the Supreme Court has said, and I know that it has been fairly narrow. I also know that other people make an argument for a somewhat more expanded view. But nobody that I have heard makes the argument going into these areas where there is quite a lot of regulation already.

I should not really underline no one, because you can find, you know, people who make different arguments. But it seems there is a pretty board consensus there.

Senator FEINSTEIN. Would you attach any significance to the Framers of the second amendment where it puts certain things in capital letters?

Judge BREYER. I am sure when you interpret this, you do go back from the text to the history and try to get an idea of what they had in mind. And if there is a capital letter there, you ask, Why is there this capital letter there? Somebody had an idea, and you read and try to figure out what the importance of that was viewed at the time and if that has changed over time.

Senator FEINSTEIN. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Moseley-Braun.

OPENING STATEMENT OF HON. CAROL MOSELEY-BRAUN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator MOSELEY-BRAUN. Thank you very much.

Senator Feinstein is the caboose. I guess that makes me the flag. When you are No. 18 on a panel like this, you learn a lot, Judge Breyer, and I have certainly learned a lot listening to my colleagues and their questions and certainly to your very clear responses. And I have been, frankly, very much impressed by the clarity of your thinking, the preciseness and succinctness of your answers to the question, and they have been difficult questions. They have ranged just about the gamut. So I am kind of bringing up the rear here on the first round, but I did have an area that I wanted to discuss with you a little bit today that, in my years, certainly in law school but later in practice, that was very near and dear to my heart and that is no doubt near and dear to yours insofar as you have written in the area of administrative law quite a bit. And I, frankly, feel that these cases and these issues in administrative law are so important because, the big-picture issues notwithstanding, the administrative process is often where the rubber meets the road insofar as the rights of the little guy are concerned.

Judge BREYER. I agree.

Senator MOSELEY-BRAUN. The cases that come out of the agency decisionmaking very often impact on real people in their day-to-day lives in a more direct fashion than many of the other more esoteric and philosophical issues. And so while I would like to get to the esoteric and at some point, if I get a chance, I would like to start by asking you about your philosophical decisions and your decisionmaking in terms of administrative law.

It is particularly true since the time of the New Deal that Federal administrative agencies have played a major role in the development of policies that regulate the personal lives of American citizens and the commercial life of this Nation. And in reviewing some

of your cases, in fact, at least three cases which you have written—one had to do with a death claim for asbestosis by a pipefitter in a shipyard, and another a bead-stringer, whether or not the 17 years as a dollmaker qualified that person for employment disability, and whether or not a highway bypass could be constructed. And, of course, the Supreme Court recently ruled in a case involving my home, Chicago, with regard to the treatment of municipal waste.

And so we have got this line of cases, and the central issue really comes down to the role of the courts in regulating the regulators, and whether or not the judicial review of agency decisionmaking actually forms an adequate check on the power of the agency vis-a-vis the individual.

The Supreme Court had acknowledged the oversight function in *Abbott Laboratories* v. *Gardner,* and as you know, that was a case that involved a challenge by pharmaceutical companies to a regulation issued by the FDA. In deciding whether or not there was authority for judicial review of the agency decisionmaking, the Court held that judicial review would be improper only upon a showing of clear and convincing evidence that Congress intended to preclude judicial involvement.

Lately, however, the Court seems to have lowered that standard, backing away from that standard, and making it less likely that agency decisions will be subject to judicial scrutiny. In a case decided last term, *Thunder Basin Coal* v. *Wright,* the Court appeared to replace the *Abbott* clear and convincing standard with a standard that would prevent judicial review of an agency action in any case in which the intent on the part of Congress is—"fairly discernible in the statutory scheme."

While the Court in *Thunder Basin* attempted to distinguish itself from the opinion in *Abbott Labs,* I am not quite sure that the distinction is as clear as they said it was in *Thunder Basin,* and I fear that the *Thunder Basin* decision might signal a willingness of the Court to remove itself from—to retrench from the review of decisions of administrative agencies.

So I would pose the question to you: Do you agree that there has been a trend away from judicial review of administrative decisionmaking, and therefore do you agree that it holds the troubling prospect that the rights of the individual little people vis-a-vis these agencies which have so much power over their lives, that those rights might be less protected in the future than previously?

