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.