Even the syndicate's auditor, the accounting firm of Ernst and Young, will not give a firm opinion as to the size. I think that the point that I would make with you, Judge, is that you were aware that you had certain exposure. You had concerns. You actually sent several letters to other investors in Merritt 418, dated from February 1992 through February of this year.

Those letters indicate your knowledge of Merritt's asbestos risk in 1987 and 1988 and describe why you decided by 1988 to recuse yourself from asbestos cases because of Merritt's asbestos risk.

You say in one letter:

> I was surprised Merritt syndicate was involved more than average, for this seems contrary to what I had wanted. As a result, I have had to disqualify myself on all asbestos cases, and ultimately, for that reason, in 1988 I decided to leave Lloyd's.

And then it goes on, other letters that you wrote.

I think we can agree that the Merritt 418 was obviously a bad investment. The Merritt 418 had all sorts of exposure, asbestos, pollution, other kinds of exposures. And the question of your recusing yourself in future cases until you can discharge yourself of the liability, potential liability that you have arising out of it I think is a valid concern. I think you have addressed yourself to that concern. I am pretty well satisfied that when and if matters come up before you, you will be aware of some of the questions that have been discussed with you here, and I wish you well.

Judge BREYER. Thank you, Senator.

The CHAIRMAN. Does that mean the matter is closed, Senator?

Senator METZENBAUM. Pardon?

The CHAIRMAN. Does that mean the matter is closed?

Senator METZENBAUM. For the moment. [Laughter.]

I think so, but who knows what the next hour will bring?

The CHAIRMAN. I surely do not.

I know the next 10 minutes will bring a break. You have been sitting there a long time, Judge. Why don't we break until 10 minutes after. That is about 8 or 10 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Our next questioner is the distinguished Senator from Wyoming, Senator Simpson. Senator, the floor is yours.

Senator SIMPSON. Mr. Chairman, I thank you very much.

Judge Breyer and associates, fellow lawyers and family and so on. Anyway, in my first round of questions, I mentioned that bills had been introduced in both Houses of Congress by members of both parties to eliminate birthright citizenship. I kind of fired this out the other day, knowing you would mull it, as you do. The issue of eliminating birthright citizenship in the case of a child born in the United States to persons who are here illegally.

There are calls for repeal of what we would term birthright citizenship for children of aliens who are in an illegal status, and part of the impetus behind this interest in changing the law regarding birthright citizenship is that these children, often born impoverished to impoverished parents, are immediately eligible for public assistance, and then that assistance, of course, is provided to the parents who care for their citizen child even though the parents themselves would not qualify for public assistance because they are illegal, undocumented persons.

Having been in this issue for some 15 years, I have never seen more of a rush toward doing something. Things are being said by people on both sides of the aisle that, if I had said them 10 years ago, I would have been prey to the designation of bigotry or racism or some other. But this is an issue filled with that when we talk about immigration and refugees and legal and illegal and permanent resident aliens and so on.

But illegal immigration in the United States, in combination with the development of the modern welfare state in this country, has increased the fears and resentments of many citizens in the most heavily impacted States.

And as I mentioned to you, the citizenship clause of the 14th amendment provides that any person born in the United States and subject to the jurisdiction thereof is a citizen of the United States.

While the citizenship clause was intended originally to benefit black Americans, it is obvious that this "jurisdiction requirement," as it has been called, was intended to narrow the scope of the birthright citizenship principle.

Clearly, the American-born children of foreign diplomats who receive extraterritorial immunity from our laws are not subject—not subject to the jurisdiction thereof. Further, the debate over the Civil Rights Act of 1866 makes clear that citizenship of Native-Americans was also an issue.

I mention the 1866 act because the citizenship clause in that statute was apparently the basis for a similar provision in the 14th amendment.

So at the time the framers of the citizenship clause wrote that provision, the United States maintained a policy of open borders. It was a time when immigration was thoroughly encouraged. We wanted to populate the vast open spaces of a young nation, and I suppose there were no illegal aliens in 1868. Immigration at that time was essentially unregulated. Today the vast majority of Americans would consider an open-border policy to be nonsensical, if not unthinkable. And so, rather, now all policy discussions today revolve around control of our borders and a sovereign nation's duty to control its borders.

