NOMINATION OF STEPHEN G. BREYER TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, JULY 12, 1994

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:09 a.m., in room 216, Hart Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee), presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Feinstein, Moseley-Braun, Hatch, Thurmond, Simpson, Grassley, Specter, Brown, Cohen, and Pressler.

The CHAIRMAN. The hearing will come to order.

Judge and Mrs. Breyer, welcome. We are delighted to have you here. The first issue, when we get to questions, will be resolving what State you are really from. But you are, indeed, privileged this morning to have four of our distinguished colleagues anxious to be associated with your nomination, and one in particular maybe is considerably responsible for your nomination.

OPENING STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Today the Senate Judiciary Committee welcomes Judge Stephen Breyer, the President's nominee to be Associate Justice of the Supreme Court of the United States.

In each of the confirmation hearings that I have had the privilege to chair, I have tried to look at the broader issues at stake when we confirm a nominee to the Court—to consider the values by which our Nation defines and redefines itself over time, and the means by which Government can best express and defend those values.

At the start of the last decade, the Court seemed poised to reconsider many basic questions that most of us and most of the legal community thought had already been well settled. In the late 1980's, for example, the Nation watched to see whether the Supreme Court would limit the set of personal rights that the Court had previously deemed off limits to the Government and Government intrusion, especially the right of the individual to make certain highly intimate decisions free from Court interference, or, as Justice Brandeis had put it, the "right to be let alone."

In considering the nomination of Judge Robert Bork, therefore, I focused on the scope of personal rights not named—the so-called unenumerated rights—in the Constitution. My blatantly stated fear at that time was, if you will, a constitutional fear.

More recently, we have seen new challenges mounted by the most powerful economic interests in America by those who want to reduce the ability of Government to protect the rights and interests of the majority of Americans.

Thus, in the hearings on Justice Clarence Thomas—and most people forget that there really were two hearings. We had had a hearing, and it had ended, on the substance before we had the second, much more celebrated hearing. But in the hearing on Justice Thomas's nomination, I was concerned at the same time the Court would limit individual freedoms, it would tell Government that it must pay a factory owner before it can keep him from dumping chemical waste in a river running through his property and then onto some adjacent farmland downstream.

At the time, many people asked why I was concerned about this arcane thing referred to as the takings clause, the takings clause of the fifth amendment. As a matter of fact, many of the press writing today wrote interesting articles about how boring the discussion was and why were we taking any interest in it, except for the Wall Street Journal, which worried me that they got it right.

That is supposed to be a joke. You are supposed to laugh a little bit.

There may be fewer questions now as to why I raised the issue of the takings clause then, since in recent cases the Supreme Court has used the takings clause to make it harder for Government to regulate polluters or developers or other economic interests and activities in the name of public welfare. In raising the level of protection afforded the rights of owners of businesses and beach-front vacation properties, the Court used language equating these property rights with personal rights, such as the first amendment guarantee of freedom of speech.

So our recent confirmation hearings have focused primarily on how the Court's direct interpretation of the Constitution shapes our life. But the focus has now changed again in academia and among legal scholars, and we are soon going to see a whole new set of questions arise in the Supreme Court that I think have far-reaching consequences based on how they will be resolved for the public at large.

The focus has now changed, and it must be remembered, it seems to me, that the Court has, in fact, two major responsibilities. The first responsibility is to interpret the Constitution, and the second is to interpret statutes passed by the Congress and signed by the President.

While the first job is more familiar to most Americans, it is not in any way more significant. Indeed, what has become quite clear over the last decade is that it is increasingly through statutory interpretation that the Court is shaping the nature and scope of basic rights of all Americans.

For example, one of the rights secured by the Constitution is the 14th amendment guarantee of equal protection of the laws. The Constitution empowers the Congress to enforce that guarantee of

equality through legislation. And, today, women, Americans with disabilities, older Americans, and others enjoy equal opportunity to work and to conduct their daily lives that are protected not by the Constitution but by statute.

In recent years, the Court has tended toward a grudging interpretation of statutes passed by the Congress, signed by the President, and supported by the American people to ensure this greater equality.

Through various interpretive rules or, as we lawyers say, canons of interpretation, the Court has raised the bar on Government by adopting unduly restrictive, in my view, rules for interpreting statutes or changing those statutory rules of interpretation midstream and frustrating Congress' intent to ensure equality to women, the disabled, and others. A classic case which I will discuss with you later, Judge, is the *Patterson* case where the Court ruled that legislation passed after the Civil War guaranteed that an employer could not deny a person employment because they were black, but concluded that if they were fired because they were black, the legislation did not cover them for other reasons.

