans think is constitutionally guaranteed, and only under exceptional circumstances can the State interfere with your choice of who you want to marry. They have to be able to prove there is some overwhelming reason for their interfering with your right to marry. That is why they call it a fundamental right.

Now, that test has been met in the minds of the courts, when you say I wish to marry my brother or my sister. There is an overwhelming reason why the State can prohibit that, an overwhelming State interest. But it is a fundamental right, and most Americans think it is written into the Constitution. Most Americans think, as they should, that that is something that is a fundamental right.

Just like what happened—and I will get back to this, Senator, in light of the understandable interruption—when the States used to come along and say, hey, white folks can't marry black folks. The Court went, wait a minute, what's the rationale for that? Why can't white folks marry black folks or black folks marry white folks—the so-called antimiscegenation laws. The Court said, hey, wait a minute, that doesn't make any sense.

I am confusing a little bit right to privacy and some of these issues, but I don't want to—in a generic sense, the answer to your question, Senator, is they have to have an overwhelming reason to interfere with certain of our rights of privacy.

So the right to make decisions about how to raise and educate one's children free from government interference has been recognized by the courts. You told Senator Leahy, Judge, that there is a constitutional right to privacy. I think that is what you said to him, which you described as "the right to make basic decisions about one's life course"—well stated, well articulated, and similarly articulated by other Justices whose ranks you are about to join.

But I was as little unsure from your answer to Senator Leahy's question about how strong you thought that right of privacy was. The Supreme Court has recognized these rights about marriage, child rearing, and family, and when they have, they have generally referred to them—and I think in all those three areas—as fundamental rights.

As you and I both know, when the Court uses the word "fundamental," it is a term of art as they use it. Now, there usually is a need to make a distinction, when in the law there is a difference between fundamental rights and other kinds of rights and how the courts look at them. This means that the Government must have an extraordinary or compelling justification for interfering with a personal decision of the kinds I have mentioned.

Now, when Senator Leahy asked you about the right to privacy, you first agreed with the statement that the Government could not interfere with that right, absent a very compelling reason. But you then went on to say that the Government "just needs a reason." There is a big difference, as you know, between the two, just needing any old reason and needing a compelling reason. The Government has reason for almost any action they take, a compelling reason for only a few of the actions that we take.

Now, it may have been just a semantic difference. But what I want to go back to, having read the record, is do you agree that the right of privacy is fundamental, meaning that it is so important—I am not asking about any specific rights of privacy—meaning that it is so important, that the Government may interfere with it only for compelling reasons, when it finds that such a right exists, the right of privacy?

Judge GINSBURG. The line of cases that you just outlined, the right to marry, the right to procreate or not, the right to raise one's children, the degree of justification the State must have to interfere with those rights is large.

The CHAIRMAN. That is what I thought you meant, but there was a line in your response that you have now clarified for me. I am not pressing you about other rights, unfounded, unrecognized, arguably existing. I am not asking you about those. I am not asking you about consensual homosexual marriages or anything else. I am just dealing with the line of cases that have already been decided on procreation, in this case the *Griswold* case, starting with it, and family decisions and the like. I am not pressing you to where you are going to go from here. I just wanted to make sure I understood you viewed these cases as requiring a compelling government reason.

Judge GINSBURG. You mentioned *Meyer* v. *Nebraska* (1923) and *Pierce* v. *Society of Sisters* (1925). Although pigeonholed in the free exercise of religion area, I would put the *Yoder* (1972) case in that same line.

The CHAIRMAN. I agree with you. Again, the reason I raised this is that at least two of the last five Justices who have come before us have argued that either the right does not exist, should not exist, that the Court made incorrect decisions in that line of cases, or that if it exists, it is not a fundamental right. And that is why I am pursuing this, to make sure I understood what your answer was. I now understand it.

Now, another critical question concerning the method you would use to determine whether or not personal decisions are included within the zone of decisions protected by the right of privacy has been raised by my friend from Utah. He indicates there is no principled means by which one could find a right to privacy, a notion I strongly disagree with, from the standpoint of legal scholarship. There is a principled rationale that has been employed to find the right to privacy.

But there is a debate that exists. I am not going to ask you about how you decide any specific case, but I would like to determine where you are, in a general sense, in this debate over the methodology that should be employed to determine in the first instance whether or not there is a principled reason for finding a right of privacy in the Constitution.

Now, Judge Scalia, a brilliant jurist who you know well, who apparently wants to be on an island with you somewhere——[laughter].

By the way, please note in the record that people laughed. That was——

Judge GINSBURG. Compared to what. He didn't say I would be his first or second choice. He said compared to what. He was given a tightly circumscribed choice.

The CHAIRMAN. Well, if I had to be on an island with a man for any extended period of time, I might pick Judge Scalia. The reason I would, sincerely, is I think he is brilliant, I think he is dead wrong most of the time, as he thinks I am, and it would be, as another nominee who came before us once said, when asked why he wanted to be on the Court, it would be an intellectual feast.

A slight digression: I had a conversation with Justice Scalia after you had been nominated, to tell him that I was about to say in an interview the vote I most regretted casting out of all the ones I ever cast was voting for him, because he was so effective. He said what are you doing now? I said I am teaching a course in constitutional law at Widener University. He said, oh, my God, I had better come and tell them the truth. [Laughter.]

So I am sure he would have an opportunity to educate me, if we were on an island together.

Having said that, Justice Scalia, on a very serious note, has offered one method, a methodology to determine whether or not a right of privacy, a personal right that is not enumerated, not mentioned in the Constitution, warrants constitutional protection. And he has written that the only interests protected by the liberty clause of the 14th amendment are those interests which are defined in the most narrow and specific terms, where historical safeguards from government interference have existed.

Now, as you know better than I do—again, at the expense of offending my brethren in the press, I am going to be very fundamen-

tal about this, to use a phrase from another context—when in the past we determined whether or not fundamental rights of privacy exist, one of the things they go back and do, as courts have done, is look at history. They say what have we done in the past, as a people, what has our country done, what has our English jurisprudential system recognized, not only here in the States, but in England, in the common law? And they look back at that as one of the guideposts, not the only one, not necessarily determinative, but that is what they have done.

I think, by inference, Justice Scalia acknowledges that is an appropriate method, at least a starting point to determine whether or not an unenumerated right should be recognized as protected by the Constitution.

So Justice Scalia says that when you go back, determining whether or not there is an interest protected by the liberty clause of the 14th amendment, you go back and look at those interests defined in their most narrow and specific terms. So the question for Justice Scalia, in deciding whether the Constitution protects a particular liberty, including a particular privacy interest, is whether years and years ago the Government recognized that precise specific interest.

Now, that approach of Justice Scalia, which was outlined by him in the *Michael H.* case, that approach is very different from another that I would characterize as the traditional approach for determining whether or not these unenumerated rights that we have recognized exist.

The traditional approach, in my view, looks to whether the Constitution expresses a commitment to a more general interest, and then asks how that commitment should be applied in our time to a specific situation. The difference between these two approaches can make all the difference in the world on where a Justice comes out on the finding of whether such a right exists or doesn't.

For example, under Justice Scalia's approach, the right to marry someone of a different race is not protected by the Constitution, at least arguably, based on things he has said, because the right to marry is nowhere specifically mentioned in the Constitution. And when you go back to look at whether or not—which is one of the methods used by all Justices to determine whether or not there is an unenumerated right that should be protected—when you go back in history and look, there is no place you can say that, under our English jurisprudential system, our courts or the English courts have traditionally recognized the specific right of blacks and whites to marry. And since you can't find that back there, then the right doesn't exist.

Whereas, in footnote 6, for example, as you well know, although Justices Kennedy and O'Connor agreed with the overall finding on that case—which I won't bother you with the facts, which you know well and are not particularly relevant to my point—they said we dissent from the methodology used by Justice Scalia in arising at a decision, which is the right decision—my words—but for the wrong reason. And they said you go back and you look at the general proposition of whether or not the general interest seeking protection under the Constitution is in fact one we have historically protected.

So they say when you go back, you should look at whether we historically protected the right and recognized the right of individuals to marry who they want to marry. So you go back and, depending on what question you ask, you get a different answer. If you go back and say, OK, we will recognize—and I am oversimplifying—we are going to recognize, determine whether or not antimiscegenation laws are constitutional, and the basis on which they are being challenged is I have a privacy right to marry who I want to marry, so let's see if that right is protected by the Constitution.

