The CHAIRMAN. Thank you very much, Judge.

Again, a housekeeping matter. As I understand it, you would rather not take a break. One of our tendencies, as you remember when you used to sit back here, is that we get to get up after we ask our questions and make our phone calls and make our visits, and you do not get to move as long as someone is up here asking you questions. So I want to be clear that we want to accommodate you. It is kind of hard sitting there all this time answering questions.

Now, as I understand it, though, you would like to proceed with one round of questioning, and then we will take a 5-minute break and come back and hear from Senators Hatch and Kennedy, and then we will break for lunch. Is that how you would prefer to proceed?

Judge BREYER. That is fine, Mr. Chairman.

The CHAIRMAN. Judge, let me begin by saying, in recent years, we have seen new challenges to the efforts of government at all levels to adopt regulations that government believes are designed to protect the environment and promote a public goal. These challenges have taken the form of asking the Court to change how it has interpreted the takings cause of the fifth amendment.

Less than 3 weeks ago, the Supreme Court of the United States decided a case called *Dolan* v. *Tigert,* where, using the takings clause, the Court rejected a local town measure intended to reduce flooding and traffic congestion caused by a business' development along a river. This decision follows a case decided 2 years earlier, *Lucas* v. *South Carolina Coastal Council,* and in these cases the Court adopted a new standard for reviewing the takings clause.

Judge, my first question is, before the *Dolan* and *Lucas* cases, how did the Supreme Court review claims that a regulation designed and stated to be designed to safeguard public welfare was the taking of property, thereby requiring the Government to pay the landowner for the so-called taking? What was the law, as you understand it, prior to *Dolan* and *Lucas*? What standard did the Court use?

Judge BREYER. Mr. Chairman, I think usually, when I go back to basics, what I often try to do is I try to keep in my mind some kind of basic, two or three basic points in different areas which are sometimes helpful.

The basic point or the basic case or the basic idea I have in my mind in this area is I go back to a case Justice Holmes decided. It is actually a very interesting case. A person owned a coal mine, and the Government said here is what you ought to do: Leave some columns of coal in that mine, because if you do not leave big thick columns of coal, the whole ceiling will collapse, and there are cities that are built on top of that coal mine and they are all going to fall down, and, therefore, we will have a regulation which tells you big thick coal columns. But the owner said I agree with you, I don't want anything to happen to anyone on the surface.

But, really, you don't have to have columns that are that thick, you don't have to have that many, and what you have done is taken my coal.

So the case presented the issue of when is it a reasonable regulation, for, after all, it is a good purpose to stop the cities from falling

into the mine. I mean that is a wonderful purpose. When does a reasonable regulation become a taking of property for which you must pay compensation? You know what Justice Holmes said. You are going to be disappointed, but what he said was this. He said, "You can regulate, you can regulate, you don't have to compensate, when you regulate. But, Government, you cannot go too far."

What is too far? Indeed, ever since that time, the courts have been trying to work out what is too far, and I don't think anyone has gotten a perfect measure of that. They look into factors, they say how important is the regulation, what kind of reliance has there been on this, has there been a physical, a physical occupation of property.

You see, in the case you have, which is very interesting, the one you mentioned, there might have been a physical taking of a piece of property, and then the Government can do less. But as I looked through these cases thereafter, you always come back to what is a kind of human judgment, what is too far. And the more reasonable what you are doing is, the less reliance there has been, the less it looks like it is taking something that historically has been considered a person's physical property, the more likely it is that you don't have to compensate.

The CHAIRMAN. Isn't the issue, Judge, what you said, whether the Government has gone too far? Most observers and legal scholars have referenced *Lucas* and then recently *Dolan* as evidence of the fact that the Court is changing that standard of how they determine what is too far. As you know better than I, Judge, in *Lucas* and in *Dolan,* but in *Dolan,* in particular, two things changed that seem to me to be different. I would like to talk with you a moment in the same general sense you discussed in the Holmes case.

