That this is so was painfully demonstrated by the face-off between executive and the Court in the 1930's which resulted in a repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental.

"Otherwise"—and this is the last sentence.

Otherwise, the judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

While you have probably stated this already, but as a sort of summary, can you agree that this expression of judicial restraint is an important consideration in determining the parameters of the right of privacy?

Judge THOMAS. Senator, I think that in areas in which a court or a judge is adjudicating or interpreting the more openended provision of the Constitution that judges should restrain themselves from imposing their personal views in the Constitution; that their adjudication must be rooted in something other than their personal opinion. And as I have indicated and the Court has attempted to do, attempted to root the interpretation or analysis in those areas in history and tradition of this country, the liberty component of the due process clause, and I think that that is an appropriate restraint on judges.

Senator GRASSLEY. Is what you just said, your way of telling me that you agree with those statements?

Judge THOMAS. Yes.

Senator GRASSLEY. Thank you, Mr. Chairman, and also thanks to my colleagues for the courtesy of going out of order.

The CHAIRMAN. This may be an appropriate time to take a break. We will break until 3:30.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Let me say that, after consultation with Senator Thurmond and with Judge Thomas, it looks like our best efforts to get finished today—finished in the sense that Judge Thomas' testimony is finished—are not going to work. We would be here well into the night for that to happen. But it also appears after consultation with Judge Thomas and with Senator Thurmond, that we can get still a good hour-and-a-half more, maybe even more than that, in today, and can then resume at 9:30 on Monday morning. And I believe that we can finish by lunch on Monday. That will be the Chair's express intention, and it looks like that is very reasonable that that could be done.

So, Judge, instead of being finished today at 5, you will in all probability be finished at lunchtime on Monday. With that, why don't we just get under way and see how much more we can get finished tonight, if everyone is agreeable.

Now, unless I have miscounted, I believe it is my turn to ask some questions, Judge. I would like to go back and ask one very straightforward question because it has been mentioned 87 different ways by 6 or 8 different people. And I don't think you in any way have confused it. I think maybe we have confused it—we, the members of this committee, Republican and Democrat, and as I read some of the press accounts, the press even seems mildly con-

fused on it. Again, not you. I think you are perfectly clear on it, but let me make sure my recollection is right.

I want to ask you a very precise question, similar to what I indicated I would ask you. And if it requires more than a yes or no answer, obviously elaborate. But if you could answer it yes or no, it sure will save a lot of time and be on point.

Judge very simply, if you can, yes or no: Do you believe that the liberty clause of the 14th amendment of the Constitution provides a fundamental right to privacy for individuals in the area of procreation, including contraception?

Judge THOMAS. Senator, I think I answered earlier yes, based upon the precedent of *Eisenstadt* v. *Baird.*

The CHAIRMAN. Well, you know, what folks are going to say is that *Eisenstadt* v. *Baird* was an equal protection case. All right? That is not the question I am asking you. Let me make sure and say it one more time. Do you believe the liberty clause of the 14th amendment of the Constitution provides a fundamental right to privacy for individuals in the area of procreation, including contraception?

Judge THOMAS. I think I have answered that, Senator.

The CHAIRMAN. Yes or no?

Judge THOMAS. Yes, and——

The CHAIRMAN. I like it. I mean, not I like it. I think we can end confusion. If it yes, the answer is yes——

Senator THURMOND. Well, if he wants to explain it——

The CHAIRMAN. If you want to go on, go on. But, I mean, I think that is what you mean.

Judge THOMAS. I have expressed on what I base that, and I would leave it at that.

The CHAIRMAN. OK. Let's switch to what I thought was a very, very interesting and informative exchange you had with Senator Brown earlier. Now, we don't have the actual record because it is not able to be transcribed as we move, although they do a phenomenal job of transcribing it quickly, and we don't have it yet. But here is what I understood that exchange to say.

