Then there was the tremendous debt the women's movement owed to the civil rights movement of the sixties, in the development of legal theories. There is also some crossover.

You mentioned the case of *Ida Phillips* v. *Martin-Marietta,* the 1971 Supreme Court decision, the first title VII sex discrimination case to come before the Court. That case was brought by the NAACP, Inc. Fund, although Ida Phillips was a white woman. The employer said we won't hire or retain women with preschool-age children. Although Ida Phillips was white, the NAACP, Inc. Fund appreciated what a devastating effect a rule like that would have on black women who were seeking to gain or retain employment.

People who have known discrimination are bound to be sympathetic to discrimination encountered by others, because they understand how it feels to be exposed to disadvantageous treatment for reasons that have nothing to do with one's ability, or the contributions one can make to society.

Senator KENNEDY. I thank you. My time is up, but I want to thank Judge Ginsburg for revealing not only the brilliance of her mind, but I think the quality of her soul and heart, as well.

Thank you, Mr. Chairman.

The CHAIRMAN. Judge, this would be an appropriate time to take a break, if you would like, or we can continue for one more Senator and then take a break. Do you have a preference?

Judge GINSBURG. Then we will have——

The CHAIRMAN. In other words, we need to take a break now or in 30 minutes.

Judge GINSBURG. Why don't we go another 30 minutes and then take a break, if that is satisfactory.

The CHAIRMAN. That is fine.

Mr. Chairman.

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

Judge Ginsburg, several educators in South Carolina have requested I propound four questions to you, and in preparing these questions or any others I may propound during the hearings, if you feel they are inappropriate to answer, will you speak out and say so.

The first is, many parents feel that public school education is lacking. What are your views on the constitutionality of some form of voucher system, so that working and middle-class parents can receive more choice in selecting the best education available for their children?

Judge GINSBURG. Senator Thurmond, aid to schools is a question that comes up again and again before the Supreme Court. This is the very kind of question that I ruled out.

Senator THURMOND. Would you prefer not to answer?

Judge GINSBURG. Yes.

Senator THURMOND. Well, you feel free to express yourself on any of these.

Next is, based upon your understanding of the U.S. Constitution, do communities, cities, counties, and States have sufficient flexibility to experiment with and provide for diverse educational environments aided by public funding and geared to the particular needs of individual students of their particular area of jurisdiction?

Judge GINSBURG. Senator Thurmond, that is the kind of questions that a judge cannot answer at-large. The judge will consider a specific program in a specific school situation, together with the legal arguments for or against that program, but it cannot be answered in the abstract. As you so well know, judges work from the particular case, not from the general proposition.

Senator THURMOND. Judge, some recent studies underscored the historical precedent in the United States and elsewhere to the effect that single-sex education may be best for many students. Do you care to express your views under the Constitution concerning single-sex education, or do you think single-sex education should be available for girls and boys, young women and young men, aided by public funding?

Judge GINSBURG. Senator, I can say only this: The Constitution requires that equal opportunity be given for boys and girls, equal opportunity for education. I will report on one class of cases in which I was involved. They were easy cases, because there was an exclusion, an imbalance in opportunity.

I worked at Rutgers University for 9 years. The main college was all-male when I began working there. There was also a very fine school, Douglas, much smaller, for women. But the State had many more places for male students than it had for female students. That was wrong. The way it was eventually cured was fine. Rutgers opened its doors to female students, the women's college remained separate. I think it remains separate to this day. But the State can't say we are going to have separate education and we are going to have many more places for men than for women.

Other cases in which I was involved concerned Princeton, a private university. Princeton had a wonderful program for sixth graders. That program took sixth graders from the community and gave them an enriched learning experience, an introduction to math and science. The program included followup instruction in the students' high school years. This program was designed for children who were disadvantaged, children who did not go to private schools. They went to public schools and they lived in neighborhoods that weren't affluent. It was a wonderful program, but it was only for boys.