Judge BREYER. I think I would say three or four things. I think first, if there is such a trend, it is troubling. Second, the reason that I think it is troubling is I understand all these constitutional rights are very important—believe me, we all think they are incredibly important—but one thing also that is very important is just the area that you are talking about. And the reason that I think that to myself is because if you are dealing with whether a man or a woman is getting a Social Security disability check, you do not just think to yourself: That check is as important to that man or woman as a whole business is to its owner. You think it is more important, because that man or woman has nothing else.

And I think, too—when I was walking about 4 months ago with Judge Woodlock somewhere in Boston, and he pointed out a build-

ing, and in that building, they had worked out a series of part-time people, lawyers, who give a little bit of their time for a very low price—I believe this is how it works—so that people who have little complaints—little complaints—that just means a complaint that maybe, compared to some other complaint, is little; it is not little to the person—and they have a way of coming in and getting some kind of proceeding to see that they have been treated fairly in respect to a sidewalk, or snow removal, or a parking ticket, or whatever—that is terribly important.

Why is it so important? That is really my third point. The reason it is so important is it is important to that individual, and it is really quite a wonderful, marvelous thing to have a society that treats those complaints properly.

And my fourth point is I guess when I was with these judges in Russia which, as you can tell—I will slow down a little, because I am feeling strongly about it——

Senator MOSELEY-BRAUN. I am glad.

Judge BREYER. We were talking about it, and I said do not forget—you see, we have a meeting of the administrative law people and the American Bar Association—we sometimes say we are administrative law buffs—we believe it is important, too, and how many, and so forth. Well, I said to the Russian people there: Please do not forget this part of the law, because one wonderful thing that happened in that part of the law was that one time, it was decided that we would write everything down. That does not seem that important, but it is so important. It was something as a result of a Supreme Court case where somebody could not find the regulation, and after that, Congress said if that regulation is not written down, if you do not have that in the Code of Federal Regulations, if there is not a place where a person can go without a lawyer, if necessary, to find out what he is supposed to do, then it is not a rule, and it is not a regulation. I thought to the Russians that, too, is an enormous protection against arbitrary behavior, against people who are in the Government saying, "Well, this is what you have to do, and tomorrow, we will tell you why you have to do it."

So all of those are reasons why I agree with you, I think this is a very important area of law.

Senator MOSELEY-BRAUN. I think we share the same view, and you have made the point very well, I think, Judge, that this really does serve as a check and balance in the system that frankly, the Framers of the Constitution almost did not have to think about; but following the explosion of the administrative agencies, the far-reaching consequences of that decisionmaking, clearly, the rights of the individual vis-a-vis that kind of array of power can only be protected if the courts are vigilant in regulating the regulators and providing that backdrop of protection of personal rights and individual liberty versus the agency decisionmaking in cases in which it may be arbitrary—which raises a second set of concerns, namely the ability in present time of the courts to exercise that function adequately.

We have seen, with the explosion of litigation and with the overburdening of the courts—everybody reads articles about how overworked the courts are and how they are cutting back on activity, and in fact, in my State of Illinois just a month ago, the Supreme

Court promulgated a rule that limited the number of opinions that the appellate courts could issue every year on the grounds that the courts were overburdened and that there could only be a finite number of opinions, a finite number of written decisions.

Well, these two factors coming together may well mean that we are confronted with a limitation or a retrenchment or a retraction of the capacity of the courts to look out for the rights of that beadstringer or that pipe fitter or that individual who many have a claim for medical services, and someone has decided that they cannot have it.

How would you address the challenge that the court overload or the allocation of judicial resources poses for us now? How do we get around having the courts retrench in this very important area? Can you shed any guidance or light on how you would suggest going forward?

Judge BREYER. I have said a couple of things which may help a little but not a lot. One is a positive thing, and one is a negative thing. The positive thing is that probably, it is worth, when Congress passes laws, when State legislatures pass laws, when agencies have rules and regulations, a human being thinking about the process of translating that statute, rule, law, regulation into reality. And that means think through when and whether court process, administrative process, mediation process, or some combination thereof will be the most effective way of making that right in the statute real.

I do not know how you would come out, but I am reasonably convinced it is worth trying to give someone the job of thinking through that problem every time some statute that affects people is or is not going to be passed or modified.

The negative thing is this. Beware of door-closing in the courts. Beware of it in the following sense. Remember that the Social Security case to the person who needs the Social Security really is as important as any other case involving a lot more money.

