the most outrageous charges raised against them, a case in point being the Attorney General of the United States. When she was nominated, some of the most outrageous charges were drawn to the attention of me personally and the investigative staff. We investigated them, found them without any foundation. It would have been extremely embarrassing and degrading and, I think, damaging had that taken place under the full glare of the Senate lights. This new procedure is meant to avoid that, to separate the chaff from the wheat, and I just want to make that clear as we begin.

Now, let's get down to business. I ask the staff to kick off the clock. We are going to have 30-minute rounds, and Judge, at any time at all, I would ask someone from the White House who may be with you to indicate to me when it is appropriate to take a break, because we will forget. We get to get up and walk out of here after we have our questions and go back and get coffee or take a call or whatever, and you have to sit there the whole time. So if I trespass at all on your physical constitution, I want to be made aware of that. But I will say now we will try to go for a total of up to 2 hours from this point on, try to get four Senators in. We will break very briefly to give you a rest. Then we will come back and continue again until roughly the 6:30 hour.

Is that agreeable with you, Judge?

Judge GINSBURG. That is fine, Mr. Chairman.

The CHAIRMAN. It must be an unusual role, for so many years, you sitting up here and having litigants down there. This is one of the few we get to do this and one of the few of my duties in the Senate that I don't particularly enjoy, although in your case it has been a pleasure thus far. Let me begin now with the questioning.

I would like to begin by asking you about how you will go about interpreting our Constitution, Judge. Judges, as you know better than I do, approach this job in many different ways, and these different approaches often lead to very different results.

You have made a great many statements about constitutional interpretation as a scholar and as a judge in lectures that you have delivered—most recently in a talk you gave this year which is referred to as the Madison Lecture. In that lecture, you said—and I am quoting here—that "Our fundamental instrument of Government is an evolving document."

You also said you rejected the notion "that the great clauses of the Constitution must be confined to the interpretation which the Framers would have placed on them."

I could not agree more. If the meaning of the Constitution did not evolve over time, today we would not have many of the individual rights all Americans now hold most dear, like the right to choose whomever we wish to marry. There is nothing in the Constitution, as you know, that gives someone a constitutional right to marry whom they want. It is not specifically enumerated. And were that not changed in *Loving* v. *Virginia*, there would still be laws on the books saying blacks can't marry whites and whites can't marry blacks. Or the right to get a job, whoever you are, whether you are white or black, male or female.

But, still, there are hard questions about precisely how the Constitution evolves, about when the Court should recognize a right not specifically mentioned in the Constitution or specifically con-

templated by the authors of that document at that moment, whether it is an amendment or the core of the Constitution.

You spoke of these questions at some length in the Madison Lecture. You said that the history of the U.S. Constitution is in large part a story of—and I quote—"the extension of the constitutional rights and protections" to include "once excluded groups."

Judge, can you discuss with me for a moment what allows courts to recognize rights like the right to marry whomever you wish, like the right to be employed or not employed without regard to gender, like the right that was mentioned here earlier by several of my colleagues in the opening statements for women to be included in—I thought the phrase that Eleanor Holmes Norton used was "within the embrace of the 14th amendment," or something to that effect, when, in fact, they were not contemplated to be part of that amendment when it was written.

What is it that allows the Court to recognize such rights that the drafters of the Constitution or specific amendments did not mention or even contemplate at the time the amendment, in the case of the 14th amendment, or the Constitution and the Bill of Rights were drafted?

Judge GINSBURG. That is a large question, Mr. Chairman, and I will do my best to respond.

First, I think the credit goes to the Founders. When I visited Senator Thurmond, he was kind enough to give me a pocket Constitution.

The CHAIRMAN. I think that was Sam Ervin's. Did you give her Senator Ervin's pocket Constitution?

Senator THURMOND. I gave her a Thurmond Constitution. That is the U.S. Constitution.

Judge GINSBURG. But this pocket Constitution contains another document, and it is our basic rights-declaring document. It is the Declaration of Independence, the Declaration that created the United States.

I think the Framers are shortchanged if we view them as having a limited view of rights, because they wrote, Thomas Jefferson wrote, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these"—among these—"are life, liberty, and the pursuit of happiness," and that government is formed to protect and secure those rights.

Now, when the Constitution was written, as you know, there was much concern over a Bill of Rights. There were some who thought a Bill of Rights dangerous because one couldn't enumerate all the rights of the people; one couldn't compose a complete catalog. The thing to do was to limit the powers of government, and that would keep government from trampling on people's rights.

