tion that the popular wisdom is not prepared to strike down. That is the essence of my question.

Judge GINSBURG. Mr. Chairman, I can assure you on one thing: I will never, as long as I am able to sit on any court, rule the way the home crowd wants out of concern about how it will play in the press if I rule the other way.

The CHAIRMAN. I wasn't implying playing the press. I know you would never do that. That is not even a question. My question is again—and I will drop it now—my question is whether or not, if you determined that it is appropriate in 1948, and you were on the Court, and you deemed separate but equal was inappropriate, or in 1938 that it was not constitutionally permissible under the 14th amendment, whether notwithstanding the fact you had reached that conclusion as a legal scholar and as a Justice bound by no previous Supreme Court ruling, that notwithstanding the fact that in 1938 America had not gone to war, did not understand genocide, did not have a notion of the value and the role that blacks would play in that war, that you would have been willing to say, if you believed it at that moment, we should strike down the law that the vast majority of Americans thinks is appropriate.

Judge GINSBURG. I think I can give you a clear example. It was Chief Justice John Marshall, who ruled in a way that the State of Georgia found exceedingly displeasing. The case was *Worcester* v. *Georgia* in 1832. Marshall ruled the right way, even though he knew that the people of that State, especially the people in power in that state, would be down on his head for that ruling. But it was the right ruling and so he made it.

May I also say that *Dred Scott* (1857) was the wrong decision for its time. There was no warrant for it at the time it was rendered. It should never have been decided the way it was. It was incorrect originally and it was incorrect ever after. I don't think it was a decision that the Court had to make at the time that it made it.

The CHAIRMAN. I thank you very much, Judge. I have exceeded my time, and I thank you for your cooperation.

I yield to the Senator from Utah.

Senator HATCH. Judge, I thought your answers were pretty good. Because, as a matter of fact, *Dred Scott* was the first illustration of substantive due process, where the judges just decided they want it done that way. Justice Taney thought he was really saving the country through doing that, so he did that, which really was not ahead of society. Society, at least in the North, was ahead of them.

And in the case of *Plessy* v. *Ferguson,* Mr. Justice Harlan, in 1896, had previously said that separate but equal was wrong. So, in all honesty, the Court was not ahead of society, but society really was ready for that type of a decision.

Now, there are many that criticize *Brown* v. *Board of Education* for the rationale of the decision, but, frankly, all *Brown* v. *Board of Education* did was what Justice Harlan suggested, and that is treat equality as equality under the 14th amendment.

So it isn't a question of whether you are ahead of society or not. It is a question of whether you are actually interpreting the laws in accordance with the original meaning which, of course, under the 14th amendment meant equal protection, equal rights, equality.

Let me just move on to something else. I would like to ask you whether you agree with the following statements about the role of a judge, including a Supreme Court Justice. The first statement is this: The judge's authority derives entirely from the fact that he or she is applying the law, not his or her personal values. Do you agree or disagree with that?

Judge GINSBURG. No judge is appointed to apply his or her personal values, but a judge will apply the values that come from the Constitution, its history, its structure, the history of our country, the traditions of our people.

Senator HATCH. I agree. Then you agree with that basic statement then, you shouldn't be applying your own personal values?

Judge GINSBURG. I made a statement quoting Holmes to that effect in my opening remarks.

Senator HATCH. You did. What about this statement: The only legitimate way for a judge to go about defining the law is by attempting to discern what those who made the law intended.

Judge GINSBURG. I think all people could agree with that. But as I tried to say in response to the chairman's question, trying to divine what the Framers intended, I must look at that matter two ways. One is what they might have intended immediately for their day, and the other is their larger expectation that the Constitution would govern, as Cardozo said, not for the passing hour, but for the expanding future. And I know no better illustration of that than to take the words of the great man who wrote the Declaration of Independence. Thomas Jefferson said: "Were our state a pure democracy, there would still be excluded from our deliberations women who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men." Nonetheless, I do believe that Thomas Jefferson, were he alive today, would say that women are equal citizens.