In your exchange with Senator Brown, Senator Brown in my view accurately stated the law and Supreme Court decisions. He accurately stated the law and the stated decisions in the Court as to where the law now stands with regard to the standard of review that judges use in determining whether an action taken by the Government against an individual is constitutional, against their individual rights of privacy or against their individual right relating to their property. And he pointed out that when the Court looks at whether an action by a State to limit an individual's fundamental right to privacy, like in *Griswold* or *Moore*, the State has an overwhelming burden. He pointed out the Court says the State in those kinds of cases has to apply a standard of strict scrutiny. They have to have an overwhelming reason to justify their action impacting upon that person's right.

But, he went on to say, if a State impacts on a person's use of their property, they now apply a rational basis test, he said. Now, he went on to explain that the Court looks at the State and determines whether or not it had a rational reason for impacting on

that person's property right, not an overwhelming reason, a lower standard.

Senator Brown said that he thought this was wrong. He said that property rights should not be separated out in that way, and he went on to point out—if my notes are correct—that property is the basis of all our moral rights. And he further pointed out that—he said—I believe this is the quote, "The courts ignore this reality now."

Senator Brown then cited *Moore* v. *East Cleveland* as an example of the failure of the Supreme Court to recognize what he calls the reality of their mistake. He said that *Moore* was a violation—the way the Supreme Court ruled, *Moore* was a violation of the right of someone to use their property.

He then quoted as authority for that Professor Tribe. He probably knows it, but he didn't have an opportunity to say it. He quoted Tribe's comments on *Lynch* v. *Household Finance*. The Tribe quote he read was about *Lynch* v. *Household Finance*, although he didn't state that, not about *Moore*.

Now, he then looked at you and he said, Do you agree? Do you agree that these two different standards—the Court has a strict scrutiny standard for matters with regard to privacy and matters with regard to other things other than property—race, suspect categories, classifications. They have this standard, and with property they have this standard. And he said, That is wrong; do you agree?

And the answer you gave, as I understood it, was exactly the opposite of the position he staked out—if I understood it correctly. You said you have no quarrel with what the Court does, how the Court deals now with regard to regulations of property. You said that this is where the Court should defer to the legislative branch. As you and I know, there is a venerable theory in constitutional law that says the reason why there should be a strict scrutiny standard on matters like privacy and suspect categories is because that is where democratic institutions have erred the most. That is when the legislative bodies have made the most mistakes, like saying people can be slaves. So, historically, we have applied a stricter standard.

But, as you pointed out, in areas where it related to property, the legislature didn't err that much. That is the basis of the thesis underlying the argument—the point, I should say. They don't err that much, so the courts have been more ready to rely on what the legislature says. A different standard.

And you went on to say, "I don't quarrel with this approach." That was the quote I do remember writing precisely.

Now, Judge, either you completely fundamentally disagree with everything that Senator Brown said and he thought you agreed with him, or the following: You said you had no quarrel with the equal protection analysis in this area, which is, of course, the area where terms like rational basis and strict scrutiny are most often used. But, of course, Judge, technically we are not dealing with the equal protection analysis when we are talking about the taking of property, as you well know. We are dealing with the fifth amendment and the due process analysis.

Now, there are always two questions in analyzing whether a regulation is valid, whether the regulation by the Government to reg-

ulate somebody's property, take their property, is valid. I can see the press and others are bored by this, but this is the single most important question you can be asked in this entire hearing.

One of the tests they apply is whether the object that is being served by the law, taking the property, is an object that falls within the scope of police power. And the other, as you well know, is whether the means chosen to legislate accomplishes an objective that is reasonably related to the reason they say they are doing this thing.

Now, Judge, the Court's current approach is to give the legislature a broad latitude in both these areas—the area of determining whether or not the means is an appropriate means and whether or not the objective being served is an objective that falls within the police power. That is the state of the law now, and they essentially use a rational basis test for a much lower standard.

So my question is this: Do you agree with the state of the law as it is now with regard to property, as I understood you to say it? Or do you agree with Senator Brown who said it is wrong the way we are doing it now; property and the test applied to the taking of property should be elevated to the same level as other constitutional rights—that is, the case he cited, the right to privacy in *Moore*?

What is your position?

Judge THOMAS. Senator, I think that I indicated to Senator Brown as well as, I believe, to the question from Senator DeConcini on equal protection analysis, that the current manner of equal protection analysis I have no quarrel with.

The CHAIRMAN. But do you have a quarrel—I am sorry. Go ahead.