Scalia's approach, you go back and look at all the history and say, hey, there is no place where blacks and whites were protected. But if you used the O'Connor approach, you go back and say have we recognized the right to marry? You say yes, we have done that, ergo, we can say, using that methodology of looking at the general proposition, there may be a principled rationale to acknowledge or recognize the right to marry a black man or a white woman or a white man or a black woman, that may fall within the domain of my right of privacy guaranteed by the Constitution.

Senator HATCH. Would you yield just for a second on that point?

The CHAIRMAN. I would like to finish just this line, so I don't confuse anybody.

Senator HATCH. I just want to mention that I really don't think Justice Scalia would fail to find, under the 14th amendment protection clause, that *Loving* v. *Virginia* is the correct decision.

The CHAIRMAN. A valid point.

Senator HATCH. I don't think he would have had the interpretation——

The CHAIRMAN. He may have come up with the exact same decision of saying that it would, in fact, be inappropriate and unconstitutional for the State of Virginia to have such a law. But he would not have found it, if you used his methodology, because that is where the right of privacy has most often been found by the courts since *Pierce*.

Now, in contrast, as I said, under the more traditional approach recognizing unenumerated rights, the courts ask not whether the legal system historically had protected interracial marriages, but whether the legal system historically had protected the institution of marriage generally. Because it had, because our legal system long had understood the importance of family integrity and independence, the Court held in *Loving* v. *Virginia* that the particular right to marry someone of another race is also protected.

Now, in thinking about how the Constitution protects unenumerated rights, including rights of privacy, will you use—I am not asking you where you are going to come out on any issue, but will you use the methodology that looks to going back to a specific right being sought, guaranteed, or will you use the more traditional method of more broadly looking at the right that is attempting, seeking constitutional protection before the Court? What methodology will you use? What role will history and tradition play for you in determining whether or not a right exists that is not enumerated?

Judge GINSBURG. Mr. Chairman, if I understand your question correctly, including the exchange between you and Senator Hatch,

if you are asking whether I would have subscribed to both parts of *Loving* (1967)—that is, both the equal protection and due process——

The CHAIRMAN. No. Let me be very clear. I don't care about *Loving*. I was using *Loving* as an illustration as to how you would arrive at a different decision depending on which methodology. I am asking you very specifically——

Judge GINSBURG. *Loving* was the case Justice O'Connor used to——

The CHAIRMAN. Illustrate.

Judge GINSBURG. To distinguish her position from the position Justice Scalia took in the *Michael H.* (1989) case. That case, as you know, had nothing to do with the issue raised in *Loving*. The controversy centered on a footnote in the Court's opinion, in Justice Scalia's opinion, a footnote added to the opinion in response to the dissent. The footnote was rather long, as I remember—it is not in front of me. The note appears at least to Associate Justice Scalia with a first step that some people wouldn't take; that is, he appears to recognize the existence of an unenumerated right. Then the question is: How does one define that right? He is not saying there are no unenumerated rights.

I have a colleague who has written a wonderfully amusing article, which I think he means us to take seriously. It is an article by my chief judge, Abner Mikva. It says, "Good-bye to Footnotes." And perhaps——

The CHAIRMAN. Well, the footnote here, Judge, is irrelevant. Let's just put it all aside. I am just using that as an illustration. The debate among people today in your business is: What principled rationale do you use in determining whether or not, under the liberty clause of the 14th amendment, a privacy right exists?

Judge GINSBURG. Senator Biden, I have stated in response to Senator Hatch that I associate myself with the dissenting opinion in *Poe* v. *Ullman* (1961), the method revealed most completely by Justice Harlan in that opinion. The next best statement of it appears in Justice Powell's opinion in *Moore* v. *City of East Cleveland* (1977).

My understanding of the O'Connor/Kennedy position in the *Michael H.* case is that they, too, associate themselves with that position. Justice O'Connor cited the dissenting opinion in *Poe* v. *Ullman* as the methodology she employs. She cited *Loving* as her reason for not associating herself with the footnote, the famous footnote 6 in Justice Scalia's *Michael H.* opinion, a footnote in which two Justices concurred. That is about all I can say on that subject.

The CHAIRMAN. Well, I think that answers the question. It seems to me that based on what you have said, you believe the more traditional principled rationale for arriving at whether or not such a right exists as it relates to the use of historical precedent is the one that you would use, rather than very narrowly speaking to a very specific right to determine whether or not it was protected.

Now, I have used up 15 minutes. When I come back, I can tell you, I want to move from that to talk about the *Chevron* case and what methodology you use in terms of deciding—and it is a different issue there. It is legislative intent that is going to be the issue, and what deference is given to it. I know we have raised

questions about that before, but I would like to nail down a few more points.

I appreciate your answer, and I am not going to go beyond the 15 minutes. I will now yield to the Senator from Pennsylvania.

Senator COHEN. Does that mean I am precluded from raising that issue before it comes back to you, the *Chevron* issue?

The CHAIRMAN. Not at all. Not at all.

Senator SPECTER. Mr. Chairman, thank you very much. You asked for an indication of time. I would expect to use the full 30 minutes.

Judge Ginsburg, I begin by expressing my own concern about the scope of the answers. The chairman said that he wished you would have answered a little more. I would join Senator Biden in that. I appreciate the fact that you have to make your own judgment as to what you will answer.

My own reading of the prior nominees has been that, as a general rule, there were more answers. Some answered less. Justice Scalia answered virtually nothing.

The CHAIRMAN. That is why I would like to be on an island with him. [Laughter.]

Senator SPECTER. He is a very engaging gentleman and a squash player, and I haven't yet been able to persuade him to do that. But when he was before this panel, I think Senator Biden is correct that he answered much less than you have.

You will not find any quotations from me in the record about praising nominees before our panel, and this is the eighth occasion I have been a party to them—praising nominees for not answering questions. I read one of your articles, and as you know, I wrote to you because you had commented that you believed the committee had crossed the line with Judge Bork in questions we asked. I wrote to you and asked for some examples, and I can understand your being too busy to give them.

My own observations have been that nominees answer about as many questions as they have to for confirmation, and I think that Chief Justice Rehnquist, for example, came back and answered some questions. It was a 65–33 vote. The tenor of these hearings has been very laudatory from this side of the bench, and I would join in that, as I said, about your academic and professional and judicial career. So that I don't think there is any doubt about your nomination not being in any jeopardy, but I would just add my voice to those who have commented about an appreciation on our side for more information.

When I asked the question about the death penalty yesterday, I tried to articulate it in as gentle a way as possible. I would not ask you, as Senator Hatch did—and he had every right to ask, and you had every right to decline—about issues moving toward how cases might be decided and whether you agreed with Justices Marshall and Brennan on capital punishment being cruel and unusual punishment in violation of the eighth amendment.

But I think that capital punishment is sort of a landmark issue on law enforcement, its deterrent effect and its ability to be a beacon, so to speak. That is one of the areas where I would have appreciated a little more.

I mention those comments to you at the outset because I think it is important, and this is obviously going to be an area where there are going to be lots of differences of opinion, not only with you today but with the nominees who will follow.

Let me now move to the substantive area that I consider to be very important, and that is the role of the Court on refereeing disputes between the President and the Congress on the War Powers Act issue, about which you wrote a concurring opinion in *Sanchez-Espinoza* v. *President Reagan.*

The issue of the gulf war was very problemsome, and President Bush asserted very late into December 1990 the intent to move into a conflict with Iraq over Kuwait without congressional approval. The leadership in the Congress stated their intention not to bring the matter to the floor. It was in a very unusual procedural setting where we had swearing-ins on January 3, and Senator Harkin of Iowa brought the issue up in a way which I think forced the hand of the leadership, and the issue did come up and we did have a vote on the resolution for the use of power.

Let me move to your concurring opinion in *Sanchez-Espinoza*, as the fastest way to get into the issue and into a dialog, where you said that you:

> would dismiss the War Powers claim for relief asserted by congressional plaintiffs as not ripe for judicial review. The judicial branch should not decide issues affecting the allocation of power between the President and Congress until the political leaders reach a constitutional impasse. Congress has formidable weapons at its disposal: the power of the purse and investigative resources far beyond those available in the third branch.

I would suggest to you, Judge Ginsburg, that the power of the purse is not very helpful if the President goes into Kuwait without authorization from Congress were the Congress to cut off his funding. It obviously can't be done when fighting men and women are at risk.

And when you talk about the investigate resources far beyond those available in the third branch, I don't believe that our investigative resources, which are customarily very important, really bear on this issue.

If we are to have a resolution between the Congress and the President, where we have a Korean war without a declaration of war, we have a Vietnam war without a declaration of war, and we have an issue about a violation of the War Powers Act in El Salvador as the issue came before your court, how can this dispute of enormous constitutional proportion be decided unless the Court will take jurisdiction and decide it?