The CHAIRMAN. Or else he wouldn't be President. [Laughter.]

Judge GINSBURG. But what was his understanding of "all men are created equal" for his day, for his time? It was that "the breasts of women were not made for political convulsion." So I see an immediate intent about how an ideal is going to be recognized at a given time and place, but also a larger aspiration as our society improves. I think the Framers were intending to create a more perfect union that would become ever more perfect over time.

Senator HATCH. I think that is a good way of putting it. I think reasonable jurists can disagree about what the original meaning of a provision is or how to apply it under certain circumstances. I don't think there is any question about that, or as to how to apply it to a given set of facts. But so long as the judge's or Justice's starting point is the original meaning of the text, then it seems to me that judge is seeking to fulfill his or her constitutional duty.

Let me ask about this statement: If a judge abandons the intention of the lawmakers as his or her guide, there is no law available to the judge and the judge begins to legislate a social agenda for the American people. That goes well beyond his or her legitimate power.

Judge GINSBURG. The judge has a law—whether it is a statute that Congress passed or our highest law, the Constitution—to construe, to interpret, and must try to be faithful to the provision. But

it is no secret that some of these provisions are not self-defining. Some of the laws that you write are not self-defining. There is nothing a judge would like better than to be able to look at a text and say this text is clear and certain, I do not have to go beyond it to comprehend its meaning. But often that is not the case, and then a judge must do more than just read the specific words. The judge will read on to see what else is in the law and read back to see what was there earlier. The judge will look at precedent, to see how the words in this provision or in similar provisions have been construed. The effort is always to relate to the intent of the lawgiver or the lawmaker, but sometimes that intent is obscure.

Senator HATCH. I like your statement that the judge has an obligation to be faithful to the provisions of the law, and you have explained that I think very well.

Let me move to another subject that is very important to my folks out in Utah, and that is the second amendment. I would like to address the second amendment, the right to keep and bear arms, a right that many of us from Utah and across the country believe sometimes gets short shrift.

For instance, for most of our country's history, the Bill of Rights limited only the powers of the Federal Government, not the States. But through the process of so-called selective incorporation, the Supreme Court in recent decades ruled that most of the provisions of the Bill of Rights apply via the 14th amendment against the States.

Now, one right, however, that has not yet been held to be protected from infringement by the States, of course, is the second amendment right of law-abiding citizens to own firearms. Now, do you believe that there is a principled basis for applying almost all of the other provisions of the Bill of Rights against the States, but not the second amendment?

Judge GINSBURG. The second amendment shares with at least two other provisions of the Bill of Rights that status. They are significant provisions, but they have not been held to be incorporated. One is the grand jury presentment or indictment provision——

Senator HATCH. In amendment V.

Judge GINSBURG [continuing]. In article V. grand juries are not obligatory for the States. And another, also a right that many people think is very important, is the seventh amendment; the right to trial by jury in a civil case, stated in the seventh amendment, has not been held applicable to the States. So the second amendment doesn't stand alone. Grand juries and civil juries fall in that same category.

As you know, Senator, there is much debate about what the second amendment means. I think the last time the Supreme Court addressed the matter was in 1939, was it not, in the *Miller* case? So I am not prepared to expound on it beyond making the obvious point that the second amendment has been variously interpreted.

Senator HATCH. Well, I think what I am saying is I would agree with Justice Black, that if we are going to have incorporation against the States of any portion of the Bill of Rights, all eight amendments conferring rights should apply against the States. I don't think judges should be picking and choosing which rights they prefer.

Now, in the two cases that you have mentioned, the amendments still apply, other than those features. But it is just one I wanted to raise with you, just for whatever purpose I could.