One scholar examined this issue of birthright citizenship in some depth. His name was Peter Schuck, of Yale. He has written:

> It is difficult to defend a practice that extends birthright citizenship to the native-born children of illegal aliens. Parents of such children are, by definition, individuals whose presence within the jurisdiction of the United States is prohibited by law. They are manifestly individuals, therefore, to whom the society has explicitly and self-consciously decided to deny membership. And if the society has refused to consent to their membership, they can hardly be said to have consented to that of their children who happen to be born while their parents are here in clear violation of American law.

In my view and research and study, the meaning of the clause "subject to the jurisdiction thereof" is very unclear and ambiguous. And my question to you: As a general matter, may the Congress by statute define an ambiguous constitutional provision?

Judge BREYER. The short answer, Senator, is it would depend upon the provision and it would depend upon the statute. You have raised the question about whether those words "subject to the jurisdiction thereof" are meant to exclude only a few people, such as

diplomats' children and some others, or whether Congress can control that definition by statute.

I understand the question, and I am absolutely certain if legislation of that sort is enacted, court challenge will follow immediately. And, therefore, we would consider that—I would have to if I was on the Court—in the context of litigation, get the briefs, get the arguments, and think hard about it.

Senator SIMPSON. Actually, mine is the general question, although it was obviously long and somewhat tedious, about the single issue of the birthright. But on the general question of whether the Congress may statutorily define or clarify any ambiguous constitutional provision, do you have a view on that, completely aside from the citizenship clause jurisdiction issue requirement?

Judge BREYER. The reason that I say I think it depends is because I know there are legal arguments about the extent to which section 2, I guess, or section 5 of the 14th amendment does or does not allow Congress to do or say certain things in statutes.

So, not having gone into it thoroughly, I suspect it depends upon the particular statute and the particular provision. Always there will be a question with any statute and any provision: If there is an area of ambiguity, does that particular statute nonetheless fall outside of it? So those are the kinds of questions that would arise.

Senator SIMPSON. And will arise?

Judge BREYER. Yes, they will.

Senator SIMPSON. That is why you do not intend to go any further.

Judge BREYER. That is right.

Senator SIMPSON. Is that correct?

Judge BREYER. That is exactly right.

Senator SIMPSON. Thus sparing you further pain.

Let me ask you, I want to follow up on home schooling. Surprisingly enough, I have received a tremendous amount of mail. I do not know what group is generating this, but I want to be certain—and I know others have asked about it, and should, and my colleague, Senator Warner, who is not on the panel, our panel, asked me about it. And he, too, is receiving a great deal of material. But we discussed the *New Life Baptist Academy* case Tuesday, and you assured me you had nothing against or no bias against home schooling.

If I might just ask a final question on that, at least from me, as a Justice you will be, of course, interpreting the Constitution. And so I am interested, and I know many, as I say, in my State and other States are interested, in hearing your interpretation of the Constitution as it pertains to the right of parents to teach their children at home and the right of religious organizations to operate private schools.

In your mind, what does the Constitution have to say about that?

Judge BREYER. In general, though not in detail, I think it fair to start from the proposition, it is true, religion is extremely important to all of us. Even if we have different religions, we share the fact that it is important. And from a constitutional point of view, it is there protected in the first amendment because the Founders recognized the importance of religion and the importance of allowing people freely to exercise their religion. They had learned

through experience. That experience came from the religious wars of the 17th century. They put that in the Constitution to be absolutely certain that that free exercise was protected.

In my own view, if someone or a State or someone tried to prevent people from teaching their religion to their children or practicing a home school that was based on that kind of thing, very serious constitutional questions would arise. They would have to be decided in the context of the case. But on their face, it would be a very serious problem.

Senator SIMPSON. But the Constitution, without——

Judge BREYER. It is designed to protect the right of the parents to pass along to their children their religion and to protect that from State interference.

Senator SIMPSON. And to then also have home schools if that——

Judge BREYER. I think those home schools based on that principle follow from that, and that is why I say somebody who tried to prevent that legally would suddenly face very, very serious constitutional challenges.

Senator SIMPSON. Well, I think that is important, and I have been listening to what Senator Brown has asked, and others. It seems rather absurd that you can get on your hind legs now and do about any kind of oral expression known except you cannot pray in schools. I do not know how it got to that point, but I think that certainly there has been a great removal of religion from our society. And I am not talking about forcing it on people, but commencement exercises. I understand all those things, but it seems to me that it is a part of the heritage of our country, one of the only countries on the face of the Earth founded in a belief in God, that is the United States.