Judge GINSBURG. Senator Specter, in that case, in the portion you read, I said that the question was not ripe for our review.

Senator SPECTER. I did.

Judge GINSBURG. It is a position developed far more extensively than in the abbreviated statement I made in the *Sanchez-Espinoza* (1985) case. The principal exponent was my colleague, Carl McGowan. He wrote persuasively on congressional standing and the concept of ripeness for review. His position was essentially adopted by Justice Powell in *Goldwater* v. *Carter* (1979). That case concerned the termination of the Taiwan Defense Treaty.

Senator SPECTER. It was Justice Powell who just had a single line: "Although I agree with the result reached by the Court, I would dismiss the complaint as not ripe for judicial review." But I do not believe that either the Supreme Court or the circuit court—and the circuit had it in *Crockett* v. *Reagan*—has ever really dealt with the issue.

I tried with Justice Souter, asked him if he thought the Korean war was a war. I answered the question in the question, because I think the Korean war was a war, and he said he would have to think about it. I said, "I am going to ask you the next round," and over the weekend he came back. I said, "Have you thought about it?" And he said, "Yes, I have." And I said, "Well, was the Korean war a war?" And he said, "I don't know."

I think this is a matter that we really ought to explore with a nominee—standing, ripeness. You have written expansively and I have admired your work on standing. I think that the Court dismisses too many cases on the standing issue. But isn't the Supreme Court there really to referee big, big issues? It is harder to have a bigger issue than the constitutional authority of the Congress to declare war or whether the President exceeds the War Powers Act if we don't come to you. And we can hardly come to you when the troops are in the field.

Judge GINSBURG. Senator Specter, the question for me was: Who is the "we"? I have not ruled out the ultimate justiciability of a question of the kind you have raised. What I said was that I associate myself with the position taken by Justice Powell, and in both decisions and law review articles by Carl McGowan, the position that legislators must stand up and be counted in their own House before they can come to court. If Congress puts itself in conflict with the Executive by passing a resolution, by a majority of both Houses, saying we, the Congress, take the position that the Executive is acting in opposition to our will, at that point I could not say there isn't a ripe controversy. But unless and until that occurs, I have taken the position—whether it is Republican Senators or Democratic Senators—that no ripe controversy exists between Congress and the Executive. The controversy ripens only when legislators who oppose to the Executive's position win in their own branch. Until that point is reached, in my view, there is no justiciable controversy between the two branches of government.

The President is a unitary. The President takes a position. For Congress to take a position, Congress must act by majority vote. I do not think a group of Senators can come to court and ask the third branch to resolve a clash between the legislative and the executive branches. That is my position on ripeness. I have stated that position in an abbreviated way in *Sanchez-Espinoza* (1985). Others take different positions. Members of my court have taken other positions.

As I see it, there must be a majority vote in Congress before the Executive and the Congress can have a controversy ripe for court to review. If a group of legislators does not prevail in Congress, that group cannot come to court for resolution of a clash that, in my mind, does not exist until it becomes the position of the Congress.

That is about all I can say, Senator Specter, on that subject.

Senator SPECTER. Judge Ginsburg, do you believe that the Korean war was a war?

Judge GINSBURG. That is the kind of question on which you might ask a law teacher to expound. If you are asking me how I would rule as a judge—and you are considering me to be a judge, not a legislator—I would have to say the Korean conflict was a complex operation. If I were presented with the record, the briefs, the arguments, I would be required to make a decision on it on the basis of what the parties present to me. I am afraid I can't do any better than Justice Souter did on that question.

The job for which you are considering me is the job of a judge, and a judge has no business expounding on a question like that apart from the record, the briefs, the presentations of the parties. We do have a great attachment in our system of justice to the principle of party presentation. Judges in our system are not inquisitorial. They do not take over the proceedings and pursue what they will. Senator Hatch reminded me of that very forcefully. Very dear to our system of procedure is the principle of party, not judicial, presentations.

I can't answer the question about the Korean war off the top of my head. If I were confronted with it as a judge in a case where the issue was justiciable, I would make my decision on the basis of the record, the briefs, and the arguments before me; out of that setting I am not prepared to answer the question.

Senator SPECTER. May I respectfully suggest, Judge Ginsburg, that a question as to whether the Korean conflict was a war does not come within the confines of justiciable issues where briefs are required and oral argument is required on a narrowly focused matter. As a matter of common life experience, people have a view as to whether the Korean conflict, involving thousands of people with a lot of military action, was or was not a war.

In citing the Korean conflict, I cite something which is not going to come before the Court, and I would expect that that would be the kind of a question where at least we could get some idea as to your life experience and your general approach to a matter of some magnitude, but I am not going to press it.

Let me move to another issue. I have been very much concerned about the Supreme Court functioning as a super legislature. As I said earlier, I am very much concerned about the issue of judicial activism, and would cite two cases where the Court acted as a revisionist Court. The *Griggs* decision was handed down in 1971 on a matter involving the Civil Rights Act, and then *Ward's Cove* came along in 1989 and, in my view, overruled *Griggs*. Congress changed that and returned to *Griggs* with the Civil Rights Act of 1991.

Senator Kennedy asked you earlier today if you agreed with the decision of the Supreme Court in one of those series of cases, and I am going to have to recheck the record to see if that was really answered. But the case I want to take up with you is the case of *Rust* v. *Sullivan,* and the concern that I have here is with an activist-revisionist Court which is going to make new law.

Rust v. *Sullivan* is the gag rule case, and that involved a situation where the provisions of the Public Health Services Act of 1970 relating to counseling on planned parenthood, was passed in 1970, and a regulation was promulgated in 1971 that there could be

counseling on abortion issues. Then in 1988, the Secretary of Health and Human Services issued a new regulation to the contrary, that there could not be counseling. Even though the earlier regulation had stood for some 17 years, Congress had not acted to alter it, strongly suggesting congressional approval of the regulation.

Then in a 5-to-4 decision, the Supreme Court upheld to new regulation, pointing out, among other things, that the new regulation was "in accord with the shift in attitude against the elimination of the unborn children by abortion." I was surprised to see the Court rest its opinion in part on a shift in attitude, shift in public opinion, to come out with a new regulation.

My question to you, as this is now a decided issue, do you agree with the Supreme Court's judgment in *Rust* v. *Sullivan?*

Judge GINSBURG. Senator Specter, remind me of the prior history of that case. It was a question, was it not, of the deference due to the Health and Human Services——

Senator SPECTER. That was a factor in the case, on the deference due a regulation promulgated by the executive branch, but within the context where there had previously been a contrary regulation, which had been in existence for 17 years, and no congressional action to change it during that time.

Judge GINSBURG. You said that you were going to check to see what my answer was about *Griggs* (1971) and *Ward's Cove* (1989). I hope I have been consistent in saying I think that the court, my court, and the Supreme Court, endeavored to determine what Congress meant. *Griggs*, was a unanimous decision authored by Chief Justice Burger, was it not?

Senator SPECTER. It was.

Judge GINSBURG. And wasn't *Ward's Cove* a divided decision?

Senator SPECTER. Five-to-four.

Judge GINSBURG. And then Congress said what it meant. I gave some other examples of such congressional clarification or correction. But I am uncomfortable about inquiries concerning how I would cast my vote in a particular case. I will address and explain, to the extent I am able, any vote I have cast. But you are raising a question about—one of your colleagues said he would inquire about *Chevron* (1984) deference and ask what that means to me.

I will confess I am the judge who wrote the decision that was reversed in *Chevron.* I regard *Chevron* as stating a canon of construction, which Congress is at liberty to say it doesn't want applied. I don't want to sit here before this committee, however, and write the opinion I would have written in the *Rust* v. *Sullivan* case.

Senator SPECTER. Judge Ginsburg, I am not asking you about *Chevron.* The specific case that Senator Kennedy asked you about I believe was *Patterson,* and in response to his question about whether you agreed with the opinion—and I believe it was *Patterson*—he said since they won't come back, you responded about—I don't believe you answered his question—you responded about the Congress changing the law on title VII cases applying to sex discrimination, and then about the *Goldman* case.

But I have moved away from *Patterson* and I haven't brought up *Chervon,* and the decision involving the gag rule, *Rust* v. *Sullivan,* is an example of a revisionist Court, in my opinion. It is a decided

case. What is the problem, on a matter which has been litigated and is finished, in having a Senator on the Judiciary Committee ask a nominee for the Supreme Court whether that case was correctly decided? It is a finished matter. Just as Senator Kennedy asked you about *Patterson* this morning, as he put it, the case won't come back.