The effect on that woman was the same. She was discriminated against because a grudging interpretation of a statute was made, not because of the failure to find a constitutional right in the Constitution.

I will discuss those cases at length with you, Judge, but I now have a second concern and a related one, equally significant in my view; that is, what values the Court will incorporate into its calculus of interpreting statutes.

In recent years, an influential group of scholars and judges, known as the Law and Economics Movement, has proposed that legal problems should be resolved from a purely economic perspective.

Some proponents of this movement are relentless in their application of this reasoning, analyzing every feature of our lives, including marriage and sex, by reference to transactions costs, search costs, and missed opportunities. Some have even said that we can explain rape by talking about the cost to the rapist of finding a sexual partner. This is a serious, serious undertaking on the part of some very, very bright individuals.

Presently, of course, we quite consciously prefer other values, including social and moral norms, when we make policy and resolve legal disputes. We choose to take into account the social values and norms whether or not they make good, purely economic sense. We do that every single day. We make those judgments on health care. It does not make purely economic sense to spend a disproportionate amount of our booty, our money, our taxes, on saving the lives of people over the age of 80. But, as a matter of value, we value—not from an economic standpoint—we, the American people, through their Congress and their President, value the lives of the elderly and conclude even though it does not make economic sense, we have decided to do it. We choose to take into account social values and norms—again, whether or not they make good, purely economic sense.

Throughout your career, Judge, you have advocated the use of economic analysis in prescribing solutions for many legal and policy

problems. As I read what you have written—and I think I have read most of what you have written—your view is very distinguishable from the school of law and economics. But I will want to know how you will use the economic model that you propose in judicial decisionmaking.

Judge Breyer, you have served ably as a judge and chief judge on the First Circuit Court of Appeals for 14 years. As a professor of law at Harvard and, to some of us here, more importantly, as counsel to this committee, you are an established expert in regulation and its reform, in administrative law and processes, and in the intersection of science and law.

I began by describing how the confirmation hearings of the past 8 years have engaged us in the constitutional debates of those times. The reason that occurred, in part, was because the nominees before us were active and influential participants in those debates.

So it is again today, Judge. You have written and spoken at length about the methods of statutory interpretation, and about the role of economic analysis in resolving legal disputes. Thus, many of the very issues that are now boiling today in the cauldrons of debate among legal scholars and judges are those in which you are considered the foremost expert.

So we welcome you here today, Judge, not merely to measure your competence to sit on the Court, but to engage us in a discussion of those important matters.

I would ask unanimous consent that the entirety of my statement be entered in the record at this moment.

[The prepared statement of Senator Biden follows:]

PREPARED STATEMENT OF CHAIRMAN BIDEN

Today, the Senate Judiciary Committee welcomes Judge Stephen Breyer, the President's nominee to be Associate Justice of the Supreme Court of the United States.

The Constitution vests authority in the United States Senate to give "advice and consent" to the appointment of women and men nominated by the President to serve as justices on the Supreme Court. "Advice and consent" has come to serve two purposes: the first is for the Senate to learn more about the qualities of a President's nominee and to determine whether to vote for confirmation; the second—a unique function that has developed more fully over the last decade—is to provide the only opportunity the Senate and the American people will have to discuss the great legal issues of the day with the nominee, to get some indication of how he or she views these issues.

In each of the confirmation hearings I have chaired, I have tried to look at the broader issues at stake when we confirm a nominee to the Court—to consider the values by which a nation defines and re-defines itself over time—and the means by which government can best express and defend those values.

At the start of the last decade, the Court seemed poised to reconsider many basic questions that most of us thought had already been well settled. In the late 1980's, for example, the nation watched to see whether the Supreme Court would limit the set of personal rights that the Court has previously deemed off-limits to government intrusion—especially the right of the individual to make certain highly intimate decisions free from government interference—the "right to be let alone"—which Justice Brandeis characterized as "the most comprehensive of rights and the right most valued by civilized man."

In considering the nomination of Judge Robert Bork, therefore, I focused on the scope of personal rights not named in the Constitution. My fear at that time was, if you will, a "constitutional" fear: I was concerned that the Supreme Court might, in the name of constitutional interpretation, constrict our right to make these highly personal decisions without interference from the government.

More recently, in the early 1990's, we have seen new challenges mounted by the most powerful economic interests in America to reduce the ability of government to

protect the rights and interests of the vast majority of the American people. We had not seen such a sustained attack on the ability of government to protect the average person since early in this century, when the Supreme Court struck down child labor laws, minimum wage laws and many others.