Judge THOMAS. With respect to the area of the current law, in the area of taking, I have no basis to quarrel with that either.

The CHAIRMAN. That is what Senator Brown was talking about.

Judge THOMAS. Well, I thought that he recognized that we disagreed.

The CHAIRMAN. OK. Good. That is all I want to make sure because——

Judge THOMAS. I thought that was recognized.

The CHAIRMAN. Because I thought Senator Brown—Senator Brown, please correct me if I am wrong. I thought Senator Brown said, well, I understand, we agree, and, you know, property should have a higher scrutiny and should be treated with more respect in the law, et cetera. I thought he thought you agreed.

Senator BROWN. I was doing my best to get him to agree.

The CHAIRMAN. But you are aware that on the record under oath he does not agree with that.

Senator BROWN. And was very disappointed that he disagreed with Professor Tribe. [Laughter.]

The CHAIRMAN. Well, if you have an opportunity to read the case that Tribe was talking about, you will know that it is not related to the issue that we are talking about.

Anyway, now—in that I don't mean to defend Professor Tribe. I don't care one way or another whether Professor Tribe is right or wrong. It is just that it doesn't relate directly to this issue.

Now, Judge, the reason I bothered to take you through all of this I think you know well, and that is that it is a big deal at least to

me, and a big deal, in fact, to this country, that if the theory and thesis promoted by Senator Brown, espoused in great detail with significant annotation and with great articulation, and is a first-rate book by Professor Epstein, if you agree with this view, it means that, as the Brown-Epstein view, it means very simply that, to use his phrase, that—let me get it straight here—"if what follows, I shall advocate a level of judicial intervention far greater than we now have and, indeed, far greater than we have ever had"—that is what is being advocated by a very brilliant, informed, respected school of thought.

Now, I will not go into all the nuances of it. You understand them well. I might add that a couple newspaper articles that have written about this thesis said it has nothing to do with natural law. Let me quote from the book, so they are informed, quote from Mr. Epstein: "Thus, the political tradition in which I operate and to which the Takings Clause itself is bound rests upon a theory of natural rights."

I read from a very informed newspaper that natural rights had nothing to do with this theory. It is the thing upon which this theory is based. So, I am happy to hear your answer. If you would like to elaborate or speak on anything at all about this subject matter, I would be delighted to hear it. If you do not, that is OK, too. It is up to you. I do not want to cut you off.

All right. Now, let me move to another area, if I may, and that is to the area we have touched on very briefly, religion, if I may, not your religion or mine, how the court deals with religion.

Judge this is one area where the level of protection accorded fundamental rights is changing, and I do not think most of us even know it. You know it, and that is the right of free speech and the free exercise of religion. These rights, which, perhaps more than any other, are central to what most of us believe to be what it means to be an American.

In my view, these rights deserve the highest level of protection by the court, and I would like to start first with the Free Exercise Clause of the First Amendment, which provides, as you well know, "Congress shall make no law prohibiting the free exercise of religion."

Now, until last year, the Supreme Court applied the standard known as strict scrutiny, when reviewing legislation that restricted religious practice. Under the strict scrutiny standard we have discussed a number of times, but it bears repeating, the State first needed a compelling reason for restricting the religious practice, and, second, the State had to show that no other alternatives were available for it the State to achieve its goal. It has been a test now for about 40 years, 35 years, a two-prong test.

Under this doctrine, the Supreme Court held, for example, that the compulsory education law could not be used, for example, to require Amish children to attend school, when their parents believe that they have a religious duty to be educated at home, the *Yoder* case, *Wisconsin* v. *Yoder*.

The Court reasoned that, even though the State was not acting out of any hostility, and even though the State had a compelling reason for making children attend school, in general, in *Yoder* they held the State law could not constitutionally be applied to the

Amish, because there was "no compelling reason for abridging the religious freedom to educate their children."

Then, last year, the Supreme Court decided the case of the *Employment Division of Oregon* v. *Smith*. In the *Smith* case, the Court held that the Free Exercise Clause permits the State to prohibit sacramental use of peyote. I think that is how it is pronounced, is that correct? Never having used it, I am not sure of the pronunciation. Peyote, it is a drug used in an Indian ceremony and it has been used historically by them. Thus, a State could deny unemployment benefits to those who were discharged from employment for such use.

