

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

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

Judge Breyer, you are very welcome here.

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

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

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

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

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

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

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

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

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

Any other philosophy of judging enables unelected judges with lifetime tenure to impose their own personal views or sentiments on the American people in the guise of construing the Constitution and Federal statutes. There is no other way around this conclusion. Such an approach is called judicial activism, plain and simple. And it is wrong, whether it comes from the political left or whether it comes from the political right.

Let there be no mistake: The Constitution, in its original meaning, can be applied to changing circumstances. The fact that telephones did not exist in 1791, for example, does not mean that the fourth amendment's ban on unreasonable searches and seizures is inapplicable to a person's use of the telephone. But while circumstances may change, the meaning of the text, which applies to those new circumstances, does not change.

We often hear about the supposed needed for a living Constitution. Those who use this phrase typically mean that the Constitution should be reconstrued to give constitutional status to whatever interests they currently regard as important. But the Constitution remains living and well suited to a changing society not because its provisions can be twisted to mean whatever activist judges want them to mean. It remains living because it disperses and limits Government power and, equally importantly, because within those limits it leaves to the State legislatures and Congress primary authority to adapt laws to changing circumstances. After all, the very point of a democratic republic, its core virtue, is that the people generally decide how society will pursue its various goals and combat its various problems.

This does not mean that those liberties not specially guaranteed by the Constitution have no protection. The Constitution's real genius—what Madison recognized as its greatest protection of our liberties—lies in its dispersion of Government power among the three Federal branches and between the Federal Government and the States. It is these structural features of separation of powers and federalism that provide our most important guarantee against oppressive legislation.

In an earlier era, judicial activism resulted in the invalidation of State social welfare legislation, such as wage and hour laws. Since the advent of the Warren Court, judicial activism has, to cite a few examples, handcuffed the police in the battle against crime; interfered with the ability of communities to protect themselves from the scourges of obscenity, drug dealing, and prostitution; twisted constitutional and statutory guarantees of equal protection into vehicles for reverse discrimination and quotas; chased religious expression out of the public square; and imposed a regime of abortion on demand that is the most extreme in the Western World. The death penalty, which is, of course, expressly contemplated by the Constitution, is currently under attack by advocates of judicial activism.

Many voices will urge Judge Breyer to become a judicial activist. Indeed, one judicial activist, in a remarkable display of effrontery, has already written a newspaper op-ed appealing to Judge Breyer to grow. Funny, isn't it, how moving to the left is seen as growing? Judge Breyer can rest assured that his stature will grow by his

continuing to do what has brought him to this special point: crafting judicial opinions that support the rule of law.

While I do not agree with all of his opinions, I take considerable comfort from Judge Breyer's overall record that he will resist the siren calls of judicial activism. Judge Breyer has not displayed his sentiments on the sleeve of his judicial robe, nor has he pursued an ideological or political agenda. He has not strained to invent hypertechnical rules that benefit criminals at the expense of honest, law-abiding citizens. Instead, he has called into question what he has termed the right creation problem—that is, the misguided view that society's problems can best be resolved by recasting competing interests as rights or entitlements.

There are, undoubtedly, areas where Judge Breyer and I will disagree in our reading of the law. I do not expect to agree with any nominee, especially one chosen by a President of the other party, on every issue that will come before the judicial branch. But it has been my consistent belief that a President—and this President—is entitled to significant deference in selecting a Supreme Court Justice, and in this case he has made an excellent selection.

President Clinton and I are unlikely ever to agree on the person who ought to be nominated. But so long as a nominee is experienced in the law, is intelligent, has good character and temperament, and gives clear and convincing evidence of understanding the proper role of the judiciary in our system of Government, I can support that nominee. In this case, I have a great deal of regard and affection and experience and understanding of Judge Breyer, and I think a great deal of him, and I intend to support him. It is my hope and my firm expectation that this hearing will satisfy this committee that Judge Breyer meets the test of understanding the role of the judiciary in the constitutional processes of this Government.

Judge Breyer, we welcome you here. We compliment you for being selected. We have high expectations of your service on the Court, and I hope you will enjoy these proceedings.

The CHAIRMAN. The hearing is adjourned. [Laughter.]

Judge, I said earlier that one of the most difficult questions faced today is from what State you hail, and I have decided how to resolve that: to disregard the States and go by a time-honored tradition of the Senate, seniority.

Senator Kennedy.

#### **OPENING STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Mr. Chairman, Senator Hatch, members of the committee, it is a great honor to introduce Judge Stephen Breyer, President Clinton's nominee to be Associate Justice of the U.S. Supreme Court.

We all know the fundamental role of the Supreme Court in our society. Our Nation celebrated its 218th birthday last week, proud of the fact that more Americans than ever can enjoy the fundamental rights to life, liberty, and the pursuit of happiness pledged in the Declaration of Independence.

The Constitution is designed to guarantee those rights, and it is the nine Justices of the Supreme Court who have the last word on