Judge Ginsburg, I am concerned about a reverse discrimination case decided in the D.C. Circuit that you sought to overturn. Now, that is the case of *Hammon* v. *Barry*. That was in 1987. There the court ruled the District of Columbia Fire Department's racial hiring quotas violated title VII of the equal protection clause. In that particular case, according to Judge Starr's opinion, there was no evidence of any actual intentional discrimination in hiring by the D.C. Fire Department since the 1950's, in other words, no evidence of discrimination or intentional discrimination.

In fact, long before the quota hiring policy began, the majority of the new hires by the department had been black. In Judge Mikva's opinion dissenting from the court's denial of rehearing en banc in the case, an opinion which you joined, Judge Mikva wrote: "This case concerns one of the fundamental dilemmas our society faces, how to eliminate a 'manifest imbalance' that reflected underrepresentation of women and minorities in the workforce."

Now, because you joined in this opinion here, I take it that you agree with Judge Mikva that a "manifest imbalance" in an employer's workforce is sufficient justification under title VII for either voluntary or court-ordered race and sex-based quotas and preferences under title VII, even if the imbalance is not traceable to any prior intentional discrimination. Would that be a fair statement?

Judge GINSBURG. Senator Hatch, the *Hammon* (1987) case is not in the front of my mind. As you have pointed out, I wasn't on the panel that made the decision in that case.

Senator HATCH. I won't hold you to it, because I don't expect you to remember all of these.

Judge GINSBURG. This was a——

Senator HATCH. You have written some 700 opinions, as I recall, so I am not going to hold you to that.

Judge GINSBURG. I think it is important, though, to understand the difference between being part of a full court and being a member of a three-judge panel, which I was not. I was not one of the decisionmakers in the *Hammon* case, I was simply a member of the court, and all of us voted whether to hear the case en banc. But I was not part of any decision in that case.

Senator HATCH. Well, the problem with permitting a manifest imbalance, that is, a statistical disparity not traceable to any intentional discrimination, to justify quotas or other preferential euphemisms like numerical goals is that statistical disparities can and do often occur for many reasons other than discrimination, and it is unfair to penalize innocent persons and deny them opportunities through quotas or other preferences, simply because an employer's hiring statistics are not balanced, according to some notion of statistical proportionality.

It is an important issue. It is probably one of the most important issues in the future for our country. And I don't expect you to tell me how you would rule, but let me just pose a hypothetical situation to you.

Suppose a small business in a majority city that was majority black had never hired a black person, even though that business in over a decade had hired more than 50 people. Further, suppose that a disappointed black job applicant filed a discrimination suit and that she or he was unable to provide any direct evidence of intentional discrimination by the employer. Would such statistics standing alone, in your view, justify an inference of racial discrimination by the employer? And would that employer, in your view, to avoid an expensive and protracted lawsuit that could cost hundreds of thousands of dollars, be justified in using quotas or other forms of racial preferences to eliminate the manifest imbalance, if that really is the law?

And just one other question: Would a Federal court be justified in such a case, in ordering that employer to resort to quotas or other forms of racial preferences, to eliminate or reduce the manifest imbalance?

Senator COHEN. Would you repeat the question again for me? [Laughter.]

Judge GINSBURG. I think I have the gist of it, Senator Cohen.

Senator Hatch, we have many employment discrimination cases in the court. They come to us with a very large record of facts developed in the trial court, and they come also with lengthy briefs on both sides. I study those records intensely, read the arguments, have my law clerks do additional research, come armed to the teeth to the oral arguments so I can ask testing questions. So I am always suspicious, on guard, when given a one, two, three series in a hypothetical. I know I have done it myself when I was a law teacher, and sometimes my students would answer to that kind of question: "Unprepared."

But I can say this. I was thinking in relation to your question, about a particular case, one that, in fact, went to the Supreme Court. It was a Santa Clara (California) Highway Department case that involved an affirmative action program.

Senator HATCH. That was the *Johnson* (1987) case.

Judge GINSBURG. Right, Paul Johnson was the plaintiff and he complained that Diane Joyce had gotten a job he should have gotten, and it was a result of the affirmative action plan. That was a case that was much discussed.