Judge GINSBURG. It isn't clear to me, Senator, that the case won't come back, simply because we have a different regulation now. The gag rule was withdrawn in the very first week of this new administration. But it isn't far-fetched to think the rule could return in another administration.

Again, I sense that I am in the position of a skier at the top of that hill, because you are asking me how I would have voted in *Rust* v. *Sullivan* (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case. So I believe I must draw the line at the cases I have decided.

You asked about my statement in *Sanchez-Espinosa,* and I answered that question. If you inquire about something I have written, or an authority on which I have relied, I will do my best to respond. But if you ask how I would have voted on an issue that can come back, I must abstain. I can address an issue or case that is never going to come before the Court again—*Dred Scott,* for example, a decision I said was wrong for all times.

The issue in *Rust* is one that may come back. You can't rule it out, any more than I can. You can say for now the gag rule has been removed, the President removed it in his very first week in office. But it was put in place by the prior administration. I can't rule out the possibility that another administration will put the gag rule back. If I address the question here, if I tell this legislative chamber what my vote would be, then my position as a judge could be compromised. And that is the extreme discomfort I am feeling at the moment. You are asking me to tell you how I would vote on a case you call over and gone, one that can't come up again. I know the case is not going to come up again in the next 4 years. I can't see beyond that. I know that——

Senator SPECTER. How about 8 years? [Laughter.]

Judge GINSBURG. I am not going to predict the result of the next election, any more than you are, Senator.

Senator SPECTER. Judge Ginsburg, do you agree with the decisions of the Supreme Court in the 1930's, when the Supreme Court of the United States invalidated a whole series of congressional enactments on the New Deal, on the ground of substantive due process? Do you agree with those decisions?

Judge GINSBURG. Senator Specter, I think that line of authority has been so discredited by so many Supreme Court decisions, that if anything is well established, it is well established that the *Lochner* era is over. One cannot say of a recent 5-to-4 decision what one can say about the repudiation of the *Lochner* line of cases.

Senator SPECTER. Good. Now that we are finished with the thirties, we can move into the forties.

Judge Ginsburg, do you think that Congress has the authority to take away the jurisdiction of the Supreme Court of the United States to decide the constitutionality of issues under the equal protection clause of the 14th amendment?

Judge GINSBURG. You are asking me, what if Congress decided to do that, and if it were challenged in court—I don't think Congress has ever done that, right?

Senator SPECTER. *Ex Parte McCardle* dealt with that right after the Civil War.

Judge GINSBURG. There is *McCardle* (1869) and there is *Klein* (1872), and I don't think there is much more. If Congress were ever to do what your question hypothesizes, there would almost certainly be a challenge and it would almost certainly come before the Court. I can recite the names of the cases that exist, but I can't say anything beyond that. Any further statement would not be in the best interests of the Supreme Court.

Senator SPECTER. Did you answer—I believe you did yesterday—that you agreed with *Marbury* v. *Madison?*

Judge GINSBURG. I believe——

Senator SPECTER. I don't ask that question lightly, because some don't.

Judge GINSBURG. I believe the institution of judicial review for constitutionality is well established—I think I expressed myself to that effect yesterday. It is a hallmark of this Nation that our courts exercise that function.

We have served as a model for the world in that regard. After World War II, a number of states that never had the institution of judicial review for constitutionality looked to our system as a model. Yes, I feel comfortable that I am not doing any damage to the Supreme Court or the Federal judiciary by saying I believe *Marbury* v. *Madison* (1803) is here to stay.

Senator SPECTER. The time goes fast when I am questioning, maybe more slowly for you, Judge Ginsburg. The red light is on. If I may just pursue this for a moment or two more, Mr. Chairman.

Marbury v. *Madison* established the supremacy of the Supreme Court to decide the constitutionality of issues, and there are some up to this moment who dispute that. I asked you the question about whether Congress can take away the power of the Supreme Court to decide the constitutionality of issues under the equal protection clause of the 14th amendment, because you are the foremost champion of that clause.

But when you declined to answer that question, the thought occurs how do you have inviolate Supreme Court standing to decide constitutional issues, if the Congress can take away the authority of the Supreme Court to decide it, take away the jurisdiction.

When Justice Rehnquist was up for confirmation for Chief Justice, I asked him the question as to whether the Congress could take away the jurisdiction of the Supreme Court, and he declined to answer. Overnight, one of the staffers found an article written by Chief Justice Rehnquist in 1958. It was in the Harvard Law Record. He was then William H. Rehnquist, no titles.

In that article, Mr. Rehnquist criticized the Judiciary Committee for not asking Justice Whittaker, a nominee, important questions on due process. I said to him the next morning, I said this article

was found by staff and this is what you said in 1958, and he had a great answer. He said, "I was wrong." Then I pursued the question, with some tenacity, perhaps, and he finally answered the question. He said the Court could not be stripped of jurisdiction in first amendment cases.

I then asked him what about fourth amendment cases. He said I am not going to answer that. How about fifth amendment cases, due process, right to counsel? No, I am not going to answer. Sixth amendment? I asked him what's the difference between saying the Court can't be stripped of jurisdiction in the first amendment, but you won't answer as to the fourth, fifth and sixth? I said I am not going to answer that, either. [Laughter.]

The CHAIRMAN. Senator, I have a feeling your tenacity is not likely to be rewarded with this Judge.

Senator SPECTER. Don't bet on it, Mr. Chairman.

My final question to you, Judge Ginsburg, for this round is how can your granddaughters have the protection of equal protection under the equal protection clause of the 14th amendment, and my granddaughters, too, if the Congress can take away the jurisdiction of the Supreme Court of the United States to decide those issues?

Judge GINSBURG. Senator Specter, so far I have only one granddaughter.

Senator SPECTER. Just wait.

Judge GINSBURG. I am hopeful. I never said the Congress could. I haven't got the case before me. Chief Justice Marshall, in *Marbury* v. *Madison* (1803), said you start with the case. As Madison said, before the courts can do anything, they must have a case of a judiciary nature. Then Chief Justice Marshall said, when I have a case, I must apply the law to it, and the highest law in the land is the Constitution. That fundamental law trumps other laws. But judges do not apply the Constitution to abstract questions. I am bound by the case, I must decide the case, that is where a judge gets his or her authority to expound on anything from, from what article III says, from a case or controversy, a case of a justifiable nature.

If I may, I do want to emphasize what I hope I have made clear to you, because I do not want to be misunderstood as having criticized this committee. In the article that you read, I confess to an ambiguity. The sentence I wrote was, "The distinction between judicial philosophy and votes in particular cases blurred as the questions and answers wore on." I would like to clarify that I was not criticizing this committee. Far from it. I appreciate now more than ever how difficult it is for the responder to maintain that line and not pass beyond it into forecasting or giving hints about votes in particular cases. I was speaking of the vulnerable responder, not the committee that asked the questions.

I might also say, on your question concerning the word "war," it depends on the context. Are you asking about the power of Congress to declare war, or are you speaking in lay terms? I can recite wise counsel that has always shored me up. What a word means depends on the context in which it is used.

That you define a word one way in one context doesn't necessarily mean that you should define that word the same way in every other context. The notion that you should, said a great law

professor, Walter Wheeler Cook, "has all the tenacity of original sin and must constantly be guarded against." So that is what I was guarding against by not answering the question, was the Korean conflict a war. I must ask in what context are you asking that question, are you asking me to decide whether the Executive, in that affair, violated the Constitution, which gives Congress the power to declare war?

Senator SPECTER. I thank you for your answers, Judge Ginsburg. I will return to the issue of war on the next round, because I don't think there is any context in which it wasn't a war.

I would conclude by saying, and I would ask for your reconsideration of this, that although you should not answer questions about cases which are likely to come before your Court, *Marbury* v. *Madison* could, and, just as that is rockbed, I would hope that we would have assurances from nominees that rockbed issues, like the jurisdiction of the Court to carry out *Marbury* v. *Madison* on constitutional issues, like the first amendment and like the equal protection clause, are inviolate. Those are rockbed issues which are not going to change, no matter who brings them to the Court, and we are willing to stand up and say so.

Judge GINSBURG. In a case of a judiciary nature, I am prepared to do what a judge does.

Senator SPECTER. Thank you.

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. Judge Ginsburg, during my first round of questions Wednesday, we had a discussion of antitrust. Now, antitrust is sort of a phrase in the law that you are very familiar with, and a lot of Americans don't pay too much attention to it. But in this Senator's opinion, it really has—it is the bedrock of the whole free enterprise system.

