Senator MOSELEY-BRAUN. I do not think so. I think we are all kind of flailing around in this area. Again, I just want to thank you very much for your responses, and I thank the chairman for his graciousness in allowing me to go past the red light. When you are last, I guess you can—you get so anxious to ask your questions. Thank you again, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Judge, one of the most interesting little treatises I ever read was Patterson's "The Forgotten Ninth Amendment." I am not going to quiz you on it. I just was curious whether you had ever read "The Forgotten Ninth Amendment," the rights retained by the people. It's a skinny little book in every law library.

Judge BREYER. It rings a bell. It rings a bell. If I did, it was quite a while ago.

The CHAIRMAN. Well, you know, I am going to sound a little bit like Paul Simon, who it is not bad sounding like, by making a suggestion that you can totally disregard. I would recommend it to you for your edification. It is not very cumbersome, and it gives a perspective that I think all Supreme Court Justices need. I think it accurately reflects the fear and trepidation that they all have—and the self-restraint they all have exercised in looking at the ninth amendment and its applicability to the notion of unenumerated rights. But I just cite it. You may find it at least interesting.

Let me pick up where I left off yesterday, and not merely because a professor at my alma mater who has been helping me out, Bill Banks, sitting behind me, spent a lot of time helping me put this together. You know, you are always intimidated by your professors from your law school. Only Bill is younger than I am, so I am not intimidated by him. But I would like to follow up on a couple things that we started on yesterday.

We were discussing—and I do not expect you to remember this, you have had so many questioners. But to refresh your recollection, we were discussing statutes where the Congress delegates to an agency, one of the alphabet agencies, the decision of how best to regulate. We very often, as you know from your days here, will say we would like to clean up the environment and we would like it to be cleaned up to a certain extent, but we are not scientists so we are going to give that responsibility to the Environmental Protection Agency, which has a battery of scientists and experts, to tell us when it has been cleaned up sufficiently to guarantee the public health and safety or whatever.

We do that all the time. We do that not just in environmental legislation but in areas like, for example, this area you were discussing with the distinguished Senator from Illinois. There are a few of us, very few, who are experts on the computer age and the information highway, and we will delegate certain responsibilities to the Federal Trade Commission. We will delegate certain responsibilities to the Federal Communications Commission, in part because if we did not, we would be hamstrung here. We would spend the entirety of our time, 365 days a year, dealing with the minutiae, scientific, and quasi-scientific information that we are not equipped to deal with, notwithstanding our competent staffs. And so I would like to talk with you about this notion of delegation and where courts come in and where they can interject their own views.

More specifically, we were talking about whether it is appropriate for a judge to second-guess the agency's regulators, the agency's regulations as promulgated, because the judge thinks that the cost of the regulation outweighs the benefits.

Now, in discussing the case overturning EPA's ban on asbestos, you said, and I quote, "It is not a very good idea for courts to get involved in making that decision." And I subscribe to that view. But in *United States* v. *Ottati and Goss,* you upheld a lower court's decision rejecting the Environmental Protection Agency's judgment as to what level of cleanliness was appropriate as it related to how much of the hazardous waste on a particular site had to be cleaned up or to what degree the site had to be cleaned of hazardous waste.

More specifically, the site in question was contaminated with PCB's, and the area was zoned for—although the homes were not built—single-family homes.

The EPA wanted a high level of cleanup to, in their view, adequately protect children who might live and play on that site in the future. And the cleanup—I know you know all this, but for the record, the cleanup EPA believed was necessary cost $9 million above what the developer felt was necessary to sufficiently clean up the site.

The lower court judge said that the additional $9 million to ratchet up the cleanliness of the site was too much. And as I read the case and read your opinion, that was based on the lower court judge's own view of the cost and benefits.

Now, you approved the lower court decision, which was appealed up to you in the first circuit, saying that from the record in the case—"one might conclude that this amounts to a very high cost for a very little extra safety."