In the past, if a Government agency said we are regulating for the public welfare so cities do not fall in, the burden has basically been on the property owner to say, you know, you have gone too far, Government, and here is why. Second, it has been generally speaking the Government, the Court has looked and said has the government had a rational basis for doing this, have they had a reason that comports with some sense of what seems to be related here, and, if they have, we will accept that, unless the plaintiff can prove, the property owner can prove that they have gone too far.

Well, as I read *Dolan,* two things happened. Granted, it is a case not of great moment in terms of what was at stake, in terms of a bicycle path and a flood plain and an extension of a permit to be able to make a hardware store larger, and so on, but it did two things. One, it shifted the burden of proof to the Government, and, to the best of my knowledge, I think that is the first time in 70 or 80 years the Court has done that. It has explicitly said, hey, look, Government, now you have got to prove, not the plaintiff, you have got to prove that this regulation was necessary and that you didn't go too far.

The second thing it did was it established what might be a new rule of construction, a new canon, one might argue, that says that the taking has to be roughly proportional to the needs. It took that bar and raised it just a little bit higher.

Now, my question is this: Is there any doubt in your mind, after *Dolan* and after *Lucas,* that it is at least incrementally more dif-

ficult for the Government to regulate zoning and environmental laws than it was prior, not impossible, but just incrementally at least more difficult, or am I off on that?

Judge BREYER. No, no, you are not off on that. Absolutely, the dissent you see in that absolutely thought that was so. The reason I hesitate a little bit is there is something special about that case, and what is I think a little special about the case is that it did at least arguably involve a physical occupation of a piece of property, and at the same time they didn't make all that much out of it. Then, as you just pointed out, they used this test of rough proportionality, and what exactly is that, it looks as if it is a little tougher.

So where I end up in my mind is that this is an area that is not determined forever, that there are likely to be quite a few cases coming up, that this problem of how you work out when it goes too far is something that undoubtedly will come up again in the future, and there is a degree of flexibility and flux in these opinions that I think haven't made a definite decision forever. That is basically my state of mind on them at the moment.

The CHAIRMAN. Well, mine, as well, and, therefore, it raises a series of—again, the Court did not do what I am about to say. But if you juxtapose what the Court did do, that incremental change that it made, with some of the leading legal experts and minds in this area—Professor Epstein comes to mind—it is hard, to use a phrase often used by Judge Bork, it is hard to find a principled rationale for how and where this stops, because the burden is a big deal.

Judge BREYER. Yes, it is.

The CHAIRMAN. It is a big deal in terms of outcome, whomever has the burden. We understand that in terms of criminal law. We understand that if the defendant had the burden to prove that he or she was innocent, it makes a big difference, the same facts, the same circumstances, it would make a big difference. In these cases, which affect economic rights and affect public health and welfare, whomever has the burden makes a big difference.

Now, as you know, Judge Breyer, this is not the first time the Supreme Court has of late elevated—I do not want to be pejorative here—has moved the bar on economic rights.

In the early part of this century, as mentioned by my friend from Utah, in the so-called *Lochner* era, named after the leading case of the time, the Supreme Court routinely struck down health and safety measures as unconstitutional. The Court struck down the types of regulation that everyone in this room now considers normal and appropriate. It struck down minimum wage laws, which we now take for granted, it struck down child labor laws, and it struck down workplace safety laws. The Court finally changed course and put an end to the so-called Lochner-izing toward the end of the 1930's.

Now, would our society look different today, if the Supreme Court had not gone back on *Lochner* and still gave economic rights the same level of protection that it did during the *Lochner* era? What effect would there have been on labor laws, for example, and environmental laws, had *West Coast Hotel* v. *Parrish* not come along and overruled *Lochner*? Talk to us about that. Be a professor

for a minute here. Tell us what the effect would be, as you would see it.

Judge BREYER. I think, Senator, that you would have very, very wide agreement with you across a very, very wide spectrum with what Holmes said, that the Constitution does not enact into law Herbert Spencer's social statics. What he meant by that is there is no particular theory of the economy that the Constitution enacts into law.