The question really having to do with antitrust is whether conglomerates of business or economic power can be used to adversely affect the consumer in his or her right to buy or sell at a fair price.

I would like to follow up on the discussion that we had yesterday. As you may recall, I am concerned about the fact that the Supreme Court appears to be of two minds about certain antitrust cases. Its most recent decision on the subject seemed to favor a pro-big business approach to antitrust law based on economic theory instead of the facts. And that disturbs me much.

My question to you is: How would you view an antitrust case where the facts indicated that there had been anticompetitive conduct but the defendant attempted to justify it based on an economic theory such as business efficiency?

Judge GINSBURG. I am not going to be any more satisfying to you, I am afraid, than I was to Senator Specter. I can answer antitrust questions as they emerge in a case. I said to you yesterday that I believe the only case in which I addressed an antitrust question fully on the merits was the Detroit newspaper case. In my disserting opinion in that case, I attempted faithfully to interpret the Newspaper Preservation Act. I sought to determine what Congress meant in allowing that exemption from the antitrust laws.

Senator METZENBAUM. Indeed you did.

Judge GINSBURG. Antitrust, I will confess, is not my strong suit. I have had, as you pointed out, some half a dozen—not many

more—cases on this court. I think I understand the consumer protective purpose, the entrepreneur, independent decisionmaking protective thrust of those laws, but I can't give you an answer to your abstract question any more than I could—I can't be any more satisfying on the question you are asking me than I was to Senator Specter on the question that he was asking.

If you talk about a particular case—my opinion in the Detroit newspapers case was a dissent. There was a division in the court on how to interpret the statute, the Newspaper Preservation Act. That case indicates my approach to determining what Congress meant.

Senator METZENBAUM. Well, let me ask you this: Do you think that anticompetitive conduct can ever be justified on the basis that you have to have it in order to achieve business efficiency? I am really not asking you how you would vote on a case. I am just sort of asking you generally.

Judge GINSBURG. As you know, there is a key decision by Justice Brandeis, *Chicago Board of Trade*, which teaches that restraints of trade which are not per se illegal can be justified if their effects are more procompetitive than anticompetitive. And that is the analysis one would have to undertake.

You asked me if the only purpose of the antitrust law is efficiency. The cases indicate that the antitrust laws are focused on the interests of the consumer. There is also an interest in preserving the independence of entrepreneurs. I don't think the antitrust laws call into play only one particular economic theory. The Supreme Court made that clear in the *Kodak* (1992) case. But out of the context of a specific case, I can't say much more. No, I don't think efficiency is the sole drive.

Senator METZENBAUM. In a totally different area, I recognize the majority of Americans, and a majority in Congress for that matter, support the death penalty as a means of dealing with violent crime. I have long opposed the death penalty because of my concern that our criminal justice system too often makes a mistake and sentences an innocent person to death.

I am frank to say that there are certain crimes with which I am familiar, which we all read about in the paper, we see on nightly TV, in which I would almost want to go out and shoot the criminal myself with a gun because they are so heinous. But so often, too often, mistakes are made.

Four months ago, this committee held a hearing on innocence and the death penalty, and we heard firsthand about two of the tragic mistakes the criminal system made. We heard from Walter McMillian, an African-American from Alabama, who was convicted of murdering a convenience-store clerk after a trial lasting all of a day-and-a-half. The jury recommended life imprisonment, but the State judge, who was an elected official, perhaps recognized the political aspects of the matter, overruled the jury and ordered the execution of McMillian. After 5 years on death row, Mr. McMillian was freed because he did not commit the murder.

We also heard from Randall Dale Adams, a white man who in 1979 came within a week—within a week—of being executed for the murder of a Dallas, TX, policeman. Ten years later, he was able to show his innocence and was released.

Another example occurred after our hearing. Just last month, a white man from Maryland, Kirk Bloodsworth, was set free after 9 years in prison when it was conclusively proven that he did not commit the heinous rape and murder of a young girl. He had been sentenced to die.

Our committee held a hearing to understand the problems with the Supreme Court's decision in the case of *Herrera* v. *Collins.* In that case, Mr. Herrera was sentenced to die and later obtained evidence that allegedly proved his innocence. A Reagan-appointed Federal judge, a district judge in Texas, wanted to conduct a timely hearing to review Herrera's new evidence of innocence. He was prepared to go forward with the hearing within 2 or 3 days. The State of Texas objected to the district court's decision to hold a hearing, and the case was sent to the Supreme Court for review.

The Supreme Court ruled that the Constitution does not require that a hearing be granted to a death row inmate who has newly discovered evidence which, if proven, could establish his innocence.

In the opinion for the Court, Chief Justice Rehnquist was unable to declare clearly and unequivocally that the Constitution forbids the execution of innocent people.

The attorney who represented the State of Texas went even further than the Chief Justice. She bluntly asserted that if a death row inmate receives a fair trial, it does not violate the Constitution to execute that inmate even if everyone agrees that he is innocent.

Now, frankly, that is a shocking statement that came from the prosecutor in that case. I am extremely concerned with the Court's opinion in *Herrera* and the argument made by the Texas prosecutor. Even though the Rehnquist opinion did not clearly hold that it was unconstitutional to execute an innocent person, it is possible to read that into his statements.

Do you believe the *Herrera* case stands for the principle that it is unconstitutional to execute an innocent person?

Judge GINSBURG. As I understand it—and the case is not fresh in my mind—what the Court said was that the evidence in that case was insufficient to show innocence. It did not exclude a different ruling in a case with a stronger record.

We heard yesterday from Senator Feinstein who expressed her anxiety about the number of cases that go on for years and years. The colloquy occurring here shows the tremendous tensions and difficulties in this area. Her concern was that there must be a time when the curtain is drawn, and your anxiety is that no innocent person should ever be put to death.

Those tensions are before you, some of them are presented in the Powell Commission report that you will address. My understanding of *Herrera* (1993) is that it is concerned with the situation of a prisoner asserting, say 10 years after a conviction and multiple appeals, "I didn't do it," and then the process would start all over again.

I can empathize tremendously with the concerns——

Senator METZENBAUM. No, I don't think anybody would argue that. I don't think anybody would argue that, Judge Ginsburg, that 10 years later he can "I didn't do it," because he has been saying for 10 years he didn't do it.

Judge GINSBURG. What the Court said—this is to the best of my recollection—is that the evidence was too slim in *Herrera* to make out that claim, and it left the door open to a case where there was stronger evidence of innocence. That case is yet to come before the Court. So my understanding of this case is that, based on its particular record, the Court found the evidence too thin to show innocence, but the Court left open the question whether one could maintain such a plea on a stronger showing than the one made in that case.

That is as far as the *Herrera* case went. The decision left open a case where a stronger showing could be made.

Senator METZENBAUM. Now, State courts, of course, should review any new claim of a death row inmate that he is innocent. But that review can be in an atmosphere of strong public pressure for execution, especially when the conviction is for a particularly heinous or vicious crime.

Public pressure in these circumstances is most worrisome when the State trial and appellate judges are elected. Historically, the Federal courts have played a significant role in reviewing State death penalty verdicts. Federal judges have lifetime appointments and are more immune to the strong public sentiments that surround death penalty cases for heinous and violent crimes.

Now, the *Herrera* case raised significant new questions about the availability of the Federal courts to hear the claim of a death row inmate that he has new evidence of his innocence. Would you care to explain your view on the general role Federal courts should play in hearing the claims of death row inmates who have newly discovered evidence of their innocence?

Judge GINSBURG. Senator Metzenbaum, the question of habeas review and its limits is before the Senate, before this committee, I believe——

Senator METZENBAUM. But not before the Court. Not before the Court, so I think it is entirely proper for you to respond.

Judge GINSBURG. I can tell you of the legislation Congress passed for the District in which I operate; that is, we generally do not have habeas review. You have given to the District of Columbia courts a fine postconviction remedy. It is identical to the Federal remedy. The Supreme Court said, some time in the middle 1970's, that one goes from the District of Columbia courts to the Supreme Court. If the Supreme Court turns down a review request, there is no collateral review in the Federal Courts.

Some States must wonder why Congress so values the District of Columbia courts and doesn't similarly value the State courts. But I am now simply stating that in my court we don't have the brand of habeas review that the regional circuits have because Congress has said we don't. One of the reasons is that the President appoints District of Columbia court judges. Although they are not life-tenured judges, they are not elected or appointed by the city government. They are Presidential appointees commissioned to serve as judges for the District of Columbia.

What happens next in Federal habeas review, what controls there should be in setting the difficult balance between fairness to the defendant and finality in the system, is going to be your call,

not the Court's call. The next step will be the legislative response to the Powell Commission report.