They came here to freely exercise their religion. That is who came here. And to see it all twisted in these ways through judicial interpretation through the years is puzzling, a curious thing to me. We have almost removed religion, certainly the establishment of religion. I think I understand that. But to remove these things in a—well, enough. But that is a puzzler to me when we are the country that was founded—the only one I know of founded on a belief in God, and when all of its Founding Fathers were deeply committed in almost elitist ways to worship. Interesting.

You do not have any comment on that, do you? You are waiting for more?

Judge BREYER. No, I understand this is an area—how the first amendment is applied in this area is a matter of great contention legally. But I do not think it is contentious, and I think the vast majority of people, I think there is a kind of consensus that that first amendment—it is not my opinion. I think there is a consensus opinion that that first amendment protects the right of people to pass their religion on to their children, and the home school situation on its face seems to fall within that. Therefore, I think there is a consensus. Not my personal opinion but a consensus that some protection is offered there.

Senator SIMPSON. Well, I thank you.

In response to the question on judicial activism in the committee questionnaire, you said, among other things:

One must recognize that legislators and executive entities have sometimes failed to address problems until constitutional violation resulted. It would be vastly preferable for all branches of Government and for the public if the political branches were able to resolve such issues and render their determination through judicial adjudication unnecessary.

Then you also noted that:

If the legislature or the executive either acts or fails to act in a manner that results in a violation of individual rights, the Court's role must include the difficult and sensitive task of defining an appropriate judicial remedy.

Could you share, if you would, what are some of those issues which have not been resolved by the executive or legislative branches which, in your view, the judicial branch has had to resolve through judicial adjudication? Are there any such issues or problems before us today for which the judicial branch might be called upon to define an appropriate judicial remedy due to present and historical inaction by the executive and legislative branches?

Judge BREYER. It is certainly true, Senator, that Congress gets advice from all kinds of people, everybody in the country, including judges, including policymakers, including dozens of others, and it is up to Congress to decide, the legislature, what to do. So, therefore, I would stick to a historical example. The one that most obviously comes to mind is: Wouldn't it have been a wonderful thing, in my mind, if sometime around the year 1870, 1880, 1885, 1890, any time before 1954, that Congress had decided to enact laws that made that promise of fairness in the 14th amendment a real thing? How wonderful that would have been. And yet there was not that law.

I think in 1954 the Court said that promise will be made a reality, and it has been a very difficult thing, but an ultimately critical thing, that that become real. I can hardly think of all our country's problems—and there are so many, whether you start with violence, or hunger, or children, or reading, or anything. Right there at the top of that list is the need to make that promise a reality. And that is hard.

So I think the courts began that in 1954, and I know Congress has stepped in, and I just wish, wouldn't it have been wonderful if that had been done earlier.

Senator SIMPSON. Well, I remember Justice Brennan, in visits with him, and Justice Burger, I was fortunate to come to know both of them personally. Wonderful men. And they would both say, in rather remarkably guarded ways: When will you people begin to do something about illegal immigration? This is when the commission started back in the early 1980's because the court cases were coming in. The Texas case; you had to educate the children of an illegal, undocumented person because you couldn't visit the sins of the parent upon the child, and that child was entitled to an education, and is. So that was a gentle goading from the other side of the triangle of our constitutional government, like: Don't you think you ought to get busy with something? And I remember we did get busy, and we did a bill, and eventually dealt with that in a way which we will have to revisit.

But one final question, and then I will yield back the balance of my time. A continuing aspect of the game in these Supreme Court nominations is the committee's efforts to learn or try to learn a

nominee's position on one legal issue or another, countered by the nominee's efforts to avoid disclosing where he or she stands on specific issues. This is our ritual.

We say we need to know in order to assure ourselves and the Senate that the nominee is within "the mainstream" of legal thought. That was a phrase that we heard during these latter years, "the mainstream." The nominees argue that it would be inappropriate, if not wholly improper, to indicate where a prospective Justice stands on a particular issue which may come before the Court on which the nominee hopes to sit. But if the nominee has written or spoken on an issue, it is often rather difficult for him or her to duck that issue at the confirmation hearings.

The exceedingly bright and able Judge Bork had written and spoken extensively. He had done 106 opinions. None of them had been overruled. And six of his dissents became majority opinions of the U.S. Supreme Court. But before my eyes, the nomination process turned him into a lot different guy than that.