Now, why do you think that the question of how much it cost to clean up a site was a decision for the court instead of the EPA in this case? It seems to contradict your earlier statement.

Judge BREYER. The case was rather special in that respect, very special. As the beginning of the case points out, to put it in its simplest terms, when I wrote it, as far as the standard of review is concerned, what courts should do when an agency decides something is to respect the view of the agency and to overturn the agency only if it is arbitrary or capricious.

Then I listed three ways in the statute that in a normal case the agency would make that determination. The agency has lots of procedures. They go in three different ways through those procedures. And they end up with something called an order. And the court may enforce the order, and when it does, the issue is: Was the agency right or not? And you play the agency's game. That is to say, you overturn it only if it is arbitrary, capricious, abuse of discretion.

In that particular case, the agency did something that was very unusual, I thought. I do not know. I cannot tell you by actual experience how unusual, but I have never seen another one in our court. Instead of playing what I would call the agency's game where they went through their own procedure, they never finished their own procedure. Instead, 10 years earlier, they had come into court and asked the court to weigh the evidence and to issue an injunction according to court procedure. And basically what that

decision says is well, of course, if you or anyone else comes in and plays the court's game in setting the facts, you follow the court's rules. I do not think that interferes with your ability to do something because you have loads of authority to go make the decision over in the agency.

The CHAIRMAN. Let me make sure I understand this, and I think I do. The agency has two routes to go.

Judge BREYER. Yes; four, actually.

The CHAIRMAN. At least two that you have mentioned.

Judge BREYER. Absolutely.

The CHAIRMAN. The first route was to issue an order based on its findings and tell the developer, whomever, clean up the site, spend the extra $9 million. Then if he refuses to do that, the agency can go to court and say, "Enforce our order", or the builder can go to court and say, This order is capricious, or whatever argument they wish to make, do not make me do it.

Judge BREYER. That is right.

The CHAIRMAN. The second route, in this case, is for the agency to come along and say we have assembled—and I think it was about 40——

Judge BREYER. Oh, enormous.

The CHAIRMAN [continuing]. 40,000 pages of documentation to sustain why we think the court should make the owner clean up this site and spend an extra $9 million. But the agency did not issue an order. Is that correct?

Judge BREYER. That is right.

The CHAIRMAN. They made a request to the court, "You tell them to do it, you issue the order."

Judge BREYER. That is right.

The CHAIRMAN. OK; now, I in no way mean to nor do I suggest you should have belittled the difference in the process there. So as I understand what you are saying to me, the EPA, notwithstanding they had these 40,000 pages of documents making their case why they thought the extra $9 million was necessary to be spent, did not issue an order, technically, and said, "You tell them, Judge. You look at it, you tell them we are right, you issue the order."

What would have happened had the agency issued the order? A procedural difference. They have issued the order, and either the property owner, the builder, or developer says, "I will not do it" and starts to build, and they seek the court to shut him down. Or the builder came in and said, "they are trying to make me pay an extra $9 million to be able to begin to build. I do not want to do it."

What would have come into play, if anything, that did not in terms of the way the case did proceed?

Judge BREYER. I believe, as I have written the case, that under those circumstances the court would not have reviewed the record afresh. It would have reviewed what was in back of that order under the ordinary deferential agency standard. And it would have said it is up to the agency, unless it is arbitrary, capricious, abuse of discretion——

The CHAIRMAN. So they would have looked at, theoretically, the 40,000 pages or thereabouts of the documentation that the EPA presented, and unless they found some reason other than it seemed awfully high, they would, in your view—or you would have as an

appeals court judge, had they come back and used the same language, it just seems to high, you would have been more inclined to overrule the agency. Is that correct?

Judge BREYER. That is right. The court.

The CHAIRMAN. The court, I meant to say. I meant to say the court.

Judge BREYER. That is correct.

The CHAIRMAN. All right.