Senator METZENBAUM. But having said that it is our call, my question to you is: What role do you believe the Federal courts should play in hearing the claims of death row inmates who have newly discovered evidence of their innocence, absent any action by the Congress?

Judge GINSBURG. All one can say is that the evidence would have to be stronger than it was in the *Herrera* case, because that is the binding precedent at the moment. I can't give you an advisory opinion on a case that is not before me with a particular record, a particular showing of innocence of the defendant in question.

Senator METZENBAUM. I am not asking for an opinion in a case. I am asking whether you feel that the Federal courts do have a role to play in habeas proceedings where there is newly discovered evidence that the guilty man, the man already found guilty, is innocent?

Judge GINSBURG. I think the Supreme Court has indicated that they do, but not without a sufficient showing, a factual showing, of innocence.

Senator METZENBAUM. I would agree you would have to have sufficient evidence and factual showing of innocence, and I would accept that answer.

The holding in a recent District of Columbia Circuit Court, *U.S.* v. *Thomas Jones,* is very disturbing to me. The appeal to your court involved the sentencing guidelines and whether a trial judge could give a longer sentence to a defendant who admitted responsibility for a crime after trial than could be given to the same defendant if he had pled guilty and admitted responsibility for the crime before going to trial.

On its face, it is shocking to consider that a trial court on its own initiative could penalize an individual for exercising his constitutional right to go to trial. The majority opinion, which you joined, held that it was permissible for the trial judge to give a longer sentence after the trial. Frankly, I have difficulty in comprehending that.

The four dissenting judges in the case stated that the majority opinion improperly allowed for increased punishment of a defendant for exercising his constitutional right to go to trial.

Now, I realize that the *Thomas Jones* case involved complicated sentencing guidelines. Therefore, I won't ask you to go into the specifics of the case. But what I do ask is whether you believe that it is improper for a trial court on its own initiative to impose a harsher sentence on a defendant just because that defendant chose to exercise his or her constitutional right to go to trial rather than to plead guilty.

Judge GINSBURG. That was not the nature of the trial judge's decision in——

Senator METZENBAUM. No, I am not asking about that case.

Judge GINSBURG. The answer to the question, can you penalize someone for exercising a constitutional right, should be evident. One cannot be punished for exercising a constitutional right. That is not what happened in that case. The question was the degree of clemency, the degree of leniency, the court was going to give.

The judge did something extraordinary in that case. He applied the guidelines markedly in the defendant's favor. He gave the defendant credit for acceptance of responsibility, which immediately knocked the range down under the guidelines from a range of 151 months to 171 months, to one of 121 months to 151. He gave the defendant 6 additional months—to make the sentence 127 months instead of the very lowest that it could have been, 121 months—because the defendant accepted responsibility late. The trial judge thus took into account the point in the process at which the defendant accepted responsibility. And that is all that case was about. That was all the majority held. The court held that within the context of giving a defendant credit for accepting responsibility for the crime he committed, the district judge could take into account that the man had accepted responsibility late—not on day one, but only after a jury had found him guilty of the crime as charged.

That is what that case involved. It is easy to mischaracterize what the court ruled, but I believe my description is accurate.

Senator METZENBAUM. I am not trying to go into that case. I am asking the more broad general question of whether or not it is improper for a trial court—forget about that case—to impose a harsher sentence on a defendant who chooses to exercise his or her constitutional right to a trial rather than plead guilty?

Judge GINSBURG. If you are asking the question, Can you penalize someone, punish someone for exercising a constitutional right? We have constitutional rights and one can't be punished for exercising a constitutional right. Otherwise, the right is not real.

Senator METZENBAUM. But you haven't answered.

Judge GINSBURG. You can't punish someone for exercising a constitutional right. If you punish someone for exercising a constitutional right, that person has no right.

Senator METZENBAUM. OK. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. We will now, with your permission, Judge, break for lunch until 2:15, if that is OK.

[Whereupon, at 1:13 p.m., the committee recessed, to reconvene at 2:15 p.m., this same day.]

AFTERNOON SESSION

The CHAIRMAN. The committee will be in order.

Judge, welcome back. We are starting a few minutes later, because there has been a very controversial vote on the floor of the Senate, causing some Members to continue to engage in the debate, and that is why some Members are not here. Thank you. I hope you had a chance at least to get some lunch.

I now yield to our distinguished colleague from the great State of Iowa, which I do know well and have great love and respect for.

Senator Grassley.

Senator GRASSLEY. You notice how I only had to remind him once about Iowa.

Senator BROWN. I think he was referring to the State, not the Senator.

The CHAIRMAN. That is correct. I do like the Senator from Iowa.

Senator GRASSLEY. I was referring to the State, as well.

In your 1986 article, "Interpretations of Equal Protection Clause," in the Harvard Journal of Law and Public Policy, you wrote that the greatest figures of the Federal judiciary "have not been born once or reborn later liberals or conservatives," and then you went on to say:

> They have been independent thinking individuals with open, but not drafty minds, individuals willing to listen, and throughout their day to learn. They have been notably skeptical of all party lines. Above all, they have exhibited their readiness to reexamine their own premises, liberal or conservative, as thoroughly as those others.

Now, this may sound like a softball question, but I would like to ask you, from the standpoint of your years experience of judging—and the reason I ask is just to see how you have evolved as a judge—can you tell us whether any of your views have evolved or changed over time? I don't want a lot of examples, maybe one example would be enough. Is there something on which you have changed a particular view of yours. How did it come about and what was the view that changed, and why did it change.

Judge GINSBURG. Senator Grassley, I am glad you quoted that, because it is my creed. When I made my opening remarks, I quoted from Judge Learned Hand's "The Spirit of Liberty." He said "it is the spirit that is not too sure that it is right." When I was asked to enumerate the Justices I admire most, I left out some jurists one might think should be on that list; I did so because they were sometimes too sure they were right.

An example that comes immediately to mind is in the field of civil procedure. Civil procedure is a subject I taught for several years. When I graduated from law school and was clerking for a Federal district judge, I was absolutely sure of the answer to this question: Does a Federal district court have authority to transfer a case, although the transferee court lacked both subject matter and personal jurisdiction?

I had several conversations with the judge for whom I worked. It was, in the end, his decision, but the decision he made coincided with my own view—that the court was powerless to do anything but dismiss the case. The second circuit affirmed the dismissal. Then the Supreme Court reviewed the decision and held that the lower courts got it wrong. We have one Federal court system. A court without subject matter and personal jurisdiction could indeed transfer the case to another Federal court that had authority to hear it. That was the Supreme Court's decision.

I have come to recognize over the years that my thinking was too rigid, that the Supreme Court was indeed right in its view of the flexibility of the Federal court system. So that is an example that comes immediately to mind. I suppose it does, because procedure is the subject I taught for 17 years.

Senator GRASSLEY. Thank you.

I was supposed to inform Senator Biden whether or not I wanted 15 or 30 minutes, and I want to claim 30 minutes for my round.

I want to go on to something that you discussed briefly with Senator Simpson, and that was the issue of recusals. There was some confusion about the number of cases in which you were automatically recused by the clerk of the court of appeals. Senator Simpson thought it was 251, and Senator Biden's staff advised Senator

Leahy it might have been 108. My count of the list in your questionnaire shows that it was a little more than 300 cases involving more than 25 firms on the list. That is in addition to your 11 sua sponte recusals.

And while you recalled Tuesday that many of those recusals resulted from your minor child's ownership of one share of El Paso Natural Gas Co., I want to bring to your attention that none of the cases listed in your questionnaire appeared to involve El Paso Natural Gas. If I am wrong on that, you can correct me.

Rather, the cases that were listed on your questionnaire involved the major American firms on your recusal list, which I understand from your answers Tuesday are clients of members of your family who practice law. I am sure that you will agree that it is important that we clarify this matter, to make certain that conflicts of interest will not substantially impair your ability to perform your duties as an Associate Justice. I don't have any question that you will be impartial in how you make a decision, but I want to ensure your recusals don't impair the work of the Court.

As you noted Tuesday, recusals are far more significant on the Supreme Court, where every case is heard by nine Justices sitting as a full panel, as opposed to the District of Columbia Circuit, where any of the more than a dozen judges on the circuit court can be selected by the clerk to make up the three-judge panel that decides a case.

In close cases before the Supreme Court, the recusal of one Justice can substantially undermine the ability of a court to lay down a clear decisive ruling.

If confirmed, will you continue to recuse yourself from cases involving the firms listed in your questionnaire?

Judge GINSBURG. No, Senator Grassley, and I will not for this reason. The great bulk of those cases would not be on my recusal list next year in any event, no matter what court I served on. Let me explain.

The latest count I got from my chambers, and they checked last night, was 208 automatic recusals, 11 separately listed. You are quite right in reporting that, indeed, it was not my son's two shares of El Paso Natural Gas. In fact, in my early years on the court, there were only four automatic recusals. The great bulk came starting in 1984. A single corporate group my spouse represented from 1984 until this spring accounted for 111 of the 208 cases. That representation is now completed.

That representation meant that I tied for second place in the number of recusals listed for judges on my court. Eliminating that group, I would be at or probably below the middle point. But I can represent to you that the representation in question is indeed completed, so that the single corporate group that accounted for 111 of the 208 recusals should no longer be on my recusal list.

Senator LEAHY. If the Senator from Iowa will yield on my time, yesterday there had been a question on this, or 2 days ago during my discussion with Senator Simpson about recusals. I was acting chairman at that time and I was given by the chairman's staff an incorrect number which was the result of a typographical error. Now I am told the actual number was 208, not 108, as I had represented from the staff printout, and approximately 100 of them

were on matters relating to AT&T, a company which the Judge's husband no longer represents, if I am getting the correct numbers now.

Judge GINSBURG. Yes, I was reluctant to mention the name of the corporate group, but——

Senator LEAHY. I know, but we have had some question of this and a number of Senators have raised questions of whether the accurate numbers were given. That is why now the chairman has asked me to note that the correct number is 208. I also understand your husband no longer represents that client.

Judge GINSBURG. That representation is indeed completed.

Senator GRASSLEY. I think your answer is satisfactory to me. But I did have a concern, because, looking at those same firms and their involvement in appeals to the Supreme Court over a period of time, the LEXIS search found about 300 cases. Basically, what you are saying now is that there isn't any involvement by any member of your family with a large number of those firms, so there wouldn't be a need for recusal. Is that your answer?

Judge GINSBURG. That's correct, Senator.

Senator GRASSLEY. Thank you very much.

If I could go on to something that, to a nonlawyer like me, is a little more complicated. It involves a decision that you were involved in, *United States* v. *Jackson*. In that case, the defendant was indicted under the Armed Career Criminal Act. You were called upon to determine whether a part of the statute either enhanced an existing criminal penalty for repeat offenders, or, instead, created a new separate offense. You noted that the statute created a new offense, and Jackson's conviction would have to be thrown out, because the grand jury did not indict him for that new offense.

You found the statutory language to be ambiguous, but you did not apply the rule of lenity, where ambiguous criminal statutes are supposed to be construed in favor of the defendant. Instead, you upheld the conviction and, in so doing, it is my understanding, you relied to a great extent on the statute's legislative history.

To what extent should legislative history be used in interpreting criminal statutes? While everyone is presumed to know the law, how is a potential criminal to fairly foresee that a court will convict him based on legislative history, rather than how he might read the statute?

Judge GINSBURG. The meaning of a statute we would always like to get, Senator Grassley, from the text of the statute itself. Sometimes that meaning is not clear and we must resort to construction aids. Aid sometimes comes from legislative history, sometimes from an agency interpretation. I do not have the case that you mentioned in the front of my mind, and I would have to look at it to refresh my recollection. But I am certainly conscious of the need for fair notice to anyone in the criminal justice system.

Senator GRASSLEY. Why don't we do this, since it is not familiar to your mind, we will get you a copy of it and then you can answer at a later time in another round for me. Would that be OK?

Judge GINSBURG. That is fine.

Senator GRASSLEY. I would rather have you answer as thoroughly as you can.

I was here when Senator Biden talked about unenumerated rights. I was not here yesterday when the issue again came up, but I am glad that the chairman clarified whether the Constitution protects the right to marry. It doesn't protect the right to marry whomever a person chooses to marry. The Supreme Court has said the Constitution protects against State interference with the right to marry, if that State regulation is based on race. But the State can and does regulate the right to marry. For example, bigamy laws exist, and protection against people marrying their siblings exist. So you agree with Senator Biden's clarification, don't you, that the Constitution doesn't protect a right to marry whomever a person wants?

Judge GINSBURG. Yes, I agree with that. That has been recognized even in the face of a free exercise of religion challenge, as the bigamy case you mentioned demonstrates.

Senator GRASSLEY. Similarly, you know that there is no unenumerated constitutional right to get a job, assuming no race or gender discrimination. The Supreme Court has never held that anyone has a right to a job, and it is a fundamental part of constitutional law that protections against race and gender discrimination apply only to government actors, not to private employers. If the Constitution itself banned job discrimination, then there never would have been a need to enact the civil rights statues, which are based on the congressional power to regulate interstate commerce, and not upon section 5 of the 14th amendment.

So you agree that the Constitution does not protect the right to a job, free of race or gender discrimination?

Judge GINSBURG. Yes, Senator Grassley, the Constitution is established by and for the people through the people's representatives. The individual rights recognized in the Constitution are phrased as restraints on Government. The Constitution says what Government may or may not do.

There is a conspicuous exception, an instance in which the Constitution directly applies to persons. That instance is the 13th amendment, which says that slavery shall not exist, slavery or involuntary servitude shall not exist in the United States. That provision governs everyone in these United States.

Senator GRASSLEY. But you are in no way saying that that confers a right to a job?

Judge GINSBURG. In our country, as opposed to some newer democracies, we guarantee directly against Government intrusion into fundamental civil and political rights. Economic and social rights are in the charge of the legislature. Our Constitution does not guarantee a right to work, a right to be fed, a right to be clothed, a right to have decent shelter. Our society is as respectful of those rights as any I know, but the respect comes through measures passed by the legislature, and not in the form of a constitutional command that courts are capable of implementing.

Senator GRASSLEY. Judge Ginsburg, you have declined to talk about the constitutionality of capital punishment. You have distinguished your discussions about abortion from your unwillingness to talk about the death penalty on the basis that you haven't written about or spoken about capital punishment. I hope I understand that that was your answer before. So I want to bring to your atten-

tion that during your tenure at the ACLU, you wrote an amicus brief in *Coker* v. *Georgia*, arguing that the death penalty for rape was not constitutional.

You have written, then, haven't you, on the death penalty?

Judge GINSBURG. I did not write on the general question of the constitutionality of the death penalty. The *Coker* v. *Georgia* (1977) brief said the death penalty for rape—where there was no death or serious permanent injury, apart from the obvious psychological injury—was disproportionate for this reason: The death penalty for rape historically was a facet of the view that woman belonged to man. First, she was her father's possession. If she suffered rape before marriage, she became damaged goods. The rapist was a thief. He stole something that belonged first to the father, then, when the woman married, to her husband. Once raped, a woman would be regarded as damaged goods.

We have seen that phenomenon recently in tragic incidents in many places in the world. Women in Bangladesh, for example, were discarded, were treated as worthless because they had been raped. That was what prompted my position in *Coker* v. *Georgia*. That is the whole thrust of the brief I co-authored. We emphasized that rape was made punishable by death because man's property had been taken from him by reason of the rape of his woman. That was the perspective that informed the *Coker* v. *Georgia* brief.

Senator GRASSLEY. Again, I am not a lawyer, so when I refer to something, if you want to tell me that I am missing a point, feel free to do it. But on page 22 of that brief, a heading, underlined, says the death sentence for rape is impermissible under the 8th amendment because it does not meet "contemporary standards regarding the infliction of punishment and is inadvisable since it diminishes legal protection afforded rape victims."

It seems to me it deals directly with the issue of the eighth amendment.

Judge GINSBURG. "Diminishes legal protections afforded rape victims." Senator Grassley, I urge you to read the entire *Coker* v. *Georgia* brief. I think you will find it to be exactly what I represented it to be.

One of the reasons why rapes went unpunished, why women who had been raped suffered the indignity of having the police refuse to prosecute, was statutes of that order.

Senator GRASSLEY. Please understand that the reason I brought it up wasn't that I want you to tell me any more than you were willing to tell other people on your position on the death penalty. I brought it up because you said you hadn't written on the subject, and I found something that you have written on the subject.

Judge GINSBURG. I have written on the subject of women who have been raped and society's attitude toward them. *Coker* v. *Georgia* fits into that category. My statements regarding that case should not be taken out of context to say or imply anything about any subject other than the one addressed in that brief. The position developed in the brief was that the death penalty for rape, the origin of that penalty and the perpetuation of it, was harmful to women. Far from resulting in conviction——

Senator GRASSLEY. Well, let me ask you this, then, separate from the issue of the extent of your writings: Did *Coker,* outside the fact

that it outlawed capital punishment in the case of rape, solve the purpose that your brief intended to solve?