Now, I do not want to discuss the specific case of the case nor the specific outcome. Instead, I want to ask you about your understanding of the reasoning the Court used in this case. Justice Scalia, writing for a 5-to-4 majority, concluded that, as long as the Government is not specifically trying to restrict religion or as long as it is not trying to discriminate against religion, it can apply a general law against a religious activity, and it doesn't matter what effect the law has on that religion, in a sense striking down what historically—not historically, what the last several decades has been the second test needed to be passed, in order for the State to be able to take such action.

In other words, even if the law passed by the Government has a devastating impact upon a religious practice, the law is still constitutional, according to the majority, Scalia writing for them, is still constitutional, so long as the Government acted with a legitimate purpose when it passed the law.

Now, Justice O'Connor, on the other hand, said she would have upheld the ban on peyote, without changing the legal test that has historically been applied, without abandoning the strict scrutiny test. Now, Judge, which approach do you agree with, not whether or not it should be outlawed or not outlawed—that is not the issue as far as I am concerned. Do you agree with Scalia's approach, or do you agree with O'Connor's approach?

Judge THOMAS. Senator, I think as I indicated in prior testimony here, when the *Sherbet* test was abandoned or moved away from in the *Smith* case, I think that any of us who were concerned about this area, because, as we indicate, I think we all value our religious freedoms, I think that there was an appropriate reason for concern, and I did note then that Justice O'Connor, in applying the traditional test, reached the same result.

The CHAIRMAN. Correct.

Judge THOMAS. I cannot express as preference. I have not thought through those particular approaches, but I myself would be concerned that we did move away from an approach that has been used for the past I guess several decades.

The CHAIRMAN. Judge, I asked the same question of our most recent Justice and Justice Souter had no problem telling me that he agreed with the O'Connor approach. I do not care which approach. You obviously know the area well. You obviously know the facts of the cases. You obviously have an intense and deep commitment to religion and your faith in God. Do you mean to tell me you have not thought, when this came out, which approach you thought was appropriate.

Judge THOMAS. Let me restate my answer. My concern would be that, without being absolutist in my answer, my concern would be that the Scalia approach could lessen religious protections.

The CHAIRMAN. Judge, as a matter of fact, it does. I mean it is not whether it could or should. I mean it does, it limits the protection, for example, in the case—I guess it was in New Mexico, where they passed a law saying minors cannot drink wine under any circumstances. As you know, in our church and in many churches, there is a sacramental taking of wine at communion, and in most churches that occurs in most Christian religions—I cannot speak for others—and it occurs when kids are 7 years old or 8 years old, and it impacts significantly.

You know, it was struck down, that restriction in New Mexico, it never got up to the Supreme Court, to the best of my knowledge. But clearly, under the test applied by Scalia, such a law could be passed and it would be held constitutional. It has a big impact, it is a big deal, not a minor thing.

Judge THOMAS. And I guess my point is our concerns are the same, that any test which lessens the protection I think is a matter of concern. The point that I am making, though, in not being absolutist is that I think it is best for me, as a sitting Federal judge, to take more time and to think that through, but my concern about the approach taken by Justice Scalia is that it may have the potential and could have the potential of lessening protection, and I think the approach that we should take certainly is one that maximizes those protections.

The CHAIRMAN. Judge, you know, when your confirmation is over and if you are on the bench, you are on the bench and the next nominee comes up, we now talk about the Souter standard and how Souter did not answer questions that some suggest he should or shouldn't have, I am not making a judgment on that. We are going to have a new standard, the Thomas standard, which is you are answering even less than Souter.

Senator HATCH. First of all, Mr. Chairman, I do not think that is true. I think he has answered forthrightly and very straightforwardly all the way through this thing. He may not give the answers you and I want——

The CHAIRMAN. No, I am not looking for an answer that I want, let me make it clear, Senator. I am just making a statement of fact. I asked the precise same question of Judge Souter. Just Souter, sitting not as a Federal judge, sitting as a State court judge, said "I agree with O'Connor," no ifs, ands, buts about it, just click, bang, I agree with O'Connor. That is the only point I am making.