Judge BREYER. That is correct.

The CHAIRMAN. Now, when the Congress wants to require that hazardous wastesites be cleaned up—and as you know better than I do, from your experience you are well aware of it, it is an area we are going to be confronted with. Every Army base we shut down, I mean, we are finding these cleanup costs are by anybody's standards staggering, even no matter what level we are talking about cleaning up. If the Congress wants to require the hazardous wastesites be cleaned up to a level that EPA thinks is safe, must it explicitly tell the court, "Do not substitute your own judgment?" Or does the arbitrary and capricious standard in your view still prevail?

Judge BREYER. That is the normal rule. The normal rule, the Administrative Procedures Act.

The CHAIRMAN. OK; the reason I asked is because, as you know, some of your colleagues, who, I might add, have an incredible amount of respect for you, your colleagues in academia, have written—and I mentioned two of them yesterday, Eskridge and Frickey. Both, I think you would agree, are well-respected, well-known legal scholars.

Judge BREYER. Yes.

The CHAIRMAN. They are of the school that there is an emerging school of thought within the Supreme Court as presently constituted that is looking for—I think their phrase is—I am not positive of this exact phrase—I think it is "super-clear rules of construction." So that they think, at least if I have accurately read two of their publications, one by Eskridge on "The New Textualism" and the other one by Eskridge and Frickey entitled "Statutory Interpretation as Practical Reasoning." They and others are making the argument that the Court is, in fact, injecting the notion of law and economics as an appropriate measure for lower courts to take into consideration, not just merely where the agency was arbitrary and capricious.

Let me give you a concrete example. As you well know—and you have expressed, I think, very well here today and yesterday—by quoting Holmes and others, "the life of the law is not merely logic." It is a reflection of societal values. Those values do not always lend themselves to, what we used to say 30 years ago, slide rule computations. Today we would say computer computations.

The law is life and life ain't precise, and we up here legislate and attempt to reflect societal values, which don't always lend themselves to easy weighing and computation.

We are about to begin, at least I think we will in the next couple of months, a major debate about health care in America. Many of us have become much more aware of the nature and the present functioning of the present health system. I was surprised to learn—

although intuitively I guess I knew it—that 25 percent, one-quarter of all the health care costs in the United States of America are spent on the last 3 months of a person's life. Your wife knows this probably better than either one of us do, or any of us in this room.

It is a societal value we have made a judgment about. Rather than take a quarter of those almost trillion dollars we spend and spend somewhere between $150 billion and $250 billion on the young and immunization, which might very well, if you were looking at it purely from a utilitarian standpoint, provide for the greater good for a greater number and the collective better health of all America, we as a society have decided we do not have the view that has been expressed in some early cultures where, when you get old enough, your requirement is to crawl off into the bushes and die, so you don't impact on the tribe, on the society. We have consciously made a decision, no, we are willing to do the economically imprudent thing, spend one-quarter of all our resources on the last 3 months of a life, the average life expectancy of men and women roughly 70 years of age.

Now, when and if we continue to make that decision—there was an interesting article in my hometown paper on Sunday, unrelated to your confirmation hearing. There was a big article about these difficult choices. Dr. Frederick Plum, who is probably the finest neurologist in all of America, probably the best known, has written about this, as well.

There was a man who was asked by a reporter, well, how do you feel about spending an incredible amount on your grandmother, who is very old, who lived only an additional short period of time. And the man answered, it was worth it all to see the look on her face when she got to see her great-grandchild.

Now, it sounds corny, but they are the kinds of judgments we are making as a society.

What does Congress have to do to make sure that when we make those kinds of decisions, if we do, that we do not raise the bar on the societal judgments made by Congress and signed by the President on Government actions by putting into effect a new rule of construction, a canon of construction, like one of our witnesses who will testify on Friday has written about, and that is the presumption that is argued by some very bright people that the Court should presume, if the Congress does not specifically mention do not weigh the cost, that this effectively requires the Congress to anticipate that the courts should presume that they, the Congress, wanted the courts to do this balancing test on the economy. How do you respond to that whole school of thought? I am not asking you to respond to any specific case. Discuss that with me a little bit.