That does not mean property has no protection. There is a takings clause in the Constitution. It does not mean that people's clothes and toothbrushes are somehow at stake and could be swept away randomly. What it means is that the Constitution, which is a document that basically wants to guarantee people rights, that will enable them to lead lives of dignity, foresees over the course of history that a person's right to speak freely and to practice his religion is something that is of value, is not going to change.

But one particular economy theory or some other economic theory is a function of the circumstances of the moment. And if the world changes so that it becomes crucially important to all of us that we protect the environment, that we protect health, that we protect safety, the Constitution is not a bar to that, because its basic object is to permit people to lead lives of dignity.

The CHAIRMAN. I agree with your analysis, and you state it very clearly. Now, I understand that there is a significant distinction, a difference between the 5th amendment analysis engaged in *Dolan* and *Lucas* and the analysis of *Lochner* analyzing the 14th amendment, in finding the substantive due process right to freedom of contract, which is related to the 14th amendment.

Judge BREYER. Yes.

The CHAIRMAN. I understand *Lochner* went far beyond the question of takings. But if we follow *Dolan* and *Lucas* to their logical end, I do not see—I am not suggesting that the Court has done that, but if we do, I do not see how different it is from *Lochner* in its practical effect.

It is clear to me that there are some very significant legal minds who are arguing that essentially we find, in the 5th amendment in the takings clause, what had been done in the 14th amendment, which is now totally discredited.

Now, in the past, as I said, the courts gave Government the benefit of the doubt when its actions were challenged as unconstitutional. Doesn't the importance of both *Lochner* and *Dolan* lie in the fact that they refuse to give the Government the benefit of the doubt, by putting the burden of proof on the Government?

Judge BREYER. The kind of thing, Senator, that you are concerned about I think was a concern of the dissent, and I know that there are people and commentators thoughtfully reading these cases who worry about, well, how far will they go. When I think about that, I think, well, this is a matter, if you actually look at the case itself, that is still up in the air, and I think it is very widely accepted.

The CHAIRMAN. That is why I am trying to get you to talk about it, because you may bring it down to the ground.

Judge BREYER. Here I have a problem talking about things that are up in the air, for this reason, and I will be very frank with you.

Let us imagine, if I am lucky and if you find me qualified and vote to confirm me, I will be a member of the Supreme Court, and, as a member of that Court, I will consider with an open mind the cases that arise in that Court. And there is nothing more important to a judge than to have an open mind and to listen carefully to the arguments.

So I am trying both at the same time, and I will throughout these hearings—and tell me if you feel I am not striking the right balance—I will try very hard to give you an impression, an understanding of how I think about legal problems of all different kinds. At the same time, I do not want to predict or commit myself on an open issue that I feel is going to come up in the Court. The reason for that is two, there are two real reasons.

The first real reason is how often it is when we express ourselves casually or express ourselves without thorough briefing and thorough thought about a matter that I or some other judge might make a mistake. And when you get the thorough briefing and thorough thought, you find, when you really look into it, that the matter somehow strikes you as not right to what you said before.

The other reason, which is equally important, is if you were a lawyer or if I was a lawyer or any of us appearing before a court or a client, it is so important that the clients and the lawyers understand the judges are really open-minded. That is why I will hesitate sometimes and——

The CHAIRMAN. So far you have been very responsive, and I am not looking for you to give me an answer of how you would rule in any one case. But I am looking to ask you to do what you have begun to do, and that is articulate for us your view of the principled way in which you think we should approach these matters of constitutional import.

What I have attempted to establish thus far is that where this balance goes is of phenomenal consequence to the Nation.

Judge BREYER. Yes.

The CHAIRMAN. Not where you are going to take it. It is of a multi-trillion-dollar consequence to the Nation.

To overstate it, if, for example, we adopted the view proposed by some very articulate, brilliant legal scholars, which says that you really have to apply a tort standard in determining whether or not a taking has, in fact, occurred, what we would find is that if tomorrow we passed any law here and said, by the way, no more CFC's can be admitted into the atmosphere, we would have every company that now manufactures CFC's come to us and say, you know, that is a great idea. But because you cannot prove if we manufactured CFC's and they deplete the ozone layer—you cannot prove that Lloyd Cutler got cancer or Joe Biden got cancer because of that—because you cannot prove that, we will stop but you have to pay us to stop, like the coal mine owner.