No one will say that the court procedure as it is now set up is the perfect procedure. It may be, as some have suggested, that some cases of different kinds should go to mediation or so forth. But if that is to happen, the people involved must be convinced that that is a better process, and an escape route must be maintained so that there still remains the possibility of some access.

Now, that has happened sometimes, like where Congress has set up special courts like veterans' courts, so that both you have a specialty which will process the case more quickly, but an escape route is maintained so it is possible for a person who is hurt by that process to get back into Federal court. In other words, tailoring of different kinds I think is possible. I am sure it is worth thinking about, and I am sure that it cannot send a message that some people's cases are worth less than others.

Senator MOSELEY-BRAUN. Well, I am just so delighted to hear you say that, because quite frankly, in the context of, again, scarce judicial resources, the movement toward limiting judicial oversight, the values that you express here today really stand in danger of being lost, and if those values are lost, then those doors will be closed, and those individuals will not have the kind of protection

against the power of the agencies across the board that I believe, and I am delighted to hear that you believe, they ought to have.

Talking about how one looks at administrative law, statutory law, you have written in your writings regarding the use of legislative history, and there has been some discussion of this already, but you cited different circumstances in which the history behind a statute can help to reach the proper result. And I must say I was delighted again that it is a very pragmatic standard; it is a standard that suggests that people look at avoiding an absurd result, for example, and to correct an error, to take into full account any specialized meaning that the statutory word may have, to identify reasonable purpose, or to choose among reasonable interpretations of a politically controversial statute.

That is actually also encouraging because, again, getting back to *Thunder Basin*, in that case Justices Scalia and Thomas objected to the majority reliance on legislative history as an indication of congressional intent. Justice Scalia wrote there, and I quote: "I find this discussion unnecessary to the decision. It serves to maintain the illusion"—he calls it an illusion—"that legislative history is an important factor in this Court's deciding of cases."

Just for a moment, if you would share with us whether you believe that it is an illusion, that legislative history is an illusion, or if in fact legislative history is something that is important, and should be looked at by the Court.

Judge BREYER. The answer is I do not think it is an illusion. I think it is very important to look at. I once debated Justice Scalia in the Hall of Justice on this point, and we debated about whose view was the illusion. They were opposite views, and I doubt that we convinced each other. But nonetheless I did think and do think that legislative history is very, very important.

Senator MOSELEY-BRAUN. I agree with you there, also. I would now like to ask you to focus in on the role that you think that real life history, real history, should play in a court's decision, if any, and specifically, to explore your thoughts on some of the recent Supreme Court cases in the area of voting rights.

We have had a couple of cases—*Presley* v. *Atoka County*, not to mention *Shaw* v. *Reno*—cases in which the history surrounding the enactment of the Voting Rights Act might have led—I am not prejudging whether it would have—but might have led to a different conclusion.

So I would like your view in general on to what extent should real life history, whether it is the civil rights history in this country or the history of women in this country or the history of workers in this country, that history, to what extent do you see history as a guide to decisionmaking?

Judge BREYER. At a general level, at a statement of generality, of course, I think the more realism, the better. I do think that laws are supposed to, when fitted together, work according to their purposes. I do not think a court can know whether an interpretation is correct until it understands both the purpose and how the interpretation is likely in light of that purpose to work out in the world, in the actual world. And history and real fact is important, often, to make a sensible judgment. So at a general level, I think it is important.

Senator MOSELEY-BRAUN. Specifically with regard to the Voting Rights Act cases, and there are several—and in fact, I was delighted, Judge Breyer, in a decision that you wrote in Latino Political Action Committee, where you referenced a case that I tried, or at least was one of the group, the *Rybicki* case that came out of Illinois; I was involved with that redistricting case—without going into the facts or the circumstances around *Rybicki* specifically, I would like to ask you a question in general, that under the 13th and 14th and 15th amendments, which have been referenced here, the interests of minorities in this society stand to be—the Court has an obligation to eliminate forms of racial discrimination and talk the step forward whether or not the specific words of the language of the statute suggest that result.

Judge BREYER. Such is very often likely to be the purpose of the civil rights statute, and one normally interprets language in light of its purpose. I am hesitant to go into the details of voting rights, because if there is one case that is bound to come back to the Supreme Court, and if I am on it, I would have to get involved, is *Shaw* v. *Reno*. That is my problem in that.