I will tell you a nonlegal reaction I had to it. The case involved a department that had 238 positions, and not one before Diane Joyce was ever held by a woman. After an initial screening, 12 people qualified for the job. That number was further reduced until there were 7 considered well qualified for the job. Then the final selection was made.

On the point score, Paul Johnson came out slightly higher than Diane Joyce, but part of the composite score was determined by a subjective test, an interview, if I recall correctly, and they were scored on the basis of the interview.

I thought back to the days when I was in law school. I did fine on the pen and paper tests. I had good grades. And then I had interviews. I didn't score as high as the men on the interviews. I was screened out on the basis of the interviews.

So I wonder whether the kind of program that was involved in the *Johnson* (1987) case was no preference at all, but a safeguard,

a check against unconscious bias, bias that may even have been conscious way back in the fifties. In a department that has 238 positions and none of them are filled by women, perhaps the slight plus—one must always recognize that there is another interest at stake in the cases, Paul Johnson's—checks against the prospect that the employer was in fact engaged unconsciously in denying full and equal opportunity to women.

These are very difficult cases and each one has to be studied in its own particular context. But in that case, at least, I related back to my own experience. Whenever a subjective test is involved, there is that concern. If you are a member of the group that has up until now been left out, you wonder whether the person conducting the interview finds you unfamiliar, finds himself slightly uncomfortable, thinking about you being part of a workplace that up until then has been, say, all-white or all-male.

I did want to make one comment, if you will allow me, Senator Hatch.

Senator HATCH. Surely.

Judge GINSBURG. When you said that *Brown* (1954) wasn't ahead of the people, in at least one respect——

Senator HATCH. It was ahead of some of the people, there is no question about that.

Judge GINSBURG. Yes. When I think about one of my wonderful District of Columbia circuit colleagues, Judge Skelley Wright, who was a brave district judge in New Orleans in the 1960's, a judge who for 10 years tried to implement the *Brown* decision, when massive resistance was mounted against it. But he did what a good judge should do, he enforced the law.

Senator HATCH. Sure. The reason I brought up *Dred Scott* and that case is because there were segments, whole segments of our society who were way behind—or way ahead in the case of *Dred Scott*, almost all of the North was ahead. And many people in the South, they refused to fight on the part of the South.

In the case of *Brown* v. *Board of Education*, there were many in both areas that were way ahead and who expected and really demanded the decision that came.

Well, the reason I gave you the hypothetical example I did is because I have had a lot of experience with small business people who are suffering the stings of these employment discrimination cases. The average cost of defending those cases before our 1991 civil rights bill that we enacted here, which I voted for, the average cost of defending it, defense alone, just paying their attorneys to defend them is $80,000. That was before that statute, and I suspect that cost has gone up a little bit since then.

But I give you that example I did, because I have great faith in you. I have known you since 1980, and I have watched what you have done, I have admired you, I have no doubt that you are a person of total equality and a person who deserves to be on the Supreme Court.

But in response to the Judiciary Committee questionnaire, in the 13 years since you went on the bench in 1980, you have not had a single black law clerk or secretary or intern, out of 57 such employees that you have hired. Now, I find no fault with that, because

I know that there was no desire to discriminate, even though your court sits in the middle of a majority black city of Washington, DC.

Now, some, if they took the broad language of Abner Mikva in that case, might call that a manifest imbalance. Now, I would not suggest for a moment that that imbalance resulted from any intentional discrimination on your part. The crucial point to keep in mind, however, is that when the concept of discrimination is divorced from intent and we rely on statistics alone, a small business man or woman with your record of employing minorities might find himself or herself spending hundreds of thousands of dollars to fend off discrimination suits, and that in fact is what is happening around this country right now.

Such an employer might adopt quotas or other forms of preferences in order to avoid or avert such litigation under any number of Federal civil rights laws. And I am worried about it, because it is not fair to the employer and it is not fair to the persons denied opportunities, because of preferences.