Judge BREYER. It is foreign to me. I mean, it is foreign to me. What I have written about it is that that is the kind of decision—my goodness, it is health, it is safety. There is no economics that tells you the right result in that kind of area. There is no economics that tells you or me or all of us how much we are prepared to spend or should spend on the life of another person. There is nothing that tells us the answer to that in some kind of economics book that I am aware of.

And also, that is so much a decision that people will make through their elected representatives. It is a democratically made decision. Judges are not democratically elected. I mean, it is exactly the kind of reason, in my own view, that it is very important for courts—and I have written this, I have written this—it is so important for courts, which are not good institutions to make those kinds of technical choices because judges are cut off from information that would be relevant, among many other reasons, and they do not have the time, among many other reasons, and they do not have the contact with the people, among many other reasons, and there are just dozens of reasons which I have spelled out why they are not good institutions to make those kinds of decisions.

So that reinforces what I have tended to write, that it is important for courts to go back to try to understand the human purposes that are moving those in Congress who write these statutes when they interpret them.

The CHAIRMAN. I appreciate the answer, and I have read your Law Review article where you essentially say that, and you have cleared up for me—just as I frankly thought you would—the apparent—apparent—inconsistency in the *Ottati and Goss* case, where that was based upon the manner in which the agency brought the matter before the Court.

Now, my staff is urging me to go to the end, because my time is running out, and speak about another area, but since I am chairman and have such a wonderful cochairman here, I am sure he will let me run over a little bit, and I will ask both my questions.

Senator HATCH. Sure; go ahead, Joe.

The CHAIRMAN. It comes with being here 22 years.

All kidding aside, let me quickly try to touch these last two areas, and I do not think I will have any more questions for you.

I mentioned, again, my concern about raising the bar, and we talked a little bit about that today. Senator Brown raised issues that related to this, and balancing tests, and stages, and I interjected and asked about the distinction between the test of whether or not as a black person, I can live in a neighborhood, and whether or not I can build a 20-story building in the neighborhood. They are very different things, and you explained that you in fact did see gradations and requirements as a judge to look at them slightly differently.

But one of the ways to raise the bar, to use the expression I have been using again, is by the Court requiring Congress to speak in a super-plain, super-clear way when they interpret the statutes we write and signed by the President. And it is argued by the textualists—and these phrases change all the time, but I am in your territory here, and I need not explain any of this to you—that you look only at the literal language—not you, but some, like Justice Scalia, very articulately argue you just look at the literal language, ignoring the context and history. And Senator Moseley-Braun asked you about context and history as well.

I mentioned yesterday the *Patterson* case as an example of a case where the Court looked at a statute, a statute passed by the Congress after the Civil War, over 100 years ago, to guarantee citizens of all races equal rights. The Court held that the statute's language, which gave all citizens the same right to "make and enforce

contracts," did not protect the black employee from racial discrimination after she was hired. The irony is she could be demeaned after she was hired, but she could not be demeaned during the job interview process while she was being considered. And I think the average person would think that is not a very common sense reading.

The Court read the literal language of the statute very narrowly and supported doing so by looking outside the statute to another law passed 100 years later. It said that, well, in 1964, the Congress passed the Civil Rights Act, which really is the area where this case should be brought. So therefore, we are going to assume, by reading the literal language of this post Civil War statute, that they did not mean to cover this because 100 years later, Congress came along and explicitly covered it. But they did not look at the legislative history of the action in the 1960's, which specifically said in the legislative history we do not mean in any way to overrule or affect or change the statute passed in the 1870's.

Now, if you will, how would you have approached the *Patterson* case had you been on the Court?