But there was a sufficient call for a Bill of Rights, and so the Framers put down what was in the front of their minds in the Bill of Rights. Let's look at the way rights are stated in the Bill of Rights in contrast to the Declaration of Independence, let's take liberty as it appears in the fifth amendment.

The statement in the fifth amendment—"nor shall any person be deprived of life, liberty, or property, without due process of law"—is written as a restriction on the government. The Founders had

already declared in the Declaration that liberty is an unalienable right, and the government is accordingly warned to keep off, both in the structure of the Constitution, which limits the powers of government, and in the Bill of Rights. And, as you also know, Mr. Chairman, the Framers were fearful that this limited catalog might be perceived—even though written as a restriction on government rather than as a grant of rights to people—as skimpy, as not stating everything that is. And so we have the ninth amendment, which states that the Constitution shall not be construed to deny or disparage other rights.

You might contrast our Bill of Rights with the great 1789 French Declaration of the Rights of Man, which does appear to grant or confer rights, for example, the state grants citizens a right to speak freely. But our Bill of Rights doesn't say the state gives one a right to speak. It says Congress shall make no law abridging the freedom of speech. So the whole thrust of it is that people have rights, and government must be kept from trampling on them. And the rights are stated with great breadth in the Declaration of Independence.

Now, it is true—and it is a point I made in the Madison Lecture—that the immediate implementation in the days of the Founding Fathers in many respects was limited. "We the People" was not then what it is today. The most eloquent speaker on that subject was Justice Thurgood Marshall, during the series of bicentennial celebrations, when songs in full praise of the Constitution were sung. Justice Marshall reminded us that the Constitution's immediate implementation, even its text, had certain limitations, blind spots, blots on our record. But he said that the beauty of this Constitution is that, through a combination of judicial interpretation, constitutional amendment, laws passed by Congress, "We the People" has grown ever larger. So now it includes people who were once held in bondage. It includes women who were left out of the political community at the start.

I hope that begins to answer your question. The view of the Framers, their large view, I think was expansive. Their immediate view was tied to the circumstances in which they lived.

The CHAIRMAN. Well, it does answer the question, and I am delighted, to be very blunt about it, with the answer. As I have indicated to you and said on numerous occasions over my 20 years in the Senate, I do not expect a nominee nor demand of a nominee to agree with me on substantive issues. But it does make a difference to me and give me, at least, some insight into the view of the past history and the future of this Nation that a nominee has, the vision they have, if I know the place from which they believe our rights are derived. And you have made a fundamental distinction from other nominees that have been before this committee in the past decade, in that you acknowledge there is a ninth amendment. You have no idea what a milestone that is in this committee. And I am being a bit facetious, but we had one nominee who said the ninth amendment was "nothing but an ink blot on the Constitution."

But your emphasis that whereby we derive rights, the courts over the years have derived rights, or expanded a concept which at the time the Constitution was written, it did not embrace a specific circumstance, you have indicated, as I understand your answer,

that you start off with the position, which I happen to share, that this is a limited Government. We do not derive our rights as human beings from a piece of paper called the Constitution. The Government derives its rights from "We the People." "We the People" got together back a couple hundred years ago and said this is the deal we are going to make among ourselves and this is the power we are going to allow Government to have.

I think the important word in the ninth amendment is "deny or disparage others"—referring to rights—"retained by the people." And as you point out, the distinction between how the great French Declaration of Rights or other great instruments proclaiming human rights and dignity, have always proclaimed them in terms of granting them to the people. In this case, the way in which, as you point out, our Constitution is written, the first amendment, "The Congress shall make no law"—a very different perspective from which we in the country have started. Second, you are referencing the 15th amendment, the Declaration of Independence, and the 9th amendment, and I expect possibly the 14th amendment as well, as a basis from which the courts have found over the last 200 years, and in particular over the last 50 years, an intellectually consistent and rational basis for being consistent with the Constitution, but nonetheless expanding individual rights in the sense that they recognize their existence and their guarantee of constitutional protection.

So it does answer the question for me, but I would like to move from there, if I may now, having established that, to where the Constitution has to be read by Justices in light of its broadest and most fundamental commitments, commitments to liberty, commitments to individual dignity, equality of opportunity. In my view, the Framers were wise when they drafted the Constitution with such broad language. I think—and there is ample historical evidence to indicate—that they understood that at the time that the document they were drafting for this newborn Nation was one that required concepts which embodied more than specific guarantees that could change with time. And I believe they did it in broad concepts, and not specifics, precisely to avoid freezing the rights and protections that were afforded Americans.

Now, their method permits the meaning of the document to progress as we progress, and as the world changes and as we better understand the full scope of our Nation's principles and ideals, our interpretation of the Constitution has changed.

Now, in the Madison Lecture, though, you also noted constraints on the ability of the courts to expand individual rights. You recognized that that has been done, that there has constantly been an expansion, but that there was, in a sense, a self-imposed restraint. And you wrote that movement in this direction of expansion by the courts should be measured—this is your quote, "measured and restrained."

You also wrote that courts generally should follow rather than lead changes taking place elsewhere in society. And you criticized the Court, as I read the lecture, for too often "stepping boldly in front of the political process." I believe that was the quote.

But, Judge, in your work as an advocate in the 1970's, you spoke with a different voice. In the 1970's, you pressed for immediate ex-

tension of the fullest constitutional protection for women under the 14th amendment, and you said the Court should grant such protection notwithstanding what the rest of society, including the legislative branch, thought about the matter.

For example, in one brief you wrote that "The quality of the Court's review is not determined by the presence or absence of stirrings in the legislative branch." I believe that was in the *Frontiero* brief.

Now, how does that square with your statement in the Madison Lecture that courts generally should follow rather than lead society, and that courts should move in measured motions, in measured steps? Is my question clear?

Judge GINSBURG. You are referring to the *Frontiero* (1973) brief?

The CHAIRMAN. Where you said, if I am not mistaken, "The quality of the Court's review is not determined by the presence or absence of stirrings." Then in the Madison Lecture you said that the Court should be measured and restrained: It should follow rather than lead changes taking place elsewhere in society. Can you square those for me or point out their consistency to me?

Judge GINSBURG. Yes.

The CHAIRMAN. That is a good answer. Now we will go on to the next question. [Laughter.]

Judge GINSBURG. The *Frontiero* (1973) brief from which you read was, in fact, the third in a set of briefs urging the Supreme Court to recognize the equal stature of men and women before the law. As an advocate in those cases, I gave the Court initially two and later three choices for the rationale. One was that any classification based on gender should have the closest review.

The CHAIRMAN. As would distinctions made on race?

Judge GINSBURG. Yes. And then, at the opposite pole, I said, these sex-based classifications that riddle our statute books couldn't even pass the lowest level of review, the rational basis test. The first case in which those arguments were presented was a very simple one. It was the case of Sally Reed, whose young son—a teen-aged boy—died under tragic circumstances. Sally Reed applied to be administrator of her son's estate. The boy's father—the parents were separated at that point—also applied to be administrator.

The State of Idaho at that time had a rule—a statute—for deciding such cases. The rule was: As between persons equally entitled to administer a decedent's estate, males must be preferred to females. It may be astonishing to some of the young people sitting behind you that laws like that were on the books in the States of the United States in the early 1970's, but they were. And there were many of them.

There had never been in the history of the United States any instance in which any law that differentiated on the basis of sex had been declared unconstitutional up to *Reed* v. *Reed* (1971).

The CHAIRMAN. As a matter of fact, some had been challenged and declared to be constitutional.

Judge GINSBURG. A number of them. But without reciting that entire history, as an advocate I presented to the Court different ways that the Justices could reach the decision in Sally Reed's case, which was as clear on its facts as any case could be.

That was the position I took as an advocate. My expectation, to be candid, was that I would repeat that kind of argument maybe half a dozen times.

The CHAIRMAN. Until they got it right?

Judge GINSBURG. Until the Court would look at one classification after the other and say, yes, this is irrational. And then the Justices would come to the point where they would say none of these lines make any sense, so we might as well announce that drawing lines on the basis of gender is in almost all cases impermissible, and the presumption will be against, rather than for, their constitutionality.

I saw my role in those days as an advocate in part and as a teacher in part, because one of the differences about gender discrimination and race discrimination is that race discrimination was immediately perceived as evil, as odious, as wrong, as intolerable. But the response I was getting from the judges before whom I appeared when I first talked about sex-based discrimination, then I began to use the word "gender"—I will explain that perhaps later—was: "What are you talking about? Women are treated ever so much better than men."

I was talking to an audience of men who thought immediately that what I was saying was somehow critical about the way they treated their wives, the way they treated their daughters. Their notion was, far from treating women in an odious, evil, discriminatory way, women were kept on a pedestal. Women were spared the messy, dirty real world; they were kept in clean, bright homes. I was trying to educate the judges that there was something wrong with the notion, "Sugar and spice and everything nice, that's what little girls are made of"—for that very notion was limiting the opportunities, the aspirations of our daughters.