Thus, in the hearings on Justice Clarence Thomas's nomination, I was concerned that the Court—again interpreting the Constitution—would, on the one hand, restrict an individual's ability to make highly personal decisions without interference from the government, and at the same time make it harder for government to stop a factory owner from dumping chemical waste in a river running through his property and then onto farmland downstream—by requiring the government to pay the factory owner not to pollute.

At the time, many people asked why I was concerned about this arcane thing called the "Takings Clause" of the Fifth Amendment. What is at stake here may be harder to see, because the method of these challenges has been subtle, involving highly technical legal rules, such as those which allocate burdens of proof. There may be fewer questions now, since the Supreme Court has decided the *Lucas* case and last month's *Dolan* case, in which the Court used the takings clause to make it harder for governments to regulate polluters or developers or other economic interests and activities in the name of the public welfare. In raising the level of protection afforded to the rights of owners of businesses and beachfront vacation properties, the Court used language equating the level of protection these property rights with personal rights, such as the first amendment's guarantee of freedom of speech.

What's at stake in both these on-going debates are our individual freedoms. Our recent confirmation hearings have focused primarily on the Court's direct interpretation of the Constitution: what individual freedoms are guaranteed by the Constitution, and when may government limit those freedoms? Can the government interfere when an individual decides whom to marry? Whether to have children? How to raise children? Does the Constitution afford as much protection to economic rights as to personal rights? In other words, do we want to protect a developer's desire to build a skyscraper in a residential neighborhood as fiercely as we protect a black family's desire to buy a house in that neighborhood?

These types of decision-making are the part of the Court's work most familiar to us—but the Court has, in fact, *two* major responsibilities: to interpret the Constitution; and to interpret *statutes* passed by the Congress and signed by the President. In the first kind of case, the Court's job is to decide whether certain action taken by the Government complies with the Constitution—or in other words, is the action constitutional? Here, the Constitution serves as the touchstone for evaluating the Government's conduct. In the second kind of case, the Court's job is to decide whether and how a specific law applies to a specific case. Here, obviously, the statute itself, and not the Constitution, serves as the touchstone.

What has become clear over the last decade is that the Court confronts basic questions about individual rights, and about the tension between economic interests and the public interest, not only when it interprets the Constitution, but also when it interprets statutes. Indeed, this trend—where, by the method in which it interprets statutes, the Court makes important decisions about how Americans can lead their lives—has been demonstrated over and over again since the confirmation of Justice Scalia. Quite frankly, I wish I had appreciated, at the time of his confirmation hearings, how wedded Judge Scalia was to changing the way the Court interprets statutes—because it is increasingly through statutory interpretation that the Court is shaping the nature and scope of the basic rights of all Americans.

Now we have new questions we must ask: What is the proper role of the courts in interpreting the statues passed by the Congress and signed into law by the President—statutes that may directly affect basic individual rights? Should judges look only at the precise language of a statute, or should they also consider its purpose as reflected in what the drafters said and did in adopting it? If Congress enacts a law that accurately reflects a value judgment by the American people but that economists would deem economically unsound, should a court—may a court—use economic standards when it interprets a law to review policy choices made by elected officials? Can what economists call "the greater good" be measured merely on a mathematical scale, or should the courts respect the moral yardstick that Congress—speaking for the American people—uses to measure the public interest? Must courts recognize that the American people sometimes reach conclusions they fully understand to fall short of purely economic good sense in order to pursue a desired goal—for example, in spending large sums to make buildings accessible to the handicapped?

So what sound like mere technical questions affect, in fact, rights secured by the Constitution. Consider the fourteenth amendment's guarantee of "equal protection

of the laws." In simplest terms, this means that the government may not discriminate against people because of their race, sex and other characteristics. The Constitution empowers the Congress to enforce that guarantee of equality through legislation. For example—the right of Americans with disabilities to enjoy equal opportunities in employment, housing and other features of daily life; the right of women to work in an atmosphere uncontaminated by sexual harassment; the right of African-Americans to live in any neighborhood they choose; the right of older Americans to continue to work as long as they can do their jobs; all these rights are protected by federal statutes. If you are denied a job because you are a woman, I doubt very much whether it will matter to you whether you have been denied the job by the government, or by a private party. The Constitution protects you against the former kind of discrimination, statutes against the latter.

When a question arises about the meaning or scope of these statutes which have the intention of insuring equality, it is often the Supreme Court that resolves the dispute. If we want to know "how we're doing" with respect to equality, therefore, we must look not only at how the Supreme Court interprets the Constitution—but also at how it interprets the statutes that have equality as their aim. In deciding how to apply a statute in a specific case, the Supreme Court has two basic choices: the Court can either give the statute a generous reach to fulfill Congress's intent, or it can give it a grudging one that requires Congress to be ever more precise.