Judge BREYER. I do not want to discuss the particular case, but I can say from what I have said and what I have written, it is a fair assumption that I would have looked at the legislative history, because I think when you read statutes, and you are trying to understand what is the human purpose that you and Congress have in mind, a very good way to do it is you look at the legislative history. That does not always give you the answer, but very often, it helps.

The CHAIRMAN. Well, let me skip, then, quickly to *Dellmuth* v. *Muth,* where it seems to me the Court, in the name of doing the same thing, reached an exact opposite conclusion interpreting another statute. That statute, as you well know, was passed through the work—and I do not want to get them in trouble—but through the work of Senators Kennedy, Hatch, Dole, and others. We passed a law relating to—we all voted for it—passed a law relating to the handicapped. And we said that if a handicapped person's rights are being denied, as written under this legislation, by a State—we did not say it explicitly, but at least we implied—that the individual whose rights were not being guaranteed under the legislation could sue the State in Federal court for money damages.

I think *Patterson* and *Dellmuth* were decided the same day; I think they were handed down the exact same day. I remember in *Patterson,* they said we are going to look at the literal language, and we are going to read into the language that they must have meant look 100 years hence and see if that statute that passed in any way affects the reading of this statute.

In *Dellmuth,* they looked at the statute and said, you know, there is a presumption that has existed in the law, a canon if you will, in legislative interpretation, against allowing individual citizens to sue States in Federal court. They looked at the 11th amendment and other areas to conclude that. And they said notwithstanding the fact—in my words; I am paraphrasing—notwithstanding the fact that a common sense reading of *Dellmuth* might lead you to believe that a citizen had a right to sue the State in Federal court, we are going to presume that the Congress meant

to do something other than that, because they must have known that there is an existing presumption against that, and because they did not explicitly say in the statute you are able to sue notwithstanding previous presumptions in the law, we are going to rule that that person cannot sue the State of New York in Federal court.

The end result was the same. In one case, a black woman's equity rights were diminished. In the other case, a handicapped person's rights were denied in terms of suing.

You did not write either case, and I am not asking you how you would have decided it, but how do you reconcile those two cases in terms of statutory interpretation?

Judge BREYER. What I have said that is, I think, relevant in writing, what I have said which I think is relevant to the question that you posed, are really two things—that, one, if you are not certain about what the statute means—in all of these open, big, important cases, in any court, language rarely resolves it; otherwise, why is it in court—but go look at the legislative history. The dissents in both cases did look at the legislative history. The dissents felt that the legislative history showed that the interpretation of the majority was incorrect.

So on the basis of what I have written there, I have said, well, sometimes legislative history helps, and I guess my instinct would have been to go look at it.

The other thing, which is—I understand that other people may disagree, and all of this is very debatable—but I have said beware of these canons. Why do I say beware? Well, the clear statement canons have a very respectable pedigree. In countries that do not have written constitutions, very important countries, they have served as protection of human liberty, because judges have sometimes said in those countries: We are not going to interpret a statute to infringe on a basic human liberty unless the legislature is very clear. And that has served in those countries sometimes as a substitute for a written constitution. We do not find that here as often because we have a written Constitution.

But the danger with the clear statement rule which I saw and wrote about is you can proliferate these rules, and as you proliferate them, as you get into something called "you have to state the matter clearly if Congress wants to legislate a departure from traditional equity powers," I begin to think: What is this; who will know it; how will people understand it; how will drafters know what to draft; how will ordinary lawyers and those who must take their advice know to interpret the statute? It becomes also very complicated.

The CHAIRMAN. Or, as Brennan said in dissent in *Patterson*, that Congress would need "a particularly effective crystal ball."

Judge BREYER. Well, I have argued that it is easier, simpler, more accessible; despite the fact that use of legislative history can be abused and should not be, it is still simpler to go and look to that in many cases where it is helpful.

