

Senator FEINSTEIN. Thank you, Mr. Chairman. We are known as what is the caboose on this train. We kind of bring up the rear.

The CHAIRMAN. Well, you know those trolley cars where the engine is sometimes in the back and sometimes in the front. I think the committee has learned that you may be the caboose, but you are the engine.

Senator FEINSTEIN. That is very generous of you. Thank you.

The CHAIRMAN. It is also true. When you decide something is important—I remember saying to you, no, we cannot possibly pass the assault weapons ban. If you can talk Henry Hyde into it, good luck. And, Lord, if you did not go over and talk Henry Hyde into it. So you are an engine, Senator.

Senator FEINSTEIN. Well, thank you. Thank you very much. That is very nice.

The CHAIRMAN. The floor is yours.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Mr. Breyer, I just want to make a comment on the proceedings so far. I really want to compliment you. First of all, I believe wholly in your credibility and your integrity. But what came through today I think to me was your ability as a teacher, because you did what so many people, particularly around here, do not do. You reduce things to their basic, elemental, simple truth. And when you talked about the coal columns as an example of appropriate regulation, I think you showed all America exactly what it is.

Many times I have found things get so mired down in cases here, and no one really knows what we are talking about. So I really appreciate this, and I think you have made a lot of things clear. I think you have done extraordinarily well, and I just wanted to say that before I begin.

I notice, too, that there has not even been a yawn from your family. So on all scores, it is doing well.

Judge BREYER. Thank you very much.

Senator FEINSTEIN. I want to talk to you about two things, and hopefully talk to you rather than really question you. The first is individual versus societal rights under the Constitution.

Let me begin by reading a quick statement from someone I have admired from what is called the other House here. His name is Sam Ervin, and he said this in 1973.

The twin evils of criminal and political violence stand as a threat to our liberty in two ways. Liberty cannot survive an anarchy, but neither can it survive if our Nation's leaders and people come to feel that the only path to security lies in suspending constitutional freedoms for the duration.

And, in a sense, that is the delicate balance with which I would think a jurist must grapple. What are the rights of the few when they come in conflict with the rights of the many?

In a sense, today I want to talk to you about the rights of the few versus the rights of the many.

Last week, in California, I spent a lot of time in the communities, and I have in other cities as well. And I think violence in this Nation has reached such a state of epidemic proportions and concern for everybody. Regardless of race, creed, color, social or economic status, people are looking over their shoulder, regardless of whether they live in the suburbs or the big cities.

One school, I will give you an example, fourth-grade class, Hollywood, CA, had written to me because of their fear of violence. So I went to the school, and I talked to a fourth-grade class, I guess about 40 youngsters. In the course of the conversation, I asked the question: How many of you hear gunshots at night? And how many of you wake up to them in the morning? Every hand in the class went up.

I asked the question: How many of you have seen people getting beaten up? And 70 percent of the class, their hands went up. How many of you are afraid to go to school? About the same number of the class went up.

Now, you could ask any class that in your hometown and my hometown. One of our newspapers just did a study. Twenty-two percent of the youngsters admit to bringing guns to schools. Big problem in our society.

My question is this: I know that the Bill of Rights of our Constitution was designed to protect Americans against the enormous powers of the Government, also provided by the Constitution, in effect to protect the few from the many. And this is, I think, true in special circumstances: free speech, the free exercise of religion, protection from discrimination, regulation. But it is clear to me that in matters of public safety and perhaps other fundamental areas, we really need to protect the fabric of our society for the majority from the few among us who have the power to destroy it.

I read an article in the paper of one Governor imposing a curfew, again, to protect the rights of the many. Also, I suppose, it limits the rights of the few.

If you could talk just as a teacher, as a scholar, for a few moments before I got into something direct, about where you see this coming down, how you would see this as a jurist?

Judge BREYER. I do not have special insight. As a human being, when I hear that one real child is killed every hour through violence, of course, I react like every human being reacts to that in this country. I mean, absolutely intolerable.

Then when you say as a jurist, I think of the Preamble to the Constitution, as a jurist. Why the Preamble? Well, because it has always seemed to me that the Preamble has stated there what the goals are, simply, so any person can understand it. And the rest of the Constitution is a few understandable instructions for reaching those goals.

And I see right in that Preamble, it says,

Establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and assure the blessings of liberty to ourselves and our posterity.

It says both assure domestic tranquility and provide the blessings of liberty.

Then the rest of the Constitution, being a set of instructions to reach those goals, must be interpreted in a way so that both can be reached. And then you pose the terribly difficult question: How do you choose among them?

I have no magic answer to that question. Sometimes I have done the following in a case where, in fact, say there is a question of the fourth amendment interpretation and the right not to be seized il-

legally, the right not to be searched illegally, and what does that amount to, and is it this or is it that?