In recent years, it seems to me, the Court has too often chosen the second course—it has too often been grudging. As a consequence, some of the "constitutional" fears of the Bork and Thomas hearings have become, if you will, "statutory" fears. But to the woman denied a job because she is a woman, it matters not one bit whether the violation was constitutional or statutory—either way, she is still out of work.

In some cases the Court has been grudging by looking only at the literal language of the statute before it, ignoring the statute's history and purposes. In 1989, for example, in a case called *Patterson* v. *McLean Credit Union*, the Court was faced with the question of whether a civil-rights statute passed several years after the Civil War protected workers from racial harassment on the job. This statute guaranteed to all persons within the United States "the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens." The Court agreed that this law prohibited racial discrimination in hiring—but that it did not prohibit racial discrimination that occurs after a contract is made—that is, after a person is hired.

This conclusion meant that this statute did not protect employees on the job from being insulted because of their race, from being given demeaning work solely because of their race, or even from being fired because of their race, even though they could not be discriminated against in a hiring decision. The Court bolstered its hyper-literal interpretation of the statute by reference to a different law relating to job discrimination, passed almost 100 years after the law at issue in *Patterson* was passed—even though Congress had not said anything about changing the scope of the earlier law when we passed the later statute. Though it was interpreting a statute in *Patterson*, not the Constitution, the Supreme Court directly shaped the meaning that "equality" would have for a black woman named Brenda Patterson—and what it would mean for the lives of all working Americans.

In other cases, the Court's decisions have turned not so much on the language of the statutes in question as on interpretive rules that the Court itself has created. These interpretive rules are often called "canons" of statutory interpretation. In my view, these interpretive rules have sometimes operated as a thumb on the scales that tips the balance against a common-sense reading of legislation designed to protect individual women, individual blacks, and individual handicapped and older Americans against invidious discrimination.

Let me offer an example. Congress passed a law giving handicapped children the right to equal educational opportunities. The law was aimed at states and local governments, and it said specifically that a handicapped child could sue in a federal court government that failed to meet its obligations under the statute. But in a case called *Dellmuth* v. *Muth*, the Supreme Court refused to allow a handicapped child to sue New York state in federal court. Congress had the power to grant a right to sue a state, and the legislative history suggested that Congress had intended to allow handicapped children to sue states in federal court. Nonetheless, according to a majority of the Supreme Court, Congress had not used the correct words in granting the right of the family to sue the state. The Court used a "canon"—one that disfavors suits against states in federal court—to reject the common-sense reading of the statute's language, which would have permitted the suit.

As Professors Eskridge and Frickey have pointed out, these sorts of canons operate as "super-strong clear statement rules," that permit the Court to engage in a "'backdoor' version of the constitutional activism that most Justices on the current

Court have denounced." That is bad enough. But I have another problem with these two cases. When you take together what the Court did in *Dellmuth* and in *Patterson*, it seems to me the Court was not only grudging, but inconsistent. In *Patterson*, the Court said that the literal language of a statute counts for everything. In *Dellmuth*, the Court said that even if the literal language of the statute covers the case, it's not enough.

That strikes me as flatly inconsistent. But one thing was consistent about the two cases—their result. In one a black woman, in the second a handicapped child, were denied their right to equal treatment. In both of these cases, the Congress was able to undo the damage done by the Supreme Court by passing a new statute using different words. But the Court's decisions had the effect of delaying the equality intended by the original legislation.

These are just two of many recent cases in which the Court has narrowly interpreted laws protecting individual rights, but they illustrate how the Court, without saying anything about the Constitution, can affect the scope of equality by interpreting statutes. As we all well know, there will be many more such cases. To sum up these cases, it would be like me asking the Supreme Court, "do you know what time it is?" And the Court replying, simply, "yes." Now, you and I, Judge, and everyone in this room realize that what I wanted to know when I asked that question was the time of day. Instead, the Court answered my question formally, not as a request for information but as a test of the Court's cognitive abilities. The Court's answer was not untrue, but you might well call it a triumph of technical sophistry over plain common sense. That might serve as a debating point, Judge, but it does not serve the public interest.

In the coming decade, the rights of individuals and the powers of government will be affected as much by the Court's method of interpreting statutes as by its interpretation of the Constitution—and we need a Court more interested in clarifying the true intent of a law than in seeking quibbles that promote its own agenda.