That is a multi-billion-dollar decision for the taxpayer. Right now it is not in question. Until *Dolan* it was not in question. No one assumed that if we said no more CFC's that we would have to go out and pay every company in America to stop manufacturing CFC's. The taxpayers, the press, the public, the Senators, including me until recently, do not fully appreciate the phenomenal economic consequence of taking a reading of the takings clause to its logical

conclusion as espoused by *Dolan,* and shifting the burden of proof and changing the standard.

Now, can you articulate or think of any principled standard to stop the movement announced in *Dolan* or *Lucas*? How does that stop? How does this shifting of the burden not automatically take you into the area that I worry most about, which is the one I have just articulated? Is there a principled way in which to say, OK, shifting the burden and requiring this relationship enunciated in *Dolan* does not automatically lead to the concern I have stated in the case I have just made up?

Judge BREYER. I think the principal concern, as I listen to you, Mr. Chairman, is the Justice Holmes' concern. As I listen to you, what you are saying is think back to those columns in the coal mine.

The CHAIRMAN. Exactly.

Judge BREYER. Are you really serious that it should impose that the law should prevent people in a practical way, through their Government, requiring columns that protect coal miners? And you are saying, of course not. And as I hear that, I think you are saying a law or an interpretation of the Constitution that would seriously impede the coal columns that protect the miners and protect the cities, that would be going too far. And I agree with you that that is what Justice Holmes would have had in mind.

That is why I think what the Court is trying to work out is, in my own mind—I cannot read other people's minds, but it is what is called a practical accommodation. Of course, there is a compensation clause in the Constitution. Of course, property is given some protection. At the same time, one must not go too far, and what too far means is imposing significant practical obstacles. It sounds to me——

The CHAIRMAN. Well, let me shift here, maybe, to another area. Maybe we can come back to this. You and I are talking now about the Constitution, the fifth amendment.

Judge BREYER. Yes.

The CHAIRMAN. Another way to affect the basic rights of individuals who do not have economic power is the way in which the Court interprets statutes passed by the legislature and signed by the President. And it is my view, I will say up front, that whether courts grudgingly interpret the wishes of elected representatives or interpret them in a generous way, obviously has significant impact.

One of the things that has arisen in the last 10 years, particularly the last 2 years, is this notion—mentioned by my distinguished colleague, who is, by the way, a fine lawyer and competent to sit on the bench himself—his point made that sometimes the cost of Government actions outweigh the benefits, economically. And I said in my opening statement we often consciously make those decisions to reflect public values, societal norms. We say we know this costs a lot of money to do this, but we are not going to put a value on human life; we are not going to put a dollar value on a particular strongly felt societal value.

Now, several years ago, the Environmental Protection Agency decided to phase out the use of asbestos because it posed many health risks, including the risk of cancer. A Federal appeals court reversed the EPA's ban on asbestos in a case you discussed in your most re-

cent book. The court decided that the statute under which the EPA acted could not possibly have been intended to allow EPA's asbestos ban because the ban cost so much money for every human life it might save.

Now, my question, Judge, is: Is it reasonable for a judge to infer what Congress intended by looking at how much it costs to implement what Congress intended?

Judge BREYER. You cannot answer the question never. It would depend very much on what you had in mind in the statute.

I wrote about that case in my book.

The CHAIRMAN. Yes, I read your book.

Judge BREYER. And I wrote really two opposite things about it, absolutely opposite. The first thing I wrote about it is I thought what was in the mind of the Court, and I thought what was in the mind of the Court is they found an example where they thought that EPA was imposing a ban that cost about a quarter of a billion dollars. And it would save hardly anybody.

The CHAIRMAN. But it would save somebody.

Judge BREYER. Yes; it was like the number of people—they used a kind of absurd example about the number of people who die from toothpicks, eating toothpicks, or something like that. But that is the first way I used it in the book, was to show that there are some EPA regulations which, indeed, seem to be very expensive ways of going about saving lives.