Now, other people present very strong arguments for the other point of view, and they cannot be just dismissed, those arguments. But that is basically——

The CHAIRMAN. No; I am not just dismissing them——

Judge BREYER. No; I know you are not.

The CHAIRMAN [continuing]. But then again, they are not before us, and they are not asking to go on the Court. Others who share the opposite view than I do are already on the Court. I just wish I had been smarter then and known what was coming and understood just how strongly Mr. Justice Scalia felt about some of these things. I think he is one of the finest men I know, but it is the vote I most regret ever having cast out of over 10,000 I have cast—not because of his character, but we have such a difference of views—and I have told him that. I mean, we joke about it. I told you he found out I was teaching constitutional law at Widener Law School, and he said, "Oh, my God, I had better come to protect those students." So he shares the same view about me.

At any rate, let me close with two short questions on one last subject. That is this notion of unconstitutional conditions. I would like to return to the first case I asked you about, *Dolan* v. *Tigert*—and I hope I am pronouncing "Tigert" correctly—the takings clause case. But I would like to look at a slightly different question.

The majority in *Dolan* rejected the town's measure because it imposed what they referred to as an unconstitutional condition when it said that the business owner could only get a permit to expand her store if she agreed to give up the use of part of her land. An unconstitutional condition, as you know, occurs, to oversimplify it, when the Government forces us to give up a right voluntarily in exchange for getting something we badly need or want or are otherwise entitled to.

Now, you considered the question of unconstitutional conditions in the case of *HHS* v. *Massachusetts*. A Federal regulation forced doctors in family planning clinics to agree not to give certain medical advice as a condition to accepting Federal funds. You joined an opinion ruling that this was an unconstitutional condition on free expression, the first amendment—basically, that doctors were not allowed to give advice about alternatives to women.

The Supreme Court, when up on appeal, disagreed; one of the few cases in which you were in the majority on the first circuit that I am aware of that the Supreme Court disagreed with. In the case testing the same regulation, *Rust* v. *Sullivan*, the Supreme Court found no violation of the first amendment. And I think, quite frankly, the Court, from my perspective—it will come as a great shock to you, I know—I think the Court got both *Rust* and *Dolan* wrong. In one case, it gave a businesswoman's economic interest more protection than it gave a doctor's freedom of expression stated in the first amendment.

Now, what do you make of these results? Can you reconcile the cases? You were not in either one of them. I am not asking you how you would vote had you been there. But can you reconcile finding an unconstitutional condition as it related to a property owner's right relative to a bicycle path and not finding an unconstitutional condition where the first amendment was at least in question.

Judge BREYER. You obviously, Senator, find them difficult to reconcile——

The CHAIRMAN. I do.

Judge BREYER [continuing]. And of course, I wrote one of the opinions the other way, and if you went to a district judge on my

court that had an opinion that was reversed by a panel that I was on, and you asked, do you think that that condition is consistent with some others, he would say absolutely not. So I am sort of in a sense a party in interest, so I do not think I will go beyond——

The CHAIRMAN. Well, no; I think it is fair to ask you, not what your view—obviously, I know what your view is relative to *Rust.* You thought the first amendment was implicated, and it was an unconstitutional condition.

What I am trying to ask you is not whether you think the other should have been decided, but how are they different, how are they the same? I mean, has something changed? Is there something in the Supreme Court right now that is able to find an unconstitutional condition relative to a property right affecting essentially a zoning regulation, and not find an unconstitutional condition in the first among our amendments? Play professor with me for a moment.

Judge BREYER. I try to resist that temptation, Senator.

The CHAIRMAN. Oh, go ahead. Let yourself go. It is OK.

Judge BREYER. I am not certain you are asking me to guess what other people would say.

The CHAIRMAN. No; I am just trying to—how would you explain it to a class?