That was a painful thing, and I would not want to revisit any of it. And there have been others just as painful.

But as a result, with him we had a lengthy and wide-ranging, free-range discussion of his views on many constitutional issues during his hearings, and that is reported historically that that might have hurt him badly.

Justice Scalia handled it quite differently. He declined to respond to most questions on current constitutional questions, a man of similar brightness and ability as Judge Bork or as you. He felt it inappropriate, and said it clearly, to discuss legal issues that are, to use your words, I think the other morning, "up in the air," issues that are still "up in the air."

Now, however, my question: Justice Scalia was recently reported, at least reported—I never really believe everything the fourth estate says because I think they blur journalism with divinity. There will be a report on that now that I have done something ugly and quite evil with them, but line them up in the other alley because we will do it again.

Now, Justice Scalia recently is reported to have suggested that caning might pass constitutional muster. I do not know that. In the last year, Justice Blackmun announced to the country his position on the death penalty. Now, other sitting judges, Justices, have made statements disclosing their position on various controversial issues, and without necessarily commenting on the behavior of any particular Justice or nominee or yourself, do you see any valid reason why a Supreme Court nominee should be less forthcoming than a sitting Justice about his or her views? I am not going to ask you about a view, but should they be less forthcoming about his or her views on constitutional jurisprudence during confirmation hearings than he or she might be after becoming a sitting Justice, other than wanting very much to obtain the job? Would not the public perception of bias be just as applicable to a sitting Justice as to a nominee?

Judge BREYER. You are asking me if I can think quickly of a distinction, and obviously I cannot. But, nonetheless, I think what is important, which is what I have tried to do, is to expose to you how I might go about thinking and dealing with a problem.

What the basic view is, how I see things basically, the reason, as I see it, for hesitating to go into—there are three, really—to go into something that is going to be a specific case, the best reason, which is usually the true reason, is that I have not thought about it in that kind of depth, and I should not go say something that I have not thought about that is likely to come up in the context of a particular case. That is always true.

A second reason is, even if you think you have thought about it, how often it really is true that I think I know something, I think I have thought it through, and then a real case comes along—maybe it is like a vote. I do not know if it is or not, but suddenly it is real. Suddenly you really know that people's lives turn on it. And that produces a tremendous degree of concentration that might previously have been lacking.

You read the briefs, and you understand the full facts, and that is not true in a context before it becomes real. And of course, the third reason is that you want to impress upon people that you will be fair and openminded in a particular case, and decide on the basis of briefs and arguments and thought at the time.

Senator SIMPSON. Well, I think it is important for Supreme Court Justices and Justices in the State Supreme Courts to interact with the public, to let them know that there is not just mystery coming down from on high. Do you feel that way?

Judge BREYER. Yes; there are many, many ways of interacting. In my career, I have written quite a lot, and I have gone to bar meetings, and I have gone around and talked to people. It is not secret. It is not—there should be this interaction, and trying to work out how you do the interaction, what is going to far, what you can say, what precisely the boundaries are in terms of policy issues relating to courts, and all the different things I might have taught about or whatever—that is difficult. There are no easy answers to those things, but the need to get out and communicate, I have always felt strongly; I have tried to build a career that reflects that. I do not guarantee I have always drawn the line correct, but that is——

Senator SIMPSON. Will you hope to be able to continue to do that?

Judge BREYER. Yes, I do.

Senator SIMPSON. And you will do that.

Judge BREYER. Every instinct I have cuts in that direction.

Senator SIMPSON. I think it would be very important.

Judge BREYER. I will be careful. I would be careful if I am confirmed.

Senator SIMPSON. Oh, yes, you will. They will be watching. They will not be watching for the good things you are saying; it will be as you dibble around the edges. But I remember Justice Burger. He would speak about advertising of lawyers, go to forums, lay it on the line. I remember his great phrase he had, with regard to court-appointed attorneys and people who were not prepared in court, that we had 747 litigation and Piper Cub lawyers. That was controversial.

I think it is very important for judges to speak out, let them know that they are not just there to please those who are engaged in Elysian mysteries. And I said when we started that, knowing you as I do, you will not give them legal mumbo-jumbo. You will

give them justice and understanding, in English, of what it is you have done. Is that your hope?

Judge BREYER. I certainly hope so.