Senator THURMOND. Judge, do you believe it is desirable that single-sex education should be available on some basis for the working and middle-class parents, and not just available to those who can afford to send their children to exclusive private schools?

Judge GINSBURG. Senator Thurmond, I have expressed my view that the Constitution requires that the State treat people, boys and girls, equally. The cases I have described to you all involved either separate and nonexistent for girls, or separate and not equal. That is as far as my experience goes.

Senator THURMOND. Judge Ginsburg, it is my firm belief that the responsibility of the Congress is to make the laws. The executive branch is to execute the laws, and the role of the judiciary is to interpret the laws. Clearly, there are times when the responsibilities of the three branches of government will overlap.

However, this is in stark contrast to activities conducted by one branch which are the distinct prerogatives of another. It has been said that you agree with Harvard Law Prof. Lawrence Tribe, that

it is notion that the different branches of the Federal Government must be limited to the exercise of the powers specifically within their own sphere of authority.

Another constitutional commentator, James Madison, in the 47th Federalist, has argued that the preservation of liberty requires that the three great departments should be separate and distinct. If you are in agreement with Professor Tribe over James Madison on this issue, when do you believe it is appropriate for the Federal courts, including the Supreme Court, to engage in what would traditionally be considered a legislative activity?

The CHAIRMAN. Professor Tribe has finally gotten his true billing compared to James Madison.

Judge GINSBURG. I think James Madison had it absolutely right. He explained that ours is a system of separate branches of Government, but the very idea Professor Tribe expressed you will find in another of the Federalist papers; that is, each branch is given by the Constitution a little space in the other's territory. We see that in operation today. The judiciary is separate and independent, but I can't be a Federal judge unless you, the legislators, advise and consent. You make the laws, but the President can veto laws that you pass.

Senator THURMOND. Of course, we can override him, you know.

Judge GINSBURG. Yes, but only by a supermajority. So the Constitution has divided government, but it also has checks and balances, and it makes each branch a little dependent on the other.

Senator THURMOND. Judge Ginsburg, in a 1981 George Law Review article—oh, by the way, I am glad you agree with James Madison. I meant to say that. [Laughter.]

In a 1981 Georgia Law Review article, I believe you stated that the need for judicial interventionist decisions would be reduced significantly if elected officials shouldered the full responsibility for activist decisionmaking. I understood this to be your response to the Court's difficulty on occasion determining congressional intent in legislative acts.

If confirmed as Associate Justice, what criteria will you use and where will you place the boundaries of your own interpretation of congressional acts which you find ambiguous and lacking clarity?

Judge GINSBURG. Senator Thurmond, as I have told Senator Hatch in our conversations, there is nothing that a judge would like better than to have a highly activist legislature passing the laws, making clear its positions on policy and on implementation.

The tremendous difference between legislators who decide what policies should be, then write laws to implement those policies, and judges is that you design the plate and you put things on it. Judges never make business for themselves. Judges don't create cases. Cases come to court, brought by parties; and if it is a case of what James Madison called a judiciary nature, then the judges have no choice. They must decide it, no matter how much they would like to avoid decision.

Judge Irving Goldberg of the fifth circuit described it—and I quoted him in that University of Georgia article—this way: He compared judges to firefighters. They don't light the fire, but they are obliged to put it out. Judges are reactive. They don't make the cases or controversies that come before them, but if they are proper

judicial cases, judges are obliged to decide them no matter how unpopular the decision may be to some group or another.

Senator THURMOND. Judge Ginsburg, my next question is directly related to this issue of judicial activism. As you may know, House and Senate conferees are meeting to determine the fate of President Clinton's tax proposal. There has been spirited discourse, publicly and within the Congress, on whether there is a need to raise the taxes of the American people.