Judge BREYER. I am not sure—you would say in one case, you are talking about a Government program; in the other case, you are talking about regulation of property. In the regulation case, the Court feels it went too far. It was like those pillars of coal, and the Court felt it went too far, and they did not show enough justification, and they felt that was important because of the underlying interest that they thought was a very important interest, and you have shown more since there was some kind of possession of physical property.

In the other case, they would say, well, I guess, that the impact on this, on whatever right is involved, is not as significant or is changed because of the funding nature of the program, because it was a program the Government did not have to create in the first place.

Those are the lines of reasoning that it is trying to take.

The CHAIRMAN. Let me end—I have trespassed on everyone's time too much—let me just end with this. In an age where, rightly or wrongly, citizens depend on government to provide many needed services—wealthy citizens as well as indigent citizens—doesn't *Rust* show that the Court can significantly limit our personal rights through indirect and more subtle means?

Judge BREYER. It just seems to me that I probably, if I am confirmed, will have to deal with a lot of cases that try to go into this. And they are difficult cases, and the Court disagrees about a lot of issues that come up, and you have to try to work them out and try to figure them out in light of the briefs and the arguments——

The CHAIRMAN. Well, I will let you go on it, but I want to make it clear this is not about choice, this is not about abortion. This is about the notion which has been raised here on every matter that the Government is involved. There are those among us, left and right, in the Senate who are going to say because Government money is involved, we want to attach a condition. I predict to you

that you will be faced with a myriad of cases in your long tenure on the Court where you are going to have to come up with, if you will, various rules of construction to make a judgment about where it is appropriate and inappropriate. You are going to have liberal Senators who are extremely well respected, like Senator Simon and others, considering whether or not we condition the ability to get a license for broadcasting on whether or not they show violence on television. I doubt whether he will do that, but others will raise that question.

You will find that conservatives suggest that in order to get money for the arts, there must be a certain standard that is met. This has been raised. I put *Rust* in that context.

I think the problem we have—and I will end with this—is we become—we, on this side of the bench—are somewhat myopic. We look at the subject matter that is being debated rather than the substance of what is being debated. *Rust* does not concern me because it relates to the ability of a doctor to talk about the availability of something other than birth. It concerns me because it seems to set a precedent that suggests that a condition can be placed on a fundamental constitutional right—freedom of expression, freedom of movement—it can be anything.

So I, like all of us, am going to end up having to take a chance on what we think your instincts and methodology are. I am prepared to take that chance, and I am confident you will think a lot about this, and I am also confident—not because I said it, but because it is a'coming, Judge, in a big way in this Congress and succeeding Congresses, and it is something no one is writing very much about now, but I predict to you it will be written about; it will fill volumes before this decade is over.

Senator MOSELEY-BRAUN. Will the chairman yield just for a moment, just for a hot moment, because I know everyone is anxious to go, and Judge Breyer has been more than patient.

The CHAIRMAN. I yield the floor.

Senator MOSELEY-BRAUN. My question in that regard is would you see the possibility of unconstitutional conditions coming in areas other than first amendment—because the first amendment is such a slippery slope, and that gets us into all of these kinds of questions the chairman has just raised on arts and violence on television—but other than the first amendment, would you see the possibility of an unconstitutional condition arising in other areas?

Judge BREYER. My guess is—and it is a guess—that there could arise conditions that people would argue violate a host of different amendments—fair trial—I do not know—there are lots of different parts. I think the answer is yes, but it is a guess.

Senator MOSELEY-BRAUN. Yes.

The CHAIRMAN. I cannot think of a single amendment that would not qualify except the ninth, and that is only because the folks who are applying these unconstitutional conditions do not believe there is a ninth amendment. But that is another question.

Senator MOSELEY-BRAUN. But Mr. Chairman, again, the reason I raise the question—I think it came up—I do not know who it was—Senator Cohen may have raised it earlier today—the issue of the leases in public housing in my own State comes immediately to mind. Again, I think this is an area where, right, there has not