Senator SIMPSON. It is mine, too, and I know you will, from my knowledge of you.

I thank you, Mr. Chairman, and I have further questions; I am just going to submit those in writing, if I may.

Thank you for your courtesies and your manner in conducting the hearing.

The CHAIRMAN. Thank you. He likes judges that are controversial, but that is easy for a man who never has known controversy to say that. If you had a little controversy, political controversy, you might not encourage him so much to do that.

Senator SIMPSON. It takes one to know one, my friend. You have been there.

[Prepared questions of Senator Simpson and Judge Breyer's responses follow:]

QUESTIONS FOR JUDGE BREYER

SUBMITTED BY SENATOR ALAN K. SIMPSON

JULY 14, 1994

1. I am asking this question at the request of Senator Warner.

A number of Senator Warner's constituents have called and written asking what are your views of "home schooling" and "private religious schools." This week you addressed some testimony to these issues. Senator Warner has asked me to give you the attached op-ed piece from the July 13 *Virginia Pilot* written by Michael Farris, who is the president and founder of the Virginia-based Home School Legal Defense Association, for you review.

Specifically, in the case of *New Life Baptist Church Academy* v. *Town of East Longmeadow*, the District Court had ruled that it was a violation of the First Amendment for the public school district to evaluate teachers and curriculum in the New Life Baptist Church Academy, a "private religious school."

You reversed the lower court's decision on September 7, 1989. This raises concerns with not only those whose children are home schooled or in private religious schools, but also for others who are committed to a strict interpretation of the First Amendment.

Judge Breyer, what assurances can Senator Warner give his constituents about your views on "private religious schools" and the protection afforded these institutions in the First Amendment?

And, religion aside, what protection does the Constitution offer to those parents who wish to teach their children at home?

2. What do you think of the efficacy of state medical malpractice and product liability tort laws in the following areas:

(a) compensating people who have been injured or killed by corporate or professional negligence;

(b) deterring the marketing of unsafe products and the practice of substandard medical care; and

(c) alerting state and federal health and safety agencies to information that enables them to perform their generalized duties?

3. What are your views on the preemption of state tort laws through a federal statute [1] that does not confer federal question jurisdiction over tort lawsuits?

In other words, do you think it is wise for Congress to pass a federal law to govern product liability or medical malpractice lawsuits that are brought in state courts under state common and statutory law?

[1] S. 687, which was recently defeated on the Senate Floor, would have preempted state product liability laws with a statute that would be interpreted by 30 different state court systems.

JUDGE BREYER'S RESPONSES

JULY 18, 1994.

Senator ALAN K. SIMPSON,
*261 Dirksen Senate Office Building, Washington, DC.*

DEAR SENATOR SIMPSON: Thank you for your additional questions dated July 14, 1994. I am pleased to offer the following responses to your inquiry.

1. *Home Schooling.* Many years ago, in the cases of *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court made clear that the "liberty" guarantee of the due process clause of the Fourteenth Amendment ensures parents' right to "direct the upbringing and education of children under their control." 268 U.S. at 534–35. The Court reaffirmed the existence of that right in *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965). That basic guarantee of liberty protects parents who are not motivated by religious considerations as well as those who are. Thus it is well-established law that the Constitution offers protection independent of the Free Exercise Clause to parents in deciding how to educate their children.

At the same time, it is also well-established law that the state has a "compelling" interest in making certain that its children receive an adequate secular education. *See, e.g., Wisconsin* v. *Voder*, 406 U.S. 205, 213 (1972) ("There is no doubt as to the power of the State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."); *Meyer* v. *Nebraska*, 262 U.S. at 402 ("The power of the State of compel attendance at some school and to make reasonable regulations for all schools * * * is not questioned.")

In the case of *New Life Baptist Church Academy* v. *Town of East Longmeadow*, 885 F.2d 940 (1st Cir. 1989), the First Circuit was required to engage in a delicate balance of those competing interests of parents and the state, and to ensure that both interests were respected. The state laws at issue in *New Life Baptist* provided that a local school commission must "approve" the quality of secular education (i.e., in nonreligious subjects) provided at private schools—religious and nonreligious alike—in order for students of those schools to comply with the state's compulsory school attendance laws. A unanimous panel, in a decision which I authored, upheld the proposed approval process after ensuring that the state's regulation of private secular education was "reasonable" and no more burdensome upon constitutional protections afforded to private religious schools than necessary to serve the state's interest.