One doesn't learn that lesson in a day. Generally, change in our society is incremental, I think. Real change, enduring change, happens one step at a time.

This litigation may be illustrative. In the second case you mentioned, *Frontiero* (1973), four Justices came on board for "sex as a suspect classification." I was told that by one of the lawyers at the ACLU women's rights project the day the decision was announced. It may even have been the executive director who came in and said, "You got four votes for sex as a suspect classification." I said, "It is too soon. We are not going to get the fifth."

The education process hadn't gone on long enough. Even though as an advocate I was advancing sex as a suspect classification as the end point I expected the Court to reach after it dealt with a series of real-life cases, cases like Sally Reed's case, I didn't expect it to happen in one fell swoop.

The CHAIRMAN. Judge, I don't mean to cut you off, but this is an appropriate place to take the next step. I understand what your strategy was, and I understand now how you view and perceive permanent, important change to come about, how it does come about. And I think it would be hard to argue from a historical perspective that you are wrong. I don't mean to do that.

I am trying to square, though, your—I understand your position as an advocate. Then you became an appellate court judge, and you gave a lecture this year called the Madison Lecture. Now, as an ap-

pellate court judge, you are required to follow Supreme Court precedent. You are not able to go off on your own. A subject I am going to come back to in my second round with you is your view of stare decisis, because we both know that in the Court you are about to go to, you are not bound by any previous Supreme Court ruling. As a judge on the circuit court, you are honor-bound to follow, to the best of your ability, what you believe to be the ruling consistent with what the Supreme Court has ruled as close as you can approximate it.

Now, you have had three different roles: advocate, where you were educating—and I know you mean that literally, and that is exactly what has to be done. Believe it or not, some of us in the legislature think we have to do it that way as well, like the violence against women legislation, which I would like to talk to you about here as well from a constitutional perspective, where there are laws on the books now that are outrageous. They don't relate directly to equal protection considerations, but they start off with premises about women that are arcane and wrong.

In my own State of Delaware, you can be convicted of first-degree rape if you rape a stranger, but if you rape someone with whom you have had an acquaintanceship, under the law you cannot be convicted. It can be as brutal a rape, as terrible a rape, but it is second-degree rape because you are "a social companion." Implicit in that is if you are a social companion somehow the woman is partially responsible for this.

So there are still these outrageous laws on the books in other areas. But the point is you then moved from being an advocate to being a judge on the circuit court of appeals. And as a judge, you indicated what I said, that the Court should move in a measured, restrained way.

You also noted, though, that the Court in *Brown* v. *Board of Education* was not timid; it was not fearful; it stepped out in front of society. And yet in another lecture you said that *Brown* "ended race segregation in our society, perhaps a generation before State legislators in our Southern States would have budged on the issue." Again, a seeming inconsistency. One, you say the Court should basically wait and not step out too far ahead of society. The other, you indicated that, in *Brown* you acknowledged, they did. They stepped out maybe an entire generation ahead of society.

They stopped an odious practice in *Brown* v. *Board of Education,* and so what I would like to know is, as a Supreme Court Justice, what will guide you, if you, as you may know—I am not asking you this, but you may conclude that strict scrutiny is the measure that should be applied under the equal protection clause of the 14th amendment relative to women, as it is with regard to race.

If you, as a Justice, concluded that is the proper test to be applied, notwithstanding the fact society may not have gotten that far, would it be appropriate? Not will you, but would it be appropriate for you, as a Justice, to move ahead of society, like the Justices in *Brown* did and moved ahead of society?

What did you mean in the Madison lectures that the Court should not? Were you referring to the lower courts, the Supreme Court, all the courts?

Judge GINSBURG. Mr. Chairman, first may I say that the Court has never rejected application of the suspect classification doctrine to sex. Most recently, when it came up, the Court said we don't have to reach that question, it is still open, because even if we employ a somewhat less exacting test—a heightened standard, but somewhat less exacting—the classification before us must fall. The case in which the Court made that statement involved exclusion of men from a nursing school the University of Mississippi maintained. The fine opinion by Justice O'Connor indicates the author's understanding that opening the doors of a nursing school—I would say the same thing for nursery school teaching—opening such doors to men can only improve things for women. When a job remains one that only women fill, it tends to be paid lower. When men take part, the pay tends to go up.