Naturally, I am concerned about preferences and I know you are and I know that you are a very good person. But I just want to point that out, because that happens every day all over this country, where there is no evidence of intent and, in fact, was no desire on the part of the employer to exclude anybody.

Judge GINSBURG. I appreciate that, Senator Hatch, but I do want to say that I have tried to——

Senator HATCH. I know you have.

Judge GINSBURG. And I am going to try harder, and if you confirm me for this job, my attractiveness to black candidates is going to improve. [Laughter.]

Senator HATCH. That is wonderful. I like that. But let me just say you can see my point. These things are tough cases. They are difficult. There should be some evidence of intent.

Now, in the case of *Johnson* v. *City of Santa Clara*, your point may be very well taken that the oral interview, if it had been explored in a little more depth, may have shown some intention to exclude women, and there is a tough case, there is no question about it.

I just bring that up for whatever it is worth, because I would like the Justices to think about the real world, real people out there who really aren't intending to discriminate. And if you just use the statistical disparity to make final determinations, you can create an awful lot of bad law and an awful lot of expense to the small business community that may very well not be willing to discriminate.

Let me just ask you this: You agree, I trust, that the first amendment right of free speech—frankly, I don't think I have enough time to go through this line of questions, so I think what I will do, Mr. Chairman—and you will be real happy with this—I will defer until the next round before I go into the next round of questions.

The CHAIRMAN. Does that mean you are giving your 3½ minutes up to Senator Kennedy?

Senator HATCH. I will reserve whatever time I have. How is that?

The CHAIRMAN. Senator Kennedy.

Senator HATCH. But if Senator Kennedy needs it, he can surely have it.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I would like to just review with you, Judge Ginsburg, if I might, what I think has been an extraordinary period of Supreme Court history, and that is the progress that has been made on gender discrimination, which your involvement, your position as an advocate, as an educator, as a spokesperson, I think, has really been absolutely remarkable.

I think probably for our colleagues, maybe they have a full understanding and awareness in this committee, maybe they do in the Senate, but certainly I think it is something that it is important for the American people to know. I think you made some reference to it in response to the earlier questions by Chairman Biden.

But virtually up until 1971, the courts upheld every kind of gender discrimination. I was here in 1964 when we passed title VII of the Civil Rights Act to try to move us toward eliminating discrimination on the basis of gender. And still we found up until 1971—and we will come back to that—every kind of gender discrimination, from outright prohibitions on the entry of women into many professions to more subtle gender classifications that did just as much harm by perpetuating stereotypes about women and their role in society.

In 1873, the Supreme Court upheld a State law prohibiting women from entering the legal profession. In 1948, the Court upheld a State law prohibiting a woman from serving as a bartender unless her husband or father owned the bar. In 1961, the Court unanimously held that it was not a violation of equal protection or due process to limit jury service by women to only those women who volunteer for jury duty, while substantially all men were required to serve.

Even after the 1964 act, even more outrageous policies discriminating against women existed in the private workplace. In *Phillips* v. *Martin-Marietta*, the company absolutely barred women with preschool-aged children from applying for work. Even a man with sole custody of and responsibility for young children could apply, but the lower courts did not perceive this policy as discriminating against women. The Supreme Court ultimately reversed the lower courts, and I note that you have written that during the argument of the case before the Supreme Court, members of the High Court made light of the notion that they themselves might have to hire "lady lawyers" as law clerks. I know that you encountered the same discrimination as a young law school graduate.

So you had the perpetuation of gender discrimination in a long line of Supreme Court decisions. You had some action by the Congress. You still had rampant gender discrimination in the private sector. These kinds of barriers to equal opportunity only began to fall in the 1970's as a result of the litigation effort that you led. Your painstaking work led the Burger Court to take strides forward that would have been hard to imagine even a decade earlier.

I was interested when you referred to this in our conversations prior to the confirmation hearing in our wonderful visit that we had in our Senate offices, where I inquired about your own back-