The power to tax is an awesome power. As elected officials with this power, we are directly accountable to the American people for our actions. For over 200 years, consent to taxation has come through the ballot box. This has been fundamental in our history for over 200 years. In fact, a resolution adopted by the Stamp Act Congress in 1765, protesting excise duties imposed by Great Britain on the Colonies, stated, and I quote, "It is inseparably essential to the freedom of a people that no taxes be imposed on them but with their own consent given personally by their representatives." Yet this fundamental principle was turned on its head in the *Missouri* v. *Jenkins* decision, with which I presume you are familiar, handed down by the Supreme Court in 1990.

Essentially, the *Jenkins* decision grants the power to the Federal courts to order new taxes or tax increases to carry out a judicial remedy. It is my firm belief that the American people lack adequate protection when they are subject to taxation by unelected life-tenured Federal judges. It is worrisome enough to the American people that the majority party in the Congress is trying to raise their taxes, to which, I might add, I am opposed, without having to worry about the same treatment from the Federal courts.

As James Madison stated in Federalist No. 48, "The legislative branch alone has access to the pockets of the people."

I introduced legislation to alter the *Jenkins* decision to preclude the lower Federal courts from issuing any order or decree requiring the imposition of any new tax or to increase any existing tax or tax rates. I firmly believe that the Constitution explicitly reserves the power to tax to the legislative branch where representatives are accountable for unnecessary taxes. This matter has yet to be acted on by the Congress.

My question is: Do you believe there is sound constitutional authority for the American people to be exposed to taxation unless it is imposed by proper legislative authority?

Judge GINSBURG. Senator Thurmond, may I put the *Jenkins* case in its context, as I understand it, and preface my response with Madison's words about the Federal courts James Madison said that with the Bill of Rights, he anticipated that the Federal courts would consider themselves in a peculiar manner the guardians of the rights incorporated in the Bill of Rights. He expected the judges to be an impenetrable bulwark, naturally led to resist every encroachment upon rights stipulated for in the Constitution by the Declaration of Rights.

One of those rights, after adoption of the 14th amendment, is the right to equal protection of the laws. What was involved in that case, as I understand, was desegregation in schools. Federal courts don't make those cases. Every judge I know who has been involved in one has found it distressing, stressful, not what that judge

would choose to do. And every effort is made in those cases to have the community decide for itself, to come up with a plan that will cure a violation of rights.

Once a violation of rights, of constitutional rights, is proved, then it becomes the Court's responsibility to impose relief, to grant relief, to work out a remedy. Now, courts will work out a remedy themselves only as the very last resort, after trying in every way possible to have the people's elected representatives do the job that they should do.

I can't talk to the specifics of this particular case, but I do know that no judge, no Federal judge, to my knowledge, ever invites this kind of case. When the case comes to court, the judges will do everything they can to have the remedy worked out among the people involved in the case. And only when nothing else works will the judge then step in and fulfill, as best as she or he can, the judge's constitutional responsibility.

Senator THURMOND. As I mentioned earlier, my legislation would alter the *Jenkins* decision to preclude the Federal court from using taxation as part of a judicial remedy. This bill does not affect the subject matter jurisdiction of the courts, but limits their remedial discretion. Now we will move on to another subject.

Judge Ginsburg, in *Shaw* v. *Reno* (1993), which was handed down by the Supreme Court last month, the Court remanded to the district court the appellant's claim under the equal protection clause which alleged that a North Carolina reapportionment plan was so irrational on its face that it could be understood only as an effort to segregate voters into separate districts on the basis of race and that the separation lacked sufficient justification.

One vocal critic of this decision said that the Supreme Court has now created an entirely new constitutional right for white people. Judge Ginsburg, do you believe this to be an accurate assessment of the *Shaw* decision? And if confirmed, how will you approach challenges to reapportionment plans under the equal protection clause?

Judge GINSBURG. Senator Thurmond, the *Shaw* (1993) case to which you referred was returned to a lower court. The chance that it will return again to a higher court is hardly remote. It is hardly remote for that very case. It is almost certain that other cases like it will come up. These are very taxing questions. I think the Supreme Court already has redistricting cases on its docket for next year, so this is the very kind of question it would be injudicious for me to address.