Several of my other opinions have recognized the importance of accommodating religious beliefs and of guaranteeing parents' right to send their children to private schools. *See, e.g., Members of Jamestown School Committee* v. *Schmidt*, 699 F.2d 1, 13 (1st Cir.) (Breyer, J., concurring) (states have latitude to provide services such as bus transportation to children attending private religious schools so long as those services are provided equally to public school students), *cert. denied*, 464 U.S. 851 (1983); *see also Aman* v. *Handler*, 653 F.2d 41 (1st Cir. 1981) (public university officials may not deny official recognition to religious student organizations simply because they disagree with the organizations' views); *Alexander* v. *Trustees of Boston University*, 766 F.2d 630, 646 (1st Cir. 1985) (Breyer, J., dissenting) (states must tolerate deviations from regulations and statutes where doing so would further the accommodation of sincere religious beliefs); *Universidad Central de Bayamon* v. *NLRB*, 793 F.2d 383 (1st Cir. 1986) (en bano) (faculty hiring by church-operated universities should be exempt from the National Labor Relations Act).

I might add that the test our court applied in *New Life Baptist* might be viewed as more protective of the free exercise of religion than the test later adopted by the Supreme Court in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), and far closer to the test that Congress recently enacted into law in the Religious Freedom Restoration Act.

2. *State Medical Malpractice and Product Liability Tort Laws.* The efficacy and wisdom of state medical malpractice and product liability tort laws is a highly controversial issue currently the subject of extensive legislative debate at both the state and federal levels. It would be inappropriate for me to comment on essentially legislative judgments. As a judge, I would enforce any constitutional federal legislation enacted in the area.

3. *Preemption of State Tort Laws.* The wisdom of enactment of a federal law to govern state product liability or medical malpractice lawsuits is likewise a legislative determination that is currently the subject of extensive debate. As a judge, I would enforce any federal legislation enacted in the areas that is in accord with the Constitution.

Thank you for your inquiry. My best wishes.
Sincerely,

STEPHEN G. BREYER.

The CHAIRMAN. Senator Leahy.

Senator LEAHY [presiding]. Thank you, Mr. Chairman.

As we know, a vote has just started in the last few minutes, and so I will not have the time to do a number of the questions I had wanted.

Judge Breyer, you are the first nominee in the nearly 20 years I have been here that I have not been able to be here for every word of your testimony, and I apologize for that. Unfortunately, something that I had absolutely no control over, the foreign operations bill, was on the floor, and as we have in the last number of years, we have done both our authorizing and appropriating in the same bill. I am the manager of that bill, so I have been stuck there.

I had a lot of followup questions from your earlier responses. I was impressed with your answers, but I was also impressed earlier that on a number of my questions, very artfully, you did not go into a full answer. I understand some of your reasons, but I would like to follow up on a couple of those questions.

One answer in your discussion with Senator Simpson made me think of this question. You have talked of the ninth amendment. You have talked of unenumerated rights. You and I had a discussion of Justice Goldberg's decisions. But as I recall from my notes, after you noted that the ninth amendment protected unenumerated rights, as well as noting that a right to privacy is well-settled, you said that what these enumerated rights "are and how you find them is a big question." I would agree with that. You said you looked for a reference to liberty in the 14th amendment, and as I have read the transcript of your testimony in the evening, you have talked about the dignity of the person during the last couple days. Is that your way of articulating an unenumerated constitutional guarantee?

Judge BREYER. The ninth amendment, to Justice Goldberg, and I think to many others, makes clear that fact that certain rights are listed does not mean there are not others. Then the 14th amendment takes the word "liberty," and the question that you ask is, well, if there are others, how do we know what they are.

Senator LEAHY. How do you find them—where do you find them?

Judge BREYER. And what you have suggested is of course, you start with the text, and then you look back to history, and you look back to what the Framers thought. But so often, you cannot—what the Framers thought is that the Constitution should adapt, preserving certain basic values. So, what are those values? And we are back to where we started with a historic approach. We are back to where we started.

I think the word "dignity" is important. At the most basic level, the Preamble to the Constitution lists what the Framers were up to—establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.

Liberties are then listed, some, and underlying things like free speech and free religion, as I described or discussed when I talked about my own family, listening, is an idea, in my mind, of dignity.