

next 20 minutes or so to let me know if they have a desire to ask additional questions.

I understand you have begun this round, Judge, at about 5 after 5. If it is appropriate, I would yield now to Senator Brown, whose turn it is to ask questions. After his round of questions, depending on how long they go, you can let me know whether you would like to break then or we should continue with Senator Heflin and his questions. But, hopefully, we will get you home at a reasonable hour, and you will be able to do what I am sure you will, watch the remainder of the proceedings on television. I am sure you will be glued to your television. But that is my intention, if that is appropriate, if that is all right with you.

Judge GINSBURG. That is the greatest thing I have heard all day. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Brown.

Senator BROWN. Thank you, Mr. Chairman.

Judge Ginsburg, I appreciate the long day that you put in. The only thing I know that is somewhat comparable to this process is the bar exam. The only difference, of course, is this is oral and that is written. In this case, many of the people who grade the test have different answers, so it is more of a challenge.

The CHAIRMAN. And they are not as informed as you, and I include myself in that category.

Senator BROWN. I never thought that was a major impediment for people who took the bar exam.

Judge GINSBURG. That was 2 days, at least when I took it, back in ancient times. The bar exam was 2 days. I don't know what it is now.

Senator BROWN. I guess in the older days when I took it, it was 3.

The CHAIRMAN. It was 3 for me as well, but maybe the Senator and I were slower.

Senator BROWN. Our State was less benign. [Laughter.]

It is really quite an extraordinary treat to have you here. You not only have a distinguished academic record that we have talked about, but really a very excellent record in terms as an adjudicator and as a teacher.

If I were to describe an area of the law where perhaps you have as much or more experience than anyone we have had the pleasure of coming before the committee, it would be on the equal protection clause. We touched on it in our earlier discussions, and I thought I would follow up with questions in this area. And I appreciate the sensitivity with regard to how you would rule, and I would want to direct this more to the pleadings and your writings in this area. I say that because I think people should keep in mind that when you are filing pleadings you are an advocate. That doesn't necessarily mean that it is how you would rule. I think anyone who reviews your record knows that.

But with that in mind, as I review the equal protection clause, I guess my first question is if you feel that that clause suggests, in effect, a sex-blind standard with regard to legislation and programs?

Judge GINSBURG. In most instances, that is correct. "Nor shall any person be denied the equal protection of the laws." It is my firm belief that for purposes of being whatever a person wishes and is able to be, sex is not a relevant criterion.

One of the things I think is so wonderful about being the second woman and looking forward to the third and the fourth, is that I am thought of as judge, who happens to be a woman.

Recently, I sat on a complex case with Judge Karen Henderson and my former Chief Judge, Patricia M. Wald. When the three of us left the courtroom at the conclusion of argument we noticed there were three women. We sat together for close to 3 hours. And nobody even remarked on it. That was a tremendous change from the way it was 10 years ago. We were judges who happened to be women, but we were judges. So I think for most purposes, sex is not a relevant criterion for choosing.

Senator BROWN. I particularly appreciated your comment the other day or observation that sometimes that which has been included in our laws that are defined as favors, sometimes is not that at all in the long run for women. And we explored that a bit yesterday. My mother had gone through law school in the 1940's and worked as an attorney in the 1950's and 1960's, and I know from firsthand experience with her life that that is a keen observation.

What I thought I might do is go through questions that occurred to me, though, as I thought about the application of the equal protection clause and ask you to help me understand it, help us understand certain instances in which it may or may not apply.

Nan and I were lucky enough to have twins. They turned out to be a boy and a girl. In the process of their growing up, we have run into occasions where the law and the world treats them differently. I suppose the first thing that happened was that my son had the opportunity to register for the draft, which my daughter did not. Indeed, a provision of the law which may not be extended; the draft is obviously up before Congress right now. But as it is structured now, young men register for the draft; young women do not.

Is this an example of unequal protection under the laws?

Judge GINSBURG. Senator Brown, once it was just that way with jury duty, not that long ago. It wasn't a question that your son had the opportunity. He had the obligation. And so it was with jury duty. Men had the obligation, and women, it was thought, had the opportunity. They could serve if they wanted to. And we may see someday a similar change in this area.

It is not unknown in the world that women are obliged to serve their country as men are. That is something that has been before Congress, and may be before it again.

Senator BROWN. About that time also, both got driver's licenses, and we had the unique pleasure, as I know you have in your family, to add a rider to your policy or to secure different auto insurance rates. As it turned out, the auto insurance companies that we dealt with seemed to think that my son was a significantly greater risk than my daughter. An observation, incidentally, which appears to have some basis in fact.

Judge GINSBURG. Boys drive more, drink more, and commit more alcohol-related offenses. That, on average, is certainly true, and the

Supreme Court acknowledged it in a case called *Craig v. Boren* (1976).

Senator BROWN. This is obviously not a function so much of our statutes as a function of our market system with insurance. That is not to say we don't legislate insurance rates. Sometimes we do.

Is this an area where the equal protection of the laws may well require uniform insurance rates?

Judge GINSBURG. Not unless the Government takes over the business of insurance. You know that differentials of that same nature work the other way for pensions. Women, on average, live longer than men. Many women die young; many men live long. But, on average, it is unquestionably true that women live longer than men. And so, until not so long ago, when people retired, the women got less than the men because it was thought that there was actuarial equality. Women would live longer. Women, on average, would live longer so, in the end, they would get the same amount, but it would be stretched out over a longer period of time.

Lawsuits were brought challenging that differential under title VII. The hook was not the Constitution because the Constitution restricts government action, not private action. It was the civil rights, equal employment opportunity legislation Congress had passed. Title VII is applicable to the private sector. And it was often private employers who were providing these plans to their employees. The private employer is covered by title VII and cannot discriminate on the basis of sex, not because of the Constitution but because of the law that Congress passed.

So in group plans connected with employment, those differentials are unlawful. They aren't unlawful yet—unless Congress passes a law so regulating the insurance industry—on an individual basis. If I want to buy an annuity from a private insurance company, then, barring some State law, the insurance company can still say I will get less per month than a man of identical age because, on average, women live longer than men. But in group plans that is no longer permissible because of title VII.

It isn't true for individual plans any more than it is for automobile insurance, and I know just what you are talking about because we had the identical experience when my son got his driver's license. Our premium went way up.

Senator BROWN. I certainly hope that that differential was not as justified as it is in some families. [Laughter.]

Judge GINSBURG. I will remain silent on that subject.

Senator BROWN. I don't know that there is any bar to incrimination of your family.

One of the other areas that comes to mind is the whole question of affirmative action. You have drawn, I think, a very clear and succinct differentiation between government programs and the private sector with your last response in the application of the constitutional protections for equal protection.

Affirmative action comes, I guess, as a remedy for areas where discrimination has been spotted and perhaps well may involve governmental standards that restrict discrimination.

Would the equal protection clause apply to affirmative action programs?

Judge GINSBURG. The equal protection clause applies to government action, and there have been two cases that have come up in the course of these discussions: one, the *Croson* (1989) case, involving city plans, and the other, *Metropolitan Broadcasting* (1990), involving Federal plans. Government action is restricted; it is controlled by the equal protection guarantee. Private action in the employment sector is controlled by title VII prohibiting discrimination on the ground of race, national origin, religion, sex.

So while the equal protection principle doesn't apply, the title VII legislation does apply and does control affirmative action programs in the private sector.

Senator BROWN. I wanted to cover one last area, and it may be an area you would prefer not to explore. If you do, I would certainly understand.

I believe earlier on Senator Cohen and others had brought up a question with regard to homosexual rights. I would not expect you to comment on something that may well involve a case before the Court in the future. But there is a question I thought you might clear up for us that I think has some relevance here.

The equal protection clause, as we have explored it this afternoon, requires, in effect, sex-blind standards with regard to government action or legislation. That relates to classes of people; in this case, males and females. Obviously, there are other classes.

In the event we are dealing with forms of behavior—and I appreciate that is not a foregone conclusion with regard to homosexuals. In other words, it is open to debate whether or not it is a class of people or forms of behavior. But in the event we are dealing with forms of behavior, would homosexuals be protected under the provisions of the equal protection clause?

Judge GINSBURG. Senator Brown, I am so glad you prefaced your inquiry by saying you would understand if I resisted a response, because in this area, I sense that anything I say could be taken as a hint or a forecast of how I would treat a classification that is going to be in question before a court, and ultimately the Supreme Court. So I think it is best that I not say anything that could be used as a prediction of how I might vote with regard to that classification.

Senator BROWN. Judge, thank you for your responses.

Mr. Chairman, I yield back.

The CHAIRMAN. Thank you. It is a convenient time. There are 6 minutes left for us to go vote. Why don't we break now for 15 minutes?

Judge, I think we are moving along. Senator Specter, I was going to ask his staff, it might be appropriate to ask him after the vote if he wishes to question after we come back. I know he has questions. And I don't think there are any other questions on our side of the aisle. I have a couple, but I may submit them in writing to you, on *Chevron*. But at this moment I am not sure anyone would understand except you *Chevron* from Chivron.

So we now will recess for 15 minutes to go vote, and come back, and then we will see where the next round takes us. But we are getting there, Judge.

Judge GINSBURG. Thank you. I appreciate that.

[A short recess was taken.]