The second way is the opposite way I used that case in the book, because that case also provided an example of what you are suggesting; that it is not very good for courts to get involved in making that decision. That is more a decision for Congress to make. And what I said when I discussed the case for the second time is look how the judges, even if they have an example of what they think is absolutely wrong, look what they have to do. They have to say that there is a rule of law that prevents that, and the rule of law that they enunciated in that case was a rule of law that said agencies have to look at all the alternatives, or many of them, before they do anything.

But if you take that rule of law seriously, how can agencies have the time to do all that kind of thing?

The CHAIRMAN. As a friend of mine at home says, "Bingo."

Judge BREYER. Right. Well, you see, that is why the courts are not the right ones to decide. I mean, I cannot say never, because you can always think of an absurd case. You know, you can think of something. There was one that Judge Wisdom wrote called aqua slide, if you want to look at it sometime. But, I mean, you can find sometime there is an absurd case. But I basically—

The CHAIRMAN. Well, let me make sure I understand your, for lack of a better phrase, rules of construction. If Congress delegates to the EPA the authority to make a judgment about what is necessary or reasonable to protect against a particular risk and not delegate that to the Court, then doesn't the Court basically have to show that the agency acted in a capricious manner?

Judge BREYER. Yes, absolutely.

The CHAIRMAN. Now, if Congress delegates authority to an agency to consider costs and benefits in implementing the statute, your

view is, then, that the Court should, unless there is a clear disregard of that requirement, yield to the agency.

Judge BREYER. Absolutely.

The CHAIRMAN. Now, I have much more to ask, but I will end my round with this last point: What about the case where the Congress is silent about considerations of costs and benefits, as we often are? Under what circumstance may a court require an agency to balance costs and benefits when Congress is silent?

There is a friend of ours—and he is a friend of mine. I do not want to mention his name, and the reason I do not want to mention it is because I will do an injustice to his larger theory. But you wrote in Southern California Law Review about the presumption that one of your colleagues in the profession of teaching suggested, which was that if the Congress is silent, the Court should presume that the Congress intended the Court to make a cost-benefit analysis. And you wrote in that article, you said, "Can the Court legally adopt new up-to-date canons such as [this professor] has suggested? Such modern canons favor the use of cost benefit analysis in regulatory statutes, [among others,] but"—this is your quote—"but can the Court simply adopt them? Where would it find the legal authority for doing so?"

My question is: Can it simply adopt such a canon?

Judge BREYER. No, not in my opinion.

The CHAIRMAN. And where do those who suggest—your answer is it cannot simply adopt them. But where do those who suggest that it should find legal authority for doing so?

Judge BREYER. I have to say that is a question better addressed to them. The basic thing that I start out with, which I have written and I certainly have no compunction about discussing anything I have written, is as you suggest. What you suggest to me is that you are talking about an area of substantive decisionmaking, not procedure. You are talking about what is the best health policy? What is the best safety policy? What is the best environmental policy?

That is a question that you basically answer in Congress. And if you don't say anything in the statute, normally what you do is you delegate that authority to fill in the interstices to an agency. And the agency's opinion in those matters is an opinion that the courts must respect. They must do that, first for a legal reason. The power flows from the people through article I of the Constitution to the Congress and then to the agency. That is a legal reason that has to do with democracy. And there is a second, very practical reason. The very practical reason is, quite honestly, judges, who cannot phone anyone, who have a lot of cases in their offices, who do not have expertise in these areas, simply will not understand the basic practicalities of how you deal with substantive environmental health and safety policy, and, therefore, it is best that they let those whom you have told to do it do the job.

The CHAIRMAN. Well, Judge, as you no doubt know, from a personal standpoint that answer pleases me very much. But I will come back in my second round, which will be sometime next week, I suspect—no, which will be sometime tomorrow, I hope—to discuss what Professors Eskridge and Frickey refer to in their article on statutory interpretation. What they both are worried about is that the Courts' new canons of statutory interpretation, to quote them,

"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: