"amount to a back-door version of the constitutional activism that most Justices on the current Court have publicly denounced."

Now, I would like to talk with you a little bit about that. I will also discuss with you—and I will tell you ahead of time—the *Patterson* case and *Dellmuth* v. *Muth,* where the Court seemed to have used canons to reach the exact opposite conclusions. In *Patterson,* there was a statute passed in the post-Civil War period that said you cannot fail to hire someone merely because they are black. And then in the 1960's, Congress came along and said we are going to pass the Civil Rights Act. Then an action was brought. A person was fired because she was black. She was hired, but then fired. She said, "Wait a minute, that statute covers me." And the Court looked down at the words of the statute and said: We do not find any explicit reference to the 1964 statute, but we are going to infer that Congress must have, when they passed that 1964 statute, meant that it should cover it, not the Civil War statute.

Then *Dellmuth* comes along, and *Dellmuth* is about a handicapped person, and a handicapped person being able to sue a State. And when that person was denied equal access under the handicapped law, which the Senator from Utah and the Senator from Massachusetts played a great role in passing, the Court looked down at the statute and said, well, the 11th amendment basically says there is a presumption against an individual suing a State in Federal court. So since Congress did not mention explicitly that we want to discount that presumption, we are going to assume they meant let the presumption prevail.

So they looked in one case at the statute and used a rule of construction to find that Congress must have been talking about something that happened 100 years later, and in the second statute they looked at the language and said, well, it did not mention the 11th amendment so Congress must have meant that the 11th amendment prevailed. The end result was the same. A black woman got fired because she was black, and a handicapped child could not sue the State of New York. The result was the same. People without power got left out.

Totally different rules of construction. I want to talk to you about that, and a lot more. In the meantime, let's now take a break for 5 minutes, and then we will come back to Senator Hatch. I thank you very much, Judge.

Judge BREYER. Thank you.

[Recess.]

The CHAIRMAN. The hearing will come to order. While we are waiting for the photographers to clear the well, I want the record to show, so I do not get graded badly by Professor Heinzerling from Georgetown, who is sitting behind me, that I do know that Ms. Patterson was not fired; she alleged racial discrimination. And I just want the record to show that, because I get graded by the visiting professors who come and help us on this. So I just want the record to reflect that.

Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

Judge Breyer, throughout your career, you have set forth what can fairly be called a pragmatic, nonideological vision of the law. In your own words, you said at one time:

Law itself is a human institution serving basic human or societal needs. It is therefore properly subject to praise or to criticism in terms of certain pragmatic values, including both formal values, such as coherence and workability, and widely shared substantive values, such as helping to achieve justice by interpreting the law in accordance with the reasonable expectations of those to whom it applies.

Now, I would like to explore what implications if any your pragmatic vision of the law has for your understanding of the role of a Supreme Court Justice. It is, after all, one thing to have a pragmatic view of the law; it would be something quite different to believe that some or all actors in the legal system have a roving mandate to pursue their individual visions of pragmatic justice.

In your view, what constraints, formal or informal, legal or prudential, really bind a Supreme Court Justice in his or her own decisionmaking?

Judge BREYER. I think, Senator, I would start by saying this, and I have said this before, and it is something that has considerable significance to me. Why is it that judges wear black robes? I have always thought that the reason that a judge wears a black robe is to impress upon the people in the room that that particular judge is not speaking as an individual. In an ideal world, the personality of the judge, the face of the judge, would not be significant because when the judge speaks with a black robe on, in no matter what court, the judge is speaking for the law. And in an ideal world, the law is the same irrespective of the personality of the judge.

That is a very different thing. It is an absolutely true thing. But it is consistent with believing that the law that the judge interprets and enunciates with his black robe on is in fact a body of rules and institutions and so forth that is supposed to work properly for people.

And so, remembering that, I would imagine that on the Supreme Court, what I would be bound by is the words, the history, the precedents, the traditions, all of those things which in fact go up to make this great body of institutions, including legal advice and how businesses and labor unions interpret it and so forth, that we call law.

The role of the subjective preference of the judge is not supposed to be relevant, and while no one can escape from his own background, from his own opinions, from his own personality, et cetera, Learned Hand once described in fact, at a speech given to commemorate Justice Cardozo, he described the judge as a runner, stripped for the race. He may have been quoting Holmes then. But in his view, what that meant was to the best ability, a judge should be dispassionate and try to remember that what he is trying to do is interpret the law that applies to everyone, not enunciate a subjective belief or preference.

Senator HATCH. Would you agree, then, that a judge's authority derives entirely from the fact that he or she is applying the law, not simply imposing his or her policy preferences?

Judge BREYER. Of course, that is true. And why it is difficult, in an important court like the Supreme Court, is of course people disagree, often, about how, in vast, uncertain, open areas of law, where there are such good arguments on both sides of such important policy issues, of course people disagree about what the proper outcome of those issues is. But in trying to find the correct solution, the helpful solution consistent with the underlying human

purpose, the judge follows canons, practices, rules, cases, procedures, all those things that help define the role of the judge, which is the same for judge A as it is for judge B.

Senator HATCH. Would you agree, then, that the meaning of the law is to be ascertained according to the understanding of the law when it was enacted?

Judge BREYER. Almost always. Almost always.

Senator HATCH. Can you think of any situation——

Judge BREYER. The reason that I hesitate a little is because of course, there are instances, particularly with the Constitution and other places, where it is so open and unclear as to just how the Framers or the authors intended it.

Senator HATCH. And I accept that. Would you also agree that separation of powers concerns mandate that courts be careful not to intrude on the terrain of the various political branches?

Judge BREYER. Yes.

Senator HATCH. All right. Those are important issues to me and I think to everybody who understands or is concerned with constitutional law.

Judge Breyer, as you know, the first liberty protected in the Bill of Rights is religious liberty. Specifically, the free exercise clause of the first amendment provides that Government shall make no law prohibiting the free exercise of religion.

In its 1990 decision in *Employment Division* v. *Smith,* the Supreme Court held that a neutral, generally applicable law need not be justified by a compelling interest even if the law has the incidental effect of severely burdening a particular religious practice. And as you may know, I was very concerned that in the aftermath of the *Smith* case, the freedoms of religious minorities in this country were vulnerable to hostile majorities. For this reason, I was the lead sponsor along with Senator Kennedy in enacting the Religious Freedom Restoration Act, which became law last year and which restored the compelling interest standard that was widely understood to be in force before the *Smith* case.

I would like to ask you about an opinion that you wrote before the *Smith* case was decided, and that was *New Life Baptist Church Academy* v. *Town of East Longmeadow,* back in 1989.

You ruled that a local school committee's proposed procedures for reviewing the adequacy of the secular education provided to students at a Fundamental Baptist Church school did not violate the free exercise clause. And as you know, your ruling in this case has been criticized as not sufficiently protective of religious liberty.

How would you respond to those criticisms about your decision in that case? Both Senator Kennedy and I are watching you very carefully.

Judge BREYER. So is Chloe. Chloe was out last summer in Los Angeles. She was working with a minority religious group, the Vietnamese Buddhists, and they were actually having a very practical problem, because they were trying to set up home temples in areas of the city where the rules and regulations had made it tough for them, and the question was could you work that out in a way that both satisfied the needs of the city and also allowed these people to practice their religion. That was terribly important. So she is also very interested in that.

Senator HATCH. Well, good for you, Chloe. When we enacted the Religious Freedom Restoration Act, we were strongly supportive of protecting religious liberty and freedom.

Judge BREYER. Of course.

Senator HATCH. Go ahead.

Judge BREYER. Of course, and the particular case, I found extremely difficult. Why? I will tell you a little bit about it. If you go back into the Constitution, even free speech, I read recently it really descends historically from the need to protect religion. There is nothing more important to a person or to that person's family than a religious principle, and there is nothing more important to a family that has those principles than to be able to pass those principles and beliefs on to the next generation.

That is why schools are so important in this area. That is why people feel so strongly about schooling. So one starts with the realization that what was at issue in the first amendment, I think both for speech and for religion, was a decision made sometime around the 17th century, that it is about time to stop killing each other because of religious beliefs, and what we are going to do is respect the religion of each other, and people are going to be free to practice that religion and to pass it on to their families. They are going to teach their children, and their children can teach their children. That is absolutely basic.

Senator HATCH. Well, as you know——

Judge BREYER. The opposite side of the coin is that, of course, the people, as organized in government, have an interest to see that you or I or any other family do not abuse our children, and they have an interest in seeing that our children, each other's children, do receive some kind of education—that they learn how to read, they learn how to write, they learn mathematics—and for that reason, it is absolutely well-established that although people can teach their children at home if they wish, because of the need to pass on their religion, it is equally well-established that the State has some interest in seeing that education is going on and that the children are being taught.

Now, in that particular case, it was a little unusual because the argument came up—and I read through that record with pretty great care—and what had gone on, I think, was everyone in the State said they could teach their children at home, that particular religious group. There were some complaints about the quality of the education—they had a special school—and everybody agreed that the school system could go in and look and see what was being done.

Indeed, the religious school itself had said at one point, We do not mind if you come in and look; what we do not want to do is we do not want to acknowledge the school board, because we believe there is no higher authority than God. And the school board, making an effort to accommodate, had said, Do not acknowledge us; we do not want you to acknowledge us. Just let us look and see what is happening, the same way as you might any visitor at all. And then the school had said, Yes, that is OK. But somehow in the legal argument in the lower court, that became a little confused, and before you know it, what had happened was that the lower court had entered a decree which said the way to go about this,

State, is to test the children after they leave school; while the State had said, no, no, it is better to go in and see.

Now, there, the question was does the Constitution require after-school testing, or does it require visits, or is it up to the State? And that is a rather narrow point, and what we held in the case, unanimously, was that the Constitution does not require after-school testing; if the State wants to do it that way, they could. But you see, some people might think that was more restrictive; others might think it was less restrictive. In other words, it was a fairly narrow technical matter growing out of the record.

Senator HATCH. I just hope that you and other members of the judicial community will recognize these important issues, and I think you do—and certainly recognize the importance of the Religious Freedom Restoration Act——

Judge BREYER. Yes, yes.

Senator HATCH [continuing]. And the overwhelming vote that it had in both Houses of Congress.

Judge BREYER. The principle is absolutely right.

Senator HATCH. Congress intended to give strong protections to religious belief and liberty.

Judge BREYER. Right.

Senator HATCH. Unfortunately, just recently, in a case involving an order to a church to return tithes made in good faith by churchgoers who later became bankrupt, we have the current administration, despite its support for the Religious Freedom Restoration Act, interpreting the act in a manner that would effectively gut it, in my opinion.

Now, I am not asking for your views on that case, because undoubtedly, that is going to come before the Court; but I hope that all of you will consider this particular act and its importance, and that religious freedom is the first of the mentioned liberties in the Bill of Rights. And I hope you will consider the overwhelming congressional intent with regard to that.

The establishment clause of the first amendment provides that Congress shall make no law respecting an establishment of religion. Under the test devised by the Supreme Court in 1971, the *Lemon* v. *Kurtzman* case, a practice satisfies the establishment clause only if it, first, reflects a clearly secular purpose; second, has a primary effect that neither advances nor inhibits religion; and third, effectively avoids an excessive entanglement with religion.

Now, I am very concerned that this abstract, arid, and ahistorical test is often applied in a manner that is insensitive to practices that are part and parcel of our political and cultural heritage. In particular, narrow reliance on the *Lemon* test ignores a richer strain of Supreme Court precedent that recognizes that interpretation of the establishment clause should comport with what history reveals was the contemporaneous understanding of its guarantees.

In Justice Brennan's words, "the existence from the beginning of the Nation's life of a practice * * * is a fact of considerable import in the interpretation" of the establishment clause.

Now, do you agree or disagree that the historical pedigree of a practice should be given considerable weight in the determination of whether a practice amounts to an establishment of religion? You

mentioned that historical precedent is important to you. Do you feel it is important in this instance?

Judge BREYER. It is important; there is no question it is important. The establishment clause has tremendous foresight, tremendous foresight, I think. The simple model—there is always in my mind, like, two or three fairly simple things—I think of the establishment clause, I think of Jefferson, and I think of a wall. And the reason that there was that wall, the reason, which has become so much more important perhaps even now than it was then, is that we are a country of so many different people, of so many different religions, and it is so terribly important to members of each religion to be able to practice that religion freely, to be able to pass that religion on to their children. And each religion in a country of many, many different religions would not want the State to side with some other religion, so each must be concerned that the State remain neutral.

Then, there are also cases arising. And when cases arise with secular institutions, the question becomes have you injected too much religion into them. You can inject some—I mean, you have chaplains in Congress. Schools—what about schools? You see teaching your own children—it becomes very important not to, in a secular school, inject much religion into a school.

What of the other side of the wall? Can the State aid religion? The answer is certainly, sometimes. Nobody thinks—nobody thinks—that you are not going to send the fire brigade if the church catches fire. Nobody thinks that the church does not have the advantage of public services. The question becomes when is it too much. And again, schools are critically important because of the importance of schools to religious people.

So that is the framework that I use, and in trying to decide whether and when, what is too much, of course you look at history, and you look at tradition, and you look at the current world as we live it in the United States.

Senator HATCH. At one time, you stated that, "Of course, the wall between church and State is not absolute."

Judge BREYER. No; no one is going to say—to use an extreme example—no one would say that if the church is on fire, do not send the fire department. No one would say that the public services of a city are not available to the church. The question becomes when have you gone too far in terms of trying to preserve a country of many different religions where Government is basically neutral as among them.

Those are very difficult questions.

Senator HATCH. Well, I think, as we have seen up here on Capitol Hill, the word "wall" of separation is a metaphor——

Judge BREYER. Yes, absolutely. That is true.

Senator HATCH [continuing]. And it leads to a lot of hostility.

Judge BREYER. Right.

Senator HATCH. And there has to be some reason brought into the system.

Judge BREYER. There is.

Senator HATCH. In *Lee* v. *Weisman* back in 1992, the Supreme Court, relying on Warren Court rulings, held by a 5-to-4 vote that a school district violated the establishment clause when it invited

a rabbi to lead a prayer at a school graduation. Now, in my view, we have reached new depths when a nonsectarian prayer by a rabbi at a school graduation ceremony is censored by the establishment clause.

Notwithstanding the fact-specific language of the Court's opinion in *Lee*, some have since tried to portray *Lee* as having invalidated all prayer at school graduation ceremonies including, for example, nonsectarian student-led prayer.

Would you consider it a relevant factor for purposes of the establishment clause whether it is a member of the clergy or a student who leads the prayer?

Judge BREYER. That is very specific, and I——

Senator HATCH. I am not asking you if the factor would be dispositive, but simply whether it would be relevant.

Judge BREYER. It sounds as if it is—as you said, it sounds as if it is a relevant factor. And I understand the point and agree that it is not absolute, these things, and I do think—it sounds as if it would be a relevant factor.

Senator HATCH. Would you consider it relevant whether the decision to have prayer at a graduation was made by school officials or students?

Judge BREYER. Well, you bring up matters, Senator, which sound as if they are relevant.

Senator HATCH. I think that is good.

Judge BREYER. Would you repeat that, what was good?

Senator HATCH. I say that is good, his discussion of that.

Judge Breyer, let me turn to the matter of copyright briefly, and on a subject upon which you have written.

Judge BREYER. That is true.

Senator HATCH. I am sure you know what I am going to ask. In 1970, you wrote a Law Review article entitled "The Uneasy Case for Copyright." It was considered quite controversial in many quarters because it questioned many of the basic assumptions upon which copyright law had long been based. In addition, you strongly argued against extending copyright to what were then new areas of protection, such as computer programs, but that was nearly 25 years ago.

Since 1970, our copyright laws, of course, have been fundamentally altered, first by the adoption of the landmark 1976 Copyright Act, which greatly strengthened Federal copyright, extending it even to unpublished works; second, by the 1980 statutory recognition of the copyright-protected status of computer software and data bases; and, finally, by the 1988 U.S. ratification of the Berne Convention for the protection of literary and artistic property, which is the principal international copyright treaty.

Now, have your views on copyright changed since 1970? [Laughter.]

Judge BREYER. Senator, the reason I laugh——

Senator HATCH. How can you get a bigger home-run ball than that?

Judge BREYER. The reason I laugh is that that article was awfully important to me, because what turned on that article for me was a job. The question was whether I would get tenure, so I put quite a lot of effort into that article.

Senator HATCH. Sure.

Judge BREYER. As you point out, Congress has passed a statute since then. The law has changed since then. I certainly would follow the statute rather than views, but I cannot resist saying this: that recently I did reread that section on the computer part, and what I thought at that time years ago—it was 25 years ago—I think a lot of the computer people thought that what we would all be doing is we would have like a big electricity plant or something in the middle of the city and everybody would be hooked up to this thing with wires, and you would have the terminal that went up to this big computer utility. And then, if that had been so, I said, well, you do not really necessarily need copyright to protect the program because the guy owning the utility, which would probably be regulated, could just charge. You would come to the same thing.

Then I put in a paragraph and said, you know, it would be different if what happened would be that everybody would have his own little computer, and the programs would be made by 100 or 1,000 different companies, and they would sell them off the shelf, and it would be really easy to copy them. And then I do not know what we would do.

So I do not know that I have to change that view because it was——

Senator HATCH. OK. With regard to the takings clause, I have to say that I find it most curious that our chairman is very protective of rights that are not enumerated in the Constitution, as are many on this committee, yet is, I hate to say it, Joe, somewhat disdainful of rights that are specifically mentioned in the Constitution. And I am very concerned, as are all Westerners and I think people all over the country, about the unlawful taking of property, whether by whole or by part, by Government and Government regulation, and taking it without just compensation. So those are matters that I just want to reemphasize a lot of us are concerned about on the other side of that issue even though I think the chairman makes some good points otherwise.

Various doctrines of justiciability, for example, standing, ripeness, and mootness, operate to help confine the Federal courts within our constitutional scheme of separation of powers, the adjudication of live claims raised by parties who have suffered concrete and particularized injuries that can be readdressed.

If these elements are diluted, the judicial power is expanded at the expense of the executive and legislative branches. Are you in agreement with the current Supreme Court case law in standing, ripeness, and mootness? And if not, what are your areas of disagreement?

Judge BREYER. The basic principles arise really out of article III. Article III of the Constitution says the judicial powers shall extend to all cases. It talks about cases, and it talks about controversies. And some of the rules that you mention are really designed to make certain that the courts decide real cases and real controversies. I think that those are principles that people agree upon.

I think there is another principle that they agree upon, and that is when you in Congress pass a statute, there are certain groups of people whom that statute means to protect. And there are also

a lot of people, when your statute is unclear in this respect, that might argue their way into protection.

Now, any of those people, if they are really hurt, should be able to bring a lawsuit, because those are people that you mean to protect, or at least arguably you mean to protect them, from the very kind of injury that you are worried about in that statute. I think most people would agree with that.

Then there are areas of what I would call gray areas in the law about whether the Court is pushing a little bit more this way or a little bit more that way in respect to how we go about making a little more concrete what I have just said generally. On those matters, I think I should like to reserve judgment, because I think that those are matters that are very much at issue in Supreme Court cases.

Senator HATCH. I thank you. I notice that my time has just about expired, but I appreciate your answers. I have really enjoyed listening to you.

Judge BREYER. Thank you, Senator.

The CHAIRMAN. Thank you very much, Senator.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

Judge Breyer, the Preamble to the Constitution makes it clear the purpose of our system of law is to enhance the lives of every American; in the Framers' words, "to secure the blessings of liberty to ourselves and our posterity." And at the White House ceremony, when you were nominated, you said quite eloquently that your goal as a Justice was to help make the Constitution and laws work for real people. So I would like to discuss with you several areas where your work made an impact on real people, on the rights of working women, on the safety of medications, on the quality of our environment, and also on the security of Americans from the threat of crime in our homes and on the streets in our communities.

Let's begin with the area of gender discrimination on the job, and one of your decisions, in particular, is a classic case involving two working women in the town of Peabody, MA, which illustrates what the law can mean in real human terms to the people involved. The case I am referring to is *Stathos* v. *Bowden.*

The plaintiffs, Stella Stathos and Gloria Bailey, worked in clerical jobs at the Peabody Municipal Lighting Commission. Both women devoted their entire working lives to the city agency, starting when they finished high school and continuing until they reached the retirement age. Ms. Stathos worked there 36 years before she retired in 1985; Mrs. Bailey worked there 41 years until she retired just last year.

In 1977, the Lighting Commission reorganized the plant where the women worked and drew up an organization chart which made it clear for the first time that men holding the positions equivalent to those held by Ms. Stathos and Mrs. Bailey were being paid about $12,000 more than the two women were receiving, and the women repeatedly asked for a pay increase to eliminate the disparity, and their requests were denied. They filed suit under two Federal antidiscrimination laws, and I am sure it took a lot of courage to sue their employer. It really was fighting city hall then. But in the end, they prevailed, and they won a jury verdict in their favor,