I have a second, related concern. As significant as its method of interpretation is what values the Court will incorporate into the calculus of interpretation. In recent years, an influential group of scholars and judges known as the "Law and Economics Movement" has offered a new view of how policy should be made and how legal disputes should be resolved. In essence, this movement proposes that legal problems should be resolved from a purely economic perspective, now that seeks economic efficiency as its goal, so that the answer to a legal problem may be derived simply by summing columns of numbers—costs, benefits, missed opportunities and the like.

Some proponents of this movement are relentless in their application of this reasoning—analyzing every feature of our lives, including marriage and sex, by reference to transaction costs, search costs, and missed opportunities. Some have even said that we can explain rape by talking about the cost to the rapist of finding a sexual partner.

Presently, of course, we quite consciously prefer *other* values—including social and moral considerations—when we make policy and resolve legal disputes. We choose to take into account social values, *whether or not they make good, purely economic sense.*

Throughout his career, Judge Breyer has advocated the use of economic analysis in prescribing solutions for many legal and policy problems, and I will ask him how he will use the economic model in judicial decision-making, particularly relating to questions of public health and safety and to personal freedoms guaranteed to us under our laws.

Judge Breyer, you come before the committee with impeccable credentials and a host of impressive accomplishments to your credit. You have been an able judge and chief judge on the First Circuit Court of Appeals for 14 years. During that time and before, as a professor of law at Harvard and as chief counsel to this committee, you have made an enviable name for yourself as an expert in regulation and its reform, in administrative law and processes, and in the intersection of science and law.

I began by describing how the confirmation hearings of the past eight years have engaged us in the constitutional debates of those times, partly because those nominees were active and influential participants in those debates.

So it is again today, Judge. You have written and spoken at length about methods of statutory interpretation, and about the role of economic analysis in resolving legal disputes. Thus, many of the very issues that are boiling today in the cauldrons of debate among legal scholars and judges are those in which you are most expert. We welcome you here to engage us in a discussion of these important matters.

As we begin these hearings, I am concerned about the four areas I have identified here today, all of which affect our personal liberty—the scope of our most important individual freedoms guaranteed by the Constitution; the apparent emergence of economic rights as standing shoulder to shoulder with—or shouldering aside—our per-

sonal freedoms; the proper role for the Court in interpreting statutes enacted by the Congress and signed by the President; and the utility of economic analysis in judicial review of policy choices made by elected officials.

These are not small questions, Judge; how we answer them will determine, directly and intimately, how Americans can live their personal lives and pursue their personal goals. That is why this opportunity to discuss these questions is important—the result should be a Court better prepared to fulfill its constitutional responsibilities and a nation better enabled to pursue the destiny envisioned for it by its founders.

Judge Breyer, you are very welcome here.

The CHAIRMAN. I will now yield to my distinguished colleague from Utah, a man you know well, Senator Hatch.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman.

I welcome you, Judge Breyer, and the distinguished Senators who are here to testify with you. I appreciate your willingness to go through this process.

Mr. Chairman, I congratulate the nominee, Judge Stephen Breyer, on his nomination to be Associate Justice of the U.S. Supreme Court. Judge Breyer has had a remarkably distinguished career in the law and in public service. If confirmed, he will bring a wealth of knowledge and expertise to the Court. And I might say I believe that he will be confirmed.

As an attorney in the Department of Justice, then as a professor of law, Judge Breyer developed an expertise in administrative law and antitrust, and an appreciation of the costs of excessive governmental regulation. I first came to know and admire Judge Breyer when he worked for the Senate Judiciary Committee, first as a consultant, then as chief counsel. In his work, Judge Breyer was instrumental in bringing about airline deregulation.

For the past 14 years, Judge Breyer has distinguished himself on the U.S. Court of Appeals for the First Circuit. Known for his careful, scholarly opinions on a range of difficult issues, he has defied simplistic categorization. While a judge, he also served on the U.S. Sentencing Commission and helped to draft the Federal sentencing guidelines. That was no small achievement.

That Judge Breyer has the intellect, character, and temperament to serve on the Supreme Court is not, in my mind, in question. An additional essential qualification for any Supreme Court nominee is that he or she understand and be committed to respect the role of the Supreme Court in our governmental system of separated powers and federalism. This qualification has become all the more important in recent decades, when so many voices from academia, the media, and special interest groups have been attempting to justify the view that the Supreme Court is entitled to operate as a super legislature. Under this view, Justices enshrine their own policy preferences in place of the laws passed by Congress and the State legislatures.

Under our system, a Supreme Court Justice should interpret the law and not legislate his or her own policy preferences from the bench. The role of the judicial branch is to enforce the provisions of the Constitution and the other Federal laws according to their understood meaning when they were enacted.