Senator THURMOND. Thank you.

Judge Ginsburg, as you may know, Congress has before it a proposed amendment to the Constitution which would mandate the Federal Government to achieve and maintain a balanced budget. I am a strong supporter of the balanced budget amendment. I have worked on this for over 20 years. Should the amendment become part of our Constitution, do you believe that individual taxpayers would have standing to bring suit in Federal court to force the Congress to adhere to its mandate?

Judge GINSBURG. You have described a measure that you support and, therefore, hope and expect may someday pass. That being the

case, you are describing a future controversy that may very well come before the Court.

Senator THURMOND. Well, you don't have to answer it, then, if you feel that you shouldn't.

Judge GINSBURG. Yes.

Senator THURMOND. Judge Ginsburg, there are hundreds upon hundreds of inmates currently under death sentences across the country. Here in the Congress I have been advocating habeas corpus reform to bring about finality of judgment in capital cases.

Please tell this committee your views on the validity of placing some reasonable limitations on post-trial appeals that allow inmates under death sentences to avoid execution for years after commission of their crimes. Some of these cases go on for many years. For example, one in my State went for 10 or 11 years; one I believe in the State of Utah, Senator Hatch's State, went for 16 years.

Judge GINSBURG. I know, Senator Thurmond, that there is in this area a great tension between two important principles. The one to which you have referred is finality. All things must come to an end, and that is important in the law. Controversies must be decided, and people must go on about their business. So finality is important.

But fairness is also important and, unfortunately, we don't live in an ideal world where people get the best representation the first time they come to court.

Senator THURMOND. Suppose they do have good representation?

Judge GINSBURG. These concerns, finality and fairness, are in tension, and they must be balanced in the particular case. I should add that, unlike Federal judges in many other places, judges in the District of Columbia Circuit do not have experience with the kind of habeas petitions you have in mind. Congress, when it created the separate District of Columbia court system, established courts with judges appointed by the President, gave them a postconviction remedy that is identical to 2255 of title 28, the Federal postconviction remedy, and then indicated, you go from the District of Columbia courts to the Supreme Court, if the Supreme Court will take your case. There is no Federal habeas review when you get through with the District of Columbia courts. So we don't get the kind of habeas corpus business that the fourth circuit and the other regional circuits get.

So I appreciate the tension between finality and fairness. I have not had the experience that some of my colleagues on the Federal bench have had with the habeas jurisdiction.

Senator THURMOND. It is my belief that the public loses respect for the courts when the case is tried and the sentence is given and it is 10 years later or 15 years later before the sentence takes effect. We have got to do something to bring finality to these matters. If you remember, Justice Rehnquist appointed a commission with Justice Powell to make recommendations on habeas corpus reform. The Congress has been considering the Powell report.

Judge GINSBURG. Yes, I understand that Congress has and will continue to give consideration to the Powell report.

Senator THURMOND. I welcome your statement and your committee questionnaire response that judges must avoid capitulating to

a result or any criticism. I especially welcome your approving reference to Prof. Gerald Gunther's discussion of Chief Justice Marshall's 1832 opinion in *Worcester* v. *Georgia*. As Professor Gunther explains, when John Marshall and his fellow Justices voted in that case, they generally believed that the decision might well mean the end of effective Court authority, but they also thought that it was legally right. And, unflinchingly, they did their duty. They decided the case on merits, even though the immediate prospects were anxiety-producing, even though the survival of the Court was truly at stake.

If a decision is right on the merits, it should be handed down, despite fears about consequences. This approach, which you soundly praise, contrasts sharply with the approach taken by five Justices of the Supreme Court last year in the *Casey* decision. In the past, Chief Justice Marshall did what he believed was right regardless of the possible effect on the Court's public standing. By contrast, five Justices relied on concerns over the Court's perceived legitimacy in the public's eyes in deciding not to overrule the constitutional error made in *Roe* v. *Wade*.

As Justice Scalia pointed out in dissent, instead of engaging in the hopeless task of predicting public perception, a job not for lawyers but for political campaign managers, the Justices should do what is legally right. I am pleased to see that you are with Chief Justice Marshall and Justice Scalia on this principle.

Would you care to make any further comment?

Judge GINSBURG. I think that every Justice of the Supreme Court and every Federal judge would subscribe to the principle that a judge must do what he or she determines to be legally right.

The CHAIRMAN. You are good, Judge. You are real good.

Senator THURMOND. Judge Ginsburg, in 1975, at a meeting of the ACLU board of directors that you attended, the board adopted a policy statement that declared the ACLU opposed limitations on the custody and visitation rights of parents where such limitations are based solely on the parent's sexual preference. However, that statement did not claim that such limitations are unconstitutional.

My question for you is this: Putting aside your views on the wisdom of any such limitations, do you have any doubt that a State is free, if it wishes, under the Constitution to take into account a parent's sexual preference in awarding custody and visitation rights and to limit those rights solely because of that preference? Similarly, could a State, in your view, if it so desired, limit adoption rights to heterosexuals, or do you feel that that might come before the Supreme Court?

Judge GINSBURG. From the announcements we have seen in the paper today, yes, the questions that you have outlined certainly could come up.

Senator THURMOND. I will not press you to answer any that you feel are inappropriate.

Judge GINSBURG. Thank you.

Senator THURMOND. Judge Ginsburg, one very important area of the law is the question of whether courts exceed their authority by creating rights of action for private litigants under Federal statutes where Congress did not expressly provide such rights of action, and Justice Powell put it this way:

In Article III, Congress alone has the responsibility for determining the jurisdiction of the lower Federal courts. As the legislative branch, Congress should also determine when private parties are to be given causes of action under legislation it adopts. As countless statutes demonstrate, including titles of the Civil Rights Act of 1964, Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. When Congress chooses not to provide a private civil remedy, Federal courts should not assume the legislative role of creating such a remedy, and thereby enlarge that jurisdiction.

As a general matter, what do you think of Justice Powell's argument?

Judge GINSBURG. Congress should express itself plainly on the question of private rights of action. Judges would welcome clear expression by Congress with great enthusiasm. Judges do not lightly imply private rights of action. In some areas of the law, securities law, for example, where private rights of action have been understood by the courts to be the legislature's intention—and that is always what the Court is trying to divine—it appears that the legislature has been content with those implications. Congress has let those private rights stand now in some cases for even decades.

Judges have said often enough in their opinions, we are going to try to find out, try to determine as best we can, whether Congress intended that there be a private right of action. We wish that Congress would speak precisely to this question, because, as you said, Senator, the existence of a private right of action is a question for Congress to decide.

Senator THURMOND. Judge, I believe my time is up. Thank you for your presence here on this occasion.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Judge you are obviously doing very well. Do you know how I know that? Three-quarters of the press has left. [Laughter.]

The print media has left, not the important ones, but three-quarters of the press has left, which means that they assume you have been confirmed.

We will, as I indicated, take a break now for 10 minutes, and when we return we will go at least through Senator Metzenbaum and possibly through Senator Simpson. We have a little conflict here. I said we would end by 6:30. If we get both, we are going to go until 7:15 or so. We are going to check with my colleagues to see what is the most appropriate. If you have a preference, you can let your staff know in the break and we will take that into consideration.

We will now recess until quarter after. If we start sharp at quarter after, we can get a lot done.

[A short recess was taken.]

The CHAIRMAN. The hearing will come to order.

Judge, I have conferred with my colleagues and your staff on what we will do. We will proceed now with the distinguished Senator from Ohio—and I will say this for the 15th time, what great regret I have that he is leaving at the end of this term, choosing not to run again—who will begin the questioning. Then I am going to have to leave here at 5 of 7, and the distinguished chairman of the Agriculture Committee and a member of this committee, Chairman Leahy, has agreed that he will preside until Senator Simpson, who will be here, has his round of questioning.