Senator HATCH. But he has answered things that Justice Souter had not answered, so I am saying——

The CHAIRMAN. I cannot think of any, but maybe yes.

Senator HATCH. I can.

Senator BROWN. Mr. Chairman, if I could have 30 seconds, I would like to comment on the previous business you were kind enough to bring up.

The CHAIRMAN. Surely.

Senator BROWN. Thank you.

I thought perhaps it was worthwhile, while the transcript is not out, as you noted, to note a couple of things that had been dis-

cussed. First, my concern about having property rights treated as second-class rights, I did not mean to indicate that property rights are the basis for moral rights. I do believe they are integral, that they are interdependent, but I do not believe that is the basis for it.

Second, the tribe citation was meant to indicate their interdependence, not necessarily as a support for more.

Third, at least my view of it is the tribe showed the interrelationship between personal and property rights, not necessarily having a different implication than that, so I cited it for its interdependence of those rights and not for another purpose.

Thank you for allowing me to interject, Mr. Chairman.

The CHAIRMAN. I did misunderstand, though, you do think *Moore* was wrongly decided, you did say that, did you not?

Senator BROWN. I cited *Moore* as an example of a case where it is very difficult to separate personal rights and property rights, where the problems that were exemplified by *Moore* clearly affect both.

The CHAIRMAN. Right. I thank my colleague and I think that is a perfect case, because where two rights come in conflict, the right of the government to tell someone that they cannot live in an area, unless they live in that area with what is defined as a traditional family, and that a woman moves in and lives there, grandparents live there and they have two grandchildren who are cousins, not brothers and sisters, and the State, in the form of the county or city, East Cleveland, says you must leave, you are violating our laws, our zoning laws which affect property, and the Supreme Court says wrong, is a basic fundamental right to privacy for grandmom to have her grandchildren, even though they are cousins and not brothers who live together.

The reason I raised this is a perfect example of this. That is why I raised the White House Working Group report. I do not want to go into whether or not you signed it or did not. I am not talking about you now. There are a number of very intelligent, very well-intended, and maybe even right, but people have a very different view than I do, and I believe you are one in this score, Senator, who argue that, hey—not you, I am not talking about you, Judge, I am talking about my colleague—but there is a whole group of people in this town, in this country who say wrong, we ought to let States, counties, cities make those judgments, and if they do they should be upheld by the Supreme Court.

From my perspective as to how I read the Constitution, I think that is absolutely, categorically wrong to say that the State should be able to tell a grandmother she cannot have two grandsons living in her house, fine kids, no problems, cannot have them living in the house because they are cousins and not brothers. I think that is bizarre, but there are a lot of people who do not think it is bizarre, and that is why I asked you questions about that, because if you thought that way, Judge—which you said you did not—but if you did, I would do everything in my power to keep you off the Court, but you do not, so you said and I believe you.

My time is up, but that is what the debate is about and that is why I am asking the questions. I can think of no way to frame it better than it was just framed in terms of your discussion with me, Senator.

My time is up, and I yield now to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman. Mr. Chairman, I have no questions of my own, but I will reserve my time in case something comes up I have not anticipated.

I do have one question to clear up something that was asked this morning by Senator Leahy.

Judge Thomas, this morning when you answered Senator Leahy's question about important Supreme Court cases, did you understand him to be referring to important cases decided when you were in law school?

Judge THOMAS. My understanding was that he was asking me for cases decided during the period that I was in law school, from 1971 to 1974, and I think I answered him in response to that *Griggs* and *Roe* v. *Wade*.

Senator THURMOND. I just wanted to clarify that if there is any question about it.

Now, Mr. Chairman, I believe the distinguished Senator from Illinois brought out that 12 Members of the House have opposed you. Is that correct?

Judge THOMAS. That is right.

Senator THURMOND. Well, Mr. Chairman, I wish to offer for the record a letter signed by 128 Members of the House endorsing Judge Thomas, several of whom are Democrats, and ask that that be made a part of the record.

The CHAIRMAN. Without objection, it will be made a part of the record.

[The letter follows:]