Senator MOSELEY-BRAUN. I think that the Voting Rights Act area, you are right, is a contentious and controversial one, but I think it is important, again, to have a sense of how you would approach these issues.

Yesterday, when we were talking, you said—and I am going to quote a little bit, or at least paraphrase—you said the need for dignity does not change, but the conditions that impact on dignity do. And I would like to explore with you for a moment questions pertaining to the whole notion of dignity and the rights of privacy and to explore for a moment the constitutional basis that you see the right of privacy as coming out of.

The different Justices that have written about privacy, frankly, have seen it as coming out of different parts of the Constitution. In the *Griswold* v. *Connecticut* case, the right to privacy was seen by Justice Goldberg, your mentor, as emanating from the ninth amendment's limitations. In *Roe* v. *Wade,* Justice Blackmun saw it as coming out of the 14th amendment's concept of liberty. Justice Brandeis has suggested that a right to privacy comes out of the fourth amendment.

From where do you see the right of privacy emerging? I believe you have said previously that you believe a right to privacy exists in the Constitution. In your constitutional analysis, how do you see that the right of privacy emerges?

Judge BREYER. Basically, I think that word "liberty" in the 14th amendment has been recognized by most—almost all—modern judges on the Supreme Court, and is pretty widely accepted, that that word "liberty" includes a number of basic, important things that are not those only listed in the first eight amendments to the Constitution.

And the ninth amendment helps make that very clear, because it says do not use that fact of the first eight to reason to the conclusion that there are no others.

So it is not surprising to me that there is widespread recognition that that word "liberty" does encompass something on the order of privacy. People have described those basic rights not mentioned in

words like "concept of ordered liberty," that which the traditions of our people realize or recognize as fundamental, and in looking to try to decide what is the content of that, I think judges have started with text, and after all, in amendments to the Constitution, there are words that suggest that in different contexts, privacy was important. They go back to the history; they look at what the Framers intended; they look at traditions over time; they look at how those traditions have worked out as history has changed, and they are careful, they are careful, because eventually, 20 or 30 years from now, other people will look back at the interpretations that this generation writes if they are judges, and they will say: Were they right to say that that ought permanently to have been the law?

If the answer to that question is yes, then the judges of today were right in finding that that was a basic value that the Framers of the Constitution intended to have enshrined. That is a kind of test of objectivity. But the source I think is the 14th amendment and that word "liberty."

Senator MOSELEY-BRAUN. The notion of liberty arises, obviously, in a number of different areas, and I think there has been some examination here on this committee, but I just would like for my own edification to really get a specific response from you. This goes to the issue of a woman's right to choose.

Justice Ginsburg a year ago said that she believed that a woman's right was part of the essential dignity of the individual; and of course, the notion of privacy has also been referred to as the right to be left alone. And I guess my specific question is whether you would believe that a woman's right to be left alone means the right to be left alone with regard to as intimate a decision as whether or not to be pregnant.

Judge BREYER. That is the determination of *Roe* v. *Wade. Roe* v. *Wade* is the law of this country, at least for more than 20 years, that there is some kind of basic right of the nature that you describe.

Recently, the Supreme Court has reaffirmed that right in *Casey* v. *Planned Parenthood.* So, in my opinion, that is settled law.

Senator MOSELEY-BRAUN. Good. OK.

I want to move along to talk about privacy because, again, this is such an important area. Judge, you joined in a decision in the case of *Daury* v. *Smith,* which purported to recognize that individuals have a right to informational privacy. It has been touched on here in this committee previously because in this information age, with all the technologies that put more and more of our personal information "on-line," the individual's interest in avoiding disclosure of personal matters is and will be a more and more important issue.

So, briefly, do you believe that there is, in fact, a constitutional right to informational privacy, privacy about one's person? And how do you see that right emerging? Do you see that as coming out of the 14th amendment or otherwise? Do you see it as a fundamental right, the right not to distribute personal information about oneself, whether it is to credit bureaus or, E-mail readers or others?

Judge BREYER. There I cannot talk about settled law because that is not settled. And I am quite certain that the scope of the

right to privacy that is within that word liberty, I am quite certain that that will be a matter that is going to be litigated.

That there is a privacy interest of the sort that you suggest I think is clear. How that interplays with other rights and how that ends up being decided in a particular court case is something I think I have to leave to the briefs and the arguments and thinking about the particular case as it might come up.

