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.