Sometimes I go back and try in my own mind to remember that those rights are there to protect innocent people. And we protect guilty people because that is absolutely necessary if we are going to protect innocent people.

And so I ask myself: What would an innocent person think about what is going on? The case that came up, you see, was a case about whether a policeman could say to a person at the airport, who was acting very suspiciously: Excuse me, do you mind if I ask a few questions? And the man said yes.

Now, did that violate the fourth amendment? Though the question was a close one, I thought no. And my reason for thinking no was because I thought most innocent people do not mind answering questions when posed by the police where they are not put in custody, where they are not subject to restraint, but they are politely asked, Do you mind answering a question?

So that notion of what do innocent people actually fear is an unreasonable restraint on their liberty, I have found sometimes helps reconcile those two things in the context of a real case. I do not know if that is helpful. I see the need to pursue both.

Senator FEINSTEIN. Let me give you an example. Some of us, I think, on the Elementary and Secondary Education Act that will be coming up, will put an amendment or try to place an amendment that will say that any school that accepts Federal money must have a zero tolerance for guns in schools; that if a youngster brings a gun to school, that youngster is expelled for 1 year. Otherwise, I go home, and all people are talking about are metal detectors in schools. Metal detectors should not have to be in schools.

Judge BREYER. I agree with you.

Senator FEINSTEIN. And I think we reach that point where we really need to protect the general welfare.

Now, let me go to where it gets tricky. The second amendment,

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Arms is in a capital, State begins with a capital, and Militia begins with a capital.

I think it is probably true to say that the Framers of the Constitution provided no guidance as to whether the amendment was intended to secure the rights of individuals to own guns, to provide exclusively for a well-regulated militia, like the National Guard, or both.

Proponents of gun control argue that, although challenged, restrictions on the sale and ownership of guns have never been struck down by the courts on the basis of the second amendment. Indeed, in the *United States v. Miller*, the U.S. Court of Appeals for the Ninth Circuit expressly rejected a second amendment argument in upholding California's 1989 assault weapons ban. The National Rifle Association, which had challenged the ban, elected not to appeal the ninth circuit's ruling to the U.S. Supreme Court.

Former Chief Justice Warren Burger, not, I think, considered a political liberal, accused the NRA of perpetrating the greatest constitutional fraud in history for its repeated reference to the second amendment as a bar to gun control legislation.

Now, as the chairman of the committee said, I have just authored legislation on assault weapons. I have seen them become the gun of choice of youngsters, of grievance killers, and it appeared to me that the public well-being is served by not having what is crafted as a military weapon, first and foremost, available on the streets, homes, and workplaces of our cities and our counties and our Nation.

Whether that will be challenged or not, I do not know. I almost hope it would be so that we could settle, much like the coal mine, what is an appropriate role for government regulation.

I cannot forget the faces of the youngsters who raised their hands, every one in a class, that I go to sleep every night to the sound of gunfire. And to me, it is the rights of the many to feel safe that come into conflict with the rights of the few to possess and bear weapons.

I would appreciate any comment that you might care to give as to the *Miller* case, as to the second amendment, and how you might see it.

Judge BREYER. As you recognize, Senator, the second amendment is in the Constitution. It provides a protection. As you also have recognized, the Supreme Court law on the subject is very, very few cases. This really has not been gone into in any depth by the Supreme Court at all.

Like you, I have never heard anyone even argue that there is some kind of constitutional right to have guns in a school. And I know that every day—not every day, I do not want to exaggerate, but every week or every month for the last 14 years, I have sat on case after case in which Congress has legislated rules, regulations, restrictions of all kinds on weapons; that is to say, there are many, many circumstances in which carrying weapons of all kinds is punishable by very, very, very severe penalties. And Congress, often by overwhelming majorities, has passed legislation imposing very severe additional penalties on people who commit all kinds of crimes with guns, even various people just possessing guns under certain circumstances.

In all those 14 years, I have never heard anyone seriously argue that any of those was unconstitutional in a serious way. I should not say never because I do not remember every case in 14 years. So, obviously, it is fairly well conceded across the whole range of society, whatever their views about gun control legislatively and so forth, that there is a very, very large area for government to act. At the same time, as you concede, and others, there is some kind of protection given in the second amendment.

Now, that is, it seems to me, where I have to stop, and the reason that I have to stop is we are in a void in terms of what the Supreme Court has said. There is legislation likely to pass or has recently passed that will be challenged. And I, therefore, if I am on that Court, have to listen with an open mind to the arguments that are made in the particular context.

Senator FEINSTEIN. Well, would you hold that the 1939 decision is good law?

Judge BREYER. I have not heard it argued that it is not, but I have not reviewed the case, and I do not know the argument that would really come up. I know that it has been fairly limited, what

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