Judge GINSBURG. It was a contribution to the proper way to look at this terrible crime. It was a contribution to the end of thinking of women as damaged goods because they had been raped. That is what I think about it.

Senator GRASSLEY. If I could go on to another point, yesterday in conversation with Senator Cohen, there was a discussion of whether judges should or should not follow opinion polls. In light of that statement, I wonder what you think of the approach to constitutional decisionmaking espoused by the authors of the joint opinion in *Planned Parenthood* v. *Casey*. And I don't want this to be a discussion about abortion. That is not my point.

I want to quote:

> Where in the performance of its judicial duties the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe*, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

Do you agree that Justices should consider the political dimensions of controversial cases, or is that the kind of constitutionally unprincipled "pleasing the home crowd" that you have criticized?

Judge GINSBURG. What those three Justices said in the *Casey* (1992) case I think has to be taken in the context of what they said before. They were talking about the importance of stare decisis, of precedent, in a judicial system. What I regard as most important, Senator Grassley, is what those Justices said just before the line you read. They talked about stability in the legal system. Was a precedent plainly established? How was it working in society? Had reliance interests been built up around it?

There is an expansive discussion of the principle of stare decisis in that portion of the *Casey* opinion. The sentences you read can't be detached from the three or four pages that go before it. The part that goes before stresses the reliance interest built up around a precedent, the generation of women who have grown up thinking that *Roe* v. *Wade* (1973) is the law of the land.

That is the central part of the stare decisis discussion, and not the very last part, the portion you read. To concentrate on that last part, I think, diminishes what is a very satisfactory, very complete discussion of the principle of stare decisis. Those last sentences seem to me not nearly as impressive as what went before. The discussion of stare decisis in the central part of the opinion is excellent and means much more than that last paragraph. Taken in isolation, the last paragraph might be misperceived. I think it must be read in context. I might express, regarding judicial opinions, the same things I say about legislation. The first rule is read, the next rule is read on, and the third rule is read back.

That is my view of the portion of the *Casey* opinion about which you inquired. I can't give that paragraph a mark apart from what precedes it. Taking it together with what precedes it, the whole is a very impressive statement of the doctrine of stare decisis.

Senator GRASSLEY. Well, without commenting on *Casey* or *Roe* or any other case, could you just simply comment whether judges

should, in any way, consider the effects of their rulings on external political disputes?

Judge GINSBURG. I have said here and in several other places that a judge——

Senator GRASSLEY. Should they be drafting political compromises?

Judge GINSBURG. A judge is not a politician. A judge rules in accord with what the judge determines to be right. That means in the context of the particular case, based on the arguments the parties present, in accord with the applicable law and precedent. A judge must do that no matter what the home crowd wants, no matter how unpopular that decision is likely to be. If it is legally right, it is the decision that the judge should render.

And I also said what a judge should take account of is not the weather of the day, but the climate of an era. The climate of the age, yes, but not the weather of the day, not what the newspaper is reporting.

Senator GRASSLEY. You addressed the standing issue to some extent yesterday with Senator Heflin, and you have talked with a number of Senators about deferring to Congress as you decide cases. I would like to talk about one case, that was a dissent of yours, that covers both issues.

In *Dellums* v. *Nuclear Regulatory Commission,* you called for deference to congressional predictions regarding the South African sanction laws. The plaintiffs were trying to sue the NRC over the importation of a commodity that wasn't specifically mentioned in those sanction laws. They argued its importation violated the law and, therefore, prevented a quicker end to the apartheid government.

The majority found that they lacked standing. You dissented. By deferring to congressional predictions, weren't you actually expanding the scope of constitutional standing and Federal court jurisdiction? And isn't there a line to be drawn between what you might have to look for that we just talked about, legislative history, congressional intent, and what are congressional predictions?

Judge GINSBURG. Senator Grassley, let me try to explain the *Dellums* (1988) case. The constitutional requirement for standing was that a person show injury in fact. Among the plaintiffs in that case—the one on whom I concentrated—was an exile, an outcast from his country, a South African black who had been banned from his native country because of his political activity.

Our Congress, you, had enacted an embargo on certain commodities from South Africa. In doing so, you said you thought that putting this kind of pressure on the South African Government would hasten the time when apartheid would end. When apartheid ended—or when it began to break down—that man could return to his native country.

He said he was injured by his outcast status. You said you were pursuing a policy designed to promote the end of apartheid, the day that this man would no longer be an outcast from his country.

I was following the constitutional requirement that to have standing to sue one must suffer an injury in fact. This man was claiming an injury, and I was relying on your factfinding that the

measure you took could hasten the day when his injury would end. That is the nub of my dissenting position.

The court majority disagreed with me and said he didn't sustain an injury in fact. I thought he did, and I relied on your factfinding that the reason you put an embargo on South Africa was not to do something futile, but to hasten the day when apartheid in that country would end. On that day, this man would no longer be an exile from his native land. That was my reasoning in the *Dellums* case.

You asked me before if I stand ready to reexamine my own decisions. If you asked me in this Chamber today: Do I think I was right in taking the position that the plaintiff in *Dellums* suffered an injury in fact within the meaning of article III of the Constitution, and that Congress had recognized his injury would abate as a result of the embargo? I thought my decision was right then, and I think it is right today, and I stand by my dissent in the *Dellums* case.

Senator GRASSLEY. As a taxpayer, I would like to have standing in court based on a prediction Congress makes. In fact, we are in the process of making a prediction right now that 4 or 5 years from now we will have $500 billion less deficit than we have now. And if we don't meet that target, can a taxpayer sue me—not sue me——

Judge GINSBURG. A taxpayer has standing——

Senator GRASSLEY. Would it have standing in court?

Judge GINSBURG. No. The answer is "no." Under current precedent, a taxpayer has standing to challenge only one thing, and that is the State's involvement in establishing a church. A taxpayer—you are a taxpayer, and I am a taxpayer, and we have shared grievances about what the Government does with our money. But the plaintiff who had been declared an exile, an outcast from his native land, was not a taxpayer who shared with the generality of the public a common grievance. He was not complaining about the way the Government was spending his tax dollars. The cases are simply not comparable. There is only one category of case in which a taxpayer can sue. The paradigm case, under current precedent, is *Flast* v. *Cohen* (1968).

Senator GRASSLEY. Well, I was hoping that I would maybe have a friend on the Court who would want to overturn *Frothingham*.

My last question: In response to questions by Senator Pressler and Senator Moseley-Braun yesterday, you stated basic agreement with the Court's general holding in *Lucas* v. *South Carolina Coastal Council* that a regulatory taking which denies an owner of all economically beneficial uses of her property violated the fifth amendment.

Now I, of course, understand your unwillingness to elaborate on *Lucas* because there will be many, many more cases before the courts. But I would like to see if you could help me understand the rule of *Lucas*.

The Court said that when a regulation leaves an owner with no economic use of her property, the land has been taken for the benefit of the general public just as if the Government has physically occupied the land. Do you think that what I just said was an accurate statement of the holding in *Lucas?*

Judge GINSBURG. The Court said, just as you summarized it, that the Government cannot take, but it may regulate. There is a point at which the regulation is so enveloping that it becomes a taking. When the Government acts so as to deprive the owner of all of the value of the land, as the Supreme Court said in *Lucas* (1992), that is tantamount to a taking and it must be compensated.

The *Lucas* case itself went back to the lower court to determine whether that was, indeed, the case—had the owner been deprived of all the economic value of the land. But you are also right, Senator Grassley, that the point at which regulation becomes a taking is something that will be determined case by case. Many cases will come before the Court calling for development of the doctrine of the *Lucas* case.

Senator GRASSLEY. Thank you, Judge Ginsburg.

Senator LEAHY [presiding]. Thank you, Judge. You can see how these hearings have progressed. Once again, the back-benchers come in to chair the hearing. I would hope that you feel complimented by that lack of a full-court attention up here. I suspect it indicates more approval than disapproval.

Earlier this morning, I know that you and Senator Hatch had a dialog regarding Judge Thomas, now Justice Thomas' confirmation hearing. I had asked him some questions about *Roe* v. *Wade*. Both the questions and answers became a matter of some of the debate subsequently in Justice Thomas' confirmation hearings.

Without going further, I just want to make sure that when somebody dusts off these records they get it fully and accurately, and so I will place in the record at this point the transcript of the series of questions I asked then-Judge Thomas regarding *Roe* v. *Wade* and his responses to them. That is not directed as a question to you. I know you went through that this morning.

[The transcript follows:]