Senator MOSELEY-BRAUN. You are right, this is an emerging area.

Judge BREYER. Yes, it is.

Senator MOSELEY-BRAUN. And it is a very important one.

Judge BREYER. It is important.

Senator MOSELEY-BRAUN. But, specifically, we run into with regard—Congress has legislated in this area on kind of an ad hoc basis. There has not been any comprehensive protection to informational privacy. We are moving to create an information superhighway. We have not yet put up any stop signs.

The question is whether or not—and this is a hypothetical I would like to explore with you—whether or not you believe that the protections, the privacy protections in the Constitution, would extend to private action with regard to, again, informational privacy, with regard to one's capacity to control specific information about oneself?

Judge BREYER. Control it in respect to State efforts to uncover it and so forth?

Senator MOSELEY-BRAUN. Well, that is the other side of it.

Judge BREYER. Do you mean with respect to other private——

Senator MOSELEY-BRAUN. Well, let's start with—no, I think you started on the right tack. Let's talk first about control with regard to State action, which obviously is the Orwellian kind of specter that people are, frankly, probably more attuned to and on guard about than with regard to private action. But both, obviously, can be of vital importance, particularly in a time when the private action will in all probability outpace anything that the Government might do in this area.

Judge BREYER. I cannot give you a really good answer. The reason is that normally what would happen—and I think it is what I hear reflected in your question—is the first thing that happens is that many, many people across the country recognize problems in this area. Then having recognized the problems, they turn to you or your part of the recognition, and you say, look, there are these different interests involved. There are interests in spreading information around rapidly. There are interests in protecting something very important to people, which is their own basic information and that which makes them an individual. And these things might conflict in the face of new technology. We are not quite certain how they will conflict. So you listen to the technology people, you identify the interests, and then you pass laws.

Then normally what happens to the judiciary is we decide whether there is a constitutional protection, but only in the context of the particular law. And it is because that latter decision would arise in a particular context that I find it difficult to go further.

Senator MOSELEY-BRAUN. Mr. Chairman, I understand my time is up, but I would just like to ask a quick Matthew question, if that is all right.

The CHAIRMAN. Sure.

Senator MOSELEY-BRAUN. It would end up this line.

My son is 16 and he plays with his computer, and he came in about a month ago complaining that he was in one of these bulletin boards. I have not gotten there yet. I just use it for word processing. But he was playing in one of the rooms on one of these electronic bulletin boards, and he came back and said: "Somebody changed my message. Somebody changed my"—he was really upset and aggravated. "Somebody changed my message."

Then he proceeded to describe for me that there is a policy that you cannot use obscenity and the like. And he says, you know, they will censor, whoever they are, somebody out there in the electronic miasma somewhere. They will bleep out obscenity and things for which they have already given their subscribers notice that these things cannot go over the wires—well, they are not even wires, but over this, whatever it is, the circuits. And he said that is one thing, he said, and I understand that and that makes sense. But nobody has a right to change my message on the bulletin board and I am going to write them.

And we discussed it for a moment, and it became clear that there was no way, first, to know who had done the changing. Someone who is involved with regulating what goes on the bulletin boards in these rooms, these electronic places, makes these decisions. And talking about informational privacy and all the kinds of new issues that come up in this area, I was, frankly, appalled that this could happen. Then I raised the question, well, what protection does the individual user have against this sort of thing happening?

We do not really have a lot of answers. How would you look at that situation? Would you react as vociferously as Matthew did about someone changing his message in this electronic room on the bulletin board or whatever?

Judge BREYER. Michael and I have been communicating by E-mail back and forth from Stanford. I have been trying to learn it a little bit, and I think I would be rather upset—and I know he would be—if somebody were distorting his message. My message is distorted enough without some other person.

So I do see it is a problem, and it does seem to me that I would react by trying to ask the questions that you are trying to ask, and then trying to find out how this all works and how you protect people's interest. And as I say, my guess is it would end up in legislation of some kind.

Senator MOSELEY-BRAUN. Do you see the courts as having a role in providing that protection?

Judge BREYER. I would have to say it would depend on how it got in. It is an area of such lack of knowledge to me as to the technical part that I begin with, my goodness, why would somebody be monkeying with my message. Then I would have to see how it arose to know whether the courts would have a role or not.

It is reflecting ignorance on my part, but I see the importance of the problem.

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.