But let me try to respond to your question about *Brown* (1954), about moving ahead of society and at what level. First, recall that *Brown* wasn't born in a day. Thurgood Marshall came to the Court showing that facilities or opportunities were not equal, in case after case, in notable 1948 and 1950 higher education cases, particularly: *McLaurin* (1950), *Sweatt* v. *Painter* (1950), *Sipuel* (1948), a line started even earlier, in 1938, in *Gaines*. He set the building blocks, until it became obvious that separate couldn't be equal.

Something else had happened. One of the influences on *Brown,* I think, was a war we had just come through, in which people were exterminated on the basis of what other people called their race. And I don't think that apartheid in the United States could long outlive the Holocaust. From that perspective, the Court was not moving ahead of most of the people. There was resistance, of course, indeed massive resistance in some parts of the country.

But *Brown* itself, even *Brown* didn't command an end to all racial segregation. The end came years later. *Brown* was decided in 1954. It wasn't until *Loving* v. *Virginia* in 1967 that the Court took the final step in the series by declaring a miscegenation law unconstitutional.

The CHAIRMAN. So what did you mean when you said, Judge, in the Madison lecture that it ended race discrimination in our country, perhaps a generation before State legislators in our southern States would have budged on the issue? Are you saying that the Nation itself may have been in sync with *Brown* and the Court not that far ahead of the Nation, and it was only that part of the country?

Judge GINSBURG. The massive resistance was concentrated in some parts of the country. That there was discrimination throughout the country is undoubtedly true. But there was a positive reaction in Congress, not immediately, but voting rights legislation started in the late fifties, and then we had the great civil rights legislation of 1964. The country was moving together.

The CHAIRMAN. It was a decade later. My time is up, Judge. You have been very instructive about how things have moved, but you still haven't—and I will come back to it—squared for me the issue of whether or not the Court can or should move ahead of society a decade, even admittedly in the *Brown* case, it was at least a decade ahead of society. The Congress did not, in fact, react in any meaningful way until 10 years later, and so it moved ahead.

One of the things that has been raised, the only question that I am aware of that has been raised, not about you personally, but about your judicial philosophy in the popular press and among those who follow this, is how does this distinguished jurist distinguish between what she thinks the Court is entitled to do under the Constitution and what she thinks it is wise for it to do. What is permitted is not always wise.

So I am trying to get—and I will fish for it again when I come back—I am trying to get a clear distinction of whether or not you think, like in the case of *Brown*, where it clearly did step out ahead of where the Nation's legislators were, whether that was appropriate. If it was, what do you mean by "it should not get too far out ahead of society," when you talked about that in the Madison lectures?

But I will give it another try. I think you not only make a great Justice, you are good enough to be confirmed as Secretary of State, because State Department people never answer the questions fully directly, either.

Judge GINSBURG. May I leave you, Mr. Chairman——

The CHAIRMAN. If you would like to answer it more fully, I am anxious to——

Judge GINSBURG. I might offer two thoughts to consider between now and our next round. One of them was prompted by Senator Moseley-Braun, when she reminded us that the spirit of liberty must lie in the hearts of the women and men of this country. It would be one solution, wouldn't it, to appoint Platonic guardians who would rule wisely for all us. But then we wouldn't have a democracy, would we?

We cherish living in a democracy, and we know that this Constitution did not create a tricameral system. Judges must be mindful of their place in our constitutional order; they must always remember that we live in a democracy that can be destroyed if judges take it upon themselves to rule as Platonic guardians.

The CHAIRMAN. Well, I would have been happier, had the Court in *Dred Scott* decided to go ahead of society. I think America would maybe have had the same Civil War, but would have moved ahead more rapidly. Clearly, it would have been stepping out by 100 years ahead of where the Nation ultimately arrived.

I am not asking you to accept that, but what I am trying to get at is, there is no doubt that a Court's opinion cannot be sustained without ultimately the support of the majority of the people. As someone said relative to the Pope during World War II, how many legions does he have? You all have no legions. Ultimately, your judgments, as the Supreme Court, will depend upon the willingness of the American people to accept them as appropriate. I have no doubt about that.

I understand that, but there does come a time in the course of human events when the Court has in the past, and I suspect may have to in the future, be a generation ahead of where the Nation is. And I am wondering whether or not, as a matter of judging, if you conclude it should arrive at a decision, but look behind you and determine that the folks ain't with you, that that would restrain you from saying and enunciating what you believe the Constitution calls for in terms of enunciating a right or striking down a prohibi-

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.