

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.